The (Missing) Parody Exception in Italy and its Inconsistency with EU Law

by **Gabriele Spina Ali***

Abstract: The Italian Copyright Statute does not contain a general exception for 'parody, caricature and pastiche' pursuant to Article 5(3k) of the InfoSoc Directive. In spite of this, commentators believe that the case law prior to the Directive sufficiently safeguards parodies against infringement, by granting them the status of autonomous, 'transformative' creations and leveraging on the fundamental freedoms of speech and artistic expression as enshrined in the Italian Constitution. In addition, they have lauded this approach for avoiding downgrading parody from an 'overarching principle' to a narrowly defined 'exception' to copyright protection. The present article criticizes this construct by dissecting and rebuking the related arguments. It emphasizes its inconsistency with the InfoSoc Directive and the recent case law of the Court of Justice of the European Union and submits that, paradoxically, framing parody as a principle leads to more restrictive outcomes than an ad verbum implementation of Article 5(3)(k).

Keywords: Parody; Copyright; Exceptions and Limitations; Three-step test

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A. Yet another boring contribution on a fun topic

1 It is commonplace that lawyers take professional matters overly seriously, even the most laughable ones. Italian lawyers are no exception to the rule and the debate surrounding parody does confirm to the cliché. Commentators submit that the lack of an explicit exception in the Italian Copyright Statute (ICS) does not undercut the importance of parody in the legal system, nor undermines the freedom to engage into humorous reinterpretations of prior works. Quite on the contrary, it reflects a well-pondered choice: not to relegate parody to a mere 'exception' but to reaffirm its status of overarching principle in the Italian copyright system. In this sense, parody is not a defense-type rule that grants immunity against conduct that would otherwise constitute infringement, but an activity that falls outside the reach of copyright. According to this view, the legitimacy of parodies derives from the basic principles governing the scope of copyright protection and infringement, as well as the fundamental rights of freedom of speech and artistic expression, as enshrined in Articles 21 and 33 of the Italian Constitution.

2 The present article takes issue with this framing and casts doubts over its legitimacy. In particular, it submits that the recent caselaw of the European Court of Justice (CJEU) on the relationship between fundamental rights and copyright exceptions and limitations (E&L), as well as the scope of the exclusive rights of reproduction, distribution and communication to the public, undermine the Italian construct on parody.[1] Under this perspective, the

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1 *Spiegel Online GmbH v Volker Beck* C 516/17, CJEU (2019); *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* C476/17, CJEU (2019); *Funke Medien NRW GmbH v*

article hopes to be of interest also for other European jurisdictions, especially those who do not foresee an explicit parody exception in their statutes.[2]

3 The article develops its arguments in the following order. Section B describes the current legal system, citing both the relevant case law and the academic literature. Sections C carries out a critical analysis of the legal construct endorsed by courts and academics, dissecting the arguments that parodies are autonomous creations (C.I), that they do not fall within the right of adaptation (C.II) and criticizing the reference to broad constitutional principles (C.III). Section D addresses the question of the alleged negative effects of implementing an exception at the statutory level, providing further arguments against treating parody as a principle (D.I and D.II). In particular, it submits that an explicit exception carries no risks both in terms of narrowing down the scope of parody (D.III and D.IV) as well as in terms of the application of the three-step test (3ST) (D.V). Section E shortly concludes by reflecting on the gap between the academic theorization of the law and its pragmatic application.

4 As for its limitations, mostly for reasons of space, the article avoids delving into two issues. The first one is the relationship between parody and moral rights, and in particular the right of integrity. This is because according to a common take, parodies do not normally harm the reputation of the author of the first work, insofar as it is prima facie clear that the two works originate from different authors.[3] The second is the balancing between the right to engage in parodies and conflicting interests such as honor, privacy or the principle of nondiscrimination, being the focus of the paper the conflict between parody and the exclusive rights granted to copyright holders.[4]

B. The Legal Framework in Italy and the EU

5 In Italian copyright law, the parliamentary debate on parody dates as far back as 1882, when the appointed committee refused to include parodies among the list of infringing conducts. In 1919, there was a second heated debate on whether parodies constituted derivative elaborations under the control of the author of the parodied work or they fell outside the scope of its exclusive rights. In the end, the advocates of opposite solutions just 'agreed to disagree', and the matter has been left unregulated up to nowadays.[5]

6 Parody received a renewed attention following the enactment of Directive 2001/29/EC (InfoSoc Directive), whose Article 5 contains an *optional* list of E&L to the exclusive rights of reproduction, communication to the public and distribution.[6] As clarified by the CJEU, the list of E&L in Article 5 has exhaustive character, foreclosing any possibility to implement different exceptions beyond the ones enumerated by the provision.[7] Among the relevant exceptions, Article 5(3)(k) allows the use of copyrighted works 'for the purpose of caricature, parody or pastiche'.

7 In *Deckmyn*, the CJEU clarified that these are autonomous concepts of EU law and domestic laws bear no role in clarifying their meaning.[8] The CJEU construed the scope of parody primarily by leveraging on the ordinary meaning of the term in the everyday language, but also on the context of the provision and the objective of the InfoSoc Directive.[9] From these criteria, the Court concluded that the two essential characteristics of parody are to evoke an existing work while being noticeably different from it and to constitute an expression of humor or mockery.[10] No other limiting condition applies to parody, which would not find a solid basis on the above-mentioned interpretative canons. As such, it is irrelevant whether parodies display an

Bundesrepublik Deutschland, C-469/17, CJEU (2019).

2 See for instance the Swedish Act on Copyright in Literary and Artistic Works (Swedish Statute Book, SFS), 1960:729, last amended April 1, 2011.

3 Court of Milan 29 January 1996, Tamaro v Soc. Comix e Soc. P.D.E, *Il Foro Italiano* (1996) 1432; Court of Naples 15 February 2000, De Filippo v Altieri in *Dir. D'autore* (2001) 471; Court of Naples, 15 February 2000, in *Dir. informaz. e informatica* (2001) p. 457.

4 See *Johan Deckmyn et al. v Helena Vandersteen et al.*, C-201/13, CJEU (2014).

5 A. Monti (1996) Case Note to Court of Milan 29 Jan 1996, Tamaro v Soc. Comix e Soc. P.D.E, *Il Foro Italiano,* pp. 1426-8.

6 See Art. 2, 3 and of 4 of 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 (InfoSoc Directive).

7 See Recital 32 of the InfoSoc Directive. See also Spiegel Online at 41; Funke Medien at 56; Pelham at *32.*

8 Deckmyn at 15.

9 Deckmyn at 19.

10 Deckmyn at 20-1.

original character, can be reasonably attributed to a person other than the author of the original work or even mention the source of the parodied work.[11] Unlike other E&L in the Directive, parody is a full-harmonization measure, which leaves Member States no room to maneuver once they decide to implement the exception.[12-13]

8 More recently, Article 17 of the Directive on Copyright in the Digital Single Market (DSM Directive) reiterated that users shall be able to rely on the parody exception when uploading and making available user-generated content on online content-sharing services. In other words, users must be able invoke parody as a defense against takedown measures targeting their derivative content published on online platforms.[14] Marking an important shift from the InfoSoc Directive,[15] the wording of the provision and its context make parody a mandatory exception but *only* for the online activities falling within the scope of the provision.[16]

9 Adopted in December 2021, the legislative decree for the implementation of the DSM in Italy opted for an *ad verbum* implementation of the above-mentioned provision. It allows platform uses to rely on "the exception or limitation" for "the purpose of parody, caricature or pastiche",[17] but does not stipulate an equivalent exception for offline uses. Undoubtedly, this choice adds an additional level of complexity to the legal regulation on parody. Indeed, it is difficult to predict whether it would lead to diverging standards for parody in the offline and online environment, or if the Italian courts will adopt the legal solutions elaborated for the former to the latter.[18]

I. Italian Courts

10 Not without efforts, Italian courts have managed to fill the void left by the legislator. Their definition of parody is similar to the one adopted by the CJEU, even if there are noteworthy differences. According to the case-law, a work qualifies as a parody when, notwithstanding the evident utilization or evocation of a previous one, it shows a creative contribution capable of modifying or overturning the message conveyed by the referenced work, so to achieve a humorous result of any kind.[19-20] This appears a different formulation of the two constitutive elements identified by the CJEU in Deckmyn, i.e. the evocation of pre-existing material and parody's humorous connotation. In spite of this, it seems to require a *quid pluris*: a substantial modification of the message conveyed by the original work, i.e. its *transformation* into something entirely different.

11 For what concerns their regulation, courts have unanimously ruled that parodies do not infringe upon the exclusive rights of copyright holders. This leaves the public at large free to engage into humorous reinterpretations of copyrighted material, without the need to seek approval or compensate the rightsholders of the referenced works. This conclu-

11 Deckmyn at 21.

12 See Deckmyn vis-à-vis Funke Medien at 42-3 and Spiegel Online at 26-7.

13 For some literature see Eleonora Rosati (2015) 'Just a Matter of Laugh? Why the CJEU Decision in Deckmyn is Broader than Parody', *Common Market Law Review* 52(2), 511-30; Daniel Jongsma (2017) 'Parody after Deckmyn - A Comparative Overview of the Approach to Parody under Copyright Law in Belgium, France, Germany and the Netherlands', *IIC* 48(6), 670-674.

14 Article 17(7), Directive 2019/790 on Copyright and Related Rights in the Digital Single Market.

15 See Recital 70, Directive 2019/790; Axel Metzger & Martin Senftleben (2020) Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law, *European Copyright Society*.

16 Christophe Geiger & Bernd Justin Jütte (2021) 'Towards a Virtuous Legal Framework for Content Moderation by Digital Platforms in the EU? The Commission's Guidance on Article 17 CDSM Directive in the light of the YouTube/Cyando judgement and the AG's Opinion in C-401/19', *European Intellectual Property Review* 43(10), 634-36; Joao Pedro Quintais, Giancarlo Frosio et al. (2020) 'Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive', JIPITEC 10, 277-282.

17 Art. 102 nonies, par. 2(b), Italian Copyright Statute, as amended by Legislative Decree 8 November 2021, n. 177.

18 See, for instance, Confindustria (2021) 'Position Paper: Recepimento della Direttiva europea n. 790/2019 sul diritto d'autore e sui diritti connessi nel mercato unico nell'ordinamento italiano', pp 14-15, arguing that the new parody exception for works uploaded on content-sharing platforms should not extend to offline uses.

19 Pret. of Rome, 18 November 1966, in *Foro It* 412; Court of Naples 15 February 2000, De Filippo v Altieri in *Dir. D'autore* 2001 457; Court of Milan 29 January 1996, Tamaro v Soc. Comix e Soc. P.D.E, Il Foro Italiano, 1432.

20 The latter requirement has been interpreted as meaning that a parody must achieve a humoristic effect, not being sufficient a mere intention to mock. Federica De Santis (2014) 'Appropriation Art e Diritto D'Autore', PhD Dissertation (University of Milan), p. 111. See also Court of Rome 12 October 2000.

sion leverages on two main arguments, with neither, unsurprisingly, referring to parody as an exception to copyright.

12 According to the first line of reasoning, parodies are not derivative works but fully autonomous creations. This happens because there is no misappropriation of the ideological core of the referenced works, but on the opposite, an overturning of their original meaning.[21] Courts have reinforced this conclusion through an analysis of Article 4 ICS, conferring upon rightsholders the exclusive right of adaptation of their works.[22] They point out that parodies are nothing alike the other forms of elaborations mentioned in that provision, such as translations or cinematographic adaptations. These are mere changes in the medium of communication of the work, but do not concern its message. By contrast, parodies revolutionize the meaning of the referenced work, in other words, they establish a semantic distance with the latter, regardless of the medium used to express them.[23] In addition, some courts have also argued that parodies must not compete commercially with the referenced worked.[24-25] It is, however, unclear whether lack of competition is necessary to prove the semantic distance between the two works or if it constitutes an independent element that courts address when assessing infringement.

13 In this connotation, parody is not an exception because it concerns the delimitation of the scope of copyright protection. Parodies are not derivative works because of their intrinsic difference with the referenced works. To borrow the US terminology, parodies are 'transformative', insofar as they display a new expression, meaning or message that is not traceable in the original work.[26] The case law on appropriation art, i.e. a form of art realized by incorporating previous works to convey a new artistic message, further supports this reading.[27] In this context, courts have ruled out infringement anytime there is a creative transformation of a work into something different, with one ruling explicitly referring to the US fair use doctrine.[28] These judgements thus extend the principles elaborated for parody to any transformative utilization of a work, even when a humoristic intent is missing.[2930] The Italian Supreme Court has indirectly endorsed this line of reasoning, by remarking that the semantic gap between the works is one of the elements to take into account in the assessment of copyright infringement.[31]

14 Notably, Italy is not the only European country to follow this approach. Before the latest amendment to the copyright act introduced a specific parody exception,[32] German courts traditionally dealt with parodies through the application of the 'free use' doctrine (*freie Benutzung*). This principle allowed qualifying a work as an independent creation insofar as it shows sufficient original character so to establish sufficient 'inner distance' from the referenced

21 Court of Naples 27 May 1908, *D'Annunzio v Scarpetta,* in *Foro It.* 1909 n. 18; Pret. of Rome, 18 November 1966, in *Foro It* 412*;* Pret. of Rome, 29 August 1978 in *Dir. Aut.* 1979; Court of Milan 29 January 1996, Tamaro v Soc. Comix e Soc. P.D.E; Court of Naples 15 February 2000, De Filippo v Altieri in *Dir. D'autore* 2001, 471.

