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Parody's Precarious Place: The Need to Legally Recognize Parody as Japan's Cultural Property

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PARODY'S PRECARIOUS PLACE: THE NEED TO LEGALLY RECOGNIZE PARODY AS JAPAN'S CULTURAL PROPERTY

*Mariko A. Foster**

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I. INTRODUCTION

From satirical 12th century drawings of rivaling Buddhist schools to modern day cartoons and commercial posters, Japanese literature and art abound with parody.¹ The best records of early Japanese parody date from the mid-17th century when Japan experienced the rise of a publishing industry and the mass production of printed material.² This printed material, *kana-zōshi* (booklets in vernacular prose), covered a range of genres including parodies, which used and adapted texts from the previous Heian and medieval periods³ into humorous versions for contemporary popular culture.⁴ Examples include *The Dog Pillow*, a parody of Sei Shōnagon's *Pillow Book* and *Nise Monogatari* (Fake Tales), a word-for-word parody of *Ise Monogatari* (The Tales of Ise).⁵ Other literary forms include *senryū* (satirical haiku), *kibyōshi* (satirical pictorial books), and *kyōka* (wild poetry).⁶

Today, parody is common in Japan's anime industry. *Doujinshi*, which traditionally refers to works such as poetry or short stories for distribution within a specific association or society, is increasingly used to refer to manga or anime featuring characters not originally created by the author.⁷ Today's *doujinshi* authors use manga or anime characters from well-known series and create their own plots and side stories.⁸ For instance, there is a *doujinshi* community that creates parodies involving the *Pokemon* character and other characters from the *Pokemon* series.⁹ Of particular note, *doujinshi* do not necessarily steal profits from the original, but enhance the market for the original by causing customers and fans that enjoy the parodies to seek out the original.¹⁰ It is per-

1. Martin Repp, *Buddhism and Cartoons in Japan: How Much Parody Can a Religion Bear?*, *Japanese Religions* Vol. 31(2), 187-203.

2. EARLY MODERN JAPANESE LITERATURE: AN ANTHOLOGY, 1600-1900 22 (Haruo Shirane ed., 2002).

3. The Heian Period spans from A.D. 794 to A.D. 1185 and the following medieval periods date from A.D. 1192 to A.D. 1603.

4. Shirane, *supra* note 2.

5. *Id.* at 23-25.

6. *Id.* at 16-18.

7. Salil Mehra, *Copyright And Comics In Japan: Does Law Explain Why All The Cartoons My Kid Watches Are Japanese Imports?*, 55 RUTGERS L. REV. 155, 164 (2002).

8. *Id.* at 164-65.

9. See Mehra, *supra* note 7.

10. *Id.* at 197.

haps for this reason that copyright holders and the authors of the original works have generally let *doujinshi* authors continue with their art.¹¹

Despite the prevalence of parody in Japanese society, under Japan's copyright law, parody is not recognized as a permissible use of copyright unless the user has received the copyright holder's consent.¹² Notably, Japan's courts have consistently refused to recognize a parody defense.¹³ For instance, in 2001, plaintiffs with rights to the Japanese translation and reproduction of Spencer Johnson's popular motivational book *Who Moved My Cheese?* alleged that the defendants infringed those rights through the work *Where Did the Butter Melt?*¹⁴ The defendants raised parody as a defense, but the Tokyo District Court rejected this stating that a Japanese court has never allowed parody nor provided any possible reason for allowing parody.¹⁵ Instead, the court found that Japanese courts generally evaluate parody under the "quotation" exception to copyright or find a blanket violation of an author's moral rights because a parodist changed an original work without the author's consent.¹⁶

Arguably, there is a conflict between Japan's cultural works and the country's copyright law. This conflict becomes more striking when one considers that the purpose of Japan's Copyright Act is to protect the cultural property of pan,¹⁷ and how parody has contributed to and developed Japanese culture over several centuries. Parody is an important aspect of the Japanese culture and should be entitled to protection under the country's copyright law.

This article argues that Japan's existing copyright law cannot properly address parody through its current excep-

11. *But see id.* at 198-200.

12. Chosakukenhō [Copyright Act], Law No. 48 of May 6, 1970, as amended by Act. 65 of December 3, 2010, art. 2 sec. 20 (Japan) (hereinafter "Chosakukenhō").

