From Mozart to Danger Mouse: Musical Parody, Humor and Copyright Law

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FROM MOZART TO DANGER MOUSE: MUSICAL PARODY, HUMOR AND COPYRIGHT LAW

EYAL BROOK *

Parody is a key element in the development of art, and it constitutes a type of artistic expression. Parody provides society at large with a new point of view relative to a particular artistic work, or to societal norms, more broadly. It often serves as a type of criticism of traditional thought patterns, thereby acting as a catalyst for further creative pursuits and social discourse. Parodies are invaluable to modern societies and have the power to encourage or inspire people to express new perceptions of various situations. Concurrently, parody is by its nature intertextual, as new works of parody necessarily relate to existing expressions, people or institutions. Parody entails the use of one or more artistic expressions as inherent to the process of creating a distinct work. As this use is intentional and entails choices that make it a creative endeavor in its own right, parody undermines certain notions of copyright and authorship.

However, despite its importance, while parody in general has been widely discussed, musical parody is largely absent from the legal discourse, particularly in relation to copyright law. Music is a medium of expression that is distinct from other artistic practices, and musical parody in particular necessitates special skills and understanding that are not currently reflected in legal scholarship. Furthermore, research dealing with musical parody is important in light of both the multitude of parodies created in the Digital Age, as well as the fact that musical

* Visiting Senior Research Fellow, Harry Radzyner Law School, Reichman University. This Article is part of a larger research examining digital and algorithmic musical authorship. I am indebted to Lior Zemer, for insightful and constructive comments on earlier drafts. The ideas developed in this Article benefited greatly from discussions and comments made on earlier drafts by Andreas Rahmatian, Shlomit Yanisky-Ravid, Niva Elkin-Koren and Shulamit Almog. I would like to thank all the participants in the colloquium held in June 2021 at Reichman University, particularly Amnon Lehavi, Amir Licht, Anat Rosenberg, Asaf Yaacov, Aviv Gaon, Yaniv Roznai and Yoram Shachar, for their invaluable comments.
parody is a fruitful and creative means for expression and public criticism, which should be understood as part of the public interest in a democratic society.

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“Comedy is simply a funny way of being serious.”

-Peter Ustinov

INTRODUCTION

Law plays a central role in determining the categories through which humans understand their world and the possibilities of action within it, and as a consequence of resolving legal disputes, courts inherently contribute to molding society’s political imagination. Parody enjoys an exalted, protected status in intellectual property jurisprudence, and the parodic form of expression also plays a critical role in cultural and political discourse. It is a key element in the development of art. “Parody opens a new view of the world . . . . [I]t often explodes traditional thought patterns, being a catalyst for further creative quests.” At the same time, however, parody is by nature intertextual, as it draws from one artistic expression, such as a melody in music or a text in political speech, into another, in this case parodic, artistic expression. This undermines basic notions of copyright and authorship that “assume a dichotomy between copying and creativity and presume that borrowing is inimical to creativity and innovation.” Consequently, parody constitutes a creative process that is largely missing from the current copyright regime and legal understanding of creativity.

While parody as a general concept has been widely discussed, musical parody is largely absent from the legal discourse, particularly in relation to copyright law. Although various scholars have written about parody, research generally views parody as a type of literary work; musical parody, as well as musical humor, are often overlooked in theoretical research, resulting in an underdeveloped field of research about humor in

music. The application of intellectual property law to protect musical humoristic material is still in its infancy. Therefore, a study of musical parody has considerable academic importance, for musical humor should be understood differently than visual or linguistic humor. Courts rely on text to interpret and analyze—how does this impact the judicial treatment of musical parody? Do judges understand musical humor? The difficulty is that the medium of text often fails to convey the subjective meaning of musical content, since many elements used in musical humor are practically impossible to adequately define in words. Words generate a specific mental image, whereas music alone generates a unique mental image for different people, likely different than what the author may have specifically intended. Music is expressed in a different manner than other artistic practices, and the creation of musical parody thus necessitates special skills and understanding. David Huron has pointed out the unique challenges faced by the musicians who attempt to create parody with sound:

Of the many arts, music has perhaps faced the most onerous challenge. Where the poet or playwright can evoke sadness by narrating a recognizably sad story, musicians must create sadness through abstract nonrepresentational sounds. Where a comedian might evoke laughter through parody, wordplay, or absurd tales, musicians must find more abstract forms of parody and absurdity. Where magicians evoke awe by appearing to transgress the laws of physics, no comparable recipe exists for creating musical awe.

Furthermore, a study devoted to musical parody is important both due to the high number of parodies created and the fact that musical parody constitutes a fertile ground for creative means of expression and criticism. Therefore, in light of the uniqueness of musical work, there is a need to understand and apply a new legal interpretation that considers the process in which musical work is generated and its significance, for the benefit of both creators and listeners alike.

5. Although music may be full of humor, it is generally the lyrics that elicit laughter, not the musical notes and melodies.
7. While copyright law seems to focus on the product, it would seem that an important, yet neglected, characteristic is the creative process leading to the creation of such product. The scholar Thomas Veatch presented his theory of humor and noted that
Accordingly, this Article seeks to bridge the gap in the copyright discourse on parody by reviewing the sources used in musical humor, as well as how humor and criticism are expressed in works of musical parody. The sources of musical humor explored in this study are inadequately understood in the current scholarly debate, but they have an importance and distinctiveness which merit independent analysis. This Article will delve into the idea of borrowing as a common practice in various musical traditions, followed by a discussion of the creative elements underlying musical parody. Then, this Article will then examine the humoristic elements underlying mash-ups in the Digital Age as a form of musical parody. The Digital Age has expanded musical parody as technological advancements have unquestionably amplified the range of creative capabilities and musical practices available to the amateur and to the professional musical author alike. Finally, I will explore the legal mechanisms required to protect works of musical parody while assessing how, and if, copyright laws should be adapted to deal with novel and current forms of musical parody.

Part I defines the terms “parody” and “musical parody”, discussing musical humor and parody in the Digital Age (including mash-ups as musical parody). Part I also considers how audience members’ expectations and participation are important elements of parody. Part Two presents a discussion of the various legal approaches to parody under copyright law and addresses the rise of “transformative” use in the Digital Age. This Article endeavors to demonstrate that musical parody constitutes a unique, fertile ground and creative tool for expression and criticism. However, the concept of creativity is defined on a strictly personal level (“intrapsychic”), underlining the creative individual’s innate potential as the primary basis of creative activity at the expense of other

there were many different “academic disciplines in which the study of humor is ‘part of the field,’” yet, musicology and musical humor are not among them. Asbørn Øfsthus Eriksen, A Taxonomy of Humor in Instrumental Music, 35 J. MUSICOCOLOGICAL RsCH. 233, 233 (2016) (citing Thomas C. Veatch, A Theory of Humor, 11 HUMOR 161, 161–62 (1998). Veatch’s new theory “is so general as to cover all instances of humor.” Id. at 235. His theory is as follows: The necessary and (jointly) sufficient conditions for the perception of humor are: V [= Violation]: The perceiver has in mind a view of the situation as constituting a violation of a “subjective moral principle” [. . .]. That is, some affective commitment of the perceiver to the way something in the situation ought to be is violated. N [= Normal]: The perceiver has in mind a predominating view of the situation as being normal. Simultaneity: The N and V understandings are present in the mind of the perceiver at the same instant of time. Id. at 236.
elements, mainly including social or collective elements, that might otherwise contribute to the creative process.

The importance and uniqueness of musical humor may justify an adjustment to the perceptions of musical creativity as implied by copyright doctrines. Such a “recalibration” of the law could promote a more welcome space for musical inspiration, influence, and transformation to develop. As humor has been perceived as part of the social understanding of parody, and many researchers believe that humor is a defining and requisite element of parody, this Article shall open with a brief discussion of humor’s role and significance.

I. THE CONCEPT OF PARODY

A. The Importance of Humor

Humor can be traced back thousands of years: “[B]y the sixth century BCE[,] the Greeks had popularized comedy as a form of theatre, and philosophers like Aristotle and Plato examined the role humor play[ed] in society.”


9. ALLEEN PACE NILSEN & DON L. F. NILSEN, THE LANGUAGE OF HUMOR: AN INTRODUCTION 61 (2019). In addition, the other agreed-upon characteristics humans share are our ability to stand and walk upright (Homo erectus) and think in complex ways (Homo sapiens). Id.

10. See Orna Shani, עיר מקלט ושמה הומור [A City of Refuge Named Humor], 18 KAYERET 12 (2010) (Isr.).

11. Id.

12. Id. at 13.

Id.
structure.13 Today, this function is served by the parodist, a new type of critic who has arisen in prominence within modern cultures.14

Through humor, society defines its boundaries of tolerance with respect to its values, such as aesthetics, language, knowledge, and behavior.15 Humor can sometimes encourage a new perception of social situations and thereby contribute to their improvement.16 Humor can also promote a release from fixated, rigid ways.17 Humor can promote social justice.18 Humor enables people to openly and plainly state their observations and opinions that they otherwise might not be able to, and provides a space in which the social customs of a culture temporarily release their grip.19 In this sense, humor can constitute a collective sigh of relief, and act as a barometer for sentiments that are brimming beneath the surface of public decorum.20 The literary arts (literature, poetry, theater) reserve a place of honor for the humorous that is no less significant than the dramatic or the tragic.21 Melzer argues:

The musical and textual wittiness of the ‘light’ operas of Mozart is no less canonical. Be that as it may, while various creators have dealt with, and even specialized in, humoristic writing as a craft of creative expression to hone and practice, few emphasized comic sensitivity in their works. Those artists who did operate from within the humoristic modus, proved the exceptions to the rule and suffered difficulties because of it. The comic dimensions of their creations were associated with widely-perceived harms to rather than benefiting political, social, or theological conventions.22
Several theories have been proposed to explain laughter:

**The Superiority Theory**: Plato and Aristotle, as well as Thomas Hobbes in *Leviathan*, have observed that people “are in constant struggle with one another for power” over the other, and when one realizes that he is superior to the other, he laughs to express his “sudden glory.”

“[T]he major tenet of superiority theory is that ‘mockery, ridicule, and laughter at the foolish actions of others are central to the humor experience.’” Thus, “[a]musement, seen through the lens of superiority theory, emerges from elevated feelings of self-worth after verbal denigration of a target.”

**The Relief Theory**: Rather than expressing superiority, the relief theory perceives laughter “as resulting from the release of nervous energy[,]” and humor as a method “of overcoming sociocultural inhibitions and revealing suppressed desires.” Commonly associated today with Sigmund Freud and Herbert Spencer, this theory characterizes humor as a method for discharging emotional energy and “releasing internal tension that can bring pleasure and relief to a joke teller and an audience.” For Freud, humor “can mask and release our aggressions surrounding topics we may be unwilling to discuss in polite company.”

“Letting off steam in this manner . . . enables humor to create feelings of liberation.” In Spencer’s essay, “On the Physiology of Laughter,” he claims that our emotions, or at least our nervous systems, take the form of nervous energy. Laughing, then, is purely a release of that energy.

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25. *Id.*
28. *Id.* at 51.
29. *Id.* at 53.
The Incongruity Theory: “The connection between humor and incongruity was recognized as early as Aristotle’s *Rhetoric*, and later in Cicero’s *On the Orator.*” 32  “[B]oth pointed out that laughter often results from a violation of expectations.” 33  The idea behind this theory is that humor yields pleasure which is derived from incongruity between expectation and resolution. The idea of “comical effect . . . result[s] from a perceived incongruity or discrepancy between the constituting elements of a situation.” 34  Since we live in an orderly world where we expect certain patterns of events to happen, if we face something that conflicts with these patterns and violates those expectations, our response is often to laugh.35

“[Arthur Schopenhauer] and Immanuel Kant were among the first to explain humor by pointing to incongruity or to the violation of our perceptual patterns that results in the understanding of something as odd or unusual.” 36  Humor thus occurs when a sense of anticipation is deliber-

mapping the ‘living’ onto the ‘mechanical.’” 37  Nilsen & Nilsen, supra note 9, at 252. According to Bergson in *Le rire. Essai sur la signification du comique* [Laughter: An Essay on the Meaning of the Comic], “[l]aughter is . . . to be understood as synonymous with humor. The main theme of this small book is that people who are out of step with themselves appear comical by behaving rigidly and automatically, instead of with flexibility . . . .” 38  Eriksen, supra note 7, at 237. Bergson wrote that:

were all men always attentive to life, were we constantly keeping in touch with others as well as with ourselves, nothing within us would ever appear as due to the working of strings or springs. The comic is that side of a person which reveals his likeness to a thing, that aspect of human events which, through its peculiar inelasticity, conveys the impression of pure mechanism, of automatism, of movement without life.


34. Eriksen, supra note 7, at 234.

35. *See* Morreall, supra note 31, at 245.

ately created only to be confounded by something entirely unexpected. Schopenhauer argued that laughter in response to humor derives from “the sudden perception of the incongruity between a concept and the real object which have been thought through in some relation . . . ”37 Schopenhauer specified incongruity as being a mismatch between concepts and the way they are presented—“laughter is the release of nervous energy generated in this situation.”38 Similarly, Immanuel Kant, in discussing his theory of humor, proposed that what makes something comical is “the sudden transformation of a strained expectation into nothing.”39 “In music, humor can thus occur when ‘tense expectation is transformed into nothing . . . ’”40

Ragnhild Brøvig-Hanssen emphasizes how the contributions of James Beattie led “to a more comprehensive incongruity theory during the eighteenth century” through his expansion “upon this notion: ‘Laughter [or humor] arises from the view of two or more inconsistent, unsuitable, or incongruous parts or circumstances, considered as united in complex object or assemblage, or as acquiring a sort of mutual relation from the peculiar manner in which the mind takes notice of them.’”41 Contemporary scholar John Morreall identifies humor as the juxtaposition of unrelated things.42 In Part II, this Article will expand on audience expectation and its particular importance to parody and copyright law.

Bakhtin and the “Carnivalesque”: What can humor inform us about individual artistic space or building collective solidarity? Mikhail Bakhtin, whose writings about the nature of humor and laughter have made a significant impact on scholarship over the last half century, offers a productive means of approaching such questions.43 Bakhtin coined the

37. Brøvig-Hanssen, supra note 32, at 190–91 (internal quotations omitted).
39. NILSEN & NILSEN, supra note 9, at 252 (internal quotations omitted).
40. Bonet, supra note 38, at 192 (citing KANT, CRITIQUE OF JUDGMENT (J. H. Bernard trans., Hafner Press 1951) (1790)).
41. Brøvig-Hanssen, supra note 32, at 190 (quoting James Beattie, An Essay on Laughter and Ludicrous Composition, in ESSAYS 583, 602 (Garland Publ’g 1971) (1776)).
42. NILSEN & NILSEN, supra note 9, at 252.
43. Garrett, supra note 2729, at 63.
phrase “carnivalesque” as a literary means to analyze humor, and it was his exploration of “the power of humor and chaos to enact liberation or to subvert dominant culture, [that] has contributed to a great deal of research on humor, parody and satire.”

In the twentieth century, artists were excited about the idea of a carnival-like reversal and wearing down normative values and traditions. Bakhtin considered the potential for social resistance through comic-grotesque performances, using the term “carnival” to refer to folklore performances, manifested in various manners in different periods and cultures, and which are embodied in the texts of each culture. The characteristics of Carnivalesque are expressed, according to Bakhtin, in the union of disparate elements and in unusual combinations such as the serious and the comic, the sacred and the profane. Yet, its primary principle is the suspension of cultural, moral, and religious norms and the inversion of the usual hierarchies and rules. These are replaced by a new disrupted order which holds true only within the carnival grounds. This is the moment when the order of the world is inverted and the character of the fool becomes the king. According to Bakhtin, carnivalesque performances are used in order to contend with and resist systems of power through humor, parody and satire. Bakhtin sees the carnival as an instrument of criticism and political liberation.

44. Id.
45. See Denisov, supra note 2, at 67.
47. Id. at 5–6.
48. Id. at 10.
49. Id. at 10–11.
50. Id. at 426.
51. Id. at 10–11.
52. See Lior Zemer, [The Social Bargain in Copyright], 46 Mishpatim 297, 343 (2017) (Isr.); תסנכת חכמיות על רעיונות [Carnival], [ENCYCLOPEDIA OF IDEAS], https://haraayonot.com/idea/carnival (last visited Mar. 15, 2024) (Isr.). The carnival produces an open alternative framework in which people can engage in a fruitful dialogue. Id. Carnival writing and critique become an important axis of cultural reference. Id. The carnival serves as a conceptual instrument that reveals the power of popular culture, a critical force that stems from a mixture of worlds, from a low-to-high dialogue and from contact between spirit and body. Id. The carnival is perceived by Bakhtin as a kind of negative image of reality whose most important element is laughter. Id. This laughter stems from a certain refraction of reality, from

https://scholarlycommons.law.cwsl.edu/cwlr/vol60/iss3/2
Bakhtin emphasized “the importance of the comic elements” which, in his view, “had been either eliminated, overlooked, or looked down upon by some formalist and other modern critics.”\(^{53}\) Parodies serve as the place where the real Carnivalesque experience resides. As such, parody’s social and cultural impact is vast and encourages artists to expand on their ideas and come up with new ways of thinking.\(^{54}\)

**Other Contemporary Theories:** More recently, influential contemporary theories of humor include Victor Raskin’s “Script-Based Semantic Theory of Humor” (SSTH) and Salvatore Attardo and Raskin’s revision of this theory, called the “General Theory of Verbal Humor” (GTVH).\(^ {55}\)

Some contemporary theories have also attributed therapeutic characteristics to humor: “[h]umor is a medicine against despair,” as it can help individuals “to re-frame their perspective and deal with their personal misfortunes and the broader failing of society.”\(^ {56}\) Alain de Botton argues that comedy has “therapeutic potential,” and that humor is “an invaluable tool in communicating without causing offence in emotionally intelligent relationships.”\(^ {57}\)

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53. ROSE, PARODY, supra note 4, at 16.

54. See Denisov, supra note 2, at 69. “Bakhtin claims that what we might deem as the lightest or most flimsy types of comic expression often can reveal something very significant about the human condition—that playful pandemonium and comic bedlam can function as much more than a mass of bewildering chaos.” Garrett, supra note 2729, at 63.

55. NILSEN & NILSEN, supra note 9, at 253.


57. Id. (citing What is Comedy For?, SCH. LIFE, https://www.theschooloflife.com/article/what-is-comedy-for/ (last visited Mar. 17, 2024)).
B. What is Parody?

Parody is an “intertextual artistic statement[] with a specific character[,] with a long history in various art forms and media.58 The term ‘parody’ has roots in ancient Greek literature.59 Etymologically, the term descends from the Greek word parodia, comprised of the parts para, meaning “next to,” or “counter,” and ods, which means “song.”60 In other words, parody means “a counter-song.”61 Since the seventeenth and eighteenth centuries, the term “parody” has often been used to describe a comical imitation of a style of writing, aiming to mock the quality of the imitated work.62 Dictionaries provide a range of definitions for the term “parody.” Additional definitions have been provided

60. HUTCHEON, supra note 59, at 32.
61. Id.
62. In Aristotle’s Poetics, he argues that mocking others is a central component of the comic text: “[comedy] consists in some defect or ugliness which is not painful or destructive.” ARISTOTLE, POETICS (S. H. Butcher trans., Project Gutenberg EBook 2013) (c. 330 B.C.E.), https://www.gutenberg.org/files/1974/1974-h/1974-h.htm. Linda Hutcheon argues, on the other hand, that:

[i]there is nothing in parodia that necessitates the inclusion of a concept of ridicule . . . .

Parody, then, in its ironic ‘trans-contextualization’ and inversion, is repetition with difference. A critical distance is implied between the background text being parodied and the new incorporating work, a distance usually signaled by irony. But this irony can be playful as well as belittling; it can be critically constructive as well as destructive. The pleasure of parody’s irony comes not from humor in particular but from the degree of engagement of the reader in the intertextual ‘bouncing’ . . . between complicity and distance.

