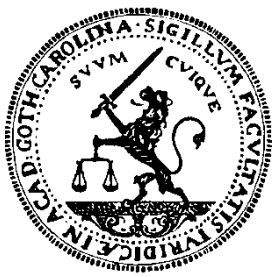

FACULTY OF LAW

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Copyright and the Parody Problem

An examination between the UK, Sweden and Canada

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Summary

This paper examines the copyright laws of the British, Swedish and Canadian systems. More precisely it investigates the different countries views on parodies and in what way they are or aren't protected under their Copyright Act. To get a better understanding of parodies and how they can qualify as a copyright work, this paper also deals with the different requirement each country has set up for a work to be seen as original. All three countries require in some way that a work needs to be original but nowhere in any of the Copyright Acts is there a definition of the concept. Instead each of the countries have their own interpretation of it. In both the UK and Canada the definition derives from court rulings, while in Sweden the interpretation of the concept derives from the preparatory work leading up to the Swedish Copyright Act.

Even though the definition of original and the criteria that has to be fulfilled for a work to be original is very different in the three countries, all of them have come to the conclusion where parodies are rarely seen as original works. For a parody to be seen as funny it depends on the fact that people need to recognize the original work on which the parody is based. Therefore a parody isn't often seen as original since it uses someone else's work. This creates a problem since parodies are something that have been around for thousands of years and something that people thoroughly enjoy.

The UK, Sweden and Canada have dealt with the parody problem in different ways and this is something that will be discussed more in detail in this paper. The UK has their special approach when they deal with parodies, and this is something that creates a lot of problems within the British copyright law. Since in the UK parodies don't receive any special treatment, they are most of the time seen as substantial taking of someone else's work and therefore infringement. There is neither an exception for parodies within the C.D.P.A and therefore there are a lot of different approaches that the courts have taken when they dealt with parodies in the UK.

In Sweden on the other hand there isn't an expressed exception for parodies in their Copyright Act. Notwithstanding that this is the case parodies are most of the time seen as allowed works and not infringements. This derives from the preparatory work of the Copyright Act where it has been stated that parodies should be seen as independent works, even though they can be very similar to someone else's. In Sweden the preparatory work indicates that parodies won't offend neither the economic nor the moral rights. However, a case from 2005 does suggest that there is a possibility that moral rights can be infringed upon by parodies.

In Canada parodies are since the beginning of November 2012 explicitly covered under the fair dealing exception in section 29 of the Canadian Copyright Act. Since this is a very new amendment there haven't yet been any cases dealing with this new regulation, and how this new exception will be used and interpreted by the courts is something only time will tell. Although it seems to be the case that only the economic rights are protected under section 29 of the Copyright Act, which means that parodies under some circumstances can still infringe the moral rights.

Sammanfattning

Den här uppsatsen är en granskning av brittisk, svensk och kanadensisk upphovsrätt. Mer exakt utreder detta arbete de olika ländernas syn på parodier och hur dessa skyddas under respektive lands upphovsrättslag. För att få en bättre förståelse för om parodier kan kvalificeras som upphovsrättsliga verk, berör även denna uppsats vilka olika kriterier varje land har satt upp för att ett verk ska anses vara originellt. Alla tre länder kräver att ett verk måste vara originellt, men inte någonstans i någon av upphovsrättslagarna finns det en konkret definition av ordet. Istället har varje land sin egen tolkning av det. I både Storbritannien och Kanada härleds definitionen från domstolsavgöranden, medan Sveriges tolkning av begreppet härleds från förarbetena som ledde fram till den svenska upphovsrättslagen.

Trots att definitionen av ordet originalitet och de kriterier som måste vara uppfyllda för att ett verk ska anses vara originellt är väldigt olika i de tre länderna, så leder de alla till slutsatsen att parodier väldigt sällan anses vara originella verk. För att en parodi ska anses vara rolig och för att uppfylla det syftet, krävs att de personer som läser eller ser parodin känner igen originalverket som parodin bygger på. Därför anses en parodi mycket sällan vara ett originellt verk i och med att de ofta använder sig av andras verk och det här skapar problem. För parodier är något som har funnits i tusentals år och dessutom något som människor ofta uppskattar.

Storbritannien, Sverige och Kanada har hanterat problemet med parodier på olika sätt och det här är något som kommer att diskuteras mer i detalj i denna uppsats. Storbritannien har sitt speciella tillvägagångssätt när de hanterar parodier och det har skapat en hel del problem inom den brittiska upphovsrätten. I Storbritannien särbehandlas inte parodier på något sätt, vilket innebär att de oftast ses som intrång i och med att en väsentlig del av någon annans upphovsrättsliga verk används. Det finns heller inget uttryckligt undantag för parodier i den brittiska upphovsrättslagen. Därför finns det hos de brittiska domstolarna en mängd olika synsätt beträffande hur frågor som rör parodier ska tolkas.

I Sverige däremot finns inget uttryckligt undantag i upphovsrättslagen som täcker parodier. Trots det ses oftast parodier som tillåtna verk som inte innebär intrång. Denna tolkning härleds från förarbetena till upphovsrättslagen, där det anges att parodier ska ses som självständiga verk även om de kan vara väldigt lika andras upphovsrättsliga verk. I de svenska förarbetena påpekas att parodier varken ska anses kränka den ekonomiska eller den ideella rätten. Trots detta förslår ett HD-fall från 2005 att det finns en möjlighet att parodier kan kränka den ideella rätten.

I Kanada är parodier sedan början av november 2012 uttryckligt täckta under undantaget god sed i paragraf 29 i den kanadensiska upphovsrättslagen. I och med att det här är en väldigt ny ändring i lagen så har det inte hunnit komma någon ny praxis som berör denna fråga, och hur det nya undantaget kommer att tolkas av domstolarna är något som bara tiden kan utvisa. Även om situationen är sådan förefaller det som att det enbart är den ekonomiska rätten som är täckt under paragraf 29 av den kanadensiska upphovsrättslagen, vilket innebär att parodier i vissa fall fortfarande kan anses vara intrång i den ideella rätten.

Preface

First of all I would like to thank my supervisor Ulf Maunsbach who have given me guidance and helped me making my thesis as good as it can be. Also I would like to thank my family and grandparents for all the love and support they have given me throughout the years. A special thought goes out to my grandmother who passed away this spring and won't be there to see me graduate this year.

Most of all I would like to thank my wonderful boyfriend Mattias Letellier, not only for supporting me but also for proofreading my whole paper. You have been amazing and I am very thankful for all the help you have given me.

Calgary, April 30, 2013

Lisette Karlsson

Abbreviations

C.D.P.A	Copyright, Designs and Patents Act 1988
CJEU	Court of Justice of the European Union
HD	Högsta Domstolen (Supreme Court of Sweden)
TRIPS	(Agreement on) Trade-Related Aspects of Intellectual property rights
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

1 Introduction

1.1 Background

Parodies have existed for thousands of years and are a well known form of entertainment world round. They are identified by the use of other people's literary, artistic, dramatic or musical works and in some way transforming them humorously. Although most people are very amused by parodies and find them entertaining they are the basis to a number of legal problems in numerous countries. Due to the fact that parodies can be seen as copyright infringement they have managed to replicate the expression of the idea. This would make them illegal unless an exception is present within the statute, case law or preparatory work of the Copyright Act. In this paper I will examine how parodies are treated in the copyright laws of the UK, Sweden and Canada. The reason why I have chosen these three countries is not only because they have different legal systems and therefore deal with this question in different ways, it's also because I have lived in all of them during my university time and therefore have become both interested and knowledgeable of their different copyright laws.

To decide if a parody is infringing or if it should be recognised as an original work, it is very important to understand how the concept of original is interpreted in each of these countries. None of them have an exact definition of the concept in their Copyright Acts. This has lead to courts not having a solid interpretation of originality within the statute, so they have needed to draw inspiration from other sources to put a meaning to the concept. These three countries have ended up having their own national understanding of originality, which also means that they have their own national issues when dealing with this question. Not only is the concept of originality interpreted differently in each of these three countries. They have also dealt with the problems parodies cause in different ways. Some have decided to expressly put an exception for parodies within the statute or indirectly so by using the interpretation of the preparatory work, others haven't made it clear or easy and are therefore struggling with conflicting cases on this matter.

Parodies have posed a significant problem and created debate within the field of copyright law in many countries, not limited to those discussed in this thesis. It goes without saying that a lot of people take parodies for granted, and they would never in their wildest imaginations think of it as infringement. However the Copyright Act of these three countries seems to dictate the contrary, we only need to look at the statute to see that the legality of parodies are not as obvious as many of us would like to think. I have found it very interesting to examine this problem in detail, and really investigate how these three countries deal with parodies and the problems they can create.

1.2 Purpose & hypotheses

The purpose of this paper is to examine how the UK, Sweden and Canada regulates and deals with the problems which parodies can create within the confines of each countries copyright law. With this purpose in mind the following hypotheses will be addressed:

1. What are the requirements for a work to be original within the context of copyright in the UK, Sweden and Canada?
2. How are parodies regulated within the different countries copyright laws?

1.3 Delimitations

In this thesis I have chosen to focus on the national Copyright Acts of the UK, Sweden and Canada. Due to the different countries being incorporated within international conventions is only briefly mentioned and not taken into consideration. I have decided not to take into account all international treatises and directives from the European Union that also deals with the question of copyright and more specifically parodies. This paper only focuses on the national perspective of each of these three countries and not the international. I am aware that the UK and Sweden are part of the European Union and their legislation reflect this, but this is not elaborated upon in detail. This is merely an examination between the UK, Sweden and Canada and therefore no other countries perspective on this question will be considered.

This paper is mainly concerned on what the requirements for a work to be original are in each of these countries, how they have chosen to deal with parodies and the problems they can create when it comes to copyright law. Therefore other matters concerning copyright such as duration, fixation and so on are only mentioned in the beginning of each country's chapter, this to create a brief picture as to how the copyright law in each country is structured.

Infringement and other areas within copyright have only been touched upon where it is relevant within the question of parodies. Also I only deal with parodies within the field of copyright law. This means that the problems that parodies can create when it comes to trade marks or passing off will be left outside of this essay.

This paper targets readers that have essential knowledge within the field of intellectual property law, and due to this there won't be a detailed explanation of copyright law and the meaning of it.

1.4 Method & material

In this paper an examination and analysis of parodies and the problems they can create within the field of copyright will be done, based on British, Swedish and Canadian copyright law. Also an investigation of the countries different interpretation of the concept of originality will be conducted. In this thesis a traditional legal dogmatic method has been used to establish the existing law within this field. Hence, case law, literature, articles and statutes from the different countries have been of great importance when examining my hypotheses. Also the use of preparatory work was of significance when finding answers to my questions.

Since I have studied British copyright law and learned how they deal with the problems, which parodies create, a lot of case law has been used. This is due to the fact that British law is based on principles of which derive from court rulings. Also when it comes to determining the concept of originality, case law has mostly been used. There are numerous cases that concern these questions and therefore I have chosen to use only the most relevant ones. However, some doctrines have been used

in this study, mainly to examine the interpretation of originality. The research to determine the legal situation for parodies in the UK has consisted of case law, doctrine and articles.

When studying the situation in Sweden the doctrine, a few cases and the preparatory work leading up to the Swedish Copyright Act has been used to both interpret originality and to understand the legality of parodies. However, the study concerning the legality of parodies within the field of copyright law in Sweden has also required the use of articles. The important case *NJA 2005 s. 905* has also been used in this paper to determine the Swedish Supreme Courts view on parodies. Also the chapter in Jan Roséns book *Medie- och upphovsrätt* that comments on this case has been used.

Finally whiles examine the Canadian side concerning theses questions the doctrine has been the main intermediary used. However the most important source that was used to interpret originality in Canadian copyright law, has been the case *CCH Canadian Ltd* v *Law Society of Upper Canada*. When it comes to determining the legal situation for parodies, I have also used the statute and an article by John S. McKeown.

1.5 Outlines

The first three chapters of this paper have a main focus on either the UK, Sweden or Canada. Within the chapters are subheadings concerning a short presentation of each country's general copyright law. Then each chapter has a subsection elaborating the interpretation of originality, and a subsection concerning parodies and how these are being dealt with under the copyright law of the three countries. The final chapter of the paper contains an analysis and conclusion where an examination of the countries interpretation of originality is made. Also and most importantly this last chapter contains an examination of how the different countries deal with parodies and the problems they can create. Here I will make a conclusion based on the advantages and disadvantages I think each of the countries have in respect to one another.

2 British law

2.1 British Copyright Law in General

In the UK copyright is regulated within the C.D.P.A from 1988, which has been amended a couple of times due to directives from the European Union. The copyright act has also been amended to fit the requirement of the Berne Convention, WIPO, TRIPS and other international acts in which the country has signed on to.[1] The duration of copyright protection in the UK is the entirety of the author's life plus 70 years from his or her death.[2] In the copyright law there are no requirements that a work must be registered to gain copyright protection, as soon as a work is created it is protected. In literary work for example, the work is considered to have been created once it has been written.[3] If a person in the UK would give a speech it wouldn't get any copyright protection unless the words would be physically affixed, by either the speaker himself or someone around him.[4] However there are some other criteria concerning the nature of the work and the authorship, which needs to be fulfilled for a work to gain protection.[5] In section 1 of the C.D.P.A the different types of work which are protected by copyright are listed, and in this section it is also stated that originality is needed when it comes to literary, dramatic, musical or artistic work.[6] The meaning of originality will be discussed further down.

