



Plagiarism: an Original Sin?

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I - The Multiple Faces of Plagiarism

"That the supporting evidence for the accusation of plagiarism may on occasion be elusive, insufficient, or uncertain, is not the same as thinking that the definition of plagiarism is uncertain. The gray areas may remain resistant to adjudication without being resistant to definition. It may be perfectly clear what constitutes plagiarism ("using the work of another with an intent to deceive") without its being clear that what faces us is a truly case of this".¹

It would be difficult to find a way of better describing the problem that plagiarism poses both to the academic and to the legal world. However, if the concept is not resistant to definition, the common use of the word "plagiarism" often leads to confusion because it is used to express different meanings without discrimination:

- On the one hand, plagiarism is an ethical concept. The Collins English Dictionary and Thesaurus defines the verb plagiarize as "to appropriate (ideas, passages, etc.) from (another work or author)" and gives as synonyms "appropriate, borrow, crib, infringe, lift, pirate, steal, thief".² This is not a very precise definition. It lacks the false attribution of authorship as a constituent element of plagiarism. Nevertheless, it does contain a strong incriminatory character.³

¹ Christopher Ricks, *Plagiarism*, Proceedings of the British academy, 97 (1998), lecture reproduced in Paulina Kewes (ed.), *Plagiarism in early modern England*, 2003, pp. 22-23.

² Collins English Dictionary and Thesaurus, 21st Century Edition, 2000, p. 897. The word comes originally from the Latin *plagium*, which was the Roman Law term for the kidnapping of children or slaves. The Latin poet and epigrammatist Martial (Marcus Valerius Martialis, ca. AD 40 - ca. AD 104) used the word for the first time in a metaphorical way to mock his rival Fidentinus, who allegedly recited the former's poems in public as if they were his own. Martial viewed his works as similar to freed slaves being enslaved again by his rival poet. Martial indeed considered his rival's behaviour as shameful, but nevertheless Roman Law knew no such concept as plagiarism in the contemporary sense of the word. For more information on the Roman Law concept of *plagium* see:

http://www.ukans.edu/history/index/europe/ancient_rome/E/Roman/Texts/secondary/SMIGRA*/Plagium.html

³ Since the time of Martial, the question whether or not plagiarism is a reprehensible deed has been (and it is still) widely discussed. An interesting account of views for and against plagiarism can be read at: Hélène Maurel-Indart, *Du plagiat*, Presses Universitaires de France (collection " Perspectives Critiques "), 1999, pp. 77-98.



- On the other hand, certain cases of plagiarism can have legal consequences. However, plagiarism is not a legal doctrine and the term as such cannot be found in any Copyright or Author's Rights Act. The lawyer may generally speak of plagiarism for cases in which the unauthorised use of a work coupled with a false attribution of authorship infringes upon the copyrights of the original author. Although both concepts may appear to the lay person as being the same, copyright infringement is a much narrower concept, and therefore acts of plagiarism may constitute copyright infringement only in very precise cases.

To understand fully the difference between unethical plagiarism and copyright infringement, one must first and foremost look at the interests that each of these norms protect. The ethical rule against plagiarism protects first of all the original author's reputation but also the interests of third parties, like readers and academic or professional institutions, so that these parties are not led into believing that the plagiarist has created an original work. In contrast, the aim of copyright is solely to protect the author's interests (of both moral and economic nature). This legal protection is achieved by giving him/her certain exclusive rights to exert control over his/her work.

The protection of different interests requires different remedies. This is another factor distinguishing plagiarism from copyright infringement. As an illustration, let us imagine a student who borrows a friend's paper and passes it off as his/her own at the University. This will constitute an academic offence and will have an impact on the student's academic record. If the same student has this very paper published as his/her own and the original author gives his/her consent to that publication, that may still be a case of plagiarism to the reader's eye but definitively not a case of copyright infringement. If our student does not ask for permission, a suit for copyright infringement will most probably follow.

The following distinction made by Stuart P. Green between non-legal, quasi-legal and civil legal sanctions captures the breadth of acts that constitute plagiarism:⁴

- Unethical (legal) plagiarism is mostly sanctioned through "informal, non-legal, social stigma".
- In certain cases it can also be sanctioned through "formal, quasi-legal, academic and professional disciplinary proceedings" (e.g. the above-mentioned student sees his/her degree revoked)
- Only in very precise cases might acts of plagiarism constitute copyright infringement and therefore be sanctioned through civil and criminal law penalties.

This article will explore the grey areas of copyright with the aim of finding the border between the legal borrowing of intellectual work and copyright infringement. Firstly, it discusses the concept of plagiarism as copyright infringement. Then, it examines cases in which legal exceptions to copyright make it difficult to find the path to infringement. This is done by analysing jurisprudence from Germany, France and the United States. Finally, some thoughts are put forward regarding the concept of originality.

⁴ Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 *Hastings Law Journal* 167-242 (2002), pp. 195-207. Available at: <http://faculty.law.lsu.edu/stuartgreen/j-green2.pdf>



II - Plagiarism as Copyright Infringement

"What are you?"
"To define is to limit"
"Give me a clue."
"Threads snap. You would lose your way in the labyrinth."
Oscar Wilde, *The Picture of Dorian Gray*, Chapter 17.

