

WHEN IS A PARODY A VIOLATION OF COPYRIGHT?

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Introduction

Copyright belongs to the realm of intellectual property and it deals with the rights the authors are entitled to in respect of their original works. Recognizing the importance of these rights a number of international conventions, multilateral or bilateral agreements, and volumes of national legislation regulate this area of law. The major documents in this field are The Berne Convention on Literary and Artistic Works¹, The Universal Copyright Convention², The WIPO (World Intellectual Property Organization) Copyright Treaty³, and The EC Copyright Directive⁴. National legislation, namely The Lithuanian Law on Copyright and Related Rights⁵, is also relevant.

Copyright is intended to encourage creativity, progress and innovation by protecting certain economic and moral rights of the authors and, at the same time, by rendering copyrighted works accessible to the rest of society. The balancing of these two conflicting interests is of crucial importance, therefore the authors are granted specific rights while the public is entitled to the privilege of using the work, provided that these activities are subjected to a number of restrictions. These restrictions relate to the copyrightability of the subject matter, the duration of the period of protection, the availability of the work to the public and the conditions of its use. So, in order to avoid infringing a copyright, the use has to satisfy a number of requirements, namely, it has to be fair and must not unreasonably prejudice the legitimate interests of the author.

The relevant statutes, conventions and case law take different approaches on how to regulate and balance the interests of the authors and the privileges of the users, nevertheless they provide relatively similar catalogues of non-infringing uses and the pertinent factors to be considered in the process of evaluation. Normally, the use for educational and information purposes, criticism or review and scientific research is regarded as fair and does not constitute a violation of copyright. Parody is often included as well; some legislation explicitly incorporates parodies of original works into the list of exceptions to the copyright protection, while others allow it to pass under the heading of criticism. However, a natural question is whether a parody – like any other exempted use – is always fair and thus non-infringing or whether a thorough evaluation has to be performed in every single case in order to justify an unauthorized copying or other use. As the sources provide sufficient grounds to state that no use is presumptively justified, so the central issue is under what circumstances a parody constitutes a violation of copyright.

Thus, the aim of this article is to determine the conditions, which render a use of a copyrighted work for the purpose of parody an unfair use that impedes the normal exploitation of the work and violates the interests of the author. In order to accomplish this goal, firstly the subject matter of copyright and the scope of its protection will be discussed. Secondly, this article will touch upon the concept of violation and the available defenses to an alleged infringement of copyright. Thirdly, the concept of parody

¹ The Berne Convention on Literary and Artistic Works of September 9, 1886 (as amended by October 2, 1979).

² Universal Copyright Convention As Revised at Paris On 24 July 1971, U.N.T.S. No. 13444, vol. 943, pp. 178-325.

³ WIPO Copyright Treaty, adopted by the Diplomatic Conference in Geneva on December 20, 1996.

⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (OJL 167 of 22.6.2001).

⁵ Law on Copyright and Related Rights of Republic of Lithuania, 18 May 1999, No. VIII-1185 (as amended by 5 March 2003 No.IX-1355), official translation.

will be discussed, paying particular attention to the parody exception as a defense to a claimed violation of copyright. And the final part will center on the specific factors and circumstances under which a parody may be determined to constitute a copyright violation.

1. Identifying Copyright

1.1. Definition and Subject Matter of Copyright

Intellectual property is broadly understood as “a type of intangible personal property comprising ... matter created by the exercise of the human intellect”⁶. Intellectual property covers such areas as patents, trademarks, trade secrets, copyrights and related rights, right of publicity, and moral rights⁷. All intellectual property rights possess certain common features: they may exist independently of each other and may be subject to sale agreements, they are divisible, territorially bound, anti-competitive, and provisional⁸ only. Despite these similarities, these areas of intellectual property law are usually regulated separately. Therefore, only the material relevant to copyright will be significant here.

Copyright is normally understood to be the right of an author to his or her original work and it comes into existence with the creation thereof⁹. No registration or any other kind of formal procedure is required for a work to become the subject matter of copyright, to enable the holder of these rights exercise and enforce them within the scope of the relevant statutes. Therefore, the definition of “work” appears to be significant. The Lithuanian Law on Copyright and Related Rights, for example, defines “work” as “any original result of intellectual creation activity in the field of literature, science or art, whatever may be its artistic value, or the mode or form of its expression”¹⁰. It is similarly defined in the Berne Convention: “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”¹¹. Such literary and artistic works include books and other writings, speeches and lectures, scientific writings, dramatic, choreographic, musical, audiovisual, photographic works, also works of architecture, sculpture, and applied arts as well as any other works of authorship¹².

Besides the understanding of the subject matter of copyright, it is equally important to distinguish between its categories: the rights of the authors may be economic and moral¹³. Economic rights comprise such acts as the reproduction of work, its publication, translation, adaptation, distribution, public display, public performance, broadcasting, and retransmission¹⁴. The author may exercise these rights personally or he may authorize somebody else to undertake their management. These rights may be sold or otherwise transferred to other persons. Moral rights, on the other hand, include the right of authorship, the right to the author’s name and the right of inviolability of the

⁶ Peter Groves, *Intellectual Property with Competition Law and Practice* (London: London Guildhall U, 1994), p.1.

⁷ David I. Bainbridge, *Intellectual Property*, 3rd ed. (London: Pitman Publishing, 1996).

⁸ See note 6: Peter Groves, p. 3-5.

⁹ See note 5: Law on Copyright and Related Rights of Republic of Lithuania, article 13.

¹⁰ *Id.*, article 2, subparagraph 17.

¹¹ See note 1: Berne Convention, article 2, paragraph 1.

¹² See note 5: Law on Copyright and Related Rights of Republic of Lithuania, article 4.

¹³ *Id.*, articles 14 and 15.

¹⁴ *Id.*, article 15, paragraph 1.

work¹⁵; these non-economic rights may not be transferred and their duration is unlimited¹⁶.

1.2. Scope of protection

The underlying idea of copyright and all intellectual property law is to give protection for the authors of original works, thus providing them with an incentive to create and invent¹⁷. In the Constitution of the United States there is a special provision authorizing the Congress to legislate to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”¹⁸. According to the EC Copyright Directive, “copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation”¹⁹. However, this grant of protection creates a kind of monopoly, which is by many perceived as a shortcoming, thus if protection were granted to any work without any limitations this whole institute would defeat its own purpose. Therefore, the rights of the authors are strictly defined and are made subject to a number of restrictions, such as requirements of fixation and originality, and the limited duration of these exclusive economic rights themselves.

