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Online Copyright Lessons from Europe: A Note of Warning for Latin American Creative Expression, Memes and Parody?

Enrique Uribe-Jongbloed, Universidad Externado de Colombia.

enrique.uribe@uexternado.edu.co

Kim Barker, Open University Law School (UK). kim.barker@open.ac.uk

Tobias Scholz, University of Siegen. tobias.scholz@uni-siegen.de

1) Introduction

Parody has historically proven problematic for copyright systems and creative exploitation, despite being oftentimes considered as exceptions to the author's rights and copyright legislation. This chapter offers an overview of the debate regarding copyright in specific issues such as meme sharing, online restrictions, notice and takedowns, and access to parody content. We discuss from the standpoint of the un-territoriality of content (Daskal, 2015), the difficulties that arise from determining how to enact legislation for those issues, and what such law means in reality, given the absence of physical borders for digital copyright and creative expression online. The analysis here focuses on the definitional and practical difficulties of categorising works of parody, meme, irony and humour, and their – connected – problematic transplantation into the copyright system.

Perspectives of different copyright systems, notably across Latin America, are explored through the lens of meme as parody. First, copyright reforms will be explored in their consequences for memes as they are understood within the category of parody works. Second, a definition of meme is offered here – as a specific subcategory of parody works, and one which highlights both the value of meme as a creative expression, but more significantly, that the problematic nature of a meme is only recognised once there is a copyright dispute. The discussion here then, thirdly, explores – positively and negatively – online parodies and memes, and the issues arising once these are used, shared, and embedded within other online content.

Consequently, this chapter argues that memes should be understood as a form of parody, and categorised accordingly within the copyright system. The discussions here make a broad assessment of the state of copyright reform in the context of parody – and its interplay not only with the sharing of comment and critique for humour but also within the confines of creative expression. The changes – and challenges – posed by copyright reforms will be assessed from the perspectives of end-users, and creators – the two parties directly involved and most directly impacted here.

The analysis explores recent legislation regarding copyright in Colombia (Ley 1915, 2018) to see how its development protects as a parody under the exceptions in article 16 (d) in the context of similar exceptions in other Latin American countries. Above all, this paper discusses the differences, convergences, potentials, and pitfalls of the European approach – including proposed copyright reforms – as well as the copyright exceptions of some Latin American countries, with specific examples including the Confused Travolta and the Cinderella of the Coast memes. In assessing the challenges posed by transformational works such as parody and

meme, the discussions here highlight Europe's situation in light of the reforms made to the uses of copyright works. In exploring those changes between the EU position and Latin American approaches to parody and meme are explored.

Ultimately, this paper argues that while there are well-documented discussions of the problematic definition and extent of parody, cross-border cultural consumption means that parody and meme need to be given renewed consideration within copyright systems – across Latin America, as well as in Europe. Above all else, a recognised category – and definition – of memes is required within copyright systems. This paper shows that Latin American states have a unique opportunity to protect parody and meme in distinct copyright categories, rather than follow the dominant Western copyright system and regard them as derivative works without a clear definition.

2) The Parody Problem

The problem of parody is one that poses numerous challenges, starting with its scope and extent, stemming from its lack of attention in copyright legislation. As with identifying cultural context and defining copyright, determining a widely accepted legal definition of parody is far from straightforward. Notions are vague and often 'clarified' through sweeping categorisationsⁱ rather than precise definitions with identifiable and transferable characteristics (see Melo Sarmiento, 2020, p. 221). Most definitions do not seem to address the interdisciplinary take on parody, from literary to media studies, which develops around the idea of intertextuality, context, and audience interpretation.

a. Defining Parody – The Legalities of Humour and Irony?

The elements of parody, which are said to evoke laughter, and contain a comedic element, can also prove problematic. For instance, where there are legal definitions enshrined in legislation of parody, they often fail to identify what is the essence of legally protectable humour or mockery. Discussions as to the extent of any definition are also unwilling to set boundaries, with some, such as Lai (2018, p. 71), advocating for a narrow definition of parody rather than a broad one, which is open to interpretation depending on the context and characteristics of the expression in question. Other difficulties persist, notably as to what should fall within the scope of parody. For instance, Hutcheon (1985, p. 82) marks the boundary between satire and parody because of the mockery involved in the satirical expression, whereas others, such as Chatman (2001, p. 33) draw a different line, and in contrast, stress that the modern interpretations of parody mean that the ridicule has to be considered as an essential ingredient. Moreover, the absence of irony as a specific consideration in discussions of legal definitions of parody is also problematic, most notably when the context of the parody or satirical expression is the thing which causes the humour. In grappling with the inclusion of irony in parody, Jacques (2019) stipulates the essence of the relationship between irony and parody in stating, "Parody does not always rely upon irony, but irony is one instrument to achieve its aim" (p. 7).