HUTCHEON, supra note 59, at 32.
63. Webster’s Third New International Dictionary defines parody as: “[W]riting in which the language and style of an author or work is closely imitated for comic effect or ridicule, often with certain peculiarities greatly heightened or exaggerated . . . .” Parody, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1643 (Merriam Webster eds., 1986). Cambridge Dictionary defines parody as: “writing, music, art, speech, etc. that intentionally copies the style of someone famous or copies a particular situation, making the features or qualities of the original more noticeable in a way that is humorous.” Parody, CAMBRIDGE
by scholars researching the subject. Thus, Linda Hutcheon, a prominent scholar on parody, argues:

Like irony, parody is a form of indirect as well as double-voiced discourse, but it is not parasitic in any way. In transmuting or remodeling previous texts, it points to the differential but mutual dependence of parody and parodied texts. Its two voices neither merge nor cancel each other out; they work together, while remaining distinct in their defining difference.64 . . . Parody is fundamentally double and divided; its ambivalence stems from the dual drives of conservative and revolutionary forces that are inherent in its nature as authorized transgression.65 . . . [Parody demonstrates] [t]he tension between the potentially conservative effect of repetition and the potentially revolutionary impact of difference.66

Sabine Jacques emphasizes the multi-functional nature of parody, including "provoking laughter, conveying criticism, providing (positive or negative) social or political commentary, paying homage, and developing or testing artistic or musical rules and techniques. Furthermore, the target of the parody may vary, to include the underlying work itself, other works, a style, or something completely unrelated.”67

Yet, “[t]he exact meaning of terms such as parody . . . remains nebulous.” 68 Simon Dentith contends that it is impossible to encapsulate parody in a single definition; instead, he suggests parody broadly “includes any cultural practice which provides a relatively polemical

64. HUTCHEON, supra note 59, at xiv.
65. Id. at 26.
66. Id. at xii. Cf. ESTI SHEINBERG, IRONY, SATIRE, PARODY AND THE GROTESQUE IN THE MUSIC OF SHOSTAKOVICH: A THEORY OF MUSICAL INCONGRUITIES 143 (Routledge 2016) (2000) ("[Parody is an] ironic utterance, the layers of which are embedded in two or more incongruent encoded texts. . . . Parody characteristically is based on elements of imitation, which it modifies by the insertion of incongruous critical and/or polemical components.").
67. JACQUES, supra note 4, at 5.
68. Id. at 1.
allusive imitation of another cultural production or practice.” These definitions are inconclusive in determining whether a parody may only use the original work and its characteristic style as the target, or whether the original work may be mimicked to criticize or comment on something else. Nonetheless, all the definitions similarly find the imitation of the original work is the essential characteristic of parody. Due to the term’s relative incoherence, courts similarly struggle to define parody. In the United States, the First Circuit Court of Appeals described parody as “a humorous form of social commentary and literary criticism” that “seeks to ridicule sacred verities and prevailing mores . . . .” The Second Circuit noted “the broad scope permitted parody in First Amendment Law,” and that “in today’s world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody.” Finally, the United States Supreme Court recognized the following definition of parody:

[A] literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule, or as a composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous.

The objective of parody, then, is to make use of existing works while remaining distinct from them and to enable the expression of additional humor or mockery. As Zemer notes, “A parody is a unique dialogical construct akin to a ‘festive liberation of laughter.’” The ubiquity of parody derives from the unavoidable reliance on another work, “muddying the original author’s viewpoint” while continuing a conversation through the meaning of displaying “repetition with critical distance” and creating

69. SIMON DENTITH, PARODY 9 (2000) (internal quotations omitted).
70. L.L. Bean, Inc. v. Drake Publrs., Inc., 811 F.2d 26, 29 (1st Cir. 1987).
74. Lior Zemer, העסקה החברתית בזכות יוצרים [The Social Bargain in Copyright], 46 MISHPATIM 297, 343 (2017) (Isr.).
76. HUTCHEON, supra note 59, at 6.
a “refunctioning of preformed linguistic or artistic material.”

Gilad Melzer reflects on the reflexive nature of parody and further notes:

The primary function of parody has not changed since the Greek term was coined; then, parody was a type of song which imitated the style and content of the epic, in other words, something which simultaneously imitates and works against the original. While satire turns ‘outwards’ and directs most of its criticism and mockery at the world—mostly in the present—parody turns ‘inwards,’ into the medium itself—its structure, the typical and fashionable genres, mannerisms, styles, and it operates on the axis of history, moving back in time.

The comic effect of parody is only achievable when the original work is used as an object of comparison for the reflexive parodic work. Thus, the intertextual nature of parody makes it possible to imbue preexisting cultural metaphors or concepts with new meanings. Jewell and Louise consider the underlying elements of parody and characterize parody as any work that “deliberately imitates another work, style, genre or body of works.” Moreover, parody “assumes that the intended audience is familiar with the original,” and “is intended to draw attention to significant features of the original (including flaws or faults. . . ).” Likewise, parody “uses humorous techniques, such as incongruity or exaggeration, as a means of commentary.” Jewell and Louise elaborate further: first, an essential layer of parody is the involvement of an imitation of an original work or style. Second, to constitute a parody, the imitation or repetition must deliberately seek to constitute a criticism of or commentary on the original work.

77. ROSE, supra note 4, at 52.
78. See Melzer, supra note 21.
80. Id. at 6.
81. Id.
82. Id.
83. Id. at 4.
84. Id.
After defining parody, it is important to discuss parody’s role and benefits. Parody undermines social conventions and strips them bare.\textsuperscript{85} It makes it possible to challenge and undermine social and political norms or institutions by ridiculing and voicing effective criticism of them.\textsuperscript{86} Parodies contribute many original and expressive works to the cultural sphere, while exposing the inner structure of artistic representation by directing the gaze towards the means of production themselves.\textsuperscript{87} Parody thereby enriches the public availability of works and opinions that can contribute to diversity and fecundity in public discourse, as well as to each individual citizen’s ability to actively and critically participate in the same, shape the preferences and tastes of the public, and ultimately influencing public life.\textsuperscript{88} Furthermore, parody serves as an expression of the creator’s individual autonomy, thereby enabling creators to unequivocally express themselves.\textsuperscript{89}

Parodies are invaluable to modern societies and have the power to encourage or inspire people to express new perceptions of various situations. As Ronan Deazley notes, “parody does more than enable the creation of new work; it can also play a significant role in the emergence of new cultural forms.”\textsuperscript{90} David Tan adds that parody may be seen as an art form contributing “valuable commentary and criticism to the marketplace of ideas,” and “advance[ing] democratic debate on matters of public interest through the use of irreverent humor.”\textsuperscript{91}

The art form of parody allows cultures to evolve by serving as a platform for the “ongoing activity of transformative meaning-making.”\textsuperscript{92} Brodie argues that “[t]he Russian Formalist school goes so far as to suggest that parody is the most important element in the evolution of forms

\textsuperscript{85} Ram Rivlin, "פרודיות וזכויות יוצרים: האם.getOrElse המל"ח"ות Hollande" mira [Parodies and Copyright: Is the Use of “Fair Use” Fair?] 47 (2005) (Isr.).
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
and genres as it exposes their conventions and thus pushes for new forms to emerge.”

Denisov observes that parodies disrupt traditional thought patterns through encouraging new creative processes, arguing that “[d]espite all the diversity of thought and behaviour patterns, people are constantly in need of finding a mirror opposite of everyday life, trying to get incarnated in it and find themselves fully in its space.” In this process, individuals find themselves confronted with social prohibitions, but the desire to transcend ordinary meaning and rules prevails. Such an inversion generates “genuine otherness of culture, while parody presents itself as a special case that refreshes the otherness of the text.” Jeanne Fromer argues that “parody borrows expression that is valuable in and of itself and confers on that expression new meanings, frequently and deliberately muddying the original author’s viewpoint.” Thus, parody cultivates uniqueness in something ordinary while also leading to a collision between separate ideas and subverting common assumptions and stereotypes.

Linda Hutcheon argues that understanding parody depends on audience recognition of both the “foreground” (parody) and “background” (original text, genre or style being imitated), as well as the dynamics at play between these levels. The importance of the audience is further discussed below. It is important to note that works of parody occupy a central position in contemporary artistic activity, particularly in the postmodern era. Hutcheon believes that the parodic effect is achieved by expressing the ideas within or components of an existing work within a

93. Ian Brodie, Parody: Intertextuality and Music, 47 MUSICULTURES 1, 2 (2020).
94. Denisov, supra note 2, at 68. Denisov observed that a parody is not a simple response to another’s voice, but the result of a “battle between two voices.” Id. at 63.
95. See generally id.
96. Id. at 68.
97. Fromer, supra note 75, at 116.
98. Hutcheon, supra note 59, at 33–34.
99. See discussion infra Section D.
100. See generally Linda Hutcheon, Beginning to Theorize Postmodernism, 1 TEXTUAL PRAC. 10–12 (1987). Hutcheon further claims that in comparison to modernism, which was characterized by such concepts as aesthetic originality and textual completeness, post-modern art is essentially a conflictual project: “[W]hat I want to call postmodernism is fundamentally contradictory . . . .” Id. at 11.
Referencing the work or the style from a critical distance has great significance. Hutcheon claims that:

[Parody proffers a perspective of the past and present that enables the artist to speak to the discourse from within it, but without fully going back through it. For this reason, it seems that parody has become the method of expression of those excluded from the mainstream, or those struggling against the dominant ideology that is sideling them.]

Postmodern art looks backwards, not in ridicule, but through a reevaluation of means and contents—a procedure which empowers, weakens, undermines, and exposes superficiality in that which has sunk into history with formal confidence of its veracity and completeness. Postmodernist meaning can indeed lead—and does lead—to a vision of mutual interdependence: self-reflexive “artwork simultaneously casts light on the workings of aesthetic conceptualization and on art’s sociological situation.”

A postmodern parody utilizes its own historical memory, its aesthetic introversion, to signal that such a discourse of self-examination is always integrally bound to the social discourse.

C. Humor as an Element of Parody

Historically, humor has been perceived as part and parcel of the social understanding of parody. Sabine Jacques argues that humor is at the heart of the complexity of the parody exception because appraising humorous character is “inherently subjective and sensitive to the norms . . . within a particular society.” Zemer notes that:

[Parody is communication which expresses criticism and reflects aspects of society’s image, the need for humor and expression that is free of the constraints of formality and officiousness—communication which undermines the control of the author and hegemonic power of

102. Hutcheon, supra note 100.
105. Hutcheon, supra note 103, at 63.
106. See Jacques, supra note 4, at 98.
the owners in order to enrich cultural diversity and establish communities in society that the discourse in the content invites new meanings and interpretation to arise.  

Some commentators believe that humor is not a necessary element of parody; rather, they contend that the only requirement is imitation that intends to interpret or critique. 

Humoristic criticism is a friendly and relatively efficient mechanism, at least in comparison to direct, non-humoristic and aggressive criticism. Comical elements enjoy a prevalence in parody; nonetheless, these elements have been abandoned or overlooked in favor of formalistic criticisms, even though the serious and grave shell has been removed, to be replaced by subversive aspects of theater, deliberate clowning,

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107. Zemer, supra note 74.

When we place the normative language next to the language of humor, we are actually comparing two contradictory cognitive behaviors of the mind. For the first time, the brain operates in well-organized rational patterns and rejects anything that does not conform to these patterns. Otherwise, the brain runs contrary to the normative activity and takes the liberty of breaking the rules of the game and behaving such that impossible cognitive and intellectual connections become possible at the moment humor is created. Humor, in addition to being a cognitive and intellectual exercise, can also be used as an offensive tool to hurt someone. Verbal humor contains sub-genres, one of the most prominent of which is aggressive humor. Humor in general contains a critical element. When we laugh at a state of humor we express criticism towards the object of our laughter. This criticism can be towards a person, towards a situation or towards a wrong way of thinking. Sometimes the criticism is subtle and imperceptible and sometimes so sharp that humor consciously, or not, becomes an aggressive mechanism. Humanity, in its cultural development, knew how to convert physical aggression into verbal aggression. It might be said that aggressive verbal humor is the highest refinement of verbal aggression. This ability sharp criticism has to generate blatant aggression can be seen in satirical theatrical and television works, such as the plays of Aristophanes and Molière, for example. Verbal humor is also used on a daily basis as an optional substitute for physical or verbal aggression and remains prevalent in our world. Aggressive humor can be hurtful to the object of humor and cause great pleasure to those who use it or laugh at it.

Id.
chance, absurdity and luck, all wrapped up by humor, wittiness and jokes.110 Thus, Melzer notes that:

[H]umor, laughter, wittiness, jokes—all these are not words that frequently appear in descriptions or interpretations of art before the early twentieth century. Until modernism, and in fact prior to the emergence of the classical avant-garde movements, the history of art has few examples in which humor is the most significant register.111

Despite its integral role in human life, humor and its representations are rarely addressed in the law.112 Law aspires to achieve justice. Because the law is committed to logical, rational, unobscured thinking, and as it deals with “serious” matters in which it must reach a judgment, humor is not often present in the legal sphere.113 The law may conceive of humor generally.114 Courts in particular may view humor as a foreign, threatening entity which undermines the very legitimacy, seriousness, and effectiveness of a judicial act.115 Humor as a matter of personal and cultural taste cultivates this perception. Thus, the law risks overlooking some of life’s true issues, which simmer beneath the surface. In his article Law and Humor, Jonathan Yovel notes the importance of humor as a deep layer of our self-perception and our approach to the limitations of knowledge, thought, and judgment.116 Yovel views humor as a foundational and necessary part of any ethical liberal mechanism, which recognizes our epistemological and practical limitations.117 Moreover, Yovel

110. See Melzer, supra note 21, at 10.
111. Id.
113. Id.
114. Id.
115. Id.
116. Id.
117. Id. at 88 (noting Gulliver’s Travels by Jonathan Swift, the sharpest social, political and intellectual satire of the eighteenth century, as a canonical example of the relations between law and humor). Yovel explains that the humor within it, figurative and symbolic, serves as a type of social and institutional criticism, a rhetorical means of transmitting messages that would not be accepted, or else would generate antagonism, in both the audience and the censor were they to be spoken in a ‘serious’ manner. Id. Yovel further suggests:
notes that humor is deeply and seriously committed to empirical and critical examinations of the world and its representations; additionally like law, humor stands to lose its legitimacy in the absence of a mimetic commitment to represent the world in a valid manner.118

What about audible humor? How do we understand it? As Olufunmilayo Arewa claims, the inclination to focus on the textual and the visual led the formulators of copyright law to identify protection of musical works under the term “author” (despite the distinct literary aspect in the word “author”).119 Consequently, creativity in the musical arena tends to focus on the written aspects of music, which to an extent fails to include the full spectrum of elements contained in musical works.120 In spite of the scholars who have taken humor seriously, research showcasing humor’s revelations about “human psychology, social interaction, creative expression, playfulness and pleasure” is rare in the field of musicology; moreover, research remains confined to limited studies on canonical figures, such as Mozart, Haydn, and Beethoven, whose credentials as serious musicians have already been firmly established.121 Having reviewed the importance of parody in general, the following section will examine the status of musical parody, and consider what makes parody unique as an art form or cultural artifact.

II. MUSICAL PARODY

A. Historical Background

Musical parody has existed for centuries as a form of humoristic expression and a means of criticism. From time to time, the canonical composers of the classical era expressed open humor through the stylistic

Humor masquerades as unserious, and this is its main weapon since it is completely serious, just as deep seriousness must also be humoristic. Swift invents fantastic worlds, but his fantasy is committed to representing the reality from which he writes. Just as in law, the legitimization of humor is dependent on his commitment and mimetic efforts, in other words representation of reality.

Id. at 89.


Id. at 50–51.
framework of pure instrumental expression. Well-known examples include the Mozart production *A Musical Joke* (K.522), a parody on musical conventions meant to ridicule composition and failed amateur performances, as well as *The Village Musicians* by Josef Haydn, also known as *A Musical Joke*, and the *Joke Quartet* (Opus 33, no. 2 in E-flat). In the Haydn composition, the listener must guess when and if the composition will end. Camille Saint-Saëns, in *The Carnival of the Animals*, wrote musical parodies of a “Royal March of lions, plus hens and roosters, wild asses, tortoises, elephants, kangaroos, fish, donkeys, cuckoos, birds, pianists, fossils and swans.” In Mozart’s *The Magic Flute*, there is a “wonderful duet between Papagena and Papageno with many popping sounds.” In Western music, the opera buffa and operettas in the style of Gilbert and Sullivan have constituted a popular form of musical comedy.

Notably, until the nineteenth century, musical parody was primarily associated with non-musical texts. Techniques to transform intonation, deformation, and hyperbole in music or sound were relatively rare. The parodic effect was primarily achieved by incongruity between musical and verbal content. In Rousseau’s dictionary published in 1768, a musical parody is described as follows: “*an instrumental piece which is made into an aria by adjusting the words. In a well-made music, the melody is composed to words; in a parody, the words are composed to the melody; all the stanzas of a song except the first are a kind of parody.*”

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122. NILSEN & NILSEN, supra note 9, at 211–12.
124. NILSEN & NILSEN, supra note 9, at 213.
125. Id. at 211.
127. Denisov, supra note 2, at 65.
128. Id.
129. Id.
130. JACQUES, supra note 4, at 4.
In the Age of Enlightenment, parody was used to imitate and reference previous works through alteration. As in other artistic fields, however, music parody was seen as serving a public benefit. Sources of musical humor were both external and innate to music. Later, musical humor was generated by referencing the musical style, performing changes in tempo, intriguing musical notes, changing the style of performance, or using unusual melodic design.

As Sabine Jacques notes, parody in music takes on a slightly different form. Musical parody described either a “musical rearrangement to adapt a work for different musical registers, or a technique which transformed . . . or replaced [the lyrics of a song] with an entirely different text.” While theories of humor are generally limited to verbally expressed humor, such theories may nonetheless prove useful to the study of musical humor. Addressing classical composers, it should be noted that parody in classical music is a common compositional technique in which a composer adapts existing material into a new work.

J.S. Bach, in particular, transformed between the sacred and the secular: “The Bachian style was the sacred; and the sacred style was the Bachian.” Bach’s “secular occasional compositions were, on the contrary, unsecular, and as such did not fulfill their purpose; the composer returned them to their rightful place when he transformed them into church pieces.” For example, Werner Neumann, in his 1965 essay On the Extent and Nature of Bach’s Parody Process, contributed to the understanding of Bach’s parody process by distinguishing between

131. Id. at 5.
132. Id.
134. See id. at 165–66.
135. JACQUES, supra note 4, at 4.
136. Id. (citing Robert Falck, Parody and Contrafactum: A Terminological Clarification, 65 MUSICAL Q. 1, 5 (1979)).
138. Id. at 8.
“compositional” and “poetic” parodies. A compositional parody refers to a seemingly arbitrary process in which “the composer, starting with an aria text that has been set before him, looks through his oeuvre for a piece suitable for adaptation.”

“Poetic parody refers to the deliberate re-texting of a previously existing work—all movements in extreme cases.”

Dalmonte notes that a joke (musical or otherwise)—where an expectation is resolved in an unexpected manner—presupposes a “reciprocal awareness [between composer and listener] of the two codes,” thus humor presupposes a strong sense of what constitutes the norm. Laughter might “break out when the subject found something unexpected and stupefying in the object . . . when the correspondence between the object that is perceived and the subject’s schematic perception and judgement” has been violated. “[T]his would only happen if the unexpected and surprising result were of a lower, more modest, less intelligent nature” than the subject had expected or imagined.

Dalmonte points out:

In the musical field, this contrast between the expectations deliberately created by the composer and the preconceived ideas of the listener is all the more violent—and thus the comic effect is all the more appreciable—if reciprocal awareness of the two codes involved is all the clearer; the two codes being the composer’s code of expectations and the listener’s linguistic/musical code.