The Berne Convention provides that it is “a matter for legislation in” the countries parties to the convention “to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form”²⁰. Therefore, the statutes of various countries, such as the United States, Lithuania, The United Kingdom²¹, require the work to be somehow fixed in some tangible form in order for it to be granted the protection of copyright law. The Lithuanian Copyright Law requires the work to be “expressed in any objective form”²², whereas the American Copyright Act is much more explicit – a work must be “fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device”²³.

Besides fixation, the work also has to be original in order to qualify for copyright protection. Originality is an absolute requirement; it is normally included in the definition of the subject matter of copyright²⁴. It should be noted that this statutory requirement of originality does not imply an extraordinary degree of innovation or extreme creativity; what it simply means is that the work has to be created by the author himself or herself and not copied from somebody else. To qualify for the copyright

¹⁵ The British Copyright, Designs and Patents Act 1988 (c. 48) recognizes only two moral rights of authors, namely the paternity right (the right to be identified as the author of a work) and the integrity right (the right to prevent any modification to the work). Compared to this, in the opinion of the author, the Lithuanian distinction between the right of authorship and the right to the name of author seems unclear, redundant and hardly justified.

¹⁶ See note 5: Law on Copyright and Related Rights of Republic of Lithuania, article 14.

¹⁷ See note 6: Peter Groves, p. 5.

¹⁸ Constitution of the United States, Art. I, 8, cl.8.

¹⁹ See note 4: Directive 2001/29/EC, paragraph 9.

²⁰ See note 1: Berne Convention, article 2, paragraph 2.

²¹ The countries mentioned are all parties to the Berne Convention.

²² See note 5: Law on Copyright and Related Rights of Republic of Lithuania, article 4, paragraph 1.

²³ The United States Copyright Act of 1976 (17 U.S.C. §101 et seq.)

²⁴ See note 5: Law on Copyright and Related Rights of Republic of Lithuania, article 2.

protection very often an originality of form is considered sufficient²⁵, thus such works as various compilations of data, directories, dictionaries and other works of little expression are within the scope of copyright protection for the originality of arrangement and selection of relevant information. For the same reason the copyright protection extends to derivative works²⁶ and unofficial translations of legal acts²⁷.

Another restriction placed on the monopoly rights of an author is the period of time during which the copyright may be protected and enforced. It is important to note that this term of protection depends on the kind of the author's rights and varies from country to country. The Berne Convention sets the general period for the duration of economic rights for "the life of the author and fifty years after his death"²⁸. This term is accepted by the British Copyright, Designs and Patents Act 1988²⁹, while the Lithuanian Law on Copyright guarantees protection for "the life of the author and ... 70 years after his death"³⁰, which is the same in the United States³¹.

The legislators also explicitly provide for the subject matter excluded from the copyright protection. Normally, ideas, procedures, methods of operation or mathematical concepts cannot be copyrighted³². The Lithuanian Law on Copyright, for example, provides an exhaustive list of subject matter to which the copyright protection does not extend; it comprises the same categories as set out in the WIPO Copyright Treaty or the US Copyright Act of 1976 and in addition includes: legal acts and their official translations, "official state symbols and insignia", "officially registered draft legal acts", "regular information reports on events" and "works of folk art"³³.

2. Violation of Copyright

2.1. Concept of Violation

As soon as a work of authorship is created it is awarded statutory protection against any kind of violation; if an infringement takes place, the holder of the author's rights is entitled to remedies that should be made available by the state³⁴. A violation occurs when any of the rights the author is entitled to is disregarded; it may involve an unauthorized copying of the work, or any kind of use without a license or without the consent of the author, import or export of infringing copies, non-payment of royalties, violation of moral rights or any other violation of the statutes regulating copyright³⁵. The

²⁵ Translated by the author from Alfonsas Vileita, *Lietuvos Respublikos Autorių teisių ir gretutinių teisių įstatymo komentaras*, (Vilnius: Lietuvos Rašytojų Sąjungos Leidykla, 2000), p.33.

²⁶ Derivative work is defined as a work "created on the basis of other literary, scientific or artistic works", see note 5, Law on Copyright and Related Rights of Republic of Lithuania, article 4, paragraph 3, subparagraph 1.

²⁷ See note 5: Law on Copyright, article 4, paragraph 3.

²⁸ See note 1: Berne Convention, article 7, paragraph 1.

²⁹ See note 6: Peter Groves, p.79.

³⁰ See note 5: Law on Copyright, article 34, paragraph 1.

³¹ See note 23: US Copyright Act, §302.

³² See note 3: WIPO Copyright Treaty, article 2.

³³ See note 5: Law on Copyright, article 5.

³⁴ According to the EC Copyright Directive (see note 4: article 8, paragraph 1), "[m]ember [s]tates shall provide appropriate sanctions and remedies in respect of infringements of the rights" of authors and "shall ensure that those sanctions and remedies are applied". So, the obligation to create particular remedies is conferred upon the member states, however, the "sanctions thus provided for shall be effective, proportionate and dissuasive".

³⁵ See note 5: Law on Copyright, article 73.

US Copyright Act of 1976 also explicitly describes what constitutes a violation of copyright, namely, a violation “of the exclusive rights of the copyright owner as provided by sections 106 through 121 or of the author as provided in section 106A(a)”³⁶. It should be noted that an infringement of copyright is not some kind of amorphous offence; it only takes place when those economic or moral rights enumerated in the relevant statutes are violated.

In the United States the infringement of copyright may be established in two ways: by direct evidence and by indirect proof. To prevail on a *prima facie* case of infringement, the plaintiff must prove actual copying by the defendant; this involves showing that the defendant has “taken an improper amount of the plaintiff’s work” and independent creation is always a defense³⁷. In the majority of cases it is impossible to prove direct copying, as the evidence is unavailable; then the action could still be sustained by producing “circumstantial evidence”. In order to argue a case based on circumstantial evidence, the plaintiff must prove “access” and “probative similarity”³⁸. The access requirement is met when it is evident that the defendant had reasonable opportunity to view the work, while the necessary degree of similarity varies depending on the type of work. The two relevant elements – similarity and access – are complimentary; that is, the more “striking” the similarity, the less proof of access is necessary and *visa versa*³⁹. When the evidence of access is insufficient, the plaintiff may still be able to prevail on his claim if the degree of similarity is such as to preclude “the possibilities of independent creation, coincidence and prior common source”⁴⁰. However, similarity alone does not establish access and must not be analyzed in isolation, it only tends to prove access with regard to “other circumstantial evidence”⁴¹.