The definition of plagiarism may not be uncertain, but drawing the boundaries of copyright infringement in a concrete case is an exercise of legal virtuosity.⁵ In order to determine when a case of plagiarism infringes copyright, three main principles may act as reliable threads to help us not to lose our way in the labyrinth: 1) the plagiarised work must be protected by copyright; 2) the author does not give authorisation for the use of his/her work; and 3) the false attribution of authorship.

1) Protected work

Copyright does not protect ideas but the expression thereof. This is a basic principle of both Copyright and Authors' Rights systems. Courts are sovereign (although obliged to give reasons) in determining what is an idea and what is the expression of an idea, and whether the expression is original or not. In order to be protected by copyright, a work must be original and bear the mark of its author's personality.

Works that plagiarise non-protectable works or public domain works will not infringe any rights. However, in the case of France, moral rights are "perpetual, inalienable and imprescriptible" (Art. L 121-1-3 of the French Code of Intellectual Property) so that they subsist even after the end of the term of protection. Therefore, the original author's heirs retain the right of disclosure, the right of integrity and the right of attribution. The exercise of the moral right *post mortem* has to be done according to the author's wishes.⁶

The infringing work is a derivative work. This implies that the plagiarist had access to the original work, and excludes cases in which a work shows similarity with another but there is no connection between them. That is e.g. the case of parallel creations, in which two authors independently create similar works at the same time.

2) Unauthorised use

Copyright gives authors certain exclusive rights over their creations. This means that uses such as reproducing or adapting the work require the authorisation of the author or rightsholder.

The use of the original work must take place without the permission of the author. Accordingly cases of ghostwriting do not infringe on the ghostwriter's rights.

⁵ For the sake of clarity, the term "plagiarism" will be employed hereinafter to denote cases of plagiarism that constitute copyright infringement.

⁶ As a recent example of this, on 31 March 2004, the *Cour d'appel de Paris* imposed a symbolic fine of EUR 1 as well as the publication of the court decision in three journals on the publisher of a sequel of Victor Hugo's *Les Misérables*. Following a suit by a descendant, the court decided that the sequel infringed upon the moral rights of the French novelist, considering that this author would have never allowed a third person to write a continuation of his work.



3) False attribution of authorship

The author has a moral right to claim authorship of his/her work. The plagiarist will normally pass off somebody else's work as his/her own or will borrow substantial parts of it without appropriate attribution. But expressing gratitude, influence or homage to the author of the original work or even quoting him/her as co-author of the derivative work will not serve as a defence if the conditions for infringement are met. The lack of intention or knowledge as regards the act of borrowing is not a defence either. That is the case of "subconscious copying", in which a person copies from another work without being actually aware of doing so.

The most blatant case of plagiarism is of course an unauthorised reproduction of a work with false attribution of authorship. But plagiarism is rarely just plain copying. In most cases the plagiarist will "mask" his larceny e.g. by changing the form, style, the time and place of the plot or by introducing new characters. In such cases, this borrowing may also take place in infringement of an adaptation right. And that is exactly when the "grey areas" become "*resistant to adjudication*".

III - The Grey Areas of Copyright

There is no such thing as a work made *ex nihilo*. Therefore, if a work relates to a certain extent to a number of other works, how is it possible to distinguish between similarity, coincidence, homage, influence, imitation... and plagiarism? Between an original creation and the undue appropriation of someone else's work there are indeed "grey areas" with different shades. Therefore, in order to get to the hardcore of plagiarism one will also have to define other non-infringing acts that look pretty much like it. These are cases in which a work legally derives from another, and indeed some clear-cut situations, like authorised adaptations and also the re-using of public domain works to create new ones, do not cast doubts about the legality of the borrowing. However, there are two other possibilities that do not involve copyright infringement but nevertheless usually lead to confusion: 1) works created under the influence of or inspired by others; and 2) parodies.

1) Works Influenced / Inspired by Others

Even the most innovative geniuses owe a debt to their predecessors. For example, Einstein humbly admitted that if he had seen farther than others, it was only because he was standing on the shoulders of giants. However, cinema audiences tend easily to mistake influences or even homages for plagiarism. One of the most popular examples in recent times is Quentin Tarantino's well-known penchant for introducing cinematographic "references" in his own films, which leads people to accuse him of intellectual theft after each of his releases. Plagiarism does not equal being influenced by other works, although finding the dividing line can sometimes be really tricky.

In order to distinguish between the legitimate borrowing of situations, characters or other traits of a work and an adaptation of a work requiring the consent of the rightsholder, a two-step test is commonly carried out:



1. Similarity test: Comparison between works must be made according to similarities and not to differences. This is a rule commonly used by courts, although sometimes they also take differences into account when measuring infringement.
2. Originality test: Only the borrowing of original, protectable elements of a work requires an authorisation. Historical facts, common ideas, scenes or characters can be borrowed without infringement.

This two-step test may be viewed as a common standard of both Copyright and Authors' Rights systems, and it is applied in a similar way by national courts around the globe.