Kendall Walton sought to draw an analogy between understanding humor and music, concluding that the analogy between humor and music deepens the understanding of musical composition and enriches the

140. Schulze & Melamed, supra note 137, at 10.
141. Id.
142. Id.
144. Id.
145. Id.
146. Id.
147. Id.
listener’s experience. Smith studied the subject of humor in musical therapy and concluded that humor should be treated as a tool through which music therapists can achieve a change in the therapeutic process.¹⁴⁹ Miguel Mera also studied the topic of musical humor in the cinema and identified channels in which humor was used to identify aesthetic values and limitations.¹⁵⁰ Further, Laurie-Jeanne Lister sought to discover how listeners hear and interpret music as humoristic, and adopted the point of view of Leonard Meyer, who argued that the “principal emotional content of music arises through the composer’s choreography of the listener’s expectation.”¹⁵¹ Lister presents two types of humor: referential humor and absolute humor.¹⁵² Referential humor refers to associations outside of the music that lead the listener to perceive the music as humoristic.¹⁵³ Absolute humor constitutes an integral part of the music itself, structured from playful elements with absurd incompatibility or distortion of the preexisting expectations the music sets.¹⁵⁴ This form of humor requires the listener to have a certain acquaintance with the musical style.¹⁵⁵

Techniques for creating absolute humor are exaggeration, clumsiness, parody and incongruity. These can be achieved musically through a multitude of methods, including dynamic interruptions, eccentric or unusual rhythms/rhythmic development, unexpected wrong notes or unprepared dissonances, awkward intervals, inexplicable harmonizations—the possibilities for play with musical grammar can be limited only by the imagination of the composer.¹⁵⁶

¹⁵¹. HURON, supra note 6, at 2 (citing LEONARD MEYER, EMOTION AND MEANING IN MUSIC (1965)) (emphasizing that Meyer’s theory underscores the power wielded by a composer through the act of defying or conforming to expectations); see also LAURIE-JEANNE LISTER, HUMOR AS A CONCEPT IN MUSIC: A THEORETICAL STUDY OF EXPRESSION IN MUSIC, THE CONCEPT OF HUMOR, AND HUMOR IN MUSIC, WITH AN ANALYTICAL EXAMPLE—W.A. MOZART, EIN MUSIKALISCHER SPASS, KV 522 (1994).
¹⁵². LISTER, supra note 151.
¹⁵³. Id. at 74.
¹⁵⁴. Id.
¹⁵⁵. Id.
¹⁵⁶. Id. at 79.
For example, according to Lister, referential humor in instrumental music includes the following techniques: satirical quoting from another composer;\textsuperscript{157} imitation of non-musical sounds;\textsuperscript{158} tone-painting;\textsuperscript{159} parodic portrayal of instruments or performers;\textsuperscript{160} and private musical jokes.\textsuperscript{161} Although humor has been used in different genres of music,\textsuperscript{162} a very limited number of studies have been conducted.\textsuperscript{163} Mull executed an early empirical study that asked college students to judge which of three works made the most use of humor to confirm whether the titles composers give to their music can imply humor.\textsuperscript{164} Additionally, Moore and Johnson investigated humoristic work in classical music by creating a tape recording with sixteen samples and playing it to 202 university students.\textsuperscript{165} The results indicated general agreement between the students on what was and was not humoristic work.\textsuperscript{166}

In the modern era, several musicians have developed a career in the field of musical comedy. Well-known examples include comedic pianist Victor Borge (1909–2000), and singer Anna Russel (1911–2006). Both used spoken monologues which were intermixed with musical samples.\textsuperscript{167} A more recent parodist is the singer and creator Weird

\textsuperscript{157} See id. at 74–78.
\textsuperscript{158} Id. at 74 (“In simulating other sounds—mechanical noises, sounds of nature etc.—a piece of instrumental music can quickly acquire programmatic content.”).
\textsuperscript{159} Id. at 75–76 (discussing music that “is also capable of creating a humorous picture by imitating a scene or a comical movement. . . . In Mussorgsky’s Gnomus from the Pictures at an Exhibition the farcical effect of a limping gnome is portrayed through large interval jumps, dotted rhythms and strange dissonances.”).
\textsuperscript{160} Id. at 77.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} התשמש קולו: מחקרים חדשות במוסיקהالمוניאחת ב親דיאט \[LISTEN TO MY VOICE: NEW RESEARCH STUDIES IN MUSIC THERAPY\] 285–86 (Dorit Amir & Cochavit Elefant eds., 2012) (Isr.) [hereinafter LISTEN TO MY VOICE].
\textsuperscript{164} See Mull, supra note 133.
\textsuperscript{166} Id.
Al Yankovic, who gained considerable fame through the 1980s and 1990s thanks to parodies he created for various hit pop songs. For example, he created the parody “I’m Fat” referencing Michael Jackson’s “I’m Bad.” These parodies became hits in their own right, with millions of copies sold, transforming Weird Al Yankovic into a dazzling commercial success and showcasing the commercial and prestigious potential of musical parody. And yet, such use raises the question—who is entitled to enjoy the profits of these parodies? The original creator of the work, or the parodist creator of the derived work? In this case, Yankovic makes clear on his website that every parody he makes is with the permission of the copyright holders.

Musical parodies can be further categorized, and commercial entities have widely utilized them. For example, “lyric parodies” are usually based on an adaptation of the instrumental and melodic portion of a piece, to which the parodist adds their own words or otherwise changes the original text. “Parodies of celebrities and performers” are those


169. Id.

170. Id. at 11, 36.

171. See id. at 11.

172. See id. at 36; see also Frequently Asked Questions, WEIRDAL, https://www.weirdal.com/archives/faq ("Al does get permission from the original writers of the songs that he parodies. While the law supports his ability to parody without permission," Al strives “to maintain the relationships that he’s built with artists and writers over the years. Plus, Al wants to make sure that he gets his songwriter credit (as writer of new lyrics) as well as his rightful share of the royalties.”). Weird Al’s attorney, Chuck Hurewitz, notes that: Weird Al generally gets a writing credit and a copyright interest in the song parody, which he shares (in varying royalty ratios) with the writers of the original underlying work. The publishing rights in the parody are most often conveyed to the copyright owner of the original song, usually a music publisher, which in turn, issues instructions to the applicable rights societies as to division of performance royalties on the parody. . . .

Sanders & Gordon, supra note 168, at 36.

173. See Sanders & Gordon, supra note 168, at 34 (noting, however, that lyric parodies often fall outside the scope of the fair use doctrine due primarily to licensing requirements).
that make use of original (and unmodified) music. For instance, in 1986 a parodist calling himself “Bruce Springstone” taped the song “(Meet) The Flintstones” in singer Bruce Springsteen’s performance style.174

“Parodies making use of musical illusions to pre-existing copyright musical works” are parodies that use musical elements that are linked to the work that is being criticized or ridiculed, with the aim of producing ‘new’ music for use in a parody.”175 For instance, in the 1978 NBC broadcasted a program called “All You Need Is Cash,” referencing The Beatles (in the parody the producers called them “The Ruttels”).176 Fourteen songs written by producer Neil Innes were included in the program, satirizing some of The Beatles’ famous hits.177

Further, before the development of sampling technology, late parodist Dickie Goodman optimized an earlier genre, “samples of recordings,” in which he habitually interweaved short segments from hits into parodic recordings as answers to staged interview questions supposedly directed at celebrities and politicians.178 For example, in a 1974 album, Goodman portrayed President Nixon responding to questions about the Watergate Affair by incorporating a brief section from musician Helen Ready’s recording of “leave me alone, won’t you leave me alone.”179

The last category is “parodies in commercials,” or parodies that, in the context of a commercial advertisement, usually change the words of a popular song in order to insert an adaptation to the product being advertised.180

Another genre replete with humor is jazz music. When cornetist Bix Beiderbecke was asked in 1929 to define jazz, he replied, “Jazz is musical humor.”181 Charles Hiroshi Garrett, a professor of music, contributes to the understanding of humor in jazz music by using Huron’s observations to analyze how jazz instrumentalists produce humor, suggesting several additional elements.182 First, Garett argues that “the humor of

174. Id. at 40.
175. See id. at 41.
176. Id. at 42.
177. Id.
178. Id. at 43.
179. Id.
180. Sanders & Gordon, supra note 168, at 54.
181. Sanders & Gordon, supra note 168, at 54.
182. Sanders & Gordon, supra note 168, at 54.
jazz exists beyond any musical incongruities intrinsic to an individual work.”

Second, he notes that “jazz humor extends beyond instrumental capabilities, since singers have been responsible for producing much humor in jazz performances and recordings. Their imaginative vocals, lyrical play, and comedic stagecraft have opened up wide vistas for creating jazz humor.”

Third, Garrett points out that “jazz humor is not limited to a written score or to the sounds of an individual performance. We can locate elements of jazz humor in song titles, comic lyrics, and visual imagery, or watch it take shape between live musicians in their facial expressions, performance gestures, and stage banter.”

Fourth, “jazz musicians use humor not only to evoke laughter but also to establish group rapport and a sense of intimacy with their audiences.” Lastly, “[j]azz humor moves beyond the comic production of musical incongruity to encompass a variety of artistic strategies, including wit, comedy, slapstick, irony, parody and satire.”

1. Parodic Techniques in Instrumental Musical Works

As mentioned above, the sources of musical humor are both external to and innate to music. It has been argued that musical humor, neither vocal nor verbal, exists on at least two planes. First, musical humor can be generated by referring to phenomena outside the music itself (animal sounds, body movements, texts), which are called “extra-musical references”—humor is formed by the “non-musical associations with the sounds we hear.”

For example, a musical parody was the topic of a fascinating ruling regarding the song Barbie Girl, by the Danish group Aqua.

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183. Id.
184. Id.
185. Id.
186. Id.
187. Id. at 55.
188. Mull, supra note 133, at 560, 566 (explaining intrinsic and extrinsic sources).
189. See Peter Kay, Music and Humor: What’s So Funny?, 10 MUSIC REFERENCE SERV. Q. 27, 49 (2006) (defining the two levels as that contained within the music itself and sounds that are humorous due to non-musical associations with the sounds).
190. Id. at 49.
191. Eriksen, supra note 7, at 245.
Another way to reference humor is through that which exists in the musical language itself or “interstylistic” humor. For instance, Leonard Bernstein referred to the imitation of human and mechanical voices, imageries, associations involving humans, and animals.

The most conspicuous examples of musical humor are musical puns—a sort of musical wordplay, alongside musical parodies. Musical puns deal with functionality and musical choices through playing with the traditional elements of music theory. For example, musicians may use musical puns to unexpectedly alter the meaning or the end of the musical sentence. However, unlike musical parody, this change is insufficient to trigger laughter. Parody illustrates the proximity of two separate patterns, one which is followed by our ears and the other that we do not expect. The parodic creation uses various techniques, including the kind associated with particular inner organization of the tonal structure of the musical text and techniques that approach the extra-musical semantic field, which refers to the text, if any.

Interstylistic techniques include deformation, exaggeration, and agglutination techniques. In deformation, the tonal texture of the derivative text undergoes modifications to the original, in a manner that distorts and may even destroy the original musical work. Sometimes the change in the tone, rhythm, dynamics or articulation are sufficient to generate the parodic effect. One of the most popular techniques leading to deformation is polarization of one or more bars of the musical work. For example: a high tone rather than a low one; a rapid tempo rather than a slow one; or a noisy rather than a quiet dynamic all implicate polarization. Exaggeration is a commonly used interstylistic technique. Examples of works using exaggeration include “The Song

192. Eriksen, supra note 7, at 245.
194. Kay, supra note 189, at 48.
195. Id.
196. See Denisov, supra note 2, at 58.
197. See id.
198. See id.
199. See id.
200. Id.
201. Id.
of the Roasted Swan” in the opera *Carmina Burana* by C. Orff, and the third portion of Gustav Mahler’s first symphony—with a parody of a funeral march.202

Another method is agglutination, which is the juxtaposition of contradictory elements.203 For instance, when elements from different styles clash or when an element does not suit its location in the text.204 One example is the Kreutzer Sonata from Shostakovich’s “Satyrs to Verse by Sasha Chyorny.”205 This work contains “quotes” from the Ninth Sonata for the Violin and Piano by Beethoven that are being gradually deformed, with the quoted segment and following a misquotation of Lensky’s aria from Tchaikovsky’s Eugene Onegin, a new tune suddenly appears by way of a light waltz.206 Another example is the music representing the elephant in the “Carnival of the Animals” by Saint-Saëns.207

A humoristic effect can also be achieved through instrumental techniques. Dorit Amir, who studied musical humor in music therapy, distinguishes between types, gestures and forms of musical humor.208 For musical gestures the study participants experienced as humoristic were exaggeration, clumsiness, and incongruity.209 These were musically formed by perturbations to the strength of sound, irregular rhythmic development, sounds outside the bar which arrived unexpectedly, unprepared dissonances, strange spacings, irrational harmonies, speed acceleration and glissando.210 Further, musical improvisations can create musical jokes, parody, caricature and comedy by exaggerating melodic or harmonic motions, producing “wrong” sounds, incorporating heavy rhythms, and time distortion.211 Imitation and unmusical sounds such as mechanical, animal and body sounds can be perceived as humoristic via instrumental, vocal or physical improvisation.212 Additionally, musical

203. *See id.*
204. *Id.*
205. *Id.*
206. *Id.* at 39–40.
207. *Id.* at 59.
209. *Id.* at 294.
210. *Id.*
211. *Id.*
212. *Id.*
use of certain instruments—such as kazoo or small flutes, can generate energy that is perceived as embarrassingly funny, resulting in a release. Musical instruments considered to be “jokers” are tuba, bassoon, trombone, and piccolo. Likewise, Asbjørn Øfsthus Eriksen identifies five categories of humor in instrumental music:

Imitations of phenomena in the outside world, especially non-musical sounds (onomatopoeia). . . Quotations: excerpts from well-known pieces placed in a new stylistic context . . . Departures from stylistic norms . . . Excessive repetition (of melodic figures or stylistic cliches) . . . [and] Incongruities in relation to the premises of the musical piece (discrepant musical characters or musical syntax). 213

Eriksen notes, “[a] necessary and sufficient condition for humor in instrumental music has to include the reaction of the perceiver (listener), such as in the case with Veatch’s definition.” 214 The involvement of the listener echoes Roland Barthes’ observations about the “birth of the reader.” 215 In this sense, we can speak about the “birth of the listener,” as an active player in the creative process. 216

As discussed above, musicologist Leonard Meyer argued that the principal emotional content of music arises through the composer’s choreography of expectation. 217 “In his book sweet anticipation, Huron describes in close detail how musical incongruities can be generated by foiling a listener’s expectations.” 218 Huron notes that there are four basic ways by which musical events can be experienced as surprising:

First, there is “schematic surprise”, where the music is constructed to violate some existing schema that listeners have brought to the listening experience. 219 Huron notes that surprises can be created, for example, 213. Eriksen, supra note 7, at 251–52.
214. Id. at 252.
215. Roland Barthes, The Death of the Author, in Image Music Text 148 (Stephen Heath trans.) (1967) (“The reader is the space on which all the quotations that make up a writing are inscribed without any of them being lost; a text’s unity lies not in its origin but in its destination.”).
217. See Huron, supra note 6, at 2.
218. Garrett, supra note 27, at 53.
219. Huron supra note 6, at 270.
through “sudden changes of loudness, switching instrumentation, violating the current key, transgressing the meter, using a rare chord progression, prematurely terminating a phrase, adding an improbable melodic leap, delaying a resolution, or jumping to a different style. . . .”220 The second method is “dynamic surprise”, where the music is crafted in a way that establishes specific expectations, only to subsequently defy those expectations within the work.221 Third, veridical surprise, which is elicited by “violating a listener’s existing knowledge of a given musical work.”222 All these forms of surprise act at an unconscious level.

Fourth is “conscious surprise”, where “the music leads a knowledgeable listener to consciously form an expectation about a future event that is then thwarted.”223 Musical surprises can be fashioned using techniques that break rules and upend conventions, including intentionally “wrong” notes, unexpected sounds or noises, and sudden changes in timbre, tempo, style, harmony, or dynamics.224 Additionally, Huron argues that understanding a musical joke often “requires a listener to have some knowledge about genre conventions as well as to quickly relate new musical information to what has already been heard.”225

Very few professional musicians have fashioned musical surprises using techniques that break rules. One of the most prominent is Peter Schickele, a Juilliard graduate, who creates parodies under an imaginary alter-ego named P.D.Q. Bach.226 Schickele has composed around a hundred humoristic works.227 The names of Schickele’s parodies are suggestive of their content and frequently quote melodies of drastically

220. Id.
221. Id. at 278 (referring to Joseph Haydn’s Surprise Symphony (no. 94), which contains the “surprise” in its slow second movement, as “[p]erhaps the most familiar example of a dynamic surprise in Western classical music . . .”).
222. Id. at 269–70 (emphasizing some examples of such violations may arise through performance error, misquotations, or intentional parody) (emphasis added).
223. Id. at 270.
224. Id.
225. See Garrett, supra note 27, at 54.
227. See ROSEN, supra note 226; HURON, supra note 226.
opposed styles in his music, which has become a “hallmark” of sorts for his works.\textsuperscript{228} Huron examined live recordings of works by Peter Schickele and identified 629 incidents of audience laughter.\textsuperscript{229} Each incident was analyzed in order to determine what made the audience laugh, particularly by using types of surprise.\textsuperscript{230} If one excludes visual gauges and humor-based jokes, one can categorize the humor-based tools into nine categories, each incorporating breaking conventions.\textsuperscript{231}

2. \textit{Incongruous Sounds}

Schickele utilizes irregular sound sources such as whistles or the kazoo.\textsuperscript{232} Frequently, his works are written to unusual orchestration, incorporating unusual instruments alongside the typical instruments used in classical orchestra.\textsuperscript{233} The classical orchestra’s sound serves as the base against which the unconventional instrument stands out.\textsuperscript{234} As Huron points out, “the role of the normal orchestral timbres is analogous to the ‘straight man’ in a comedy duo. Absurdity is more successful as a humoristic device when it is placed in the context of normalcy.”\textsuperscript{235}

3. \textit{Mixed Genres}

Schickele frequently shifts between different styles and genres, such as from Beethoven to tango.\textsuperscript{236} For example, in one of his works, Schickele starts with a slow, lyrical andante section, and about a minute

\begin{itemize}
\item \textsuperscript{228} See ROSEN, supra note 226. Examples of Rosen’s works include: The Stoned Guest; Hansel & Gretel & Ted & Alice; The Abduction of Figaro; Iphigenia in Brooklyn; Blaues Gras (Blue Grass Cantata); Wachet Arf! (a canine cantata poking fun at the Bach sacred cantata Wachet Auf, Ruft Uns Die Stimme [Awake! A Voice Calls to Thee]); Pervertimento and Variations on An Unusually Simpleminded Theme for Piano and Orchestra.
\item \textsuperscript{229} See HURON, supra note 226.
\item \textsuperscript{230} Id.
\item \textsuperscript{231} See HURON, supra note 6, at 284–85.
\item \textsuperscript{232} Id.
\item \textsuperscript{233} Id.
\item \textsuperscript{234} See id.
\item \textsuperscript{235} HURON, supra note 6, at 284.
\item \textsuperscript{236} See HURON, supra note 226, at 701.
\end{itemize}
later, there is a slow transition to a fast and unexpected allegro section accompanied by a trumpet playing “De Camptown Races.” Schickele’s most common tactic is to juxtapose “high art” and “low art” styles.

4. Drifting Tonality

This technique involves a sudden shift from one key to an unexpectedly different key. Often, Schickele employs the tritone interval to create the least predictable and, therefore, the most surprising, effect, and also the most disruptive to maintaining the tonal center. In popular music, a sudden shift in keys is called a “pump-up,” where the key ascends by either a diatonic or chromatic step. Conversely, Schickele employs a “pump-down”, where the music abruptly shifts a semitone or more. Noteworthy, while there are hundreds of examples of pump-ups in Western pop music, there are very few examples of pump-downs, illustrating the improbability of Schickele’s pump-downs.

5. Metric Disruptions

Just as tonality can be disrupted, the same holds true for meter. This simple technique is executed by subtracting or adding extra beats to a measure. For example, Schickele might subtract a beat from a three-quarters waltz or allocate an additional half-beat to a march.

6. Implausible Delay

This approach requires delaying a highly-expected resolution. An appoggiatura typically resolves on the second beat of the second

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237. HURON, supra note 6, at 285.
238. Id.
239. Id.
240. Id.
241. Id.
242. Id.
243. Id.
244. Id.
245. Id.
246. Id.
247. See id. at 285–86.
measure; employing this method may result in a failure to resolve at the expected moment.248

7. Excessive Repetition

This entails repeating a section of music more times than is the musical norm.249 In *Concerto for Horn and Hardart*, Schickele repeats a segment of eighth-notes for a dozen consecutive times to create a “broken record” effect for the listener. 250

8. Incompetence Cues

Another tool Schickele uses is performing a musical passage in a crude way, featuring devices such as bad pitch, unreasonably loud sounds, obnoxious instrumental or vocal timbres.251

9. Incongruous Quotation

Schickele frequently incorporates familiar melodies with incongruous styles; for example, Schickele integrated the opening of Bach’s first suites for unaccompanied cello with the initial melodies of the Latin pop song “Brazil.”252

10. Misquotation

This method involves misquoting well-known musical tunes, like Schickele using a section from Beethoven’s Fifth Symphony with a different interval.253 In summary, it would seem that all these tools constitute a violation of audience expectations.254 Huron explains that:

248. *Id.*
249. *Id.* at 286.
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. For further information on the importance of listener expectations and the surprise factor in music, see HANS KREITLER & SHULAMIT KREITLER, PSYCHOLOGY OF THE ARTS (1980).
Incongruous sounds violate expectations related to norms of musical timbres. Drifting tonality and metric disruptions violate pitch-related schemas and temporal schemas, respectively. Mixed genres violate the maintenance of schematic-stylistic norms, while incongruous quotations violate veridical-stylistic norms. Misquotation violates veridical expectations. Implausible delay confound the norms of temporal succession, while excessive repetition thwarts expectations of form-related structure. Incompetence cues violate a number of performance-related norms.  

11. How Music Differs from Other Copyright-Protected Arts

One of the primary fields of research within musical cognition is determining how people “think with sounds” beyond the verbal level. The field seeks to explore how the brain represents musical knowledge and how it processes these representations. One approach in the field of music and personality refers to “musical identities.” The concept is based on the idea that music plays an important role in daily life, influencing broader aspects than dedicated music listening. Music is perceived as a sensitive means of communication, which transcends language, and plays a social and emotional role. We use music not only to regulate our emotions, but to present ourselves to others, in a way that we perceive as positive. The music we listen to and create defines us in many ways.