Copyright tries to protect the author's skill and labour that has been invested in creating the work, by giving the author the right to prevent others from using his creation without permission, this can also be called the author's economic rights. In other words, you could say that copyright provides a negative right, which stops others from exploiting the author's work.[7] Also the author's moral rights are being protected, meaning that the creator has the right to object to derogatory treatment of his work and/or not having a work falsely attributed to him.[8] What needs to be pointed out is that there is a possibility for two people to create and gain copyright protection for the same work, because the only thing that the law requires is that there has been no copying. So as long as the works are created independently of each other both creations can get protection.[9] Copyright isn't a monopoly like the patent when it comes to the content of the work. Because when it comes to ideas and thoughts they can't be protected by the copyright, they remain in the public domain and anyone can use them. That which is being protected within the copyright is the expression of an idea.[10] The distinction between an idea and its expression is very important and it can also be called the idea-expression dichotomy. The idea-expression dichotomy is supposed to guarantee the free circulation of ideas, so that creators won't be able to claim protection over them. Since this has been seen as crucial to the reconciliation of copyright and free speech.[11] It can however become extremely difficult to know when

[1] MacQueen et al., p. 41ff.
[2] S. 12 C.D.P.A 1988.
[3] Baker & McKenzie, p. 10ff.
[4] Dutfield & Suthersanen, p. 84.
[5] Baker & McKenzie, p. 10ff.
[6] S. 1 C.D.P.A 1988.
[7] MacQueen et al., p. 133f.
[8] S. 80 & S. 84 C.D.P.A 1988.
[9] MacQueen et al., p. 133f.
[10] Abbott, Cottier & Gurry, p. 81.
[11] Spence (2007), p. 110.

an expression has reached the threshold where a work is copyright protected, to help distinguish this we need to look at the case law.[12]

2.2 Originality

2.2.1 Qualification criteria

In section 1 subsection 1a C.D.P.A it's held that copyright subsists in literary, dramatic, musical and artistic work if the creation is original.[13] This means that the work must originate from the author.[14] It's not the originality of the underlying idea that copyright concerns. What has to be original is the form in which the idea is expressed.[15] If you compare the use of originality in the UK copyright law with the continental or Nordic copyright laws, the UK law does not have the same requirements of individuality in the work as the continental copyright law does.[16]

The significance of originality has long been problematic for the courts. If we go back to the start of the 20th century the courts alleged that the exact amount of knowledge, labour and judgement that is needed for a work to be original and gain copyright, couldn't be defined in precise terms. The decision should depend on the particular facts of the case and should in each case be a question of degree. The courts went on saying that there is nothing original in painting a picture of Trafalgar Square but the originality lies in the specific painting and that is what the copyright protects.[17]

The concept of originality was in the beginning of the 20th century and remains to this day a problematic concept to interpret.[18] What we have to bear in mind is that originality is only needed for literary, dramatic, musical and artistic works as compared to sound recordings, films and broadcasts which are known as neighbouring rights.[19] Even though originality has been a requirement since 1911 that needs to be fulfilled for a creation to gain copyright protection, it is almost impossible to exactly state what the law signifies when it demands that the work is original.[20] This is partly due to the fact that the C.D.P.A from 1988 doesn't define the concept.[21] Also what has made the interpretation of the concept even more uncertain is the harmonization of the copyright laws in Europe. Of course there are similarities between the European and the British concept of originality. For example, both concepts of originality see to the relationship between the creator and the work.[22] This means that for a work to be original it doesn't have to be inventive or novel, this has been made clear in the case *University of London Press* v *University Tutorial press*.[23] To bring me to my point originality isn't about the creation being new, it's about the

[12] MacQueen et al., p. 46f.
[13] S. 1 C.D.P.A 1988.
[14] Routledge, p. 54.
[15] Davis, p. 28.
[16] Strömholm, p. 104.
[17] Cotterell, p. 182.
[18] Bently & Sherman, p. 93.
[19] S. 1 C.D.P.A 1988.
[20] Bently & Sherman, p. 93.
[21] Davis, p. 28.
[22] Bently & Sherman, p. 93.
[23] University of London Press v University Tutorial press (1916) 2 Ch 601.

way in which it's been created, that it originates from the creator and isn't copied from another work.[24]

When copyright refers to the work as original it signifies that the creator fulfilled the intellectual qualities. In British copyright law this means that labour, skill or effort has been used in creating the work.[25] This can also be called the de minimis test and is a test that has been adopted by the British courts.[26] The copyright law focuses on the author's contribution to the finished work, when they determine whether a work is original or not. The requirement of originality when it comes to literary, dramatic, musical and artistic works set the standard for when a creation should be protected by the copyright law. Even if the exact criteria for when a work is original hasn't been made clear, it certainly excludes trivial works from getting protection, meaning creations that only involve a minimal amount of labour, skill or effort.[27]

The originality requirement doesn't only operate as a threshold for copyright. It is also important when it comes to determining if a person has infringed a copyright. This is due to the fact that infringement doesn't exist if a person has only copied parts of the claimant's work that isn't original. An infringement can also occur if a substantial part of the original has been copied, and therefore it's also important to be able to tell which part or parts of the work that is original, so that the court then can go on and determine if there has been a substantial copying of the original.[28] It is important to note that a creation can both be original and infringing at the same time.[29] You must also consider that it's not only a question about whether the defendant has added enough skill or labour when he created an original work, it's also about how much the defendant has used of the claimant's copyright protected material.[30]

The case law hasn't done a very good job clarifying the definition of originality when it comes to literary, dramatic, musical or artistic work. Several cases are inconsistent in this area and the works that are seen as original vs. imitative is very uncertain and changing all the time. The reason for this is largely because you need to see to the different facts in each case, when it comes to making a decision about originality.[31] How much skill and labour that is needed for a creation to gain copyright is in other words a matter of fact and degree, which means that even a very basic work can get protection.[32] In the case *Macmillan & Co Ltd* v *Cooper* for example, the House of Lords denied copyright protection to a condensed text because it was held that the labour, skill and capital had to give the product some quality or character that the raw material didn't have.[33]

As stated, British courts use labour, skill or judgement as the test of originality, but the problem is that these concepts aren't used with great precision. In some cases the

[24] Bainbridge, p. 44.
[25] Bently & Sherman, p. 93f.
[26] Dutfield & Suthersanen, p. 81.
[27] Bently & Sherman, p. 93f.
[28] Ibid., p. 94.
[29] ZYX Music GmbH v King (1997) 2 All ER 129 (CA).
[30] Routledge, p. 66.
[31] Bently & Sherman, p. 94f.
[32] Davis, p. 32.
[33] Macmillan & Co Ltd v Cooper (1923) 93 LJPC 113.

courts refers to labour, skill or judgement, while in other cases they refer to labour, skill and judgement. Sometimes they use the words: work, effort, time, capital and taste. Using these different words to describe the same problem and the inconsistency of using "or" sometimes and "and" other time makes the law ambiguous.[34] Even though labour, skill or judgement are very important today, when the courts are deciding upon originality, it isn't necessarily sufficient for a work to gain copyright protection. Neither should it be seen as a universal test of originality.[35]

As I've mentioned before, British law cares about the originality of expression and not the idea itself. So to determine if a work is original we'll have to look at how the labour, skill and effort are expressed in the work. However, the court has accepted that originality can exist in the pre-expressive stages, meaning that originality of a creation can arise in the steps preceding the finished work.[36] In the case *Ladbroke* v *William Hill*, the court said that labour, skill and judgement shouldn't be divided into pre-expressive and expressive parts. Instead both parts should be taken into account when determining if the threshold for originality has been reached.[37] Neither should it be forgotten that the meaning of originality can change over time and it can be very much dependant on particular social and political contexts. Therefore we must tread carefully when we draw conclusions from earlier cases. Note however, that the threshold for originality is set very low. The courts have found that such things as timetables and exam papers can meet the requirement for originality.[38]

2.2.2 Originality in different kinds of works

Originality's main problem is that it cannot be defined in precise terms and that it is always dependent on the facts for each case. To simplify the determination process of a work's originality or the lack of, we can look at the labour, skill or effort that have been necessary for its creation. Unfortunately this can only be of limited help when determining originality. In an attempt to attain a better understanding of the concept, we have to peer into the courts approach to originality within different kinds of works; such as new and derivative works, tables, compilations and computer-generated works.[39]

When it comes to new works Peterson J in the *University of London Press* case, made it clear that a creation is original when it isn't copied and originates from the author.[40] However in the *Merchandising Corporation* case the court elaborated on an exception to this principle, which was that if the labour and result is trivial and insignificant the work cannot be considered original.[41] Even if trivial work can't be seen as original, the court has been willing to accept that originality can subsist in very simple works.[42] When it comes to derivative works on the other hand, the courts have quite a different view on originality. A derivative work means a creation, which is based upon or derives from an existing work. Even though copyright law for a long time has

[34] Bently & Sherman, p. 95.
[35] Interlego AG v Tyco Industries Inc (1989) AC 217 (PC).
[36] Bently & Sherman, p. 95.
[37] Ladbroke (Football) Ltd v William Hill (Football) Ltd (1964) 1 WLR 273 (HL).
[38] Bently & Sherman, p. 95ff.
[39] Ibid., p. 97.
[40] University of London Press v University Tutorial press (1916) 2 Ch 601.
[41] Merchandising Corporation of America v Harpbond (1983) FSR 32.
[42] British Northrop Ltd v Texteam Blackburn Ltd (1974) RPC 57.

accepted that derivative work should get protection, it seems like the law has imposed three hurdles that need to be crossed before the work is seen as being original.[43]

The first criterion needed for a derivative work to be considered original is that the labour is of the right kind. This means that even if a person exercises a great amount of labour into a creation, there will still not be any originality if the labour is of the wrong kind. An example of this would be the labour put into a work that is a direct copy of someone else's.[44] This criterion was discussed in the case *Interlego*, where Lord Oliver stated that even if the copying of a drawing requires great amount of skill and labour, it can't be considered as an original.[45] In some cases it has been suggested that for labour, skill and judgement to be relevant there must exist some kind of individuality in the work. Just reproducing a work and merely omitting various parts was not considered original.[46] From this case it seems unlikely that digitization of a work, with no other changes would be seen as an original.[47]

The second criterion is that the effort must bring about a material change in the work.[48] More specifically this means that the labour, skill and capital must have given the creation some kind of character or quality, that the raw material was missing and which separates the work from the raw material.[49] By having this criterion the law ensures that the derivative work is distinct from the original. Even though the author of the derivative work has made an effort, which has led to a change in the resulting work, this doesn't mean that the change is sufficient to confer the work original. However if the change is material the work will be considered as being original. This approach is used so that new editions, translations and so on can be seen as having originality. Although it is very difficult to discern when such a transformation has occurred, and it will be up to the courts to deem if it can be seen as a material change.[50] There is however an exception from this rule, which states that there is no need for a material change where there are a series of drafts by the same author, but if there is a different author at each stage of the alterations then the rules above need to be applied.[51]

The last criterion is that the change must be of the right kind. This means that even if a person puts in a great amount of labour into a work, it still won't be considered as original if the kind of labour that has been exercised doesn't correspond with the type of work for which protection has been sought.[52] This criterion was considered in the *Interlego* case, where the changes made to the drawings were mostly shown by letters and figures in which only the first was shown pictorially. The Privy Council agreed that the changes made were technically significant but they weren't sufficient to make the work original, since it was held that when it comes to artistic work the change must be visually significant to be of the right kind.[53]

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[43] Bently & Sherman, p. 98f.
[44] Ibid., p. 99.
[45] Interlego AG v Tyco Industries Inc (1989) AC 217 (PC).
[46] Macmillan & Co Ltd v Cooper (1924) 40 TLR 186.
[47] Bently & Sherman, p. 100.
[48] Ibid.
[49] Macmillan & Co Ltd v Cooper (1924) 40 TLR 186.
[50] Bently & Sherman, p. 100 & 102.
[51] Ibid., p. 103.
[52] Ibid., p. 103.
[53] Interlego AG v Tyco Industries Inc (1989) AC 217 (PC).

The courts have a different approach to originality when it comes to tables and compilations. Since the establishment of the Database Directive the standard for originality that exist for tables and compilations doesn't apply to databases. When the courts decide if these works are original they use two different approaches that are inconsistent to each other. One approach that has been used in some cases is; that for a work to be original it's all about the quality of the labour rather then the quantity in creating a work, meanwhile other cases have taken the opposite approach leading to a completely different conclusion. When the courts have decided that quality is the crucial factor for originality, they have mainly looked at how the information has been selected or in the way it has been arranged.[54]

In regards to the other approach, there have been situations where the courts have accepted the works as original, on the mere facts that there has been a substantial amount of routine labour spent on creating the work. If the compilation doesn't involve enough judgement or skill and the labour is insufficient, then the work won't be treated as original. The difficulty is to know how much labour that has to go into creating the work for it to be original. The important thing to consider in a situation like this is that the defendant hasn't taken advantage of someone else's creation. To use quantity of labour to decide upon originality isn't commonplace in the UK, and it has only been used in a few cases.[55] More specifically this has only been used for certain types of works, such as tables and compilations for maps, guidebooks and dictionaries etc.[56] In cases where it's been accepted that originality can arise through sufficient labour, the focus has been on the labour concerning the selection of the materials that would be included in the tables and compilations. This means that originality takes place more often in the pre-expressive then the expressive stage.[57] Both these approaches are similar in the way that they both focus on the labour that is used when the work is created. The main difference however is the type of labour that the work needs in order to be considered original. Since tables and compilations are very similar to derivative work, what's stated above is also applicable in these situations. For example a compilation is not seen as original if it has been directly copied from someone else's work or if the creation is a result of an automatic process.[58]

Finally when it comes to computer-generated works it is clear in the C.D.P.A that these works can get copyright protection.[59] However the problem with originality when it comes to computer-generated works still stand. Because it hasn't been made clear by the courts if originality should be interpreted in the same way as it usually is for literary, dramatic, musical and artistic work. The problem with computer-generated works is that there is no human author, which means that when the courts decide on originality they can't see the relationship between the author and the work. What test of originality that will be used for these works is still a question that we must wait for the courts of the future to decide upon.[60]

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[54] Bently & Sherman, p. 104.
[55] Ibid., p. 105f.
[56] Macmillan & Co Ltd v Cooper (1924) 40 TLR 186.
[57] Bently & Sherman, p. 106.
[58] Ibid., p. 104f.
[59] S. 9(3) C.D.P.A 1988.
[60] Bently & Sherman, p. 107.

