

# AIPPI Study Question Q291 – Defence of Parody in Copyright

Report of the Swiss Group

## I. Current law and practice

1. Does your law or case law provide for exceptions or limitations to copyright protection for the purpose of parody or any other similar exceptions (e.g. satire, caricature, pastiche)?

Yes.

Art. 11 para. 3 of the Swiss Copyright Act (1992) (hereinafter, «SCA») provides for an exception for parodies and comparable variations of protected works («It shall be permissible to use existing works for the creation of parodies or other comparable variations on the work.»; translation by B. MÜLLER/R. OERTLI (eds.), SHK Urheberrecht, 2<sup>nd</sup> ed., Bern 2012).

Although this provision is found in the Article dedicated to the integrity right rather than in Chapter 5 of the SCA, which deals with exceptions/limitations, it is undisputed that it fulfils the function of an exception/limitation (R. M. HILTY, *Urheberrecht*, 2<sup>nd</sup> ed., Bern 2020, para. 445; M. REHBINDER/L. HAAS/K.-P. UHLIG, *URG-Kommentar*, 4<sup>th</sup> ed., Zürich 2022, SCA 11 para. 15).

Prior to 1992, there was no exception for parodies in Swiss copyright legislation. However, there were attempts in case law to deal with comparable situations on the basis of the unwritten legal concept of «free use» («freie Benutzung»). Thereby, Swiss courts were particularly inspired by decisions of German courts (cf. V. SALVADÉ, *L'exception de parodie ou les limites d'une liberté*, *medialex* 1998, pp. 92 et seqq., p. 93, E. HEFTI, *Die Parodie im Urheberrecht*, Zürich 1975).

2. Does your law or case law define parody or any of the other similar exceptions mentioned in the above question?

Neither the SCA nor any other Swiss statute provide a legal definition of «parody» or «comparable variations».

In the context of the 1992 revision of the SCA, the Swiss Federal Council defined parodies in its explanatory memorandum as «comical representations of existing works for the purpose of criticism» (BBl 1989 III 530).

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*The english translation of the summary is included on Swissex and legalis only.*

There are only a few Swiss court cases that deal with the parody exception. The most recent is a first-instance judgment rendered by a single judge in criminal proceedings (BezGer Zürich, sic! 2022, pp. 68 et seqq. «Trittligasse»). It has not been subject to review by a higher court or even the Federal Supreme Court. The case deals with a revue musical, i.e. a type of musical created in 1959 and played successfully in Zurich for many years. In 2017, a theatre producer took several popular songs from that revue and integrated them into a new play that was strongly reminiscent of the well-known original revue. The producer shortened and «updated» the song texts by referring to contemporary events, celebrities (e.g., Justin Bieber, Prince William), and new technical developments (e.g., WLAN, e-mail). The single judge concluded that these adaptations of the songs constituted parodies and could therefore be performed without the original author's consent. While this decision is highly debatable as to whether a parody actually exists in the specific case, it nevertheless provides useful indications for the interpretation of the term parody. The judge found that the term «parody», underlying Art. 11 para. 3 SCA, «must be interpreted broadly» (cons. 6.1). According to her, a parody «must [...] be funny. [...] However, when assessing the humoristic effect of a parody the threshold should not be excessively high [...]. The parody uses an existing work to criticise the work in question, the author, or even situations or people who have no connection to the work. It must be evident that the parodist intended a critical view and this must be perceptible in the parody itself. It is irrelevant whether the criticism is justified or not [...]. The parody must not be confused with the original work [...]» (cons. 6.2).

In a 2002 decision, the District Court of Zurich held that a parody may not lead to a distortion of the original work (BezGer Zürich, sic! 2022, pp. 127 et seqq., cons. 27 «*Malbuner Is*). This case concerned the use of excerpts from old Swiss films that were combined with new texts for advertising purposes.