In the United States, courts apply the so-called substantial similarity test in order to find copyright infringement through circumstantial evidence.⁷ First the plaintiff must establish that the defendant had access to the work copied⁸ and that there is probative similarity between the two works. Probative or factual similarity means a certain degree of similarity that implies a copy. After that, the plaintiff must establish substantial similarity, that is, the defendant has copied protected expression in a sufficient amount so as to infringe plaintiff's copyright. Here "amount" is understood in a qualitative rather than in a quantitative way.⁹

The dawn of the Hollywood cinema industry saw a flood of infringement cases in which dramatic or literary authors claimed their work had been plundered by the studios in order to adapt them for the big screen. In these early cases, US courts were increasingly reluctant to find copyright infringement. Jessica Litman observes that this reluctance could be explained by two facts: a) the judges' "*perception of economic realities*" coupled with their "*awareness of the limitations inherent in dramatic and film art forms*".¹⁰ Most of these cases involved a modestly successful book or play turned into a production taking millions of dollars at the box-office; this huge success having more to do with the film's star (or with the novelty and immediacy of the medium itself) than with the quality of the story borrowed. As the proof of access was (as is normally the case) quite easy to establish, the finding of substantial similarity as regards protected expression represented (and has since become) the essential part of a plagiarism lawsuit. Had one court found infringement for one film, many other suits against films telling similar typical stories would have followed, because the stories told by these films lacked real originality. In *Nichols v Universal*,¹¹ a 1930 case about a play and a movie both involving a kind of "Romeo and Juliet" story between Irish and Jewish families, the court found that the plot and characters as taken by the defendant were too general to be protectable. As the court stated, "*If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress*". For the court, barely-developed characters or situations do not meet the originality test and therefore will not be protected by copyright.

⁷ See e.g. Mark V.B. Partridge, *Understanding Substantial Similarity and Scope of Protection*, available at <http://www.pattishall.com/pdfs/UnderstandingSubstantialSim.pdf> and Victor Knapp, Esq., *A Writer's Guide to Copyright Infringement*, The Dramatist (The Journal of the Dramatists Guild of America, Inc.) January/February 2001, available at: <http://www.showbiz-lawyer.com/articles/copyright-infringement.htm>

⁸ There are cases in which proof of access cannot be established. In such cases only works that show striking similarities will meet the test. See *Bright Tunes Music v. Harrisongs Music*, 420 F. Supp. 177 (S.D.N.Y. 1976), available (with commentary) at: http://www.ccnmtl.columbia.edu/projects/law/library/cases/case_brightharrisongs.html

⁹ Victor Knapp, Esq., *op. cit.*

¹⁰ See Jessica Litman, *The Public Domain*, II, B. Originally published in *Emory Law Journal*, Fall, 1990, 39 *Emory L.J.* 965. Available at: http://www.law.duke.edu/pd/papers/Litman_background.pdf

¹¹ *Nichols v. Universal Pictures Corporation*, Circuit Court of Appeals, Second Circuit 45 F.2d 119; 1930 U.S. App. LEXIS 3587 10 November 1930, available at: <http://cyber.law.harvard.edu/IPCoop/30nich1.html>



Also in more recent times, courts are also reluctant to find infringement. In the *Amistad* case,¹² which involved a motion for a preliminary injunction sought by the writer Barbara Chase-Riboud against Dreamworks, Steven Spielberg's film production company, the court did not find similarities involving protectable elements. After the court had established the defendant's access to the original work, the plaintiff pointed to nine substantial similarities between the two works in regard to the plot and main characters. However, the court found that the alleged similarities did not meet the originality test. The court explained that neither historical, contemporary or other factual aspects, on which both works were based, nor material traceable to common sources or in the public domain, nor *scènes à faire*¹³ deserve copyright protection. Also the court did not consider as substantial the similarities in the depiction of certain fictional characters in both works. Therefore, the court denied the plaintiff's motion because she had not established a probability of success on the merits.¹⁴

The German *Urheberrechtsgesetz*¹⁵ (Author's Rights Act - UrhG) makes explicit the distinction between the adaptation of a work (*Bearbeitungsrecht*, § 23 UrhG) and the "free use" (*freie Benutzung*, § 24 UrhG¹⁶) thereof: "an independent work created in free use of another author's work, can be published and used for commercial purposes without the permission of the author of the original work" (§ 24 UrhG).¹⁷ The borrower must use the earlier work only as a suggestion for his/her own creative work.¹⁸ This definition is again vague and needs further clarification. The German Federal Court (civil matters) has therefore developed a consistent jurisprudence around the "free use" which complements its legal definition. In the *Laras Tochter* case¹⁹, which concerned an unauthorised sequel of Boris Pasternak's *Doctor Zhivago*, the Court, following the originality/similarity test, considered that the determination of whether the new work was created "in free use" of the older work or whether it was an adaptation thereof depended on how much the new work distanced itself from the extracted traits of the original work. This "distance" had to be great enough so that "*in view of the characteristics of the new work, the borrowed traits of the old copyrighted work faded away*". In the *Laras Tochter* case, the Federal Court concluded that the unauthorised sequel had not distanced itself sufficiently to be considered as an original work created in free use of Pasternak's novel, as it used *Doctor Zhivago's* plot, context and characters to compose a sequel, and was therefore in breach of copyright. Very importantly, the Court affirmed that the protection afforded to a work by Copyright goes beyond "the concrete text version or the immediate shaping of a thought": in addition it extends to "*components and form-giving elements of the work, which bear the mark of the author's personality, that lie in the course of the action, in the characteristics and the distribution of character roles, in the arrangement of scenes and the scenery of the novel [...]*". Accordingly, the originality test does not confine itself to the written text, but also to plot, characters and scenes, as long as they are original enough to be protectable. Also, the court considered that differences between the two works are not to be taken into consideration: "*it is not significant that both Dr Zhivago's world and especially all its many layers and its depths are not completely transposed into the new work*".