2.3 Parodies

2.3.1 The problem

In the UK copyright law parodies don't get any special treatment.[61] Neither is there an expressed exception for parodies, which many times lead to the courts seeing parodies as infringement.[62] For a work to be infringing there must be copying of a substantial part and also a causal connection between the two creations. It doesn't matter if the causal connection is unintended or indirect.[63] These two criteria are often fulfilled when it comes to parodies. The reason is that a parody depends on the fact that people recognise the original work on which the parody is based.[64] In other words avoiding infringement can be really difficult when you created a parody, since falling outside the substantial part test and causal connection seems extremely hard to do.[65] When making a parody you can also infringe the author's moral rights.[66] More precisely the moral rights that can be infringed upon are those of derogatory treatment in section 80 of the C.D.P.A and the right to object to false attribution of authorship in section 84 of the C.D.P.A.[67]

The problem lies not only with the fact that there are no regulations for parodies and that therefore many times they can constitute infringement. It's also that there are no exact definition of the word parody; it can be interpreted in many different ways and have a very loose meaning. A parody can also serve different purposes such as being a target or a weapon parody, which also makes it harder to define the word. A target parody means that the parody strives to comment on the source work or its creator, and a weapon parody means that the parodied work is used as a weapon to examine values in society, life-styles and politics etc.[68]

2.3.2 Is parodies substantial taking?

If what has been taken is a substantial part of the claimant's work, then it doesn't matter that the intentions behind copying were to make a parody. When the courts decide if a substantial part has been taken they don't see to the defendant's motives.[69] In other words this means that parodies don't get any special treatment. However there are old cases that indicate that this hasn't always been the case.[70] In the case *Glyn* v *Weston Feature Films Co* it was held that no substantial part of the original had been taken when making the parody. The defendant had also added enough skill, labour and judgement into his creation, which also prevented him from being guilty of infringement.[71] The same approach was also taken in the *Joy Music* case and in this case the court also did not find that a substantial part of the original had been taken, and therefore there was no copyright infringement. In making the decision it was relevant to take into account the purpose and intention of the defendant, and also to

[61] Spence (2007), p. 117.
[62] Stokes, p. 174.
[63] Davis, p. 55.
[64] Garnett, Davies & Harbottle, p. 568.
[65] Colston & Middleton, p. 325f.
[66] Bainbridge, p. 167.
[67] Stokes, p. 174.
[68] Rutz, p. 2ff.
[69] Garnett, Davies & Harbottle, p. 454.
[70] Colston & Middleton, p. 326.
[71] Glyn v Weston Feature Films Co (1916) 1 Ch 261.

see if the parody was sufficiently original. If the creation was in itself original then there could not be an infringement.[72] These two cases indicated that parodies were entitled to special treatment.[73]

The old cases didn't look at how much of the claimant's skill, labour and judgement that had survived in the parody, instead they looked at how much effort the defendant had put into his work. This is however seen today as a discredited test when judging if infringement has occurred. More recent cases indicated that parodies are infringements and that creating them often means that a substantial part of the original has been taken.[74] In the *Schweppes* case for example it was held that a substantial part had been taken, and that it didn't matter if the defendant put in a lot of skill and labour in creating a work, when the question about infringement had been settled. Falconer J stated that the question in the case was if the defendant's creation contained a reproduction of a substantial part of the original work.[75] A work can both be original and infringing at the same time and therefore one doesn't exclude the other.[76] The approach in the *Schweppes* case was later also adopted in the *Williamson Music* case. In this case Judge Baker pointed out that a parody is never infringing if it's merely the idea that has been taken and not the expression of it. He also went on by saying that the approach Falconer J had used in the *Schweppes* case was the one that should be used when considering any questions about parodies. What was new in the *Williamson Music* case was that the court mentioned that it would be lawful to invoke an old piece. Parodies however usually do more than invoke the original since they often use the most memorable features of a work, and therefore they will still infringe copyright law.[77]

The more recent cases seem to indicate that the question when it comes to parodies and infringement is whether there has been copying of a substantial part of the plaintiffs work. Substantiality is a question of quality rather than quantity.[78] It also seems clear that the usual principles of infringement will apply to parodies, even though there still is uncertainty as to how exactly to apply them.[79] At this moment there is no reason why parodies should be treated more favourably than other creations that are derived from prior works, when it comes to judging if there is an infringement. The case law shows that these same principles apply to parodies as to other copies of works.[80] This means that section 16 of the C.D.P.A applies to parodies, and for them not to be infringing the original work there can't be a substantial taking.[81] The general rules about infringement applies to parodies, but there are authors who believe that there is still room for the courts to be more sympathetic to parodies when they apply the substantial part test. However the case law we have within this field today doesn't show any special treatment for parodies.[82]

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[72] Joy Music Ltd v Sunday Pictorial Newspapers (1960) 2 QB 60.
[73] Rutz, p. 5.
[74] Colston & Middleton, p. 326.
[75] Schweppes Ltd v Wellingtons Ltd (1984) FSR 210.
[76] Phillips & Firth, p. 181.
[77] Williamson Music Ltd v Pearson Partnership Ltd (1987) FSR 97.
[78] Rutz, p. 5f.
[79] Colston & Middleton, p. 326.
[80] Bainbridge, p. 167.
[81] S. 16 C.D.P.A 1988.
[82] Rutz, p. 5f.

2.3.3 Is parodies infringing the moral rights?

A parody can also be addressed as infringing the author of the original works moral rights.[83] The moral rights that can be violated are that of derogatory treatment of work in section 80 of the C.D.P.A and false attribution of work in section 84 C.D.P.A.[84] In section 80 we can see that the provision of derogatory treatment is included to prevent alteration and additions of copyright work, which can lead to for instance distortion of the work. Section 80 is also there to prevent the honour and/or reputation of the original author from getting harmed. Derogatory treatment can be applied to any part of the work and is not only limited to the alterations of the most important part.[85] Some have argued that a parody isn't derogatory treatment because it doesn't claim to be the making of the same author as the original, and therefore can't be prejudicial to the honour or reputation of the original author. Some on the other hand strongly suggest that moral rights should protect against parodies.[86] There are also commentators that have claimed that there can't be an infringement unless the parody is offensive to the original works spirit. This is to mean that laughing on the original author's expense doesn't hurt his reputation. The question of a parody being derogatory treatment is at this point unclear.[87]

An author also has the right to object to false attribution of authorship. What is important to point out here is that there has to be an actual false attribution for section 84 to come into effect. If there is merely evidence of confusion as to the authorship, this cannot be objected by the author of the original work.[88] An important case in this matter is *Alan Clark* v *Associated Newspapers*. In this case it was held that there had been an infringement even though the parody expressly contradicted an attribution in the first paragraph. The court based the decision on the evidence of 22 witnesses who all said that it was possible for readers to see the heading and then skip the first paragraph to read the article. This could then very easily lead to the readers believing that the article was attributed to the claimant.[89] Although the courts have never said that parodies should be prevented, the ruling in this decision shows that even if a parody is very well made, it can still be in a collision course with section 84 C.D.P.A, if it does not identify the real author in a correct way.[90]

2.3.4 Is the fair dealing defence protecting parodies?

At this point there are no expressed exceptions in the copyright law that allows for parodies; neither are there any common law defences.[91] However there is a possibility that some parodies can benefit from the fair dealing defence, more precisely the one about criticism and review. What's important to point out is that this would only be a defence for copyright infringement, and not to any infringement in which moral rights are concerned.[92] A parody can fall under the fair dealing defence for criticism or review under section 30 of the C.D.P.A; this was acknowledged in the *Williamson*

[83] Colston & Middleton, p. 326.
[84] S. 80 & S. 84 C.D.P.A 1988.
[85] Rutz, p. 7.
[86] Stokes, p. 174f.
[87] Rutz, p. 7.
[88] Ibid.
[89] Alan Clark v Associated Newspapers (1998) 1 All ER 959.
[90] Rutz, p. 7.
[91] Baden-Powell & Woodhead, p. 1f.
[92] Stokes, p. 175f.

Music case. However it was mentioned in the case that fair dealing could be an option when it came to parodies, the court never considered if section 30 C.D.P.A covered them. The question was avoided because it was stated that the parody in this case didn't intend to criticise.[93]

It's a challenging task for a parody to be dependent on the fair dealing defence for criticism and review. This defence cannot be used as a way to cover up an infringement as criticism on the association of it being humorous.[94] For a work to fall under the exception of section 30(1) in the C.D.P.A, it has to have been made available to the public and there must be a sufficient acknowledgement.[95] It has been a topic of argument whether or not most parodies contains sufficient acknowledgement.[96] Furthermore, the question remains as to how precise the acknowledgement has to be in the context of the parody.[97] The uncertainty in parodies fulfilling the criterion of sufficient acknowledgement makes the use of this defence even more difficult. If the courts were prepared to be more flexible when interpreting it, more parodies would most likely be able to fall under this exception.[98]

When looking at case law, such as *Joy Music Ltd* v *Sunday Pictorial Newspapers Ltd* from 1920 and *William Music Ltd* v *Pearson Partnership Ltd* from 1987, we can see that the courts haven't used fair dealing when they deal with the questions surrounding parodies. Instead as is mentioned above, when it comes to parodies the courts have decided to look whether a substantial part has been taken from the original. So as for now it is very doubtful that the fair dealing defence about criticism and review can be used as a defence for parodies. The exception is still treated very stringently by the courts.[99]

2.3.5 Special treatment for parodies?

In the case *Ashdown* v *Telegraph Group* from 2002, the Court of Appeal held that freedom of expression shouldn't normally mean that anyone was authorized to use someone else's work however they wanted. Although the court did accept that copyright in some cases, could amount to an illegitimate restriction on freedom of expression.[100] The general view however, in the UK is that copyright doesn't limit free speech. The existing defences in the C.D.P.A are seen as sufficient security to preserve the freedom of speech.[101] Although it's been argued that parody should get special treatment, since it is deemed necessary for the protection of the parodist's right to freedom of speech.[102] Even if this is the case, there is no national or European agreement that parody should stand above copyright due to this right.[103] To only make an exception from liability as soon as freedom of speech conflicts with intellectual property law wouldn't be right. Having said that, this does not mean that the courts

[93] Williamson Music Ltd v Pearson Partnership Ltd (1987) FSR 97.
[94] Rutz, p. 6.
[95] S. 30 C.D.P.A 1988.
[96] Spence (1998), p. 3.
[97] Spence (2007), p. 117.
[98] Spence (1998), p. 17.
[99] Sims, p. 30f.
[100] Ashdown v Telegraph Group (2002) 1 Ch 149 (CA).
[101] Rutz, p. 21.
[102] Spence (1998), p. 10.
[103] Rutz, p. 23.

shouldn't consider free speech when they deal with a question relating to copyright infringement. There are opportunities for the courts to protect freedom of speech against what can be seen as overprotection of intellectual property, as long as the judges are willing to interpret the law bearing in mind the need for protection of free speech. This means that there is still a possibility for some parodies to be protected under this law and by extension get some type of special treatment.[104]

It has also been stated that parodies should get special treatment because it can otherwise lead to market failure. This is due to the fact that right holders might not want to give people licenses for their work, since they would not want parodies to be made of them. The owners of the original may be afraid that their honour or reputation will be damaged if their creation were ridiculed. Issuing licenses to works is assumed to generally ensure their most efficient use, but since authors of the originals most likely won't agree to licence these due to the facts stated above, this can therefore lead to market failure.[105] To solve this problem a suggestion of compulsory licenses has come up. This means that an authority provides the license and takes out revenue from anyone who chooses to parody a work that is protected. It is however unlikely that the UK government would be willing to create an authority like this.[106] It has also been pointed out that this argument for special treatment of parodies is a weak one, since it has not been proven that refusal of licenses would amount to market failure.[107] Even though this argument is weak, some have still deliberated that there should at least be some form of remuneration rights for the owner of the original work when it is being used. The creators of a parody should not be allowed to free ride on someone else's work.[108]

Some might also argue that parodies should get special treatment because they amount to transformative use. If a parody is seen as transformative it means that it is its own creation, even though it is dependent on an existing work. Transformative use shouldn't be seen as copyright infringement and therefore parodies should be protected.[109] If too much of the existing works are to be protected by the copyright law, then future authors might find it too difficult to create new content.[110] Although transformative use is argued to be an exception to copyright infringement, there seem to be little support for this actually being the case.[111]

2.3.6 A parody defence?

It has been argued that parodies should get special treatment because it is a distinctive genre. To create an explicit exception for parodies would imply that all types of parodies would be protected. The problem with making an exception would be as discussed above, that there is no expressed consensus on the word parody. This would mean that it would be very hard to interpret the rule.[112] If the word isn't defined in a meaningful way, this can lead to the authors of the parody not knowing whether they

[104] Spence (1998), p. 16f.
[105] Ibid., p. 7.
[106] Rutz, p. 19f.
[107] Spence (1998), p. 8.
[108] Groves, p. 6f.
[109] Spence (1998), p. 8.
[110] Stokes, p. 178.
[111] Spence (1998), p. 10.
[112] Ibid., p. 6.

will fall within the exceptions or not.[113] It has also been suggested that the exception for parody should be put under the fair dealings defence, due to it meaning that competing uses would not be allowed.[114]

The Directive 2001/29/EC permits in article 5(3)(k) the member states of the European Union to make an exception in the copyright law for parody.[115] To make an exception like this has been suggested in the Gowers Review in 2006, because this would not only reduce transaction costs across Europe, it would also create value.[116] The same has been suggested in the Hargreaves Review from 2011. This review was on the same line of thinking as Gowers review, and stated the importance of parodies since comedy can be big business.[117] Even though the Directive allows for an exception to parodies and that in multiple reviews it has been suggested that a provision should be implemented in the UK copyright law, it has to this date not been done. Though this doesn't mean that a provision cannot be added in the future.[118]

Also according to the UK Government's Consultation on Copyright, which was published in December 2011, the UK needs an exception for parodies. The suggestion of the Government is that the UK copyright law gets a new fair dealing defence for parodies. In the newly suggested legislation the word parody shouldn't be defined, instead it should be for the courts to decide the meaning of this word. Furthermore the Government doesn't want this exception to limit the author's moral rights; the purpose should instead be that they could co-exist together. The Government argues to the importance for a change in the law. Not just due to the fact that an exception would obtain more clarity in the field then it does now, but also having this rule would avoid the disadvantage that the British comedians have compared to other countries which allow parodies. Although it does not seem as if parodist are currently deterred by the existing state of the law. An exception might mean a potential loss of sales of the original work due to confusion and competition between the parody and the original, but the Government still stands firm on their opinion that an exception is in order.[119]

Implementing an exception into the law would probably not make everything regarding parodies absolutely clear. The practicalities of the new rule if ever applied would still be in the hands of the courts. It would however be a step in the right direction to begin clarifying the position of the state on the subject.[120] Parodying is worth protecting even if it is obscene. A balanced approach is needed when it comes to the legislation of parodies. What is crucial is to find a suitable level of protection for all stakeholders. At this moment the UK does not have protection for parodies, and it has been argued that the lack of cases that have reached the courts concerning them, is proof of the fact that an exception is not needed. Others have argued that there is a problem with parodies where the solution can only be found in the

[113] Rutz, p. 24.
[114] Groves, p. 5.
[115] 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.
[116] Gowers Review, p. 68.
[117] Hargreaves Review, p. 50.
[118] Rutz, p. 23.
[119] Baden-Powell, p. 1f.
[120] Ibid., p. 3.

legislative process and in the attitudes of the judges towards removing the uncertainty which parodies create.[121]

[121] Rutz, p. 25.