Thus, it appears that almost any activity, connected with an original work of authorship, risks to infringe the author’s copyright. However, the copyright protection has a purpose of protecting expression for the sake of promotion of “Science and useful Arts”⁴², thus it would be reasonable to allow the society to somehow profit from those protected works and build upon those experiences. Therefore, the following section will discuss the statutory provisions enabling to use the copyrighted matter and at the same time allowing to avoid copyright infringement.

2.2. Acts Not Considered a Copyright Violation

Concerned not only with the protection of the rights of authors but with the wider interests of society at large, the legislators provide a comprehensive list of situations when copying or otherwise using the copyrighted material, which would normally constitute an infringement, is justified. The American, British, Lithuanian statutes, the Copyright Directive and the relevant Conventions⁴³ provide substantially similar catalogues of activities that are recognized as not violating an author’s copyright. Generally, these exceptions include such activities as restricted personal use, quotation,

³⁶ See note 23: US Copyright Act, §501.

³⁷ Marshall Leafer, *Understanding Copyright Law*, 2nd ed. (New York: Matthew Bender, 1995), p.286.

³⁸ Instead of “probative similarity” a term “substantial similarity” is often employed; for a discussion on possibly significant distinction see: *Id.*, pp. 286-287.

³⁹ *Id.*, pp. 286-290.

⁴⁰ *Selle v. Gibb*, 741 F.2d 896, 223 U.S.P.Q. 195 (United States Court of Appeals, 7th Cir. 1984); *Arnstein v. Porter*, 154 F.2d 464 (United States Court of Appeals, 2nd Cir. 1946).

⁴¹ *Id.*

⁴² See note 18: U.S. Constitution.

⁴³ See notes 23, 15, 5, 4, 1, 2 and 3 respectively.

review or criticism, teaching and scientific research purposes and reporting of current events, provided that the source is adequately identified⁴⁴. When the above-mentioned defenses are invoked and supported by evidence, the use of a copyrighted work is not regarded as a copyright violation as a matter of law. The defendant, willing to employ these defenses, bears the burden of proving that his actions fall within the activities exempted from the general copyright protection. However, these defenses are available in the case of an alleged copyright infringement only if they are compatible with the requirements of fairness and necessity or, in the case of American and British practices, if they pass through an examination under a judicially created and applied doctrine of “fair use” or “fair dealing”.

2.3. The Doctrine of “Fair Use”

Even though the doctrine of “fair dealing” is not defined in the Copyright, Designs and Patents Act 1988 it is nevertheless frequently applied by the British courts. The “fair dealing” provisions permit acts performed for the purpose of research or private study (s.29 (1)), criticism or review (s.30 (1)), purposes of education (ss.32-35) and reporting current events (s.30 (2))⁴⁵. But neither of these acts will be considered “fair” *per se*, the court will determine whether it is “fair” under all the relevant circumstances of the case. The pertinent factors include the amount and substantiality of the portion used, “the number of people to whom the copies have been shown”, the potentiality of adverse effect on the “normal exploitation” of the original work, the status of the work (that is, whether it has been previously published or not), the true intention of the copyst (whether it was intended for the criticism and/or review of the original or to “damage the author”) and the possibility of “economic benefit” to the user of the copyrighted material⁴⁶. Under the totality of these elements, developed through case law, the acts will be judged “fair” or decided to constitute a copyright violation.

Very similarly the doctrine of “fair use” is applied in the United States, however here it has been codified. Section 107 of the Copyright Act of 1976⁴⁷ enumerates the criteria under which the use may be determined to be “fair”. The court has to consider the following factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁴⁸

All of these elements have to be evaluated in connection on a case-by-case basis; the more one factor weighs in favor of fairness, the less is the influence of others in finding a copyright infringement. When the purpose and character of the use are analyzed, the purely commercial use - such acts that result in profit to the user - are not likely to be considered fair, even though only a relatively small amount of the original

⁴⁴ See note 5: Law on Copyright, articles 20 through 24; note 23: US Copyright Act, §107; note 1: Berne Convention, articles 10, 10bis.

⁴⁵ Copyright, Designs and Patents Act 1988 (c.48).

⁴⁶ Michael Edenborough, *Intellectual Property Law*, (London: Cavendish Publishing Limited, 1995), p. 97.

⁴⁷ See note 23: U.S. Copyright Act.

⁴⁸ *Id.* §107.

work has been copied. Educational purposes, on the other hand, may justify the usage of rather large portions of copyrighted works. The nature of copyrighted work is equally important, namely, whether the work has been published and become publicly accessible or whether it is confidential or ready for publication (when it is likely to receive more protection). The significance of substantiality of the part taken depends on the balance of the rest of the factors; nevertheless, copying the bigger part or the whole work without any alterations will doubtfully qualify as “fair use” under any purpose. And finally, the use of the work should not adversely affect the market for the copyrighted work or prejudice other legitimate interests of the author or the holder of the author’s rights where appropriate. However, this does not mean that a work cannot be criticized because this is likely to harm the potential market for the original; what it is intended to prevent is that the infringing work become a substitute for the original, especially when the markets overlap⁴⁹.

According to the US law, no use is presumptively fair; it is determined to be such only after a careful examination of all the relevant factors listed in the statutory provisions.

The Lithuanian law takes another approach to achieve “fairness” towards the creators of original works. It provides a comprehensive list of activities that are presumptively justified under one of the enumerated exceptions, namely teaching, research, dissemination of information, quotation, and criticism and then elaborates and discusses the circumstances under which this use of a copyrighted work does not violate the rights of the author. For example, quotations are permitted and do not require the authorization of the author or the owner of copyright if the rights have been transferred if:

- (a) the passage of a published work used is “relatively short”;
- (b) it is “in a form of a quotation in another work”;
- (c) “such reproduction is compatible with fair practice”;
- (d) “its extent does not exceed the extent justified by the purpose”;
- (e) the “indication of the source and the name of the author must accompany the quotation”⁵⁰.

These requirements appear similar to the “fair use” criteria provided by the US copyright law and the factors considered relevant by the British copyright legislature and case law. Nevertheless, the Lithuanian statutory requirements employ many concepts subject to valuation, such as “extent justified”, “fair practice”, and “relatively short”, leaving ample grounds for judicial interpretation. It is reasonable to assume that in evaluating the circumstances of each single case (especially bearing in mind that the doctrine of *stare decisis* is not recognized by the Lithuanian legal system), the reasoning of the court will likely follow similar stages as adopted by the American and British courts; however, it may yield a slightly different result in similar cases and probably lead to greater inconsistencies of application of the copyright law by different courts and before different judges.