Music is distinct. Music is the only type of creative work that appeals primarily to the ear rather than the eye, and sound is a medium that acts as glue between the senses. In his book, Musicophilia, neurologist and brain researcher Oliver Sacks claims that the human inclination to music is innate. According to Sacks, “[w]e humans are a musical species, no less than a linguistic one,” and that “for virtually all of us, music has great power . . . .” This propensity to music shows itself in

255. HURON, supra note 226, at 702.
257. Id.
258. Id.
259. Id. at 110 (citing NICHOLAS COOK, מוזיקה: קצצון קצר [MUSIC: A VERY SHORT INTRODUCTION] (2006) (Isr.).
261. Id. at xi.
infancy, is manifest and central in every culture, and probably goes back to the very beginnings of our species.\textsuperscript{262} Such \textquotedblleft musicophilia\textquotedblright is a given in human nature . . . [such that] one must think of it as innate.”\textsuperscript{263}

Furthermore, Sacks adds that \textquoteleft music, uniquely among the arts, is both completely abstract and profoundly emotional.”\textsuperscript{264} This particular art form “has no power to represent anything particular or external, but it has a unique power to express states or feelings.”\textsuperscript{265} In this way, music “pierce[s] the heart directly; it needs no mediation.”\textsuperscript{266} Indeed, on the emotional level there is something “deeper” in hearing as opposed to seeing.\textsuperscript{267} Felix Mendelssohn-Bartholdy wrote that “people often complain that music is ambiguous, that their ideas on the subject always seem so vague, whereas everyone understands words; with me it is exactly the reverse; . . . [music] fills the soul with a thousand things better than words.”\textsuperscript{268}

Ami Maayani also emphasizes that emotional elements of sound can be utilized to express the intended \textquoteleft spirit\textquoteright in a more or less complete manner, and writes that:

Music, unlike other arts, enables release from any text and from any expression of a defined content. . . . the content is expressed less accurately with sounds, harmonic associations and melodic bounty, than with words, by subjective inner perception which stirs inner life as music does . . . inwardness is the way in which music conceives of its own content, and that is what enables the union of that which is linked to the emotion and which forms part of our inner self.\textsuperscript{269}

\begin{thebibliography}{9}
\bibitem{262} Id. at x.
\bibitem{263} Id.
\bibitem{264} Id. at 300–01.
\bibitem{265} Id.
\bibitem{266} Id.
\bibitem{267} Id.
\bibitem{268} \textit{Anthony Storr}, \textit{Music and the Mind} 33 (1992).
\end{thebibliography}
Similarly, in his book, *Listening and Voice: Phenomenologies of Sound*, Don Ihde considers acoustic technologies and demonstrates that sounds produce internal spaces, which are analogous to visuals which are hidden from sight. Craig and Laroche note four characteristics in which music differs from other copyright law protected works.

Music is not created on paper, and interaction with it is not through visual or tactile means. As public performance represents the primary medium for interaction with music, the work and its performance are interlinked. Perhaps more than any other protected work, music is transmitted and absorbed through performance because “the most basic medium of music involves sound waves sent through the air into the ears of an audience and experienced over time.” As Andreas Rahmatian notes, “[i]n no other type of art does time form so much the basis of, and is so strongly interwoven in, any aspect of artistic manifestation than in music.”

Music “affords biological benefits that elude common understanding.” Thus, “[m]ore so than any other artistic endeavours, music possesses ethereal qualities that infiltrates and permeates multiple facets of our existence in a complex manner.”

Music is a language. People who are not musicians can nonetheless recognize the sound of a note that does not belong to the scale being used. And yet, profound understanding of musical structure and syntax requires in-depth knowledge.

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272. Id. at 46.
273. Id.
274. Id.
275. Id. (citing Andreas Rahmatian, *Music and Creativity as Perceived by Copyright Law*, 3 INTELL. PROP. Q. 267, 272–73 (2005)).
276. Id. at 47.
278. Id.
279. Id.
280. See id.
Most important to copyright law, “borrowing and copying among musicians is commonplace in the music world and an accepted part of musical practice.”\textsuperscript{281} Taking another’s “musical idea and developing it in a new way is largely understood as part of musical culture and thus entirely consistent with cultural norms.”\textsuperscript{282} Thus, “[i]n some sense, music creation \textit{depends} on the borrowing and adaptation of material passed from one musician to another.”\textsuperscript{283} This contrasts normative copyright law, which “generally assumes a romantic vision of independent origination that sits uneasily with the realities of human creativity and culture at large.”\textsuperscript{284} Such contrast “magnifies the mismatch between creative practice and the structures (and strictures) of copyright law.”\textsuperscript{285}

Despite the uniqueness of music and its substantial contribution to mankind, the full nature of the musical work is not fully acknowledged within the bounds of copyright jurisprudence. For example, Andreas Rahmatian claims that “copyright law has no genuine understanding of the nature of music as an art form . . . “\textsuperscript{286} The courts’ general “emphasis on melody demonstrates the limited cultural gaze of copyright with respect to musical works.”\textsuperscript{287} By focusing on what the court perceives as “normatively relevant” aspects of music, music is perceived as “an object of legal transactions” and therefore transferrable property.\textsuperscript{288}

Musical creation is a type of subjective art form, so trying to delineate it in terms of the profit it produces may miss the mark. The uniqueness of auditory humor has been underlined by Hutcheon, who refers to music in the twentieth century and notes that parody has two separate, yet coexisting meanings.\textsuperscript{289} The first refers to an existing work from a

\begin{itemize}
  \item \textsuperscript{281} Id.
  \item \textsuperscript{282} Id.
  \item \textsuperscript{283} Id. at 48 (emphasis in original).
  \item \textsuperscript{284} Id.
  \item \textsuperscript{285} Id.
  \item \textsuperscript{286} Andreas Rahmatian, \textit{The Elements of Music Relevant for Copyright Protection}, in \textit{CONCEPTS OF MUSIC AND COPYRIGHT} 78 (Andreas Rahmatian ed., 2015).
  \item \textsuperscript{288} Rahmatian, supra note 286.
  \item \textsuperscript{289} HUTCHEON, supra note 59, at 65.
\end{itemize}
critical distance.290 The second relates to a deeper significance, of referencing existing music for humor.291 Although, Hutcheon suggests opening the concept of parody to encompass a broader variety of works, while still distinguishing between parody, and, say, works like satire.292

Ultimately, the importance of musical parody is that it constitutes a tool with which one can criticize music, alongside social phenomena, while using the unique language of music. Clair Levy adds another layer referring to interpretation of musical conventions and notes that use of musical parody is not limited to ironic gestures.293 Rather, it may have a positive attitude and innovative approach regarding the interpretation of musical conventions.294 Levy defines the basis of musical parody by focusing on “key concepts, such as inversion, intertextuality, irony, and interpretative reading.”295

Furthermore, Dorit Amir emphasizes the value of musical humor as a tool which is playful, yet at the same time serious.296 Humor embodies tension and release, and “[t]he great value of humor lies in its ability to tap multiple levels of meaning.”297 In this way, musical humor can, among its other features, encourage communication and development and bring about novel insights or ways of thinking. Humanity is forced to think in every comedic situation. Charlie Chaplin, for example, bases his humor on the visual aspect, whereas Groucho Marx and Woody Allen base their humor primarily on the verbal aspect.298 “We connect to a given aspect of the humor in accordance with our taste,” which is a function of our individual personalities.299

Nicholas Cook refers to the “cultural activity” which is associated with music criticism: books, journals, interviews, television shows, and

290. See id. at 65, 68.
291. See id. at 67.
292. See id. at 103–04.
293. See Mihail Lukanov, Musical Parody at the Late 20th and Early 21st Century, 4 J. INT’L ASSOC. STUDY OF POPULAR MUSIC 126 (2014).
294. See id.
295. Id. (citing CLAIRE LEVY, DIALOGICAL MUSIC: BLUES, POPULAR CULTURE AND THE MYTHS OF MODERNITY (2005)).
296. LISTEN TO MY VOICE, supra note 163, at 301.
298. See SOVER, supra note 109, at 79.
299. See id. at 55.
so forth. According to Cook, we exert influence through words. We use them in order to change things, to make things what they are. Words make reality, more than they reflect it. What this means is that the languages we use with respect to music and the stories we tell about it help us determine what music is, what meaning we transmit with it, and what it means to us.

The way we think about music greatly influences how we create music, resulting in a seemingly circular process. A type of continuity in our perception generates what we call “traditions” in music, just as anywhere else in life. Cook notes that music enables a certain level of intercultural communication. This means that “music is not only a way of achieving understanding of the cultural other, but also leads to a shift in our own positions, in structuring and rebuilding our identity within the process.”

For the reasons set out above, musical parody constitutes an important, yet under-evaluated, vehicle to criticize various social phenomena, using unique artistic and creative means. The problem is that legal standards fail to encompass the reality of musical creativity. Such failure risks narrowing musical creativity in response to imposed legal constraints. This result would be undesirable for the world of music.

B. Musical Parody in the Digital Age

Over the past few decades, music videos that incorporate text and sound with images have formed a layer of humor. In the Digital Age, the process of parody creation has accelerated, and musical parody is particularly common in digital culture. The development of technology and video-editing equipment enables users to generate remix style works

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301. Id.
302. Id.
303. Id. at 14–15.
304. Id. at 100.
with a minimum of resources or technical knowledge. 307 In the Hargreaves Commission Report, parody’s widespread use among private citizens served to justify protecting parodies. 308 “Video parody is today becoming part and parcel of the interactions of private citizens, often via social networking sites, and encourages literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy. Comedy is big business.” 309

Videos are specifically based on generational appeal to youth, and are additionally, like many texts in popular culture, reliant on an intertextual template that may not be entirely accessible to adults. 310 The perception of musical videos is associated with rhythm and innovation. 311 The music industry has changed greatly, and the internet constitutes most listeners’ initial environment for access to, and communication about, music, including parodies. 312 In most cases musical parodies will, today, be uploaded to platforms such as YouTube. 313 Due to the nature of music, however, purely instrumental musical humor can be more complicated to understand. The process of musical creation has been revolutionized during the Digital Age, both technologically and stylistically. Technologically speaking, whereas in the past, musical instruments were

307. See id. at 27.
308. Id. at 50.
309. Id.
310. Ariel Friedman, who wrote about humor in Israeli videos, notes that the short structure of the video, and the many technical tricks, enable videos from different musical styles and genres to constitute a “short joke.” See Ariel Friedman, הומור בקליפים [Humor in Israeli Videos: From “Etzel Ha’doda Veha’dod” to the “Arisa”], 6 [HUMOR MEEKUVAN: RSCH. J. IN HUMOR STUD.] 7, 8 (2016) (Isr.). This is usually based on the principle of incongruity, amplified by the comic intersection of three languages: the sung word, the music, and the visual expression in the video. See id. The incongruity theory, which is also the most widely accepted theory on humor, explains humor in most comic videos, both due to the language typical of the videos and the creativity embodied by the very combination between the different languages in the video. See id.
311. Id.
313. For example, Miley Cyrus’ “Wrecking Ball” has been a popular work to parody. See Alex Crilly-McKean, Top 5 Wrecking Ball Parodies, WATCHMOJO (May 31, 2018), https://www.watchmojo.com/blog/2018/05/31/top-5-wrecking-ball-parodies.
Parody constitutes a challenging case for copyright law, undermining some of its basic premises. In *Campbell v. Acuff-Rose Music Inc.*, the United States Supreme Court, in deciding whether an infringing work was sufficiently transformative under the first factor of the fair use doctrine, focused on the lyrics of the infringing work. Yet, it has been nearly three decades since *Campbell*, and technological changes since then compel reexamination of parody and copyright law. Courts in the post-*Campbell* era have been forced to deal with parodies which convey parody through technology, including movies, dramatic works, or graphically generated characters. One of the most notable musical practices in the Digital Age is the mash-up. While constituting a fertile ground for musical parody and intertextuality, it presents a unique challenge for copyright law.

C. Mash-Ups as Musical Parody

In the contemporary period, and especially the Digital Age, the process of musical creation has fundamentally changed. “Musical sculpting” has led to a variety of creative artistic and musical styles. The mash-up is one such variety. Mash-up is a musical genre created by

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314. Campbell v. Acuff-Rose Music, 510 U.S. 569, 588 (1994). The Court considers the tension between parody and copyright law: Parody presents a difficult case. . . . Its art lies in the tension between a known original and its parodic twin. . . . Once enough has been taken to assure identification, how much more is reasonable will depend . . . on the extent to which the [work’s] overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original.

315. Id. at 579.

316. Id. at 583 (“[The infringing artist] juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility.”).


318. MARK MARRINGTON, *Composing with the Digital Audio Workstation, in The Singer-Songwriter Handbook* 77–89 (Justin Williams & Katherine Williams eds.).

https://scholarlycommons.law.cwsl.edu/cwlr/vol60/iss3/2
integrating several musical recordings into a single new musical creation.\textsuperscript{319} The most common traditional usage of mash-ups can be characterized as A v. B, where two sound recordings are combined to create a new work.\textsuperscript{320} The use of computers, however, enables new processes, such as the generation of audio-collage compositions, which incorporate sections of existing recordings from a broad variety of styles.\textsuperscript{321} Samples can be juxtaposed horizontally or played simultaneously (vertically), creating different aesthetic effects. Even the best-known artists receive mash-up versions of their hits.\textsuperscript{322}

1. From Musique Concrète to Plunderphonics and Danger Mouse

Before the mash up arose, the collage techniques of \textit{musique concrète} and the avant-garde existed.\textsuperscript{323} This movement, led by Pierre Schaeffer and Pierre Henry in France in the 1940s, spearheaded the development of new musical practices which challenged old compositional paradigms.\textsuperscript{324} Music Concrète developed an aesthetic of borrowing sounds from recorded sources and composing musical works by mixing and arranging nonmusical sounds collected via microphone.\textsuperscript{325} Schaeffer used random recordings from his studio and mixed them into his compositions, discovering interesting sonic combinations while recording them onto records.\textsuperscript{326} Indeed, Musique Concrète

\begin{footnotes}
\item[322] For example, The Beatles’ works have been used to create DJ mashups: In 2004 a DJ known as “dj BC” published a project titled “Beastles” that fused songs by the Beastie Boys and The Beatles. See Greg Cook, \textit{If the Beatles and Beastie Boys Had a Beautiful Baby: ‘Ill Submarine’}, WBUR (June 14, 2013), https://www.wbur.org/news/2013/06/14/beatles-beastie-beastles. It is possible to create a mashup that crosses cultures and periods, such as Beethoven combined with a contemporary artist like Shakira, for example.
\item[323] Interview by Tim Hodgkinson with Pierre Schaeffer, pioneer of Music Concrète, at the house of M. Schaeffer (May 2, 1986).
\item[324] See id.
\item[325] See id.
\item[326] See id.
\end{footnotes}
[I]s music made of raw sounds: thunderstorms, steam-engines, waterfalls, steel foundries[.] The sounds are not produced by traditional acoustic musical instruments. They are captured on tape (originally, before tape, on disk) and manipulated to form sound-structures.327

Canadian composer John Oswald also developed distinct musical practices that included the transformation of recorded popular songs.328 Serge Lacasse coined the term “Plunderphonics,”—based off of Oswald’s album Plunderphonic329—a term comparable to Duchamp’s “readymades.”330 In February 1990, after Oswald released a popular mash-up CD, “the Canadian Recording Industry Association demanded that Oswald cease distribution and destroy the three hundred remaining copies. Not wanting to fight a potentially costly lawsuit, Oswald complied.”331 The Canadian Recording Industry Association made this demand because Oswald had used commercially released recordings as his basic material.332 Importantly for musical creativity, each track on Plunderphonic presented “a well-known recorded piece with an entirely new sonic configuration.”333

The most discussed example of a mash-up in academic literature is The Grey Album released in 2004 by Danger Mouse (a.k.a. Brian

327. See id.
329. Id. at 52.

Elvis Presley’s hit record “Blue Suede Shoes” (itself borrowed from Carl Perkins) [was] transformed [by Jim Tenney in his song “Collage 1”] by means of multi-speed tape recorders and razor blade. In the same way that Pierre Schaeffer found musical potential in his object sonore, which could be, for instance, a footstep . . . Tenney took an everyday [piece of] music and allowed us to hear it differently. At the same time, all that was inherently Elvis radically influenced our perception of Jim’s piece. Id.

331. LACASSE, supra note 328, at 51 (citations omitted).
332. Id. at 52.
333. Id. at 52 (“Such a practice could be viewed as a ‘mega-editing’ process . . . . [T]he amount of manipulation is much greater . . . .”).
This album consists of songs that manipulate The Beatles’ *White Album* and overlay a capella rap verses from Jay-Z’s *The Black Album*. After receiving a warning that he would be subject to legal proceedings, Danger Mouse removed *The Grey Album* from his website.

In his book, *Remix*, Lawrence Lessig argues that *The Grey Album* by Danger Mouse “[was] not simply copying. Sounds [were] being used like paint on a palette. But all the paint [had] been scratched off of the other paintings.” Shiga points out that the diverging responses to *The Grey Album* between Jay Z’s label and The Beatles’ label stem from two very “different strategies of managing change in audience preferences and musical styles. Put simply, [The Beatles’ label] manages innovation through the notion of originality, whereas [Jay Z’s label] manages innovation as novelty.” As a point of crucial distinction, managing innovation through originality, like the Beatles’ label, “depends primarily on the use of copyright law,” while management of innovation through novelty does not.

2. Musical Appropriation

Whether mash-ups are a form of musical appropriation is starkly contested. For example, borrowing materials from existing works is a tradition, not a new practice, and constitutes a form of expression that is worthy of protection. Proponents of mash-ups claim that such use should be defined as “quasi-parody” and subsequently sheltered under the fair use protection, as a form of art which promotes “criticism.”

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334. See Brøvig-Hanssen & Harkins, supra note 36, at 95.
335. See id.
339. Id.
Furthermore, mash-ups are argued to have a sufficiently transformative element to justify fair use protection under copyright.343 Opponents, in contrast, claim that use involved in the creation of the derivative work might ultimately harm the original work.344 The simplest response to such opposition is that it may be unlikely that people would purchase only the mash-up, without subsequently taking interest in the original work. On the contrary, the mash-up might help raise awareness of the original song, and lead to renewed purchases of the work and an increase in its value.

Utilizing part of an existing musical work in a creative manner is part and parcel of a common practice in musical tradition.345 Alfred Schnittke implies that “the principle of quotation and the principle of allusion” are inherent in the development of modern music.346 As various scholars have demonstrated, canonical composers would use previous musical quotations in their own pieces, at times.347 Thus, Beethoven borrowed from Clementi and Cherubini, and Schubert borrowed from Mozart and Beethoven.348 “Handel, Mendelssohn, Haydn, Mozart, Wagner, Debussy, Mahler and Rachmaninoff . . . actively used musical quotations in their own pieces.”349 To an extent, “[i]f we examined all music that borrowed in some way from its predecessors, we would be examining all music.”350

The same concept extends to blues music. For example, Jason Toynbee notes that in the first half of the twentieth century it was common in the blues tradition to make use of blues melodies to create new works, as well as new variations.351 Toynbee notes that it was

343. Id. at 537–38
344. See generally id. at 538–39.
345. Arewa, From J.C. Bach to Hip Hop, supra note 3, at 586.
347. See Arewa, From J.C. Bach to Hip Hop, supra note 3, at 586.
349. Id.
351. See Jason Toynbee, Copyright, The Work and Phonographic Orality in Music, 15 SOC. & LEGAL STUD. 77, 84 (2006) ("[G]iven its essentially oral function, the
uncommon for musicians at the time to engage in litigation over use of their work.\textsuperscript{352} Since enforcement was not common in this genre, musicians continued to make use of these practices until the second half of the twentieth century.\textsuperscript{353}

This shared creative process and the practice of unauthorized borrowing stand at a stark contrast to the demand for independent creation that is prevalent in copyright law and differ greatly from the romantic image of the individual creator. Narrowly focusing on the dichotomy between originality and borrowing ignores how use of an existing work may be a source of creativity on its own.\textsuperscript{354} Olufunmilayo Arewa extensively reviews the use of existing works in hip-hop culture, alongside other postmodern works that are appropriative works by nature.\textsuperscript{355} Using the creation and evolution of blues music as an example, Arewa demonstrates there is clear artistic value in using elements of an existing work in the process of creating something new.\textsuperscript{356} The conversation about hip-hop merits special attention, in light of cultural assumptions about the aesthetic of cultural works embedded in copyright law, whether through the conscious or unintentional efforts of current and past agents of authority in music. “Copyright is thus not only shaped by conceptions of authorship

\textsuperscript{352} See id. at 87.

\textsuperscript{353} Id. For example, jazz musician Charlie Parker made new works while relying on existing structures. Luke T. McDonagh, \textit{Is the Creative Use of Musical Works without a License Acceptable Under Copyright Law}, 4 INT’L REV. INTELL. PROP. & COMPETITION L. 1, 3 (2012). Thelonious Monk’s work “In Walked Bud” is based on a previous work’s chord progression, and John Coltrane used Miles Davis’ work, “So What.” Id.

\textsuperscript{354} In fact, some of the most revered writers and speakers of American culture—Thomas Jefferson, Mark Twain, Martin Luther King—could, from a narrow perspective, be accused of plagiarism.” Danielle Nicole DeVoss & James E. Porter, \textit{Why Napster Matters to Writing: Filesharing as a New Ethic of Digital Delivery}, 23 COMPUTS. & COMPOSITION 178, 200 (2006). “But we see them, rather, as effective writers—who remix existing cultural tracks to create significant new compilations.” Id.


