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# **Copyright and the Economic Effects of Parody:**

## **An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options**

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Parody and Pastiche. Study III. January 2013

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This is an independent report commissioned by the Intellectual Property Office (IPO)

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This is the third in a sequence of three reports on Parody & Pastiche, commissioned to evaluate policy options in the implementation of the Hargreaves Review of Intellectual Property & Growth (2011). Study I presents new empirical data about music video parodies on the online platform YouTube; Study II offers a comparative legal review of the law of parody in seven jurisdictions; Study III provides a summary of the findings of Studies I & II, and analyses their relevance for copyright policy.

**ISBN: 978-1-908908-61-2**

Copyright and the Economic Effects of Parody:  
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Tube Platform and an Assessment of the  
Regulatory Options

Published by The Intellectual Property Office  
8<sup>th</sup> January 2013

1 2 3 4 5 6 7 8 9 10

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# Abstract

The status of parody and related derivative works within the UK copyright framework lacks clarity and has been recommended for further policy study in two recent independent reviews: the *Gowers Review of Intellectual Property* in 2006 and the more recent *Hargreaves Review of Intellectual Property and Growth* published in 2011. The review documents highlight the dual importance of parodic works both as a form of cultural expression and as a potential source of innovation and growth. A key recommendation made by Hargreaves is that the Government create a new fair dealing copyright exception for parody. However, a shortage of empirical data renders policy intervention in this area difficult. The issue is complicated by the inherently creative nature of parody, ambiguity about its definition and the multiplicity of economic and legal approaches that may be applied.

In December 2011, following a call to tender procedure, the UK Intellectual Property Office (IPO) commissioned the Centre for Intellectual Property Policy and Management (CIPPM) at Bournemouth University to undertake research into the potential effects for rightsholders, creators and audiences of introducing a copyright exception for Parody in the UK.

This synopsis reports the key findings from two complementary studies carried out by the researchers. Study I presents new empirical data about the rate and nature of parody content production on the online video platform YouTube, and its impact on commercial exploitation of original works where they can be considered to be part of the same market. Study II distils regulatory options for a parody exception from a comparative review of seven jurisdictions. The current synopsis document contains three parts.

First, it discusses the empirical findings from Study I. A sample of 8,299 user-generated music video parodies was constructed relating to the top-100 charting music singles in the UK for the year 2011. The key findings are:

- Parody is a significant consumer activity: On average, there are 24 user-generated parodies available for each original video of a charting single.
  - There is no evidence for economic damage to rights holders through substitution: The presence of parody content is correlated with, and predicts larger audiences for original music videos.
  - The potential for reputational harm in the observed sample is limited: Only 1.5% of all parodies sampled took a directly negative stance, discouraging viewers from commercially supporting the original.
  - Observed creative contributions were considerable: In 78% of all cases, the parodist appeared on camera (also diminishing the possibility of confusion).
  - There exists a small but growing market for skilled user-generated parody: Parodists who exhibit higher production values in their works attract larger audiences, which can be monetised via revenue share with YouTube.
-

Secondly, this synopsis presents a distilled discussion of the legal treatment of parodies in seven jurisdictions that have implemented or are considering implementing a copyright exception for parody (Australia, Canada, France, Germany, Netherlands, UK, and USA). The underlying principles (including economic and constitutional) governing divergent legal approaches are identified, and a list of policy options is presented.

Thirdly, this synopsis document provides a synthesis of the legal analysis and the empirical data. Each of the policy options identified in Study II is examined for its likely impact on the empirical sample gathered in Study I.

Finally, some recommendations are made.

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# Context

Many countries, both inside the European Union and in the common law tradition (Australia, Canada and USA), afford special treatment to parody (and related cultural practices, such as caricature, pastiche, satire and burlesque) within their copyright laws. Under EU Law, a specific copyright exception '*for the purpose of caricature, parody or pastiche*' is possible within Article 5(3) of the 2001 Information Society Directive<sup>1</sup>.

The UK does not explicitly recognise parody as a copyright issue. In fact, the doctrinal base of UK copyright law poses a particular risk. The general test for copyright infringement, under section 16(3) of the Copyright, Designs and Patents Act 1988 (hereinafter CDPA 1988) is the taking of the work "as a whole or any substantial part of it". Parodic treatment, almost by definition, involves a taking of substance, since, if the object of parody cannot be recognised, the parody fails.

The UK Courts only once considered a fair dealing defence in the context of parody (section 30(1) CDPA 1988)<sup>2</sup>, and the wider public interest defence (section 171(3) CDPA 1988) has yet to be invoked successfully.

The Hargreaves Review (2011) recommended that 'Government should firmly resist over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators'.<sup>3</sup> Hargreaves argued that using the full range of exceptions 'will reduce transaction costs and stimulate new works in growing sectors of the creative economy' [5.36]. The Review also asserted that, in the digital context, video parody specifically 'encourages literacy in multimedia expressions in ways that are increasingly essential to the skills base of the economy' [5.35].

This research assesses the policy options regarding the introduction of a parody exception in several steps.

First, an empirical study of music videos on the YouTube platform investigates if commercial exploitation of original works is affected by the presence of parodies where they can be considered to be part of the same market and to what extent parodies may be a potential source of innovation and growth for the UK creative economy in their own right.

Secondly, a comparative review of the treatment of parodies under copyright law in seven jurisdictions was conducted, distilling those (economic and non-economic) rationales underlying the tests developed by legislators and courts.

Thirdly, the legal rules identified by the comparative review are applied to the empirical sample, in order to assist the assessment how desired innovation and growth benefits could be made available while ensuring, at the same time, appropriate incentives to original production and distribution for creators and rightsholders.

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1 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

2 *Kennard v Lewis* [1983] F.S.R. 346 (Ch.D).

3 *Digital Opportunity: A Review of Intellectual Property and Growth: An Independent Report by Professor Ian Hargreaves* (London: Intellectual Property Office; 2011: Recommendation 5).

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## 1. Summary of Empirical Study

The aim of this study was to gather and analyse objective data about parody video creation and its potential impact on the market for original works. The researchers collected a significant amount of data about parody audiences and creators on the YouTube video-sharing service. The YouTube platform was chosen for its dominance in the emerging online video market and for the opportunity it provided to observe user-generated production in an online marketplace where original licensed music videos and parodies exist next to each other. This provided a basis to explore the extent of parody content production as both a commercial and a cultural activity and to analyse the relationship between the presence of parody treatment of a work and the successful economic exploitation of that work. While YouTube is, in part, a licensed environment (where rightsholders have a choice of removing infringing material, or benefiting from royalty arrangements), the empirical results relating to the potential economic effects of parodies are applicable to non-licensed platforms (which was the status of YouTube before being bought by Google Inc. in 2006, and which remains the case for many new digital start-up firms).

It should be noted that the present study is focused exclusively on one type of media – the music video – characterised by its own set of aesthetic and commercial dynamics, which may not be generalisable to all mediums and contexts. Specifically, the music video is a composite work, consisting of an underlying sound recording, musical composition, lyrics and video recording. This is a groundbreaking study – one of the first to collect quantitative data on parody creation and viewership behaviour, however, it is necessarily limited in scope and reflects a strategic judgement about how to most efficiently capture large amounts of data on a common cultural practice. The results of this research are not exhaustive but should instead be seen as indicative of broader trends taking place in online environments: Repurposing of media across formats, audience engagement with commercial texts, remix and mashup as aesthetic forms, and markets characterised by viral social networking effects.

Future research might be conducted to determine whether the same or similar dynamics hold for other types of online media, for example, parodic still images, popularly known as ‘image macros’, or audience generated fan fiction, some of which might fall under the definition of parody. Offline parody markets may also exhibit unique dynamics. However, it is the assertion of the researchers that online production of parody quantitatively surpasses that of offline media and will continue to do so, making it a particularly germane site from which to offer forward-looking policy guidance.

For the purposes of this synopsis, we summarise the methodology used in the YouTube study, followed by five key findings. The results of the empirical study are discussed in greater detail in the accompanying study document [Report I: *Evaluating the Impact of Parody on the Exploitation of Copyright Works: An empirical study of music video content on YouTube*].

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## 1.1. Methodology

YouTube is the world's most popular online video sharing service, with over 800 million unique visitors per month, accessing 4 billion videos per day. While it is well known as a platform for amateur user-generated video content, YouTube also hosts commercial content on channels such as Vevo, a partnership between Google, EMI, Sony Music and others. In fact, the most extensively exploited commercial product on the platform is the music video, being well suited to the short length of the YouTube format, and enabled through advertising revenue share partnerships with music labels. Because viewership data is publicly available, it enabled researchers to evaluate the possible effects of parody content on the fortunes of commercially licensed works. The study therefore focused on the music video market, with the unit of analysis being the individual music video, comprised of several copyright-attracting elements: the original sound recording, the video recording, the lyrics and the musical composition.