¹² Barbara Chase-Riboud v. Dreamworks, Inc., et al., CV 97-7619 ABC (Jgx) Order Re: Plaintiff Chase-Riboud's Motion For Preliminary Injunction. Available at: <http://www.courtTV.com/trials/amistad/ruling.html>

¹³ "*In copyright law, standard or general themes that are common to a wide variety of works and are therefore not copyrightable*". Black's Law Dictionary, 7th edition, p. 1346.

¹⁴ The plaintiff did not succeed either in establishing that she would suffer irreparable injury from the film being released before the issue of a decision on the merits nor did she meet the burden of demonstrating that the balance of hardships tipped in her favour. She subsequently dropped the lawsuit.

¹⁵ *Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz – UrhG)* of 9 September 1965 (BGBl. I S. 1273, last amended by the *Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft* of 10 September 2003, BGBl. I S. 1774). Available at: <http://www.gema.de/urheberrecht/urhg/index.shtml>

¹⁶ Not to be confused with the American "fair use" doctrine, which only applies to the use of a work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research (see *infra*).

¹⁷ The borrowing of music is explicitly excluded from the § 24 UrhG field of application.

¹⁸ Loewenheim/Vogel, *op.cit.*, § 8 Rdnr. 8, p. 69.

¹⁹ Decision of the *Bundesgerichtshof* (German Federal Court) of 29 April 1999 - I ZR 65/96. Available at: http://www.rws-verlag.de/bgh-free/volltext/1999/vo6_9/vo61201.htm



French case law has also recognised the similarity/originality test. For example, in the case *Gerardi v. Luc Besson*,²⁰ in which the latter was accused of having plagiarised Gerardi's script *L'enfance déchirée* in his film *Léon*, the court found that neither the subject nor the overall structure of Gerardi's work could be found in Besson's work and, that given the lack of similarities, copyright infringement could not be found. However, the difficulty of putting the similarity test into practice has caused the French courts to introduce in some cases the complementary comparison of differences. If differences prevail the courts will tend not to find infringement.²¹ In the case *Sté Worldvision Enterprise et autres v. Yves Boisset et autres*,²² the court found copyright infringement, but introduced an important nuance to the similarity test: the differences between the works were negligible and insufficient to hide the direct borrowing of essential elements and characteristics. A *contrario*, that implies that essential differences concerning the elements borrowed from the earlier work may rule out infringement. In fact, some years previously, this line of reasoning had been followed in another (well-known) court decision. On 15 December 1993, the *Cour d'appel de Versailles*²³ dismissed charges of plagiarism against the writer Régine Deforges, whose novel *la bicyclette bleue* was deemed to be an unauthorised adaptation of *Gone with the Wind* by the rightsholders of that novel and by Margaret Mitchell's descendants. Using a systematic comparison of both works, a previous court decision²⁴ had found a striking similarity in plot, scenes and main as well as secondary characters, and accordingly held that the defendant had infringed the copyright of the plaintiffs.²⁵ In contrast, the *Cour d'appel*, after acknowledging the evident resemblance between the works, came to the conclusion that there had been no infringement because the differences between them were substantial. First, the court stated that the originality of a novel is based on three elements (characters, context and plot) put in literary form according to the author's style, and only the combination of the three gives character to the work. Following this definition of *novel writing*, the court observed that the different historical setting (in Mitchell's novel, the American Civil War; in Deforges' work, the German occupation of France during the Second World War) necessarily implied substantial differences as regards the characters' lives, behaviour and mentality, even if the characters as such were presented in a very similar way. For France, this decision introduced a different line of reasoning as regards the determination of copyright infringement. Moreover, it gave a rather narrow interpretation of the exclusive right to adaptation, because a plot's transposition in time and/or place (that is, a change of context) became sufficient to substantially modify the work so as to turn it into a different one, independent of the source work.

Despite this French line of reasoning introduced in the *bicyclette bleue* case, one can observe in the case law of Germany, France and the USA that some version of the similarity/originality test is used by the courts. But above all, the case law analysis shows that the rather slight difference between free borrowing and plagiarism is a matter of subjective interpretation that will ultimately be decided by the courts on a case-by-case basis. And, following the *Nichols v. Universal* decision, "as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that, as was recently well said by a distinguished judge, the decisions cannot help much in a new case."²⁶ The court dealing with the matter will necessarily have to re-discover the thin line between plagiarism and legitimate

²⁰ Decision of the *Cour d'appel de Paris*, 4e Chambre of 27 June 2001, *Franck Gerardi c./ Luc Besson*, *Sté Films du Dauphin et autres*, *Revue internationale du droit d'auteur*, no. 192, April 2002, pp. 426-432.

²¹ Xavier Linant de Bellfonds, *op. cit.*, p. 400.

²² Decision of the *Cour d'appel de Douai*, *Assemblée des Chambres* of 20 May 1996, *Sté Worldvision Enterprise et autres c./ Yves Boisset et autres*, *Revue internationale du droit d'auteur*, no. 170, October 1996, pp. 278-289.

²³ Decision of the *Cour d'appel de Versailles (Chambres Civiles Réunies)* of 15 December 1993, *Régine Deforges et Ed. Ramsey c./ Trust Company Bank et al.*, *Revue internationale du droit d'auteur*, no. 160, April 1994, pp. 255-266.

²⁴ Decision of the *Tribunal de Grande Instance de Paris*, 3ème Chambre, of 6 December 1989.

