

# NOT SO FUNNY NOW IS IT ?

## THE SERIOUS ISSUE OF PARODY IN INTELLECTUAL PROPERTY LAW

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### I. Introduction

On December 2, 1987 the Supreme Court of the United States of America (U.S.) was faced with an unusual case<sup>1</sup>: The publisher of a pornographic magazine called *Hustler* was being sued for libel and infliction of emotional distress by a well known minister and political commentator, Jerry Falwell, for publishing a parodic advertisement depicting the plaintiff, among other things, as having engaged in sexual intercourse with his mother in the outhouse. On November 9, 1993 the same Court was faced with an equally strange case<sup>2</sup>: The rap band, *2 Live Crew*, was being sued, for copyright infringement, on releasing a parodic version of Roy Orbison's hit song *Oh Pretty Woman* with changed lyrics such as "Big hairy woman you need to shave that stuff...Bald headed woman girl your hair won't grow...Two timin' woman girl you know you ain't right." In both of the above cases, the Court ruled in favour of the defendant.

Parody, in a literal sense, refers to a work, which humorously and critically comments on an existing work in order to expose the flaws of the original work.<sup>3</sup> In order to create a successful parody, the parodist necessarily requires his audience to recognize the original work as well as the manner in which it has been ridiculed.<sup>4</sup> Thus, a parody, by its very nature, is dependant upon, and borrows from, the original work. It is this nature of parody that brings it into potential conflict with three areas of intellectual property law. Firstly, a parodist might violate copyright law which grants authors rights over duplication and distribution of their creations. Secondly, a parodist may violate a public figure's right of publicity by holding him up to ridicule. Thirdly, a parodist may violate

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<sup>1</sup> *Hustler Magazine v. Jerry Falwell*, 485 U.S. 46 : 108 S.Ct. 876.

<sup>2</sup> *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994).

<sup>3</sup> Van Hecke, B. W., "But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use", (1999) 77 *Minnesota Law Review*, 465, 465.

<sup>4</sup> *Ibid*, 466.

the moral rights of the author by modifying his work in a manner that injures his honour and reputation.

This paper aims to show that parody, as an art form, does not violate the copyright in the original work, right of publicity of its subjects, or moral rights of the author of the original work. On this basis, it argues that parody is not and should not be actionable under intellectual property law.

Part II of this paper reviews the American and Indian cases dealing with parody and copyright infringement, and argues that parody constitutes fair use and thus does not violate copyright law. Part III discusses American case law on parody of public figures in order to show that parody does not violate the right to publicity of public figures whom it ridicules. Part IV carries out a critical analysis of the moral rights provision in the Indian Copyright Act, 1957, in order to show that the same is not violated when a work is parodied. Part V argues that changing the current position of law and making parody actionable under intellectual property law would be economically inefficient and not in consonance with the principles of copyright law. Part VI contains the observation of the authors and concluding remarks.

## **II. Parody, Copyright Infringement And Fair Use**

This part argues that a parody does not infringe the copyright of the work it parodies because it qualifies as fair dealing under copyright law.

### **A. The U.S. Position on Fair Use**

*Fair use* has been referred to as the most troublesome issue in the whole of copyright law<sup>5</sup>, and described as being so flexible as to virtually defy definition.<sup>6</sup> The term *fair use* is not defined in the U.S. Copyright Act, and it is widely accepted that the definition for the same is open to interpretation by courts on a case-to-case basis.<sup>7</sup> As a result of the lack of a statutory definition, *fair use* is determined in

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<sup>5</sup> *Dellar v. Samuel Goldwyn*, 104 F.2d 661, 662 (2d Cir. 1939).

<sup>6</sup> *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

<sup>7</sup> Narayanan, P., *Copyright and Industrial Designs* (Calcutta: Eastern Law House, 2<sup>nd</sup> ed., 1995) § 15.37.

the U.S. on the basis of Justice Story's four factor test laid down in *Folsom v. Marsh*<sup>8</sup>, where it was stated:

*"Look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."*<sup>9</sup>

Judges used these criteria to decide *fair use* cases until Congress codified the basic elements of Justice Story's test into Paragraph 107<sup>10</sup> of the Copyright Act in 1976, which enumerates the above relevant factors.