3 Swedish law

3.1 Swedish Copyright Law in General

Swedish copyright is protected under "Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk" (The Swedish Copyright Act).[122] The purpose of the copyright law has been to give legal protection for creations within the literary and artistic fields.[123] Just like British C.D.P.A, Swedish copyright law is also adapted to the Berne Convention, TRIPS, and European Union directives.[124] In Sweden the duration of a copyright work is, the same as the British duration, 70 years after the author's death.[125] There are no formalities that have to be fulfilled for a work to gain protection, just like in the UK. As long as you have created a work that covers the requirements in the Copyright Act, the author will get protection as soon as it's created. The simple fact that you have an encircled C symbol doesn't indicate that you have a copyright for the creation. It's for the court to decide if a work satisfies the criteria in the statute and therefore is protected. Also for a work to be protected by the law it has to have been created by an actual person and not an animal, process, force of nature etc.[126] However if a person puts together objects which have been shaped by the nature, that creation can then be protected.[127] To gain protection a work doesn't have to be written down, recorded or fixated in any way, which is something that differs from the British copyright law. An improvised musical piece for example can still be protected.[128] In reference to article 1 of the Swedish Copyright Act, to gain copyright protection the work has to be a literary or artistic work, such as fictions, computer programs, musical works, films etc. The prerequisites, which are critical for a court to assess if there has been copyright infringement, are the words "create" and "work". [129] How these concepts have been interpreted by the courts and within the doctrine will be discussed further down.

As an author of a creation you gain certain rights, such as economic and moral rights, these rights are also given to works in the UK. This dictates that you have the exclusive right to the work and no one else can use it without your permission.[130] What this signifies for example, is that you decide when a work should be made available to the public; if copies should be made of it; how the work should be distributed etc.[131] The moral rights determine that you have the right to have your name on any copy made of your work. It also means that changes cannot be made to the creation, which can be interpreted as offensive to the author.[132] However, there are exceptions to these rights in chapter 2 of the Copyright Act, such as fair dealing, and there are also special rules for people that have for example; translated a work into another language.[133] If the use of a protected work doesn't fall within the exceptions

[122] Stannow & Hillerström, p. 48f.
[123] Nordell & Paulsson, p. 70.
[124] Stannow & Hillerström, p. 48f.
[125] 43§ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk.
[126] Stannow & Hillerström, p. 61ff.
[127] Olsson (2006), p. 69.
[128] Ahlberg, p. 61.
[129] 1§ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk.
[130] Stannow & Hillerström, p. 74.
[131] 2§ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk.
[132] 3§ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk.
[133] Stannow & Hillerström, p. 68 & 80.

of the law it is regarded to be a copyright infringement, which can imply that damages need to be paid to the claimant.[134]

What is protected in the Copyright Act is the execution of a work, the particular way in which an author has presented his creation.[135] Although in theory it is possible for two authors to get copyright protection for the same creation as long as the works were created completely independent of each other, which is the same rule that also applies in the UK.[136] However just like in the British copyright law the idea, facts, function and working methods that the creator uses can't be protected, and can therefore be used by everyone else. Even if you can copy someone else's idea you have to be careful that you don't end up creating something too similar to the first author's work, because this can lead to copyright infringement.[137]

3.2 What is required for a work to get copyright protection?

To gain copyright protection a literary or artistic work first needs to be produced.[138] It is not enough that your referencing or copying others work; you have to create something in order to get protection.[139] Not all creations may get protection and the critical word in article 1 of the Copyright Act is therefore "work" and the meaning of it. How to interpret this word has been discussed for many years in Sweden and the difficulty has been to decide the demarcation of it. In Swedish copyright law the accepted concept of "verkshöjd"[140], has often been used when deciding if a work fulfils the requirement to gain copyright protection. "Verkshöjd" is an overall expression, which focuses on there being some sign of the author's personality and independence which is shown in the work.[141] The use of the concept "verkshöjd" isn't specifically stated in the copyright law. However, in the preparatory work that preceded the Copyright Act it is said that "work" as it is interpreted in the statute, should show that the creation has features of personality and individuality. These can then be used to distinguish a work from others. To gain protection a work should have some kind of independence and originality. From this we can draw the conclusion that there has to be some sort of performance level for a work to be protected, but to what degree this level should be set cannot be interpreted in the statute. Instead it has been left to the courts to make the assessment.[142] What we do know however, is that the term "work" is interpreted very loosely.[143]

For a work to gain copyright protection by fulfilling the requirement of "verkshöjd", the work has to be created by the author himself and be an expression of his

[134] Koktvedgaard &Levin, p. 144.
[135] Carlén-Wendels & Tornberg, p. 27 & 31.
[136] Levin (2011), p. 72.
[137] Carlén-Wendels & Tornberg, p. 27, 31 & 33.
[138] 1§ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk.
[139] Lundin, p. 35f.
[140] "Verkshöjd" can be translated with other words then originality and therefore I have chosen to use "verkshöjd" throughout this paper instead of an English translation. Although when I talk about "verkshöjd" in Swedish copyright law I use it in the same sense as when I talk about originality in British and Canadian Copyright law. When mentioning the word original in general in the paper, I also refer to "verkshöjd".
[141] Stannow & Hillerström, p. 64.
[142] Rosén (1993), p. 60.
[143] Eklöf, p. 31.

personality.[144] However it has been discussed if the concept of "verkshöjd" should still be used when deciding if a work gets copyright protection, or if Sweden instead should use the word originality in accordance with the directives from EU and the cases from CJEU concerning copyright. Nonetheless by looking at rulings made by the Supreme Court of Sweden we can see that they still prefer the use of "verkshöjd" rather then originality. Looking at the court rulings it is impossible to deduce if the harmonisation of the original criteria, which derived from the EU directives, has resulted in a displacement of the meaning of "verkshöjd", but it is most likely that it hasn't.[145] Although there has been discussions of whether or not Sweden should still exercise the concept of "verkshöjd".[146] In theory it would be possible to replace "verkshöjd" with the concept of originality. However in a Report made in 2011 it was held that a replacement of the wording could mean practical problems, since "verkshöjd" and its interpretation is well established within Swedish copyright law. The Report also states that using the word "work" in the Swedish Copyright Act, in the context of assessing whether or not a creation gets copyright protection, is enough and shouldn't be changed since the word has been well developed in the doctrine and the case law.[147] Whether Sweden replaces the word "verkshöjd" with originality or decides to include its criteria from the EU-law within the word "verkshöjd" remains to be seen. For now I am of the opinion that "verkshöjd" is still the word most often used to interpret if a work has what it takes to gain copyright protection.

3.3 "Verkshöjd"

In order for a work to get copyright protection it needs to be new in some way and obtain "verkshöjd", this can be seen as the creative level of the work.[148] The fact that a creation has to be new is quite obvious, although it's not clearly stated within the law.[149] A person who copies someone else's creation cannot get copyright protection. The requirement that a work has to be new doesn't generate any sizeable problems in regards to copyright. The same can't be said about the necessity that a creation needs to obtain "verkshöjd". What this creates is a difficulty in drawing limitations and defining the meaning of the concept. The concept has however a central significance, because in practice this concept is the deciding factor of what gains protection, and what may be used by everyone else.[150] "Verkshöjd" isn't expressed as a requirement in the copyright law; it is derived from the term "work".[151]

It should be seen as rather obvious that everything, which expresses some form of intellectual creativity, cannot be given protection. Since copyright allows the author the sole right to the work, this then implies that no one else may create the same work and use the same expression when creating a work. If for example drawing a very simple figure such as a "stick man" it would be absurd to assume that you would get protection for that, since this would be seen as lacking features of individuality. To gain protection the creation must require a certain amount of originality or

[144] Levin (2011), p. 81.
[145] Calissendorff, p. 538.
[146] Levin (2011), p. 86.
[147] SOU 2011:32, p. 141f.
[148] Carlén-Wendels & Tornberg, p. 21.
[149] Carlén-Wendels, p. 34.
[150] Carlén-Wendels & Tornberg, p. 21.
[151] Carlén-Wendels, p. 35.

individuality.[152] There must be some sort of creativity within a work, which sets it apart from others. The problem lies in deciding the level of creativity a work needs to reach in order to be protected.[153]

The criteria of "verkshöjd" are usually described based on the concept of double creation. This suggests that if there is minimal to no risk that two people would independently be able to create the same work, then the work should have "verkshöjd".[154] However if a work is similar or identical with another, the work can still get protection if it is created independently. In theory it is therefore possible for two authors to create the same work completely independent of each other.[155] This criterion about double creation should however be treated carefully. This isn't an absolute rule that has to be followed; it should be used more as a guideline, when deciding if a work is original enough to gain protection.[156] Works that haven't been accepted to obtain "verkshöjd" are for example radio commercials, ads, website layout and shorter texts, because these have been considered to be too simple to gain protection. However, just because a text is short doesn't always mean it is excluded. For example both shorter poems and rhymes can gain protection and even just one word can gain protection if it is creative enough.[157] Works that have been created in a mechanical way, needless of the effort involved, does not obtain copyright protection. This can include such things as charts, lists and catalogues. Nevertheless these creations can get "catalogue protection" according to article 49 of the Copyright Act.[158] The reason why this neighbouring protection was introduced was due to the great amount of labour often underlying these works.[159]

Even if a creation is more complex such as a film or a theatre, the requirement of "verkshöjd" for these kinds of works still stands. The complexity can however make it very easy for a work to be seen as fulfilling this requirement. Although we shall not forget that even a film can lack creative skills and therefore not have "verkshöjd". A good example would be a surveillance camera.[160] There is a sort of quality criterion in the copyright law, which has been covered by the use of the word "creation" in article 1 of the Copyright Act.[161] The creation however has nothing to do with the aesthetic appeal of the work.[162] Whether a work gets copyright protection has nothing to do with it being considered "good" or "bad" quality. Even if someone thinks a painting is ugly or that a book is boring doesn't mean that the work is not worthy of protection. The assessment doesn't lie here, instead it's all about the creative level, when it comes to deciding whether a creation gets protection or not. A common mistake that laymen do is think that just because a work is famous it's also protected. This isn't always the case; the decision only lies in the fulfilment of the requirement of "verkshöjd".[163] The concept of "verkshöjd" has nothing to do with famousness or

[152] Carlén-Wendels & Tornberg, p. 22.
[153] Carlén-Wendels, p. 35.
[154] Olsson (2006), p. 66.
[155] Levin (2011), p. 72.
[156] Eklöf, p. 38 and also the Supreme Courts ruling in NJA 2004 s. 149.
[157] Carlén-Wendels & Tornberg, p. 22 & 32.
[158] Carlén-Wendels, p. 35f.
[159] Nordell (1990), p. 30.
[160] Carlén-Wendels, p. 36.
[161] Hillert & Ljungman, p. 43.
[162] Lundin, p. 40.
[163] Carlén-Wendels & Tornberg, p. 23.

the level of recognition.[164] The fact that a famous designer has helped create a work, is not a sole indication for it to have protection.[165]

"Verkshöjd" can also be said to contain a quantity criterion, which means that the amount of time spent creating the work can be a relevant factor. A work that is too trivial, like simple notes and sounds can't get protection. The shorter a work is the harder it is for it to fulfil an originality requirement, and therefore there need to be some type of quantity criterion when deciding whether a creation needs to get copyright protection or not. A copyright protection is not limited to covering an entire work, it may also be granted for sections of it, and in these cases a quantity criterion can be useful. In practice the quantity criterion is not often applied, a better question is to ask if a work holds enough creative effort.[166]

"Verkshöjd" isn't only used as a measure to decide whether a creation is protected or not. It can also measure the scope of the protection. In other words it also decides how similar another work may be without it qualifying as infringement. When deciding if a work is infringing, the first thing that needs to be determined is if the claimant's creation obtains "verkshöjd". The next thing is to determine the scope of the protection. The less "verkshöjd" a creation has the less protection it will have in relation to works which are similar. If there is minimal "verkshöjd", infringement will most likely only occur if the defendant's work is a direct copy, while if the "verkshöjd" is strong infringement will more easily transpire. Also a work as a whole can be considered to have "verkshöjd", meanwhile if you break it down into smaller pieces each piece can't be considered to have it. Take a poem for example, the whole poem can definitely gain protection since it fulfils the requirement of "verkshöjd", but if we break down the poem in to sentences or even words it doesn't mean that each of these will have protection. A limit cannot be put for the precise amount of words that will gain protection; this is best decided on a case-to-case basis.[167]

As I've mentioned before facts don't gain copyright protection. So if you for instance have a newspaper that only states the facts, it will most likely not gain protection. If you however use very colourful words and descriptions in your article you'll almost certainly gain protection, since the work will now be seen as having your personality. Nonetheless, the circumstances that you are writing about can't be protected since they are facts.[168] In Sweden the threshold for "verkshöjd" has been considered to be very low, just like the threshold for originality in the UK. The reason for this being that the Swedish government does not want to put a constraint on peoples works due to them being similar to other established works. The danger of this is that it can lead to copyright protection being weak. On the other hand if the threshold are set too high, this will mean that no one can create any work vaguely similar to another without it being infringement.[169]

The low threshold which is needed for a work to gain "verkshöjd", leads to the fact that a lot of creations that we normally wouldn't think of as having copyright are in

[164] Carlén-Wendels, p. 37.
[165] Olsson (2006), p. 71.
[166] Lundin, p. 41 & 48.
[167] Carlén-Wendels & Tornberg, p. 23ff.
[168] Ibid., p. 28.
[169] Nordell & Paulsson, p. 74.

fact protected.[170] For example the Supreme Court of Sweden has held that a private letter can obtain "verkshöjd" and should therefore get copyright protection.[171] Although it should be pointed out that for utility art, the standard for a work to obtain "verkshöjd" is normally very high. This has to do with the fact that these types of works can get protection in another Swedish intellectual property law called Mönsterskyddslagen (The Designs Act). Also two people can create the same utility work independent of each other.[172] In other words "verkshöjd" can differ depending on what kind of work we are talking about. The concept should be seen as a threshold that needs to be conquered to gain protection, even though the standard is variable depending on the type of work.[173] A question that has been successively debated is if the purpose of the work should be a criterion under consideration for the courts deciding on copyright protection.[174] This doesn't seem to be the case; instead it is the final result of the work that counts.[175]

Since Sweden is a part of the EU, they also have to take into account the content of its directives relating to the original standard and also how CJEU has interpreted the concept in different cases, which has added to the complexity of "verkshöjd". In the *Infopaq* case it was held by the CJEU that originality should mean that the work is the expression of the author's own intellectual creation.[176] In the *Painer* case the court held that the author's own intellectual creation meant that the work is reflecting the author's personality and that the work was made by free and creative choices.[177]

Notwithstanding all the requirements that are deemed necessary to decide if a creation has "verkshöjd", it is still in practice incredibly difficult to determine the meaning of the concept.[178] It shouldn't be forgotten that the interpretation of these criteria could change over time, which makes the definition of "verkshöjd" even harder.[179] However, "verkshöjd" is most important to establish when an author claims that his work has been infringed by someone else.[180]

3.4 Parody

3.4.1 Parodies – pre the Swedish Copyright Act of 1960

Pre Swedish Copyright Act of 1960's, the doctrine for the most part had always thought of parodies as something which should be legal. How parodies had been interpreted in the Copyright Act however created many different opinions, since there were no explicit exceptions to them in the law. Some argued that parodies should be allowed since their purpose wasn't to take advantages of the author's economic rights.