²⁵ A description of this case including a detailed comparison of the works as done by the *Tribunal de Grande Instance de Paris* can be read in Hélène Maurel-Indart, *op. cit.*, pp. 144-159.

²⁶ Quoting *Fendler v. Morosco*, 253 N.Y. 281, 292, 171 N.E. 56.



borrowing in each and every concrete case, and in case of doubt courts seem to be rather reluctant to find that plagiarism has been established.

2) Parodies

When it comes to seeing their own works distorted for a laugh, authors tend to show little or no sense of humour. For example, as the Marx Brothers were preparing their film parody *A Night in Casablanca*, Warner Bros. sent them a letter threatening legal action, arguing that the film's title was too similar to their own *Casablanca*, released some years before. Groucho wrote them back a letter full of his usual wit, in which he stated: "*I am sure that the average movie fan could learn in time to distinguish between Ingrid Bergman and Harpo. I don't know whether I could, but I certainly would like to try.*"²⁷ Warner Bros. did not find the letter funny and asked for an outline of the plot. Groucho answered with the most absurd story, in which the hero's name was called Paul Hangover, Groucho played "a Doctor of Divinity who ministers to the natives and, as a sideline, hawks can openers and pea jackets to the savages along the Gold Coast of Africa", Chico worked "in a saloon selling sponges to barflies who are unable to carry their liquor" and Harpo "was an Arabian caddie who lives in a small Grecian urn on the outskirts of the city". There was a further exchange of letters, in which Groucho explained that, in a new version of the film, he played "*Bordello, the sweetheart of Humphrey Bogart*", Harpo married a hotel detective and Chico operated an ostrich farm.²⁸ After that last piece of absurdity, Warner Bros. decided to give up...²⁹

Voorhoof defines parody as "a ridiculing dialogue with an existing, mostly a famous work or a well-known trademark [...] a creation of a new work that makes ridiculous, or creates at least an antagonistic, critical, humoristic tension with the style, content or form of the original work".³⁰ In some jurisdictions it is recognised as an exception to copyright. That is, parody implies the creation of a new, original work based on a pre-existing one, but contrary to the "free use" of works described *supra*, the parodist does not need the authorisation of the parodied work's author in order to borrow substantial parts of it. This often makes it difficult to draw the line between legitimate use as parody and copyright infringement. Voorhoof considers that the difficulty lies in what he calls "*the inherent paradoxes*" of parody. By that he refers to the following:³¹

- the reproduction of the parodied work is necessary, but not too much of it can be taken, otherwise it becomes a direct copy.
- there must be resemblance without confusion. If the public cannot see the difference between the works, this will conflict with the normal exploitation of the pre-existing work and unreasonably prejudice the legitimate interests of its author.
- Additional elements are needed to create a new, original work, but not too many, otherwise the public would fail to recognise the parody as such. Contrary to the "free use" of a work, differences are instrumental in determining whether there is infringement or not.
- there must be criticism without offence or defamation.

²⁷ The entire letter is available at <http://www.chillingeffects.org/resource.cgi?ResourceID=31>

²⁸ See <http://www.anecdorage.com/index.php?aid=5304>

²⁹ It seems that the Marx brothers actually provoked this situation in order to get publicity for their film. See <http://www.snopes.com/movies/films/nightin.htm>

³⁰ Dirk Voorhoof, *Freedom of expression, parody, copyright and trademarks*, presentation held at the ALAI 2001 Congress, *Adjuncts and Alternatives to Copyright*, 16 June 2001, New York. Available at:

http://www.alai-usa.org/2001_conference/pres_voorhoof.doc

³¹ Dirk Voorhoof, *op.cit.*



The parody exception is justified by the need to allow for criticism and humour. It represents a classic example of the tension that exists between freedom of expression and copyright. This tension is dealt with differently by Copyright and Authors' Rights systems, the former allowing for more freedom to parody than its European counterparts. This can be explained by the fact that, when dealing with copyright cases, free speech considerations play an important role in the US judge's legal reasoning, whereas in Europe Art. 10 ECHR does not because it explicitly admits restrictions to freedom of expression *inter alia* "for the protection of the reputation or rights of others" (these rights include copyright). This will normally lead national courts not to invoke freedom of expression in similar cases.³²

The way each country understands parody also reflects national moral values. For example, the US courts will tend to find infringement in cases of pornographic or obscene parodies,³³ in Europe that would be the case for parodies that incite to racism.³⁴

This different treatment can also be explained by the different way in which each system deals with exceptions and limitations to copyrights. As prescribed by Art. 10 of the WIPO Copyright Treaty, national legislations can introduce exceptions and limitations to copyright only in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. In Europe limitations and exceptions to copyright have been construed narrowly and the lists thereof contained in national laws are considered to be exhaustive. In contrast, the US fair use doctrine enshrined in Art. 107 USCA allows for an open interpretation by the courts of what is permissible copying.³⁵

In US Copyright Law, parody is included as a fair use exception to copyright among uses of a work for purposes such as criticism, comment, news reporting, teaching, scholarship or research. Art. 107 USCA lists four criteria for determining whether or not there is an infringement of copyright in such cases. These criteria are:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The most famous US example concerning parody is the Supreme Court decision in *Campbell et al. v. Acuff Rose Music, Inc.*,³⁶ which involved the use of Roy Orbison's famous *Oh, Pretty Woman!* in a 2 Live Crew's rap song. The Supreme Court considered therein that the four criteria had to be "*explored and weighed together*" rather than being "*treated in isolation*".