22 Article 4 ICS: 'Without prejudice to the rights subsisting in the original work, works of a creative character derived from any such work, such as translations into another language, transformations into any other literary or artistic form, modifications and additions constituting a substantial remodelling of the original work, adaptations, arrangements, abridgements and variations which do not constitute an original work, shall also be protected'. Unofficial translation available at https://www.wipo.int/edocs/lexdocs/laws/en/it/it211en.pdf [Accessed on 10 February 2021].

23 Court of Milan 29 January 1996; Court of Venice, 7 November 2015, Sanguinetti vs Fondazione La Biennale di Venezia and Samson Kabalu.

24 See in particular Court of Naples (1908), Pret. of Rome, 29 August 1978 and Court of Milan 29 January 1996; Court of Milan, 31 May 1999, Warner Chappell Music Italiana S.p.A. c. New Music International S.r.l., Leone Di Lernia, *AIDA*, 2000; Court of Rome, 12 October 2000 in *Dir. Radiodiffusioni*, 2001, p. 67.

25 See Spedicato (2013), pp. 124-5, agreeing on the point.

26 William Fisher (1988) 'Reconstructing the Fair Use Doctrine', *Harvard Law Review* 101(8), p. 1659.

27 See https://www.tate.org.uk/art/art-terms/a/appropriation, [Accessed 03 March 2021].

28 Court of Milan, 14 July 2011, *Giurispr. Comm.* 2013; Court of Venice, 7 November 2015, *Riv. Dir. Ind.* 2018.

29 Court of Milan, 14 July 2011; Court of Venice, 7 November 2015.

30 On the topic see Annapaola Negri-Clementi & Filippo Federici (2017) 'La Salvaguardia del Diritto D'Autore nell'Appropriation Art', *Art & Law* 4, 27-38; see Spedicato (2013), p. 130.

31 See Italian Supreme Court, 19 February 2015, n. 3340 in *AIDA* (2015) 1655; Italian Supreme Court, 26 January 2018, n. 2039 in *AIDA* (2018) 1837. On the topic see, Alberto Musso (2015) 'Il Plagio-Contraffazione Parziale e la Rielaborazione Creativa di Singoli Brani in Altrui Opere Successive: Un Approccio Giuridico in Termini di Funzionalità Estetica', *Lex Mercatoria* 13, p. 60.

32 Act on Copyright and Related Rights, (Urheberrechtsgesetz – UrhG), § 51.

work.[33] Austria, Sweden and the Netherlands have also preferred framing parody under the principles regulating infringement and derivative works.[34]

15 Some have explained the reasoning of the courts by pointing out that, as things stand, the ICS only gave them only two interpretative options.[35] The first one was subsuming parodies under Article 4 to treat them as derivative creations. This would have meant obliging parodists to seek prior authorization and therefore destroying the whole genre, as some courts have pointed out.[36] It should therefore not surprise that courts shied away from this option and embraced the second one, i.e. to treat parodies as fully autonomous creations.[37] This observation however waters downs the *ratio decidendi* of the Courts, describing it more as the result of policy driven considerations than robust legal reasoning.[38]

16 The second line of reasoning is that in the silence of the law, the freedom to engage in parody finds a legal basis in the Italian Constitution and especially in Articles 21 and 33, which guarantee free speech and artistic expression.[39] This is because subjecting parodies to prior consent would unduly curtail the aforementioned rights, which is undesirable and illegitimate in a pluralistic and democratic society. In other words, between the two options of considering parodies as derivative or autonomous creations, the Italian Constitution pushes the interpreter towards the latter, as the most consistent with fundamental rights' doctrines.[40]

II. The legal scholarship

17 Few isolated voices have disagreed with the conclusions of the judiciary, arguing that parodies should be treated as derivative works, at least as long as there is a substantial reproduction of the first work.[41] By contrast, most academics have shared the position of Italian courts.[42] Some have pushed the conclusions of the courts even further. For instance, a few have argued that the freedom to engage in parodies is an expression of the exercise of fundamental rights, thus suggesting a direct application of constitutional provisions, rather than hinging on their radiating effect on copyright law.[43] Others instead

33 Paul Edward Gellller (2010) 'A German Approach to Fair Use: Test Cases for TRIPS Criteria for Copyright Limitations', *Journal of the Copyright Society of the USA* 57, 553-71.

34 Martin Senftleben (2020) 'Flexibility Grace – Partial Reproduction Focus and Closed System Fetishism in CJEU, *Pelham'*, *IIC* 51, 753-60; Martin Senfteleben (2012) 'Quotations, Parody and Fair Use', p 360; J. Rosen (2007) "Copyright and Freedom of Expression in Sweden - Private Law in a Constitutional Context", in Torremans P. (ed) Copyright law: a handbook of contemporary research (Edward Elgar Publishing: Cheltenham), pp 355–372. For a first overview of the implementation of the exception in Europe see Lucie Guibalt, Guido Westkamp et al. (2012) 'Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society', [online]. Available at https://dare.uva.nl/search?identifier=200997ce-c8d4-49e9-8fb6-ee874037de9c [Accessed 26 March 2021].

35 Monti (1996) 1426-8

36 Court of Milan 29 January 1996.

37 Monti (1996) 1426-8.

38 In this sense see Vittorio De Sanctis (1990) 'Il Diritto di Satira all'Esame della Pretura di Roma: I Poteri di Riferibilità alla Parodia dell'Opera dell'Ingegno', *Dir. aut.,* 149; Monti (1996), p. 1427; E. Mina (1996) 'Opera Parodistica: Plagio di Opera Letteraria o Autonoma Opera dell'ingegno?', *Diritto Industriale* p. 417.

39 Art 21 of the Italian Constitution: 'Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication'; Art. 33: 'The Republic guarantees the freedom of the arts and sciences, which may be freely taught'. Italian Constitution 1947. Official translation by the Italian Senate. Available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf [accessed 30 December 2020].

40 Court of Milan 29 January 1996; Court of Naples 15 February 2000; Court of Milan, 13 September 2004; Court of Venice 7 November 2015.

41 Z.O. Algardi (1978) 'La Tutela dell'Opera dell'Ingegno e il Plagio' (CEDAM: Padova) p. 274; Mina (1996), p. 417; more recently Luca Boggio (2015) 'L'Opera Parodistica tra Proprietà Intellettuale e Diritti della Personalità', *Giurisprudenza Italiana* p. 1143, referring to the primacy of EU law.

42 See for instance Vittorio De Sanctis (1990); Alberto Maria Gambino (2002) 'Le Utilizzazioni Libere: Cronaca, Critica e Parodia', *AIDA* 11, p. 132; Alberto Musso (2008) 'Del Diritto d'Autore sulle Opere dell'Ingegno Letterarie e Artistiche', in *Commentario al Codice Civile Scialoja-Branca* (Zanichelli: Bologna), pp. 43-44; Lorenzo Albertini (2015) 'L'Opera Elaborata e la Questione della sua Titolarità', *Jus Civile* 7, pp. 360-446; Giorgio Spedicato (2018) 'Diritto (o Eccezione?) di Parodia e Libertà d'Espressione' (Persiani: Bologna), p. 95.

43 De Sanctis (1990) 149-51; Vittorio De Sanctis (2002) 'I Soggetti del Diritto d'Autore' (Giuffrè: Milan), pp. 140-1.

suggest that the recontextualization of prior material is sufficient to achieve the semantic distance between the works.[44]

1. Re-conceptualizing parody within the principles governing infringement

18 Some authors have re-conceptualized parodies within a holistic approach to copyright infringement. According to this line of reasoning, infringement does not concern the factual reproduction of copyrighted material but constitutes a multifaceted assessment requiring the balancing of several factors. These include the perception of the work in the eyes of the public, the artistic merit of the work as a standalone creation and the semantic distance between the two works.[45] Some have interpreted the latter requirement as an emphasis on the appropriation of the 'expressive form' of the previous work, i.e. the specific shape or structure through which the author conveys their artistic message.[46] Other possible elements to consider are the amount of work used, the lack of competition between the works and the purpose of the use.[47]

19 In the absence of a legal definition of infringement, some have reinforced this conclusion through systematic considerations. They have found a first normative anchor in Article 2(2) ICS, which protects "musical variations that themselves constitute original works". Under this perspective, the provision would express the wider principle that copyright only covers the parasitic appropriation of previous works and not their transformation into something new and original.[48] However, against this line of reasoning, it is difficult to overlook at the black letter of the law. It is unclear why, if the provision expresses a general principle, the legislator decided to formulate it only in relation to musical works. Furthermore, the relationship between Article 2(2) and 4 ICS remains unexplored, as it is not possible to exclude *a priori* that an original variation does not constitute a derivative elaboration subjected to the consent of the first author.

20 These academics have found a second confirmation in Article 70 ICS, concerning the quotation exception for the purpose of criticisms or review.[49] Indeed, the provision seems to confirm the possibility to reproduce copyrighted material in support of new personal statements,[50] or the principle that no infringement occurs without the appropriation of the 'expressive form' of the previous work.[51] In this sense, parody and quotation would share a common matrix, confirming the freedom to incorporate prior material into a new artistic message, insofar as this does not harm the interest of the rightsholder.[52] Unfortunately, this argument is also not immune from criticism. There is a clear contradiction in elevating quotation to a principle of the ICS when the legislator decided to treat it as an exception. Academics are somewhat aware of this and take issue with the legislative framing of Article 70 in

44 Giorgio Spedicato (2013) 'Opere dell'Arte Appropriativa e Diritto d'Autore', *Giurisp. Comm.* 40(2), p. 123.

45 On the topic see, Paolo Greco & Paolo Vercellone (1974) 'I Diritti sulle Opere dell'Ingegno (UTET: Turin) p. 358; Musso (2015), p. 60; Alessandro Cogo (2016) 'Plagio dell'Opera Musicale', *Giurisprud. It.* 106-8. More vaguely, Vittorio De Sanctis (2003) 'La Protezione delle Opere dell'Ingegno' (Giffrè: Milan) pp. 186-7.

46 Spedicato (2013) p. 121.

47 Spedicato (2013) p. 130, here the inspiration to fair use is evident.

48 Alberto Musso (2008) 'Del Diritto d'Autore sulle Opere dell'Ingegno Letterarie e Artistiche', in *Commentario al Codice Civile Scialoja-Branca* (Zanichelli: Bologna), p. 64; Spedicato (2013), pp. 124-5 and Alessandra Donati (2018) 'Quando L'Artista si Appropria dell'Opera Altrui', *Riv. Dir. Ind.* 67(2), p. 89.

49 Art. 70 ICS: "The abridgment, quotation or reproduction of fragments or parts of a work and their communication to the public for the purpose of criticism or discussion, shall be permitted within the limits justified for such purposes, provided such acts do not conflict with the commercial exploitation of the work; if they are made for teaching or research, the use must have the sole purpose of illustration, and non-commercial purposes". See https://www.wipo.int/edocs/lexdocs/laws/en/it/it211en.pdf [accessed 19 April 2021].

50 Musso (2008) p. 64; Spedicato (2013), pp. 124-5 and Donati (2018), p. 89.

51 Spedicato (2013) pp. 124-5 argues that quotation is permissible because it reproduces copyrighted material to refer to its content/ideas without appropriating the 'expressive form' of the quoted work. See Court of Cassation, 7 March 1997 n. 2089, *Dir. D'Aut.* 1997, 362. However, we do not share this view since: a) if quotations would simply be a matter of referencing content, than courts should reject the exception anytime it would have been possible to engage into a rephrasing of the chosen excerpt. This would make the quotation of scientific or descriptive material impossible; b) there are numerous examples of quotations capturing the aestathic value of the referenced work such as epigraphs, or the incorporations of poetic passages within the one's own text. These should nonetheless being considered licit pursuant Art 70.