\textsuperscript{356} See id. at 596–601 (discussing how principles of copyright law conflict with the tradition of borrowing in blues music). Blues music distinguishes itself from other genres through complex rhythmic structures. See id. at 578.
but is also a powerful force in melding notions of authorship and delineating appropriate and inappropriate methods of artistic production.”357

Arewa demonstrates how the concept of copying and borrowing has always been prevalent among musicians and is an acceptable part of musical practice.358 Arewa claims that the prevalent, traditional view in copyright law assumes a dichotomy between copying and creativity, treats borrowing as antithetical to creativity359, and only deems independently-created works as entitled to protection.360 Such approaches fail to recognize that existing materials can, and do, contribute to creativity in new works.361 Musicologists use various terms to describe these practices, including: “borrowing, self-borrowing, transformative imitation, quotation, allusion, homage, modeling, emulation, recomposition, influence, paraphrase and indebtedness.”362

This raises the question: “[t]o what extent do current valences of the term ‘borrowing’ in relation to music emerge from contemporary developments in audio technologies?”363 Barham notes that musical borrowing is “almost certainly as old as music itself.”364 Contemporary cultural activities such as file sharing, sampling, remixing, plunderphonics, and mash-up might be said to represent merely an intensification and digitalization of the “age-old (yet often artistically relegated) co-operative improvisational practices of a pre-industrial ‘world’ music with its more recent, diverse echoes in, for example, jazz, hip-hop . . . and any number of other individuals and ensembles engaged in ‘freer’ creative practices.”365

357. Arewa, From J.C. Bach to Hip Hop, supra note 3, at 585.
358. Id. at 550, 580, 586–618 (providing a historical overview of musical borrowing).
359. Id. at 585.
360. See id. at 550–51.
361. See generally id.
362. Id. at 602.
365. Id.
3. Humor in Mash-Ups

In *The Act of Creation*, Arthur Koestler argues there are three types of creativity: artistic originality, scientific discovery, and comic inspiration. Koestler argues that humor exists whenever two different frames of reference collide. In this sense, mash-ups are a great platform for humor. However, “the role that humor plays in remixes and mash-ups remains largely understudied.” Brøvig-Hanssen discusses how various types of remixes, including mash-ups, embrace a combination of incongruity and congruity or resolution. As various scholars point out, “humor in music often arises from radical juxtapositions of conflicting musical styles or from the inclusion of nonnormative stylistic features in an otherwise normative style-manifestation.”

366. Nilsen & Nilsen, supra note 9, at 28. “For Koestler, the responses to ‘Artistic originality’ is ‘Ah!’” while “the response to ‘Scientific Discovery’ is ‘Ah Ha!’” . . . Id. at 56. The response to “Comic Inspiration” is “HaHa!” Id. This occurs whenever “the clash between the real and the imagined is so great that it is incongruous, incompatible, satiric, ironic, paradoxical ludicrous, or ridiculous.” Id.

367. See id. at 252. In Koestler’s perspective, humor is a type of creation based on unusual thinking. See Werner Dubitzky et al., *Towards Creative Information Exploration Based on Koestler’s Concept of Bisociation*, in *Bisociative Knowledge Discovery* 11, 16 (Michael R. Berthold ed., 2012). Parody itself may serve as an inspiration for additional parodies. See id. The thought connects two planes which would not normally overlap. Creative thinking finds a way to combine them. Koestler’s model of creativity rests on this concept that he calls “bisociation.” Id. at 16. “Bisociative thinking occurs when a problem, idea, event or situation is perceived simultaneously in two or more ‘matrices of thought’ or domains.” Id. at 11. An interaction between two “habitually independent matrices of perception or reasoning . . . result[s] in either a collision ending in laughter, or their fusion in a new intellectual synthesis, or their confrontation in an aesthetic experience.” Id. at 18. This type of creative thinking seeks to pave new paths and find innovative solutions. Sometimes it is provocative and challenging. See Sover, supra note 109, at 55.


369. See generally id.

370. Id. at 193; see Eriksen, supra note 7, at 236; see also, e.g., Garrett, supra note 27, at 53 (describing the complex way that incongruence functions as humor in jazz); John Covach, *Stylistic Competencies. Musical Humor, and ‘This is Spinal Tap’*, in *Concert Music, Rock and Jazz Since 1945: Essays and Analytical Studies* 399, 400–02 (Elizabeth West Marvin & Richard Hermann eds., 1995) (explaining that philosophers Immanuel Kant and Arthur Schopenhauer called this phenomenon “incongruity theory”).
Therefore, whether musical incongruity is humorous “often relies on the listener’s ability to discern nonnormative/incongruent stylistic features from the normative/congruent ones.”371 The listener’s role is to “oscillat[e] between two heterogeneous halves forming a compelling whole that often evokes a humorous response.”372 Brøvig-Hanssen and Harkins “argue that mash-ups are characterized by two underlying principles, namely the contextual incongruity of recognizable samples and the musical congruity between the ‘mashed’ tracks.”373

This effect is achieved through inventive and humorous titles, often linguistic puns.374 Artists add an additional layer of intentional humor by synchronizing their mash-ups with “bizarre visual combination[s]” of videos and art collages, which have reached widespread popularity in online forums.375 Despite online demand, humor appears neglected within academic literature, which Brøvig-Hanssen and Harkin attribute to “[t]he fact that humorous amusement is evoked in different ways and for different motives . . .”376

D. The Law of Audience Expectation in Copyright

1. Parody and Audience Expectation

Parody creates a dialogue and an intertextual form of communication. Parody, however, violates audience expectation, especially where the audience is familiar with the original work which is the subject of the parody.377 Marcel Duchamp described the audience’s creative contribution, writing “[t]he creative act is not performed by the artist alone; the spectator brings the work in contact with the external world by deciphering and interpreting its inner qualifications and thus adds his contribution to the creative act.”378

372. Id. at 195.
374. See id. at 91.
375. Id. at 92.
376. Id.
377. See discussion supra Part.II.A.
McFarlin asserts, “[i]f not for a hungry audience, law would have little reason to grant authors the right to control copying of their works.” He asks:

But for the audience . . . would copyright even exist? Would the progress of knowledge . . . continue if no one read, saw, heard, or felt? Would the law protect creative work that had no one to purchase, praise, critique, condemn, or respond to it in some way?

Buccafusco further speaks to the power of the audience-artist relationship and holds that copyright authorship begins at the moment “[an artist] has the categorial intention that her creation is capable of producing mental effects in an audience.”

This echoes the seminal 1967 essay, “The Death of the Author,” in which Roland Barthes considers “the essential role of the audience in understanding a creative work.” “Barthes theorized that the audience—with its various cultural, historical and social contexts—infuses a creative work with constantly renewed meaning.” Barthes argued for a shift in the process of interpretation: a move from an authoritative text to intertextual reference points; from the author’s intentions to the reader’s insights. “Death of the Author’s” premise has been used to justify a focus on how meaning is produced by readers rather than by authors, which starkly contrasts with the traditional “image of literature . . . tyrannically centered on the author . . .” Barthes concluded:

performance of Yugoslav Artist Marina Abramovic’s “The Artist is Present.” See Megan Carpenter & Stephen Hetcher, Function Over Form: Bringing the Fixation Requirement into the Modern Era, 82 FORDHAM L. REV. 2221, 2230–31 (2014). This performance involves a high degree of audience participation. Id.

380. Id. at 447.
383. Lund, supra note 382, at 73.
384. See BARTHES, supra note 382, at 148; see also Keith Negus, Authorship and the Popular Song, 93 MUSIC & LETTERS 607, 620 (2011) (“[T]he real author could be identifiable as one person . . . or might be many people . . .”).
385. Id. at 143.
[A] text is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation, but there is [one] place where this multiplicity is focused, and that place is the reader, not, as was hitherto said, the author. The reader is the space on which all quotations that make up a writing are inscribed without any of them being lost; a text’s unity lies not in its origin but in its destination.386

Thus, “[f]or Barthes, the significance of a creative work lies not in the author, but in the audience that enjoys or consumes it.”387 This once controversial viewpoint has inspired scholarship on interpretive communities.388 Nathaniel Noda extends the concept further, urging copyright law to “keep pace with changing times and practices by recognizing that an author implicitly cedes certain interpretive rights to the general public when he or she introduces a work into the stream of public discourse.”389 Philosopher Jerrold Levinson distinguishes two categories of intentions—semantic and categorical—to identify if someone is an author for purposes of copyright law.390 Levinson defines semantic intentions as “those having to do with the meaning or interpretation of the work.”391 However, only categorical intentions which indicate the “kind of work the person has created” are relevant to copyright law, Levinson explains:

Categorial intentions involve the maker’s framing and positioning of his product vis-a-vis his projected audience; they involve the maker’s conception of what he has produced and what it is for, on a rather basic level; they govern not what a work is to mean but how it is to be fundamentally conceived or approached.392

Among other scholars, John Fiske has appreciated that use of dominant cultural symbols can reconstruct an audience. “Fiske coined the

386. Id. at 148.
387. See Lund, supra note 382, at 73–74.
390. See Buccafusco, supra note 381, at 1261.
391. Id.
392. Id.
term ‘semiotic democracy’ to describe a world where empowered audiences freely and widely engage in the use of cultural symbols or narratives to express meanings that are different from the ones intended by their creators.”

The relationship between musical expectation and emotion was explored by Meyer in the 1950s, and David Huron has recently elaborated on the topic. Scientists note, “musical expectation plays an important role in musical pleasure.” Music theoreticians consider “musical anticipation as one of the principal means by which music conveys meanings and emotion.”

Huron observes, “[t]he idea that people prefer the familiar is a long-standing concept in folk psychology.”

Max Meyer, a German psychologist, conducted an experiment one hundred years ago, in which he asked people to listen to him play short piano works. Meyer observed that the more he repeated a piece, the more the listeners enjoyed it.

One of Huron’s most substantial contributions to the cognitive science of music is the application of general theories of expectation to the realm of musical expectation. Huron discusses how particular kinds of sounds evoke certain physiological responses. Huron’s book Sweet Anticipation claims that as the essential function of human cognition is prediction, musical processing, as an act of human cognition, is fundamentally expectational.

Huron suggests three “strong emotions are closely linked to

393. Tan, supra note 388, at 81.
394. HURON, supra note 6, at 2; see generally LEONARD B. MEYER, EMOTION AND MEANING IN MUSIC (1956).
395. See generally HURON, supra note 6.
397. See Peter Vuust & Chris D. Frith, Anticipation is the Key to Understanding Music and the Effects of Music on Emotion, 31 BEHAV. & BRAIN SCI. 599, 599 (2008).
398. HURON, supra note 6, at 131.
399. Id.
400. Id.
401. See generally id.
402. See generally id. at 41–57.
surprise: *laughter, awe*, and *frisson*.”\(^{403}\) Such emotions are rare, but memorable, and arise in response to particular moments or passages.\(^{404}\) The science of laughter can be “circuitous” according to Huron, although he considers that “[p]erhaps the single most important lesson from research on laughing is that laughter is predominantly a *social* response.”\(^{405}\)

The humorous devices and elements in Joseph Haydn’s music require convention.\(^{406}\) Executing humor therefore requires composers to rely on clichés or normative styles and genres, because “[h]umor requires surprise[,] surprise require[s] an expected outcome[,] and an expected outcome require[s] internalized norms.”\(^{407}\) Huron thus concludes, “that musicians cannot generate laughter, awe, or frisson without violating the listener’s expectations.”\(^{408}\) Furthermore, as Bhagwati argues, “[c]omposing is a very peculiar way of contextualizing sound. For it relies on a tightly regulated behavior towards music—namely, the expectation of re-listening and re-production. In other words, composition needs faithful interpreter performers and, vitally, an audience.”\(^{409}\)

Given the definition of audience expectation, the following section analyzes the relationship between audience expectation, parody, and copyright law in more detail.

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403. *Id.* at 25. Huron explains:

Laughter is a state of jocular amusement that is characterized by a distinctive “ha-ha-ha” vocalization. Awe is a state of astonishment or wonder that may cause a person to gasp. Frisson is the feeling you have when “chills” run up and down your spine and the hair stands up on the back of your neck.

404. *Id.* at 26.

405. *Id.* at 27 (“Robert Provine estimates that people are thirty times more likely to laugh in the presence of another person than when they are alone.”).

406. *Id.* at 36. A good example of such convention is the fourth movement of Haydn’s *String Quartet no. 30* in E-Flat Major (Opus 33 No. 2)—otherwise known as *The Joke*—written in 1781. See MKI Artists, *Ariel Quartet—Haydn: Quartet in E-flat major, Op. 33 No. 2, “Joke*”, YOUTUBE (Aug. 28, 2012), https://www.youtube.com/watch?v=iZo9FoajL4A. See also *Joseph Haydn*, ENCYC. BRITTANICA, https://www.britannica.com/biography/Joseph-Haydn (last updated Mar. 12, 2024) (“Joseph Haydn . . . was an Austrian composer who was one of the most important figures in the development of the Classical style in music during the 18th century. He helped establish the forms and styles for the string quartet and the symphony.”).


408. *Id.* at 304.

2. Audience Expectation and Copyright Law

The “notion of audience as justification for copyright has deep roots in the law’s origins.”\(^{410}\) Indeed, “[t]he relationship between authorship and audience is undeniably a cornerstone of copyright.”\(^{411}\) Thus, even prior to the recognition of authors’ rights with the Statute of Anne in 1710,\(^{412}\) various rights were granted to publishers to control copying by third parties and sales to hungry audiences.\(^{413}\)

Audiences play a vital role in the practical administration of copyright law. Courts and scholars have long looked to audience response to help define the proper scope of copyright protection,\(^{414}\) and to decide whether an alleged infringing work can be properly understood as a parody, and thus protected by the fair use doctrine.\(^{415}\) Courts have also looked to the “reasonable audience member” in disputes over infringement and fair use in order to define the proper scope of copyright protection.\(^{416}\)

Judge Putnam considered the public an arbiter of infringement in *Henderson v. Tompkins* as the defendants’ motion to dismiss argued their iteration of the musical, *Ali Baba, or Morgiana and the Forty Thieves* was “too trivial to demand the notice of the law.”\(^{417}\) Judge Putnam commented:

> [T]he very essence of some kinds of humor is in unexpectedness and lack of proportion . . . neither courts nor juries have any certain rule for valuing it . . . reception by the public may be the only test on the question of insignificance or worthlessness under the copyright statutes.\(^{418}\)

\(^{410}\) McFarlin, *supra* note 379, at 448.

\(^{411}\) *Id.* at 446.

\(^{412}\) Statute of Anne, 8 Ann. c.19/c.21 (Gr. Brit.), https://statutes.org.uk/site/the-statutes/eighteenth-century/1710-8-anne-c-19-c-21-the-statute-of-anne/ (an early modern British copyright statute granting literary authors and their assigns the “sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer”).

\(^{413}\) McFarlin, *supra* note 379, at 448.


\(^{415}\) McFarlin, *supra* note 379379, at 448.

\(^{416}\) *Id.*

\(^{417}\) *Id.* at 464.

\(^{418}\) *Id.*
However, it should be noted that audience tastes shift across culture, space, and time. What is liked by one today may be disliked tomorrow, and perceptions differ across cultures. The focus on audience has normative, as well as descriptive, implications. The potential impact of the concept of audience participation on copyright is far reaching. However, despite its importance to copyright law, the place of the audience in copyright has largely been ignored by academic literature.

III. PARODY AND COPYRIGHT LAW

A. Parody at a Crossroads between Two Paradigms

As discussed earlier, the creators of parody rely on the original work to create their parody of it, in most cases without receiving any authorization from the original author. Thus, parody challenges some of the most basic principles of intellectual property law such as originality, ownership, and authorship; parody further poses a genuine challenge to copyright law. A dominant conception of intellectual property rights tends to grant acts of copying with negative connotations, despite the role of copying as a basic component of “creativity in many contexts of musical and other artistic practices, as well as a critical element in musical collaboration.”

Due to the inevitable depreciation in the informational potential and the limitation on the possibilities of the expressive form, it is easy to judge works of parody as parasitical and lightweight in the aesthetic sense—as “light” entertainment. However, regardless of whether it has a social function or not, parody surely influences how “we perceive

419. See id. at 455.
420. Fromer & Lemley, supra note 414, at 1251.
421. There are a few articles that focus on a particular audience in a single area of law. See, e.g., McFarlin, supra note 379; Fromer & Lemley, supra note 414; Rebecca S. Eisenberg, Obvious to Whom? Evaluating Inventions from the Perspective of PHOSITA, 19 BERKELEY TECH. L.J. 885 (2004); Mark D. Janis & Timothy R. Holbrook, Patent Law’s Audience, 97 MINN. L. REV. 72, 89–120 (2012); Lund, supra note 382, at 61.
422. Parody, LEGAL INFO. INST., https://www.law.cornell.edu/wex/parody#:~:text=In%20the%20United%20States%2C%20parody,combat%20claims%20of%20copyright%20infringement%20(July%202020).
art forms, cliché, stylistic inheritance, and genre, and forms a unique and important tool for public criticism.

Discussion of the status of parody appears to be located at the crossroads between two central paradigms. According to the first paradigm, the protection of intellectual property would seem to call for a strict property right that grants the creator full control of their work and its usage. Thus, use without the creator’s authorization should be strictly prohibited except in unusual circumstances. Accordingly, parody would be required to meet weighty tests, demonstrating that the work of parody in question possesses a unique social value, and only then would copying be permitted under intellectual property law. Because an understanding of the original work is vital, a parodist must use the “heart” of the original song. In this sense, a parodist is both a parasitic user and an original creator.

The second paradigm that arises regarding copying, plagiarism, or forgery, and that may also be applied to parody is that parodists profit from the work of others, while that profit should have accrued to the original creator, who is now deprived of the profits they deserve. Thus, according to this paradigm, parodists are as parasitic as forgers and

424. Mera, supra note 150, at 99.
425. Cf. id.
426. See generally Jewell & Louise, supra note 79, at 8 (discussing Richard Posner’s view that “fair use exceptions in copyright law should only be granted to parodists under very tightly constrained circumstances.”).
428. Abraham Drassinower, A Note on Incentives, Rights, and the Public Domain in Copyright Law, 86 NOTRE DAME L. REV. 1869, 1884 (2011). Since parody often involves a question or direct quote of parts of an original work, parody may be interpreted as problematic, much like plagiarism or forgery, since the fame of the original author is taken away from them in order to give value to the derivative work. Jewell & Louise, supra note 79, at 8. In addition, parody can also be interpreted as problematical due to another characteristic it shares with forgery: parody diminishes the value or else twists our understanding of the original work. Id. Jewell and Louise speak to this problematic characteristic of forgery:

FORGERY and PLAGIARISM are both forms of fraud. In committing art forgery, I claim another person’s work is my own. In forgery, someone’s name is stolen in order to add value to the wrong work; in plagiarism someone’s work is stolen in order to give credit to the wrong author.

Id. (citing Denis Dutton, Forgery and Plagiarism, in ENCYCLOPEDIA OF APPLIED ETHICS (Ruth Chadwick ed., 1998).
429. See id.
plagiarists. Furthermore, it has been claimed that the parody “is likely to serve a substitute for the original work,” thereby depriving the original creator of their legitimate intellectual property rights.

In contrast, the freedom of expression approach claims that it is the very ownership of information that requires justification. From this perspective, the question is not whether the parody justifies an exception that would enable copying, but rather whether limitations on copying are justified based on the principles and arguments underlying the general prohibition against plagiarism.