In the leading case grappling with definitions of parody – and by extension – irony and humour, within the European Union, the Court of Justice of the European Union (CJEU) in *Deckmyn v*

Vandersteen (C-203/13) found that the concept of parody has to be identified in light of its usual meaning as it is found in everyday language. The court's conclusion that everyday language has to be considered is significant because it does not attempt to impose any unusual or obscure criteria on attempting to identify what may fall within the categorisation of parody itself. Given the traditional – and long-standing difficulties – in determining what does and does not fall within the category of parody, this acknowledgement from the CJEU has the potential to require consideration of the context in which a potential parody sits to be a determining factor.

Beyond this though, the *Deckmyn* court elucidated what is referred to as the "essential characteristics" of parody, which is determined to be, "first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery." (*Deckmyn*, 2013, para. 12). This was tempered by the CJEU recognising and reiterating the need for a balance to remain between the rights of the original copyright work and the free expression of the creator of the parody itself, which it did by stating that "if a parody conveys a discriminatory message, a person holding rights in the parodied work may demand that work should not be associated with that message" (*Deckmyn*, 2013, para.12). This judicial reasoning sits somewhat alongside the UK Copyright Regulations 2014, which introduced permitted uses for the purposes of parody works, and in doing so, gives due credence to concerns over reputational harm that may arise to the creator of the original work on which the parody is based (Marks & Clerk, 2020).

Unfortunately, despite law reform at a European Commission level, consideration judicially by the highest EU court (CJEU), and reform in the UK – which introduced the first piece of copyright legislation – there remains a specific and widely accepted definition of parody. A further omission compounds this lack of a definition – there is no agreed list of elements said to comprise parody. By extension – and more problematically in the age of user-generated content, there is no agreed definition nor legal conceptualisation of meme either.

b. From Irony and Humour to the inclusion of Meme?

When defining humour for the copyright system, parody is taken to include satire, caricature, and pastiche, and is, as Jacques (2019, p. 1) highlights, a concept with a "nebulous" meaning. Traditionally, lawmakers have avoided defining parody (Copyright Regulations, 2014) – and by extension – humour. The notion that parody contains elements of humour (Rosati, 2015, p. 511) is something of a departure from its Greek origins, where the essence of 'parodia' rests on critical-humorous intent (von Becker, 2015, p. 867). More puzzling for defining the concept in legally constrictive terms is the suggestion by Condren (2012, p. 387) that satire is missing from the notion of parody – and, so too is lacking in a definition – while remaining central to copyright law and the capturing of parody (and its forms) as a protected aspect of creative expression.ⁱⁱ

One other, distinct form of creative expression that falls within the umbrella term of parody is deserving of its own recognition. Memes – taken here to mean "(a) a group of digital items sharing common characteristics of content, form, and/or stance, which (b) were created with awareness of each other, and (c) were circulated, imitated, and/or transformed via the Internet by many users" (Shifman, 2014, p. 41) are increasingly common on user-generated platforms,

yet are also absent from legal and judicial considerations of parody. While the essence of a meme is one that is not necessarily funny nor parodic in nature, the virality of memes suggests that they ought to be considered as falling within parody because of their ability to show parodic allusion. This is especially the situation because of traits (a) and (b) mentioned above, namely that they have shared characteristics with, and an awareness of one another. Memes operating in particular cultural contexts have the distinct potential to evoke laughter, or constitute an expression of humour, whilst capturing or using (excerpts) from pre-existing copyright works. Given that memes can – at the very least, satisfy the characteristics identified by the *Deckmyn* court, it seems that they should fall within the category of parody, and potentially benefit from their place within the copyright system.