52 See Court of Rome 29 September 2008 *AIDA* (2010), 1341.

the ICS.[53] However, if Article 70 truly expressed a general copyright principle, the provision would not be needed in the first place, and reference should be made to the provisions regulating the scope of the exclusive rights rather than its exceptions.[54]

21 Leaving aside the arguments based on Articles 2 and 70 ICS, in short, there are at least three other overriding reasons that *corroborate* the holistic approach to infringement.[55] First, in the absence of a description of 'infringement' in the ICS, if we correctly understand the concept as the violation of the exclusive rights granted to rightsholders, any attempt to draw its contours cannot ignore the definition of the rights that are deemed violated. Accordingly, the violation of the right of reproduction presupposes the 'multiplication' of 'copies' of the work in question.[56] The definition clearly hints that what matters for infringement is the slavish imitation of copyrighted material since the term 'multiplication' stands for the increase in *quantity* or *numbers*,[57] and it therefore suggests that variations in terms of *quality* or *meaning* fall outside the scope of the term. The same goes for the word 'copy', which hints that the right of reproduction protects against *imitations* and not the creative re-elaboration of protected material.[58] Secondly, according to the most recent case law of the Court of Cassation, infringement entails a synthetical assessment, i.e. an overall evaluation of the similarity between the works rather than an analytical comparison of their individual elements.[59] Whereas the reference to doctrines elaborated in the field of trademarks might appear misplaced, here the Court seems to suggest that to assess the similarity between the protected and the infringing works through the eyes of the relevant public. Indeed, it is the latter that purchases the works and who ultimately determines whether they are fungible from a commercial perspective. In this sense, the maxim appears a reiteration of the principle that the lack of economic competition between the works deposes against infringement.[60] Finally, the suggested reading reconnects copyright to the reasons underlying the granting of the exclusive right(s), i.e. a temporary monopoly to incentive the flourishing of arts, science, and culture. Under this perspective, it appears reasonable to deny protection anytime copyright "would stifle the very creativity which that law is designed to foster".[61]

2. The rejection of parody as an exception

22 Established case law sufficiently protects parodists and the legislator should refrain from promulgating a specific exception on the matter.[62] According to this view, an express exception would relegate parody from an overarching principle to a mere exception, which is something to avoid as a matter of principle.[63] There are also pragmatic considerations behind this stance. Commentators fear that the exception approach could open the door towards a restrictive judicial practice, which normally permeates the application of exceptions to IPRs.[64] Likewise, enacting a parody exception would

53 See Spedicato (2013), p. 126.

54 Court of Milan 9 January 1996, refused assimilating parody to quotations.

55 We will see shortly how the judgement of the CJEU in Pelham has shaken this framework.

56 Article 13 ICS: 'The exclusive right of reproduction concerns the multiplication of copies of the work in all or in part, either direct or indirect, temporary or permanent, by any means or in any form, such as copying by hand, printing, lithography, engraving, photography, phonography, cinematography, and any other process of reproduction'.

57 The term has equivalent meaning in Italian and English. See https://www.treccani.it/vocabolario/moltiplicazione/ [accessed 19 April 2021]; https://dictionary.cambridge.org/dictionary/english/multiplication [accessed 19 April 2021]; https://www.merriam-webster.com/dictionary/multiplication [accessed 19 April 2021].

58 The term has equivalent meaning in Italian and English. See https://www.treccani.it/vocabolario/copia2/ [accessed 19 April 2021]. https://www.merriam-webster.com/dictionary/copy; https://dictionary.cambridge.org/dictionary/english/copy, [accessed 19 April 2021].

59 See Italian Supreme Court, 19 February 2015 n. 3340; Italian Supreme Court, 26 January 2018, n. 2039.

60 Please note that this does not entail that the risk of confusion is relevant for the assessment.

61 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994)

62 De Sanctis (2003), p. 220; L.C. Ubertazzi (2012) 'Commentario Breve alla Leggi su Proprietà Intellettuale e Concorrenza' (Cedam: Padova), p. 1512.

63 Gustavo Ghidini (2018) 'Rethinking Intellectual Property: Balancing Conflicts of Interests in the Constitutional Paradigm' (Edward Elgar: Cheltenham), p. 182; Stefania Ercolani (2004) 'Il Diritto d'Autore e i Diritti Connessi. La legge 633/1941 Dopo l'Attuazione della Direttiva 2001/09CE' (UTET: Turin), p. 75; Spedicato (2018) p. 95.

64 Ghidini (2018) 'Rethinking Intellectual Property', p. 182; Gustavo Ghidini (2018) 'Conclusioni' in Quaderni di Alai Italia, p. 183; Spedicato (2018) p. 95.

mean subjecting it to the infamous threestep tests, pursuant to Article 5(5) InfoSoc.[65]

23 Finally, there might also be a perception that the regulation of parody is more a matter of academic debate than pragmatic relevance. In the end, courts have heard cases on parodies in only a dozen of occasions over the past century. This to some extent justifies the preference for a more sophisticated doctrinal construction at the expense of a clear, but academically rougher statutory exception.[66]

C. A critical analysis of the Italian construct on parody

24 Having illustrated the case law on parody and the position of the Italian scholarship on the matter, this section will now provide a critical analysis of the current legal framework. It will question: a) the soundness of considering parodies fully autonomous creations; b) the relevance of the right to adaptation to the regulation of parody, c) the risks of applying constitutional principles and fundamental rights to copyright law.

I. Parodies as fully autonomous creations

25 As seen above, courts have leveraged on the status of parodies as fully autonomous creations to dismiss any infringement proceedings brought against parodists. Even if parodies draw heavily from previous works, they capsize their meaning to such an extent that they fall outside the scope of protection of the works they evoke. In other words, because of existing conceptual and semantic differences, parodies are substantially different from their referenced works and do not fall within the scope of protection of the latter. Two main arguments militate against this construct. The first one hinges on the socalled 'idea-expression dichotomy'. The second and most important one relates to the consistency of the Italian case law with the EU acquis. Finally, there is a question of the utilization of analogy as a (temporary) solution to the lack of specific regulation.

1. The idea-expression dichotomy

26 The idea-expression dichotomy is a defining element of the international copyright system, being enshrined in influential treaties like the TRIPS Agreement and the WIPO Copyright Treaty.[67] At the European level, the Software Directive contains an enunciation thereof,[68] but the dichotomy pervades the whole EU copyright acquis,[69] as well as the Italian legal system.[70] This fundamental principle mandates that copyright protection shall extend to expressions but never to their underlying ideas, therefore excluding procedures, abstract methods or mathematical concepts as such from the scope of the exclusive rights.[71] In other words, copyright protects against the misappropriation of specific expressive forms while leaving free the utilization of generic ideas, including also general plots, artistic styles, or stereotyped characters.[72] In prescribing so, the dichotomy prevents copyright from stagnating creativity by hampering the free flow of ideas.[73]

27 Against this background, the reasoning of Italian courts, or at least some of them, capsizes the relationship between ideas and expressions in the dichotomy: what becomes relevant for infringement is no longer the misappropriation of the expression itself, but of the ideological core therein. In this way, their reasoning defies common logic insofar as it does not provide why the *lack* of appropriation of ideas unexpectedly becomes relevant for the assessment if it is irrelevant for infringement.[74]

65 Ghidini (2018) 'Rethinking Intellectual Property', p. 182; Ghidini (2018) 'Conclusioni' in Quaderni di Alai Italia, p. 96.

66 This emerged from a discussion of the author with some prominent Italian academics in February 2019, in Bologna.

67 Article 9 of the TRIPS Agreement (1995); Article 2 of the WIPO Copyright Treaty (1996).

68 Article 1(2), Directive 2009/24/EC on the Legal Protection of Computer Programs.

69 Roberta Mongillo (2016) 'The Idea-Expression Dichotomy in the US and the EU', *EIPR* 38(12), p. 737.

70 See Giorgio Spedicato (2020) 'Principi di Diritto d'Autore' (Il Mulino: Bologna), p. 41; Marco Saverio Spolidoro (2019) 'I Criteri di Accertamento del Plagio nel Diritto D'Autore', *Riv. Dir. Ind.* 6(1), pp. 584-5. See Italian Supreme Court, 26 January 2018, n. 2039.

71 See for instance WIPO (1978) 'Guide to the Berne Convention', p. 12

72 For a brief recapitulation of the relevant case law in the UK, see Ed Barker and Iona Harding (2012) "Copyright, The Ideas/Expression Dichotomy and Harmonization: Digging Deeper into SAS", *JIPLP* 7(9), 673-9.

73 Mongillo (2016), p. 737.

74 See Monti (1996), p. 1428, emphasizing the weakness on leveraging on the ideological core of parodies. By contrast,

Under this perspective, the choice to leverage on the ideological aspects of parodies is unwise for contradicting a basic tenet of the copyright system.[75]

28 In truth, the above-mentioned holistic approach to infringement does solve the objections based on the dichotomy insofar as it does not blindly emphasize the ideological differences between the two works. Conversely, it fine-tunes the assessment by construing the scope of the exclusive rights in the light of fundamental questions of copyright policy, in particular the necessity to avoid parasitic rent seeking claims and the exercise of private censorship over derivative creativity. Even more importantly, this approach seems consistent with the wording of the ICS insofar as nothing in the statute prevents from carrying out the analysis of infringement by using parameters such as the perception of the interested public or the harm caused to the rightsholder. Despite this, the main problem with this holistic approach now lies in its inconsistency with EU law, as we will see shortly.

2. Inconsistency with EU law

29 Following the most recent judgements of the CJEU, the Italian construct on parody is now an evident deviation from Articles 2, 3, and 4 of the InfoSoc Directive. These constitute measures of full harmonization to be interpreted uniformly throughout the Union.[76] According to the Court, these provisions do not leave room for considerations relating to the meaning and purpose of the use, as well as the lack of harm caused to the rightsholder. As held in *Pelham* in relation to music sampling, the ordinary meaning of 'reproduction' suggests that the only relevant factor for assessing infringement is the objective replication of the copyrighted work or part thereof, and thus even the reproduction of a short sequence of a composition amounts in principle to infringement.[77] As a limit to this finding, the Court held that a reproduction might not amount to infringement when, in exercising the freedom of arts, the user of the sample modifies it "to such a degree that [it] is unrecognizable to the ear in that new work".[78]

30 Despite the Court's statement, it is unclear whether this conclusion is truly the result of a balancing exercise between copyright and fundamental rights. More pragmatically, it seems that no reproduction occurs when it is not possible to recognize in the second work the footprint of the first one.[79] For our purposes, it seems clear that the CJEU's approach, by elevating 'recognizability' as the sole criterion for evaluating infringement, rules out from the assessment any possible consideration as to the semantic/ideological distance between the two works as well the different context in which the borrowed material appears. The emphasis is indeed on the 'factual' reproduction of the first work to be assessed through the eyes of the relevant public.[80] Prominent academics have criticized the reasoning of the CJEU, *inter alia* for writing off the tradition of those member states who followed a holistic approach in assessing infringement. However, they have also pointed out that, as things stand, the teachings of the Court do not leave much room for different interpretations.[81]

31 The CJEU's approach has profound implications for parodies, which by definition establish a strong connection with the referenced works (if not entirely reproduce large parts of it) and thus hardly satisfy the unrecognizability threshold set in *Pelham*. It is therefore clear that the Italian approach is incon-

Spedicato (2013).

75 It must however be noted that foreign courts have also proceeded along similar lines. For instance, in Sweden the Supreme Court has defended the independence of parodies by noting that they serve a different purpose than the original works. Some scholars have however vehemently criticized the judgement, noting that there is little room for the consideration of the purpose of a work in copyright law. See the Swedish Supreme Court in NJA 2005 s. 905. The case is recounted in Lisette Karlsson (2013) 'Copyright and the Parody Problem' (University of Lund: Graduate Thesis), pp. 29-35. Similarly, German courts also used to assess whether parodies subverted the meaning of the original work, at least until they abandoned this line of reasoning in order to comply with the teachings of Deckmyn. See Henrike Maier (2017) 'German Federal Court of Justice Rules on Parody and Free Use', *JIPLP* 12(1), p. 16.

76 See Pelham at 85-6 and Funke Medien at 35-8.

77 See Pelham at 27-30; see also *Infopaq* C 5/08, CJEU (2009) at 57, where the Court held that the reproduction of 11 words constituted infringement.

78 See Pelham at 30-39.

79 To draw a parallel with the US; in this jurisdiction copyright infringement occurs when there is a substantial similarity between the two works, but fundamental rights do not really seem to play any role in this assessment.

80 See also case C-145/10, Painer CJEU (2011), paras. 41–42, 95–99.

81 Senftleben (2020) 759-61; James Parish (2020) 'Sampling and copyright - did the CJEU make the right noises?', *Cambridge Law Journal* 79(1), pp. 32-4; with reference to the AG opinion see Bernd Justin Jütte & João Pedro Quintais (2019) 'Advocate General turns down the music - sampling is not a fundamental right under EU copyright law: Pelham v Hutter', *EIPR* 41(10), 654-657.

sistent EU law. It alters the scope of the exclusive rights granted to the rightsholder and ends up undermining the goal of the InfoSoc Directive to harmonize copyright across the EU.[82] It also violates EU law on the ground that the InfoSoc Directive preempts Member States to implement the corresponding provisions of Berne.[83] This puts Italian courts in a very uncomfortable position, since in the absence of a domestic exception, currently they must either endorse an interpretation that violates EU law or deem parodies as a form of infringement. The following sub-paragraph will show how the recourse to analogy might mitigate this situation.