The British Charts Company publishes data on the retail popularity of music in a variety of genres and formats. The weekly Top 100 Singles Chart was used to generate the primary sample, selected because it offers the highest level of resolution (chart frequency) and depth (number of places on the chart) compared with other publicly available data. The key advantage of this chart over other formats is that it provides the widest possible view of the music retail business available to researchers, covering hit songs that place in the top ten as well as minor retail successes that would not be visible in a top-10 or top-40 chart. The singles chart was preferred over the albums chart because it enables direct comparison with the units of analysis in the secondary sample: Individual works.

The researchers recorded all music singles that made a first appearance in the Top 100 Singles Chart from Tuesday, 4 January 2011 to Tuesday, 3 January 2012, yielding a total of 375 individual tracks. This sample size reflects the fact that most songs were present on the chart across multiple weeks.

The original sample of 375 music tracks was triangulated against the YouTube commercial video channels to ensure that an officially licensed music video was present on the video hosting service. We define 'officially licensed version' as a video upload that can be clearly attributed to the original artist or rights holding music label. This included videos available on the YouTube Vevo service as well as videos uploaded to a channel belonging to the music label or artist. Un-licensed music videos or uploads, where the attribution could not be definitively established, were not included in the final sample. A further 32 songs from the original sample were thus jettisoned because they did not have corresponding music videos on YouTube that could be clearly attributed to the legitimate rightsholder. The cross-checking process left a primary sample of 343 original licensed music videos, from an original sample comprised of the top-100 charting music tracks from the year 2011.

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The next phase of the research involved locating user-uploaded parody videos, referencing the commercial music videos in the primary sample. The researchers used YouTube's search functionality, and in each case entered a search string consisting of the song title plus the word 'parody'. While the authors acknowledge that this approach imposed limits on the sample, it was deemed appropriate to leave the choice of distinguishing between parody and other types of work to the video creator. This approach avoided the need for the researchers to make a subjective *a priori* judgment about what constituted parody and consequently what would be included in the sample. The current sample reflects a working definition of parody inherited from YouTube creators themselves.

Four research assistants, including the primary investigator, were responsible for identifying and coding the sample of parody videos. The primary sample of 343 licensed music videos yielded a total of 8,299 parody videos, found using the YouTube search engine. A sample of 1,845 parodies from within the total sample were subjected to further scrutiny to determine the characteristics of online music video parodies, including the target of critique, the production values in the video, the quantity of copyright material used in the derivative work, and the amount of commercial exploitation of these new works (see section 4 below).

To streamline the coding process, a survey instrument was developed in SNAP to collect the details of each individual parody. For each parody, researchers recorded details such as the type (weapon, target, etc.), number of views, the presence of advertising or calls to action in the video, the nature and severity of critique directed at the original work, copyright elements that were taken from the original and those that were added by the parodist, and the production values present in the parody. This data was then exported to SPSS and Excel for analysis. Two key variables from the study were the number of parodies related to a single original work and the aggregate parody audience. These were used to evaluate the presence of economic effects caused by the existence of those parodies. Other aspects of the study, such as the nature and extent of copying and transformative use present in the parody sample, offer insight into the potential effects of the range of policy options on parodists and their audiences.

What follows are the five key findings from the study, discussed in greater detail in the accompanying document, Report I: *Evaluating the Impact of Parody on the Exploitation of Copyright Works: An empirical study of music video content on YouTube*.

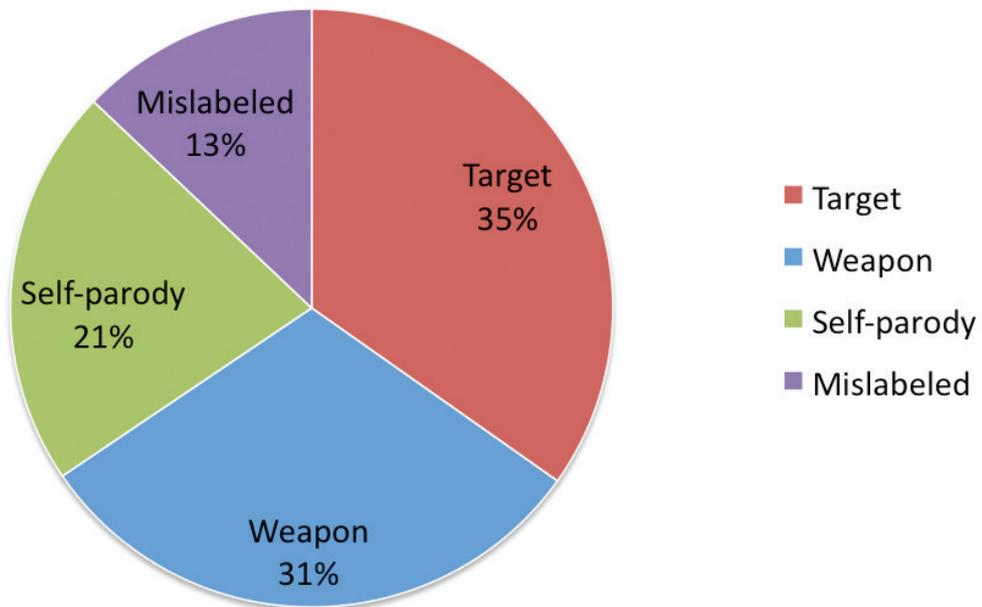
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## 1.2. Parody is a highly significant consumer activity

Working from a sample of 343 commercial music videos, the researchers located 8299 user-uploaded parodies, indicating an average rate of parody production of more than 24:1. Online parody was found to encompass a broader range of communicative intentions, stretching the traditional academic definitions of the activity. The majority of the sample fell into one of the traditional categories of either weapon or target parody. Target parodies, directed at the original artist or work, accounted for 35% of the total sample. Weapon parody, which takes as its focus a critique of a third party issue or phenomenon, made up a further 31% of the works observed. Within the weapon category, we observed a wide range of social and political expression, ranging from comments about race, gender and religion, to satirical commentary on the intellectual paucity of mass media, the commercialisation of the Internet, and the causes of the recent banking crisis.

In addition to those traditional definitions, the researchers encountered a third type of parody, which accounted for 21.6% of the total sample and which we termed ‘self parody’. In these videos the uploader turned the critical eye on themselves, rather than the original artist or a third party. Finally, the researchers discovered a range of other amateur performances, labelled as parody, which did not contain any discernible target of critique and therefore could not be easily defined. They include a range of communicative acts, such as karaoke, choreography, remix, mashup or machinima. We have termed these videos ‘mislabelled/other, and they account for 12.9% of the observed sample.

Figure 1.1: Parody sample by type (n=1845)



### 1.3. No evidence that parody causes economic harm from substitution

A doctrinal but empirically untested view is that parody may harm the market for an original work by acting as a substitute and siphoning audience away from the original<sup>4</sup>. The results of this study suggest that no such dynamic is present for music videos on YouTube. In fact, the presence of parody is positively correlated with size of audience for commercial music videos (see Figure 2). Statistical analysis suggests that while minimal, the positive impact of parody is most significant for works that are not commercially successful before appearing on YouTube. These ‘minor hits’ appear to be most susceptible to a lift provided by publicity and awareness generated by a large number of parody videos available elsewhere on the platform.