The concept of parody is discussed extensively and sometimes controversially in legal doctrine. There is a consensus that parodies are adaptations of existing published works. The parody must add an additional meaning and significance to the parodied work, which this alone did not contain. According to most scholars, the adaptation must itself be a separate copyrighted work to benefit from the exception (D. BARRELET/W. EGLOFF, *Das neue Urheberrecht*, 4<sup>th</sup> ed., Bern 2020, SCA 11 para. 21; REHBINDER/HAAS/UHLIG,

op. cit., SCA 11 N 13; F. DESSEMONTET, SIWR II/1, 3<sup>rd</sup> ed., Basel 2014, para.636). Even if separate protectability were not a mandatory requirement for a parody, it is difficult to imagine adaptations that do not meet the copyright protection requirements, but fulfil all other requirements to qualify for the parody exception, cf. HILTY, op. cit., para. 526). In a parody, the existing work's characteristic elements may be altered or complemented with new elements, but they remain recognisable (if they were not recognisable, the creation would be outside the scope of protection of the existing work and the question of an exception/limitation would not arise; SALVADÉ, op. cit., *medialex* 1998, pp.92 et seq.). Parodies must serve a humorous, satirical purpose. Opinions differ on what constitutes humour, but generally, no high threshold is set in this respect (cf. REHBINDER/HAAAS/UHLIG, op. cit., SCA 11 para. 13; more reluctant, however, BARRELET/EGLOFF, op. cit., SCA 11 para. 22 [no parody exists if there are doubts as to its humorous objective]). Some scholars argue that the motives for which an existing work is humorously modified should not be considered when deciding on the application of the parody exception (cf. DESSEMONTET, op. cit., para. 620, arguing that internal motives cannot be reliably determined from the outside anyway). Most authors, however, demand – as suggested by the Federal Council (see above) – a critical intention for an adaptation to be eligible as a parody. Such critical message may relate thematically to the parodied work or its author but may also use the parodied work for criticism directed towards third parties, such as criticising unrelated persons, companies, countries, social conditions or politics (BARRELET/EGLOFF, op. cit., SCA 11 para. 22; REHBINDER/HAAAS/UHLIG, op. cit., SCA 11 para. 13). It is generally accepted that parodies may (also) serve commercial purposes (HILTY, op. cit., para. 527; Barrelet/Egloff, op. cit., SCA 11 para. 22; REHBINDER/HAAAS/UHLIG, op. cit., SCA 11 para. 13; opposing view: CH. WILLI, *Fiktive Figuren als Rechtsgut*, AJP 1997, 161 et seq.). The parody is not required to criticise the parodied work or its author, in the sense of finding fault with them, but rather parodies regularly represent a kind of homage to them. The intention to disparage the parodied work or its author in order to harm the one or the other is rather an argument against the existence of a parody. A parody must not be confused with the original work and must not impair its exploitation (HILTY, op. cit., para. 527; BARRELET/EGLOFF, op. cit., SCA 11 para. 22; REHBINDER/HAAAS/UHLIG, op. cit., SCA 11 para. 15; DESSEMONTET, op. cit., paras. 624 et seq.).

Case law has not dealt with «comparable variations». In legal literature, caricature, travesty and pastiche are given as examples, mostly without defining these types of alterations in detail (HILTY, op. cit., para. 525; BARRELET/EGLOFF, op. cit., SCA 11 para. 23). These opinions were expressed, however, when it was not yet foreseeable which broad scope of application certain authors and courts – particularly in Germany – intend to attribute to pastiche.

### 3. Must the parody comply with the three-step test provided for in article 9(2) of the Berne Convention?

Yes. Switzerland is a contracting party of the Berne Convention. Consequentially, the three-step test is one of multiple elements that must be considered when interpreting the term «parody» and the parody exception in general (cf. REHBINDER/HAAAS/UHLIG, op. cit., SCA 11 para. 15).

### 4. Are there any other special conditions or requirements for a parodist to benefit from this exception?

#### a) Parody must constitute an expression of humour or mockery.

Yes. Swiss practice requires a humorous intention when creating a parody. What exactly is meant by this, however, remains vague. Overall, the respective requirements appear to be rather low (cf. answer to question 2, above). The new meaning added to the pre-existing parodied work serves to bring a comic relief.

#### b) Parody must be transformative or add some significant new creation to the original work.

Yes. Swiss law requires that the parodist adds some new meaning to the parodied work that sheds new light on it, its author or third parties or circumstances, which justifies the parody exception/limitation. Most Swiss authors assume that adaptations which meet the requirements to benefit from the parody exception (for example, regarding the humoristic or critical reference) more or less automatically meet the requirements for separate copyright protection (i.e., have an individual character). Therefore, it is sometimes left open whether it is necessary to declare copyright protectability as a stand-alone requirement for a parody (cf. answer to question 2, above).