[170] Olsson (2006), p. 67.
[171] NJA 1921 s. 579.
[172] Olsson (2006), p. 70.
[173] Hillert & Ljungman, p. 191f.
[174] Nordell (1990), p. 41ff.
[175] Ahlberg, p. 63.
[176] Case C-5/08 Infopaq International A/S v Danske Dagblades Forening, Rättsfallssamling 2009 p. I-06569.
[177] Case C-145/10 Eva-Maria Painer v Standard VerlagsGmbH and Others, Rättfallssamling 2011 p. 00000.
[178] Gahrton, p. 25.
[179] Nordell (1990), p. 115.
[180] Bernitz et al., p. 51.

Others claimed that this should have nothing to do with the legality of parodies, instead reasoning that a parody being created should be seen as its own independent and novel creation. They agreed that a parody could be an independent work; however a parody shouldn't have any advantages over other works when it came to being seen as independent. This criterion makes certain that no matter what kind of work it was it would be judged equally. In some cases the purpose of the parody was crucial when deciding upon the independence of the work. Delin is of the belief that the purpose shouldn't be of too much value since it was a subjective criterion.[181]

The important mechanism for a parody is that the work which is being parodied, is well known to the public. The original work doesn't have to have copyright protection, as long as people know about the original it can still be worthwhile making a parody of it. Without the original work the parody would be nonsensical and would lose its entertainment value. Most of the time a parody is based on the work of someone else, and claiming otherwise would be a lie. However, we know that it is not the idea itself that is protected by copyright, but the expression of an idea. So if someone creates a parody of an idea or a genre such as detective novels, those parodies are most certainly to be considered as their own independent creations. The problems with parodies seem to arise when it is specified that its basis is on one particular work. As previously mentioned the general perception was for parodies to be allowed but how to interpret them into the statute was the real question. Delin is of the opinion that a parody if it fulfilled the requirement of being independent, should be considered to be its own creation. He also thinks that a parody could be an adaptation and therefore should follow those rules, otherwise it can be considered infringement. According to Delin he doesn't see any reasons why a parody should be interpreted any differently than other works, which are themselves based on or inspired by other creations. He goes on by stating that even though there is no certainty on how to interpret parodies according to the old Swedish Copyright Act, making parodies illegal isn't desirable. Because this would most likely be seen as an infringement on the citizens freedom of expression.[182]

3.4.2 The Swedish Copyright Act of 1960

3.4.2.1 An independent work or an adaptation?

Within the Swedish copyright system it is tradition that parodies are lawful even though there is no explicit article dictating this in the law. This is the situation when it comes to the economic and moral rights of the work.[183] However it has been argued that parodies can be seen as adaptations of a work, which cannot be made unless the author has granted permission for the parodist to use it.[184] When reading the preparatory work for the Swedish Copyright Act, this doesn't seem to be the case. Instead it's been held that parodies shouldn't fall within article 4 subsection 1 of the law, which covers creations which are adaptations. A parody should be covered by article 4 subsection 2 of the Copyright Act, which says that if the work is created in free association to another work, then the new creation will be seen as novel and

[181] Delin, p. 235ff.
[182] Ibid., p. 240-248.
[183] Levin (1992), p. 711.
[184] Carlén-Wendels, p. 31.

independent.[185] A parody will gain its own copyright protection and not be dependent on the protection of the original, which is the case of an adaptation.[186] If a work is new and independent, you can only see glimpse of the original in the background of the new one.[187] Subsection 2 contains rules for when a work has been created with inspiration from another work, but where the association between the two aren't close enough for the latter to be seen as an adaptation of the first one. A criterion for this is to make sure the new work isn't too close of an imitation to the original; to draw a line can in practice be incredibly hard.[188]

The preparatory work for the Copyright Act states that even though a parody is very similar to the original, maybe even containing copied fragments of it; it is still to be seen as an independent work and not an adaptation. The reason being that the purpose of the parody is completely different from the purpose of an adaptation.[189] A parody focuses on inducing laughter and amusement, without damaging the original or hurting its author. What is important however is not to confuse the parody with the original, because then the parody will lose its intended effect.[190] The purpose of the adaptation on the other hand, is seen as being the same or very similar to the original work. It doesn't change the originals basic structure; it just gives it a new shape. Even though it seems as if this is how the preparatory work wants parodies to be interpreted, it has been stated that it is not necessary to explicitly mention this in the law.[191] Rosén has a problem with the fact that it seems like a parody is independent because it serves a different purpose then the original. This according to him is a criterion that is too subjective, and he thinks it is very inappropriate to deem if a work is acceptable or not on that basis. He goes on and states that nowhere else in the preparatory work of the copyright law, nor in the statute is it held that the purpose of a work needs to be this critical. Rosén also criticises the preparatory work for not discussing the fact that some parodies should be considered to be adaptations.[192]

What seems to be problematic for parodies is that for them to be funny, they have to have a certain connection to the original work. This connection is what often makes it difficult for a parody to be considered as a new and independent work.[193] However, as mentioned in the preparatory work, a parody should still be considered as an independent creation no matter the amount of the original which been used. The reason for parodies being lawful can be attributed to tradition, and in the preparatory work it is made clear that this wasn't going to change when the Copyright Act of 1960 was incorporated. The purpose is to poke fun of others creations, but just claiming that your work is a parody doesn't mean that it will be considered as one, it can instead be considered as an infringement and it's up to the courts to decide the difference.[194]

[185] SOU 1956:25 p. 136f.
[186] Nordell (2007), p. 317.
[187] SOU 1956:25 p. 136f.
[188] Olsson (2009), p. 91 & 94.
[189] SOU 1956:25, p. 137.
[190] Levin (1992), p. 711.
[191] SOU 1956:25, p. 136f.
[192] Rosén (1993), p. 124f.
[193] Ålund, p. 101.
[194] Stannow & Hillerström, p. 71.

It's also difficult to know how parodies should be interpreted in the Copyright Act, because parodies are only discussed in article 4 of the preparatory work. Not even when the preparatory work discusses article 1 or 2 of the Copyright Act are parodies specifically mentioned. Although when it comes to the moral rights in article 3 of the Copyright Act, the preparatory work mentions that parodies are something which should be considered as legal and non-offensive.[195] Also if a parody is suppose to be interpreted as an independent work, the moral rights of the authors cannot be infringed upon, since the parody will be considered to be its own creation and have its own protection. Nowhere in the Copyright Act is there an expressed exception for parodies, and when reading the preparatory work it's not mentioned anywhere that a parody is considered to be a restriction of the author's exclusive rights.[196] The case law within this area is not very helpful, since there haven't been many cases where this question is considered.[197] Further down some cases concerning parodies will be discussed.

What is made clear about parodies is that they are lawful and that they are seen as new and independent works, which have a completely different purpose from the original. This means that the parody shouldn't be considered an infringement or plagiarism. To support this argument we have to look at the preparatory work and the case law.[198] Since the parody is an independent creation it shouldn't be infringing the economic or moral rights of the original author.[199] Rosén as mentioned previously, has a problem with how the preparatory work considers parodies to be interpreted within the Copyright Act. He is of the opinion that a new work that is being compared to an already existing one should be assessed based on its independence and individuality, when the courts make the decision upon which works are infringing. The mere fact that the creation is a parody shouldn't give the new one any advantages and special treatments. Rosén holds that the independence of a work has nothing to do with it being a mockery or imitation. To draw the conclusion that a parody makes an exception from the author of the originals exclusive rights is according to Rosén a big mistake.[200]

3.4.3 Relevant case law

3.4.3.1 NJA 1975 s. 679

From the preparatory work of the Copyright Act we know that parodies are lawful, even though the word in itself doesn't occur and isn't described within the statute. To understand the meaning of the word parody is therefore not very easy, and only in one case has the Supreme Court taken a stand for what a parody isn't.[201] This case *NJA 1975 s. 679* where a record producer got sued for producing and distributing a record that contained a song where the tune was the same as the original, but the text had been fully changed except for the first sentence. The claimant argued that the alteration of the text was a distortion of it, and that this should be seen as derogatory

[195] Ålund, p. 103f.
[196] Rosén (1993), p. 122.
[197] Ålund, p. 103f.
[198] Ibid., p. 106ff.
[199] Gahrton, p. 34.
[200] Rosén (1993), p. 126.
[201] Ibid., p. 119f.

treatment of the work. The defendant on the other hand claimed that the work was new and independent according to article 4 subsection 2 in the Copyright Act. Therefore it was not a derogatory treatment of the work for either the tune or the text of the song.[202]

The Supreme Court held that as a general principle parodies are to be seen as independent creations, which fall outside the original copyright protection. However the defendant's work was not to be considered as a parody in this case according to the court. This was political propaganda and even the defendant himself had argued that he never intended to mock the original song in any way. The court also went on stating that authors' moral rights shouldn't be waived for the political freedom of speech. For those reasons this case would be judged in accordance with the moral rights in article 3 of the Copyright Act. According to the preparatory work of the law, when judging if there is a violation of the moral rights the courts should see the case from the perspective of the author of the original, but also use an objective standard. It was held that the defendant's work wasn't a parody and therefore not an independent work, and that this was infringing the original authors rights.[203]

3.4.3.2 NJA 2005 s. 905

This case was about a radio show that had used extracts from multiple literary works by the same author and combined them with movie lines, this was to create a sketch with a comedic effect. The literary work that had been used was a well known Swedish children's book about a boy called Alfons Åberg. It had come to the radio shows attention that the word Alfons in Danish, in addition to being the name of the character, also meant pimp. Therefore they thought of the idea to combine extracts from the books, with lines from a movie about drugs. The question that arose in this case was whether this creation was to be seen as an independent work, or if it was infringing the author's rights. The claimant argued that this creation was an infringement of the author's moral rights, because it had been made available to the public in a context that was very offensive towards the author. It was offensive since the author's character Alfons Åberg was always made out to be a good and obedient boy who never used violence. The author also claimed that even if the court found the work to be new and independent, it should still be considered as infringing her moral rights since this sketch was a derogatory treatment of her work. The defendant on the other hand argued that the creation was new and independent and that it didn't depend on the author of the original for property rights. Therefore this new work couldn't be infringing the moral rights of the author. The defendant claimed that the work was a parody and that making a parody was allowed without it being an infringement of the original. Since it was obvious, according to the defendant that this work was a parody or satire it was to be seen as independent.[204]

The Swedish District Court held that the public saw Alfons Åberg as a nice and proper boy, and the new context where Alfons was used was very different. The court went on stating that the big contrast that appeared here made it very obvious that the defendant's work was a parody, it had a different purpose then the original. Since every extract that was used from the literary books was chosen very carefully to fit

[202] NJA 1975 s. 679.
[203] Ibid.
[204] NJA 2005 s. 905.

into the context with the lines from the movie, this was seen as a robust reason for why the court found it to be a parody. The people that had listened to the sketch knew that it was clearly not an assault on Alfons or the author. The point of this sketch was to highlight the contrast between the nice and innocent boy and the bad boy. For these reasons the work was held to be new and independent according to article 4 subsection 2 of the Copyright Act. In this case the District Court took for granted that if a creation is subjected to a parody, things that would normally be seen as offensive to the claimant, would be considered to be allowed. A work could therefore not infringe the moral rights if it was a parody of some sort, and the claimant's action was therefore dismissed in the District Court. However, there was one discrepant in the District Court who did not think the parody should be seen as an independent work, and it should therefore most likely be infringing the moral rights of the claimant.[205]

The claimant appealed and the case made its way to the Court of Appeal. The Court of Appeal didn't find any reasons to make a different judgement, and therefore they held the same verdict as the District Court. The case went on to the Supreme Court where it was held that parodies should be considered to be independent creations, which fall outside of the original's copyright protection. The critical part of this is that the parody serves a different purpose then the original. The Supreme Court went on to state that the meaning of the word parody was not properly established, but that the principal should lie in the term being used when someone employs a known work with the aim of creating a new one with comedic effect. This was found to be true in this case, where Alfons was placed in a completely different context then the one he usually appears. This lead to the sketch being seen as an independent work. This meant that the claimant's moral rights weren't infringed, since the new creation was independent. However the court did add that even if there had not been an infringement of the moral rights in this case, it did not exclude the fact that a parody could infringe these rights in some occasions even though it is an independent work. Two justices of the Supreme Court were of different opinions then the majority when it came to the reasoning of the judgement. They believed that the creation was to be seen as a parody, but on this mere fact it couldn't be seen as a new and independent work. Article 4 subsection 2 in the Copyright Act was not available in this case, instead the justices said that this was a secondary work and article 4 subsection 1 of the statute was applicable. Since the work wasn't independent the parody could therefore infringe the author's moral rights. They held that this new work was offensive for Alfons Åberg but not for the author of the original and her literary reputation and distinctive character. Therefore the justices came to the conclusion that there had been no infringement in this case.[206]

3.4.4 Some comments on NJA 2005 s. 905

Nordell argues that it seems as if the Supreme Court in *NJA 2005 s. 905* stood by the freedom of the parody, as it is stated in the preparatory work of the law. However, the different context Alfons is put in, is an obvious attempt to create a comedic effect. The facts speak to this work serving the purpose of a parody. Nordell also claims that this case shows that the economic and moral rights are to be separated from each other. Even though a parody can be seen as a new and independent work it can still in