c. Context is Key

Even though the goal of parody to entertain, poke fun at or mock a situation, person or action, seems clear, its legal basis being ostensibly less so, and its execution and reception can lead to unintended consequences. Parodies may be misunderstood because of a lack of cultural capital, leading some people to feel offended by them because a parody's intertextuality could get lost or become disrupted (Hutcheon, 1989). Parodies are often profoundly linked to a specific cultural context. It is possible to assume the intertextual nature by understanding the cultural framework where they were created. Still, there is a chance for the parody to be lost in translation (Van Staden, 2011). Therefore, for a parody, it is not only the process of making "different texts come together into a web of relationships, increasing the pleasure derived from discovering this relationship, providing amusement, challenges, and identification for the initiated" (Uribe-Jongbloed et al., 2015, p. 1179), but also the cultural dimension empowering the parody. Or within a different cultural framework destroying the parodic potential leading towards the opposite, unintended, effect.

Still, there is textual space in a parody to give context and enable an intercultural positivist (Scholz and Stein, 2013) to decipher the cultural dimension and understand the underlying message. In other words, what might be a parody in one cultural context, might not be understood as parody elsewhere. In the case of memes, the potential of adding cultural context is more problematic. Memes are more straightforward and often are a mash-up of only a few graphical and/or textual contents. They often work due to their simplistic structure. Still, the context is necessary to understand pop culture references or some current occasion that has led to time-sensitive popularity (Shifman, 2014). Thus, the cultural context plays a crucial role for a meme and may render it pointless in a different cultural environment.

One prominent example is a meme surrounding Angela Merkel and Nicolas Sarkozy. In 2011 Germany and France worked closely together. Both leaders were the driving force for Europe in the Financial Crisis (Riesbeck, 2019). Out of that, the portmanteau word Merkozy emerged. Furthermore, a meme concerning both leaders gained popularity in 2011 and was picked up by prominent newspapers (e.g., Welt, 2011). In that meme, Merkel and Sarkozy's faces got photoshopped into the popular German TV movie "Dinner for One." This movie is about an older woman having a dinner party with imaginary friends played by her servant. Everybody knows this movie in Germany since nearly everyone has watched it before the end of the year celebration, becoming a cultural tradition (Mayr, 2013). Thus, Germans or anyone having lived in Germany for an extended period knows the movie and understands the meme as stating

"Sarkozy is doing everything for Merkel to make her happy." But the meme gets lost in translation if it goes beyond the German cultural context. Outside of Germany, it is just an elderly woman with a servant, the meme context is lost, and the intertextuality is disrupted. Although the general aspect of Sarkozy's servitude might be understood, the link to the TV movie's specificity –the parodic allusion– becomes secondary or irrelevant.

3) Colombia and Parody Protection – Confused Travolta and Cinderella of the Coast

In Colombia, the issue of parody appeared alongside caricature as exceptions or limitations to authors' and neighbouring (related) rights in the partial modification to authors rights legislation introduced by Law 1915 of 2018 under article 16d. Thus, Colombia joined Chile, Ecuador and Nicaragua considering parody as an exception, in contrast to Argentina, Costa Rica, Paraguay, and Uruguay, which still require parodies to have authorization of the author of the original work (Melo Sarmiento, 2020, pp. 218-219). The inclusion, in the Colombian case, of parody as one of the exceptions to author's rights was championed, among others, by Fundación para la Libertad de Prensa (FLIP) [Foundation for Press Freedom] (2016) by stating that "the author's rights legislation must allow for the protection of those rights without removing protection for the freedom of expression, in any of its justified manifestations, including specifically critique, parody, caricature and comment" (p. 5). Although critique and comment are not part of the exceptions or limitations under article 16 of the Colombian, parody and caricature are considered under clause (d). There is, however, no definition of parody or caricature in the legislation (Melo Sarmiento, 2020, p. 230).