³² However, Hugenholtz thinks that the European Court of Human Rights would be willing to consider as contrary to freedom of expression the absence of a parody exception in national copyright legislation. See P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, in Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First (eds.), *Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Society*, Oxford: Oxford University Press (2001), available at: <http://www.ivir.nl/publications/hugenholtz/PBH-Engelberg.doc>

³³ Richard J. Greenstone, *Protection of Obscene Parody as Fair Use*, available at: <http://www.batnet.com/rjg/parody.html>

³⁴ Dirk Voorhoof, *op.cit.*

³⁵ See P. Bernt Hugenholtz, *op. cit.*, quoting A. Strowel, *Droit d'auteur et copyright. Divergences et convergences*, Brussels: Bruylant 1993, p. 144-147 and A. Lucas, *Droit d'auteur et numérique*, Paris: Litec, p. 173.

³⁶ Decision of the Supreme Court, *Luther R. Campbell aka Luke Skywalker, et al., Petitioners v. Acuff Rose Music, Inc., on writ of certiorari to the United States Court of Appeals for the Sixth Circuit*, No. 92-1292, 7 March 1994. Available at: <http://supct.law.cornell.edu/supct/html/92-1292.ZO.html>



After considering as established the fact that 2 Live Crew's song contained parody commenting on and criticising the original work, the Supreme Court dismissed the Court of Appeals' finding that the commercial nature of the parody presupposed an unfair use of Orbison's song. The Court stated that "*transformative works [...] lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright [...] and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use*". Regarding the nature of the copyrighted work, the court found that this criterion was not "*likely to help much in separating the fair use sheep from the infringing goats in a parody case*" since parodies are *per se* based on previous, well-known expressive works. As to the amount and substantiality of the portion copied in relation to the copyrighted work as a whole, the Supreme Court found that 2 Live Crew had indeed copied the characteristic opening bass riff of the original as well as Orbison's lyrics, but that substantial copying was necessary for parody purposes. "*Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart. If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through.*" Besides, 2 Live Crew had created an original transformative work by adding to the original work "*otherwise distinctive sounds, interposing "scrapper" noise, overlaying the music with solos in different keys, and altering the drum beat*", and did not constitute "*a case where the parody is so insubstantial, as compared to the copying, that the third factor must be resolved as a matter of law against the parodists*". Also the Supreme Court found no harm as to the effect of the use upon the potential market for or value of the copyrighted work.

Copyright jurisdictions in Europe tend to be less tolerant with parody. Art. 5.3 (k) of the Directive 2001/29/EC³⁷ allows Member States to provide for exceptions or limitations to the reproduction right and to the right of communication to the public for purposes of caricature, parody or pastiche. But not all Member States have a parody exception in their national legislation (e.g. Denmark, United Kingdom).

In German Authors' Rights Law, parody is not explicitly considered an exception to copyright. However, in application of the "free use" principle, cases that can be seen as parodies may apply as "free uses" of the parodied work. This means *inter alia* that the rules described *supra* as regards other "free uses" of an original work apply also to parodies. The German Supreme Court in two different cases has further clarified the boundaries of parody. In the case *Astérix-Persiflagen*,³⁸ which concerned the use of the famous characters created by Uderzo and Goscinny by other authors to compose an homage work celebrating the 30th anniversary of Astérix's first publication, the German Supreme Court analysed one by one the different stories composing the homage work and found in some cases a "free use", and in others an unauthorised adaptation of the Uderzo/Goscinny characters. For example, in the story called "*die große Mauer*" (the big wall), the court found that the use of both Astérix and Obélix characters in a story that also presented main constitutive elements of the Astérix series was not a "free use" of these characters. But in the story called "*kleines Arschloch*" (little asshole), the court admitted the "free use", since the Uderzo/Goscinny characters were not directly used. The characters in this story were children playing Astérix, Obélix and Idéfix in a school play. The court also found that the story was different to the Astérix series, even if it used elements from it. This case cannot be considered as a classic example of parody, because there is no real critical or humorous approach to the original work but an homage to it, therefore the distance between original and derivative work must be great enough so that

³⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167 , 22/06/2001 pp. 0010 – 0019, available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001L0029&model=guiche

³⁸ Decision of the *Bundesgerichtshof* (German Federal Court) of 11 March 1993 - I ZR 264/91, GRUR 1994, 191, 205, 206 - Asterix-Persiflagen.



"in view of the new work's characteristics the borrowed traits of the old copyrighted work fade". However, in cases where there is a critical approach to the original work, judges will be keener to find a "free use". In the case *Kalkofes Mattscheibe*,³⁹ the Supreme Court decided that a direct reproduction of moving pictures from a TV spot in another TV spot for the purpose of criticising the former was acceptable. The court observed that in order to decide whether this borrowing was legitimate, the "inner distance" taken by the second TV spot as regards the original spot was decisive. Also, the images taken from the original spot were very short, even if they were an important part of the new one (68%). These images were also important for the general effect of the new spot and they showed only little original content. As to the criticism contained therein, the court ruled that the tendency, quality or bad taste of the critic were not elements to take into consideration for the determination of the "free use".