Figure 1.2: Distribution of 343 original works and presence of parodies

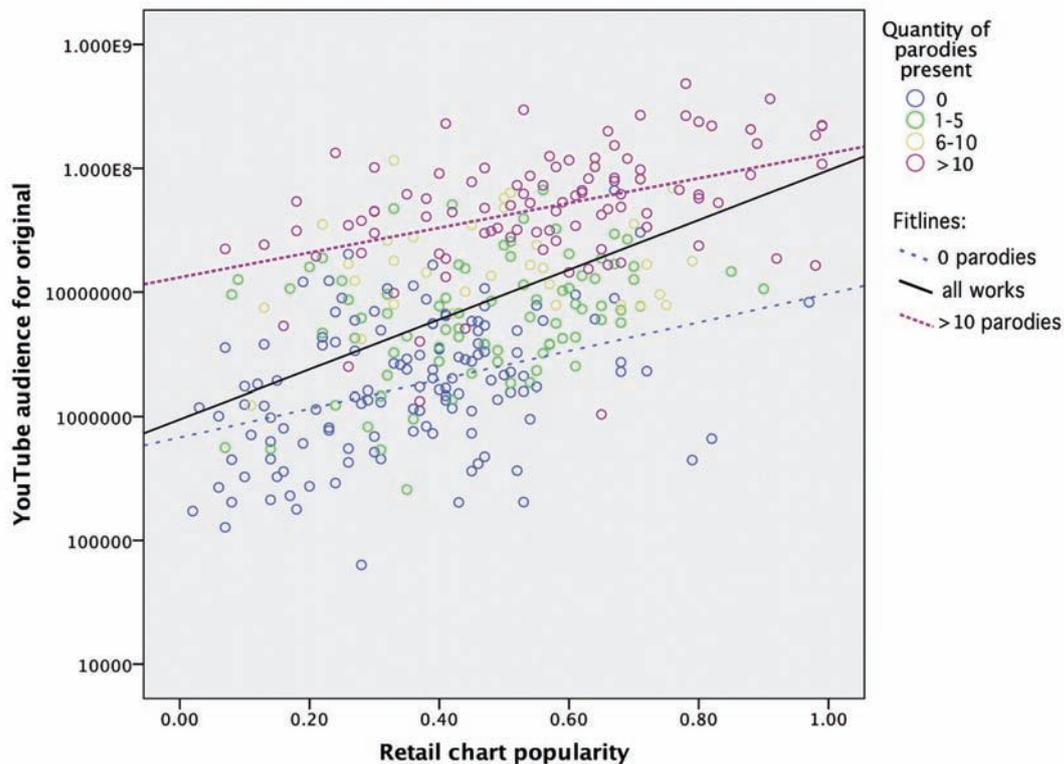


Figure 1.2 Notes: Retail chart popularity is equal-weighted index of two factors: Highest chart position attained and proportion of weeks spent on chart.

4 Rogers, Mark, Joshua Tomalin and Ray Corrigan (2009) *The economic impact of consumer copyright exceptions: A literature review*. London: Consumer Focus.

Despite the indication of a statistically significant positive relationship between presence of parody and the success of a licensed work on YouTube, the direct impact of parody creators on the fortunes of original rightsholders remains limited by overall lower audiences for parody works. In 92.4% of cases, the aggregate parody audience (adding up all parody treatments located by the researchers) was less than 10% of the audience for the original work. In only one case was the aggregate parody audience greater than that for the original work, and there was no anecdotal evidence for harm in that case (it lies within the 95% confidence intervals for the predicted distribution of commercial audience viewership).

Based upon these two findings it can be concluded that parodies do not function as a substitute for the originals. Correlation between presence of parody and the size of audiences for the commercial work on YouTube suggests that the same dynamic that makes songs attractive to parodists may help rightsholders exploit their works on that platform. The correlation appears to hold for parodies of all types as well as those with high production values and commercial intent.

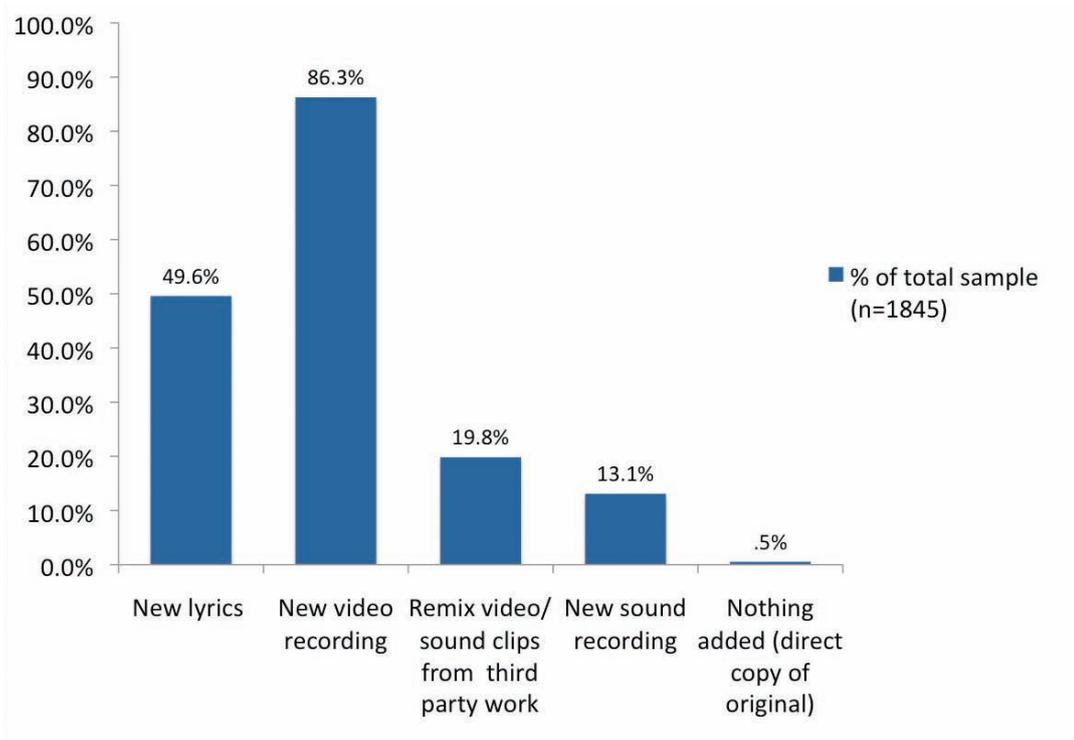
#### **1.4. The scope for reputational harm caused by parodies is limited**

Another direction of inquiry was to explore whether negative treatment of an original work could harm the market for the original by lowering its reputation in the minds of potential consumers. While 35% of parodies observed in this study contained a critique aimed at the original work, only 4.4% of those (or 1.5% of all parodies sampled) took an explicitly negative stance discouraging viewers from commercially supporting the original. Within this broad category of target parody, a much larger proportion (53%) referenced the original in a light hearted or respectful way. Two music videos which attracted a disproportionately negative response from parodists, Cher Lloyd's *Swagger Jagger* and Rebecca Black's *Friday*, performed within the expected (95% confidence interval) range for all commercial videos with a similar number of parodies, suggesting that even concentrated, highly negative parodic treatments did not harm the original work. In other words, it appears to be more advantageous for a commercial video on YouTube to attract parodies, even if highly negative, than to have no parodies at all.

#### **1.5. There is evidence of a high degree of creative input by parodists**

Although parody is by nature a derivative work whose impact is derived from referencing an original, we observed a significant amount of new creative input in the parody videos studied. The majority of music video parodists on YouTube (77%) copied the original sound recording in their work; however, some 50% of the sample added new original lyrics to the parody, while 86% of creators added a new original video recording. This pattern of creativity is consonant with the broader emphasis of YouTube on video sharing and on 'broadcasting oneself'. In 78% of all cases, the parodist appeared on camera, which highlights the presence of creative labour while also diminishing the possibility of confusion in the minds of viewers between parody content and original works.

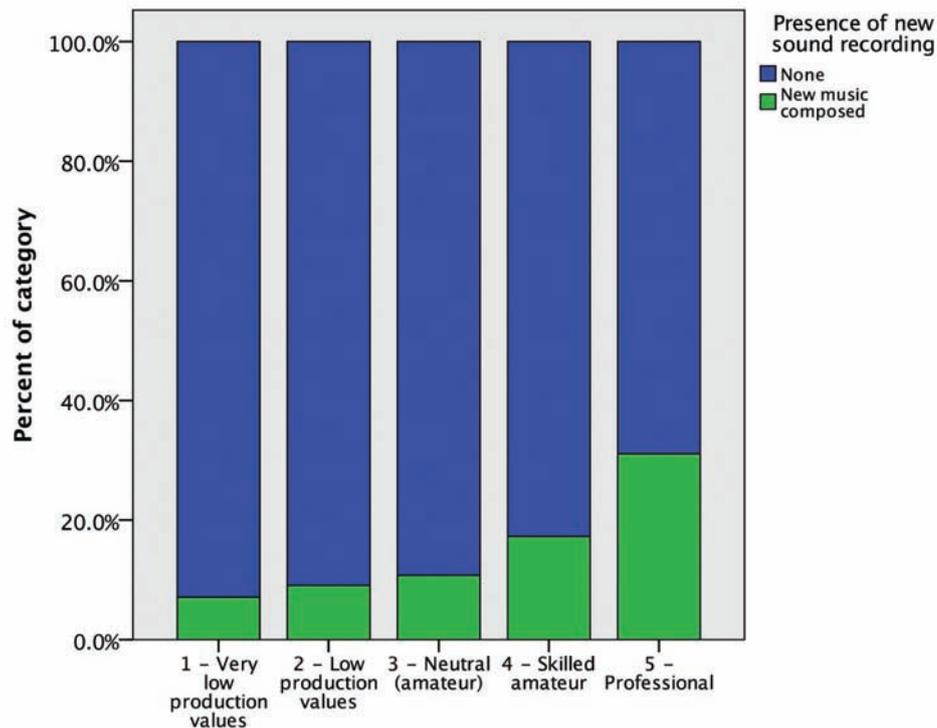
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**Figure 1.3: New creative elements added by parodist**

### 1.6. A commercial market exists for highly skilled amateur parody

The most popular parody videos in our sample were those that displayed higher-than-average production values. Within the range of parody works sampled, we observed a small but significant number (6.5%) that displayed commercial production values. A further 24.8% of the sample we classify as ‘skilled amateur’; these are works that display a considerable level of skill and polish in their execution, but appear to have been created without the benefit of commercial equipment or resources. Many of these skilled amateur and professional creators are commercially exploiting the parodies that they produce, via advertising revenue earned as YouTube partners or indirectly via digital download sales, merchandise and self promotion. Further evidence suggests that these semi-professional producers are more sophisticated in their understanding of copyright, and take steps to distance their parodic works from original works, in order to monetise their derivative works without triggering YouTube’s Content ID filter, which detects exact copies of original works. For example, the data clearly indicates that the propensity to add a newly composed sound recording to a parody video increases with production values.