[205] NJA 2005 s. 905.
[206] Ibid.

some circumstances, which had not been considered by the court, be offensive towards the original author's literary individuality.[207]

Rosén is of the belief that there are three different ways in which we can discuss if a parody is lawful. The first way is to see if a parody can be seen as an exception to the original author's exclusive rights, for example covered by the constitutional protection of freedom of speech. In *NJA 2005 s. 905* it didn't seem like the court felt the need to considerate this.[208] The Supreme Court didn't even look at the freedom of speech aspect when they made their decision. Instead this case was solved with an internal copyright test.[209] However, in a few similar circumstances the courts have held that if a work is seen as a parody then it is allowed to use someone else's work. The moral rights of the original author would be put aside when his work is used to create a parody. From this it would seem as though the making of parodies are permitted, and if this is the case it would then be preferable if the courts gave a better description of the word. Excluding the difficulties with the meaning of the word parody, there has previously been a problem with the courts not finding it necessary to see if a parody was a new and independent creation when deciding if it was acceptable or not. Instead they only looked if there was a satirical effect to the work in order to decide. Rosén argues that this would mean that the parody would be seen as a freedom of expression imposition to the copyright. If this were the case it would create some problems. First of all there is no perceptible line between copyright and the freedom of speech, which is maintained. Also the general perception is that the copyright in some cases restrains the freedom of speech, and an exception from the copyright law normally requires support in the statute.[210]

In *NJA 1985 s. 893* the Supreme Court held that freedom of speech could limit the copyright in some rare cases; however they also argued that making restrictions in the copyright was primarily a job for the legislator and not the courts. The court went on and said that in the very rare event that a situation emerges where the legislation could not predict, it would come upon the courts to have to make a restriction within the Copyright Act.[211] It would be in conflict with Swedish ordre public to override moral rights without ascertaining any legislative support. In *NJA 2005 s. 905* it didn't seem like the court were willing to restrict the copyright by placing a parody as an exception to the law. Instead the court said that when the copyright was created, adaptations of a work that would be a parody was to be considered as an independent creation, and would therefore fall outside the copyright protection of the original. Rosén interprets this as a confirmation that parodies shouldn't be understood as a freedom of speech restriction within the copyright. The reason a parody is acceptable is due to its originality. The conclusion would be according to Rosén, that there is no reason to change the author's legal position for the benefit of freedom of speech.[212]

The second way in which it can be discussed if a parody should be lawful, is the question considering if it is a new work. In the decision of *NJA 2005 s. 905* the majority of the Supreme Court judges leaned towards this being the case when it

[207] Nordell (2007), p. 319ff.
[208] Rosén (2012), p. 240f.
[209] Rosén (2007), p. 371.
[210] Rosén (2012), p. 241f.
[211] NJA 1985 s. 893.
[212] Rosén (2012), p. 244f.

came to parodies. It seems as if the court took for granted that a parody is an independent work, using the preparatory work of the law as a reference. As long as what was being created had a comedic effect, this differentiated it from the original. Rosén thinks that this interpretation seems to put the intellectual content as the crucial criteria to gain copyright protection, and not the literary or artistic form, which historically has seemed to be the important criteria for protection. However, he refuses to believe that it was the wish of the Supreme Court, to create a completely new criterion for what is needed for a work to gain protection. Notwithstanding in the end it seems like the creation and the form of the parody is still what is crucial for it to be an independent work, since the court looks at the changes, distortions and joining of the text and so on. According to Rosén this is very important to take notice of, because this indicates that you would not be able to use someone else's work to make a commercial and avoid infringement by simply naming it a parody. Keeping the criteria which are usually needed for a creation to gain copyright protection makes the statement above true. The decision indicates that since the court found the parody to be its own independent work, no parts of the claimant's original work should be seen as material for the new work. However the two descending justices did think that the parody was a secondary work, and that it should therefore contain parts of the claimants work. This last part is an opinion that Rosén agrees with.[213]

The last way, in which we can discuss the lawfulness of parodies, is if it should matter at all that a parody is seen as an independent work, with respect to the author's moral rights. In *NJA 2005 s. 905* the Supreme Court states that even if a parody is an independent work and therefore has nothing to do with the original, it can still in some circumstances be seen as infringing the original author's moral rights. It is possible for a parody to offend the author's artistic reputation and individuality. As we know the majority of the courts did not find this to be the case and they didn't test the question whether the moral rights had been infringed upon. Rosén held that this is a minor flaw in the case that should have been discussed in more detail. The two opposing justices however did find that the character Alfons had been offended, but that the author hadn't. Rosén finds it incredible hard to see this as a logical argument. It is the author that creates the character and through Alfons shares her moral standards etc., which she wants to highlight within her books. This should according to Rosén at least be seen as offensive towards the author's individuality or distinctive character, although it might not be seen as infringing on her reputation as an author.[214]

[213] Rosén (2012), p. 246f.
[214] Ibid., p. 248f.

4 Canadian law

4.1 Canadian Copyright Law in General

In Canada the copyright is protected under the Copyright Act of 1985.[215] Just like the UK and Sweden, Canada is also a member of the Berne Convention and WTO, which means that their Copyright Act has been amended to fulfil the requirements of these agreements.[216] When someone creates a work that falls within the Copyright Act, the general rule is that it is protected for the duration of the author's life plus an added 50 years after his or her death, unlike the UK and Sweden where the duration is the author's life plus 70 years. When the protection has expired the work automatically enters the public domain.[217] Just like in the UK and Sweden there is no formality that needs to be fulfilled for a work to get protection under the act. As soon as a work is created it falls within the Copyright Act and becomes protected. It is not important for the work to be registered or carry the copyright symbol[218] in order to be protected.[219] Also it doesn't matter whether the creation is published or unpublished for it to be protected by copyright.[220]

That which can be protected in the law is literary, dramatic, musical and artistic work. Since 1997 however, performers´ performances, sound recordings and broadcast signals are also protected and these are called neighbouring rights. For a work to be protected it also has to fulfil some requirements, such as being a fixation of an original expression in a tangible form, like the UK but unlike Sweden who doesn't have a requirement for fixation of the work.[221] Copyright only subsists if the work is fixed in some material way; there is no explicit expression of this requirement in the statute. Instead this criterion comes from the case law, and this principle can be associated with the fact that ideas can't be covered by copyright; only the expression of the idea is protected. Although fixation is a requirement for copyright protection, there exist exceptions to this rule. For example the Copyright Act contains a special definition of the meaning of "lecture", which seems to state that fixation isn't needed in a case that fall within this category. Also when it comes to a performance there is nothing that indicates a requirement for fixation either.[222] A literary, dramatic, musical and artistic work must be original to gain copyright protection and the interpretation of the concept will be discussed below.[223]

Precisely like the UK and Sweden, a Canadian creator have both economic rights, which means that you have the sole right to produce or reproduce the whole or substantial parts of your creation.[224] The author also has moral rights, which is covered in section 14 and section 28 of the Copyright Act. These rights are more personal to the author and are concerning rights such as the right to integrity and attribution, but also the right of association. These moral rights cannot like the

[215] Copyright Act (R.S.C., 1985, c. C-42).
[216] Gervais & Judge, p. 37.
[217] Ibid., p. 49.
[218] With copyright symbol I mean: ©.
[219] Murray & Trosow, p. 47.
[220] Gervais & Judge, p. 35.
[221] Murray & Trosow, p. 37f.
[222] Ibid., p. 44f.
[223] S. 5 Copyright Act (R.S.C., 1985, c. C-42).
[224] S. 3(1) Copyright Act (R.S.C., 1985, c. C-42).

economic rights be assigned; however they can be waived.[225] If someone uses an author's creation without having the permission to do so, that person can be held responsible for copyright infringement.[226] The exclusive rights of the copyright are a negative right, which means that no one has the right to reproduce a copyrighted work without the permission of the owner. However if two authors independently come up with the same creation without copying each other, this means that both works are copyright protected as long as the other requirements for copyright are fulfilled, this rule is also applied in the UK and Sweden.[227] The purpose of the Copyright Act is to protect forms of expression, but it doesn't protect ideas and facts.[228] However if there is only one way to express an idea that expression cannot gain copyright protection, since that would be the equivalent of giving protection to an idea.[229]

4.2 Original – some general facts and background

For a work to have copyright protection it must be original in the copyright sense of the word.[230] In section 5 of the Canadian Copyright Act it is stated that copyright subsists in literary, dramatic, musical and artistic work, which are original.[231] A more precise meaning or a guidance of originality is however not given anywhere within the act. As mentioned above, copyright does not protect the idea only the expression of the idea, similarly like the UK and Sweden, and therefore the originality requirement must only apply to the expressive element of the work and not the mere idea. Originality shouldn't be interpreted to mean that the work has to be novel, and it shouldn't either be confused as such.[232] A lot of people think that for a creation to be original it has to be unique and even have some artistic or literary quality. This is not true at all; in reality the level of originality that is required for a work to get copyright protection is very low.[233] For a creation to get protection it doesn't require the idea to be new, an old idea that is expressed originally can still get protection. It is important to point out that original is not equivalent to high quality. There is no requirement that a work needs to be brilliant or outstanding to be considered original. Intellectual effort is however required, but the threshold in order to fulfil this is very low. Originality should neither indicate that the work has to contain aesthetic quality; this means that even technical writing and business forms can be original. It's important to point out that there is a possibility for a work to have copyright protection, at the same time as it is infringing someone else's copyrighted work. An example would be if a French copyrighted play got translated into English, the English translation could still be considered as an original expression at the same time as it could infringe on the author of the French play.[234]

Also originality can subsist in two identical works provided that there was no copying, comparable to the UK and Sweden.[235] It is important to have a moderate

[225] Murray & Trosow, p. 63.
[226] Strong, p. 6.
[227] Gervais & Judge, p. 37.
[228] Murray & Trosow, p. 37.
[229] Gervais & Judge, p. 47.
[230] Harris, p. 18.
[231] S. 5 Copyright Act (R.S.C., 1985, c. C-42).
[232] Handa, p. 209f.
[233] Harris, p. 18.
[234] Gervais & Judge, p. 52f.
[235] Handa, p. 210f.

standard on the originality requirement. Because if you set the standard to low that implies that you will get copyright protection for almost anything, and that mere facts and ideas would become unavailable for anyone to use however they wanted. If the standard of the originality requirement is set to high on the other hand, this would put the courts in a position where they would be the ones evaluating artistic merits and this is not desirable.[236] Originality is also important for the balance between the author and the public, because it defines what is copyrightable and what is not; in other words it defines the scope of what is protected by copyright. The requirement of originality also works as a filter to decide which expressions within the copyright is protected.[237]

What original means in the sense of copyright is always a factual question, and something that the courts must decide from a case-to-case basis.[238] Before 2004 the Canadian courts acknowledged two standards for originality, one that derived from the UK. This was a very low standard characterized by skill, judgement and labour requirements, which meant that a work had to originate from the author of the created work, and it shouldn't be a copy of someone else's work. The Canadian courts could also sometimes use a higher standard when they decided upon originality and here the courts used a test of a modicum of creativity, which was a test that derived from the United States. Before the *CCH* case of 2004 these two standards of originality coexisted and it created a lot of confusion.[239] However there was a form of originality test before 2004 that Canadian courts used when they made a judgement in a copyright case. To decide if the work was original the courts were of the opinion that the Copyright Act didn't require an original or novel form of the expression, but it was important that the creation was not copied from someone else. Also the work that was created should originate from the author. From different court cases pre 2004, an interpretation of the meaning and qualities that was required for a work to be original was made. A creation should first of all, as mentioned above, not be a copy of another author's work and it should originate from the author. Also the work should be the creation of an independent and creative effort, and not be a mechanical or automatically created work. It was also important that the author had used skill, effort, labour, taste, judgement, knowledge, experience and personal effort.[240] By using different wordings such as the words skill, judgement and labour in some cases, as compared to work, skill, judgement and knowledge in other cases to describe how a work gains originality can make it confusing when setting a standard for originality.[241]

Quality and quantity criterions have also been a conundrum when the courts have decided upon the standards for originality. It is important that these criteria aren't interpreted to loosely, while at the same time it is also important they are not interpreted to stringently when deciding upon originality. Because if for example the courts didn't take quality at all in to consideration when deciding upon originality, this would lead to anything no matter how trivial gaining copyright protection. If the standard of quality were too high on the other hand, this would mean that there has to

[236] Murray & Trosow, p. 42.
[237] Gervais & Judge, p. 52.
[238] Harris, p. 19.
[239] Gervais & Judge, p. 68.
[240] Harris, p. 18f.
[241] Gervais & Judge, p. 70.

be some kind of aesthetic appeal to a created work for it to be original, and it would be the judge's job to act as an aesthetic arbiter. When it comes to quantity, a low standard of this would mean that one word or even one letter could amount to copyright protection, and that would lead to a limitation of basic expressive building blocks for other people. Were the courts to fix the standard too high, this would mean that novels etc. that contains a great amount of content would be the only creations which could subsist copyright protection. Short original expressions on the other hand wouldn't be able to gain it.[242] Even though there have been some milestones for how originality should be interpreted, it has been very hard for the courts to keep a unanimous front in this question.[243] However, in 2004 a case from the Supreme Court of Canada introduced new conditions for when a work is to be considered as original. *The CCH Canadian Ltd* v *Law Society* from 2004 is a very important case for Canadian copyright law, since the Supreme Court here established the threshold of originality.[244] In this case the Supreme Court held that the Canadian original standard was one that was situated between the United States creativity standard and the British industriousness standard.[245]

4.3 The new original test – CCH Canadian Ltd v Law Society of Upper Canada

4.3.1 Background

The Law Society of Upper Canada is a statutory non-profit corporation, which has maintained and operated the Great Library at Osgoode Hall in Toronto since 1845. This is a library which is known as a reference and research facility with one of Canada's largest legal material collections. For members of the Law society, the judiciary and other authorized researchers; the library provides a request-based photocopy service. This means that the library reproduces legal materials and delivers the photocopy to the person who requested it, either in person or by mail. The Great Library also has self-service photocopiers that can be used by people at the library. The respondents CCH Canadian Ltd., Thomason Canada Ltd. and Canada Law Book Inc., are publishers of law reports and other legal materials. In 1993 the respondents took copyright infringement actions against the Law Society. They sought a declaration of subsistence and ownership of copyright in eleven works, and a declaration that when the library was reproducing copies of these works the Law Society was infringing their copyright. The Law Society on the other hand denied any liability, and they also made a counterclaim for a declaration that copyright shouldn't be infringed when only a single copy of a reported decision, case summary, statute, regular or limited selection of texts from treatise was made by the staff of the Great Library, or when the self-service photocopies was used for the purpose of research. One of the questions that the court had to address in this case was whether the publisher's material was original works which were protected by copyright.[246]

[242] Gervais & Judge, p. 54.
[243] Murray & Trosow, p. 39.
[244] Sookman & Mason, p. 75.
[245] Gervais & Judge, p. 63.
[246] CCH Canadian Ltd v Law Society of Upper Canada (2004) 1 SCR 399, 2004 SCC 13.