13. PETER GANEA & CHRISTOPHER HEATH, JAPAN COPYRIGHT LAW: WRITINGS IN HONOUR OF GERHARD SCHRICKER 69-70 (Peter Ganea, Christopher Heath, and Hiroshi Saito eds., 2005).

14. Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Dec. 19, 2001, Hei 13 (yo) no. 22103, CHITEKI ZAISAN SAIBAN REISHŪ [SAIBANREI JŌHŌ] available at <http://www.courts.go.jp> (Japan).

15. *Id.*

16. GANEA, *supra* note 13, 69-70.

17. Chosakukenhō; See Geoffrey R. Scott, *A Comparative View of Copyright As Cultural Property In Japan And The United States*, 20 TEMP. INT'L & COMP. L.J. 283(2006) (comparing view of cultural property between Japan and U.S.).

tions to copyright and that strong moral rights within the Copyright Act negate any possibility for a parody defense. Specifically, Part II will explain what parody is and how other legal systems define and allow for it. Part III will examine the Japanese courts' decision in one parody case and show how Japanese copyright law proves ineffective in addressing parody. Finally, Part IV will recommend that Japan adopt an exception for parody based on lessons and concepts from Australia, the United States, and France. The exception will provide a working definition for both parody and satire, recognize parody and satire as transformative works, and restrict moral rights in cases involving parody and satire. Such an exception will conform with the Berne Convention Three-Step Test, the international standard for creating exceptions to copyright, and protect cultural property in accordance with Japan's Copyright Act.

II. PARODY SERVES A CRITICAL PURPOSE IN SOCIETY AND IS PERMITTED UNDER SEVERAL LEGAL REGIMES

Parody is a creative genre that comments in a critical manner.¹⁸ As “a dialectic substitution of formal elements whose functions have become mechanized or automatic,”¹⁹ parody is an important outlet for human expression to point out the conventional, criticize the status quo, and suggest change.²⁰ Mad Amano, Japan's leading political parodist, has stated that “[expressing] ridicule is the most effective weapon for us common people to take a stand against authority.”²¹

Although Mad Amano used the word “ridicule,” such expression is but one manifestation of parody. This is evident in the range of works that employ parody. For instance, Aristotle's *Poetics*, Shakespeare's plays, or even Jon Stewart's nightly segments on *The Daily Show with Jon Stewart* all employ parody to varying degrees.

As evidenced in the aforementioned works, parody uses a target work to highlight flaws in that target.²² This use vio-

18. LINDA HUTCHEON, *A THEORY OF PARODY: THE TEACHINGS OF TWENTIETH-CENTURY ART FORMS* (2000).

19. *Id.* at 35.

20. *Id.* at 34-36.

21. Tetsushi Kajimoto, *Top Parodist Serves Anti-Koizumi Camp*, THE JAPAN TIMES ONLINE (Aug. 14, 2004), <http://search.japantimes.co.jp/cgi-bin/nn20040814a8.html>.

22. See Hutcheon, *supra* note 18, at 36.

lates copyright law in several countries, including Japan, that grant exclusive copyright to a work's creator.²³ This exclusive copyright includes economic rights such as the right to reproduce a work and to create derivative works.²⁴ Therefore, when parodists use a copyrighted work, they are arguably violating the copyright holders' right to reproduce their work or creative derivatives based on the original work. Additionally, many countries, grant authors moral rights, which provide, for example, protection against distortion of one's work.²⁵ Moral rights are an insurmountable hurdle for parodists who essentially distort an original work in order to make their point.

Despite legal arguments against parody, several governments have recognized some type of parody exception to exclusive copyright in order to promote policy goals such as innovation, cultural appreciation, free expression, etc.²⁶ Three such governments are the United States, Australia, and France. Each has a lesson for Japan in terms of how and why Japan should adopt parody exception. For instance, the United States adopted a unique approach through the Fair Use Doctrine, which is designed to avoid the rigid application of copyright law where its application may stifle creativity.²⁷ In employing Fair Use Doctrine, the United States Supreme Court has found a parodist's use of copyrighted material permissible where the Fair Use Doctrine's factors balanced in the parodist's favor.²⁸ Australia, another common law system, has also recently recognized parody and satire as permissible uses by statute where the use fits its Fair Dealing criteria.²⁹ Stating that Australians "have always had an irreverent streak," Philip Ruddock, Australia's Attorney-General, praised the bill authorizing the use of parody and satire as

23. Chosakukenhō, art. 1.

24. *Id.* at arts. 21 and 28.