3. Binary reasoning and analogy

32 For a long time Italian courts seemed stuck in a binary logic, whereby one of the two following options must necessarily hold true: either parodies are autonomous creations or they are derivative works subjected to the consent of the first author.[84] As seen, none of these options is ideal, since the latter unduly restricts free of speech, while the former seems nowadays inconsistent with EU law.

33 However, there are possible ways out of this binary reasoning. A first one is leveraging on the circumstance that the ICS does not explicitly regulate parodies and embark in analogical interpretation of the law. This is the tool expressly devised by the legislator to fill existing gaps in the legal system. It consists of a three-phased process whereby courts must: a) verify the existence of a gap in the legal system; b) identify a legal provision (*analogia legis*) or principle (*analogia iuris*) that regulates an analogous matter and obeys the same rationale;[85] c) check that the identified provision does not have exceptional character or relate to criminal matters.[86] As a tool meant to overcome legislative gaps analogy departs from the ordinary process of interpretation in at least two significant aspects: on one side, it privileges identity of rationales over the linguistic similarity of legal provisions, while on the other it allows courts to resort to general principles instead of specific provisions.

34 In spite of this, the application of analogy to parodies poses several problems, and thus should not surprise that both academics and courts have refrained from taking this path. The first step requires the absence of an applicable legal provision. In this sense, it is possible to undertake an analogical interpretation only as a last resort, when the ordinary means of interpretation leave the matter unregulated or lead to manifestly absurd results.[87] In this sense, analogy entails an historical assessment, insofar as the gap in the legal system and the way to fill it depends on the legal rules applicable at the time of litigation. That is why the first court to adjudicate on parody far back in 1908 had good reasons for not embarking in an analogical interpretation. First, the case revolved around a criminal offense. Secondly, the Court engaged into an analysis of the preparatory works of the then Copyright Act, giving particular emphasis to the 1882 amendment. It concluded that the choice to exclude parody from the list of infringing uses confirmed that parody fell outside the scope of copyright protection. In the analysis of the Court, there was no gap in the legal system but an implicit rule.[88]

35 This line of reasoning does not hold up to nowadays. The last (failed) attempt to regulate parody dates back to 1919, when the legislator decided to leave the matter unregulated and the law has been silent up to nowadays.[89] Until not too long ago, it was the abovedescribed holistic approach to infringement avoided the necessity to appeal to analogy. No gap in the legal system existed as long as courts could resolve the matter by limiting the scope of copyright protection. However, the InfoSoc Directive and its interpretation by CJEU's has created a regulatory void since EU law mandates the considering material reproduction of protected material as the sole element relevant for infringement. There is therefore room to open up to an evolutionary interpretation of the law that leverages on the observation that if the legislator had to confront the matter today, it would have legislated differently, probably by

82 See Recitals 1 and 6 of Directive 2001/29 InfoSoc.

83 See Case *Luksan* C-277/10, CJEU (2012); Mutatis mutandis, see *Football Dataco* Case C-604/10 CJEU (2012) in relation to databases.

84 Monti (1996) 1428.

85 See Art 12(2) of the pre-laws of the Italian Civil Code; Cassazione Civile, 14 February 1994, n. 10699.

86 See Art 14 of the pre-laws of the Italian Civil Code.

87 Court of Cassation, 28 April 1995, n. 4754, in *Giust. Civ. Mass.* 1995, 925; Court of Cassation, 4 February 1985 n. 731, in *Giust. civ. Mass.* 1985, 2.

88 Court of Naples 27 May 1908.

89 Monti (1996) p. 1428.

promulgating an explicit parody exception.[90-91]

36 Another obstacle is the identification of the legal provision to use as a base-reference for regulating parodies. A first problem is motivating why the right to adaptation in Article 4 is not the closest parameter to apply to parodies. Here, the different rationales between parody and other kinds of adaptions might have a role to play in the assessment. As it will be seen shortly, the right of adaptation is meant to extend the reach of copyright to different expressive mediums and not to regulate transformative elaborations. It is also possible to point out that, as a deviation from the idea/expression dichotomy, the right to adaption falls within the prohibition against the analogical application of provisions of exceptional character. Unfortunately, other E&L in the ICS are also unfit reference provisions for parody. First and foremost, because most of them have limiting conditions that would conflict with the teachings of *Deckmyn*.[92] Secondly, because it is controversial whether E&L, being exceptions to a general rule are caught by the prohibition against the analogical utilization of provisions of exceptional character.[93] In the light of the December 2021 ICS amendment, the easiest solution is to rely on the parody exception foreseen for online uses to offline utilizations. Another possibility is appealing to the *analogia iuris* and leveraging on the overarching principle of freedom of expression in Article 21 of the Constitution. A similar solution has for instance been endorsed in relation to the 'right to satire' which normally prevails over the individual right to reputation.[94]

37 Despite this, it is important to stress that analogy must only be a short-term solution to mitigate the impact of the CJEU's case law on the Italian copyright system. Analogy must not become an excuse to postpone legislative intervention on parody for three reasons. First, from a methodological standpoint, analogy by definition is a last resort tool to confront unforeseen circumstances. Second, from an ideological view, analogy confirms the existence of a loophole in the copyright system. Finally, from a pragmatic perspective analogy entails an unnecessary complex regulation of the matter, obliging courts to embark into a multi-layered assessment that can lead to uncertainty and diverging outcomes.

II. The right to adaptation

38 It is also important to clarify the complex relationship between parody and the right to adaptation both at the domestic and international level. Indeed, the argument that parodies are substantially different from the referenced works does not automatically rule out the application of the right of adaptation and the possibility that, therefore, they might infringe upon this right.

1. The right to adaptation at the international level

39 Article 2(3) of the Berne Convention stipulates that "translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work", a concept reiterated in Article 12.[95] However, the relationship between the right of adaption and the one of reproduction are a matter of controversy at the domestic, comparative, and international level. Some countries consider the rights of adaptation as a subspecie of the right of reproduction, while other see them as fully independent rights.[96] In any case, the Berne Convention does not seem to

90 On evolutionary interpretation, see Court of Cassation 9 September 2007 n. 17579 and Court of Cassation 7 February 1996 n. 978.

91 Please note that the amendments of the ICS that will follow the implementation of the DSM Directive only concern the online environment and do not take into consideration the impact of the recent CJEU case law on the Italian copyright system.

92 See for instance, Art. 70 ICS on quotation.

93 On the complex topic of what constitutes a provision of exceptional character see Marcello Maria Fracanzani (2003) 'Analogia e Interpretazione Estensiva nell'Ordinamento Giuridico', *Collana Della Libera Università Mediterranea Jean Monnet*. Paola Spada (2018) 'Riflessioni Conclusive', in *Quaderni di Alai Italia*, p. 189, argues in favour of analogy anytime there is no endangerment of the interest of the copyright holder and the exception favors the flourishing and dissemination of creativity. On a similar vein, see Spedicato (2020) p. 198. *Contra* De Sanctis (2003) p. 204 and, most importantly, Court of Cassation 7 March 1997 n. 2089 *Dir. D'Aut.* 1997, 362.

94 Mutatis mutandis, Courts have leveraged on free speech to affirm that the right to satire prevails over reputation. See Court of Cassation, 22 November 2018, n. 30193; Corte of Cassation, 5 February 2014, n. 5499.

95 Article 2(3), Berne Covention; Art. 12: Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works'.

96 See Samuel Ricketson (1987) 'The Berne Convention for the Protection of Literary and Artistic Works' (Kluwer: United Kingdon), p. 389; See Jongsma (2017) pp 668-9.

bind countries to one of these systematic choices.[97] Importantly, the second approach leads to the question of whether the two rights are mutually exclusive, i.e. whether the qualification of a work as an adaptation rules out the application of the rules on the right of reproduction.[98]

40 Under the 'autonomous approach' the two rights clearly serve different purposes. The right of adaptation goes beyond the right of reproduction by granting protection over new expressive elements that are untraceable in the original work.[99] The history of the right to adaptation in the US helps clarifying this point. In 1907, the US Supreme Court held that a perforated roll used to recreate the sound of a musical composition did not infringe upon the copyright on the underlying music. Copyright only protected the particular form of expressions of ideas and the change of medium consequently implied a difference in the expression. Copyright protected against the utilization of the roll to play the music in public, but the distribution of the paper roll was *per se* lawful.[100] This led the US Congress to grant upon authors the exclusive right to transform the work into a different medium. The effects of the amendment was soon felt in courtrooms, with courts concluding that the author of a book enjoyed the exclusive right over its cinematographic dramatization or that making a tridimensional toy out of an animated character would infringe the right of adaptation of the cartoonist.[101] Under this perspective, the right to adaptation is itself an exception to the idea/expression dichotomy, since it grants rightsholders control beyond the original form expression in which their work was first embodied.

41 This excursus also suggests that the rights are not mutually exclusive and *can* overlap in specific cases. In other words, a work might be at the same time an adaptation and a reproduction of a pre-existing creation. Indeed, there would be quite a contradiction in transforming a provision initially devised as *enhancing* the scope of copyright protection beyond the first embodiment of the work into a limitation of the right of reproduction. This reasoning seems especially relevant at the European level, since the InfoSoc Directive does not regulate the right of adaptation. In this context, some have argued that classifying a use as an adaptation does not automatically rules out a violation of the right of reproduction and have consequently proposed a distinction between 'pure' adaptations (e.g. a translation) and those entailing the duplication of protected subject matter. While the former fall outside the scope of the InfoSoc Directive, the same does not hold true for the latter since these encroach upon Article 2 thereof.[102]

2. The right of adaptation in Italy

42 The implicit position of Italian courts and academics is that the assessment of the right of adaptation does not rule out the infringement of different exclusive rights and especially the right of reproduction. As to whether parodies fall within the former, courts have leveraged on a teleological interpretation of the non-exhaustive list of elaborations in Article 4. This hints that the provision only regulates the transposition of a work into a different medium but does not concern transformative elaborations that revolutionize the meaning of the first work.[103-104]

43 Regardless of whether this outcome is correct, this line of reasoning seems methodologically flawed. It tries to secondguess the extent of the non-exhaustive list of adaptations in the provision beyond non-exemplified cases.[105] However, it is possible to argue otherwise that the inherent function of a non-exhaustive list is to clarify which cases unambiguously fall within the literal scope of a provision, while leaving to the courts the evaluation of unstated cases. In carrying out this task, courts should not depart from the ordinary canons of interpretation and, first among them, the ordinary meaning of legislative text. Against this background, it is striking that courts did not investigate whether the concept of parody falls within the ordinary

97 Silke Von Lewinski (2008) 'International Copyright Law and Policy' (Oxford University Press: Oxford), p. 143.

98 In this sense Ercolani (2004), p. 75; and Senftleben (2020).

99 Paul Goldstein (1983) 'Derivative Rights and Derivative Works in Copyright" (1983) *J. Copyright Society' USA* 30, p. 217

100 See White-Smith Music Publishing Co. v. Apollo Co. 209 US 1 (1908).

101 See Amy B. Cohen (1990) 'Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy', *Indiana Law Journal* 66(1), p. 201-4 and the case law cited therein.

102 Rosati (2014) p. 21.

103 This seems in particular the reasoning of the Court of Milan 29 January 1996.

104 In the literature see, Emanuele Santoro (1967) 'Brevi Osservazioni in Tema di Parodia', *Il Diritto d'Autore*, p. 1-15; Alberto Musso (2009) 'Diritto d'Autore sulle Opere dell'Ingegno, Letterarie e Artistiche' in Scialoja e Branca (eds) Commentario del Codice Civile (Zanichelli: Bologna), p. 43.

105 According to Giacomo Guglielmetti (1996) 'Case note on Court of Milan', 29 January 1996, *AIDA* p 677, there is no valid reason to exclude parodies from the reach of Art. 4.

meaning of "creative elaboration of the work", i.e. the very definition offered by Article 4. Instead, they entirely skipped this fundamental phase of the interpretative process, to jump to a systematic conceptualization of the list of adaptations in the provision. In doing so, they privileged a systematic interpretation over a literary one and this seems a questionable hermeneutical choice.[106] Instead courts should have emphasized the ambiguity of the term 'elaborazione' (elaboration), and *then* indulge into an analysis of the context and history of the provision. For instance, some dictionaries define 'elaborations' or 'to elaborate' as the act of expanding or developing a content, which suggest that the term presupposes a certain degree of conceptual identity between the original work and its elaboration.[107] This definition is strikingly different from 'rielaborare' (re-elaborate), which does not simply stand for elaborate for a second time but 'to elaborate through different criteria and for different purposes'.[108-109]

III. The impact of constitutional principles on the copyright act

44 The argument that subjecting parodies to prior authorization would curtail the constitutional freedoms of speech and artistic expressions is undoubtedly compelling. Nevertheless, there are both formal and substantive reasons against invoking constitutional provisions to rule on parody.