## **B. The U.S. Judiciary on Parody: Campbell and Its Legacy**

The most comprehensive judicial analysis of the four fair use factors *vis-à-vis* parodies is found in *Campbell v. Acuff-Rose Music, Inc.* (referred to as *Campbell*).<sup>11</sup>

The facts of the case are as follows: In 1964, Roy Orbison and William Dees wrote and recorded "*Oh, Pretty Woman*". The rights to the song were assigned to Acuff-Rose Music Inc., which subsequently registered the song for copyright protection. In 1989, Luther Campbell, lead vocalist and song writer for an obscure band called *2 Live Crew*, wrote a version of the famous song, substituting its lyrics with ones which were obscene. Subsequently, Campbell's music production company, *Luke Records*, released an album which included the parody. The credits on the album recognized Orbison and Dees as the writers and Acuff-Rose as publisher of the original song. The general manager of Campbell's music production company, *Luke Records*, had offered to give due credit for ownership and authorship of the original song to *Acuff-Rose Music Inc.*, and also to pay a fee for its use, but Acuff-Rose declined to grant permission. Undeterred, *2 Live Crew* continued to sell

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<sup>8</sup> 9 F. Cas. 342, No. 4,901 (C.C.D. Mass. 1841).

<sup>9</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 348.

<sup>10</sup> The provision reads:

*"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*

*(2) the nature of the copyrighted work;*

*(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*

*(4) the effect of the use upon the potential market for or value of the copyrighted work."*

<sup>11</sup> 510 U.S. 569 (1994).

the album. Acuff-Rose contended that the lyrics were either inconsistent with good taste or would disparage the future value of its copyright.<sup>12</sup>

Before *Campbell* reached the Supreme Court, the Sixth Circuit, relying on *Sony Corporation of America v. Universal Studios*<sup>13</sup>, (referred to as *Sony*) and reversing the district Court's decision, held that the song was not a *fair use* and thus, constituted copyright infringement. In *Sony*, the Court had commented that commercial use creates a presumption against *fair use*.<sup>14</sup> Relying on this, the Sixth Circuit emphatically concluded, "*its blatantly commercial purpose prevented the derivative work from qualifying as fair use.*"<sup>15</sup>

However, when the case reached the Supreme Court, Justice Souter, the author of the majority decision, rejected the Sixth Circuit's decision that all commercial parodies are presumptively unfair. The Supreme Court also rejected *2 Live Crew's* argument that all parodies should be considered presumptively fair. The Court held that every parody must pass the test of *fair use*,<sup>16</sup> and applied the factors set out in Section 107 of the Copyright Act to the parody in question.

Of the four *fair use* factors, it was the first one that the *Campbell* Court singled out for the most comprehensive analysis. The Court defined parody as "*the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's work.*"<sup>17</sup> According to the Court, the relevant question is, to what extent the new work is transformative, *i.e.*, to what extent the new work alters the original with new expression, meaning, or message.<sup>18</sup> The more transformative the new work, the less will be the significance of other factors that may weigh against a finding of fair use. Justice Souter found that *2 Live Crew's* version rose to the level of parody by virtue of its comments on the naïveté of the original; since it "*juxtaposes the romantic musings of a man...with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility.*"<sup>19</sup>

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<sup>12</sup> *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1152 (M.D. Tenn. 1991).

<sup>13</sup> 464 U.S. 417 (1984).

<sup>14</sup> *Sony Corporation of America v. Universal Studios*, 464 U.S. 417, 451 (1984).

<sup>15</sup> *Campbell v. Acuff-Rose Music, Inc.*, 972 F.2d 1429, 1439 (6th Cir. 1992).

<sup>16</sup> 510 U.S. 569, 581 (1994).

<sup>17</sup> *Ibid*, 580.

<sup>18</sup> *Ibid*, 580.