#### c) Parody must have a critical intent.

Yes. Most scholars hold – in line with the definition put forward by the Federal Council – that the critical intent is a defining characteristic of a parody. A humorous aspect of an adaptation alone does not justify an exception. The requirement of critique must, however, be interpreted broadly. It is sufficient for the creator of the adaptation to express some kind of analytic view and to add some meaning (in detail SALVADÉ, op. cit., *medialex* 1998, p. 93 et seq.).

#### d) Parody must be directed at the original work (instead of targeting at society or other aspects unrelated to the original work).

No. Parodies may also establish a humoristic or critical reference to individuals, things, situations, social or political conditions, or other aspects that have nothing to do with the parodied work (cf. answer to question 2, above).

#### e) Parody must be non-commercial.

No. Nevertheless, a parody must fulfil all the criteria set out above. In particular, it must not impair the exploitation of the original work (cf. the three-step test of the Berne Convention and the answer to question 2, above). The reference to the underlying work must not serve the sole purpose of promoting the sales of one's own products. The parodist, however, may add his or her new meaning, thereby satisfying the parody requirements, to sell the parody.

Further, the parody must not lead to a distortion, denigration or disparaging of the original work, which also sets limits on the use of parodies for advertising purposes (cf. answer to question 2, above).

**f) Parody must not disparage or discredit the original work.**

Yes. See the answer to question 7, below.

**g) Other.**

No.

**5. Do freedom of speech principles play any role when assessing lawfulness of a Parody?**

Yes. In accordance with the overarching principles governing the application of copyright exceptions and the interpretation of pertinent legal terms, the fundamental rights privileged by the parody exception are an important element when assessing the lawfulness of a parody. Consequentially, the Swiss parody exception must be applied in a way that the parodist's freedom of expression (Art. 16 para. 2 Swiss Federal Constitution, SFC) and the freedom of art (Art. 21 SFC) are secured adequately.

It follows from the importance of these fundamental rights that there is no general rule according to which copyright exceptions/limitations must be interpreted in a narrow manner.

**6. Are all types of copyright works subject to parody exceptions?**

Yes. However, cases in the field of computer software, for example, are difficult to imagine.

Opinions differ as to whether certain types of humorous-critical adaptations should be considered as parodies or as «comparable variations». This debate does not change the fact that such adaptations potentially fall under the parody exception/limitation.

It is undisputed under Swiss law whether pastiche is a type of parody. As such, it must meet the requirement of adding critical-humorous meaning in order to qualify as a parody. This does not exclude the possibility that pastiche may be meant as a homage – bowing or a tip of the hat – but it must not be limited to this.

**7. Does your law or case law provide for any exceptions or limitations to moral rights associated with parodies?**

The parody exception restricts the alteration right and the adaptation right (Art. 11 para. 1 SCA). However, it is itself restricted by the fact that a parody may not lead to a distortion of the original work that violates the moral rights of its author (Art. 11 para. 2 SCA; cf. answer to question 2, above). The relationship between limitation and counter-limitation are interpreted in the sense that the author has to tolerate the parody if it is justified by the added critical-humorous meaning but can object to a use that serves primarily commercial or denigrating purposes that are not justified by such additional meaning.

The freedom of parody does not exempt from crediting the author of the adapted work (Art. 9 para. 1 SCA) if the

practice allows for it. Depending on the type of parody, however, it may well be that the author has little interest in being explicitly associated with the parody and the associated message (Salvadé, op. cit., *medialex* 1998, p. 97).

As only published works may be the subject of parodies, it follows that the parody exemption does not restrict the right of first publication (Art. 9 para. 2 SCA; Salvadé, op. cit., *medialex* 1998, p. 97).

**II. Policy considerations and proposals for improvements of your Group's current law**

**8. Could your Group's current law or practice relating to parody defences to copyright claims be improved? If yes, please explain.**

No. Current law appears to be well balanced as it takes into consideration the conflicting interests of the authors of the parodied works and the authors of the parodies, as well as the general interest in the existence of freedom of expression and freedom of art in a democratic society. The law as presently in effect leaves plenty of room for debate between legal scholars, the parties to a dispute, and for interpretation by the courts.

There is very little case law on the subject to date. Perhaps this means that the rules on parody are sufficiently predictable, or that authors are tolerant of parodies of their works.

**9. Could any of the following aspects of your Group's current law relating to parody defences be improved? Please explain:**

**a) Definition of Parody or of other similar exceptions;**

There is no legal definition of «parody» or of «comparable variations». This has the advantage of allowing a broader and more flexible interpretation of the scope of this copyright exception. As an interpretation is carried out on a case-by-case basis, it seems reasonable to the Group not to confine these terms to detailed definitions. This would have the effect of restricting the scope of the exception and limiting the discretion of judges when, on the contrary, these terms should be interpreted broadly in Switzerland.

