Parody and Fair Markets

Author : Jessica Silbey

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Kris Erickson, Martin Kretschmer, and Dinusha Mendis, Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options (2013).

In December 2011, the UK Intellectual Property Office commissioned the Centre for Intellectual Property Policy and Management at Bournemouth University to research the effects of parody on copyrighted works. Do parodies harm the market for the underlying work? How might we measure the economic effects of parody, as incentive depressors or engines?

UK copyright law does not contain an exception specifically covering parodies. The authors of the study perceive the UK copyright law as one of the most restrictive in seven jurisdictions surveyed (US, Canada, Australia, France, Germany, Netherlands, UK) with regard to parodies. By commissioning this research, the UK appears to be considering reform. The study concludes that changes loosening the reign of copyright over parodies would further copyright's underlying purposes of creation and dissemination.

This research is one of the first of its kind to measure empirically the economic effects of parody on the underlying copyrighted work. It was conducted in three parts and this paper is the synthesis of the full research. The focus of the study was of music videos on YouTube and whether "commercial exploitation of original works is affected by the presence of parodies where they can be considered to be part of the same market." (p. 5.) It also investigates the potential for parodies to be a source of growth for the UK creative economy. The study compares treatment of parodies in the seven jurisdictions listed above to discern core concerns of parody to copyright. At the end, the synthesis applies the distilled principles of parody exceptions to the empirical sample to discern potential effects on creative and distribution incentives.

To be sure, there are many limitations to the generalizability of this study beyond music videos. The authors recognize that all on-line media may not adhere to the same audience behavior or market patterns. And offline parody markets (traditional print media or some visual arts) are likely to present "unique dynamics." (p. 6.)

Nonetheless, the findings from this study are worth serious consideration by those jurisdictions in which parody exceptions are weak. Further, this study provides fodder for argument that complementary production of creative works – be they parodic, satirical or merely derivative – are unlikely to undermine the incentive to create and disseminate the work because parodies rarely substitute for the original in the marketplace. Indeed, as the authors describe, complementary works, or works in conversation with original works, do not intend to substitute for the original work but to draw attention to both the original work and the new work, lifting both up to a larger audience for inspection and enjoyment.

The main conclusion from the study is that parody is a significant consumer activity in the music video marketplace (24 parodic videos for each original video of a hit single song on average); and there is no evidence of economic damage to musical video rights holders through substitution. In fact, the presence of parody videos correlates with larger audiences for the original.

The nine criteria the authors distilled from the seven jurisdictions applying a parody (or parody-like) exception do not easily align with the empirical conclusions of the study. (The primary data set was of 343 original music videos comprised of the top-100 charting music tracks from 2011.) For example, the first two criteria – that the parody be non-commercial and not have an adverse affect on the market for the original – are often at odds in the empirical data. The study concludes that an enforced “non-commercial” criterion would prohibit 31.1% of the sampled videos and 91% of the audience for all the music videos. That is a lot of content that could be enjoined were “non-commerciality” required for a parody exception! And yet, if the predominant factor for the exception was that the parody must not adversely affect the market for the original, only 0.5% of the sample and 0.2% of the audience would be prohibited. That leaves a lot of content freely distributable. (The authors concede drawing the line of “commerciality” broadly and still these numbers are startling.)

Similarly, if one enforced the factor that the parody “must not use more of the original than necessary,” 81% of the sample would be prohibited along with 76.7% of the audience. And if it was important legally that the parody be “directed at the work” (a “target” parody rather than a “weapon” parody), 65% of the sample would be barred along with 39% of the audience. By contrast, the factor that the parody “add some significant new creation” (be modestly transformative or evidence independent creativity) would prohibit only 20% of the sample and 18% of the audience.

These criteria and their application to the sample of music videos indicate that the jurisdictions applying them tend to overprotect copyrighted works in relation to whatever market harm the original works might suffer and threaten with injunction large amounts of significantly creative work that engages in cultural conversation with and before very large audiences. There appears to be little reason to prohibit parodies if these conclusions carry over to other genres of copyrighted works.

The last criteria are about personality or moral rights of the authors and they, surprisingly, align with the sample’s conclusions that would keep the parodies circulating. The criteria that the parody not harm the personality rights of the original author would leave freely distributable 98.5% of the sample to 77.2% of the audience. And the criteria that the parody acknowledge the source of the original covers 100% of the sample. Jurisdictions applying these criteria – which are not about market harms but about moral or emotional concerns related to authorship – should have no problem with the hundreds and thousands of parodies of copyrighted music videos on YouTube.

And yet the regulation of parody under copyright law remains an open question, especially in the EU and in the UK in particular. What this important study shows – and sets the stage for more such analysis – is that copyright holders and the creative economy generally need not be afraid of parodies. In fact, parodies should be embraced as good for authorship, good for audiences and good for the economy.

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