<sup>19</sup> *Ibid*, 583.

Downplaying the importance of the commercial use factor which the Sixth Circuit's decision had stressed upon, Justice Souter disapproved of the Sixth Circuit's "*elevation of one sentence from Sony to a per se rule*".<sup>20</sup> The Court was of the opinion that the correct interpretation of *Sony* is that a commercial use as opposed to a non-profit use is merely "*a separate factor that tends to weigh against a finding of fair use...[and] the force of that tendency will vary with the context.*"<sup>21</sup>

The Court did not devote much attention to the second *fair use* factor, which called for an inquiry into the nature of the copyrighted work, and held that this factor in the parody context was not much help "*since parodies almost invariably copy publicly known, expressive works.*"<sup>22</sup>

Regarding the third factor, which mandated an inquiry into the quantity of the work copied, the Supreme Court agreed with the Sixth Circuit's holding that *2 Live Crew* had taken the *heart* of the original,<sup>23</sup> but held that this was permissible, since "*the heart is also what most readily conjures up the song for parody.*"<sup>24</sup>

As far as the market substitution test was concerned, the Court held that a parody, "*like a scathing theater review*",<sup>25</sup> does not fall foul of the fourth factor merely because it may have a detrimental effect on the market of the original. Instead, the relevant enquiry is whether the parody can act as a substitute for the original and therefore diminish demand for the original.<sup>26</sup> The Court noted that such substitution was unlikely, since the original and the parody usually serve different markets.<sup>27</sup> Analyzing the facts of the case, the Court found that *2 Live Crew's* version did not harm the market for the original.<sup>28</sup>

The Supreme Court majority thus found that the Sixth Circuit had erred on its analysis of three of the four factors, and dismissed the other as being of little assistance to the fair use analysis of parody. Based on this conclusion, the Supreme Court reversed the Sixth Circuit's grant of

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<sup>20</sup> *Ibid.*, 585.

<sup>21</sup> *Ibid.*, 585.

<sup>22</sup> *Ibid.*, 586.

<sup>23</sup> *Ibid.*, 587-588.

<sup>24</sup> *Ibid.*, 588.

<sup>25</sup> *Ibid.*, 591.

<sup>26</sup> *Ibid.*, 592.

<sup>27</sup> *Ibid.*, 592.

<sup>28</sup> *Ibid.*, 593-594.

summary judgment and remanded for further proceedings consistent with the opinion. The Supreme Court's unanimous opinion in *Campbell* has been hailed as a "significant victory for would-be parodists",<sup>29</sup> having the potential to significantly advance freedom of expression within the framework of constitutional and statutory copyright.<sup>30</sup>

Out of the subsequent American cases on parody, the Court found in favour of the plaintiff in *Dr. Seuss Enterprises v. Penguin Books USA, Inc.*,<sup>31</sup> and in favour of the defendant in *Leibovitz v. Paramount Pictures Corp.* (referred to as *Leibovitz*),<sup>32</sup> and *Suntrust Bank v. Houghton Mifflin Company*.<sup>33</sup> It is important to note that all these cases arrived at their respective conclusions by applying the test formulated in *Campbell*. The United States judiciary has remained scrupulously faithful to the *Campbell* ratio.

### C. The Indian Position on Fair Use and Parody

The *fair use* defence in India is provided for in Section 52 of the Indian Copyright Act, 1957, which stipulates, *inter alia*, that a fair dealing with a literary work for the purpose of criticism or review, whether of that work or of any other work shall not constitute infringement of copyright.

It has been observed in *M/s. Blackwood & Sons Ltd. v. A.N. Parasuraman*<sup>34</sup> that in order to constitute a fair dealing there must be no intention on the part of the alleged infringer, to compete with the copyright holder of the work and to derive profits from such competition and also, the motive of the alleged infringer in dealing with the work must not be *improper*.<sup>35</sup>

Thus, to successfully avail of the *fair use* defence in India, a parodist has to satisfy two conditions: (i) he must not intend to compete with the copyright holder and (ii) he must not make *improper* use of the

<sup>29</sup> Fox, J. M., "The Fair Use Commercial Parody Defense and How to Improve It", (2006) 46 *IDEA* 619, 628.