Furthermore, it is not certain that an exhaustive list of instances of parody would make this exception more predictable for artists, given the high degree of subjectivity in the assessment of all the criteria and the circumstances of each case.

In our Group's view, current Swiss law seems to offer a good compromise between the lack of any specific provision about the parody exception and too specific definitions/enumeration of parody or similar exceptions.

**b) Requirements for benefiting from such exceptions;**

Case law and doctrine have found a consensus on the main criteria of parody and comparable variations such as recognisable derivative work, a humorous aspect, satirical effect, critical distancing from the parodied work avoiding any confusion with the original work, and infringement of the interests of the author of the parodied work (cf. answer

to question 2, above). In the Group's view, these criteria seem sufficient to provide a framework for the application of this exception to copyright with a certain level of predictability for the artists, while leaving judges free to decide in each specific case, on the basis of a weighing up of the interests at stake, whether or not the parody exception is justified. Maintaining a large definition of requirements when it comes to assessment of the parody exception is important given the high degree of subjectivity involved in assessing notions of humour or the degree of public knowledge of the work parodied, for example.

On the merits, the requirements set out in the case law seem to be balanced. They ensure respect for fundamental constitutional principles of freedom of expression and freedom of art (cf. response to question 5, above). On the other hand, these requirements also entail limits on the freedom to parody, taking into account the need to protect copyright by preserving moral rights of disclosure, of authorship, as well as economic rights over the work, and the personality rights of authors.

**c) The interplay between parody exceptions and moral rights;**

The interplay between parody exceptions and moral rights seems to be balanced in our Group's opinion. The moral right to the integrity of the original work is only partially limited by the parody exception as the latter is itself limited by the moral right to the integrity of the work (the parody can imitate the characteristics of the parodied work but must have a clear contrast with the original work).

The other moral rights of the author, namely the right of disclosure and the right of paternity and the right of personality are preserved. In particular, parodied authors can oppose any alteration of their works that would harm their personality.

**d) The types of work that may benefit from such exceptions;**

All types of works protected by copyright may benefit from the parody or comparable variations exceptions. For the same reasons as those mentioned in response to question 9(a) above, in the Group's view it would not be desirable to limit the benefit of these exceptions to certain types of works.

**10. In your Group's view, what policy objective (such as free speech, or another objective) would a defence of parody promote and help accomplish? Does the policy objective drive the types of expression that should be allowed under a parody defence?**

As mentioned in our answer to question 5 above, a parody defence may help ensure that the constitutional principles of freedom of expression (Art. 16 para. 2 SFC) and freedom of art (Art. 21 SFC) are respected. These two principles are very important in Swiss society as they are essential components of social and cultural life in democratic societies.

Furthermore, the policy objective of copyright protection applies to parodies, as the latter are also works worthy of protection by copyright.

**11. Are there any police considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?**

No.

**III. Proposals for harmonisation**

**12. Do you believe that there should be harmonisation in relation to exceptions and defences based on parody? If YES, please respond to the following questions without regard to your Group's current law or practice. Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.**

While there is a clear interest in harmonisation for works distributed internationally or for online platforms operating globally, the Group considers that the defence of parody and comparable variations is ultimately based on constitutional principles whose interpretation is highly jurisdiction-specific and therefore not amenable to harmonisation.

Nevertheless, the Group agrees that a broadly defined harmonised exception can promote predictability, safeguard fundamental rights, and provide a cornerstone for the cross-border exploitation of works.

**13. Should there exist exceptions or limitations to copyright protection for the purpose of parody or any other similar exceptions (e.g. satire, caricature, pastiche)? If YES, please explain.**

Yes. The Group considers that exemptions for parodies and comparable variations take into account a parodist's freedom of speech and/or artistic expression, thus giving effect to fundamental human rights.

**14. Should parodies comply with the three-step test provided for in article 9(2) of the Berne Convention in order to benefit from the exception?**

Yes. In the Group's view, Art. 9(2) of the Berne Convention sets out minimum requirements that represent an adequate balancing of interests.

**15. Should there be any other special conditions or requirements for a parodist to benefit from this exception?**

**a) Parody should constitute an expression of humour or mockery;**

Yes. The Group considers that a parody as such must exhibit elements of humour, satire, or mockery. However, the Group takes the view that the bar should generally be low.