According to Enlightenment thinker and philosopher Immanuel Kant, “[f]reedom of speech, which is crucial to the enlightenments of both society and individual, is an ‘innate’ right” that “belongs to everyone by nature, independently of any act that would establish a right.” Parody sometimes collides with free speech interests, thereby requiring courts to formulate appropriate tests to resolve this conflict. While “[f]ree speech rights can be comfortably and internally accommodated within existing IP doctrine—such as the fair use defence in copyright . . . — many other challenges to the authorial narrative may fall outside constitutional protection.” For example:

430. Id.
432. See generally Drassinower, supra note 428, at 1884.
433. Rivlin, supra note 85.
435. See Hustler v. Falwell, 485 U.S. 46, 57 (1988) (holding that a parody, which no reasonable person would expect to be true, is protected free speech); see also Satire is Protected Free Speech, LIBR. OF CONGRESS https://www.loc.gov/exhibitions/drawing-justice-courtroom-illustrations/about-this-exhibition/significant-and-landmark-cases/satire-is-protected-free-speech/#:--text=The%20U.S.%20Supreme%20Court%20unanimously,true%2C%20was%20protected%20free%20speech (last visited Mar. 21, 2024). But see Jack Daniel’s Props., Inc v. VIP Prods., 599 U.S. 140, 163 (2023) (holding that the Rogers test for identifying protected fair uses of trademarks in “expressive works” does not apply if the challenged trademark is used as “a mark.”).
436. Tan, supra note 388, at 97.
IP law creates boundaries that enfranchise certain types of speech at the expense of others. And, in doing so, it enables certain types of legal and illegal dissent, conferring legitimacy on some types of speech through the prism of fair use, but often excluding other types of expression from protection. . . . Intellectual property law tends only to protect appropriative expression that occupies the extreme poles of audience interpretation—works that either adopt, oppose, or completely transform the cultural meaning of an original commodity. Because the law fails to protect appropriative works that fall short of these poles, the marketplace of speech remains locked in a perpetual dance of opposites rather than protecting true expressive diversity.437

Parody’s uniqueness derives from the fact that parody is unavoidably dependent on an existing work, while parody inherently alters and reforms the original creator’s perception of the work, all while preserving a constant dialogue with this perception. Zemer notes that parody embodies repetitiveness and cues to the original work, but also includes difference and criticism.438 These characteristics reflect the place of the “other” in the creative process of parody, which relies on intensive dialogical relations between the original creator, the parodist, and the intended audience.439 Parody utilizes the core of the original work but creates a space in which creative freedom exists, independent of the accessibility of unprotected expressions (such as ideas and facts), and even permits use of protected portions of the work.440 As Zemer claims, “[p]arody embodies the social transaction model in all its glory. It was formed following a social transaction, it generates additional social transactions in its wake, and it limits the intellectual property right owners’ ability to control the work.”441 As David Tan argues,

437. Id. (citing Sonia K. Katyal, Semiotic Disobedience, 84 WASH. U. L. REV. 489, 497 (2006)).
438. Zemer, supra note 74, at 343.
439. Id.
440. See Copyright: Parody, LIBRS.: IND. UNIV. BLOOMINGTON, https://guides.libraries.indiana.edu/c.php?g=158548&p=1581719#:%20parody%20can%20be%20a%20permission%20as%20courtesy (last visited Mar. 13, 2024) (“A parody can be a fair use under the Copyright Act, meaning the creator of the parody does not need the permission of the owner of the copyright in the earlier work.”).
441. Zemer, supra note 74.
[p]arody may thus be seen as contributing valuable commentary and criticism to the marketplace of ideas, or advancing democratic debate on matters of public interest through the use of irreverent humour, and it can be safely assured that its omnipresence in the internet in personal blogs and social networking sites will continue with the blessings of the law.442

B. Parody as Fair Use: American versus Israeli Approaches

For centuries, parody and satire have been used for art, criticism, and humor. As early as the 1960s, United States case law reflected that “[p]arody and satire are deserving of special freedom—both as entertainment and a form of social and literary criticism.”443 The American Copyright Act of 1976 affords works of parody with protection under the fair use doctrine.444 The fair use doctrine sets out a priori of permitted uses of copyright-protected works for purposes that serve the public interest; these purposes justify the limitation on exclusivity and control by authors over the use of their copyright-protected works by the public.445

American courts dealt with the protection of parody in the 1980s.446 In Elsmere Music, Inc. v. National Broadcasting Co.,447 the protection provided to parody was put to the test. The creators of the commercial jingle, “I love New York,” sued the NBC television network for their use of the music on Saturday Night Live in a skit focusing on the virtues of the biblical city of Sodom.448 The skit made use of the jingle’s music, but replaced “New York” with “Sodom.”449 The Second Circuit affirmed the district court, reasoning that it “correctly applied the doctrine of fair use...”450

442. Tan, supra note 91, at 116.
445. See id.
447. Id.
448. Id.
449. Id.
450. Id. (explaining in a footnote that the “District Court concluded... that the parody did not make more extensive use of the appellant’s song than... necessary to ‘conjure up’ the original”). Further, the court’s ruling expressed the sentiment that “in today’s world of often unrelieved solemnity, copyright law should be hospitable to the
Several years later, in *Fisher v. Dees*, plaintiffs Fisher and Segal, composers of the song “When Sunny Gets Blue,” refused to grant Dees consent to use the song in a “comedic and inoffensive version.” Dees nonetheless produced a parody of the song under the title, “When Sunny Sniffs Glue.” The court approved the use as permitted under the fair use doctrine, by examining the purpose and character of the parody and the economic effect the parody had on demand for the original use. The Court ultimately reasoned that each work was intended for a distinct purpose and that the parody had no tangible financial impact on the original work.

Furthermore, parody’s important status in American law was recognized by the Supreme Court in the *Campbell v. Acuff-Rose Music Inc.* The judgment, “was the most significant copyright decision of the twentieth century in terms of doctrinal developments of the law.” The Supreme Court in *Campbell* considered the four fair use factors as applied to a parody. The four fair use factors to be considered on balance are: (1) the purpose and character of the infringing use, specifically whether the infringing work “transforms” the copyrighted work; (2) the nature of the copyrighted work; (3) the amount and substantiality of the use; . . .”

452. *Id.* at 434.
453. *Id.*
454. *Id.* at 438.
455. *Id.* In this case, the court ruled that limiting the extent of permitted copying to that which is sufficient to conjure up the original is too harsh on the parodist. *Id.* The court explained that the parodic effect would not be achieved without copying the music of the original song almost completely. See *id.* at 439. The court ultimately selected the approach that favored the parodist. *Id.* at 440.
458. *Campbell*, 510 U.S. at 574.
copyrighted work used; and (4) the market effect the infringing use has on demand for the original.\footnote{459}

The case centered on the plaintiff’s exclusive rights to the song, “Oh, Pretty Woman.”\footnote{460} The rap music version by 2 Live Crew, who changed the words to “big hairy woman,” was found to constitute parodic criticism of the original.\footnote{461} The Supreme Court held that the Sixth Circuit Court of Appeals failed to analyze fair use properly, and required remand so that the Sixth Circuit could consider all four fair use factors on balance. Ultimately, the 2 Live Crew version was found to be a fair use of “Oh, Pretty Woman”\footnote{462}.

In Campbell, the Supreme Court also noted the importance of parody as a form of social communication that was aligned with the very core of fair use protection, which “lie[s] at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”\footnote{463} Indeed, parody, including “crude rap spoof[s]” like the song that was the subject of Campbell v. Acuff Rose Music, is the “type of humor [that is] central to the American conversation,”\footnote{464} irrespective of the original authors’ attempts to treat parodies as unwanted or coerced speech.\footnote{465}

According to the Supreme Court in Campbell, transformativeness, as considered by the first fair use factor, not only occupies the core of the fair use doctrine, but further reduces the weight of all other factors such that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a

\footnote{459} Id. at 577.
\footnote{460} Id. at 571.
\footnote{461} Id. at 582.
\footnote{462} TONY GREENMAN, זכויות יוצרים [COPYRIGHT] 431 (2d ed. 2008) (Isr.).
\footnote{463} Campbell, 510 U.S. at 579.
\footnote{465} Zemer, supra note 74 (citing ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 59–60 (2010)). As Zemer notes, “[p]arodies became a form of communication that reflected society’s image and need for humor and freedom from official restraints on expressive creativity a form of communication that dismantled the primacy of authorial control and the hegemonic power of right holders to facilitate creative transactions,” thus establishing vibrant “interpretive communities.” Id. See also DAVID TAN, THE TRANSFORMATIVE POTENTIAL OF COUNTERCULTURAL RECODING IN COPYRIGHT LAW: A STUDY OF SUPERHEROES AND FAIR USE, in DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS 403 (Irene Calboli & Srividhya Ragavan eds., 2015).
The parodist generates tension within copyright law, in part because the parodist is both a “user” and a “creator.”

This tension within copyright law, which seeks to protect the intellectual property owner from violations by the parodic work, was highlighted by the Supreme Court, which ruled that parody constitutes a “difficult case” since the “humor” or “interpretation” it contains derives from the tension between the “familiar source” and its “parodic cousin”:

Parody’s humor . . . springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin . . . . Once enough has been taken to assure identification, how much more is reasonable will depend . . . on the extent to which the song’s overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original.

The Supreme Court found that parody is entitled to fair use protection under the law, since not only does parody criticize earlier works, but it also generates new work in the process: “[I]ike less ostensibly humorous forms of criticism, [parody] can provide social benefit, by shedding light on an earlier work, and in the process creating a new one.”

The Supreme Court adopted the position of Circuit Court judge Pierre N. Leval that, although transformative use is not essential to determine that a given use is fair, this use optimally serves the rationale underlying copyright law of promoting science and art. The Supreme Court noted that parodic work can be considered to possess transformative value, as it generates the social value of criticism by presenting earlier works in a different light.

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466. Campbell, 510 U.S. at 579.
468. Campbell, 510 U.S. at 588.
469. Id. at 580.
471. Campbell, 510 U.S. at 579.
472. Id.
473. Id. at 599.
of commentary or criticism, can be used to claim fair use, referencing the *Fisher v. Dees*474 and *Elsmere* cases.475

The Supreme Court began its decision in *Campbell* by attempting to define parody.476 Justice David Souter ruled that the justification for a parodist to appropriate existing works is that they make use of existing elements from previous works to create a new work which, at least in part, comments on the original work.477 Justice Souter added that, insofar as the new work has no critical significance to the previous work, and the appropriation occurred only in order to attract attention or avoid the trouble of making a new work, the argument in favor of finding a sufficiently transformative use narrows, and loses significant weight.478

However, nearly three decades have passed since the landmark *Campbell* decision and it would seem that there is a need to broaden the decision’s definition of parody. Over the past decade, courts have, in some cases, developed a rather liberal standard of fair use. One example is the pivotal decision in *Cariou v. Prince*,479 a case regarding the defendant’s reuse of the plaintiff’s photographs in a series of paintings and collages, in which the court expanded the definition of “transformative” in fair use cases.480 In finding most instances of reuse in Richard Prince’s contested artworks to be fair use481, the Second Circuit focused on the content of Prince’s art, which juxtaposed images of Rastafarians, especially their faces, alongside images of partially naked women.482 The court explained: “to qualify as a fair use, a new work generally must alter the original with a ‘new expression, meaning, or message’”

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477. *Id.*
478. *Id.* In order to clarify this point and the distinction between satire and parody, the Court specifically referred to “satire” and ruled that satire “can stand on its own two feet,” requiring no appropriation from earlier works. *Id.* at 581. See Israel (Ruli) Ber, [*Law of Loughter: Three Legal Paradoxes of Satire and Copyright*] 23–24 (presented at the Annual Israeli Intellectual Property Scholars Workshop, Bar-Ilan University, Oct. 18, 2012) (Isr.).
480. *Id.* at 698.
481. *Id.* at 706.
482. *Id.* at 711.
Implementing this approach, the court found that Prince had made transformative use of the photographs based on the content of Prince’s creations, noting that “[the artist’s] composition, presentation, scale, color palette, and media are fundamentally different and new compared to the [original] photographs, as is the expressive nature of Prince’s work.”

In Cariou, the Second Circuit reiterated that a work need not “comment on the original to be transformative, and went even further to state that transformativeness will be judged based on how the work may ‘reasonably be perceived’ by the audience, rather than relying on an artist’s stated intent.” Cariou certainly placed greater emphasis on the reasonable perception of audiences regarding “the creation of new information, new aesthetics, new insights and understandings . . .”

Like Richard Prince, Jeff Koons repurposes original photographs in order to convey new meanings through repurposing preexisting works. Robert Kausnic discussed Koons’ work within the context of copyright law:

Koons expressed the purpose of allowing the viewer to create the meaning from his or her own ‘personal experience with these objects, products, and images and at the same time gain new [and unspecified] insight into how these affect our lives.’ In a sense, Koons carefully refused to infuse particular meaning to the work, but rather empowered the viewer with establishing his or her own relative meaning.

483. Id. at 706–07.
484. Id. at 706.
486. Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013) (internal quotations omitted).
487. Jeff Koons is an American artist and entrepreneur, hailed as an early icon of postmodern artistic practice. See Peter Jaszi, Is There Such a Thing as Postmodern Copyright?, 12 TULANE J. TECH. & INTELL. PROP. 105, 105, 107 n.3 (2009).
Koons’ repurposing of photographs was examined by the court in *Blanch v Koons*. Peter Jaszi suggests that *Blanch* “may signal a general loosening of authors’ and owners’ authority over, by now, not quite so auratic works, allowing greater space for the free play of meaning on the part of audience members and follow-up users who bring new interpretations.”

In Israel, in accordance with the Israeli Law, copying protected material constitutes a violation of the author’s intellectual property rights. The legislature has, however, seen fit to determine that under certain circumstances it would be permissible to make use of a protected work for specific purposes. Currently, Section 19 of the Israeli Law stipulates that fair use of a work is permissible for purposes such as “private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.” Parody and satire, as well as academic criticism, have been included under the definition of the term “criticism,” at least for classification of the purpose of use.

Within this framework, the Israel Supreme Court investigates a variety of considerations: Was the work created for commercial use? Is the parody directed at the original work as a subject of parody and ridicule?

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489. *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).
492. *See id.* at §§ 18–32.
493. *Id.* at § 19.
495. *See CivA 2687/92 Geva v. Walt Disney Co., 48(1) PD 251, 275 (1993) (Isr.) (ruling that the idea underlying the protection in Section 2, and the desire to enable the promotion of culture and social values embodied in derivative works, are equally valid for parody and satire). In investigating the legitimacy of parody, courts must balance between two conflicting considerations: the creator’s interest in commercializing the protected creation and the public interest in freedom of expression. *Id.* In order to examine the fairness of the work’s use in the context of this Section, all of the following shall be considered: (1) the purpose and nature of the use; (2) the nature of the work made use of; (3) the extent of the use, both qualitatively and quantitatively, compared to the work as a whole; (4) the use’s impact on the value and potential market of the original work. *See generally id.; see also Niva Elkin-Koren*, זכויות משתמשים[Users’ Rights], *in [CREATING RIGHTS: READINGS IN COPYRIGHT LAW] 327, 369–73 (Michael Birnhack & Guy Pessach eds., 2009) (Isr.).*
or does it merely use it as a foil to carry out far broader criticism? Does the work constitute productive use?\footnote{See Garrett, supra note 27, at 240.} What economic impact does the derivative work have on the original?\footnote{Michael Birnhack notes that the distributional objective of the property institution of copyright, with respect to limiting accessibility of opportunities for creative activity, can also be significantly advanced via the doctrine of fair use. See Michael Birnhack, \textit{ושליטה תרבותית מקוריות בדיני זכויות יוצרים} [The Regulatory Originality in Copyright Law and Cultural Control], 2 ALEY MISHPAT 347, 348 (2002) (Isr.). He claims that it is proper, in this context, to implement the American law approach, according to which any transformative use should as a matter of principle be entitled to the fair use protection, even if it seemingly involves only minor additions or changes. \textit{Id}.}

Zemer argues that the classification under Israeli Law creates a number of difficulties.\footnote{First, courts find it difficult to distinguish between criticism, satire, parody and burlesque. Zemer, supra note 74, at 343. These terms are used interchangeably, without any distinction. Second, the term “criticism” in intellectual property law can change in meaning from time to time. \textit{See id}. In the past, this term may have been interpreted as including only written criticism, but currently it also includes criticism in other forms. \textit{See id}. Third, since copyright laws incorporate vague concepts such as “fairness” in use or a distinction between an “expression” and an “idea,” in the absence of clear guidelines regarding the extent of protection, a culture of litigation and sanction has developed, and wary users may prefer to avoid using existing works in parody. \textit{See id}. at 347.} Zemer insists that creative liberties have increasingly become a field of private property, noting, “the doctrine of copyright is meant to realize a wider interest, the interest of the public in works that might enrich—as in the case of a musical work—our culture.”\footnote{PLA 6141/02 Acum Ltd. v. Galey Zahal Radio Station 57(2) PD 625, § 6 (2003) (Isr.), CivA 513/89 Interlego A/S v. Exin-Lines Bros. SA, 48(4) PD 133, 161 (2003) (Isr.) (referring to President Shamgar).} Nonetheless, Zemer notes that although parody is conceived as a free, critical, and humoristic expression, it does not constitute a “limitless carnival”\footnote{Zemer, supra note 74, at 344. According to Mikhail Bakhtin, parody goes beyond a means of expressing criticism—it embodies the dialogical dimension of art and free creation. Parody and laughter do not repel the official and the serious, rather complement them—they rescue them from dogmatism, fanaticism and naivete, from the only meaning. \textit{See BAKHTIN}, supra note 46, at 122–23. Jeanne Fromer notes that “parody borrows expression that is valuable in and of itself and confers on that expression new meanings, frequently and deliberately muddying the original author’s viewpoint.” \textit{See Fromer}, supra note 75, at 116.} and it is important to delineate the boundaries of parody, or else a culture
of permissive imitation will prevail, through which acts of copyright violation will receive fair use protections.\(^{501}\)

One approach views fair use as a tool to balance between the rights of creators and users.\(^{502}\) Various scholars, however, have emphasized the need to rebalance and shift the focus of copyright towards users’ rights.\(^{503}\) Attempts to rectify the balance between competing interests at

501. In the framework of shaping the boundaries of the right to create parody, courts are obligated to consider the essence of parody as a form of expression whose objective is to support a free dialogue—as a focus of criticism, laughter and creative chaos. See Zemer, supra note 107, at 344. It would seem that this argument supports the approach of Richard Posner, who claims that the fair use exception in copyright law should only be granted to parodies under very limited circumstances, for fear that in certain cases people might favor the parody over the original work. See Jewell & Louise, supra note 79, at 8. In addition, he claims that the application of a broad fair use exception would encroach on artists’ incentive to generate original works, in the event that they could come to believe they would not be entitled to compensation for use of their intellectual property. See id. Posner believes that the fair use exception should only refer to critical parodies, when the original creator would not have provided permission for use, but there is a public interest in allowing the criticism to be heard. See id., at 8. As Geiger and Izyumenko note:

One of the most frequent critiques of the fair use doctrine is its vagueness and lack of legal certainty. Since the doctrine is largely construed judicially, the application of different fairness factors to each particular case has been considered at times controversial if not arbitrary. This would lead, in the opinion of some authors, to a situation of legal uncertainty in which the users cannot be sure in advance which use is permissible. Such a situation can, the argument unfolds, have chilling effects on certain uses that could have otherwise been ruled fair to the detriment of both ordinary users and Small-to-Medium Enterprises . . . .


503. Elkin-Koren extensively reviewed the importance and legal status of users’ rights and how their anchoring in law challenges the perception of the licensing of use as a unilateral action of licensing by the rights holder. See Elkin-Koren, supra note 49595, at 375. Elkin-Koren emphasizes the inner aspect of the instrumental approach to intellectual property law, which emphasizes the fact that these rights are a construct of law. Id. Law can therefore shape the rights and their scope in a manner which will best realize their objective. Id. This approach seeks to promote certain uses that are perceived as important as an inseparable part of the creative process. Id. Thus, for example, when a creator quotes from another work, they are performing an act of correspondence with the
play have led to developments in Canada, starting in the early 2000s, where the Supreme Court adopted the notion of “user rights” within the application of “fair dealing” in order to bring exceptions on par with the personal property rights of the copyright owner.504

The Canadian doctrine of fair dealing is, to a large extent, one of the strongest and most flexible copyright exceptions in the world. Canadian courts have determined that a restrictive interpretation of the fair dealing statute will upset the balance between the rights of creators and users.505 Thus, “a parody exception in copyright law seeks to rectify the balance between rights-holders, users, and subsequent authors.”506 Additionally, it may present a new type of creative practice which will likely justify a separate exception.

C. The Rise of Transformative Use

1. Transformative Use in the Post-Modern Era and the Digital Age

A highly influential factor defining the character of use under the fair use doctrine is transformative use.507 It is important to note that the concept of recontextualization is not new as it emerged a century ago, with Marcel Duchamp’s, The Urinal, and Kurt Schwitters’ collages. In works of art like this, context is central: the significance of an iconic object

previous work. Id. The readers/observers recognize the intertextuality, the discourse between the works, and the significance is that they enrich the original work. See Michael Birnhack, Judicial Work: Fair Use in Israeli Copyright Law, in LAW, CULTURE AND LITERATURE 84 (Nili Cohen Book, Ofer Groskopf & Shai Lavi eds., 2017).


506. JACQUES, supra note 4, at 43.

changes based on its proximity to another object.\textsuperscript{508} Meaning is contextual, rather than absolute, and can exist simultaneously on multiple levels.\textsuperscript{509} This issue, however, raises serious questions regarding creation in the postmodern age and the proper scope of copyright in the digital age. A central purpose of copyright law is to incentivize authors and encourage creation, in order to expand and diversify the world of expression.\textsuperscript{510} That is why copying a protected work constitutes an infringement on the author’s rights and may entitle the author to a variety of remedies.

Various leading scholars have researched the development of fair use in the last decades. Jane Ginsburg, for example, in her review of the most significant developments in copyright law between 1992 and 2012, concludes that those twenty years marked an “extraordinary expansion” of the fair use doctrine, and in particular, the concept of transformative use, with recent cases demonstrating a shift from focusing on finding a “transformative work” to discovering a “transformative purpose”.\textsuperscript{511}

Barton Beebe’s pioneering empirical study of fair use decisions in the United States, which covered judicial opinions from 1978 to 2005,\textsuperscript{512} and Matthew Sag’s statistical analysis which focused on the \textit{ex-ante} predictability of fair use based on 280 fair use cases decided between 1978 and 2011,\textsuperscript{513} affirm the important role of transformative use. Interestingly, it is Neil Netanel’s study of U.S. district and circuit court cases decided between 2006 and 2010 that posits “the transformative use paradigm ascended to its overwhelmingly predominant position only after 2005,

\textsuperscript{508} Kate McCallum et al., \textit{The Art Experience}, 11 REV. PHIL. & PSYCH. 21, 21–22 (2020) (discussing the contextual experience generally and specifically by referencing how the objects depicted in Marcel DuChamp’s works are perceived differently depending on the context in which the objects appear).