45 The first objection relates to the complex and unsolved question of the direct applicability of constitutional provisions to civil proceedings between private parties. While it is impossible to delve into this matter here, we share the stance that courts should not apply abstract constitutional principles to interpret ordinary statutes regulating horizontal relationships between individuals.[110] The Constitution is a standard to evaluate the legitimacy of secondary legislation, so to impose a limit over the discretion of lawmakers, who cannot violate constitutional principles and the fundamental rights embed therein. Reasoning otherwise despoils the Constitutional Court of its institutional function and therefore overhauls the architecture of the Italian constitutional order for what concerns the competence of different judicial bodies. This solution can also lead to unpredictable or altogether discretionary outcomes, insofar as courts rely on abstract and undefined legal principles that are not fit to settle concrete cases.[111-112]

46 The caselaw on parody confirms these concerns. Courts have referenced only some of the constitutional rights relevant in the matter. As well known, free speech can be limited by countervailing rights and interests, including intellectual property. This is of particular relevance considering that IP finds a constitutional basis on several fundamental rights, including the promotion of art and the protection of both property and labor,[113] values that all militate in favor of the plaintiff.[114] In reality, it is possible to reframe this criticism under a wider observation: the disregard for the principle of proportionality. This

106 Please consider that the "ordinary meaning" of the law and 'the intention of the legislator' are the two main canons of interpretation in the Italian legal system, pursuant to Art. 12 of the "pre-laws" of the Italian Civil Code.

107 See for instance Vocabolario Treccani: 'To develop or carry out a project or a work through a careful coordination and transformation of its basic elements until the attainment of the intended result'. Available at https://www.treccani.it/vocabolario/rielaborare/ [accessed 21 April]. Translated by the author. Similarly, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/elaboration [accessed 21 April].

108 Vocabolario Treccani: https://www.treccani.it/vocabolario/rielaborare/ [accessed 21 April].

109 Another problematic feature is the possible difference of scope between the right of adaptation as construed by Italian courts and Arts. 2(3) and 12 of the Berne Convention. The latter seem to treat any 'alteration' of the work as falling within the scope of the right of adaptation, including original ones such as parodies. See See WIPO (1978) 'Guide to the Berne Convention for the Protection of Literary and Artistic Works', pp. 77; Ricketson (1987) p. 398; Sam Ricketson & Jane Ginsburg (2005) 'International Copyright and Neighboring Rights. The Berne Convention and Beyond', I, (Oxford University Press: Oxford), at 11.34; Von Lewinski (2008), p. 143.

110 A notable example of 'concrete' rather than abstract constitutional prescription is Art. 31 of the Italian Constitution. The provision prescribes that the employee is entitled to a fair remuneration. See Giovanni D'Amico (2016) 'Problemi (e limiti) dell'Applicazione Diretta dei Principi Costituzionali nei Rapporti di Diritto Privato (in Particolare nei Rapporti Contrattuali)', *GiustiziaCivile.com* 3 [online]. Available at https://giustiziacivile.com/giustizia-civile-riv-trim/problemi-e-limiti-dellapplicazione-diretta-dei-principi-costituzionali-nei#testo-8 [Accessed on 18 February 2021].

111 D'Amico (2016); Federica Mannella (2010) 'Giudice Comune e Costituzione: Il Problema dell'Applicazione Diretta del Testo Costituzionale', *Federalismi.it* 24, 1-23.

112 For instance, in Germany before the question was referred to the CJEU in Pelham, it was the Constitutional Court to elucidate the relationship between sampling and fundamental rights. See *Metall Auf Metall*, 31 May 2016.

113 See Constitutional Court, 6 April 1995 n. 108, *AIDA* 1995, 297.

114 Spedicato (2013), p. 124; Guglielmetti (1996), pp. 677-8.

is the standard tool to adjudicate the legitimacy of a provision limiting fundamental rights. In short, proportionality consists of ascertaining whether a) the limiting provision obeys a legitimate interest, b) no less restrictive measure is available to safeguard the interest pursued by the law, and c) the measure does not disproportionally exceed what is needed to pursue the interest in question.[115] A proportionality assessment pushes towards concluding that whereas the ICS aims at protecting property, extending its scope to parodies is neither necessary nor proportionate with the goal of the statute, insofar as parodies do not harm the moral or economic interest of rightsholders. In these regards, the application of a proportionality test from the Constitutional Court could lead to a *de facto* amendment of the ICS: the declaration of its unconstitutionality insofar as it does not foresee an exception for parody. The Constitutional Court is not new to this kind of creative judgement, having in the past deemed a statute unconstitutional for what it does not stipulate, rather than for its explicit provisions.[116]

IV. Summary of key results

47 The above discussion tried to debunk the main arguments in support of treating parody as a principle relating to infringement. It submitted that considering parodies as autonomous, non-infringing creations by leveraging on the conceptual and semantic differences between the works creates important frictions with some of the cornerstone principles of copyright law, is methodologically flawed and, most importantly, is nowadays inconsistent with EU law. By contrast, it is *in principle* possible to agree with the finding that parodies do not violate the right to adaption, even though the reasoning of the courts in this regard seems hermeneutically skewed, which also seems to apply to a constitutionally oriented interpretation of the ICS.

D. Declassing parody from a principle to an exception: Legal problems and false assumptions

48 Having dissected the case law on parody, it is now time to turn the attention to the claim that implementing a statutory exception would amount to downgrading parody from an overarching principle to a mere defense against infringement and that this would inevitably stifle creativity by providing more restrictive rules for parodists. A first counter-argument against the downgrading narrative relies on common logic: an exception would be an *addition* to the principles on copyright scope and infringement and not a downgrading. Pragmatically, it would offer parodists a double layer of protection against infringement claims. This is of particular importance, considering that defenses leveraging on the scope of protection and on E&L have different contours and one might succeed where the other fails. The Netherlands and, more recently, Germany have for instance followed this route, providing for an exception in addition to the rules on the scope of protection.[117] In any case, the connotation of parody as a principle remains ambiguous and different objections arise depending on whether we qualify parody as a copyright or human rights principle.[118]

I. Parody as a principle of copyright law

49 Under the first angle, parody concerns the limits to the scope of copyright protection.[119] As seen earlier on, the main problem with this approach relates to its compatibility with EU law. An ancillary consideration relates to the thin line between exceptions and limitations. Traditionally, while limitations delineate the scope of copyright, exceptions are defense-type rules that grant immunity against conducts that would otherwise constitute infringement.[120] This difference entails pragmatic consequences such as the burden of proof, which for defenses falls entirely

115 See for instance the former President of the Italian Court of Cassation, Giovanni Mammone (2018) 'The Relationship between the Constitutional Courts and the Supreme Courts - The Italian Experience' [online]. Available at www.cortedicassazione.it/cassazione-resources/resources/cms/documents/relazione_Rete_Presidenti_Corti_UE-Karlsrhue_2018.pdf [Accessed 18 February 2021].

116 See for instance, Danilo Diaco, 'Le Tipologie Decisorie della Corte Costituzionale attraverso gli Scritti della Dottrina', Corte Costituzionale: Quaderno Processuale del Diritto di Studi' [online]. Available at https://www.cortecostituzionale.it/documenti/convegni_seminari/STU%20296.pdf [Accessed 21 January 2021]. See for instance Constitutional Court, 5 May 1988, n. 501.

117 See Jongsma (2017); Senftleben (2012); See German Copyright Act, § 23(1) and § 51.

118 See Lorenzo Albertini (2015) 'L'Opera Elaborata e la Questione della sua Titolarità', *Jus Civile* 7, p. 364.

119 In this sense, Musso (2015), 60.

120 Annette Kur (2011) 'Limitations and Exceptions under The Three-Step Test - How Much Room to Walk the Middle Ground?' in Kur (ed) Intellectual property in a fair world trade system (Edward Elgar Publishing: Cheltenham), p. 212; Spedicato (2020) p. 191.

upon defendants, and the tendency to construe exceptions more narrowly than exclusions.[121]

50 However, both the TRIPS and the InfoSoc Directive refer to the two concepts interchangeably and the same applies to the ICS. In any case, at the European level exceptions and limitations share a common legal regime, including the application of the 3ST.[122] Some academics have argued that the E&L in the InfoSoc Directive represent either internal limitations of the exclusive rights or the expression of heterogeneous rights and interests of users or both of these options.[123] For instance, while it is better to conceptualize the exception for temporary, technologydictated reproductions as an internal limitation of the right of reproduction, the exceptions for public libraries or to the benefit of people with a disability pursue reasons of policy welfare alien to the copyright system.[124] Against this background, the parody exception might be an expression of both internal and external interests, even though the CJEU case law seems to favor the second understanding. At any rate, qualifying parody as a limitation does not rule out Article 5 InfoSoc Directive.

II. Parody as a constitutional principle

51 The necessity not to downgrade parody from a constitutional principle to ordinary law is perhaps a reference to the so-called hierarchy of legal sources, which sees constitutional provisions at the top of the ranking. The hierarchy is one of the tools to solve the conflicts between different legal rules. It also ensures that the legislative power does not encroach upon citizens' fundamental rights and overarching constitutional principles. Under this perspective, the hierarchy has no role to play in relation to parody as an exception to copyright, insofar as this would not be in conflict with the Constitution and that both the rule (copyright) and the exception (parody) enjoy equal ranking.

52 Alternatively, the rejection of the exception approach might be an attempt to emphasize the nature of parody as a 'fundamental right', finding its *raison d'être* in the ontological value of the human being. By contrast, an exception is a mere defense against infringement and obeys contingent reasons of public policy. However, this line of reasoning seems now obsolete and is being progressively replaced by a new approach that sees E&L as a concretization of constitutional principles rather than their downgrading. In this sense, E&L specify the mode of application of fundamental rights, sparing the courts the hurdle of relying on broad, abstract and ambiguous principles. Moreover, they also set the boundaries for the application of the exceptions, allowing the legislator to strike the proper balance between the interests of the involved parties.[125]

1. E&L and constitutional rights: Indications from the EU

53 The EU legislator clearly endorses this latter understanding of the relationship between E&L and fundamental rights. For instance, the Directives on Trade Secret and Copyright in the Digital Single Market both describe E&L as the preferred tool to balance the two sets of rights.[126] A statement of this kind is missing in the InfoSoc Directive, which is contemporary to the EU Charter of Fundamental Rights and precedes the following constitutionalization trend of EU IP law. This has not refrained the CJEU from portraying E&L as the weapon of choice of the EU legislator in balancing IP and fundamental rights.[127] The Court has leveraged on the linkage between the two sets of rules to push for a broader interpretation of E&L, within the boundaries imposed by the InfoSoc Directive. The CJEU has reinforced this conclusion by pointing out that E&L are not mere defenses against infringement but that they grant fullfledged rights

121 Kur (2011), p. 212.

122 See Article 13 of the TRIPS Agreement (1995); Art. 5 of Directive 2001/29 (InfoSoc) and Art 71^{nonies} ICS.

123 See Maurizio Borghi (2020) 'Exceptions as Users' Rights in EU Copyright Law', CIPPM / Jean Monnet Working Papers No. 06-2020, p. 79.

124 See Arts. 5(2)(c) and 5(3)(b) InfoSoc Directive.

125 See also the German Federal Supreme Court in Germania 3 at 19-23 in Elizabeth Adeney and Christoph Antons (2013) 'The Germania 3 Decision Translated: The Quotation Exception before the German Constitutional Court', *EIPR* 35(11) 646-657, where the Court interpreted the quotation exception in the light of the Constitution. Jan Nordemann & Viktoria Kraetzig, 'The German Bundesgerichtshof changes its concept of parody following CJEU Deckmyn v. Vrijheidsfonds/ Vandersteen', Kluwer Copyright Blog http://copyrightblog.kluweriplaw.com/2016/11/03/the-german-bundesgerichtshof-changes-its-concept-of-parody-following-cjeu-deckmyn-v-vrijheidsfonds-vandersteen/ [Accessed 3 February 2021].