3. The Concept of Parody

Parody is generally defined as “a humorous exaggerated imitation of an author, literary work, style, etc.”⁵¹ or “a literary work in which the style of an author is closely

⁴⁹ For supporting opinion see: Marshall Leafer, *Understanding Copyright Law*, 2nd ed. (New York: Matthew Bender, 1995), pp. 285-345.

⁵⁰ See note 5: Law on Copyright, article 21.

⁵¹ *The Concise Oxford Dictionary*, ed. by Della Thompson, (Oxford: Clarendon Press, 9th ed., 1995).

imitated for comic effect or in ridicule”⁵². It is distinguished from other comical works by “the depth of its technical penetration”; moreover, parody is intended to “mercilessly” reveal and criticize the peculiarities and weaknesses of the “victim”⁵³. In order for the parody to be successful it inevitably involves copying the expression of the author and often taking the heart of the work and putting it to comical uses⁵⁴.

Parody is not explicitly mentioned in either the American or the British copyright statutes, nevertheless this issue has received substantial consideration in the opinions of the courts. In the United States the right to use a work without the authorization for the purpose of comic criticism or parody evolved from the freedom of speech guaranteed by the First Amendment, which states that the “Congress shall make no law ... abridging the freedom of speech”⁵⁵. In some cases (excluding parody) the First Amendment is regarded as conflicting with the copyright protection on the whole because the protection of copyright “appears to encroach on the freedom of speech ... because it prohibits ... to reproduce the expression of others”⁵⁶. But the possible tension has been resolved by employing the doctrines of idea-expression dichotomy⁵⁷ and, in other cases, fair use⁵⁸.

The provision concerning the parody exception to copyright violation was not present in the Lithuanian Law on Copyright and Related Rights of 18 May 1999 and further amendments either, until the amendment of 5 May 2003 when the law was harmonized with the relevant European Union (EU) legislature, including the Copyright Directive⁵⁹. This amendment incorporated a separate article entitled “Use of a Work for Caricature or Parody”⁶⁰; this is not a surprising innovation because the article was intended to comply with the provisions of the Copyright Directive⁶¹. The Directive in the relevant part states: “Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

... (k) use for the purpose of caricature, parody or pastiche”⁶².

The above-mentioned terms are not defined and the conditions for the use of the exception are not described in either the Lithuanian or the EU law; however, the laws read in their entirety provide for the similar criteria as previously analyzed: the use has to be compatible with fair practices, not exceed the extent necessary for the specific purpose and be primarily non-commercial. Moreover, “exceptions and limitations ... shall only be applied in certain special cases which do not conflict with a normal exploitation of the work ... and do not unreasonably prejudice the legitimate interests of the rightholder”⁶³. It is evident that the concepts contained in these provisions, such as “necessary”, “unreasonably”, or “primarily” are likely to become subject to judicial interpretation and speculation by the parties to the litigation.

⁵² *Merriam-Webster's Encyclopaedia of Literature*, (Springfield: Merriam-Webster, Incorporated, Publishers, 1995).

⁵³ *Id.*

⁵⁴ For additional discussion of the term “parody” also see: *Luther R. Campbell Aka Luke Skywalker, et al. v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994).

⁵⁵ See note 18: U.S. Constitution.

⁵⁶ See note 37: Marshall Leafer, p. 285.

⁵⁷ *Id.*

⁵⁸ R.S. Brown, R.C. Denicola, *Cases on Copyright*, 7th ed. (New York: Foundation P, 1998), pp. 414-415.

⁵⁹ See note 4: Directive 2001/29/EC.

⁶⁰ See note 5: Law on Copyright, article 25 (translated by the author, as the official translation of the latest amendment was still unavailable as to 22 April, 2003).

⁶¹ See note 4: Directive 2001/29/EC.

⁶² *Id.* Article 5, paragraph 3, subparagraph (k).

⁶³ *Id.* Article 5.

As previously mentioned, the Lithuanian Law on Copyright does not attempt to define the relevant terms or furnish any other guidance for the application of the parody provision. Article 25 of the statute declares that it shall be permitted without the authorization of the author or the owner of copyright and without the payment of remuneration to use a work for caricature or parody⁶⁴. Contrary to the other provisions of the statute, which list some conditions when the use is justified, this article does not elaborate on the issue; it does not have any “fair practice”, “non-commercial purpose” or “amount necessary for the purpose” requirements. Read literally it could be inferred that there are no such prerequisites for the application of the parody exception; whether any potentially infringing use entitled “a parody” would be justified under article 25 remains a question to be answered by courts. However, still there are no the Supreme Court of Lithuania cases dealing with this particular issue. On the other hand, the provision could be read together with the rest of the statute and by analogy the above-mentioned requirements of necessity and fairness could be viewed as implicit in the parody limitation to the copyright protection.

4. *When Is a Parody a Copyright Violation?*

At this point a natural question should arise: whether a parody always constitutes a justifiable, and thus fair, use. A simple answer is unavailable because this issue is being resolved on a case-by-case basis, after a careful determination of all the relevant factual and legal circumstances. A number of American cases focus on this specific issue, while there are very few British cases and no Lithuanian ones. Due to this fact, the major portion of this analysis will rely on the practices of the American courts.

The seminal case in this area is considered to be *Acuff-Rose*⁶⁵, where a rap group 2 Live Crew created a parody of Roy Orbison’s well-known song “Oh, Pretty Woman”. The parodists used some of the lyrics and the characteristic rhythm of the song. They attempted to obtain a license for their work from the owner of copyright (Acuff-Rose Music, Inc.), but were refused. Nevertheless, they released their song, identifying Orbison and Dees as the authors and Acuff-Rose as the publisher; the records were sold, and the complaint for copyright infringement followed. The District Court decided in favor of 2 Live Crew, based on the analysis of all four statutorily provided factors as applied to the facts of the case. The Court of Appeals for the Sixth Circuit reversed the decision and remanded with instructions to reconsider the significance of the first element, namely the commercial character of the use, which in their opinion suggested a finding of copyright infringement. The Supreme Court reached a unanimous decision favoring the rap group, stating that the Court of Appeals applied an erroneous analysis, overemphasizing certain factors and disregarding the others. The case was remanded for further proceedings consistent with the opinion; moreover, the reasoning of the Court demonstrated that a straightforward answer is unavailable and that even slightly different factual situations may frequently produce completely diverse results.

The most prominent idea emphasized by the Court throughout the decision is that the four factors, namely, “the nature of the copyrighted work”, “the purpose and character of the use”, “the amount and substantiality of the portion used”, and “the effect of the use upon the potential market for ... the copyrighted work”⁶⁶ must be evaluated in

⁶⁴ See note 60: Law on Copyright, article 25.