25. See Chosakukenhō, arts. 18-20 (Japan); Loi 121-9 du 1 juillet 1992 Code de la Propriété Intellectuelle [Law 121-1-9 of July 1, 1992 on the Intellectual Property Code], Journal Officiel de la République Française [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 3, 1992 (granting such moral rights) (hereinafter "Code de la Propriété Intellectuelle").

26. See Parts II.B-D, *infra*.

27. *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

28. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581-82 (1994) (analyzing parody through balancing the Fair Use Doctrine's factors).

29. *Copyright Act 1968* (Cth) s 41A (Austl.).

recognizing Australia's tradition.³⁰ The exception under Fair Dealing represents a hybrid of naming parody and satire as protected uses and using a factor balancing test.³¹ Certain ambiguities make its application uncertain, but Japan may still learn from these flaws.³² Finally, France is particularly instructive for Japan because it not only makes an exception for parody and satire by statute, but also restricts moral rights where a use is for parody or satire.³³ This is significant because France's copyright law, from which Japanese copyright law draws its theoretical basis,³⁴ is founded on a natural rights perspective and has traditionally maintained a strong and pure set of moral rights for authors.³⁵ The French government's restriction of those moral rights in the case of parody and satire speaks loudly, and Japan should listen.

Additionally, the Berne Convention, an international treaty regarding copyright law, provides the standard for creating exceptions to exclusive copyright protection known as the Three-Step Test.³⁶ While free to create its own legislation, Japan, as a signatory to the Berne Convention, may desire to conform to this international treaty. The Three-Step Test and how Japan may conform its legislation to this test is further explained in Section IV.D, *infra*.

30. *Parody, Pastiche, & Caricature Enabling Social and Commercial Innovation in UK Copyright Law*, Consumer Focus, available at <http://www.consumerfocus.org.uk/files/2011/07/Consumer-Focus-Parody-briefing.pdf>.

31. See *Copyright Act 1968* (Cth) s 41A (Austl.).

32. Ben Mee, *Laughing Matters: Parody and Satire in Australian Copyright Law*, 20 J.L. INF. & SCI. 61, 95-96 (2010).

33. Code de la Propriété Intellectuelle.

34. See Part III.C, *supra*.

35. See STINA TEILMAN-LOCK, BRITISH AND FRENCH COPYRIGHT A HISTORICAL STUDY OF AESTHETIC IMPLICATIONS, 34-36 (2009) (stating that French copyright law is justified in reference to the personality of the author or to his capacity for original composition).

36. PAUL GOLDSTEIN & BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT 155 (2d ed. 2010).

A. *Parody Is a Transformative Work, Which Comments in a Critical or Humorous Manner*

To fully understand parody's critical purpose in society, one must develop a clear idea of what parody is. One of the key characteristics of parody is its ability to develop new literary forms out of old. As Professor Linda Hutcheon³⁷ writes:

Out of the union of chivalric romance and a new literary concern for everyday realism came *Don Quijote* and the novel as we know it today. Parodic works like this one—works that actually manage to free themselves from the background text enough to create a new and autonomous form—suggest that the dialectic synthesis that is parody might be a prototype of the pivotal state in that gradual process of development of literary forms.³⁸

This passage highlights two aspects of parody. First, parody involves a taking of an original work; and, second, parody involves creativity that changes the original work into a new form.³⁹ This is parody's transformative quality.

The first portion of the transformation process—taking an original work—raises the legal issue of whether the parodist is infringing on original authors' rights to reproduce or create derivatives of their own works. Additionally, some copyright systems provide authors with moral rights.⁴⁰ These include such rights as the right to have one's name identified on a work (attribution) and to protect one's work from mutilation or distortion (integrity).⁴¹ Countries such as the United States, Australia, and France, recognizing parody's social significance, deal with these issues by allowing for a parody exception to exclusive copyright, and there is further discussion on this issue in Part III, *supra*.

Wrapped up with the idea of transforming is parody's other key feature: commenting.⁴² A parody uses another work to comment on that work or the ideas expressed by that work.⁴³

37. Linda Hutcheon is a professor of English at the University of Toronto and an author of several books on literary theory and criticism. She is particularly known for her influential theories on post-modernism. See *Linda Hutcheon*, UNIV. OF TORONTO, <http://individual.utoronto.ca/lindahutcheon/> (last visited Feb. 22, 2013).