<sup>30</sup> Kaufman, H. and Cantwell, M., "The Parody Case: 2 Versions", (May 16, 1994) *Nat'l L.J.*, C1, as cited in Francis, M., "The "Fair Use" Doctrine and *Campbell v. Acuff-Rose*: Copyright Waters Remain Muddy", (1995) 2 *Vill. Sports and Ent. Law Forum* 311, 355.

<sup>31</sup> 109 F.3d 1394 (9th Cir.), cert. dismissed, 118 S. Ct. 27 (1997).

<sup>32</sup> 137 F.3d 109 (2d Cir. 1998).

<sup>33</sup> 268 F.3d at 1257 (11th Cir. 2001).

<sup>34</sup> AIR 1959 Mad. 410.

<sup>35</sup> *Ibid*, 428.

original. The first condition, which is essentially the market substitution test, is easily proved, as most parodies do not seek to compete with the original but merely to ridicule or criticize the original in a manner that exposes its flaws. As far as the second condition is concerned, it is doubtful as to what is meant by *improper* use and whether a parody is an instance of such use. In order to answer this question, reference may be made to the Kerala High Court judgment in *Civic Chandran v. Ammini Amma* (referred to as *Civic Chandran*).<sup>36</sup>

The artistic work challenged in *Civic Chandran* was not a parody as such, but a *counter drama*, as expressively termed by the Court.<sup>37</sup> The original work in question was *Ningal Enne Communistakki* – a well-known drama written by Thoppil Bhasi, a famous Malayalam playwright. The play dealt with some of the burning social and political problems of those days, specially espoused by the Communist Party of India before its split, and had considerably aided the undivided Communist Party of India to come to power in Kerala in the 1957 assembly elections. On the other hand, the *counter drama* written by the appellant, Civic Chandran, was intended to convey the message that though the party had succeeded in coming to political power, it had forgotten the depressed classes who were instrumental in its success, and who had made substantial sacrifices for the party. The *counter drama* used substantial portions of the original, with some alterations required for its purpose. The characters and dialogues in the original were also reproduced in some instances.

The Court held that the reproduction was not a misappropriation for the purpose of producing a play similar to the original. Rather, the purpose was to criticise the idea propagated by the original drama, and to expose to the public that it had failed to achieve its real object.<sup>38</sup> Furthermore, it was noted that there was no likelihood of competition between the two works in question.<sup>39</sup> It was held that since the copying was for the purpose of criticism, it amounted to fair dealing and did not constitute infringement of the copyright.<sup>40</sup> It is important to note is that, in arriving at this holding, the factors considered by the Court were: “(1) *the quantum and value of the matter taken in relation to the comments or criticism; (2) the purpose for which it is taken; and (3) the likelihood of*

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<sup>36</sup> 1996 PTR 142.

<sup>37</sup> *Ibid*, 142.

<sup>38</sup> *Ibid*, para. 24.

<sup>39</sup> *Ibid*, para. 24.

<sup>40</sup> *Ibid*, para. 42.

*competition between the two works.*<sup>41</sup> This three-fold test is markedly similar to the test used by American judiciary. The only factor omitted is the nature of the copyrighted work – a factor that has been stated to be of little importance as far as parodies are concerned.

Therefore, as far as the Kerala High Court is concerned, a parody, so long as it copies from the original in order to criticise it, does not constitute *improper* use of the original and thus qualifies as fair dealing.

The discussion carried on in this part has clearly shown that both in India and the United States, parody has been given considerable protection, both by the legislature and the judiciary, under the *fair use* defence. Such broad protection for parody has been the subject of considerable criticism. Lee argues that the Supreme Court's interpretation of the four factors unduly favors the parodist, and concludes that after weighing the factors, the majority of parodies will prevail under the fair use defence against actions by copyright holders.<sup>42</sup> Thus, he argues that the U.S. Courts have by and large set too low a threshold for parodies to qualify for the fair use defence.<sup>43</sup>

The authors believe that although the judicial analysis of the four factor test is unquestionably and markedly pro-parodist, this is not without good reason; it is economically efficient, and in consonance with the principles of copyright law, to afford parodies broad protection from infringement actions. This is a point that is further developed in part V of this paper.