Figure 1.4: presence of new sound recording by production values



In order to estimate the total commercial market for parody music videos on YouTube in 2011, the researchers collected a range of estimates of advertising revenue from published sources (*Wired Magazine*, *CitiGroup*, *Digital Music Times*, *Quora*). Based on these sources, we suggest that the total advertising revenue generated by YouTube in 2011 from viewership of the 8,299 parodies we studied did not exceed £2 million. The amount of revenue shared with partner creators has an upper bound of £1.1 million.

Audiences are disproportionately distributed in favour of videos with higher production values, meaning skilled amateurs and professionals can capture a larger share of the available advertising revenue. Parody creators in the professional production value category may achieve a hypothetical average value of £406-£816 per video.

While the total market for user-generated parody content is small, this is a dynamic market. Further study is needed to estimate secondary benefits from digital download sales, merchandise and self-promotion.

## 2. Legal status of parody in the UK and in international comparison

In August 2011, the Government published their ‘broad acceptance’ of the recommendations of the Hargreaves Review, and announced specifically<sup>5</sup>:

Government will bring forward proposals for a substantial opening up of the UK’s copyright exceptions regime, including a wide non-commercial research exception covering text and data mining, limited private copying exception, parody and library archiving. We will consult widely on the basis of sound evidence.

The Consultation documents that followed explained the position under UK Law<sup>6</sup>:

7.102 In the past, UK law provided greater flexibility for works of this nature. In *Glyn v Weston Feature Film* in 1916, it was held that a burlesque parody – an art form “as old as Aristophanes” – could escape copyright infringement if sufficiently original. But by the 1980s this parody defence had been extinguished. Parodists can attempt to rely on other defences, such as the fair dealing defence of criticism and review, but this defence is very limited and most parodies will not fall within it.

Less than two years earlier, in December 2009, the case for a parody exception, as recommended by the Gowers Review<sup>7</sup>, was rejected in the second stage Consultation on copyright exceptions<sup>8</sup>. The document had explained the position under UK law as satisfactory, as follows:

294. There is currently no exception which covers the creation of parodies, caricatures or pastiches of others’ works. However there are exceptions which apply, and circumstances where this type of creative endeavour does not require the consent of the rights owner and may therefore be carried out. For example consent is not required if:

- The part of the underlying copyright work being used is not ‘substantial’, which may also include parodies based loosely on a work rather than copying part of it;
- The use of the underlying copyright work falls within the fair dealing exception for criticism, review and news reporting;
- Enforcement of copyright is contrary to the public interest.

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5 *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (London: Intellectual Property Office; August 2011), at p. 15.

6 Consultation on Copyright (London: Intellectual Property Office; December 2011), at p. 83.

7 *Gowers Review of Intellectual Property* (London: HM Treasury; 2006).

8 *Taking forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions* (Newport: Intellectual Property Office; 2009), at p. 45.

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295. Even if the use of a work does not fall within these examples, it may also be possible to create new works of parody, etc, where the holder of the rights in the underlying work has given their permission for their work to be used in such a way. And where a work is no longer protected by copyright, there is no need to request permission at all.

The 2011 summary of the current position in law is broadly correct while the 2009 position remains problematic. The characterisation of parodic use as insubstantial takings has indeed almost disappeared from UK jurisprudence (see detailed discussion in Study II). Section 30(1) CDPA 1988 permitting “[f]air dealing with a work for the purpose of criticism or review” may allow narrow “target” parodies but does not accommodate parodies drawing on a work as part of a critique or comment directed at third parties (“weapon” parodies)<sup>9</sup>. It should also be noted that the public interest defence (section 171(3) CDPA 1988) has yet to be invoked successfully before the courts. Regarding the licensing option, it has been observed, astutely, that “parodies are often extremely critical of, or offensive to, the underlying work, or to the opinions and sensibilities of the author (or the rightsholder) of that work, and that the author (or the rightsholder) may not be interested in licensing the use of the work for parodic purposes”<sup>10</sup>.

## 2.1 Comparative summary

UK policymakers have the advantage of drawing from a range of legal interpretations of parody when considering the effects of an amendment to the existing copyright framework.

What follows is a brief summary of the legal treatment of parodies in several key countries. The jurisdictions selected share a common law heritage with the UK (Australia and Canada), or have contributed significantly to the European *acquis* (Germany, France and the Netherlands). The selection also includes countries with an explicit parody exception (Australia, France, The Netherlands and Canada), and countries that accommodate parody within a wider “fair use” provision (USA) or a narrow “free use” provision interpreted in the light of constitutional norms of freedom of expression and freedom of the arts (Germany).

The full study [*The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A comparative review of the underlying principles*] highlights and discusses the ‘turning points’ within each jurisdiction which have introduced a parody exception and those which are debating the possibility of introducing such an exception. Key cases are illustrated there by the artefacts that gave rise to the litigation, since the scope of permitted cultural activity only becomes visible in the application of legal rules (formulated initially at a high level of abstraction).

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9 It appears that the UK Courts only once considered a fair dealing defence in the context of parody, when an injunction was denied seeking to prevent the publication of a satirical pamphlet: *Kennard v Lewis* [1983] F.S.R. 346 (Ch.D). See A. Sims, Strangling Their Creation: The courts’ treatment of fair dealing in copyright law since 1911 [2010] *Intellectual Property Quarterly*, pp. 192-224.

10 R. Deazley, Copyright and Parody: Taking Backwards the Gowers Review? [2010] 73(5) *Modern Law Review*, pp. 785-823.

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Table 2.1: The treatment of parody in seven jurisdictions

| COUNTRY        | LEGISLATION ON PARODY                                                                                                                                   | CASE LAW<br>(+ for parodist)<br>(- against parodist)                                                                                                                                                                              | TEST                                                                                                                                                                                                                                                                                                                                                                                                           |
|----------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| UNITED KINGDOM | Government Consultation following <i>Hargreaves Review (2011)</i> proposes introduction of a parody exception within the existing 'fair dealing' frame. | <p>+ Glyn v Weston Feature Film Company (1894) (<i>Burlesque film of novel</i>);</p> <p>+ Joy Music (1960) (<i>Rock-a-Billy/Rock-a-Philip, rock</i>);</p> <p>- Twentieth Century Fox (1965) (<i>Cleopatra/Carry on Cleo</i>).</p> | <p>Whether a 'substantial part' has been taken from the original to create the parody (section 16(3) CDPA 1988).</p> <p>Up to, and including Joy Music (1960) the courts considered the <i>mental labour</i> that went into <i>revision and alteration</i> so as to produce an original work (Glyn v Weston).</p> <p>Following Twentieth Century Fox (1965): narrower focus on what has been <i>taken</i>.</p> |

| COUNTRY | LEGISLATION ON PARODY                                                                                                                                                                                                                                                                                                                                       | CASE LAW<br>(+ for parodist)<br>(- against parodist)                                                                                                                                                                                                                                                                                              | TEST                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|---------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| CANADA  | <p><b>Copyright Modernization Act (Bill C-11)</b> amending Copyright Act 1985 passed on 18 June 2012 and received Royal Assent on 29 June 2012. New section 29 recognises works of (education), parody or satire under the existing 'fair dealing' exception, which is further elaborated at section 29.21 for 'non-commercial user-generated content'.</p> | <ul style="list-style-type: none"> <li>- Ludlow Music (1967) (<i>This Land is Your Land/ This Land Ain't Your Land</i>);</li> <li>- CGEM Michelin (1996) (<i>'Michelin Tire Man'/ parody of artwork</i>);</li> <li>- Avanti Ciné-Vidéo (1999) (<i>La Petite Vie/La Petite Vite (pornographic version of situation comedy series)</i>).</li> </ul> | <p>Section 29 sets out that fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.</p> <p>Section 29 is further elaborated at section 29.21 ('mash-up exception'), setting out requirements for permitting user-generated content which may cover parodies that do not fall under the fair dealing exception for criticism.</p> <p>Permitted content generation must solely be <b>carried out for non-commercial purposes</b>.</p> <p>It must not have '<b>a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or subject matter</b>', including that the new work <b>should not be a substitute for the existing one</b>.</p> <p>The <b>identity of the existing work should be acknowledged</b>.</p> |