⁶⁵ *Luther R. Campbell Aka Luke Skywalker, et al. v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994).

⁶⁶ *Id.*

relation to each other. Similar requirements appear in the Lithuanian Copyright law⁶⁷, but the relevant elements the court should consider are specified in separate articles; for example, article 22 states that in deciding whether the use was of a commercial nature regard must be had to the purpose of the use⁶⁸. Thus, further analysis of the issue will concentrate on each factor separately but also paying due attention to their interdependence in order to determine the significance of particular circumstances of a parody against the finding of fair use.

4.1. *The Purpose and Character of the Use*

The first factor principally concentrates on whether the use is of a commercial character or is destined to achieve non-profit purposes. The British courts are inclined to find unfair use whenever the exploitation of a work results in the financial benefit to the user⁶⁹. The American courts tend to hold that “commercial use is presumptively unfair”⁷⁰, the Lithuanian and the EC law prohibits commercial use altogether. Therefore, the exploitation of a copyrighted work for the purpose of parody seems unlikely to be fair: parodies are normally created for audiences; they ridicule famous works, often relying on their general familiarity to the public for the success of the parody⁷¹. It would be difficult to argue that there are good reasons for parodying completely unknown works by obscure authors, because the parody by its definition should closely imitate the style or manner of the original in order to achieve comic effect. Moreover, the popular works and famous people appeal to the general public and it is inclined to take interest in some adaptation or criticism as well as in the original work itself. Therefore, strong parodies are usually commercially successful and it would be unreasonable to deny that the potential profit was never intended.

On the other hand, the right to criticize is codified in statutes and otherwise widely recognized, while parody, if not awarded a separate statutory provision, is nevertheless considered a form of criticism. By comically criticizing serious works it achieves a non-commercial educational purpose and benefits the general public “by shedding light on an earlier work, and, in the process, creating a new one”⁷². Despite the possible financial gain, parody educates the taste of the public, encourages creativity, thus promoting “the Progress of Science and useful Arts”⁷³. But in relation to comical criticism it should be mentioned that by its very definition a parody entails the criticism of the particular work used, because it is meant to achieve humorous effect by conjuring up the original and making an intended commentary upon it⁷⁴. A parody, as distinguished from satire⁷⁵, should be limited to the criticism of the work used; the authors of a parody should not exploit a serious work to make commentaries about individuals or society at large.

⁶⁷ See note 5: Law on Copyright.

⁶⁸ Id. article 22.

⁶⁹ See note 46: Michael Edenborough.

⁷⁰ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451, 78 L.Ed. 2d 574, 104 S.Ct.774 (1984).

⁷¹ As the Court stated in *Acuff-Rose* (see note 65): “parodies almost invariably copy publicly known, expressive works”.

⁷² See note 65: *Acuff-Rose*.

⁷³ See note 18: U.S. Constitution.

⁷⁴ Also see note 58: R.S.Brown, p. 401.

⁷⁵ Satire – “the use of ridicule, irony, sarcasm, etc., to expose folly or vice or to lampoon an individual” (*The Concise Oxford Dictionary*, see note 51)

It is also noteworthy that a parody itself is an original work of authorship, so the courts recognize its “transformative value”⁷⁶ to weigh strongly in favor of fair use; the more transformative the work, the less likely it is to constitute a copyright infringement. However, there exist some opinions that tend to engage in value judgment relating to the transformative aspect of a parody. In his separate opinion to *Acuff-Rose* Justice Kennedy reasoned that if “any weak transformation” is allowed “to qualify as parody”, the protection of copyright is weakened, thus the courts “must take care to ensure that not just any commercial takeoff is rationalized *post hoc* as a parody”⁷⁷. As a corollary it follows that the merits of an accused parody will inevitably be evaluated, although the central focus will remain on the commercial character of the use.

In *Acuff-Rose* the Supreme Court reproached the Court of Appeals on the grounds that it confined itself to the first essential element of the analysis and inflated its significance⁷⁸. It committed an error by simply presuming any commercial use to be unfair without having regard to and balancing all the relevant factors listed in the statute and applied judicially. Arguably, a similar decision would be reached in a British court; although the use tends to be unfair because of the actual economic benefit to the user, but the combination of pertinent factors is significant – not a single criterion. However, the result would be unclear if the case was litigated in a Lithuanian court, because the statute is silent about any restrictions on the use of a work for the purpose of parody or criticism⁷⁹, except that a separate provision declares that the available exceptions should not interfere with the ordinary exploitation of the work or prejudice the interests of the author or the owner of the copyright⁸⁰. An important issue would then be whether the commercial character of the use precludes qualifying a particular parody a fair use as a matter of law. Arguably the court would follow a comparable line of reasoning as the U.S. Supreme Court and arrive at its decision after the examination of the material facts of the case in light of the factors it deems appropriate.

In sum, the commercial character of the use does not by itself render a parody an unfair exploitation of an original work; financial gain should be given significance in the overall analysis, but only as a contributing - not a determining - factor to the outcome of the case.

4.2. *The Nature of the Copyrighted Work*

Another element dwells upon the copyrighted original work itself, not upon the product of an unauthorized use. The underlying idea of this factor is that the public benefit requires that some works should be made more accessible than others⁸¹. It is intended to safeguard that public interest for which the copyright protection was granted in the first place, namely to advance the development of useful arts and science and to encourage research and education of the general population. There are some categories of works – dictionaries, exemplary forms, encyclopedias - that are simply meant to be used. On the whole, more protection is awarded to serious works of scientific or historical nature than to works of entertainment⁸², serious works are considered worthy of more extensive protection than trivial ones, highly expressive rank above the commonplace

⁷⁶ See note 65: *Acuff-Rose*.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See note 5: Law on Copyright, article 25.

⁸⁰ *Id.* article 19.

⁸¹ See note 49: Marshall Leafer, p.324.

⁸² *Id.*

creations. In *Selle v. Gibb* the court considered a claim for copyright violation against a popular group The Bee Gees, which allegedly copied a song by the plaintiff. The court recognized that, on the one hand, the two works exhibited strong resemblance; on the other hand, the material was so common to pop songs on the whole and did not involve much creativity or expression that, in the light of the other circumstances of the case, the defendants were declared not guilty of the violation of the plaintiff's copyright⁸³.