### **III. Parody and the Right of Publicity**

This part is devoted to a brief discussion of the right of publicity of public figures. It is argued, through an analysis of American case law, that parody does not violate a public figure's right of publicity.

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<sup>41</sup> Ibid, para. 8.

<sup>42</sup> Lee, J., "*Campbell v. Acuff-Rose Music: The Sword of the Parodist Is Mightier than the Shield of the Copyright Holder*", (1994) 29 *U.S.F. Law Rev.* 279, 302.

<sup>43</sup> Ibid, 310.

### A. The Development of the Right of Publicity

The right of publicity originates from the common law right of privacy.<sup>44</sup> It is defined as an individual's right to control and profit from the commercial use of his or her name, likeness and persona.<sup>45</sup> That is, the right of publicity disallows the use of another's identity for commercial purposes without his or her permission.

After an initial reluctance to grant such a right<sup>46</sup>, the U.S. Supreme Court explicitly recognized its existence in *Haelan Laboratories Inc. v. Topps Chewing Gum, Inc.*<sup>47</sup> (referred to as *Haelan*) where the plaintiff successfully sued the defendant for making commercial use of the picture of a baseball star with whom they had signed a contract, giving them exclusive rights over the commercial use of his picture. Post-*Haelan* a number of cases have upheld and expanded the right of publicity of the individual in different contexts.<sup>48</sup>

Although the right to publicity is broad and well developed in the U.S., it has hardly found any judicial recognition in India. The only Indian case discussing this right is *ICC Development (International) Ltd. v. Arvee Enterprises*<sup>49</sup> where the Delhi High Court, without explicitly recognizing the right of publicity, stated that the right of publicity can inhere only in a natural person and not in non-living entities, which were only legal persons.<sup>50</sup>

In spite of its broad scope, it is uncertain whether the right of publicity is violated when a public figure is parodied for commercial purposes. The three important cases that have arisen in this context in the U.S. are discussed herein under.

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<sup>44</sup> Pemberton, G. A., "The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity", (1993) 27 *U.C. Davis Law Review* 97, 100.

<sup>45</sup> Byrd, L., "Privacy Rights of Entertainers and Other Celebrities: A Need for Change", (1988) 5 *Ent & Sports L.J.* 95, 100.

<sup>46</sup> Pemberton, G. A., "The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity", (1993) 27 *U.C. Davis Law Review* 97, 100-01.

<sup>47</sup> 346 U.S. 816 (1953).

<sup>48</sup> See *Allen v. National Video, Inc.*, 610 F. Supp. 612, 630 (S.D.N.Y. 1985), *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F. 2d 831, 837 (6th Cir. 1983), *Waits v. Frito-Lay, Inc.*, 506 U.S. 1080 (1993), *Abdul-Jabbar v. General Motors Corp.*, 85 F. 3d 407 (9th Cir 1996).

<sup>49</sup> 2003 VIIAD (Delhi) 405; 2003 (26) PTC 245 (Del) ; 2004 (1) RAJ 10.

<sup>50</sup> *Ibid*, para. 14.

## B. The Hustler Case

As discussed in Part I, in *Hustler Magazine v. Jerry Falwell*<sup>51</sup>, the plaintiff was a well-known minister and political figure who had been parodied in the defendant's magazine as having engaged in sexual intercourse with his mother in the outhouse. The plaintiff sued for libel and infliction of emotional distress. The lower courts dismissed the libel claim but upheld the claim for infliction of emotional distress. The defendant appealed to the U.S. Supreme Court.