| COUNTRY   | LEGISLATION ON PARODY                                                                                                                                                                             | CASE LAW<br>(+ for parodist)<br>(- against parodist)                                                                                                                                                                                                                                                                                                                                     | TEST                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|-----------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| FRANCE    | <p><i>L 122-5 of the French Intellectual Property Code 1992</i> recognises a right to parody, pastiche or caricature.</p>                                                                         | <p>+ Moulinsart (2011) (<i>Tintin/artistic parody of Tintin depicting current affairs and geopolitics in France</i>);</p> <p>+ Esso (2004) (<i>ESSO/ E\$\$O</i>);</p> <p>- Marcel Pagnol (1997) (<i>advert selling prêt-à-porter</i>);</p> <p>- Jamel Debouze (2002) (<i>humoristic audio</i>);</p> <p>- Greenpeace (2008) (<i>Areva logo with a blooded skull and a dead fish</i>).</p> | <p>Humoristic, and <b>'substantial transformation/modification of a copyright work'</b> devoid of the intention to harm the legitimate author (financially or morally). Can be commercial use.</p> <p>The parodied work should not <b>exploit the fame of the original work in order to reach its audience</b>.</p> <p>Parody defences were denied by the courts if the use was just commentary (Jamel Debouze), intended as an advertisement (Marcel Pagnol), or if the point could have been made by using different images (Greenpeace).</p> |
| AUSTRALIA | <p><i>Section 41A of the Australian Copyright Act 1968</i> as amended by the Australian Copyright Amendment Act 2006 recognises works of parody or satire under its 'fair dealing' exception.</p> | <p>- AGL v Shortland (1989) (<i>advert by applicant to push the message 'energy balanced homes save money'/'reply' advert by defendant using similar format and same factors</i>);</p> <p>- The Panel (2005) (<i>Channel Nine news clips/shown and discussed in a humorous manner on Network Ten</i>).</p>                                                                               | <p>Similar to UK, <b>'substantial part'</b> is considered when determining the scope for parody (The Panel case). Assessment includes <b>interference</b> with copyright owner's <b>financial interest</b> which can affect the <b>value of the work</b> and provide <b>an unfair advantage</b> to the parodist.</p> <p>Since Parody has been explicitly recognised as a 'fair dealing' exception (section 41A, 2006), the new provision has not been tested in court yet.</p>                                                                  |

| COUNTRY | LEGISLATION ON PARODY                                                                                              | CASE LAW<br>(+ for parodist)<br>(- against parodist)                                                                                                                                                                                                                                                                                                                 | TEST                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|---------|--------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| GERMANY | <p><b>Article 24 of Urheberrechtsgesetz 1965</b> recognises parody within 'free use' (<i>freie Benutzung</i>).</p> | <p>- <i>Disney-Parodie</i> (1971) (<b>satirical cartoon, Walt Disney creating biblical figures in heaven</b>);</p> <p>+ <i>Asterix case</i> (1993) (<b>Asterix/ Falsches Spiel mit Alcolix. Die Parodie</b>);</p> <p>+ <i>Gies-Adler</i> (2003) (<b>German national symbol/version of the Federal eagle used on magazine cover criticising national policy</b>).</p> | <p>The courts have increasingly interpreted §24(1) 'free use' in the light of constitutional guarantees (Art. 5(1): freedom of expression, Art. 5(3): freedom of art, science, research and education.</p> <p>The threshold is one of 'necessity' to borrow from the original work.</p> <p>A clear '<b>inner distance</b>' between the original and the parody must be expressed, generally through 'anti-thematic' treatment.</p> <p>§24(2) UrhG does not permit musical parodies as 'free use' where <b>a melody has been recognisably borrowed</b> from the work and <b>used as a basis for a new work</b>.</p> |

| COUNTRY | LEGISLATION ON PARODY                                                                         | CASE LAW<br>(+ for parodist)<br>(- against parodist)                                                                                                                                                                                                                                               | TEST                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
|---------|-----------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| USA     | <p><b>Section 107 Copyright Act 1976</b> recognises parody under its 'fair use' doctrine.</p> | <p>+ <i>Campbell v Acuff-Rose (1994)</i> ('<b>Pretty Woman</b>' by Roy Orbison/'Oh <b>Pretty Woman</b>' by 2 Live Crew);</p> <p>+ <i>Suntrust Bank (2001)</i> (<b>Gone With the Wind/The Wind Done Gone</b>);</p> <p>+ <i>Louis Vuitton</i> case (2007) (<b>Louis Vuitton/ Chewy Vuitton</b>).</p> | <p>The right to parody is recognised under the <b>doctrine of 'fair use'</b> under section 107 Copyright Act 1976.</p> <p>Under the fair use doctrine, factors to consider include the purpose and character (commercial/non-profit educational use), substantiality of the portion used, and the effect of the use upon the potential market.</p> <p>The case of <i>Campbell</i> established that the key test is to determine the <b>'transformative' nature</b> of the parodied work. Does it add 'something new, with a further purpose or different character, altering the first with new expression, meaning or message'?</p> |

| COUNTRY     | LEGISLATION ON PARODY                                                                                                                                            | CASE LAW<br>(+ for parodist)<br>(- against parodist)                                                                                                                                                                                                                                                                                    | TEST                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|-------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| NETHERLANDS | <p><b>Article 18b of the Dutch Copyright Act 1912 (as amended in 2004)</b><br/> <i>recognises a work in the context of a caricature, parody or pastiche.</i></p> | <p>- <i>Harry Potter case (2003) (Harry Potter/Tanja Grotter)</i>;</p> <p>+ <i>Darfurnica case (2011) (Louis Vuitton/ Depicting a child from Darfur holding a Louis Vuitton handbag and Chihuahua dog dressed in pink)</i>;</p> <p>+ <i>Miffy case (2011) (Miffy/ Miffy depicted within the roles of sex, drugs and terrorism)</i>.</p> | <p>Before recognising the right to caricature, parody and pastiche under article 18b of the Copyright Act 1912, The Netherlands was hesitant to invoke freedom of expression for the purposes of parody.</p> <p>Under the new section the test is that the parody should <b>normally be sanctioned under rules of social custom.</b></p> <p>The cases of <i>Miffy</i> and <i>Darfurnica</i> challenged the test, but in both cases the Court held in favour of the parodist.</p> |

## 2.2 Underlying criteria, and their rationales

Based upon our review of seven jurisdictions (including the UK), we can identify a number of criteria developed by legislators and courts for assessing permitted and not-permitted parodic uses of copyright works. Some of these criteria form part of a cumulative test where each requirement must be met for an exception to be available (as will be the case in Canada, and perhaps France), some are factors that must inform an overall assessment whether there is non-infringing use (such as in Australia and the USA), sometimes in the light of constitutional or human rights guarantees (such as in Germany and The Netherlands). The nine criteria emerging from the legal review are as follows:

**Table 2.2: Criteria underlying the treatment of parodies**

|                     |                                                                                                |
|---------------------|------------------------------------------------------------------------------------------------|
| <b>Criterion 1:</b> | <b><i>Parody must be non-commercial.</i></b>                                                   |
| <b>Criterion 2:</b> | <b><i>Parody must not have an adverse effect on the market for the original.</i></b>           |
| <b>Criterion 3:</b> | <b><i>Parody must not use more of the original than necessary.</i></b>                         |
| <b>Criterion 4:</b> | <b><i>Parody must add some significant new creation.</i></b>                                   |
| <b>Criterion 5:</b> | <b><i>Parody must have humorous or critical intention.</i></b>                                 |
| <b>Criterion 6:</b> | <b><i>Parody must be directed at the work used ('target').</i></b>                             |
| <b>Criterion 7:</b> | <b><i>Parody must not harm the personality rights of the creator of the original work.</i></b> |
| <b>Criterion 8:</b> | <b><i>Parody must be sanctioned under the rules of social custom.</i></b>                      |
| <b>Criterion 9:</b> | <b><i>Parody must acknowledge source of original work.</i></b>                                 |

It should be noted that some criteria can easily be combined with any other (such as the requirement to acknowledge the source work for the parody), while others are incommensurate (in that they derive from a different logic, and may not be applied coherently together – such as the criteria of 'social custom' and 'non-commerciality').

Examining each criterion in turn, we find that they reflect divergent approaches to parody and related derivative works, and are often grounded in specific justifications for copyright law itself.

**Criterion 1** requires that parody works be non-commercial. It is only explicit as a *cumulative requirement* in the new Canadian legislation (no infringement if the new work “is done solely for non-commercial purposes”), although it is present as a factor contributing to the assessment in most of the other jurisdictions considered. The US fair use doctrine (Section 107, Copyright Act 1976) includes as factor 1 the determination of “[t]he purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes”.