126 See Recital 19 and Article 5 of Directive 2016/943; see Recital 70 and Arts. 17(7) and 17(10) of Directive 2019/790.

127 Spiegel Online at 43; Funke Medien at 55-58 and 64.

to their beneficiaries.[128-129] This rhetoric opens the door to a proportionality assessment, whereby in applying E&L courts must also ensure the respect of fundamental rights.[130] Another salient point is that the CJEU has forbidden Member States to rely on their constitutions to introduce new E&L beyond the exhaustive list foreseen in Article 5 InfoSoc. Reasoning otherwise would inevitably endanger the effectiveness of the Directive in relation to its objective of harmonizing copyright across Europe.[131]

54 To recapitulate, it is possible to draw two intertwined principles from the CJEU case law. First, domestic rules, even of constitutional ranking, cannot undermine the effectiveness of EU law and the harmonizing push of the InfoSoc Directive.[132] Secondly, the devised mechanism to curtail the scope of the exclusive rights vis-à-vis fundamental ones is the list of E&L contained in Article 5 InfoSoc, with all its limits and faults.[133] Thus, it is not possible to rely on the constitution to impose external constraints on copyright beyond what foreseen by that provision.[134] These principles bind both governments and courts. The former can exercise some discretion in the implementation of E&L in national law, as long as the related measure does not constitute a case of full harmonization and they comply within the limits set in the InfoSoc Directive.[135] The latter should ensure that their interpretation of E&L does not conflict with fundamental rights, in line with the tradition of their legal system. However, national courts remain bound by the black letter of the provision and its objective.[136]

55 Against this background, the position of Italy on parody does not introduce a new exception beyond what foreseen in the InfoSoc Directive, since the instrument expressly contemplates 'parody, caricature and pastiche' in Article 5(3)(k). Nevertheless, it overhauls the architecture of the InfoSoc directive. Indeed, it relies on the Constitution as a way to bypass the prism of Article 5 and to circumvent the (alleged) restrictive effect of that provision. This approach is clearly inconsistent with EU law as recently interpreted by the CJEU.

2. Systematic considerations

56 A last observation rests on systematic analysis. Whereas courts and academics have stressed the status of parody as an overarching principle, their reasoning does not extend to another important freespeech related exception: quotation. Not only does the ICS codify an explicit exception but it also provides for an overly restrictive regulation, e.g. by allowing quotations only for non-commercial teaching and scientific research purposes.[137] The regulation of quotation goes beyond the minimum requirements prescribed by the InfoSoc Directive and the Berne Convention.[138] This different treatment is puzzling, now even more in the light of the latest DSM Copyright Directive. The latter portrays both parody and quotation as equally important for the free flow of ideas, qualifying both of them as mandatory exceptions for content uploaded on content sharing platforms.[139]

III. Restrictive interpretation

57 The concern that a statutory exception would lead to a narrow interpretation of parody seems to be an exaggeration—in principle, because the CJEU has clarified that there is no obligation to interpret E&L narrowly, at least when fundamental rights are involved. From a pragmatic standpoint, this is because the Italian approach paradoxically leads to more stringent results than relying on the corresponding InfoSoc exception.

128 Spiegel Online at 50 and Funke Medien at 70.

129 See also De Sanctis (2003) p. 218

130 Spiegel Online at 59 Funke Medien at 76.

131 Spiegel Online at 40-7: Funke Medien at 53-64.

132 Spiegel Online at 47; Funke Medien at 30.

133 Spiegel Online at 43-5; Funke Medien at 42-58.

134 For some literature see: T. Snijders and S. van Deursen (2019) 'The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the Pelham, Spiegel Online and Funke Medien Decisions', *IIC* 50(9), p. 1189; BJ Jutte (2019) 'CJEU Permits Sampling of Phonograms under a de minimis Rule and the Quotation Exception' *JIPLP* 14(11) p. 828; Christoph Geiger and Elena Izyumenko (2020) 'The Constitutionalisation of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!', *IIC* 51(3), pp. 282-289.

135 Spiegel Online 30-39; Funke Medien at 42-54.

136 Spiegel Online 31-9, 50-9; Funke Medien at 68-76.

137 Article, 70 ICS.

138 See Article 5(3)(d) of the InfoSoc Directive; see Article 10(1) Berne Convention.

139 See Article 17(7), Directive 2019/970.

1. Restrictive interpretation of E&L

58 It is true that, according to settled case law, the CJEU normally engages in a narrow interpretation of the provisions of a directive that derogate from a general principle established therein.[140] In IP-related instruments, the CJEU even reinforces this approach by venturing into teleological interpretations, whereby the Court emphasizes that EU legislators intended to grant a high level of protection to rightsholders.[141] Italian courts have endorsed the same principle, deeming exclusivity as the norm and exceptions as narrowly crafted defenses derogating therefrom.[142]

59 Despite this, the restrictive interpretation of E&L is not an obligated route. In both the EU and Italy, systematic and teleological interpretations, from which the principle of the narrow reading of exceptions descends, are ancillary to black letter interpretation. Only when the literary meaning of a provision is unclear or leads to absurd or unreasonable results should courts engage in systematic and teleological considerations.[143] This is evident in *Deckmyn*, where the CJEU explicitly discarded a restrictive reading of the parody exception by ruling that Member States could not impose on parody other limitations beyond the ones deriving from the everyday meaning of the provision.[144] As such, parodies do not have to possess an original character of their own, display noticeable differences from the original or mention the source of the parodied work. A domestic statute providing for these or any other additional requirements is inconsistent with EU law.[145] In this case, the ordinary meaning of the law also guaranteed the need for harmonized regulation across Europe, which might be endangered in case of differing implementations.

60 Furthermore, the CJEU has counterbalanced the push towards a narrow interpretation of E&L by assigning them the status of full-fledged rights.[146] This means that they are not subordinate to the exclusive rights of copyright holders, but that both claims stand equal and courts must balance them properly. Academics have also endorsed this reading. They have emphasized that construing E&L as rights better captures their fundamental role in copyright statutes, reflects the importance of users and their contribution in the copyright ecosystem and leads to a more liberal interpretation of exceptions.[147] In this way, E&L also gain a positive connotation by imposing a duty not to interfere with the use of a work covered by an exception.[148]

IV. Parody as a principle: more restrictive than as an exception?

1. Requirements to qualify a work as a parody

61 The concerns over the potential narrow reading of an exception lose credibility once we compare the Italian construct with the teachings of *Deckmyn*. It is indeed possible to trace in the domestic case law at least three additional restrictive requirements. These are: a) the absence of competition between the twoworks,[149-150] b) the need for parodies to show original character on their own,[151] and c) the necessity

140 See *Kapper* C-476/01, CJEU (2004) at 72; *Commission* v *Spain* C36/05, CJEU (2006) at 31; *Infopaq International* C5/08, CJEU (2009) at 57; *ACI Adam BV and Others v Stichting de Thuiskopie*, C435/12 CJEU (2014) at 23.

141 See *SGAE,* C-306/05 CJEU (2006), Opinion of the AG Sharpston, 26 and the Judgment, 26. See also *ITV Broadcasting* C-607/11, CJEU (2013) at 20.

142 Constitutional Court, 6 April 1995 n. 108; Court of Cassation, 7 March 1997 n. 2089, *Dir. D'Aut.* 1997, 362; Court of Appeal of Milan 21 March 2000, *AIDA* 2000, 930.

143 Giulio Itycovich (2009) 'The Interpretation of Community Law by The European Court of Justice', *German Law Journal* 10(5), pp. 550-554; Marcella Favale, Martin Kretschmer, and Paul C. Torremans (2016) 'Is there an EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice', *Modern Law Review* 79(1), pp. 31-75.

144 See Deckmyn at 22.

145 See Deckmyn at 21.

146 *Technische Universität Darmstadt v Eugen Ulmer*, C-117/13 (2014) at 43-44; Spiegel Online at 50-56; Funke Medien at 70-76.

147 Guy Pessach (2011) 'Reverse Exclusion in Copyright Law – Reconfiguring Users' Rights' (2011), Available at SSRN: https://ssrn.com/abstract=1813082 (last accessed 28 July 2020), p. 4.

148 See Maurizio Borghi (2020) 'Exceptions as Users' Rights in EU Copyright Law', *CIPPM Jean Monnet Working Papers*, No. 06-2020, p. 2.

149 See in particular Court of Naples (1908), Pret. of Rome, 29 August 1978 and Court of Milan 29 January 1996; Court of Milan, 31 May 1999, Warner Chappell Music Italiana S.p.A. c. New Music International S.r.l., Leone Di Lernia, *AIDA* (2000).

150 See Boggio (2015) p 1144, suggesting that this requirement is inconsistent with EU law.

151 See Pret. of Rome, 29 August 1978 and Court of Milan 29 January 1996; Court of Milan, 31 May 1999.

to overturn the meaning of the referenced work, or at least to establish a semantic distance between the two works.[152] Some have even hinted that the latter entails ascertaining whether the parody achieves the intended humoristic result, being the mere intent to mock insufficient.[153] All these requirements violate the principles expressed in *Deckmyn*, by providing for an overly restrictive regulation of the exception.[154] They might also perplex the application of the law, insofar as the assessment of whether a work achieves a humorous result is inherently subjective.[155]

62 By contrast, Italian courts have not endorsed the so-called 'necessity test', i.e. the evaluation of the proportionality between the amount of the borrowed work and its role in achieving the intended humorous effect.[156] On their side, academics distinguish between genuine parodies in which the amount of the reproduced work is immaterial for the assessment and bad faith attempts of disguising infringement through minor elaborations of the work.[157][158] However, qualifying parody as an exception would most likely lead to the same outcome.[159] This seems confirmed both by the wording of Article 5(3)(k) as well as by systematic considerations. In particular, it is noteworthy that unlike other E&L in the provision, parody does not require the use of the work to be limited to the extent required by the specific purpose.[160]

63 A comparative analysis confirms that subsuming parodies under the principles relating to the scope of protection leads to more restrictive results than an exception. In Germany, the application of the 'free use' doctrine to parodies led courts to require them to be 'antithetical' to the referenced work. Consequently, the humoristic intent had to be directed against the referenced work itself (target parody) but not towards a third work, person or topic (weapon parody). The German Supreme Court has now modified its approach to allow also for weapon parody, to conform to the principles of *Deckmyn*. This marks an evolution of the legal concept of parody in a more liberal sense.[161] Other restrictive requirements applied by foreign courts include necessity tests, the need for parodies to be original, the absence of confusion between the two works and the absence of the intention to obtain a competitive advantage.[162-163]

2. The hard case of parodies of musical works

64 A complex case concerns composite works made of separable copyrightable elements, and especially songs consisting of lyrics and music. The dilemma

152 Pret. of Rome, 18 November 1966; Court of Naples 15 February 2000; Court of Milan 29 January 1996.

153 Guglielmetti (1996), p. 677; De Santis (2014), p. 111; Alessandra Donati (2018) 'Quando L'Artista si Appropria dell'Opera Altrui', *Riv. Dir. Ind.* 67(2), p. 93. This seem confirmed by Court of Rome, 12 October 2000.

154 See also Jongsma (2017), pp. 652-82; Please note that according to Rosati (2015) 'Just a Matter of Laugh?', the CJEU did not clarify whether parody must achieve a humorous result or if an intention to mock suffice for the assessment.

155 In this sense, the argument against assessing the humoristic result of a parody is analogous to the one against assessing the aesthetic value of a copyrighted work: if courts must not become the arbitrators of what is art, then they should not equally become the ones of what is humor.

156 See for instance Court of Naples, 27 May 1908 and Court of Milan 29 January 1996.

157 Monti (1996), p. 1430; Spolidoro (2019), p. 591; *contra* Guglielmetti (1996) p. 687.

158 In the Netherlands, necessity tests have led to restrictive outcomes. See Senftleben (2012) pp 361-64.

159 See for instance Opinion of Advocate General Cruz Villalón, Deckmyn C-201/13 at 50-56.

160 See for instance Article 5(3)(a) and 5(3)(d), respectively on teaching and quotation.

161 See German Federal Supreme 'Auf fett getrimmt' 28 July 2016, I ZR 9/15. For commentary, Jan Nordemann & Viktoria Kraetzig, 'The German Bundesgerichtshof changes its concept of parody following CJEU Deckmyn v. Vrijheidsfonds/Vandersteen', Kluwer Copyright Blog http://copyrightblog.kluweriplaw.com/2016/11/03/the-german-bundesgerichtshof-changes-its-concept-of-parody-following-cjeu-deckmyn-v-vrijheidsfonds-vandersteen/ [Accessed 3 February 2021]; Henrike Maier (2017) 'German Federal Court of Justice Rules on Parody and Free Use', *JIPLP* 12(1), pp. 16-7.

162 See for instance Senftleben (2012) 'Quotation, Parody, and Fair Use', p. 362; and Jongma (2017), pp. 655-64, and the case law cited therein.