The Supreme Court held that in order to protect the free flow of ideas and encourage public debate, the First<sup>52</sup> and Fourteenth Amendments<sup>53</sup> restricted public figures from recovering damages when a caricature, such as a parody, of them was published without additionally showing that the publication contains a false statement of fact that might be believed by a reasonable individual.<sup>54</sup> This would be the case even if the publication were made with malice and hatred towards the targeted individual.<sup>55</sup> The Court went on to state that public figures had in essence made a social contract to be subjected to a greater level of scrutiny than the average man being parodied or satired was merely one of the consequences of that contract.<sup>56</sup> The Court noted that the political cartoon and satire were ancient arts<sup>57</sup> and went on to state:

*"[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the*

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<sup>51</sup> 99 L Ed 2d 41.

<sup>52</sup> Amendment I of the U.S. Constitution states, "*Freedom of Religion, Press, Expression. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*"

<sup>53</sup> Amendment XIV of the U.S. Constitution states, "*Citizenship Rights. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"

<sup>54</sup> *Hustler Magazine v. Jerry Falwell*, 99 L Ed 2d 41, 52.

<sup>55</sup> *Ibid*, 52.

<sup>56</sup> *Ibid*, 51.

<sup>57</sup> *Ibid*, 51.

*speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.*<sup>58</sup>

Although, in this case, the defendant did not contend that his right of publicity was violated by the parody, the Court has clearly laid down that public figures cannot recover damages when they are the subject matter of a parody. The fact that this precedent is applicable even in when an action is brought on the basis of a right of publicity is clear from the subsequent parody cases dealing with the right of publicity.

### C. L.L. Bean's Case

In *L.L. Bean v. Drake Publishers*<sup>59</sup> (referred to as *L.L. Bean*) the defendant, who published an erotic magazine, had parodied the plaintiff's well known *L.L. Bean's Back to School Catalog* by publishing a two-page article titled, *L.L. Bean's Back-To-School-Sex-Catalog* which displayed a facsimile of Bean's trademark and various nude models in sexually explicit positions. The plaintiff sued, *inter alia*, for trademark infringement and trademark dilution.<sup>60</sup> The First Circuit Court, dealing with the trademark dilution claim, characterized a trademark as a property right similar to the right of publicity and held that a trademark dilution claim could not be brought when the plaintiff's trademark was used in a noncommercial context, even if such use was negative or offensive, because this would allow a corporation to shield itself from criticism by disallowing the use of its name and trademark in commentaries critical of its conduct.<sup>61</sup> The Court recognized the vital importance of parodic speech in society and commented that though offensive, it is nevertheless deserving of substantial freedom – both as entertainment and as a form of social and literary criticism.<sup>62</sup>

This case clearly states that parody will be protected by free speech doctrine even when it is portrays an individual or a corporation in a negative light. Thus, no right of publicity claim may be brought against a parody.

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<sup>58</sup> *Ibid*, 52.

<sup>59</sup> 811 F.2d 26.

<sup>60</sup> *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 27.

<sup>61</sup> *Ibid*, 33.

<sup>62</sup> *Ibid*, 33.

#### D. White v. Samsung Electronics

The last case in this series of cases is the Ninth Circuit case of *White v. Samsung Electronics*<sup>63</sup>, (referred to as *Samsung*) which is viewed as a departure from the above cases.<sup>64</sup> In this case, the electronics company, Samsung, carried on an advertisement depicting events in the twenty-first century. One of the events was of a robot standing next to a *Wheel of Fortune* board dressed in a manner similar to Vanna White, the game show's host. The caption of the advertisement read, *Longest-running game show. 2012 A.D.*, the message of the advertisement being that Samsung would be still in use in 2012 A.D. when Vanna White would have been replaced by a robot.