Although Colombia, Chile, Ecuador and Nicaragua recognize parody as an exception, they do so in different ways. In Nicaragua, the law only expresses that parody of a published work does not require authorization by the author (Ley 312 of 1999, Art. 37). Chilean legislation considers parody (and satire) as lawful insofar as it includes an "added artistic input" that renders it different from the work cited, *its interpretation* or the characterization of its performer (Ley 20435 of 2010, Art. 71P). Interpretation here is a tricky thing since it means in Spanish both "performance" by an artist or "meaning" assigned by the audience. Ecuador's Intellectual Property Law (Ley de Propiedad Intelectual, Art. 83j) exempts the authorization requirement, "as long as it does not cause harm to the work or the author's or performing artist's reputation," creating an interpretive view on the parody. The Colombian case only demands that the transformations made for parody or caricature do not confuse the original work, something closer to the Chilean definition. They all, however, seem to refer to a transformation of one single work when they refer to parody. This trend means that the expectation of parody or caricature is to refer specifically to a work covered by an author's right that is distinguishable, creating types of derivative work. This aspect of the intertextual relationship between parody and the original work is questionable. Parody often draws elements from a group of works, rather than a single one, that can be considered a genre. As such, a parody mocks the conventions of the genre. In that sense, parody could be understood as a work of its own, whose intertextual connections are as tenuous as they are varied.

Suppose parody is only recognizable as a form of citation. In that case, it demands for those interpreting the material to know the meaning of the original work to recognize it as a parody, as with the example of Dinner for One. Consequently, a distinction needs to be drawn between parody – which seeks to comment on the original text – and parodic allusion, in which the

meaning can be understood without recognizing the connection to the original work, but the pleasure is increased when the intertextual meaning is found (Ott & Walter, 2000, pp. 435-437; Uribe-Jongbloed et al., 2016).

Two contemporary examples serve to illustrate this issue. On the one hand, there is the famous *Confused Travolta* meme, a *gif* which shows a snippet of *Pulp Fiction* (1994) where the character of Vince Vega (played by John Travolta) is trying to pinpoint the origin of Mia Wallace's voice, and his gesture of confusion is brought onto different backgrounds and with accompanying short texts, creating innumerable memes (Roncallo-Dow, 2016). In this case, the reference to the film is irrelevant, what remains as essential is the gesture and its thousand possibilities. Parodic allusion, for those who understand the origin of the reference, adds to the meme's enjoyment but does not diminish the new meaning of the meme produced, nor does it diminish the creative expression behind the meme.

The other examples are the Cinderella of the Cost memes (Uribe-Jongbloed & Mora-Moreo, in press). In this case, Disney's *Cinderella* (1950) image is used on various unlady-like situations often set in Barranquilla (e.g., hopping on a full bus, insulting prince charming), rendering Cinderella as vulgar, uncouth, and foul-mouthed. The meme includes stills from the animated film with inserts of pictures, background photos, and dialogue balloons. In this case, the reference to Cinderella – or in general, her appearance as an elegant, classy princess – is necessary to understand the parodic meaning of the memes. Whereas the former case could rarely be considered to harm in any way the value of *Pulp Fiction* (1994), and might never attract copyright concerns, the latter does indeed play against the image of *Cinderella* (1950), and could be considered for a case of "cease and desist" by Disney, if they deem their image harmed, or their copyright infringed.

As mentioned by Trevisian et al. (2016, p. 293), memes tend to include characters from audiovisual materials, famous politicians or renowned artworks as their source materials. This might be due to recognition of the material for parodic allusion or ease of availability. Not all memes are, then, quite clearly forms of parody – at least not in the sense that it makes an explicit comment on the work it is citing. However, if the parody is to be defined as "taking or stealing elements of an original or pre-existent work ... to create a new work, which contains, at least partially, critique, comment or opinion" (Melo Sarmiento, 2020, p. 221), then all memes that draw from pre-existing work (as the ones mentioned above) are parodies – and exceptions to author's rights – despite not being specific parodies of the works cited. Also, if a perspective from film studies is observed, parodies are a construction upon tropes or commonalities of genres (see Altman, 2019). Scott Olson argues that parody "exemplifies the fuzzy, mutating, recombinant times in which we live" (Gehring, 1999, p. xiv), since Gehring points out how parody does not draw only from one single source, but a multiplicity of them in their development. Then, it would seem that memes could be understood as forms of parody and categorised as such to benefit from copyright exceptions.

4) Online expression & the practice of parody – cultural production v copyright infringement?