4.3.2 Conclusion

First the Supreme Court of Canada held that in section 5 of the Copyright Act it is stated that copyright subsist in every original literary, artistic, dramatic and musical work. However originality isn't defined in the Copyright Act, even though the word is what sets the boundaries of the copyright law. It was also held that originality only applies to the expressive aspect of the work and not at all to the idea. The court then went on stating that within the copyright law, there are competing views on the concept of originality. Some courts have found that for a creation to be original it only has to originate from the author and not be a mere copy of someone else's work. This approach is consistent with the British standard of originality. Other courts have found that a work can only be original if it contains creativity, which is the approach used in the United States. Courts have held that to ensure that copyright protection only extend to the expression of the idea and not the mere idea itself, the originality requirement should contain a creativity approach.[247]

The Supreme Court concluded that the correct interpretation of originality should fall in between these two extremes. The work created must be more than a mere copy of someone else's, to be considered as original in the Copyright Act's sense. However, a work doesn't have to be creative in the sense of being either unique or novel. For an expression of an idea to gain copyright protection, skill and judgement has to be exercised. The court went on by explaining that with skill they meant that someone used their knowledge, developed aptitude or practiced ability when they created a work. The court also explained their intended interpretation of the meaning of judgement, by stating that this would mean that someone used their capacity for discernment. However, it could also mean that a person used their ability to form an opinion or used evaluation to compare different possible options when an author was creating his work. This exercise of skill and judgement would, according to the Supreme Court, mean that intellectual effort got involved in the producing of a work. However the court went on by stating that the exercise of skill and judgement that is considered to be needed when creating a work, shall not be trivial and it shouldn't be a purely mechanical exercise. The Supreme Court gave the example of someone only changing the font of a work to create another. They held that this would be too trivial and it wouldn't involve enough skill and judgement to be considered an original creation.[248]

The court stated that, to reach their decision, they had taken into regard the simple meaning of original. For example they looked at the definition of the word in the Concise Oxford Dictionary, and they also came to the conclusion that at least some intellectual effort was suggested to exist in the concept of originality. The court also looked at the history of copyright law before making their decision. Here they looked at the Berne Convention and also compared different countries interpretation of what is required for a work to gain copyright protection. Then they went on to look at recent jurisprudence and they found that even though a lot of Canadian courts have adopted a rather low standard of originality, a standard such as that of industriousness, they could see that more recent cases had started to question whether or not this standard was appropriate to follow. The Supreme Court also looked to the purpose of the Copyright Act. They found that in a case called *Théberge* v *Galerie d'art du Petit*

[247] CCH Canadian Ltd v Law Society of Upper Canada (2004) 1 SCR 399, 2004 SCC 13.
[248] Ibid.

Champlain Inc, the court here had stated that the purpose of copyright law is to find a balance between the creators right of obtaining a fair reward for his creation, and the public interest in supporting the encouragement and distribution of works of the art and intellect. It was seen to be too much in favour of the creator if the standard of originality that was adapted, was one that only required the work to be more than a mere copy, and that someone simply had to show industriousness to gain copyright protection. If an author on the other hand had to exercise skill and judgement to fulfil the originality requirement, this was seen to be a safeguard against overcompensation for the author.[249]

The last thing the court took into account before making their decision was that the requirement of originality was a workable, but also a fair standard. Requiring an exercise of skill and judgement for a work to be original was according to the court a workable yet fair standard to have. The Supreme Court felt that using the industriousness approach when setting the standard of originality was to low, and it put the author in too much of a favourable position in comparison to the public's interest. On the other hand the court felt that putting the standard so it contained a requirement of creativity was putting it too high. Having a creativity standard could according to the court be implemented as a requirement of novelty, and this interpretation was not desirable within the copyright law. The court was of the opinion that using a requirement for exercise of skill and judgement would avoid these difficulties, and would therefore be an appropriate and workable standard to use when it came to copyright protection.[250]

To summarize, the Supreme Court conclude that in accordance with the Copyright Act an original work should be a creation that originates from an author, and what had been created shouldn't be a copy of someone else's work. However these factors alone aren't sufficient when it comes to deciding if something is original. Also a produced work must be the creation of the author's exercise of skill and judgement. It is also important that the skill and judgement that has been exercised when creating the work, isn't trivial or a purely mechanical exercise. Finally the court stated that even though a creative work in most cases will be original and gain copyright protection, it doesn't mean that creativity is a requirement to make a work original. In this case it was held that the respondents works such as head notes, case summary, topical indexes and compilations of reported judicial decisions, were all considered to be original creations according to the requirements that the court had set up for the concept.[251]

4.4 Fair dealing

Sections 29, 29.1 and 29.2 of the Canadian Copyright Act contain exceptions for fair dealing. These are statutory defences and it means that even though an act that would under usual circumstances be considered an infringement, can still be allowed if it falls within one of the statutory defences.[252] For an act to be covered by the fair dealing exceptions two criteria must be fulfilled. Firstly the purpose must fall within one of the statutory purposes that are designated within the sections, for example

[249] CCH Canadian Ltd v Law Society of Upper Canada (2004) 1 SCR 399, 2004 SCC 13.
[250] Ibid.
[251] Ibid.
[252] Gervais & Judge, p. 212.

parody and satire or private study; secondly the use must be fair.[253] If the act doesn't fall within one of the statutory purposes, then the act can't fulfil the second criterion of being fair. The purposes, which are designated in the fair dealing sections, are exclusive and no other purposes will be recognized.[254]

The fair dealing exceptions can be seen as a user's right and is there to maintain a fair balance between the interests of the user and the copyright owners, the defences shouldn't be interpreted restrictively.[255] However several cases before 2002 showed an interpretation of the fair dealing exceptions that was very stringent, but the Supreme Court later cast this approach for the defence aside. It was in the case *Théberge* v *Galerie d'Art du Petit Champlain Inc* from 2002 that the shift from a restrictive and mostly copyright owners sided interpretation, to an extensive more user sided approach started to take hold. Although it wasn't until the case *CCH Canadian Ltd* v *Law Society* from 2004, that the term user's right was properly introduced and a number of points were made to expand the scope of fair dealing.[256] In the *CCH* case the Supreme Court was of the opinion, that it is necessary in the light of the Copyright Act's purpose to interpret fair dealing broadly.[257] Within this case the Supreme Court wants to communicate to other courts that they need to give fair dealing a broad and liberal approach, and to not only take the copyright owners rights into consideration but also the user's rights, when interpreting the exceptions. Even though the court wants there to be a broad interpretation of the fair dealing defences, the problem is that the provisions are very stringently drawn, and since the Copyright Act is purely statutory it can be hard to interpret this extensive approach in the fair dealing sections.[258]

As mentioned above, for the fair dealing exceptions to be relevant the statutory purposes have to be fulfilled and the use must be fair. In the Copyright Act the word fair isn't defined, and to decide whether something is fair or unfair depends on the facts relating to each case, and is therefore dealt with on a case-to-case basis. In the *CCH* case however the Supreme Court came up with a six-part test for fair dealing, containing six criteria to determine fairness. The first criterion is the purpose of the use, if it is research, private study, a parody and so on. None of these acts are defined and therefore their definitions should come from ordinary practice. The Supreme Court did however state that the purpose shouldn't be interpreted restrictively, because that could lead to unfair restrictions of the user's rights. If the act doesn't fall within the purposes stated in the provisions of fair dealing, then the analysis won't continue to the remaining five criteria. If the act doesn't fulfil the first criterion then there is no fair dealing defence and it can instead be a matter of infringement.[259]

Does the act on the other hand fall within one of the statutory purposes, then the analysis continues, and the next criterion that has to be taken into consideration is the character of the dealing. This means that the focus should be on the number of copies that has been distributed. If for example a lot of copies has been distributed this is

[253] Gervais & Judge, p. 217.
[254] Murray & Trosow, p. 75ff.
[255] Ibid., p. 74.
[256] Ibid., p. 77ff.
[257] Gervais & Judge, p. 219.
[258] Craig, p. 455f.
[259] Murray & Trosow, p. 81f.

very likely to be seen as unfair, in comparison to a single copy that is used only for a specific purpose. However the court goes on by saying that in some circumstances it can be relevant to take into consideration customs or practices in a particular industry, when determining if the character of the dealing is fair or not. The third criterion is the amount of the dealing, and here the court talks about the substantiality requirement for infringement. They state that there is no need for a fair dealing analysis if what has been taken from a creation is only trivial, since this can't be seen as an infringement. The user's right is protected by the substantiality requirement. The court also states that the quantity of the work that has been taken can help in the determination, but should not be determinative of fairness. It is also held that it can be possible to use an entire work fairly, and an example of this can be the use of a photograph. There is no firm amount of how much or how big a portion of a work which can be used to fall within the fair dealing exceptions. To fulfil this criterion you have to be able to show that what you have used was necessary.[260]

The forth criterion is the alternatives to the dealing, and here you have to ask yourself if you really needed to use exactly that work or part of it for your purpose. If for example there is another work that doesn't have copyright protection but is equivalent to the work that is protected, then the courts have to take into account that you should maybe have used the non-copyrighted work instead of the copyrighted. The fifth criterion is the nature of the work. Here the courts have to look at the publicity and the exposure of the creation. For example if a work is confidential, publishing it can be found to be unfair. The last criterion is the effect of the dealing on the work, and here the court states that even though the effect on the copyright owner when dealing on the market is a very important factor, it is not the most important one. The most important factor that the courts need to consider is if the dealing is fair.[261] The Supreme Court also holds that not all of the criteria need to be applied in every case. The result of the *CCH* case is that the Canadian Copyright law has six flexible criteria that determine fairness, but lists of acceptable purposes is exhaustive in the statutory.[262]

4.5 Parody – from old regulation to new

Before the new section 29 of the Copyright Act came into force on 2012-11-07, there was little or no possibility of a parody defence in Canada. Most cases before 2012 indicated that parodies were often, as they currently are in the UK, seen as substantial taking and therefore infringement. Neither did anything indicate that freedom of expression would be a successful argument, which would protect the parody against the author of the original. Mr Knopf wrote in his paper from 1994 that the Parliament carefully should consider establishing an exemption for parodies, given its historical significance and its importance to freedom of expression.[263] Before 2012 parodies weren't mentioned in the Copyright Act, just like they still aren't in either the UK or Sweden.[264] Some argued that parodies in some cases should fall under the fair dealing defence as a kind of criticism, which is an argument still made when it comes to parodies within the UK copyright law. However the courts weren't very willing to do

[260] Murray & Trosow, p. 82f.
[261] Ibid., p. 84f.
[262] Gervais & Judge, p. 219ff.
[263] Knopf, p. 261f.
[264] Harris, p. 129.

so, due to the extremely stringent interpretation of the fair dealing defences in the statute.[265] *Michelin* v *CAW* from 1997 is a case where the court clearly disqualified parodies from falling within the category of criticism. This case raised many concerns when it came to being able to make parodies in Canada.[266] The best protection for someone that made a parody in Canada was therefore to avoid making his or her work substantially similar to the original. Although critics thought that parodies deserved an exemption in the Copyright Act, and that it should be included in the fair dealing defences due to its important meaning of social critique.[267]

In the *CCH* case however the Supreme Court knocked down the fundamentals of the *Michelin* case. They held that fair dealing shouldn't be restrictively interpreted, since this was a way of creating a balance between the rights of the author of the copyrighted work and the rights of the user's. This judgement would most likely mean that parodies could be permitted to be interpreted as criticism.[268] Murray and Trosow writes that the fair dealing provisions in Canada should be open-ended. Meaning that there shouldn't be an exact list of which categories that are included in the fair dealing defences, instead there should be room to interpret different acts within the exceptions. Simply adding categories to the fair dealing sections wouldn't give the law the flexibility that it requires to contain broad and proper fair dealing defences.[269]

In Canadian courts parodies were never really successfully invoked for the purpose of fair dealing. There were many reasons why parodies were rejected to fall within the defence. One argument which concerns why parodies couldn't be seen as falling within the exception for criticism and review, was that the provision covering this defence expressly required that the source and other information about the original work, would be cited when someone used it in their creation. Parodies however very rarely made any exact references to the used source. Also there were courts that held that criticism and review as a defence only intended to be used when criticising a copyright protected work, and not give protection when a copyright work was used to criticise the author of the work. Even though it is not allowed to use the copyrighted work to criticise the author of the work, this doesn't mean that you aren't allowed to attack the author of a creation, as long as you do it using an original expression. Of course you are also allowed to make parodies that are based on the same idea as someone else. As we know parodies can only be infringing if they are reproductions or considered to be taking a substantial part of a work, the same rule also applies in the UK.[270]

As we can see parody have created a bit of a problem in Canada before 2012, but since 2012-11-07 section 29 of the Copyright Act also contains a fair dealing exception for the purpose of parody and satire, which is were Canada differs from both the UK and Sweden.[271] This means that parody and satire does not infringe copyright, and the amendment also means that a number of existing cases that have

[265] Craig, p. 445.
[266] Murray & Trosow, p. 175.
[267] Craig, p. 445.
[268] Murray & Trosow, p. 175.
[269] Ibid., p. 203f.
[270] Gervais & Judge, p. 227-233.
[271] http://laws-lois.justice.gc.ca/eng/acts/C-42/section-29-20121107.html#wb-cont.

found parodies not to be a valid defence against copyright infringement have been overruled. Although under certain circumstances parodies can still be considered as infringement of the author's moral rights.[272] It is too early to tell, since the new provision has only been enforced for roughly 6 month, what this amendment of section 29 will mean for the protection of parodies is for the courts to decide upon in the future.