163 In Spain the same restrictive outcomes depends on a narrow legislative drafting of the parody exception. Art. 39 of the IP Act prescribes: 'The parody of a work made available to the public shall not be deemed a transformation that requires the author's consent, provided that it involves no risk of confusion with that work and does no harm to the original work or the author thereof'. On the topic see Mario Sol Muntañola (2005) 'El Régimen Jurídico de la Parodia' (Marcial Pons: Madrid). The same goes for France and Belgium, see Jongma (2017) 655-64.

is whether the overturning effect or the semantic distance must exist in relation to all the elements of the parodied work or only to some of them. Unsurprisingly, this scenario has led to conflicting rulings. Some courts have affirmed that parodists cannot reproduce the melody of a song if they only replace its lyrics, attaching a greater value to the melodic element of a song over its literary part. This is because it is impossible to deny that the two works are in competition if they are identical in terms of melody and arrangements.[164] Other courts have opined otherwise, concluding that the replacement of the lyrics suffices to overturn the meaning of the parodied work.[165] Commentators have praised the latter approach. They have emphasized that the former would *de facto* impede parodying songs and pointed out that the ICS qualifies songs as 'composite works', characterizing music and lyrics as inseparable esthetic elements.[166] In other words, the matter depends on whether the different components of the music must be perceived as autonomous entities or mere facets of a single unity, an indivisible creation.[167]

65 However, this argument does not bring us very far. It is incapable of dealing with synchronizations of autonomous works, which might have separate esthetic value and belong to different rightsholders. Cinematographic works, for example, frequently incorporate preexisting musical tracks and popular songs as background music.[168-169] In these cases, it is difficult to argue that parodies of audiovisual works ridicule background music if their irony only targets the visual component of the work or other features such as its characters, dialogues, or plot. Even the holistic approach to infringement endorsed in the literature does not lead to optimal results. Indeed, if there is any good reason to affirm that the act of synchronization has transformative character then the same reasoning should hold true for the first music synchronization into the later parodied work. Either both synchronizations create an entirely new message or they do not. In fact, the latter seems most likely: it makes little sense to engage into a semantic analysis of musical appropriations, since, apart from the lyrics, music is a form of nonconceptual art. On the same vein, an analysis of infringement in terms of economic harm to the rightsholder leads to equally unsatisfactory outcomes. It is well-known that synchronization licenses are both a common and significant revenue stream in the music sector.[170] In this sense, under an economic perspective, it might appear unclear why if the first author is obliged to bear the cost of a synchronization license, the posterior parodist is exempted from bearing this financial burden.

66 The reality is that parodists reproduce background music in order to better evoke the parodied work and not as an object of their irony, but it is difficult for the doctrines elaborated by courts and academics to come to terms with this reality. In this sense, the Italian construct seems to undermine or, at least, create inconsistencies with commonly accepted principles on copyright and music licensing. By contrast, an exception greatly simplifies the assessment: background music falls within the concept of parody because it is a necessary element to achieve the humorous result intended by the parodist, being any speculation on concepts such as 'semantic meaning', 'transformative use' or 'competitive harm' irrelevant.

V. Parody and the three-step tests

67 The three-step test (3ST) requires E&L to copyright to comply with three cumulative conditions. These are: a) the E&L shall only be applied in certain special cases; b) it must not conflict with a normal exploitation of the work or other subject-matter and c) it must not unreasonably prejudice the legitimate interests of the rightsholder.[171] There is a common fear that the 3ST unduly limits the operability of E&L,[172] which is one of the reasons why the Italian legislator should shy away from framing parody as an exception.[173] This sub-section illustrates why these

164 Court of Milan, 31 May 1999 in *Annali It. Dir. Autore*, 2000, 687

165 Court of Rome, 12 October 2000.

166 Musso (2015) p. 60.

167 Luis Gimeno (1997) 'Parody of Songs: a Spanish Case and an International Perspective', *Entertainment Law Review* 8(1), p. 20

168 See Gimeno (1997), p. 20

169 See for instance 'Porklips Now' (parody of 'Apocalypse Now'), which starts by reproducing the famous track 'The End' by The Doors. Available at https://www.youtube.com/watch?v=Yt93DVyjSZE [Accessed 22 April 2021].

170 See B. Klein and LM Meier (2017) 'In Sync? Music Supervisors, Music Placement Practices and Industrial Change'. In: M. Mera, R. Sadoff and B. Winters (eds.) The Routledge Companion to Screen Music and Sound (Routledge, Abingdon, UK) pp. 281-290.

171 See Article 5(5) of the Infosoc Directive; Article 13 TRIPS Agreement (1995); Article 9(2) of the Berne Convention.

172 See among the many Reto Hilty (2010) 'Declaration on the Three-step Test: Where Do We Go From Here?', *JPITEC* 83-6.

173 Ghidini (2018) 'Rethinking Intellectual Property'; Ghidini (2018) 'Conclusioni' in *Quaderni di Alai Italia*, p. 183.

concerns are largely misplaced. First, it submits that, in principle, the 3ST has no bearing on parodies and secondly, it shows how parodies normally satisfy the test.

1. The addressees of the Three-Step Test

68 The signatories of international IP treaties devised the 3ST as a counterweight to the scope of the exclusive rights. The test provided a legal basis to promulgate exceptions to copyright protection, within certain normative boundaries. As such, the function of the 3ST was to enable rather than limit E&L.[174]

69 In this context, there is little doubt that the addressees of the test are national legislators as the subjects of international treaty law.[175] It was the insertion of the 3ST in the InfoSoc Directive that perplexed the matter at the EU level. It is indeed unclear whether the Directive obliges member states to transpose the 3ST into national law or whether the test only curtails the margin of discretion of member states when introducing E&L. Depending on the answer to this first enquiry, two further questions arise. If the first solution holds true, it is unclear whether national courts should apply the test even in the absence of a corresponding domestic provision. Conversely, the second solution leads to the question whether national courts must dis-apply national law when it is clear that a domestic exception violates the 3ST. Commentators normally group the two questions together under the umbrella problem of whether the test bounds national courts during the application of E&L, and we will follow this approach for reasons of conciseness.[176]

70 In the past, the CJEU has offered ambiguous indications on this matter. In some judgements, it ruled that the 3ST is relevant only during the implementation phase of the InfoSoc Directive, that it does not affect the scope of E&L and that if a conduct unequivocally falls within an exception it automatically satisfies the test.[177] In other rulings, the CJEU seemed to invite national courts to assess whether the conduct of the defendant satisfy the requirements of the test.[178-179] Member States are divided between those who refused to implement the text into their national law and those who, in a way or the other, have done so.[180] This is not surprising, since the topic of the direct applicability of directives is among the more complex and ambiguous of EU law and has perplexed experts for years.[181]

71 On their side, while academics emphasize that the direct applicability of the 3ST becomes an additional control mechanism on already narrowly drafted E&L, thus bearing a nefarious impact on the fundamental rights that E&L are meant to safeguard,[182] they disagree on the direct applicability of the 3ST. In more detail, two main arguments militate in favor of the applicability of the 3ST by domestic courts. The first one is that Article 5(5) by using the word "apply" seems to refer to the judicial application of the test.[183] However, Recital 44 links the *application* of E&L to

174 Christoph Geiger, Martin Senftelben & Daniel Gervais (2014) 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law', *Am. U. Int'l L. Rev.* 29(3), 593.

175 Geiger (2014) 593-4.

176 On the topic, see Richard Arnold & Eleonora Rosati (2015) 'Are National Courts the Addressees of the Three-step test?', *Journal of Intellectual Property and Practice* 10(10), 741-44; Eleonora Rosati (2014) 'Copyright in the EU: In search of (In) flexibilities', *JIPLP* 9(7), 585-88. They argue that domestic courts should disapply national law found inconsistent with the 3ST.

177 See *Copydan Båndkopi v Nokia Danmark A/S,* C463/12 CJEU (2015) at 90;*Infopaq International A/S v Danske Dagblades Forening,* C302/10 CJEU (2012) at 55-7; ACI Adam (2014) at 25.

178 See *Football Association Premier League Ltd et al. v Murphy et al.*, Joined Cases C403/08 and C429/08 CJEU (2011) at 181; *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others,* C360/13, CJEU (2014) at 53-63.

179 For a more exhaustive analysis of the CJEU's case law, please see Arnold & Rosati (2015).

180 See Christoph Geiger (2007) 'The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society', e-Copyright Bulletin, pp. 13-4.

181 Lorenzo Squintaini & Justin Lindeboom (2019) 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions', *Yearbook of European Law* 38(1), 18-72; Arguing against the direct applicability, Daniël Jongsma (2020) 'The Nature and Content of the Three-step Test in EU Copyright Law: A Reappraisal' in Eleonora Rosati (ed) Handbook of European Copyright Law (Routledge).

182 Geiger et al (2014); Christoph Geiger (2006) 'The Three-Step-Test, a Threat to a Balanced Copyright Law?' *IIC* 37(6), p. 683; Martin Senftleben (2010) 'Bridging the Differences between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine', p. 529; Griffithis (2009), p. 3.

183 Christoph Geiger (2006) 'The Three-Step-Test, a Threat to a Balanced Copyright Law?', *IIC* 37(6), p. 690; more generally K.J. Koelman (2006) 'Fixing the Three-Step Test', *EIPR*, p. 40; Cohen H. Jehoram, 'Restrictions on Copyright and Their Abuse', EIPR, 2005, p. 364; Gustavo Ghidini (2018) 'Conclusioni' in *Quaderni di Alai Italia*, p. 183.

the obligations deriving from the international copyright framework, which in turn exclusively bind national legislators.[184] Others have also noted that the wording of the 3ST in the InfoSoc differs from the more restrictive one adopted in the Database and Software directives, which explicitly stipulate that exceptions to the rights conferred therein may not be 'interpreted' inconsistently with the test.[185] Finally, it cannot be excluded that the Article 5(5) is directed to the judicial application of the test by the CJEU. This reading has gained consensus in the literature and finds support in some recent rulings.[186] These considerations seem indeed to suggest that the expression 'shall be applied' has far from a clear connotation or decisive value. The second argument in favor of the 3ST direct applicability leverages on the observation that, since the EU legislator has already gauged the *abstract* compatibility of the E&L in Article 5 with the 3ST, it would be redundant to require domestic governments to duplicate this assessment.[187] However, this argument is now outdated due to the most recent developments of the CJEU. As we will see shortly, these suggest that for some of the E&L in Article 5(3) the assessment as to the compatibility between an exception and the 3ST is a prerogative of national legislators. Conversely, the case against the direct applicability of the test by national courts seems to leverage on more solid arguments. These include the context of the provision,[188] its history,[189] and the overarching principle of EU law that in the absence of a specific implementation directives are not applicable *contra legem* to the horizontal relations between individuals.[190-191]

72 Furthermore, even if a reading of this kind has not been advanced yet in the literature, it can be possible to reach a middle ground between the above extremes.[192] In particular, the most recent CJEU case law seems to invite the reconceptualization of the whole discussion by drawing on the fundamental distinction between E&L constituting a measure of full-harmonization and those which do not qualify as such. The distinction demands a case-by-case assessment, taking into account factors such as the wording, context, and history of the relevant provision.[193] Full-harmonization measures limit the leeway of Member States to a 'take it or leave it' decision, binding them to the wording of the InfoSoc Directive and the scope of the exception.[194] In these cases, the EU legislator has already struck a balance between the countervailing interests of rightsholders and users and this balancing shall apply uniformly throughout the Union. It is also safe to argue that the 3ST is mostly irrelevant for fully harmonized E&L. Indeed, on one side the EU legislator has already evaluated the conformity between the exception and the 3ST. On the other, an application of the test by domestic courts could lead to conflicting results and hamper the objective of copyright harmonization across the EU. Thus, for fully harmonized E&L, it would seem that if the act of the defendants fulfils the conditions for the application of the exception, then they automatically fulfil the three prongs of the test.[195]

73 The matter is more complicated in relation to E&L that do not constitute measures of full harmonization, quotation being a notable example.[196] In this case, Member States enjoy some room to maneuver in defining the scope of E&L. However, the InfoSoc Directive circumscribes this leeway in several

184 Recital 44 of the InfoSoc Directive: "When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter".

185 Griffith (2009); See M. Hart (2002) 'The Copyright in the Information Society Directive: an Overview', *EIPR* 58.

186 Jongsma (2020); see also *Stichting Brein v Jack Frederik Wullems* C-527/15, CJEU (2017) at 63; Spedicato (2020) p. 196.

187 Christoph Geiger (2006) 'The Three-Step-Test, a Threat to a Balanced Copyright Law?', *IIC* 37(6), p. 690.

188 Recital 44 in the Preamble to the InfoSoc Directive.

189 Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society (Brussels, 10 December 1997, COM(97) 628 Final), p. 32.

190 See *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. V Léčebné lázně Mariánské Lázně a.s.,* C351/12, CJEU (2014). 43-5. See also Squintaini & Lindeboom (2019).