Capturing parody, confining its definition, and ensuring that the humorous message is conveyed without limiting freedom of expression is an obstacle that is incredibly difficult to balance in situations of online cultural production and online expression. For instance, YouTube is a single platform whereby the blend between professionally developed videos and amateur creative videos comes together in a diverse mix. The combination of users of this platform – the professional music labels and the 'individual amateur' (Boxman-Shabtai, 2019) – offers a unique environment in which the pure copyright work is disseminated by the music label, alongside the amateur creations of polished music videos. The distinction is a marked one, not least because how these two 'categories' are identified symbolises a distinction in the level of input to the creativity, but also implies a distinct difference in the legal categorisation of the two videos, and therefore a difference in the protection (and legal worth) attached to them. This distinction ultimately relegates the 'amateur' video to a category where it is – for the purposes of copyright – one of derivative, or parody work.

The challenges of online content have posed – and continue to pose – problems for copyright in the last 30 years. The additional difficulties in categorising online parodies rest not solely in the concept of parody, but go beyond this, to the heart of copyright, and considerations of originality. For some time in Western copyright, the essential question was not whether parody could be copyright protectable, but rather, whether parody was sufficiently original to benefit from protection as the creative expression itself. The changes to copyright exceptions – notably in the UK in 2014, but also in Colombia in 2018 – have shifted the discussion away from that focus and now firmly rest on what is captured by the definition of parody. This is the same for on and off-line parodies. The references to a pre-existing work used or referred to in parody or meme, bring with them enormous benefits for both works – including the economic incentives of quotation and inclusion in a parody. Where online videos and memes are generated, these bring a new lease of life – and potentially new audiences – to the original work. Traditionally, technological innovations such as YouTube videos have contributed to copyright infringement for the use – however small – of part of the initial work.

In the European Union legal regime, discussions of modernising the copyright system have pervaded since the introduction of the Information Society Directive (2002), and yet none have proved more contentious, controversial, nor politically sensitive than the DSM Directive proposals. Contained within the DSM legislation are proposals that could have a significant – detrimental – impact on internet creativity, sharing, parody and memes, and online copyright. The most contentious of the proposed reforms in the DSM Directive poses potential severe barriers to using copyright works and the availability of content to be included in parody works, mostly memes. An early critique of the DSM proposals saw them referred to as 'meme killers' by leading critics, notably including the head of the Open Rights Group (Elliott, 2018). The proposals include pre-upload filter requirements and taxes on hyperlinks – both controversial elements of the draft Directive that have attracted outcry. Some describe the proposed reforms as 'censorship' mechanisms for online content (Tribe, 2018).

The – now – Article 17 of the DSM Directive requires specific types of online content-sharing service providers (OCSSPs) enter into licensing agreements with rightsholders to allow the use of works, or some parts of works, including songs and videos. Therefore, Article 17 has significant potential to introduce significant changes to the usual practices of platforms that host content, and which encourage user-generated content such as parodies, memes, and

reinterpretations of professionally created content. For platforms such as YouTube, which tends to rely on its role as a provider, rather than a content contributor, and which can therefore avoid any liability by not becoming involved in editorial action, and merely host content (acting as a mere conduit under Article 14 of the E-Commerce Directive 2000/31), the reform proposals threaten this state of existence. If it is not possible to satisfy the obligation to enter into licensing agreements, OCSSPs, instead, must ensure that they undertake their 'best efforts' (Romero-Moreno, 2019) to guarantee that unauthorised content is inaccessible. In practice, this is likely to translate into upload filtering and notice and takedown systems. This has caused further outcry given that there is not – currently – an obligation on OCSSPs operating within the European Union to monitor content shared on their sites (Article 15, E-Commerce Directive 2000/31). As Romero-Moreno (2019), and Frosio and Mendis (2019) highlight, this represents the shift within EU internet governance towards imposing responsibilities on platforms, rather than liability. More concerningly for parody and meme, it is likely to constrain creative – and freedom of – expression

In other words, the DSM reforms are making OCSSPs responsible for the content they are hosting, and by doing so, the responsibilities are shifted from lawmakers to private entities. Gloglo (2020) is of the opinion that the change in copyright law at an EU level is reflective of the shift in copyright ideology. Yet, the change is one that alters the ways content will ultimately reach the end-users and involves – through the 'best efforts' obligation, nothing short of a need to filter the content being shared. This amounts to little other than censorship of content and is not so much a shifting ideology of copyright, but a shifting ideology about the messaging that parodies, especially memes, can convey. Alternative approaches to copyright content and the use of cultural creative content could (Frosio, 2020) – and should – have been considered to ensure that parody – and memes as a subset of parody – are given the recognition of worth and copyright value they are due in the digital age. Instead, Article 17 reforms essentially mean that creative expression is more likely to be rewarded with being sued, rather than being protected. If there is no licensing agreement in place, and content is captured and used by an individual in reproducing something produced by another, the creativity could quite easily result in being sued for copyright infringement. Therefore, the reforms raise the likelihood of being sued for infringement rather than being rewarded for creativity with a copyrighted work or, at the very least, an exception for meme/parody, and even that presupposes that the creator's work passes the upload filter initially. If it does not, then the use of copyright reform to enact online censorship laws has come to fruition.