From an economic perspective, non-commerciality may appear to be shorthand for an evaluation of potential competition, i.e. substitution of the original work by the parody. Yet the criterion is much too strong for that purpose, and does not appear to have a sound base in economic theory. The incentive copyright law is designed to provide will only be affected by a lost sale, yet commercial parody may well increase demand for the original, or be sold in a different market altogether. From a non-economic perspective, the most effective expressions may well embrace commercial use (such as in the commercial media). So if freedom of speech is at stake, a requirement for non-commercial use again seems overly demanding<sup>11</sup>.

**Criterion 2** requires that the parody not have an adverse effect upon the market for the original work. This criterion is prevalent in most jurisdictions considered: Factor 4 of the Australian test under Section 40(2) of the Copyright Act 1968 (as amended) requires the consideration of “[t]he effect of the dealing upon the potential market for, or value of, the work or adaptation”; Factor 4 of Section 107 of the US Copyright Act 1976 requires a determination of “[t]he effect of the use upon the potential market for or value of the copyrighted work.” In France too, a parody is not permitted to be commercialised in competition with the original work<sup>12</sup>.

From an economic perspective, Rogers, Tomalin and Corrigan capture the possible market effects of the presence of parodies succinctly<sup>13</sup>: “In general, the existence of more parody could both decrease demand (e.g. by influencing consumers’ views on the value of the original work) or increase demand (e.g. by increasing the awareness of consumers to the original work and hence acting as ‘advertising’).”<sup>14</sup> However, legislators and judges appear ambiguous, if not confused, when attempting to articulate what “the financial interest protected by copyright” is. Germany emphasises the equitable participation of the creator in any exploitation of copyright works; France focuses on substitution in that under no circumstances the public should be deceived about the origin of the parody. Canada’s new legislation “includes” substitution as a “substantial adverse effect, financial or otherwise” in test (d): “the

11 The point was made by the U.S. Supreme Court in *Campbell*, rejecting the proposition that the parody’s commercial nature rendered the parody presumptively unfair: *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 114 S. Ct. 1164 (1994).

12 A requirement that a permitted reproduction “does not conflict with a normal exploitation of the work” is also part of the Berne three-step-test (Art. 9(2), Berne Convention) which delimits the possible scope of national copyright exceptions. Art. 13 of the TRIPS Agreement (1994), Art. 10 of the WIPO Copyright (Internet) Treaty (1996), and Art. 5(5) of the EU Information Society Directive (2001/29/EC) make the test applicable to all copyright exceptions and limitations.

13 Rogers, M., J. Tomalin and R. Corrigan, *The Economic Impact of Consumer Copyright Exceptions: A literature review* [2009], London: Consumer Focus, p. 32.

14 Landes and Posner characterise certain parodies as complementary goods rather than substitutes, performing a function similar to book reviews: W.M. Landes & R.A. Posner, *Fair Use, Parody and Burlesque*, in *The Economic Structure of Intellectual Property Law* [2003]. Cambridge (Mass): HUP Belknap Press, p. 150.

use of, or the authorisation to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one”<sup>15</sup>.

How might we calculate non-substitution harm, “financial or otherwise”? One possibility is to conceive of permitted parodies as a lost licensing opportunity. Under such a conception, paradoxically the presence of parodies may increase sales but still may conflict with “normal exploitation”, since more could be earned if they were licensed. Another possibility is that parodies may damage the sales of works not by substitution but by highlighting dubious qualities of the original. In summary, there has been no coherent articulation in case law of what may amount to non-substitution harm. Evaluating economic harm to rights holders without also assessing the value of parody to users appears inappropriate<sup>16</sup>.

**Criteria 3, 4, 5 and 6** all focus *not* on the market effects but on the creative contribution and intention of parodic works. This kind of assessment surfaces in most jurisdictions reviewed, and can be discussed together. In the French line of cases, parody defences were denied by the courts if the use was just commentary (Jamel Debouze), intended as an advertisement (Marcel Pagnol), or if the point could have been made by using different images (Greenpeace)<sup>17</sup>. In Germany, permitted parodies must reflect a transformative inner distance (innerer Abstand) between original and parody, and by the ‘necessity’ of having borrowed, characteristics of the original work must pale in comparison<sup>18</sup>. Similarly, UK case law up to about 1960 relied on dicta in *Glyn*<sup>19</sup> that “no infringement of the plaintiff’s rights takes place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result”.

As assessment factors, Australia’s fair dealing defence requires a consideration of “the purpose and character of the dealing” and “the nature of the work or adaptation”<sup>20</sup>. Similarly, the statutory factors for determining “fair use” in the United States include “the purpose and character of the use” and “the nature of the copyrighted work”<sup>21</sup>. Following *Campbell*, the important inquiry is not whether the use is a commercial or non-profit one, but whether it is ‘transformative’ – i.e. does it add ‘something new, with a further purpose or different character, altering the first with new expression, meaning or message’<sup>22</sup>. ‘Target’ parodies (directed critically at a work) are more likely to pass this test than ‘weapon’ parodies that might simply draw on a work “to get attention or to avoid the drudgery in working up something fresh”<sup>23</sup>.

15 Bill C-11 amending Copyright Act, RSC, 1985, c. C-42. <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&File=45#7>

16 As Rogers et al. argue [2009, p. 32]: “The total value of consumers’ benefits (or consumer surplus) from parody may be very large and, in general, this will have no direct association with the possible economic damage.”

17 Marcel Pagnol (TGI PARIS, 1ère Ch., Section 1, 30-4- 1997, Pagnol v/ Société VOG); Jamel Debouze (Cour d’Appel de Paris, 18-9-2002, Dalloz 2002 A.J. p.3208); Greenpeace (Cass. civ., 1re ch., 8 avr. 2008, n° de pourvoi : 07-11251).

18 Alcolix [1994] GRUR 206; Gies-Adler [2003] (I ZR 117/00).

19 [1915] 1 Ch 261.

20 Copyright Act 1968 (amended 2006), section 41A.

21 Copyright Act 1976, section 107.

22 *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 114 S. Ct. 1164 (1994), at p. 579.

23 *ibid.* at p. 1172.

Wendy Gordon, in a widely cited article<sup>24</sup>, has attempted to give an economic explanation for the “fair use” doctrine’s emphasis on transformative use: these are uses where the rights owner may have a strong motivation for refusing to licence in order to protect his/her reputation. In Gordon’s terms, this constitutes a secondary market failure, as leaving licensing to rights owners will not ensure the most efficient use of their works<sup>25</sup>.

An alternative economic explanation for the emphasis of parody case law on transformative and critical qualities (that could not be achieved without the use of the original) is much more straightforward: Innovative parodies are precisely the kind of creative activity that copyright is meant to incentivise in the first place, and if parodic use can take place without leading to under-production of original works, it should be permitted<sup>26</sup>.

Finally, from a non-economic perspective, parody criteria affording special treatment to transformative and critical uses also naturally ally with the protection of the parodist’s right to freedom of speech<sup>27</sup>.

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24 Wendy J. Gordon, “Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors”, 82 *Columbia Law Review* 1600 (1982)

25 Gordon explains the underlying economics as an “endowment effect”: “The logic of endowment effect is this: the hostile use causes harm to reputation and peace of mind. Reputation and peace of mind are ‘priceless’ in the sense that they have high endowment effects. If an author had a right to refuse permissions, she might not sell licenses, even though, were the entitlement reversed, she might not be able to buy the user’s silence. In cases of high endowment effect, therefore, the ‘highest-valued use’ can change as entitlements change, and the market provides no stable guide to social value.” W.J. Gordon, “Market Failure and Intellectual Property: A response to Professor Lunney” (2002), 82 *Boston University Law Review* 1031, at 1033.

26 For a good discussion of the trade-off between under-production and under-use, and the importance to distinguish static (allocative and productive efficiency in a constant environment) and dynamic effects (such as induced changes), see C. Handke, *The Economics of Copyright and Digitisation* [2010], A Review commissioned by the UK Strategic Advisory Board for Intellectual Property Policy, London: SABIP, section 8, at 48ff. There are important implications for studying copyright innovation empirically: “Humdrum innovation concerns all facets of technological innovations and can be assessed with the familiar instruments of empirical research on innovation. Content creation concerns aesthetic and intellectual variations that distinguish different copyright works from each other.” C. Handke, *Economic Effects of Copyright: The Empirical Evidence So Far* [2011], Report for the U.S. National Academies of the Sciences, p. 15.