**b) Parody should be transformative or add some significant new creation to the original work;**

Yes. While it may be questionable whether a parody needs to be protectable as a derivative work, it is clear that it must not create a risk of confusion with the original work and must therefore add certain transformative elements.

**c) Parody should have a critical intent;**

Yes. The Group takes the view that a humorous element of an adaptation alone does not justify an exception. There must be an intention to express an opinion, contribute to debate, cultural communication, analysis, or critical thought. However, the requirement for critical intent should be interpreted broadly and the threshold should generally be low.

**d) Parody should be directed at the original work (instead of targeting at society or other aspects unrelated to the original work)?**

No, in the Group's view, a parody does not need to be directed at the original work and can instead target other aspects unrelated to the original work.

**e) Parody should be non-commercial;**

No. The Group is of the opinion that the exception can be invoked in a commercial context, as distinctions between non-commercial and commercial parodies would inevitably be arbitrary.

**f) Parody should not disparage or discredit the original work;**

Yes. While a parody can represent a critical view towards the original work, as part of the three-step test under the Berne Convention, a parody should not conflict with a normal exploitation of the original work and not unreasonably prejudice the legitimate interests of the author.

**g) Other – please explain.**

None.

**16. Should freedom of speech principles (or any other policy objective) play any roles when assessing lawfulness of a Parody?**

Yes. As the parody exception serves to protect fundamental rights (i.e. freedom of speech and artistic expres-

sion) against the balancing of contrary interests of authors, it cannot be assessed in isolation. Although the Group acknowledges that legal predictability speaks to setting an abstract bar, the law will always have to be interpreted in accordance with fundamental rights (the principle of constitutional interpretation).

**17. Should all types of works be subject to parody exceptions?**

Yes. The Group takes the view that parodies and comparable variations can take indefinite forms and sees no reason to exclude certain types of works.

**18. Should there be any exceptions or limitations to moral rights associated with parodies? If YES, please explain.**

In the Group's view, except for the right to maintain the integrity of the work (i.e., the right to decide on alterations and derivative or collective works), other moral rights (i.e., the right to oppose a personality right-infringing distortion of the work, right to first publication, right to be named an author) should not be limited.

**19. Please comment on any additional issues concerning exceptions and limitations to copyright protection related to parody you consider relevant to this Study Question.**

None.

**20. Please indicate which industry sector views provided by in-house counsels are included in your Group's answers to Part III.**

All members of the Group are independent practitioners. No in-house counsels formed part of the Group.

## Zusammenfassung

Parodien, die auf urheberrechtlich geschützten Werken basieren, sind potentiell konfliktträchtige Schnittpunkte gegenläufiger Interessenlinien. Während sich Schöpfer und Rechtsinhaber parodierter Werke auf ihre Urheber- und Persönlichkeitsrechte oder gar auf die Eigentumsgarantie berufen, sehen sich Parodisten durch die Grundrechte der Meinungsäusserungsfreiheit und Kunstfreiheit getragen. Viele Rechtsordnungen versuchen diese Interessen mittels Parodieschranken einem Ausgleich zuzuführen. AIPPI will im Rahmen einer «Study Question» die unterschiedlichen internationalen Regelungsansätze ermitteln und gestützt darauf ausloten, ob in diesem Bereich eine Rechtsangleichung angezeigt ist. Vorliegend wiedergegeben ist der diesbezügliche Bericht der Schweizer AIPPI-Landesgruppe, der einen aktuellen Überblick über die hiesigen rechtlichen Rahmenbedingungen für Parodien gibt.

## Résumé

Les parodies basées sur des œuvres protégées par le droit d'auteur sont susceptibles de générer des situations particulièrement conflictuelles en raison des intérêts divergents en présence. Alors que les créateurs et les ayants droit des œuvres parodiées invoquent leurs droits d'auteur et leurs droits de la personnalité, voire la garantie du droit de propriété, les parodistes font, quant à eux, valoir leurs droits fondamentaux de la liberté d'expression et de la liberté artistique.

De nombreuses juridictions tentent de concilier ces intérêts en prévoyant des exceptions de parodie. Dans le cadre d'une «Study Question», l'AIPPI propose d'identifier les différentes approches réglementaires internationales et, sur cette base, de déterminer si une harmonisation du droit serait souhaitable dans ce domaine. Le présent rapport du groupe national suisse de l'AIPPI donne un aperçu de la situation juridique actuelle de la parodie en Suisse.