191 See Jongsma (2020).

192 The analysis of this middle-ground approach will require further research and, for reasons of conciseness, we will only sketch it here.

193 Spiegel Online at 25-29; Funke Medien 40-44.

194 See Deckmyn and Panier; See also Raquel Xalabarder (2016) 'The Role of the CJEU in Harmonizing EU Copyright Law', *IIC* 47, 636.

195 We borrow the wording of Infopaq II at 55-57.

196 Spiegel Online at 28; Funke Medien at 42.

ways. These include the need to fulfil all the requirements set for the relevant exception, not to compromise the objectives of the Directive and to comply with the 3ST.[197] This leads to the question of what are the consequences of a *prima facie* 3ST-incompliant domestic implementation. If it is impossible to reconcile domestic law and the 3ST, then the prohibition against the application of directives in horizontal relationships *contra legem* must be upheld.[198] By contrast, when the letter of the law allows for alternative interpretations, of which only some are inconsistent with the 3ST, the domestic court should adopt the interpretation most consistent with the test. This solution reconciles conflicting legal principles. On one side, it respects the prohibition against the application of directives *contra legem*, since it invites courts to interpret rather than disapply domestic statutes. On the other, it respects the necessity to "consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive".[199]

74 Whereas this selective application of the 3ST in relation to only partially harmonized E&L will have to find a confirmation in future research and judicial practice, it is possible to see how the above three options play out in relation to parody. It is clear that if we conceive the 3ST as exclusively directed to legislators, it will have no bearing on the judicial application of parody. The only risk would lie in the choice to subject a parody exception to the 3ST or framing the latter as a general clause applying to all the E&L of the ICS. However, this does not seem an obligation under the InfoSoc Directive and the ICS seems to confirm this understanding.[200]

75 The same holds true under the middle-ground approach, i.e. the selective application of the 3ST to the E&L in Article 5. Indeed, parody constitutes a measure of full harmonization and as long as a state reproduces the wording of Article 5(3)k the conditions of the 3ST are automatically fulfilled. Moreover, the everyday meaning of the terms 'parody, caricature and pastiche' is sufficiently clear to clarify the scope of the exception and not even the CJEU has relied on the 3ST to construe the scope of the provision.[201] The CJEU has only emphasized the need for national courts to strike a fair balance between the interests of rightsholders and users.[202] This requirement seems close to a proportionality assessment meant to strike a balance between IP and other fundamental rights.[203] Interestingly, the German Supreme Court has also stressed the role of the 3ST as yardstick for the interpretation of E&L in relation to quotation, but has refrained from doing so in relation to parodies.[204]

76 As such, the 3ST becomes a threat to parody only under the understanding that courts must apply it in relation to all the E&L implemented in domestic statutes. However, it must be noted that the ICS rejects this approach, instead opting for a selective implementation of the test limited to only some specific E&L. Among these, Article 70 stipulates that E&L must comply with the 3ST "when applied to protected works or other subject-matter made available to the public in such a way that members of the public may access them in a time and from a place individually chosen by them".[205] Under this perspective, there seems to be a contradiction in advocating against an explicit parody exception in order to escape the reach of 3ST while prescribing for such a wide application thereof in relation to individually accessible works. Shall Italy ever implement a parody exception, it is Article 70 that constitutes the real threat to the free speech of parodists. Furthermore, the provision could also produce erratic results, for instance by subjecting 'on-demand' parodies to the 3ST, while providing for a more liberal application of the exception in other cases.

2. Application of the 3ST to parody

77 The precise criteria for applying the 3ST are not fully crystallized at the international and EU level and important ambiguities remain both as to the scope of each step and the relationship with one another.[206] However, it is possible to extract some

197 Spiegel Online at 38-9; Funke Medien at 45-53.

198 *OSA* at 45.

199 *OSA* at 44.

200 See below.

201 *Deckmyn.*

202 *Deckmyn* at 25-30.

203 *See* Christoph Geiger & Bernd Justin Jütte (2021) "Platform Liability under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match', *GRUR International* 70(6); see partially in this sense Jongsma (2017) 675-6.

204 Please compare Federal Supreme Court, Meilensteine der Psychologie' 28 November 2013 – I ZR 76/12 and 'Reformistischer Aufbruch II', 30 April 2020 – I ZR 228/15 against 'Auf fett getrimmt' 28 July 2016.

205 Article 70 ICS.

206 Jongsma (2020) *ibid.*

common trends, hinting that the 3ST has a limited impact on parody.

78 As for the first step, an exception is 'clearly defined' when it has an 'individual and limited application or purpose', so to 'guarantee a sufficient level of legal certainty'. It must also target a limited number of beneficiaries and be invoked in specific and exceptional circumstances.[207-208] It is therefore hard to doubt that the expressions 'parody, caricature and pastiche' do not meet the requirement, since the meanings of these words are clearly defined and the exception applies to the specific circumstance of the humoristic re-elaboration of a work.

79 The expression 'normal exploitation' in the second step has been interpreted by the WTO appellate bodies as encompassing all utilizations that presently generate significant or tangible income, as well as those likely to generate income in the future,[209] and that are a normal consequence of enforcing IPRs.[210] The provision therefore excludes uses from which rightsholders do not normally receive compensation.[211] The CJEU endorses a similar understanding. It has laconically concluded that a use conflicts with the normal exploitation when it significantly reduces the volume of lawful transactions for the rightsholder.[212-213] In the context of patent exceptions, the WTO appellate bodies argued that 'normal exploitations' are the ones that are essential to achieve the underlying policy goals of IPRs,[214] and some have suggested extending this reasoning to copyright cases.[215] All these principles seem to rule out that parodies violate the second step. On one side, copyright holders do not normally embark in humorous reinterpretations of their own work and regarding other parodies "do not enter into economic competition with nonexempted uses".[216-217]

80 Despite this, there might be exceptional cases of parodies competing with the rightsholders' original works and these might be particularly difficult to adjudicate. For instance, Disney and Lucas Films normally engage into mockeries of their own characters in merchandising articles, especially apparel.[218] In these cases, the commercial harm caused to the rightsholder might be significant, insofar as merchandise constitutes a valuable revenue stream. This might be particularly relevant if courts understand the requirement of normal exploitation as having an economic rather than legal connotation, i.e. in terms of economic harm to the rightsholder.[219] However, even in this case, the 3ST does not lead to diverging outcomes from the

207 On the application of the first step, see Report of the WTO Panel, United States – Section 110(5) of the US Copyright Act, para. 6.62, WT/DS160/R (June 15, 2000); in the EU see *Public Relations Consultants Association* (PRCA) Case C-360/13, CJEU (2014) at 75-6.

208 Christoph Geiger, Martin Senftelben and Daniel Gervais (2014) 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law', *Am. U. Int'l L. Rev.* 29(3), 593; Annette Kur (2009) 'Of Oceans Islands and Inland Water - How Much Room for Exceptions and Limitations Under the Three-Step Test?', *Richmond Journal of Global law and Business* 8(3), 314-5; Martin Senftleben (2006) 'Towards a Horizontal Standard for Limiting Intellectual Property Rights? – WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law', *IIC* 4, 414-8.

209 See Report of the WTO Panel, US at 6.180.

210 See Report of the Panel, Canada – Patent Protection of Pharmaceutical Products: Complaint by the European Communities and Their Member States, para. 7.69, WT/DS114/R (Mar. 17, 2000) at 7.38.

211 Senftelben (2006) 425.

212 *ACI Adam and Others*, C-435/12 (2014) at 39; *Stichting Brein* (2017) at 70.

213 In Germany the Federal Supreme Court has held that the step entails whether 'the use in question enters into direct competition with the conventional use, i.e. that there is an interference in the primary exploitation'. See Federal Supreme Court, 'Reformistischer Aufbruch II', 30 April 2020 – I ZR 228/15 at 72 and 'Meilensteine der Psychologie' 28 November 2013 – I ZR 76/12 at 50-2.

214 Report of the Panel, Canada at. 7.69, WT/DS114/R (Mar. 17, 2000).

215 See Geiger et al (2014) 594-600, Kur (2009) 318-20; Senftleben (2006) 421-428.

216 WTO Panel, US at 6.181. This is also the conclusion of the Commercial Court of Barcelona, 22 May 2019, arguing that a parody of a well-known character met the requirements of the 3ST.

217 Gambino (2002) 'Le Utilizzazioni Libere: Cronaca, Critica e Parodia', *AIDA*, pp. 127-134. This seems also confirmed by an empirical study on parody on YouTube K. Erickson (2013) 'Evaluating the Impact of Parody on the Exploitation of Copyright Works: An Empirical Study of Music Video Content on YouTube', Project Report – UK Intellectual Property Office.

218 Just browse Disney's official shop https://www.shopdisney.com/franchises/star-wars/clothing/ [Accessed 3 March 2021].

219 See for instance Senftelben (2006) p. 427-8; economic parameters were also a factor in WTO Panel, US at 6.206-6.219.

Italian approach, insofar as courts have deemed the lack of competition between the two works one of the requirements to treat parodies as autonomous creations.[220]

81 The last step entails two requirements. First, the interest claimed by the right-holder must be legitimate. This means to have a basis in the law, public policy, or social norms, which pushes courts to take into account both economic and non-economic interests.[221] In this regard, parodies normally do not encroach upon any legitimate interest of the copyright holder. This might be true insofar as the latter does not suffer any economic damages and its claims rather appear an attempt to exercise a form of censorship, a behavior that should not encounter the favor of the law in a democratic state.[222] The second requirement is even more relevant for parodies. It suggests that a certain amount of prejudice can be justified as 'reasonable', taking into account factors such as the economic harm caused to the rightsholder,[223] and the importance of the countervailing public interest in the free exploitation of the work.[224] This explains why the third step is sometimes associated with a proportionality assessment, in which courts have to gauge and balance conflicting interest, through criteria such as necessity, suitability and proportionality.[225] This reading strongly militates in favor of parodies, insofar as the prejudice caused to the rightsholder is justified by the overriding interest of safeguarding freedom of expression, while the harm caused to the rightsholder normally has little significance from an economic perspective.

VI. Summary of key results

82 The above exposition has proved that the legal scholarship has put a wrong emphasis on the status of parody as an overarching principle of the Italian legal system. First, because this construction contravenes the EU copyright law as interpreted by the CJEU, which clearly described E&L as the only legitimate tool to introduce the desired degree of flexibility into the copyright system. Secondly, because the assumption that a statutory exception would lead to an intransigent legal regime is erroneous: there is no legal principle obliging courts to interpret exceptions narrowly and, on a deeper look, even the infamous 3ST has no role to play on the matter. Conversely, it is the systematization of parody as a principle relating to infringement that paradoxically subjects parody to stricter legal requirements. The main reason for this is rather evident: while Article 5(3)(k) just requires parody to be the expression of humor, adjudicating whether a parody is a fully autonomous work requires a complex and delicate assessment, which includes considerations as to the semantic distance between the two works or the lack of economic competition among them. Furthermore, parody as a principle is incapable of effectively dealing with some hardline cases, and in particular music synchronization.

E. Conclusion

83 The tension between the pragmatic implications of the law and its dogmatic conceptualization is an old and everlasting one. Undoubtedly, it is the task of academics to refine legal theories both to guide courts and legislators and to deepen our understanding of the legal system, at least if we believe that knowledge has inherent value.[226] However, doctrinal over-conceptualization also comes with serious risks, such as overlooking the actual outcomes of the proposed constructs and neglecting the needs of the addressees of legal provisions. In Italy, the choice not to implement a parody exception has undoubtedly rested upon ideological reasons, such as portraying copyright as a principle-based system based upon solid freespeech foundations. What was lost amidst these ideological crusades was the sight of the pragmatic implications of the law: that parody as a principle leads to more restrictive outcomes than as an exception. Against this background, the implementation of the DSM directive not only seems like another lost opportunity to enact a generalized parody exception, but as anticipated, unnecessarily adds complexity to the system by potentially differentiating between the online and offline environment.

220 See in particular Pret. of Rome, 29 August 1978 and Court of Milan 29 January 1996, 1431.

221 See for instance Senftelben (2006) p. 433; WTO Panel, US at 6.224.

222 Arjun Gosh (2013) 'Censorship through Copyright: From Print to Digital Media', *Social Scientist* 41 (1/2) 51-68.

223 WTO Panel, US at 6.229; in the EU see PRCA at 61.

224 Geiger et al (2014), 596; Kur (2009) 322-4.

225 Jongsma (2020); in Germany see Federal Supreme Court, 'Reformistischer Aufbruch II at 73 and Meilensteine der Psychologie at 56.

226 In the latter sense, Michel Vivant (2021) "Thinking IP: A Game of the Mind", GRUR International 70(3), 213-4.

This result is very hard to justify, both under a doctrinal and pragmatic perspective.