The Ninth Circuit upheld Vanna White's right of publicity claim holding that the defendants had appropriated the *likeness* of the plaintiff and there was a genuine apprehension that consumers would believe that White was endorsing the Samsung products.<sup>65</sup> The Court went on to distinguish the case from *Hustler* and *L.L.Bean* by stating that in this case no humorous criticism was made of Vanna White, as was made of the plaintiff's in the above two cases, and her likeness was appropriated for merely commercial purposes.<sup>66</sup>

The authors find themselves in agreement with the decision of the Ninth Circuit but contend that this decision in no way takes away from the fact that parody does not violate the right of publicity. The decision, in fact, outlines the boundaries of parody. The Samsung advertisement was not a parody at all; it did not in anyway criticize or comment upon the personality of Vanna White but merely appropriated her likeness for commercial purposes. For this reason, the *Samsung* decision, contrary to the opinion of some commentators,<sup>67</sup> cannot be interpreted as holding that the right of publicity prevails over the right to produce parody.

The discussion carried on in this part clearly shows that even in the U.S., where the right of publicity is well developed, the courts have consistently held that the right of publicity of a public figure is not

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<sup>63</sup> 971 F.2d 1395.

<sup>64</sup> See Skoch, G., "Commercial Trademark Parody: A Creative Device worth Protecting", (1999) 9 *Kan. J.L. & Pub. Policy* 357.

<sup>65</sup> *White v. Samsung Electronics*, 971 F.2d 1395, 1401.

<sup>66</sup> *Ibid*, 1401.

<sup>67</sup> Skoch, G., "Commercial Trademark Parody: A Creative Device worth Protecting", (1999) 9 *Kan. J.L. & Pub. Policy* 357.

violated when a public figure is parodied. This is not surprising given the fact that the publicity right only protects the public figure against use of his identity for purely commercial purposes, whereas the predominant object of a parody is to criticize and satirize the personality of a public figure.

#### IV. Parody And Moral Rights

The concept of moral rights is based upon the understanding that an artist's work is an extension of his or her personality and that, in effect, one cannot *know the dancer from the dance*<sup>68</sup>. Moral rights, which are independent of copyright, protect two broad rights of the artist: his right to claim authorship of his work and his right to protect his artistic integrity. The second right, which is known as the right to integrity, protects the artist's work from mutilation or distortion in a manner that injures his reputation and honour, and is of relevance to this paper.

The concept of moral rights, being continental in origin, was not prevalent in the U.S. until 1990, when Congress enacted the Visual Artists' Rights Act, 1990, (referred to as *VARA*) which granted a limited form of moral right protection to the author of a work. However, in India, the Copyright Act, 1957 has recognized moral rights since its inception. Section 57 of the Copyright Act grants an author the right to claim authorship of the work and, until the expiration of the term of copyright, the right to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the work, if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation.

It is argued that a proper interpretation of Section 57 would show that parody does not violate the right to integrity of the author. A parody does not constitute a mutilation, distortion or modification of an existing work but is, in fact, a new and independent work in its own right, which merely borrows certain elements from an existing work. A scrutiny of parody cases confirms parody as a work that has *borrowed* from the allegedly infringed work.<sup>69</sup> For this reason a parody cannot be said to be a violation of the right to integrity of the author.

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<sup>68</sup> Yeats, W. B., *The Tower, Among School Children* (1928) stanza 8, as cited in Yonover, J., "The "Dissing" of Da Vinci: The Imaginary Case of Leonardo v. Duchamp: Moral Rights, Parody, and Fair Use", (1995) 29 *Val. U.L. Rev.* 935, 947.

<sup>69</sup> See *Campbell v. Acuff-Rose* 510 U.S. 569 (1994).

## V. A Law and Economics Justification for Intellectual Property Protection for Parodies

This part is based on the hypothesis that the negligible benefits of granting works protection against parodies must be seen in light of the loss that accrues to the public as a result of such protection. When a work is granted protection against parody, one mode of expressing an idea is deemed off-limits and the range of materials, which authors may use to create their work, is diminished. This results in fewer works and works of lesser quality being produced and thus has a negative effect on social utility. In view of these negative ramifications, such protection can be justified only if clear benefits can be shown to accrue from it. On the contrary, it is argued in this part that protection to parodies would entail no economic benefits whatsoever.