Despite the underlying public interest, the application of this factor to the fair use analysis appears problematic, as it conflicts with the rest of the statutory provisions. The Lithuanian Copyright Law⁸⁴ as well as the American case law⁸⁵ declares that original literary, musical or artistic works of authorship are granted copyright protection; a work is defined as a product of intellectual creation, irrespective of its value. The issue is whether the court is free to judge on the nature, and implicitly, the quality of the work and determine the extent of copyright protection for a work of that specific nature. As the Court expressed itself in *Bleistein v. Donaldson*, “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits”⁸⁶; what are these limits remains unclear. Although the court is inclined to restrict its determinations of value and necessary quantities of protectable expression to the narrowest possible scope, subjectivity and value judgment appear unavoidable.

Another aspect of the nature of the original work is its publication. The term “publication” is commonly understood as the production in tangible form of a sufficient amount of copies of the work so as to make it reasonably available to the public⁸⁷. Unpublished works enjoy more protection than the published ones, because the exploitation of an unpublished work may significantly prejudice the legitimate rights and expectations of the author or the owner of copyright (often the publisher), whereas the already published works are presumed to have stronger standing in the market. In general, it seems hardly realistic that anybody would attempt to parody an unpublished (thus, unknown to most members of the public) work, so this element is not particularly relevant in the case of parody.

4.3. The Amount and Substantiality of the Portion Used

The following factor that must be examined - the amount and substantiality of the portion used in relation to the copyrighted work as a whole⁸⁸ - is designed to prevent excessive copying of copyrighted works. The amount taken from the original work should be necessary for the intended purpose, which in the case of parody is to ridicule and criticize or comment upon that work. The determination of necessity is made on the basis of quantitative (amount) as well as qualitative (substantiality) considerations. Copying verbatim the biggest part of a copyrighted work would obviously constitute a violation; minor changes to achieve humorous effect will probably not justify excessive copying, because great emphasis is placed on the transformative value of an allegedly infringing work. The essence of this factor was explained by the court in *Folsom v.*

⁸³ *Selle v. Gibb*, 741 F.2d 896, 223 U.S.P.Q. 195 (United States Court of Appeals, 7th Cir. 1984).

⁸⁴ See note 5: Law on Copyright, article 2, subparagraph 18.

⁸⁵ *Bleistein v. Donaldson Lithographing Co.*, 23 S.Ct.298 U.S. (1903).

⁸⁶ *Id.*

⁸⁷ See note 2: Universal Copyright Convention; also see note 5: Law on Copyright, article 2, paragraph 14.

⁸⁸ See note 23: U.S. Copyright Act.

*Marsh*⁸⁹, stating that in order to infringe a copyright there is no need to copy the whole work “or even a large portion of it, in form or in substance”. However,

*[i]f so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law to constitute a piracy*⁹⁰.

The court also uttered the core principle of fair use analysis, which was adopted by other courts and later codified in statutes, namely, the requirement to analyze the factors in light of all the relevant circumstances. Special attention was devoted to the interdependence of the amount and substantiality factor and the economic factor, that is the effect on the (potential) market for the original. It is quite obvious, of course, that the bigger (or the better, to that matter) the part copied, the more likely it is to supersede or even substitute the original, thus adversely affecting the market for the original.

The significance of this factor in the case of a parody is arguably complicated. On the one hand, copying an extensive part of an original work and introducing relatively few comic elements in order to ridicule the work will probably affect the sensibility of the author and infringe his moral rights, such as the right to integrity and inviolability of the work. However, it is arguable whether the public would rather purchase a parody of a serious work instead of enjoying the original, which possesses artistic or aesthetic value. The very difference in genre seems to preclude the possibility of substitution even when material copying occurs⁹¹. On the other hand, the reputation of the author may be harmed if the works are rather similar and potentially subject to confusion or false attribution. But this is likely to be the case with works of entertainment, which are often comical even though not intended to be such and are afforded less protection anyway; although, according to the law, the judges should not act as experts on the quality or value of any work of authorship.

The central issue when determining whether the copying was excessive and therefore unjustified under the fair use privilege turns on the principle of necessity, which varies depending on the purpose and character of the use⁹². A parody inevitably copies and often extensively, but by the very definition it has to imitate the original, to conjure it up to achieve a humorous effect. If the audience is unable to identify the work ridiculed the entire parody simply fails. So, if it is recognized that a parody is a means of reasonable criticism then it should be allowed greater freedom of using the original without infringing the rights of the author. The element of “necessity” in the case of a parody is often determined in relation of the parodic element to the entire work. As the court in *Benny v. Loew’s Inc.* expressed itself:

*The fact that a serious dramatic work is copied practically verbatim, and then presented with actors walking on their hands or with other grotesqueries, does not avoid infringement of the copyright.*⁹³

So, when a so-labeled parody copies extensively but only a minor parodic element is present, it is likely to constitute a violation of copyright; but when the parodic element is prominent, even the copying of larger amounts of the original may still be justified⁹⁴.

Even if “no more was taken than necessary” in terms of quantity, it may still constitute a “qualitatively substantial” copying⁹⁵. This relates to the “heart” or the essence of the original, which sometimes may be limited to a few lines, several characteristic

⁸⁹ *Folsom v. Marsh*, 9F. Cas.342, 13 Copr. Dec.991, 1000-01 (1841).

⁹⁰ *Id.*

⁹¹ For supporting opinion also see note 65: *Acuff-Rose*

⁹² See note 65: *Acuff-Rose*

⁹³ *Benny v. Loew’s Inc.*, 239 F.2d 532 (9th Cir. 1956).

⁹⁴ See note 65: *Acuff-Rose*

⁹⁵ *Id.*

phrases or moves. This may be qualified as a violation of copyright, however the court in *Acuff-Rose* made it perfectly clear that “[c]opying does not become excessive in relation to parodic purpose merely because the portion taken was the original’s heart”⁹⁶. It is essential for a decent parody to capture the gist of the original to enable the identification of the work, otherwise the whole genre remains meaningless.