\textsuperscript{509} See \textit{id. at 22 (“[M]eanings are not inherent in the object, but are teased out by the viewer when considering why the great artist has placed this thing in this place in this way.””).

\textsuperscript{510} Guy Pessach, Justifying Copyright Law, at 361.


following the period that Beebe studied..." Netanel’s data reveals "a strikingly high... correlation between judicial findings regarding transformativeness and fair use outcomes."

Yet, the debate over where to draw the line between legitimate use of the cultural repertoire, for dialogue and discourse, and illegitimate plagiarism, is one of the most challenging questions for the digital age and postmodern era. One of the central questions courts must examine when determining if the use of the original work is fair, is whether the transformative usage of the earlier work adds a new expression that did not previously exist, causing it to have a message or purpose different from the original work.

Furthermore, various scholars have noted the difficulty courts have in interpreting art in general, and postmodern art in particular. Presenting convincing arguments in court related to artistic judgement may be even more challenging than presenting arguments from scientific fields, partly due to the occasionally avant-garde nature of artistic creations. These difficulties will only increase over time, because activity in the field of expression and creativity, particularly unconventional innovation, is in many cases groundbreaking, and its full significance and contribution are not always recognized in real time. For example, Marcel Duchamp’s “twisting” work, L.H.O.O.Q. 1919, which added a mustache and goatee to the face of the Mona Lisa, transforming her into a man, is now considered a work of artistic significance. Nevertheless, when L.H.O.O.Q. was created, it was seen as no more than a mere distortion of a masterpiece with zero contribution to the world of art and

515. Id. at 742.
517. See Birnhack, supra note 503, at 118 (citing Patricia Kreig, Copyright, Free Speech, and the Visual Arts, 93 YALE L.J. 1565 (1984)).
518. Rivlin, supra note 85, at 53.
Guy Pessach claims that, on a practical level as well, it is doubtful whether courts have the tools and means to determine when a distortive use of an existing work contributes to the realization of the various purposes of the freedom of expression principle, as well as when, from the subjective viewpoint of this derivative creator, the distortive use is indeed required to realize their right of freedom of expression.

Michael Birnhack has also emphasized the difficulty courts have in understanding the post-modern work. In many cases of post-modern art, works are created with demonstrative use of earlier works, but with the addition of small manipulations: Andy Warhol copied Campbell Soup’s label’s cover art, which one might presume is a protected work. He also expanded it, transferred it from three dimensions to two dimensions, and hung it in an environment which clarifies that it is a work of art. According to the law, none of this should matter: this could be seen as a derivative work, and if performed without permission, it could be considered a copyright violation. Warhol imbued his art with new content, creating new meaning and garnering widespread recognition for his originality.

The same applies to the work of Jeff Koons: Koons sculpts massive statues which are almost precisely based on photos taken by others. Thus, for example, he sculpted a massive statue based on a simple postcard of a husband and wife holding their newborn puppies. Koons included the work in a series of sculptures titled “Banality,” thereby created a completely different meaning. Birnhack notes that implementing the transformative use test requires the interpreter

522. Id.
523. See Birnhack, supra note 503, at 118.
524. Id.
525. Id.
526. Id.
527. Id.
529. Id. at 475.
530. Id.
531. Id.
(in contrast to the tendency of the courts) to utilize artistic theory as part of the legal interpretation process.\textsuperscript{532}

Art curator Nicholas Bourriaud speaks of artistic work as a “bundle of relations with the world, giving rise to other relations, and so on and so forth, ad infinitum”\textsuperscript{533}; more importantly, for him, “forms come into being, from the ‘deviation’ and random encounter between two hitherto parallel elements,”\textsuperscript{534} tracing “lines drawn both in space and time, materialising trajectories rather than destinations,” in a new type of “journey-form.”\textsuperscript{535} Bourriaud refers to Argentinian writer Jorge Luis Borges, who said that Kafka’s writing was transformative, in that many writers changed the way they wrote after being exposed to Kafka.\textsuperscript{536} This suggests that every meaningful “gesture [of artistic expression] produces

\textsuperscript{532} Tanya Reinhart writes that:

Pop sees itself as a history of culture. Pop painters replicate, copy, document cultural products. One of the assumptions of this recycling is that there are no differences between “low” and “high” materials, between high art and popular culture, because the artist, like the journalist, is the one who builds the history of their time, and for them there a Coca-Cola bottle, a Manet painting and a famous character all share equal status.

Tanya Reinhart, \textit{מקוביזם למדונה: יצוג וסובייקט באמנות המאה העשרים} [Cubism to Madonna: Subject and Representation in 20th Century Art] 100 (2000) (Isr.). Avigdor Feldman, who represented Dudu Geva in the famous Moby Duck case, see CivA 2687/92 Geva v. Walt Disney Co., 48(1) PD 251 (1993) (Isr.), concerning fair use, clarifies this difficulty in his picturesque language, as follows:

I sought, via the opinions of Menahem Perry, the literature researcher, and Ziva Ben Porat, head of the Poetics and Semiotics Unit at the Porter Institute, to explain to the judges what postmodern art is, what citation is, what referencing is, what cultural icons who float through public space are, I said Andy Warhol, I said Cindy Sherman, I said pop art, and the judges said Bahhhh . . . .


\textsuperscript{533} \textit{NICOLAS BOURRIAUD, RELATIONAL AESTHETICS} 22 (S. Pleasance & F. Wood trans., 1998).

\textsuperscript{534} \textit{Id.} at 19.

\textsuperscript{535} Barham, \textit{supra} note 364333, at 135 (citing \textit{NICOLAS BOURRIAUD, ALTERMODERN EXPLAINED: MANIFESTO} (2009) (citations omitted)).

\textsuperscript{536} \textit{NICOLAS BOURRIAUD, THE PROBLEMATIC OF TIME IN CONTEMPORARY ART} (Ami Asher trans., 2013).
genealogy that never existed before.” Bourriaud, finally, asserts that “[t]oday, it is said that nothing is finished.” Thus, parody is an example of transformative use, adding new expression to the original artwork.

2. Transformative Use in Music

With respect to originality in music, Keith Richards states “there’s only one [original] song, and Adam and Eve wrote it.” Similarly, Kirby Ferguson, an American filmmaker, argues that creativity is made up of three constituent elements: copy, transform and combine. Copying refers to the past experiences artists build upon. Transforming refers to the “creative process,” in which the initial work is edited. This could be seen as the stage at which editing takes place in the musical remix process. Finally, Ferguson argues that creative leaps can be achieved by merging already existing ideas, hinting toward something that is already familiar.

It is worth noting in this regard that the Digital Age has transformed the passive user into an active producer of content and a shaper of the ultimate user experience, especially with the advent and mass-adoption of social media. The internet transforms the creative process into a rich, ideal environment for social activity, which provides the creators a new way to self-express and engage. The new creative process of the

537. Id. Bourriaud refers to Claude Levi-Strauss, who said in Sad Tropics that “a journey occurs simultaneously in space, in time and in social hierarchy.” Id. “This phenomenon of space-time merging into a hyper-technologized world, transformed into a huge archive could lead to the emergence of a kind of Borgesian esthetics.” Id.


541. Id. at 15:50.

542. Id. at 23:32.

543. Id. at 32:10.

networked user enables a type of self-expression, space for sharing and forming of interactions, a place to communicate with the community, and the ability to garner massive popularity, which is often done via the use of existing works. As noted by Axel Bruns, “[w]ithin the communities which engage in the collaborative creation and extension of information and knowledge . . . the role of ‘consumer’ and even that of ‘end user’ have long disappeared, and the distinctions between producers and users of content have faded into comparative insignificance.” 545

Similarly, there are musical styles which make use of a sample by using a portion of a recording or an existing work within a new recording, usually imbuing it with new meaning. 546 This process has contributed to the generation of a new type of musical work. For example, sampling constitutes an intertextual practice, whereby the recording of a pre-existing work is inserted into a new work. Not every instance of sampling, however, is parodic. 547 Use of samples has become prevalent and has served as an integral part of the hip-hop genre which blossomed during the 1980s, and which was defined by repeated use of samples within the creative process. 548 For example, Olufunmilayo Arewa has extensively reviewed the use of prior works in hip-hop culture, alongside additional forms of postmodern works, works that are appropriative by their very nature, and has demonstrated that the hip-hop culture has proven there is a distinct artistic value in incorporating existing works in new ones. 549

Furthermore, use of samples today constitutes an integral part of various musical styles. Beyond the technical possibility of incorporating portions from previous works, various artists and creators have treated the sampler as a musical instrument. 550 For example, RZA, a member of Wu Tang Clan, describes the sampler as a “painter’s palette”—a tool that can mix colors and audio textures—rather than a “Xerox machine,” which merely copies significant and identifiable portions of an existing

546. See Arewa, supra note 3, at 561–63.
547. Lacasse, supra note 328, at 38–39.
548. See Arewa, supra note 3, at 561–64.
549. See generally id. at 621–29.
recording. Musician Chuck D, from the famous hip-hop group, Public Enemy, used it to create a collage. Well-known producer Mark Ronson also recently noted the transformative element in music and its significance in the digital age. Robert Szymanski wrote in an early article about sampling that:

Digital technology introduces paradoxical issues that copyright law seems ill-equipped to address. On the one hand, digital technology may greatly enrich the creative process by generating countless new, transformative works. On the other hand, if the original works can be freely manipulated, the technology may actually diminish the production of new works by undermining creative incentives. . . . [Applying copyright law to certain digital technology] may be like squeezing a “round peg into a square hole.”

The imperfect fit can be harmful to the creative incentives that copyright law seeks to foster.

Such collages are becoming more and more prevalent in contemporary culture. Moreover, the remix culture has grown, and now constitutes a form of expression that includes the mixing of sounds on images, video on text, text on sounds, or any combination of the above in order to generate a new creation. Indeed, appropriation art, alongside music like rap—which often makes use of samples from previous works—as well as digital technology has enabled “normal” people to become part of

551. Id. at 855 n. 59, 859.
552. Id. at 859.
553. Mark Ronson, How Sampling Transformed Music, YOUTUBE at 11:00–14:00 (May 9, 2014), https://www.youtube.com/watch?v=H3TF-hI7zKc.
555. See generally, LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 25, 33 (2008) (discussing a culture where people can view and then use existing works, where digital music technologies, called “infernal machines” by opponents, “could also encourage an enormous growth in economic opportunity for both the professional and the amateur, and for all those who benefit from both forms of creativity”).
the creative process, and to transition from the life of the “consumer” to life in which anyone can create something new.557

Recently, the German case, Pelham v. Hütter, analyzed artistic “transformativeness” and its role in the context of freedom of expression and “fair use.”558 This case concerned sampling in a song produced by the group Kraftwerk.559 The short sample (two seconds) was incorporated in the song ‘Nur Mir’, and it played in a continuous loop.560 The applicants contested the lower court’s finding that the sample constituted an infringement of phonogram producers’ rights.561 The German Constitutional Court found in favor of the applicants, holding that:

In the legal assessment of use of copyright-protected works, the interest of the copyright holders to prevent the exploitation of their works without permission for others’ commercial purposes stands in opposition to the interest of other artists, which is protected under artistic freedom, to be able to enter into an artistic dialogue with existing works without financial risk or restrictions on content within a creative process.562

Following a significant period of time and a number of hearings in the German national courts, it was decided that the case raised a number of interesting questions about the interpretation of European Union copyright legislation, and therefore, these questions were referred to the Court of Justice of the European Union (“CJEU”).563 The CJEU held in Kraftwerk’s favor, stating, “where a user, in exercising the freedom of the arts, takes a sound sample from a phonogram in order to use it, in a modified form unrecognisable to the ear, in a new work, it must be held that such use does not constitute ‘reproduction’ within the meaning of Article 2(c) of Directive 2001/29.”564 The Court further explained that the producer’s exclusive right in a sound recording

557. See id. at 33.
558. Geiger & Izyumenko, supra note 501, at 41.
560. Id.
561. Id.
564. Id. at ¶ 31.
“allows him or her to prevent another person from taking a sound sample, even if very short, of his or her phonogram for the purposes of including that sample in another phonogram, unless that sample is included in the phonogram in a modified form unrecognisable to the ear.”

Thus, the key criterion set forth by the EU court is “recognizability.” However, this conclusion introduces complexity into the definition of “reproduction,” and as Jonathan Griffiths notes, it also raises interesting further questions: “Recognizable by whom? An expert or to a member of the public? Does this outcome take adequate account of the cultural norms of the music industry? Do samplers often intentionally reference earlier materials? Is that acceptable practice?”

The Pelham decision’s impact on reuse, including appropriation and borrowing, should be mentioned. For instance, this case creates a more restrictive approach to certain unlicensed uses of copyright materials in new works. Currently, quotation provisions constitute the main mechanism for salvaging at least some flexibility lost with free use provisions. As Hui and Döhl argue:

> Following the recent ECJ copyright decisions, the unlicensed yet lawful reuse in the arts becomes more reliant on quotation provisions, in spite of their many requirements. This is especially true online where social media and online communities have created a participatory environment with creative reuse at its center, but copyright licensing does not enable lawful reuse in many cases.

Hui and Döhl further criticize the situation and its lack of suitability to current music making practices:

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567. *See* id.


569. *Id.*
If lawful quotation is limited, for example, to uses entering into dialogue and those where the quoted work remains identifiable, and content identification fails to recognize even this narrowed range of quotations, it is certain that reuse will come into greater conflict with EU and EEA national laws—including the fundamental freedoms of expression and of the arts. This is a challenge especially for contemporary music where deliberate appropriation is widespread for diverse important aesthetical, cultural, and social reasons. The new, post-Pelham copyright regime does not suit this musical present. Reusers in the arts, other than financially potent superstar artists and corporations that can afford a license, will have to adjust their artistic practices if parody, caricature, and pastiche, unmodified minor quotations and modifications to the point of unrecognizability will be all that is lawful. Such a new status quo would constitute a huge loss of cultural production, aesthetical diversity and social participation to creators in the countries which will now lose their free use provisions.570

Indeed, it should be noted that one well-accepted justification for sampling is parody. Parody is “a recognized category of criticism or comment authorized by Section 107.”571

D. Parody as a Separate Category Under Copyright

Alongside this permissive approach, which enables parodies to enjoy fair use protection, other approaches view parody as an entirely separate genre that needs to be widely encouraged. As Michael Spence claims, parody undermines the foundations of the dichotomy which is commonly perceived between users and creators.572 Copyright lawyers assume the two are on opposing sides, the activity of the “creative artists” is independent, bringing about the existence of a work, and the activity of the “users” is only rarely creative.573 Esther Milne says, “[i]nstead, Spence argues, we need to recognize that ‘the parodist is both a “creator” and a

570. Id.
573. See id.
Spence presents four arguments as to why parody should be protected by law. First, parody is a separate genre and needs to be protected. Second, parody constitutes an example of a market failure in creative property law, since it is unlikely that creative artists will license sometimes degrading parodies of their protected work. Third, parody is transformative because the works are new and original, even if they are based on earlier works. Fourth, it is necessary to encourage the freedom of expression of the author of the parody.

An in-depth analysis of Spence’s arguments follows.

1. Parody is a Separate Genre and Needs to be Protected

One might claim that the primary American law trend with respect to parody is permissive, given the increasing weight granted to freedom of expression. American court rulings deal heavily with fair use doctrine, though there is unease regarding reliance on this tool. For example, the commercial goal test which is the focus of testing fair use in other, non-parodic contexts, has been blurred. Accordingly, the fair use criteria is not an appropriate vehicle to perform the complex balancing act required in the relationship between a copyright holder and those who seek to use the work as a template for the parody they envision.

Thus, there is a genuine need to expand the available solutions beyond the dichotomous solution dictated by existing law. The traditional dichotomous assumption is that borrowing essentially betrays

574. Id. at 193 (citing Michael Spence, Intellectual Property and the Problem of Parody, 114 L. Q. Rev. 594, 594 (1998)).
575. Spence, supra note 467, at 601.
576. Id.
577. Rivlin, supra note 85, at 30. This Article only addresses three of Spence’s argument in the following section to avoid being redundant concerning the third issue. For further discussion concerning Spence’s third argument, see supra, Part.II.G.18.
578. Rivlin, supra note 85, at 30. For a discussion of fair use cases, see Summaries of Fair Use Cases, STANFORD LIBRARIES, https://fairuse.stanford.edu/overview/fair-use/cases/ (last visited May 9, 2024).
579. Id. Rivlin claims that the development of “parody laws” which no longer rely on regular fair use tests, and do not serve as precedents for determining regular issues, leads to conclusions regarding the independence of the field, which is entitled to its own independent arrangements. Rivlin, supra note 85, at 30.
creativity and innovation. Such an assumption fails to recognize the use of existing materials to generate new works that may contribute to creativity.

2. Parody as a Market Failure in Copyright Law

Creators of parody could request permission from the copyright holder to perform the parody. Yet, the likelihood that copyright holders would consent is slim, since the copyright holder would probably view the parodic work as harmful to themselves or to the original work (i.e., defamation of the work). Thus, requirements for permission could lead to censorship of this specific form of expression.

The parody, “Newport State of Mind,” based on the JAY-Z’s hit, “Empire State of Mind,” was offered to the public on YouTube and achieved great success, but British filmmaker M-J Delaney faced a legal threat due to violation of copyright and the song was removed from the site (although one can still find the parody version on YouTube). Based on this parody, among others, the British government has hopefully recognized the burden faced by creators of parodies, in their desire to make use of their work. This work has been described as both a “brilliant parody” and “precisely the type of work warranting protection.”

These types of parody can become even more complex in cases where the work upon which the parody is based is in turn based on preceding protected works, for this would require permission from the earlier

\[\text{580. Arewa, From J.C. Bach to Hip Hop, supra note 3, at 579 (noting that “borrowing and creativity are not mutually exclusive”).}\\
\text{582. HARGREAVES, supra note 306, at 50.}\\
\text{583. See Alec Cameron, Copyright Exceptions for the Digital Age: New Rights of Private Copying, Parody and Quotation, 9 J. INTELL. PROP. L. & PRAC 1002, 1005 (2014). “Newport State of Mind” depicts actors Alex Warrant & Terema Wainwright rapping and singing over the original musical arrangement, although the lyrics have been changed so as to describe Newport in Wales instead of New York. HARGREAVES, supra note 306, at 50. Since its creation, elements of the parody have been imitated by others. Id. The important question for the courts is whether the humor of parody in question can be said to be harmful. Wilson, supra note 56, at 27. In this case, the lyrics and films were parodies, but the musical arrangement was not. Id. “The UK-IPO later confirmed that “it would not be considered “fair” to use an entire musical track on a spoof video.”” Id.}

work’s copyright holders as well.\textsuperscript{584} In other words, permissions from the copyright holder of the work itself (words/tune), the performance, and the recording would all be required.

When calculating the societal benefit, one must also consider the public at large. When the potential parody embodies some social value, the parodist might not always be able to pay the price that reflects the public benefit that might be derived from the parodic work. The public itself, which is not a party to the transaction, therefore, represents an external influence which is neither priced nor properly represented in the transaction.\textsuperscript{585}

3. The Need to Encourage the Freedom of Expression of the Author of the Parody.

The parody exception is “firmly anchored in the recognition of freedom of expression” and therefore “affirms essential democratic values within copyright legislation . . .”\textsuperscript{586} As mentioned above, some argue that it is precisely in the context of parodic writing that application of fair use protection should be broadened, both because of the socio-cultural importance and economic considerations. Some even argue that a unique arrangement should be applied to it. Thus, in light of these understandings, and given the realization that parodies may provide a healthy form of artistic criticism, various states have passed laws which enable parodic creation.\textsuperscript{587}

The \textit{Deckmyn v. Vandersteen} case widely discussed parody exceptions in the framework of EU law.\textsuperscript{588} In this case, a member of the


\textsuperscript{585} See Rivlin, supra note 85, at 37; see also Wendy J. Gordon, \textit{Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors}, 82 COLUM. L. REV. 1600, 1607–08 (1982).

\textsuperscript{586} JACQUES, supra note 4, at 71.

\textsuperscript{587} See generally KRETSCHEMER & MENDIS, \textit{supra} note 582, at 6 (identifying seven common law countries that have adopted as law some form of protection for parodies).

\textsuperscript{588} The image was intended to imply to the mayor’s use of public money. \textit{Judgment of the Court, Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others } EUR-LEX ¶ 13, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0201 (last visited, Mar. 20, 2024) [hereinafter \textit{Deckmyn v. Vandersteen}]. Vandersteen’s heirs and other rights holders initiated proceedings for copyright infringement in the national courts. \textit{Id.}
far-right Flemish political party distributed a parodic version of the cover of a well-known comic book created by Willy Vandersteen, a celebrated author of graphic novels. In the parodic version, the main character’s face was replaced with an image of the mayor of Ghent, and the people rushing to pick up the coins were depicted as “people wearing veils and people of color.” The defendant claimed this image was covered by the parody exception in Belgian law.