38. Hutcheon, *supra* note 18, at 35.

39. *Id.*

40. See Chosakukenhō, arts. 18-20.

41. *Id.*

42. 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT §10.94 (2011).

43. *Id.*

When commenting on a work's idea, a parody often makes a comment on society in general.⁴⁴ As a result, the definition of parody has become intermingled with satire.⁴⁵

The Oxford English Dictionary (OED) defines parody as "imitating another work, *esp.* a composition in which the characteristic style and themes of a particular author or genre are satirized by being applied to inappropriate or unlikely subjects."⁴⁶ The OED defines satire as "a poem, or in modern use sometimes a prose composition, in which prevailing vices or follies are held up to ridicule."⁴⁷ The main distinction is that parody targets a particular work and comments on it as a work by mimicking, for example, its style or structure. Satire, on the other hand, uses a work to convey its ideas on, for example, society, contemporary ideas, or a person. Some scholars have thus called parody "target parody" and satire "weapon parody."⁴⁸ Similarly, Sanseido Dictionary, a Japanese dictionary, defines parody as that "which mimics the characteristics of a known work and transforms or recreates that work in a humorous manner."⁴⁹ The definition for satire is that which "criticizes society [or] a person."⁵⁰

Although people frequently conflate parody with satire, it is important to distinguish the two when applying law. In the United States, the Supreme Court draws a distinction between parody and satire stating that "[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's . . . imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."⁵¹ Under United States Law, parody possesses a claim to transformative use because it involves

44. *Id.*

45. Hutcheon, *supra* note 18, at 51.

46. *Parody Definition*, OXFORD ENGLISH DICTIONARY, www.oed.com (last visited October 20, 2011).

47. *Satire Definition*, OXFORD ENGLISH DICTIONARY, www.oed.com (last visited October 20, 2011).

48. Christian Rütz, *Parody: A Missed Opportunity?*, 8 IPQ 284 296-97 (2004) .

49. *Parody Definition*, Sanseido.net Web Dictionary, <http://www.sanseido.net/User/Dic/Index.aspx?TWords=%E3%83%91%E3%83%AD%E3%83%87%E3%82%A3%E3%83%BC&st=0&DailyJJ=checkbox>; *See also*, *Parody Definition*, goo Jisho, <http://dictionary.goo.ne.jp> (including "satirical" in definition for parody).

50. *Satire Definition*, Sanseido.net Web Dictionary, <http://www.sanseido.net/User/Dic/Index.aspx?TWords=%E9%A2%A8%E5%88%BA&st=0&DailyJJ=checkbox>.

51. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581-82 (1994).

commenting on an earlier work.⁵² A satire defense, on the other hand, is less certain. Also uncertain is whether the Court intended to create such a sharp distinction.⁵³ In comparison, Australian and French laws provide an exception to copyright for both parody and satire.⁵⁴ Discussion on these legal regimes follows in sections B, C, and D below.

B. The United States Allows Parodies Where the Fair Use Doctrine Factors Balance in Favor of Permitting the Use Over the Copyright Holders' Rights

The United States' Fair Use Doctrine stems from English common law, and Justice Joseph Story first articulated the concept in the 1841 case *Folsom v. Marsh*.⁵⁵ In 1970, Congress codified the Doctrine in Section 107 of the U.S. Copyright Act.⁵⁶ The section's preamble provides that "the fair use of a copyrighted work . . . by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright."⁵⁷ Instead, the use is considered fair where the following four factors balance in the user's favor: 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work.⁵⁸

The United States adopted the Fair Use Doctrine to permit and require "courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity

52. PATRY, *supra* note 42, at §10:87.

53. See Part II.B., *supra*, for further discussion.

54. *Short Guide to Copyright – October 2011*, AUSTRALIAN GOVERNMENT ATTORNEY-GENERAL'S DEPARTMENT, available at <http://www.ag.gov.au/RightsAndProtections/Documents/ShortGuidetoCopyright-October2012.pdf>.

55. 9 F. Cas. 342 (C.C.D. Mass. 1841); see Patry, *supra* note 42 at §10:2 and §10.4 (discussing origins of the Fair Use Doctrine); *Folsom*, 9 F. Cas. at 349 (Justice Story admits that the copying of another's work, even if not constituting a major part, is clearly an invasion of privacy. However, he suggests that the analysis would be different where the copying is deemed a fair and bonafide abridgement.)