[272] McKeown, p. 8f.

5 Analysis and conclusions

If we look at the big picture we can see that the copyright laws of the UK, Sweden and Canada aren't that different. For instance they all divide copyright into economic and moral rights, the laws only protects the expression of the idea and not the mere idea, and also none of the countries allow copying of someone else's work. The harmonisation of the copyright law, not only within the European Union in which the UK and Sweden belong to, but in big parts of the world depend on international treaties that a lot of countries have chosen to ratify. This has led to similarities between the different Copyright Acts of the UK, Sweden and Canada. There are of course big differences within the countries copyright laws as well, especially when you start to take a look at them in more detail. In this paper I have decided to look more closely at each country's interpretation of original, but more importantly on how their copyright laws deal with parodies. The conclusion is that they deal with these questions very differently.

The interpretation of original
In some way the UK, Sweden and Canada require that for a creation to be protected by their copyright law, it has to be an original work. Although nowhere in either of their Copyright Acts is there a definition of the word, and this has led to complications for all three countries when interpreting it.

The UK might at first sight seem to be the country with the simplest originality test, since here a work only requires labour, skill or effort to fulfil the requirement. However, if we look closer to court rulings regarding this question we see that unfortunately it isn't that simple. Even though the requirements of labour, skill or effort can be said to be the main rule for the interpretation of original, there are a lot of complementary rules and exceptions. For example courts have stated that the interpretation can only be decided on a case-to-case basis, meaning that there are no firm rules for when a creation is considered to be original. Also in dealing with this matter courts have taken other things into consideration. These include things such as how the works was created and whether it's a copy of someone else's work; in other words the work has to originate from the author.

The courts have however held that the threshold for originality in general should be low, even if they have also said that trivial work cannot get copyright protection. To make the originality approach even more complicated the courts do not seem to agree on how to use the words labour, skill or effort. Since sometimes other words such as judgement, capital or time is used instead. Also there is an inconsistency in using "and" between the words that the courts list as required for original, and the using of "or" between them instead. Using different wordings when describing the same problem makes understanding the interpretation of originality even more complicated.

Depending on your view, in order to get an understanding of originality, the method the UK has employed has either simplified the process, or made it more complex. The courts have decided to divide the works into, new or derivative works, tables and compilations or computer-generated works. When it comes to new works, the courts have looked upon it as if the creation originated from the author and not someone else. However the new work won't be considered original if the result is too trivial or

insignificant, but even a very simple work can get copyright protection. When it comes to derivative works three criteria have been set to determine the original requirement; the labour must be of the right kind, the effort must bring about a material change in the work and the change must be of the right type. The originality approach used for derivative work also applies when referring to tables and compilations. However in these kinds of works the courts have looked at either the quality or the quantity of the labour which has been used. Finally when it comes to computer-generated works the courts have still not made it clear what the requirement are for this work to be seen as original.

When it comes to the interpretation of original in the UK, I feel as if the requirements are not very clear, and it can be very hard to grasp how the concept of originality should be interpreted. I am of the opinion that the Supreme Court of the UK should come to a consensus and define original and it's requirements in a clear and precise way. This would make it much easier for the lower courts when ruling on this matter. Also if all the courts could be on the same page in interpreting originality, it would create a better legal position for the copyright law in the UK.

In Sweden the concept of "verkshöjd" is being used as the requirement that has to be fulfilled for a work to gain copyright protection, translated into English the concept can mean original or distinctiveness. To fulfil the requirement of "verkshöjd" in Sweden would be the same as fulfilling the original requirement in the UK and Canada. "Verkshöjd" isn't used explicitly in the Swedish Copyright Act, but it is a generally accepted concept used to decide if a creation has what it takes to get protection. There isn't an exact definition of "verkshöjd", and this creates problems since it makes it difficult to know how to interpret it.

The threshold for a work to fulfil the "verkshöjd" requirement is seen to be very low in Sweden. Although the courts still take many criteria into consideration before they decide if a work has "verkshöjd", and therefore gain copyright protection. In Sweden the criteria that have been considered when deciding if a work fulfils the requirement of "verkshöjd", is if there has been independence and originality in the creation of the work. The courts also look to individuality, quality and quantity criteria. Also there should be no possibility of double creation. This means that there is limited to no risk that two people will independently create the same work. Even though Sweden has all of these criteria that the courts consider when deciding whether a work has "verkshöjd" or not, it is still incredibly hard to determine the meaning of the word in practice.

For me, it seems as if Sweden has attempted to define what the necessities are to fulfil the requirement of "verkshöjd". When studying the meaning of this concept it felt as if I could get some understanding on the interpretation of it. However I came to conclude that in practice it isn't as easy to determine the definition of "verkshöjd", which I find regretful. I do appreciate the courts attempt to make it clear, but I believe they can find a way to make it even clearer. If they could for instance decide the value that needs to be put into each of these criteria, we might better be able to understand them and their employment in determining "verkshöjd". Although I understand that the courts can't set too firm a line here, since the law needs to retain some of it's flexibility.

Just like the UK, Canada also has a requirement in their Copyright Act which states that works must be original, but there is no definition of the word in the act. Before 2004 Canadian courts used two different standards when they decided upon originality. On one hand they used the UK criteria of skill, judgement and labour and on the other hand they used a test of a modicum of creativity, which derived from the United States. However, a Supreme Court case from 2004 has introduced a new original standard that should be applied in Canada, and it is a standard that puts the country in between the original requirement of the UK and the United States.

In this Canadian case the Supreme Court held that for a work to be original it has to originate from the author, and it is not allowed to be copied from someone else. Also the work is required to be a product of an author's exercise of skill and judgement. The courts also made it clear what they meant by "skill" and "judgement". Finally the court held that the work wasn't allowed to be too trivial and it should neither be purely a mechanical exercise. If these criteria were fulfilled the Supreme Court stated that a creation should be considered as being original.

I think that the Canadian Supreme Court has done a really good job trying to explain and define the concept of originality. For me the different criteria which needs to be fulfilled, are made very clear, and I also like the fact that the courts have defined what they mean by skill and judgement. Since these are terms that would otherwise be interpreted very unsystematically by the lower courts, so it is therefore great that a definition exist which can be used. However, I do believe that it is important for the originality requirement to not become too stringent, since we must leave room for interpretation in a variety of different circumstances. I am of the opinion that the Canadian Supreme Court has not done this when creating and explaining the new requirements for the concept of originality.

When examining the requirements of originality for these three countries, we can see that none of them have succeeded in putting a useful definition on the concept within the statute. This has led to all three countries having different approaches in dealing with the concept. We can see some similarities between the British and the Canadian interpretation of originality. Both countries look to skill and judgement in some sense. The Canadian Supreme Court has explained what they mean by these two words; while in the UK they have just been used without being given any detailed explanation. Also the UK has in some cases used other words such as effort, time and capital instead. The UK and the Canadian approach are also similar in the sense that they both look for the work originating from the author and it not being a copy. They also state that a trivial work cannot gain copyright protection.

Sweden's approach to their originality requirement of "verkshöjd" is different to the British and Canadian approach. Sweden takes into consideration a lot of different criteria when compared to Canada, which has only set out a few requirements. What all the countries do have in common however in my opinion, is the fact that it seems as if they don't want to be too limiting in their approach. That is probably why they have chosen not to define the concept in their statute. I understand that the concept needs to be flexible, so it can be used in all types of situations. However I do prefer the way Canada has chosen to handle and explain their criteria for the concept. For me it feels like they are the ones with the most structure, which also means that it will be easier to interpret the concept within the guidelines since they are made quite clear.

Sweden has also done a decent job with describing the features needed for a work to be seen as having "verkshöjd". Although I would prefer that the list of criteria would be rendered a little shorter, since too many criteria make it confusing.

The UK approach to the concept of originality is the one I find to be the inferior. It is an interpretation that is very confusing and hard to comprehend, and I think the Supreme Court of the UK should seriously consider adopting a clearer interpretation. Maybe the UK could get some inspiration from the Canadian approach, since still up to this day they have many criteria for originality in common. The UK needs to find a unanimous approach that all the courts can follow. However I do believe that all three countries can work on a better and clearer interpretation of their originality requirement. Even if it isn't an easy thing to do, I think that a more concise definition will in the long run save the courts both time and money.

Parody

When looking at how the different countries have chosen to deal with parodies, we can see that they are, similar to their interpretation of original, completely different. If we first look at the British approach we can see that they have chosen not to implement an exception for parodies in the C.D.P.A. They have also chosen not to give parodies any special treatment. Even though there is case law suggesting that special treatment for parodies would be a valid approach, more recent cases have been of a contrary opinion. Parodies are therefore in the UK often seen as infringement, since substantial parts of the original work is often taken when making a parody. According to case law the general rules for infringement applies to parodies and no exceptions are to be made here. In the UK parodies often infringe both the moral and the economic rights.

It has been suggested that parodies should fall within the fair dealing defence of criticism and review, or that they should be allowed according to freedom of expression. Some have even suggested that parodies should be considered as transformative use, while others have held that disallowing them can lead to market failure. All these suggestions on why parodies should be allowed have however not gained any support either in the statute or by the courts. Trying to interpret parodies as legal with these stated defences has failed and I believe that to be regretful. This would be a great opportunity for the courts to lead the way with this question.

The way in which the UK deals with parodies has created incredible problems. This is because their copyright law states that parodies are not allowed, and will under most circumstances be considered to be infringement. For me it is really hard to understand how something that has existed for thousands of years and that most people appreciate and find funny, can be illegal. According to me this is an extremely big problem that hasn't been dealt with in good respects under the British copyright law. The UK needs to find a better way to deal with parodies and come to a better understanding of how this problem should be solved. If the government won't do anything about this, the courts must put their foot down and come up with a solution, because the confusion that exists when it comes to parodies cannot continue. There is a need for an exception to parodies in the British copyright law; otherwise both the Gowers Review from 2006 and the Hargreaves Review from 2011 would not be suggesting that an exception be implemented in the C.D.P.A. The problems that parodies have created are being studied not only by me but also in the doctrine and articles, which all seem

to conclude that measures need to be taken. The general consensus is that parodies should be seen as legal either by an expressed exception in the law or indirectly by them being given special treatment. The question is only how long we have to wait before the UK government and courts will begin to understand this.

Moving on, we look at how Sweden has chosen to deal with parodies in their copyright law and we can see they have attempted to make it simpler then the UK. However just like the UK, Sweden has attempted not to have an expressly implemented exception for parodies in their Copyright Act. Instead they have decided to give parodies special treatment, meaning that they can always be seen as being new and independent work, no matter how much was taken from the original. Sweden also sees parodies as an independent creation since they obviously serve another purpose then the original. In Sweden parodies are not infringing either the economic or moral rights. However, in the case *NJA 2005 s. 905* the Supreme Court of Sweden held that under certain circumstances, those of which were not described in detail, a parody could infringe the original author's moral rights even if the parody is seen to be an independent work.

In comparison to the UK, Sweden has dealt with the problems that parodies generate by making the creation of them legal. Parodies are given special treatment by being seen as new and independent work. What I like about this is the fact that the Swedish courts don't have to judge if there has been any substantial taking etc. However, what becomes problematic with this view is that the word parody isn't defined anywhere in the statute, and the Supreme Court hasn't really made clear how it should be interpreted. I am of the opinion that Sweden should get a better definition or guidelines for what a parody is, because it shouldn't be sufficient for an author to only claim that he created a parody so he won't be liable for infringement. If there was a better understanding of how parody should be interpreted under the Swedish copyright law, this wouldn't be a problem. Although it suffices to say that this does not currently seem to be a big problem for courts dealing with cases concerning parodies.

The fact that there aren't that many cases overall in Sweden related to parodies, are in my regards a sign that this question is not seen as too problematic. However, in *NJA 2005 s. 905* it was held that parodies could be infringing moral rights, but under which circumstances this could be has not been mentioned in any detail. This case has left us with a lot of question marks and I hope that this is something the courts will examine and explain better in the near future.

Finally looking at the Canadian way of dealing with parodies, we can see that they have chosen a way that differs from both the UK and the Swedish method, by implementing an exception for parodies in their Copyright Act. The exception for parodies under their fair dealing defence was made quite recently on the 7th of November 2012. Prior to this amendment the Canadian view on parodies were very similar to the British one, meaning that Canada before 2012 also tried to interpret parodies under the fair dealing defence of criticism and review without any luck. Before the implementation of the parody defence they were often considered to be infringing, since in most cases there was a substantial taking of the original work.

However it is not enough for a work to fall within one of the statutory purposes of fair dealing to be covered by this defence, e.g. parody. The use must also be seen as fair and in the *CCH* case a six-part test was introduced to determine this. I think that it is great that the Supreme Court of Canada has set up this fairness test, since it makes it easier to determine the factors that should be taken into consideration. Since the Supreme Court has made the fairness test very clear, we also know how and when we can use the fair dealing defence in for example parodies.

We could see that before 2012 Canada had in some respects the same problems with parodies, which the UK still struggles with. I really prefer the way in which Canada has chosen to deal with the interpretation of parodies; it just doesn't get any clearer than having an explicit exemption in the statute. Just like in Sweden the word parody isn't defined and this may create problems in the future. However, since this amendment is a very new one and there isn't any case law dealing with this matter yet, we can only wait to see if the court will decide to define the word.

The main problem with parodies is that they often use a substantial part of the original author's work in order to create comedy. Most of the time this will lead to them not being seen as an original work, this is due to them not having fulfilled the requirement of originality. To solve this problem the UK, Sweden and Canada have chosen to deal with parodies in their own individual way, and according to me all of these methods have their advantages and disadvantages. Having said that I have to say that it is extremely hard for me to see any advantages in the way in which the UK has dealt with this matter. Compared to Sweden and Canada, the UK seems to ignore the fact that parodies are a problem when you look at it from a copyright perspective, and they have chosen to do nothing about it. Canada similar to the UK has had trouble dealing with this problem, but instead of just ignoring it they decided to actually do something about it. I am not saying that the UK has to solve this in the same way that Canada has. I understand that the laws of the UK are based on case law, which is designed to make the legal system more flexible, but when there are no good solutions given it should be the government's role to determine legislature. Parodies have been around for so long that they are embedded in our culture, and making them illegal is in my regard ridiculous. I am not saying that the Canadian or Swedish way of dealing with parodies are the best or even right, but at the very least they have provided a solution. It is my opinion that this question should be dealt with immediately, because I don't want to live in a world where parodies are illegal.

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