These proposals – notionally designed to 'improve' the copyright harmonization across the region of Europe – are potentially hugely damaging to creative industries, to the use of the internet for sharing of content, but also tremendously detrimental to the creative enjoyment of end-users of the internet. Not only do these reforms propose sweeping changes, but they threaten the ecosystem of creative sharing online, mainly because the monetized borders of intellectual creation are becoming more and more rigid, and in turn, more restrictive and damaging to the free sharing of culture through the form of the meme.

5) Conclusion: Notes of Caution & Pitfalls to Avoid?

The European package of 'reforms' poses significant threats and challenges to countries with less well-developed copyright systems. Given the increased dependency and use of the internet for creative sharing, having an increasingly restrictive copyright system seems to be a backward step. So too, is the miring of meme and parody within national systems given the proliferation of online content sharing and content consumption. In light of the jurisdictional and geographical boundaries which capture copyright and copyrightable expressions along national lines, the definition of parody for copyright purposes also seems to be overwhelmingly categorised as an exception – and therefore a permitted use of a pre-existing work – rather than a new creative expression resulting in a new copyright work. Such conceptions of parody dominate because of their historical basis on fair dealing (Cameron, 2014, p. 1004), which are little more than a nod to the origins of parody works having humorous and critical intent. By including excerpts but adding to the original works, a new work is created, but with added comedic or satirical value. In that regard, the "uniform definition" (von Becker, 2015, pp870) offered by the CJEU across Europe should be heralded as a fresh start for parody, and more importantly, the freedom to parody. It is hoped that this – rather than some of the more restrictive aspects are taken from Europe and utilised elsewhere to make cross-border content sharing less problematic.

In the absence of international definitions of 'meme' and 'parody,' it is difficult to predict the future of these areas' legal developments. Similarly, given the increasingly polarized political nature of different regions in the Americas, Europe, and beyond, reaching consensus on online copyright seems to be increasingly difficult. As such, to protect creative expression, online authors, and parodies – for the benefit of all – it is essential that non-US and non-EU states take note of the warnings about copyright restrictions enacted in the name of 'reform', and resist following the copyright models introduced in those regions. To protect and value meme and parody, and cultural humour, it is of paramount importance that Latin American states enshrine protections for meme and parody in their copyright laws, rather than following the historically dismissive Western approaches to parody.

Furthermore, if we seek to move towards an idea of the creative value of the meme – not based on its parodic value of one source, but the parodic allusion to a variety of them – then it should deserve its own copyright protection. The Cinderella of the coast memes bring with them a great deal of class commentary, include a considerable amount of added work and meaning, and their use of the Cinderella character is merely a shorthand for “princess”. The parodic allusion is relevant, but it is evident that their work amounts to something new. Enough to grant the copyright exception under the Colombian and Chilean legislations, but edgy on those, like the UK or Ecuadorian ones which place emphasis on reputation and economic incentives, rather than protecting expression rights through copyright. To offer a note of caution, since these memes may cross over from Colombia to Ecuador, could the Cinderella of the Coast memes be banned there? All of them or those that could be considered offensive? What stands as culturally acceptable commentary across borders? Melo Sarmiento (2020), reminds us that “the new limit must have limits as well, a balance between freedom of expression and copyright thus demand it” (p. 236) to ensure freedom of creative expression is not hampered or censored under the supposed protection of copyright, and its economic priorities.

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Notes

ⁱ Parody definitions are often offered through indicative lists of notions of things which may be captured within the broad category of parody, and include critique, pastiche, irony, humour, imitation, and caricature.

ⁱⁱ For example, parody is (now) protected in England & Wales under s30A CDPA 1988, but there remains a lack of a statutory definition within s30A.