27 See for example M. Spence, Intellectual Property and the problem of parody [1998] 114 (Oct) *Law Quarterly Review*, pp. 594-620, in particular section (iv): Parody as a problem of free speech, at 608ff: “In considering the free speech argument, I shall take it as axiomatic that our legal system recognises a principle that speech should be free, whether because free speech is thought necessary to the discernment of truth, to citizen participation in a democracy or to speaker or listener autonomy. I shall also take it as axiomatic that the principle applies to speech which is commercially motivated.” The economic premise for reforming parody law has been criticised by Lionel Bently and Robin Jacob: L. Bently, Parody and Copyright in the Common Law World [2006] in *Copyright and Freedom of Expression*, Proceedings of the ALAI conference Barcelona, Huygens, pp. 355-389; R. Jacob, Parody and IP Claims: A Defence? – A right to Parody? [forthcoming 2013] in *IP at The Edge*, Cambridge University Press.

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**Criteria 7 and 8** are related to the moral and cultural impact of parody, for which it is hard to find an underlying economic rationale<sup>28</sup>. In fact, perceived personality interests of creators may well be in conflict with many economically beneficial digital innovations. In the UK, parodists potentially face liability under the right to object to false attribution of authorship (section 84(1), CDPA 1988), and the right to object to derogatory treatment (section 80(1), CDPA 1988)<sup>29</sup>. In France, a distinction is made between economic rights in a work and the author's *droit moral* while, in Germany, monistic theory discourages the separation of economic and moral rights. However, commercial practice regarding moral rights does not differ as much between civil and common law jurisdictions as many commentators suggest. For example, while in Germany, moral rights (*Urheberpersönlichkeitsrechte*) cannot be waived, they are often not enforceable if use conforms to what is the usual market practice, and even can be contractually "transferred" (*übertragen*) to be exercised on behalf of the author by a third party. With regard to the question of infringement, there is no separate test for moral rights. If a parody infringes copyright it also infringes the author's moral rights. The case law in the jurisdictions investigated offers no coherent rationale for providing a different standard for assessing derogatory treatment with respect to parodies of copyright works than, say, for defamation with regard to natural persons<sup>30</sup>.

Social custom or social norms are often seen as an alternative to law in the system of social control.<sup>31</sup> On the other hand, the concept of social custom is also imported into the standards for determining liability within many branches of law.<sup>32</sup> Rules of social custom are both inherently conservative and evolutionary (as custom is defined over time). Dutch case law appears to suggest that the concept of social custom is able to respond to new attitudes and practices, such as the sudden arrival of digital technologies enabling parodic appropriation, editing, remixing and re-presentation.

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28 These criteria chime with the third leg of the Berne three-step-test that national copyright exceptions and limitations must "not unreasonably prejudice the legitimate interests of the author" (Berne Convention Art. 9(2)).

29 Spence argues that the question of when a parody will amount to a derogatory treatment is "clearly unsettled" [p. 597]: "Some commentators believe that the right to prevent derogatory treatment is 'of no general relevance to the topic of parody' because a parody will not usually be prejudicial to the author's honour or reputation. Others claim that an author's moral rights 'are often outraged by a parodic or burlesque treatment of his work' and that 'the creation of an express integrity right reinforces the author's armoury against the parodist'. Still others claim that this may, but need not be, the case and that the author's moral right will only be infringed where the parody is 'offensive to the spirit of the original work'."

30 In any case, the constitutional and human rights framework regarding freedom of speech and expression should shape what is considered to be "unreasonably prejudice [to] the legitimate interests of the author", i.e. the third leg of the Berne three-step-test: cf. C. Geiger, J. Griffiths, R.M. Hilty, Declaration on a Balanced Interpretation of the 'Three-Step-Test' in Copyright Law [2008] 39(6) IIC, pp. 707-713.

31 R.C. Ellickson, Law and Economics Discovers Social Norms [1998] 27 *J. Legal Stud.* 537.

32 R.A. Epstein, The Path to 'The T.J. Hooper': The Theory and History of Custom in the Law of Tort [1992] 21 *J. Legal Stud.* 1.

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**Criterion 9** requires acknowledgement of the original work that forms the basis of a parody. This is already implicitly served by all successful parody, as parody fails as a genre if the audience misses the object of exaggeration, ridicule or criticism. Typically, parody (and related cultural practices) trade on this allusion being implicit, i.e. as a connection to be formed in the mind of the audience. It therefore appears inappropriate to require explicit signposting of sources as a rule. The new Canadian legislation<sup>33</sup> qualifies the requirement to mention the source (existing work or other subject matter, name of author, performer, maker or broadcaster) “if it is reasonable in the circumstances to do so”.

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33 Bill C-11 amending *Copyright Act, RSC, 1985, c. C-42*:  
at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&File=45#7>

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### 3. Synthesis

Table 3.1 below applies the criteria distilled from the preceding comparative review of the legal treatment of parody in seven jurisdictions. We have attempted to map the behaviours observed in the empirical study to each of the legal criteria discussed above, with the aim of providing guidance about what the potential impacts of a proposed exception to copyright might be. In each case, we have estimated the total number of parody works, as well as the total aggregate audience, that would hypothetically be enabled or prohibited by implementation of the criteria in legislation. While online video is an important site of new parody creation, it is important to note that the legal criteria established in other national jurisdictions may not be appropriate in all cases to the specifics of this research sample. Other markets, such as literature, broadcast television or theatrical performance may possess different dynamics that would alter the way creators and audiences may react to changes to legislation. Consequently, we offer these findings as an indicative guide and as a basis for considering the interrelationship of the various criteria identified.

**Table 3.1: Application of criteria to empirical sample**

| CRITERION                                                                    | PROHIBITS                                                                                        | PERMITS                                                                                                    |
|------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------|
| <b>1. Parody must be non-commercial</b>                                      | Parodies where there is a discernible commercial intention on the part of the creator            | Parodies where there is no discernible commercial intention on the part of the parodist                    |
| Impact on empirical sample:                                                  | Skilled or higher production values                                                              | Amateur or lower production values                                                                         |
|                                                                              | 31.3% of sample*                                                                                 | 68.7 % of sample                                                                                           |
|                                                                              | 91% of audience                                                                                  | 9% of audience                                                                                             |
| <b>2. Parody must not have an adverse effect on the market for original.</b> | Works that may substitute for the original                                                       | Works that do not negatively impact the market for the original work according to a substitution rationale |
| Impact on empirical sample:                                                  | Straight copies tagged as parody                                                                 | In this study, the majority of works                                                                       |
|                                                                              | 0.5% of sample*                                                                                  | 99.5% of sample                                                                                            |
|                                                                              | 0.2% of audience                                                                                 | 99.8% of audience                                                                                          |
| <b>3. Parody must not use more of the original than is necessary</b>         | Works that take more than the bare minimum required to conjure up the original in viewers' minds | Works that take only the minimum required to reference the original work                                   |
| Impact on empirical sample:                                                  | Parodies that copied either the full original lyrics, video or sound recording                   | Parodies that created new musical compositions, videos and lyrics without direct copying any element       |
|                                                                              | 80.9% of sample*                                                                                 | 19.1% of sample                                                                                            |
|                                                                              | 76.7% of audience                                                                                | 23.3% of audience                                                                                          |

|                                                                                           |                                                                                                                                                  |                                                                                                                          |
|-------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------|
| <b>4. Parody must add some significant new creation</b>                                   | Works where the parodist has not added significant new creative input; a subjective determination                                                | Works in which the parodist has added significant new creative elements; a subjective determination                      |
| Impact on empirical sample:                                                               | Could prohibit remix, machinima, in addition to direct copies                                                                                    | For example, works that include an original new video recording                                                          |
|                                                                                           | Up to 20% of sample*                                                                                                                             | 80% of sample<br>If remix and machinima are treated as new creations, 99% of sample                                      |
|                                                                                           | Up to 18% of audience                                                                                                                            | 82% of audience or greater                                                                                               |
| <b>5. Parody must have humorous or critical intention</b>                                 | Parody where there is no discernible critical intention                                                                                          | Parody where there is a clear target of critique, whether the parodist themselves, the original artist, or a third party |
| Impact on empirical sample:                                                               | Mislabeled parody incl. karaoke, covers                                                                                                          | Weapon, target & self parody                                                                                             |
|                                                                                           | 13% of sample*                                                                                                                                   | 87% of sample                                                                                                            |
|                                                                                           | 9.5% of audience                                                                                                                                 | 90.5% of audience                                                                                                        |
| <b>6. Parody must be directed at the work used ('target')</b>                             | Parodies with focus of critique other than the original, such as weapon or self-parody                                                           | Parody where the primary focus of critique is the original work or artist ('target')                                     |
| Impact on empirical sample:                                                               | Weapon, mislabelled and self-parody                                                                                                              | Target parody                                                                                                            |
|                                                                                           | 65% of sample*                                                                                                                                   | 35% of sample                                                                                                            |
|                                                                                           | 39% of audience                                                                                                                                  | 61% of audience                                                                                                          |
| <b>7. Parody must not harm the personality rights of the creator of the original work</b> | Personality rights may protect authors from false attribution and derogatory treatment. Parody could conflict with these rights in certain cases | Parody that is inoffensive to the original artist;<br><br>Parody that makes false attribution                            |
| Impact on empirical sample:                                                               | Might prohibit the most highly offensive target parodies                                                                                         | Parodies that are reasonably inoffensive                                                                                 |
|                                                                                           | 1.5% of sample*                                                                                                                                  | 98.5% of sample                                                                                                          |
|                                                                                           | 22.8% of audience                                                                                                                                | 77.2% of audience                                                                                                        |