The French *Code de la propriété intellectuelle* explicitly recognises parody as an exception to copyright: "after the work has been published, the author cannot prohibit [...] 4^o parody, pastiche and caricature, taking into account the laws of the genre." These "laws of the genre", which leave the courts room for interpretation, could be described as follows: parody must be humorous and there must not be confusion with the parodied work. Interestingly, this definition traditionally excludes works that, according to the courts, are not funny. Humour is a traditional feature of parody. But then, what is funny? and are the courts a place to determine whether a work is funny or not? In the above-mentioned case *la bicyclette bleue*, the question whether the novel could benefit from the parody exception was also discussed by the different courts that dealt with it. The decision of the *Tribunal de grande instance de Paris* observed a "creative effort that tends to provoke laughing", but found infringement however (see *supra*). The court held that, besides being recognisable to the readers, the parody must go along with a comic or humorous effect which is "necessary to parody, and it is generally obtained through dressing the previous work in comical garb".⁴⁰ A decision of the *Cour d'appel de Paris*⁴¹ did not uphold this decision, finding that the author had a "playful aim" of establishing an "amused complicity" with the readers through the "evocation of literary reminiscences". The *Cour de cassation*⁴² did not accept this line of reasoning, considering that the parody exception must be explicitly invoked and that simply pointing out the amusing style of the work is not sufficient. The final decision did not find any infringement on other grounds (see *supra*). Contrary to this, in a decision of 11 May 1993, the *Cour d'appel de Paris* took the opposite view by admitting a non-humorous parody in an unauthorised modification of the famous song *les feuilles mortes*.⁴³ In any event, parody can be used to support a serious idea if the treatment is humorous, but can never be used to obtain a commercial benefit through unfair competition.⁴⁴

By way of conclusion, one can observe a common understanding concerning the principle of allowing room for humour and criticism, and this despite the fact that the boundaries of the parody exception differ substantially in France, Germany and the United States. Exceptions like this represent a delicate balancing act between two important interests: freedom of expression and the protection of authors. On the one hand, parody serves to foster freedom of expression by limiting the author's monopoly over his/her work, and therefore its boundaries will be drawn in each country according to the national understanding of free

³⁹ Decision of the *Bundesgerichtshof* (German Federal Court) of 13 April 2000, I ZR 282/97, available at: <http://www.rws-verlag.de/bgh-free/volltext2/vo68828.htm>

⁴⁰ Quoted in Hélène Maurel-Indart, *op. cit.*, p. 154.

⁴¹ Decision of the *Cour d'appel de Paris*, 1^{ère} Chambre, of 21 November 1991, (1991) *Revue internationale du droit d'auteur* no. 147, 319. Quoted in Pierre-Emmanuel Moysse, *La parodie*, available at: <http://www.robic.com/publications/Pdf/072PEM.pdf>

⁴² Decision of the *Cour de cassation* of 4 February 1992, (1992) *Revue internationale du droit d'auteur* no. 152, p. 196. Quoted in Pierre-Emmanuel Moysse, *op. cit.*

⁴³ See decision of the *Cour d'appel de Paris* of 11 May 1993, *Revue internationale du droit d'auteur*, no. 157, July 1993, p. 340. Quoted in Xavier Linant de Bellfonds, *op. cit.*, p. 229.

⁴⁴ Xavier Linant de Bellfonds, *op. cit.*, p. 229.



speech. On the other hand, the “*inherent paradoxes*” of parody explain themselves by the fact that some limits are needed to avoid it becoming a back door for plagiarism. To do so would amount to turning copyright into a joke.

IV - There Must Be Another Way...

As one can observe in the case law mentioned *supra*, originality is a hard test to meet. Therefore, plaintiffs often search other ways for obtaining relief, like claims for trademark infringement, breach of contract or unfair competition. In most cases plaintiffs will combine these options with copyright claims, hoping that at least one of them will work. A detailed description of the possibilities available for the plaintiff in cases of alleged plagiarism goes beyond the scope and purpose of this article. However, in order to illustrate means of relief other than copyright infringement suits, we shall look at two brief examples: unjustified profit-making from another’s intellectual work and idea theft.

The judge’s “*perception of economic realities*” will play a determining role in cases in which defendants acquire unjustified profit from plaintiffs’ intellectual work. For example, in the recent case *Luc Besson and Gaumont S.A. v. SFR and Publicis Conseil*,⁴⁵ which concerned an advertising campaign for a mobile phone company that allegedly borrowed from Luc Besson’s film *le cinquième élément* (The Fifth Element, starring Bruce Willis and Milla Jovovich) the *Tribunal de grande instance de Paris* found that the similarities between Besson’s film and the SFR advertisement were not substantial enough to find copyright infringement but nevertheless SFR had acted parasitically as regards the plaintiffs’ creation and investment. The court described parasitism as the gaining for profit and without justification of a competitive advantage from another’s intellectual work and investment, by unnecessarily drawing substantial inspiration from its economic asset.⁴⁶ According to the court, the defendant acted parasitically by deliberately setting their publicity campaign in the light of the plaintiffs’ world-renowned film. The court implied this from the publicity campaign documents that the defendant had submitted to the press. Therein it was stated that, for the launching of the mobile phone commercial offer, the company had chosen Milla Jovovich, “*the emblematic star of The Fifth Element*” as a “fifth icon” of the defendant’s commercial offer (she played Leeloo, The Fifth Element’s main character, and appeared in the advertising spot dressed in a way recalling that character). The defendant’s CEO did not hide either that Ms Jovovich was dressed “*in a clear style à la Fifth Element*”. According to the court, the choice of this actress was made intentionally to attract the attention of the target group: young urban people who would identify the advertisement with the film.