4.4. *The Effect of the Use upon the Potential Market*

This fourth element relates closely to the substantiality of the work copied; as mentioned above, the market is adversely affected if the copy substitutes or is an attempt to replace the original or potential derivative works⁹⁷. Moreover, the effect is extended to cover the impact on the value of the copyrighted work⁹⁸. This, however, should not be understood as an intention to protect the author against any criticism, unfavorable opinions or ridicule that may potentially decrease the appeal of the work to the public or demonstrate its puny value. It has been suggested that even though such works, including parody, may harm the market of the original or the potential derivative works, they “do not produce a harm cognizable under the Copyright Act”⁹⁹. Strong criticism is almost inevitably going to result into an adverse commercial effect on the original, but this should not weigh against the finding of fair use. What the inquiry must focus on is whether a work of criticism or a parody, or at least the works that are labeled such, are likely to substitute the original work or destroy the current or potential market for derivative works. But in order to protect the market for derivative works the copyright holder cannot “bar publication of works of comment” or “criticism... whose commercial success is enhanced by the wide appeal for the copyrighted work.”¹⁰⁰

But there are cases when the fourth factor is determined to favor the defendant; this occurs when it is evident under the circumstances that “the defendant’s work filled a market niche that the plaintiff simply had no interest in occupying”¹⁰¹. It rarely happens that an author of a serious work would write a parody of it, and it is also uncommon to license a person to ridicule your creative works. Sometimes in these cases an economic approach is taken, which claims that “fair use allows for dissemination of copyrighted works in situations of market failure”, which is understood as the situation “where transaction costs, i.e. the costs of negotiation – are so high that an otherwise mutually beneficial exchange would not take place”¹⁰². This approach relies on the proposition that the author has interest in disseminating his work and considers this to be beneficial even though the use involves criticism or mockery of his work. This assumption of “a mutually beneficial transaction” seems difficult to prove, because if the costs of negotiations are so high it means that the author is unwilling to enter into any kind of transactions because he cannot perceive how would this be beneficial.

⁹⁶Id.

⁹⁷ Derivative work is “a work based upon one or more pre-existing works, such as a translation, a musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted”. See note 23: US Copyright Act, §101.

⁹⁸Id., §107.

⁹⁹ See note 65: *Acuff-Rose*

¹⁰⁰ *Twin Peaks Productions, Inc. v. Publications International, Ltd.*, 996 F.2d 1366 (United States Court of Appeals, 2nd Cir. 1993).

¹⁰¹ Id.

¹⁰² Craig Joyce et al., *Copyright Law*, 3rd ed. (New York: Matthew Bender, 1997), p.823.

The economic approach would have more rationality if it dealt with the benefit to the public and not with an assumed mutual benefit to the author and the user. Their approach seems quite persuasive in viewing the fair use as an essential “counterbalance to the copyright owner’s monopoly”¹⁰³. However, they reasonably insist on the narrow interpretation of the fair use privilege in order to avoid “economic harm to the market for the copyrighted work and an undesirable diminution of incentive to create”¹⁰⁴.

So the fourth factor, which dwells upon the effect on the market for the original and/or its derivatives, is primarily concerned to preclude the substitution of the original. If a parody runs such a risk, the defendant has more difficulty to demonstrate “the extent of transformation and the parody’s critical relationship to the original”¹⁰⁵ and in addition the other factors must tend towards fair use. But when the parody is not very widely disseminated and/or the possibility of substitution is low, then even “looser forms of parody” may qualify as a fair use¹⁰⁶.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ See note 65: *Acuff-Rose*.

¹⁰⁶ Id.

Conclusions

There is no straightforward answer to the question when is a parody a copyright violation. However, it is evident that there are sufficient grounds to state that no use is presumptively justified under the statutory or the judicially created exceptions. Such decision will necessarily be made only after a careful examination of all the relevant circumstances of each individual case in light of the statutory or judicial criteria. The significant elements comprise the principles of fairness and necessity, and such factors as the purpose and character of the use, the nature of the copyrighted work, the amount taken and its substantiality in relation to the entire work and the effect on the market for the original and its potential derivatives are also considered.

The requirement of fairness is present in all jurisdictions, despite the differences in the way it is codified, determined or enforced. In the United States fairness is achieved by employing the doctrine of fair use, in Great Britain the theory of fair dealing is similarly applied, while in Lithuania separate articles of the statute attempt to ensure this condition is satisfied. The element of necessity is closely linked to the concept of fairness and enables to justify an unauthorized use which does not borrow more than is necessary for the specific purpose the user has intended. So, as a corollary it follows that whenever it is demonstrated that an allegedly infringing use creates unfairness by unnecessary, excessive copying or violates specific rights of the author a parody proves to be an infringement of copyright.

When deciding on the issue of parody, the court also has an obligation to consider the factors established through practice or provided by the applicable statute. Although there are no Lithuanian cases on this particular issue, it is reasonable to infer that a court would have regard to a comparable set of criteria as a British or an American court. Whether the use of a copyrighted work for the purpose of parody is fair and non-infringing is going to be decided after analyzing the above-mentioned factors. The factors have to be balanced against each other because their weight and relative significance to the outcome of the case always depends on their combination and never on a single element.

In sum, it could be stated that a parody is a copyright violation whenever it is determined to conflict with the statutory provisions or the case law. The major requirement is the intrinsic fairness of the use for the purpose of ridiculing or comically criticizing a particular copyrighted work. The pertinent factors are to be examined and applied to the particular circumstances of the case. There is no infringement of the rights of the author if the court is satisfied that the totality of the relevant elements favors the defendant; namely, that the purpose of the use was proper and not specifically intended for commercial benefit, that the copyrighted work did not require the highest possible level of protection, that the parodist did not copy more than was necessary, and that the use would not have an adverse effect on the market, i.e. it would not supersede or substitute the original.

Abstract in Lithuanian

Monika Bimbaitė

KADA PARODIJA PAŽEIDŽIA AUTORIŲ TEISES?

Santrauka

Autorių teisės priklauso intelektinės teisės sričiai ir yra ginamos tiek tarptautiniais susitarimais, tiek nacionalinės teisės priemonėmis. Autorių teisių ginamas objektas yra žmogaus intelektinės veiklos rezultatai: literatūros, meno, muzikos, vaizduojamosios dailės ir kiti originalūs kūriniai. Įstatymai, kurie nustato ir gina autorių teises, suteikia kūrinių sukūrusiam asmeniui tam tikrą monopolį kūrinių atžvilgiu. Tačiau pagrindinis autorių teisių tikslas yra skleisti žinias ir patirtį visuomenėje, skatinti žmonių kūrybiškumą bei bendrą progresą intelektinės veiklos sferoje. Kad būtų įgyvendintas šis tikslas bei deramai balansuojami autoriaus interesai ir visuomenės poreikiai, įstatymai nustato autoriaus teisių apribojimus. Kartu yra numatomos ir kūrinių naudojimo sąlygos, kurios leistų patenkinti platesnes visuomenės reikmes, bet nepažeistų išimtinių autorių teisių ir netrukdytų normalaus kūrinių naudojimo. Taip yra suteikiama teisė asmenims naudoti kūrinių mokslui, tyrinėjimui, informavimo tikslais, leidžiama kūrinių cituoti ar jį apžvelgti. Esant šioms sąlygoms laikoma, kad kūrinių naudojimas yra sąžiningas ir teisingas, todėl nepažeidžia autoriaus teisių ir nereikalauja autoriaus sutikimo ar autorinio atlyginimo mokėjimo. Nacionaliniai Lietuvos įstatymai, Europos Sąjungos autorių teisių direktyva bei svarbiausios šios srities konvencijos (Bern, Pasaulinės Intelektinės Nuosavybės Organizacijos, Universali autorių teisių konvencijos) taip pat numato galimybę kritikuoti, komentuoti ar parodijuoti kūrinių.