The primary rationale for intellectual property law is utilitarian. It seeks to ensure a fair return to authors, inventors and public figures for their labour.<sup>70</sup> In doing so it aims at a general social benefit by providing persons with greater incentives to engage in productive labour.<sup>71</sup> It is argued that allowing parody to remain non-actionable in no way detracts from the incentive to engage in such productive labour. Do authors, today, produce fewer works, or works of lesser quality, because of the absence of a copyright system that makes parody actionable? Do fewer individuals, today, strive to become public figures because of the fear they may be parodied if they do? Do authors feel that their honour and reputation shall be injured if they produce works, due to the absence of a moral rights system that protects such work from parody, and thus consequently produce less than the optimal amount of work?

It is submitted that the answers to the above questions are clearly in the negative. One finds it difficult to conceive of a situation where any reasonable author would be discouraged from producing it merely because it might be parodied. An author produces for one, or both, of two reasons; to put forward a point of view and/or to earn a profit from his work. If he produces the work in order to put forward a point of view he would reasonably expect a counter. The fact that this view is expressed in

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<sup>70</sup> Van Hecke, B. W., "But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use", (1999) 77 *Minnesota Law Review* 465, 467.

<sup>71</sup> See generally, Landes, W. M. and Posner, R. A., *The Economic Structure of Intellectual Property Law*, (Cambridge: Harvard University Press, 2003); Posner, R. A., "Intellectual Property: The Law and Economics Approach", (2005) 19(2) *Journal of Economic Perspectives* 57.

a humorous manner using parts of the author's own work to attack it does not make it different from any other form of criticism the author might receive. As far as the second case is concerned, where the author produces for gain, it has already been shown that a parody does not take away from the author's profit because it operates in a market different from the market of the author's work.

Thus, granting copyright protection against parody would not help increase the quality or quantity of work produced.

Similarly, the notion that individuals are discouraged from striving towards celebrity status, merely because they may be parodied, borders on the absurd. Every public figure is aware that he or she shall be subjected to a greater degree of public scrutiny and criticism than the average John Doe, and the fact that such criticism comes in the form of parody would do little to discourage an individual from striving toward achievement if he is not otherwise deterred by potential criticism of non-parodic nature.

Furthermore, as has already been argued, a moral rights system is not aimed at protecting the general honour and reputation of the author but only his honour and reputation in relation to his work. However, even assuming that a moral rights system can protect the general reputation of an author, it is argued that the absence of such a system does not deter an author from producing quality work. An author gains a reputation in the first place by producing work. A parody can, at the most, diminish such a reputation, but not obliterate it completely. Thus, if an author's work is parodied he may have a diminished reputation but if he does not produce work in the first place, due to fear of it being parodied, he would not gain a reputation at all. Hence, it would be rational for an author to produce a work even if there exists a risk of it being parodied. The strength of this argument is clearly illustrated by the experience of the United States, whose authors produced a substantial amount of creative work even prior to enactment of the *VARA* in 1990.

Additionally, the negligible benefits of granting works protection against parodies must be seen in light of the loss that accrues to the public as a result of such protection. When a work is granted protection against parody, one mode of expressing an idea is deemed off-limits and the range of materials, which authors may use to create their work, is diminished. This results in fewer works and works of lesser quality being produced and therefore, has a negative effect on social utility.

Thus, intellectual property protection against parody provides no meaningful benefits and has a significant negative impact on the quantity and quality of work produced in society.

## **VI. Conclusion**

In view of the arguments in Parts II through IV of this paper, the authors hope to have clearly established that parodies have received substantial protection at the hands of both the judiciary and the legislature and are not, as such, actionable. It has also been shown that there exists an economic justification for maintaining, if not enhancing, the level of protection that parodies currently enjoy. This justification postulates that intellectual property protection against parody provides no meaningful benefits and has a significant negative impact on the quantity and quality of work produced in society. Such protection deprives the public of entertainment and critical points of view without creating any additional incentives for individuals to engage in productive labours. In short, it would be economically inefficient and against the principles of intellectual property law to grant intellectual property law protection against parodies. Therefore, in light of the discussion carried on in this paper, and the conclusions reached, it is recommended that parodists continue to be given considerable protection against actions under intellectual property law.