Screenwriters may also find sympathetic courts in cases of idea theft. These are cases in which they pitched their idea/project/script to a producer and afterwards the latter used it for a film without credit or compensation to the author. In such situations, California courts (where most US film plagiarism cases take place) have, in the last fifty years, been applying the doctrine of breach of implied contract. This state-law doctrine was developed by the California Supreme Court in *Desny v Wilder*,⁴⁷ in which the screenwriter Victor Desny

⁴⁵ Decision of the *Tribunal de grande instance de Paris* (3ème chambre, 3ème section) of 30 March 2004, *Luc Besson and Gaumont S.A. v. SFR and Publicis Conseil*. After the writing of this article (April/May 2004), the *Cour d’appel de Paris* partially reversed this decision, finding copyright infringement. See decision of the *Cour d’appel de Paris* (4^e chambre, section A) of 8 September 2004 – *Publicis Conseil and Luc Besson v. Stés Gaumont and SFR*.

⁴⁶ The doctrine of parasitism is based on the principle of civil liability enshrined in Article 1382 of the French *Code civil*. It is related to the principle of unfair competition but does not require that the plaintiff and the defendant be in direct competition. See Xavier Linant de Bellfonds, *op. cit.*, p 15.

⁴⁷ Decision of the California Supreme Court, *Desny v. Wilder*, 46 Cal. 2d 715, 731 (1956), available at: <http://www.courtinfo.ca.gov/courts/supreme/>



submitted his idea for a film to Billy Wilder's secretary in a telephone conversation. In this conversation he made clear that his idea submission was made for the purpose of sale, that is, Wilder could only use it if he paid Desny the reasonable value thereof. The secretary agreed to that. After that, Wilder made a film called "*Ace in the Hole*", in which he used Desny's material without paying or crediting him for his creation. Desny sued for copyright infringement and breach of implied contract. The Supreme Court stated that "*ideas are as free as the air*" and that accordingly Desny's idea was not protectable under copyright law. However, as the plaintiff had submitted his (unprotectable) creation for the purpose of sale, and the defendant had accepted both the submission of the work and the purpose of it (through his secretary), the court found that there had been a breach of an implied contract between the parties. An 1976 amendment to the US Copyright Act,⁴⁸ which introduced federal copyright preemption to any state law that conflicts with the USCA scope of protection, has significantly reduced the viability of idea theft claims, although it is still used for certain cases.⁴⁹

V - Originality: just a Romantic Myth?

After studying the case law on plagiarism discussed *supra*, one cannot avoid having the impression that, in the words of Goethe's Faust, "*A fool I am, for all my chore, I'm just as clever as I was before*".⁵⁰ To understand plagiarism is to understand originality. The difficulty in proving the former lies in the absence of an objective way to measure the latter.

Litman considers originality as an "apparition" that "does not provide a basis for deciding copyright cases".⁵¹ Indeed, the least that can be said after analysing the cases *supra* is that originality is a hard test to meet. The dichotomy idea/expression does not help much with this enterprise, because in many cases it is very hard to tell where an idea ends and where the expression of that idea begins. The judge dealing with a concrete case of copyright infringement is thus sovereign as to finding originality. Since there is no objective way to measure it, the glass will be half full or half empty depending on the particular person who is looking at it. Authors themselves acknowledge this implicitly because they resort to claims other than copyright infringement in order to defend their interests.

It could be argued that the concept of originality resembles Hans Christian Andersen's tale *The Emperor's New Suit*: nobody can see it, but nobody dares to say so. However, paraphrasing Ricks' sentence quoted *supra*, we can conclude that observing the elusiveness of evidence supporting originality is not the same as accepting that originality is an illusion. Just one example: think of Shakespeare, commonly accepted as the greatest dramatist of all times. *Romeo and Juliet*'s sources go back to the forgotten Arthur Brooke's *The Tragical History of Romeus and Juliet*, and he, in turn, owes it all to Ovid's *Pyramus and Thisbe*. Hamlet was based on *Amleth, Prince of Denmark* from the *Gesta Danorum* of Saxo Grammaticus, which was written in about 1185 but is based on older oral tradition. And the list goes on and on. These facts may turn Shakespeare into a plagiarist in the eyes of some people. Yet he was never a copyright infringer, since the concept of intellectual property was not born yet and those inspiring works were much too old to be protected by any modern

⁴⁸ See § 301 USCA.

⁴⁹ See George R. Hedges, John V. Meigs, Jr., and Steven Vaughan, *The Declining Significance of Idea Theft Claims in Light of Federal Preemption*, available at: http://www.quinnemanuel.com/in_the_news/articles/article_working_title.htm and Stephen Smith and Aaron Moss, *Breach of Implied Contract Claims Are On Life Support*, Greenberg Glusker Lawreport. First Quarter, 2003 Volume 15, Number 1, p.2, available at: http://www.ggfirm.com/articles/pdf/GG_1STQ_03_LAWREP.pdf

⁵⁰ Johann Wolfgang von Goethe, *Faust: Der Tragödie Erster Teil - 1. Nacht*. The English translation of this sentence was made by Alison Hindhaugh.

⁵¹ See Jessica Litman, *op.cit.*, Conclusion.



copyright act. But should these facts cause us to deny the value added to those stories by the Bard of Stratford? That is exactly what originality is, and that is what modern societies have decided to protect by means of copyright. You may not be able to define it, but you cannot disavow it.