Parodija – kūrinių, autoriaus ar stiliaus imitavimas, siekiant komiško efekto, humoristinės kritikos ar komentaro. Tačiau tam, kad parodija būtų laikoma teisėta ir nepažeistų autoriaus teisių, jai keliami tam tikri reikalavimai. JAV ir Didžiosios Britanijos įstatymuose nėra konkrečiai numatyta kūrinių parodijos galimybė, bet tokia teisė įgyvendinama pasitelkus „sąžiningo panaudojimo“ („fair use“ ar „fair dealing“) doktriną. Ši teismų sukurta teisės doktrina pateikia tam tikrus kriterijus, kuriais vadovaujantis nustatoma, ar konkreti parodija yra teisėta ir autoriaus teisių nepažeidžiantis kūrinių naudojimas. Šie kriterijai – naudojimo tikslas ir prigimtis, autorių teisės ginamo kūrinių prigimtis, panaudoto teksto kiekis ir svarba bei poveikis kūrinių ar potencialių jo išvestinių kūrinių rinkai - turi būti išanalizuoti atsižvelgiant į jų tarpusavio santykį. Taip nusprendžiama, ar, įvertinus visas konkrečios bylos aplinkybes, parodija gali būti kvalifikuojama teisėtu ir sąžiningu kūrinių panaudojimu, nepažeidžiančiu autoriaus interesų.

Lietuvoje bei Europos Sąjungoje parodijos galimybė yra tiesiogiai numatyta atitinkamuose įstatymuose. Tačiau konkrečios įstatyme vartojamos sąvokos ir naudojimo sąlygos nėra apibrėžtos, todėl neaišku, ar bet koks autorinį kūrinių naudojantis ir parodija pavadintas intelektinės veiklos produktas bus preziumuojamas kaip nepažeidžiantis originalo autoriaus teisių. Sistemškai analizuojant atitinkamus teisės aktus galima teigti, kad šiuo atveju parodijai yra keliami sąžiningumo ir būtinumo reikalavimai. Tai reiškia, jog kūrinių panaudojimas parodijai neturi trukdyti įprastinio jo naudojimo bei pažeisti teisėtų autoriaus interesų. Be to, kūrinių ar jo dalies panaudojimas neturi viršyti tos apimtys, kuri yra būtina parodijos tikslui, t.y. imituojant sukelti aliuziją į originalą, jį sukritikuoti ir išgauti komišką efektą. Akivaizdu, kad tokios vertinamojo pobūdžio sąvokos kaip „būtina“ ar „sąžininga“, galės būti įvairiai teismo interpretuojamos ir sudarys sąlygas gauti visiškai priešingus rezultatus esant net ir nedideliems faktinių bylos aplinkybių skirtumams.

Todėl vienareikšmio atsakymo į klausimą, kada parodija pažeidžia autoriaus teises, pateikti neįmanoma. Kol nėra Lietuvos teismų praktikos, nėra aišku, kokie faktai bus reikšmingi bylos baigčiai, tačiau įstatymo struktūra ir tam tikros formuluotės leidžia manyti, kad bus atsižvelgiama į panašius faktorius, kokie nustatyti JAV ir Didžiosios Britanijos teismų. Tad šiame straipsnyje plačiai nagrinėjami šie kriterijai, lyginami su Lietuvos, Europos Sąjungos bei minėtų tarptautinių konvencijų formuluotėmis.

Galima teigti, jog komercinis kūrinio naudojimo tikslas retai kada bus pateisinamas ir tai leis daryti išvadą, kad tokia parodija pažeidžia autorines teises. Lietuvos įstatymas šiuo atveju griežtai reikalauja nenaudoti autoriaus kūrinių komerciniais tikslais, kai tuo tarpu JAV teismuose bus atliekama visų susijusių faktorių analizė ir komerciškumas nebūtinai bus lemiamos reikšmės turinti aplinkybė. Taip pat turėtų būti atsižvelgiama ir į panaudoto kūrinio prigimtį, jo formos bei turinio originalumą ir jam teikiamos autorių teisių apsaugos apimtį. Kadangi parodijuojami išimtinai gerai žinomi, išskirtiniai ar kitaip ypatingi kūriniai, tai jiems paprastai suteikiama aukščiausia apsauga; bet tai anaipol neturėtų reikšti, kad bet koks tokio kūrinio panaudojimas parodijai būtinai pažeis autorinę teisę. Labai svarbus elementas yra ir panaudoto originalo dalis, kuri neturi viršyti objektyviai parodijos tikslams reikalingos apimtys. Pažodinis didelės kūrinio dalies nukopijavimas greičiausiai niekada nebus pateisinamas, kai tuo tarpu naujas, išradingai transformuotas kūrinys su būtiniais originalo elementais bus apsaugotas nuo kaltinimų autoriaus teisių pažeidimais. Šios aplinkybės yra glaudžiai susijusios su kitu faktoriumi – poveikiu originalo ar jo išvestinių kūrinių rinkai. Jokiu būdu negalima teigti, kad parodija turi būti draudžiama, nes bet kokia kritika gali sumažinti kūrinio patrauklumą vartotojui. Šis kriterijus pirmiausia siekia to, kad parodija netaptų originalo pakaitalu ir dėl šios priežasties neišstumtų jo iš rinkos. Tačiau parodijos atveju nėra labai tikėtina, kad parodija galėtų pakeisti tą rimtą kūrinį, kurį ji parodijuoja; iš kitos pusės, jei parodijuojamas visiems gerai žinomas ar pabodęs pramoginis kūrinys, atsiranda gana didelė pakeitimo galimybė.

Tad galima daryti išvadą, kad tiek kodifikuota teisė parodijuoti, tiek teismų sukurta doktrina įgalinanti pateisinti kūrinių parodijas, automatiškai nesuteikia teisės bet kokiomis aplinkybėmis naudoti autorių teisių saugomą kūrinį ir išvengti atsakomybės už galimus pažeidimus. Parodija gali būti sąžininga arba pažeisti originalo autoriaus teises, tačiau sprendimas turės būti priimamas įvertinus visas minėtas aplinkybes ir jų reikšmę kiekvienu konkrečiu atveju.