Several questions were referred to the ECJ under Article 267 of the Treaty on the Functioning of the European Union. The ECJ held that, in everyday language, “the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and secondly, to constitute an expression of humour or mockery.” Having defined the concept of parody relatively liberally, the ECJ went on to hold that the application of the exception in a particular case had to “strike a fair balance between, on the one hand, the interests and rights of . . . [copyright holders], and, on the other, the freedom of expression of user of a protected work who is relying on the exception.” Failing to adequately weigh these considerations could lead to harmful consequences.

In the case of parody, Deckmyn limits a permitted use to specific, privileged artistic purposes that are humorous or mocking expressions that evoke an existing work while being noticeably different from

589. Id. at ¶ 9.
590. Id.
591. See id. at ¶ 11; see also Jonathan Griffiths, Fair Dealing After Deckmyn: The United Kingdom’s Defence for Caricature, Parody and Pastiche, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY IN MEDIA AND ENTERTAINMENT 64, 71 n. 28 (Megan Richardson & Sam Ricketson eds., 2017) (“Once a work has been lawfully published, its author may not prohibit . . . caricature, parody and pastiche, observing fair practice . . . .”) (quotations omitted).
594. Id. at ¶ 36.
595. See e.g., Filimon Peonidis, Freedom of Expression, Secularism and Defamation of Religion: The Case of Charlie Hebdo, 8 SOC. SCI. 276 (2019) (“The assassination of many individuals during a terrorist attack on the premises of the French satirical magazine Charlie Hebdo in January 2015, which was triggered by the publication of a series of cartoons mocking the Prophet Muhammad, was wholeheartedly denounced in many parts of the world.”).
parodied material. As Hui and Döhl point out, “[t]his may be difficult to establish, for instance, in cases of sound adaptation without lyrics or visual accompaniment which need extensive musical knowledge typically beyond a lay listener’s ability.”

A UK law enacted in 2014 secured the right of parody creators to use various original works to create the parody. Section 30A(1) of the Copyright, Designs and Patents Act (CDPA) enables use of the material only insofar as it constitutes fair use and does not compete with the original version.

The productive value of creativity underlies the recommendation of the Hargreaves Committee to anchor the protection of parody under British law. Hargreaves wrote “[a] healthy creative economy should embrace creativity in all its aspects.” The reform reflects the fact that copyright law struggles to maintain relevance in the Digital Age, an era of changing behavioral norms. Indeed, “[a] main concern is that copyright law has become too rigid[,] . . . [creating] barriers to creative endeavour and interferes unnecessarily in areas which should be beyond copyright owner’s control.”

596. Deckmyn v. Vandersteen, supra note 588, at ¶ 36.
597. Hui & Döhl, supra note 569, at 860.
598. Copyright, Designs and Patents Act § 30A(1) (1988) (UK) (“Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.”).
599. See id.
600. See HARGREAVES, supra note 306, at 50.
601. Id.
602. See id.
603. Sabine Jacques, Are the New “Fair Dealing” Provisions and Improvement on the Previous UK Law, and Why?, 10 J. INTELL. PROP. L. & PRACTICE 699, 699 (2015). Currently, § 30(1ZA) of CDPA “allows the use of a ‘quotation’ from a copyright work, for ‘criticism or review or otherwise[,]’ subject to the satisfaction of other conditions—most notably, that the use constitutes a ‘fair dealing’ with the work from which the quotation is derived.” Jane Parkin, The Copyright Quotation Exception: Not Fair Use by Another Name, 19 OXFORD U. COMMONWEALTH L.J. 55, 55 (2019) (citing Copyright, Designs and Patents Act, § 30(1ZA)). See also § 30(1ZA).

Other conditions are as follows: that the copyright work has been made available to the public; that the extent of the quotation is no more than is required by the specific purpose for which it is used; and that the quotation is accompanied by a sufficient acknowledgement, unless this would be impossible for reasons of practicality or otherwise.
Likewise, Amy Lai “argues that the right to expressing oneself through parodies should constitute part of the core freedom of expression of a normative copyright regime.”604 If freedom of speech is a natural right, then expressing oneself through parody exercises this right.605 Within this context, parody “fulfills the functions of free speech and is essential to democracy.”606 Accordingly, “parody should be broadly defined by the law . . .”607 Such a definition “would accommodate a greater variety of expressions and more speech than a narrow one would.”608

Musical parody constitutes an important part of Western society.609 It advances political debate, conveys flattery, mocks, and entertains.610 In fact, “[i]n the United States of America parody is perceived as an important part of free speech to the point that it is protected by fair use laws . . .”611 Lai suggests that with the rise of parodies in daily life, its acceptance as fair use in copyright, and the accessibility of technology for their creation, parody creation should potentially be viewed more positively as a right rather than just an exception.612 “Scholars . . . generally emphasize the significance of parody as a form of cultural expression and as a potential source of innovation and growth.”613 Ultimately, the right to parody should be unquestionably treated as a “core freedom of expression.”614

604. Lai, supra note 434, at 69.
605. Id. at 73.
606. Id. at 74.
607. Id. at 78.
608. Id.
610. Id.
611. Id.
612. Lai, supra note 434, at 70. See also Mark A. Lemley, IP in a World Without Scarcity, 90 N.Y.U. L. REV. 460, 514–15 (2015) (arguing that in a “post-scarcity economy,” the internet and other new technologies challenge the basis for our IP system as we are given “the means to be more creative . . . [and] an abundant source of raw materials to play with, mix, and remix”).
613. Lai, supra note 434, at 70.
614. Id.
E. *A New Type of Creativity?*

As mentioned, law plays a central role in determining the categories through which humans understand their world and the possibilities of action within it, and in this way the courts contribute to delineating society’s political imagination. These categories change due to intergroup struggles, and only some issues are litigated. Copyright law is a central venue where law penetrates the creative space. Law influences the internal balance of power in the field by incentivizing various actors differently, and consequently shaping behavior, market norms, social conventions, and technology also influence how humans understand the world. Copyright law seeks, as any other legal field, to interfere in the general cultural content and navigate it in the direction legislators consider desirable. Still, copyright law has another aspect: it seeks not only to determine contents and significance in society but also to influence how significance is formed.

This is a particularly complex field in which many players, factors, and forces frequently push and pull in different, contrasting directions. The law presumes to regulate what occurs in the creative sphere.

It is therefore critical to address and examine how the law influences parody, mashups, and musical humor, for such collages have become increasingly prevalent and relevant to how contemporary artists create

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616. *Id.*

617. *Id.*

618. Michael Birnhack, [*A Cultural Reading: Israel’s 2007 Copyright Act and the Creative Field*], in [AUTHORING RIGHTS: READING THE NEW ISREALI COPYRIGHT ACT], 83, 89 (Michael Birnhack & Guy Pessach eds., 2009) (Isr.).

619. *Id.*

620. *Id.* Birnhack argues that “copyright law is the legal foundation of a complex social system which is much like an ecosystem, where every factor influences the behavior of all the other factors in various ways, open and covert, such that the outside observer does not always understand how the system even works.” *See Michael Birnhack, [Introduction], in [AUTHORING RIGHTS: READING THE NEW ISREALI COPYRIGHT ACT], 1, 17 (Michael Birnhack & Guy Pessach eds., 2009) (Isr.).* The image is borrowed from James Boyle, which likens the digital environment to an ecosystem. *Id.*
and communicate. Furthermore, the mashup culture is not limited to musical works but also constitutes a form of expression that is generated today from mixing sounds with images, video with text, text with sounds or any combination of the above, to generate a new work.

Existing copyright law does not encourage creative use of copyright protected works. Previous rulings indicate that use of even a small part of a work may constitute an infringement of intellectual property rights. It appears that copyright law is based on an outdated conception of creativity, originality, and the creative process, and that such works require a new and up-to-date legal frame of reference that is adapted to the spirit and creative processes of the Digital Age.

This article argues that the reason for this is the underlying perceptions of creativity within copyright jurisprudence. Overall, copyright law concerning music has an “intra-psychic” standard of creativity. This means that the purpose of creating may be defined on a strictly personal level, underlining the superiority of the creative individual’s innate potential as the basis of creativity, at the expense of other elements that play a role in this process. Other research argues further that “artistic creativity is as much a social and cultural phenomenon as it is an intra-psychic one,” and that “an intrapsychic approach cannot do justice to the complex phenomenon of creativity . . .”

Technological advancements do enhance creativity and expand the range of creative capabilities and musical practices available to the musical author. Thus, cooperative creativity is currently facilitated through networking, distribution, or encoded online transfer, allowing for the


623. Id.


reassemble or decomposition of the work by other artists. Various scholars have reviewed this new type of creativity. For instance, Georgia Born titles it “relayed creativity.” McDonagh notes, “creative use of existing musical materials is common in musical practice,” though it is not tolerated by law. Therefore, he proposes incorporating a specific article referring to “creative use” in British copyright law.

Toynbee believes that one should understand authorship in popular music, as well as new music, as “social authorship.” He writes:

The social author stands at the center of a radius of creativity, but the range and scale of voices available to her/him/them will always be strongly determined by the compass and position of the radius on the musical field. Perhaps the biggest advantage of treating popular music authorship in such a way is that it enables one to be skeptical about grand claims to creative inspiration (sometimes made by musicians themselves) without discarding the notion of agency.

As mentioned, parody by its very nature (mash-ups included) challenges traditional conceptions of authorship. Yet copyright law appears to ignore the humoristic elements underlying many mash-ups, which also constitute a creative endeavor.

“In the Digital Age, using pre-existing material has arguably become much easier and enabled composers to engage in what Mark Katz calls ‘performative quotation,’” which he defines as “‘quotation that recreates all the details of timbre and timing that evoke and identify a unique sound event.’” In a sense, this constitutes a form of “cultural participation.”

The transition to the Digital Age poses many challenges to copyright law, and mash-ups challenge traditional concepts of authorship because they are created from already finished works. At present, it is important

626. Id.
627. Id.
628. McDonagh, supra note 353, at 1.
629. Id.
631. Id. at 46.
633. Tan, supra note 91, at 102, 119.
to note, as Brovig-Hanssen and Jones have, that exploring content moderation’s effect on mash-up music makes clear the fact that “the legal status of mash-ups is in fact still an open question.”

Hui notes that “mashups have never been the subject of [a European] or [American] copyright judgement, in spite of the prevalence of unlicensed mashups being uploaded by [American] and [European] producers.” Furthermore, mash-ups are substantially hindered by online platforms’ current content moderation practices, which may ultimately limit creative expression and prevalent musical practices.

Lemley argues that “post-scarcity technologies” like the internet challenge the basis for our intellectual property system, as we are given “the means to be more creative . . . [and] an abundant source of raw materials to play with, mix, and remix.” As Elis Jones argues, this leads to a “demonstrable proof of the novelty of digital culture, while obscuring questions of ownership, labour and reward,” adding that “mashup is a supra-music indicative of a new phase of creativity.”

F. Legal Regulation and the Protection of Mash-Ups

Copyright laws should balance between protecting the artistic creator, allowing the creator to economically benefit from their creation, and


636. For example, the author “Cast Boy,” who is famous for his online mashups, has previously noted that existing regulation has caused much frustration: “[I]t seems our style of self-expression is subject to censorship. It’s like being a painter in a country where you can’t paint. In the past, our works simply disappeared from the web at once.” Ronen Kupfer, *New Copyright Law Will Expand the Freedom of Action of Parodists*, HAARETZ NEWSPAPER (Sept. 29, 2014). As mentioned before, Nathaniel Noda contends that copyright law ought to “keep pace with changing times and practices by recognizing that an author implicitly cedes certain interpretive rights to the general public when he or she introduces a work into the stream of public discourse.” Nathaniel T. Noda, *Copyrights Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities*, 57 J. COPYRIGHT SOC’Y U.S. 987, 991 (2011).


639. Id. at 1120.
allowing the public to use the creator’s work for new, socially enriching purposes. To some extent, copyright law seeks to achieve the right “balance between . . . the interest in protecting and rewarding authors and . . . the ‘users’ freedom and their interest in the access to intellectual works.”

Due to its importance, and the considerations discussed above, it seems that copyright law should enable and even encourage general parodies, and musical parodies in particular. The parody creator’s right to make use of various original works in the production of the parody should be anchored in the law, and the relevant UK section might constitute a suitable solution. Because innovation is one of the primary objectives of copyright law, the law’s concept of creativity should be adapted to suit the current practices of musical authorship such as mashups. Peter Menell suggests that “[b]y extending a compulsory license to mash-up artists, Congress can invigorate the copyright system and channel new generations of consumers and creators into well-functioning online marketplace for digital content.” Extending such compulsory licenses, “would provide a calibrated mechanism for enabling both mash-up artists and owners of sampled works to profit equitably from the public’s enjoyment of the resulting collages.”

As Menell further notes, “[s]uch a regime . . . would not supplant fair use, but rather sidestep its amorphous contours in those situations in which mashup artists choose to operate within the compulsory license regime.” Such a policy would adjust copyright to the musical practices prevalent in the Digital Age and would recognize the contribution and vital role of such musicians in this era. As Aram Sinnreich argues, such a

643. Id.
rise, typified by mashups, suggests a “‘paradigmatic change’” in cultural production and the need for “‘a new set of [cultural] institutions to serve [the people’s] needs.’”

Collective rights organizations were founded to represent artists and simplify use of their works by providing licenses. One preferred solution is to apply an arrangement known as “Compulsory license.” For instance, the creation of a new work based on an earlier one is permitted by law in the framework of manufacturing records for royalties. This arrangement allows existing musical works to be copied onto a record, including the lyrics of the song as they were originally recorded, enabling a cover version. It may be possible to apply a compulsory license to parody, much like the copyright law clause enabled re-recording of cover versions of a recording already released on a record. A solution like a compulsory license is possible in the context of the

647. § 32 of the Israeli Copyright law (2007): (a) Despite the provisions of section 11, reproduction of a musical work in a sound recording is permitted, provided the following conditions are met, even without the consent of the copyright owner: (1) The musical work had been previously recorded, with the consent of the copyright owner, in a sound recording that was published for commercial purposes (in this section—Former Sound Recording); (2) The musical work was reproduced in its entirety, except for modifications necessary for adaptation of the reproduction and modifications necessary for the making of the reproduction, or where such modifications were made in the Former Sound Recording; (3) The person who makes the copy has so informed the copyright owner prior to the making of the copy; (4) The person making the copy has paid equitable royalties as agreed with the owner of the copyright; and in the absence of agreement—as decided by the Court; (5) The copies are neither used, nor intended for use, in commercial advertising.
648. In this way, the law enables creative artists to create a new work and contribute their interpretation to the original work. Nonetheless, permission is not absolute and is subject to various conditions. Thus, for example, it would be permissible to copy the work only in its entirety or with changes resulting from processing of the work, but prior notice to the copyright holder and royalty payments would be required, and copying for commercial advertising would be prohibited.
existing law, deriving from association to proximate fields of law, as well as theoretical and moral value considerations.649

CONCLUSION

The expressive, artistic power of music can evoke strong emotions and sensations. Music indeed serves as a means of communication and a dialogue-forming tool.650 Music, in many respects, is a language beyond language—another tool in transmitting messages as a universal language. Artistic expression, one important component of culture, does indeed express the diversity and uniqueness of every individual, but at the same time it enables dialogue between different people, for every work of art has a “sender,” “receiver,” and “message.”651 Therefore, recognizing music’s character as an “international language,” and understanding music as a language of communication, in which associations may be drawn between different meanings, particularly in social and cultural contexts, are essential.

Copyright law treats parody under all art forms as a single entity, overlooking the unique characteristics of each artistic field and each field’s distinct influence on the creative sphere. Thus, as Arthur Schopenhauer wrote: “Far from being a mere aid to poetry, music is certainly an independent art; in fact, it is the most powerful of all the arts, and therefore attains its ends entirely from its own resources.”652 Additionally, as Arewa argues:

This difference between music and literature arises in part from the non-representational nature of musical notes and the fact that such notes do not involve everyday world phenomena. Consequently, musical

649. Rivlin, supra note 85, at 57.
650. GARY ANSDELL, MUSIC FOR LIFE: ASPECTS OF CREATIVE MUSIC THERAPY WITH ADULT CLIENTS (1995); Maya Gratier & Giséle Apter-Danon, The Improvised Musicality of Belonging: Repetition and Variation in Mother-Infant Vocal Interaction, in COMMUNICATIVE MUSICALITY: EXPLORING THE BASIS OF HUMAN COMPANIONSHIP 301 (Stephen Malloch & Clowyn Treharne eds., 2009).
651. LISTEN TO MY VOICE, supra note 163, at 313 (citing ERNS KRIS, PSYCHOANALYTIC EXPLORATIONS IN ARTS 18 (1952)).
compositions are often more abstract than literary works and are based on principles often “known explicitly only by initiated practitioners.”

In the field of music, parody makes a significant contribution. Parody influences how we assess artistic creation and the social conventions associated with a given genre. Moreover, parody serves as an effective tool for discussion, which in turn encourages us to reimagine the meaning of the relationship between creators, works, and the public. In post-modern society, where introspection is a central element, it would seem that parody is far from being “irrelevant”. “No text, as Bakhtin and Kristeva would argue, exists in pure isolation . . . but parody [embodies] heteroglossia and presents the intertextual as bluntly as it can.”

With music being a creative field, parody continues to serve as a venue for creative expression. Parody makes a positive social contribution by providing a wide array of cultural creations. In fact, musical parodies can even generate entirely new musical genres. Addressing musical parody is important given the large number of parodies currently being created, and the fact that musical parody is a fertile platform for criticism and expression. Thus, there is a need to understand and apply a new interpretation to the unique process by which musical art and its significance are generated, for creators and audiences alike.

Musical parody constitutes an intertextual musical practice. It contributes in a unique manner to creativity, freedom of speech, the enrichment of the storeroom of works and opinions, the diversity and fecundity of public discourse, and the individual’s ability to participate in the public discourse actively and critically. Parody violates audience expectations, and as mentioned, the relationship between authorship and audience is undeniably a cornerstone of copyright. The audience has

653. Arewa, From J.C. Bach to Hip Hop, supra note 3, at 578.
654. See JACQUES, supra note 584, at 293.
655. See id.
656. See id.
657. Brodie, supra note 93, at 1.
658. See McDonagh, supra note 353, at 3 (describing the process of how blues and jazz developed out of sharing through oral reproduction of generational knowledge). In music, the parody connects to musical borrowing, a central part of musical creativity, which in the past contributed to the development of musical styles such as jazz and hip-hop. See id.
659. See discussion supra Section D.
further played a vital role in the practical administration of copyright law, and such a focus has normative and descriptive implications.

One of the most important goals of the legal world is to provide certainty. Legal ambiguity and uncertainty, however, surround parodists, leaving them dependent on the tolerance of copyright holders, who may not be willing to license their work due to the perceived nature of parody as denigrating.\(^{660}\) To some extent, established creators appear more favored over parodists, which indicates that established creators are favored over creativity.\(^{661}\) This dynamic not only harms creative expression, but may lead to cultural imperialism dictated by dominant players in the field of copyright law.

Furthermore, the music industry constitutes one of the most creative markets in existence. This is a market for which copyright law is absolutely essential. Nonetheless, this market has undergone radical changes in the Digital Age.\(^{662}\) Music serves as a means of communication with a unique social role. Copyright law protects works from unauthorized usage. Considering that the use of works is a customary practice which many musical creators have relied on, it is important to examine whether the application of the fair use practice is a suitable solution for implementation in the music field, or whether the basic principles of musical creativity and copyright law remain incompatible.

Accordingly, the requisite adjustments must be made, including application of a suitable exception for parodies. An exception, such as a compulsory license for mash-ups, may constitute a positive step. This is due to its focus on promoting creativity, providing recognition regarding the issue of music and/or reuse as part of an integral whole for the promotion, and encouragement of a creative process in the field of music. What may be required is a changed approach. Such an approach should move away from a judicial conception of exclusive ownership and control and towards a more nuanced understanding of the disputed work

\(^{660}\) See JACQUES, supra note 584, at 299 (discussing that parodists “often find their request [to license a work] is met with an outright refusal because rights-holders perceive parody as denigrating their works”).

\(^{661}\) See id.

\(^{662}\) Jim Rogers, Canary Down the Mine: Music and Copyright at the Digital Coalface, 28 SOCIALISM \\& DEMOCRACY 34, 34 (2014) (explaining that more than any other media or cultural sector, the music industry is often seen as having undergone the most changes and transformations, following the Internet and various technological developments for content sharing and distribution).
in each instance. This includes considering the creative process by which such work was created. Acknowledging the importance and uniqueness of musical humor and adjusting perceptions of musical creativity under copyright law might allow for more musical inspiration, influence, and transformation. Such a space need not be limited to fair use, but also should apply broadly so as to change attitudes regarding what constitutes a violation. 663

A discourse corresponding with musical disciplines would enable copyright law to develop new rules that are compatible with the norms of the musical community and processes of musical creativity.

663. See Craig & Laroche, supra note 271, at 70.