|                                                                      |                                                                                                                                                                                    |                                                                                                                                                    |
|----------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>8. Parody must be sanctioned under the rules of social custom</b> | Current trend is moving toward allowing greater fan engagement with texts, including remix, parody and pastiche                                                                    | Social custom is a moving target, dictated by the norms of practice (remix, parody, pastiche) as well as moral standards.                          |
|                                                                      | Social custom might prohibit uses that are offensive to the wider community                                                                                                        | Likely would permit a wide range of the parody content observed online                                                                             |
| Impact on empirical sample:                                          | Might prohibit the most highly offensive target parodies                                                                                                                           | Parodies that fall within the acceptable bounds of public discourse                                                                                |
|                                                                      | 1.5% of sample*                                                                                                                                                                    | 98.5% of sample                                                                                                                                    |
|                                                                      | 22.8% of audience                                                                                                                                                                  | 77.2% of audience                                                                                                                                  |
| <b>9. Parody must acknowledge source of the original work</b>        | Parody that may deceive the viewer about the origin of the work                                                                                                                    | Parody that clearly references the original                                                                                                        |
| Impact on empirical sample:                                          | Works that do not include a reference to the original artist in one or more of the title, the credits or the metadata. The research design did not permit detecting any such works | In this sample, all parody works included metadata referencing the original work; this criterion may or may not be more appropriate in other media |
|                                                                      | 0% of sample*                                                                                                                                                                      | 100% of sample                                                                                                                                     |
|                                                                      | 0% of audience                                                                                                                                                                     | 100% of audience                                                                                                                                   |

**Table 3.1 notes:**

\*Legal criteria were applied to the empirical sample using the following methods:

Criterion 1 – The researchers used production values as a proxy for commerciality. The cases where production values that were rated 4 or higher were excluded from the ‘permitted’ category.

Criterion 2 – Statistical analysis showed that parody videos were not acting as a substitute for originals in our sample. However, direct copies tagged as parody could clearly operate as substitutes. Cases where the video recording, lyrics, and sound recording were copied from the original were excluded from the ‘permitted’ category.

Criterion 3 – The legal rationale for this criterion is to restrict parodic treatment to referencing without copying a large portion of the original. In this table the researchers excluded any case that copied the entirety of either: The lyrics, the full audio recording or the full video recording from the ‘permitted’ category. Actual application of this principle by courts is subjective and may be more restrictive, for example prohibiting usage of more than a fraction of the original lyrics or sound recording.

Criterion 4 – This criterion depends on the existence of some degree of new creative input. The analysis excluded all cases of direct substitution, but also cases where the creative addition was ambiguous, such as remixes, which display editing skill but re-use third party works and machinima, which use third-party video game engines to graphically tell a story.

Criterion 5 – Many jurisdictions define what a parody must be, notably that it contains an element of critique. Interpreting this criterion using our sample, the researchers excluded all ‘mislabelled’ parodies where there was no clear target of criticism, but included traditional weapon, target and self-parody in the ‘permitted’ category.

Criterion 6 – Some jurisdictions restrict the definition of parody to include only those works that target the original. To illustrate the effects of this criterion, the analysis excluded all types of parody except the traditional ‘target’ type from the ‘permitted’ category.

Criterion 7 – There are a range of circumstances where an original artist may object to derogatory treatment by a parodist. The researchers applied this criterion to the data by excluding all highly negative parodies that rated 4 or higher in intensity.

Criterion 8 – Social custom is used by some jurisdictions as a test to determine whether a parody goes too far in being offensive or obscene. Here, the authors used ‘intensity of critique’ as a proxy for offensiveness, reasoning that highly emotionally charged and negative parodies could include offensive messages. Cases where the intensity of critique was rated 4 or above were excluded from the ‘permitted’ category.

Criterion 9 - Some jurisdictions such as France require that a parody explicitly reference or acknowledge an original work. In our sample, due to the research design, all works contained metadata (in the title, description or keywords) to the effect that the work was a parody based on an original. No parody would have appeared in our search results if it did not explicitly reference the original work – hence this is an incentive for YouTube creators to properly identify their derivative works. This criterion may be important in other markets or media where metadata are not used or are not feasible.

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### 3.1 Key Recommendations

**Recommendation 1:** Avoid distinguishing between genres (satire, burlesque, etc.).

Both the empirical and legal studies have highlighted the difficulties associated with defining creative work such as parody, caricature and pastiche. Empirically, this problem was avoided by relying on the uploading user's definition of parody for inclusion in the sample; however, this resulted in the capture of a wide range of work, including new types of parody that involved self-mockery or which lacked a clear focus of critique. Legislators and courts relying on a criterion, such as 5 and 6 above, would potentially struggle to classify works benefiting from an exception under copyright law, due to the high level of ambiguity inherent in this type of creation. It is recommended that any policy be crafted in such a way as to minimise the need for subjective judgments about what constitutes humoristic or target parody, as opposed to other types of work. A definition focused on critique, without specifying the nature or direction of such, may be more flexible. Similarly, a focus on the addition of new intellectual labour, such as the U.S. provision for 'transformative use' could be an adaptable framework.

**Recommendation 2:** In order to realise the benefits of economic growth, allow commercial parody.

The primary argument made by Hargreaves was that parody should be permitted on the grounds that it represents a new potential market for UK content creators. We observed that there is a small but growing market for skilled amateur and professional parody production via online video sharing services such as YouTube. Within the sample of parody music videos observed, those with potential commercial intention made up a relatively small portion of the overall sample of works (31.3%), but captured 91% of the aggregate audience. Providing a legal framework which allows amateurs and small producers to monetise their intellectual contributions will likely result in an increase in new works. Opening additional pathways to monetising work in digital environments such as YouTube may promote digital literacy among young people in the UK and offer new entryways into the digital and creative economy for small-scale producers and skilled amateurs. Even if we consider YouTube to be one coherent, single market, we found no evidence of substitution or negative effects on original works caused by the proximity of parody. The econometric evidence suggests that the presence of parody predicts the fortunes of original works by drawing attention to their existence.

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**Recommendation 3:** If an economic test is introduced, focus on incentive rationale and substitution effects.

As discussed in the analysis of criterion 2 ('Parody must not have an adverse effect on the market for the original') legislators and judges appear ambiguous, if not confused when attempting to articulate what is 'the financial interest protected by copyright'. Can there be parodies that do not function as a substitute to an original work and still affect the normal exploitation in an economically harmful way? How do the benefits to users, and indeed general welfare implication from follow-on innovation (e.g. the creative contribution of the parodist) feed into the assessment of economic harm? If policy makers want to resist (in Hargreaves' words) 'over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators', the focus needs to be on the threat of substitution of the original by the parody.

**Recommendation 4:** Consider responsiveness to changing cultural and technological circumstances

The empirical study of parody creation revealed that a significant amount of this work is now distributed via the Internet. Communication in web 2.0 environments is rapidly evolving, and regulators should be wary to lock in a particular communicative structure. One major feature of new media that is challenging to existing legislation in other territories is the ease with which elements of an original work can be appropriated, edited, remixed and re-presented using digital editing tools. Some 19% of the empirical sample consisted of work that involved a remix or mash up of third-party works in some way. It is recommended that any interpretation of intellectual input or transformative use, therefore, remain sensitive to the rapidly changing cultural practices enabled by online tools.

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### 3.2 Conclusion

The brief for this study was to assess whether commercial exploitation of original works was affected by the presence of parodies where they can be considered to be part of the same market, and to what extent parodies may be a potential source of innovation and growth for the UK creative economy in their own right. The empirical findings are unequivocal. There is no substitution harm from the presence of parodies, reputation harm is very limited, and there are considerable benefits from permitting parodies for innovative producers and consumers that are likely to translate into economic growth.

It should be noted that while the policy justification for permitting parodies (and related cultural activities) in a free society stands primarily on non-economic grounds (i.e. freedom of speech and expression), this synoptic report focuses on economic effects, and the regulatory options discussed aim to realise economic benefits.

However, even if economic effects were less pronounced than this report found them to be, the trade-off between economic and non-economic factors would require careful assessment beyond the empirical data offered here. If there was a greater use of explicitly critical parody (discouraging commercial purchase) than observed in our sample, a society that values freedom still will want to welcome such expression.

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