56. 17 U.S.C. § 107 (2006).

57. *Id.* (parenthetical omitted).

58. *Id.*

which that law is designed to foster.”⁵⁹ The factors are guidelines for courts to consider when determining whether a use of copyrighted material is fair. No one factor is determinative; although, the first, third, and fourth factors are particularly important to parody.⁶⁰

The Fair Use Doctrine is effective because the United States' Copyright Law does not recognize moral rights broadly.⁶¹ As a further limitation, United States authors may waive any moral rights they do have, which is not possible in most other legal regimes including Japan.⁶² The lack of moral rights in general makes it possible for the Fair Use Doctrine to operate and deem certain uses fair.

There also exists an interesting relationship between the Fair Use Doctrine, copyright, and the First Amendment.⁶³ The First Amendment has influenced the Fair Use Doctrine's underlying principle to provide exceptions to copyright. The First Amendment and copyright also appear to share similar goals of encouraging free expression, and, through that, the cultivation of new ideas.⁶⁴ Nevertheless, the Fair Use Doctrine and copyright are in tension where the former takes away copyright protection from copyright holders and the latter denies use to copyright users.⁶⁵ The courts also generally reject First Amendment claims as complete defenses against copyright infringement in favor of the Fair Use Doctrine.⁶⁶

59. *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (citation omitted).

60. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (stating that the second factor is “not much help in this case” and providing analysis of the other Fair Use factors).

61. While the Visual Arts Rights Act (VARA) grants the moral rights of attribution and integrity, these rights only apply to a narrow set of works: paintings, drawings, prints, sculptures, photographic stills for exhibition only, and existing in single copies or in limited editions of 200 or fewer copies, signed, and numbered by the artist. 17 U.S.C. § 106A (2006).

62. *Compare id. with Chosakukenhō*, arts. 18-20.

63. For a discussion on this relationship see Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831 (suggesting that public policy concerns should compel application of First Amendment principles in copyright infringement claims against parodies); Charles C. Goetsch, *Parody as Free Speech – The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. NEW ENG. L. REV. 39 (1980) (suggesting creating a category of “legal parody” that has First Amendment protection against a copyright infringement claim).

64. Bauer, *supra* note 63, at 840-44.

65. *Id.*

66. *Id.* at 851. Although courts have recognized a First Amendment defense in trademark infringement claims, *see Mattel v. MCA*, 296 F.3d 894 (9th Cir. 2002) (find-

One can perhaps understand the relationship between the three concepts as a range of tolerance with the First Amendment the most tolerant, copyright the least, and the Fair Use Doctrine occupying the middle.

1. Under the First Factor, Parody Is Considered a Transformative Work

The Fair Use Doctrine's first factor asks the court to focus on the purpose and character of a use. This allows a court to consider uses that are not listed in Section 107's preamble and to evaluate parody by whether it creates a new transformative work. As discussed in section B, *supra*, transformative use is one of parody's key characteristics. William Patry⁶⁷ writes, "[t]he transformative use inquiry thus focuses on the use, not the user: whether a given use is fair involves answering the question, 'What use was made?' not 'Who is the user?'"⁶⁸

For example, in *Campbell v. Acuff-Rose Music, Inc.*,⁶⁹ the U.S. Supreme Court found fair use where a rap group called 2 Live Crew parodied the song "Oh, Pretty Woman."⁷⁰ In analyzing the first factor, the Court stated:

2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day It is this jolter of reference and ridicule that marks off the author's choice of parody from the other types of comments and criticism that traditionally have had a claim to fair use protection as transformative works.⁷¹

This analysis shows how the Fair Use Doctrine evaluates

ing that parody did not infringe trademark under nominative use doctrine and the First Amendment).

67. William F. Patry served as a copyright counsel to the U.S. House of Representative in the early 1990s. He also worked as a policy planning advisor to the Register of Copyrights and held a post as Professor of Law at the Benjamin N. Cardozo School of Law. He is currently Senior Copyright Counsel for Google. He is the author of a several volume treatise on U.S. copyright law entitled *Patry on Copyright*. See *Center for the Study of the Public Domain*, DUKE LAW, <http://www.law.duke.edu/cspd/lectures/patry> (last visited Feb. 11, 2013).

68. PATRY, *supra* note 42, at §10:13.

69. 510 U.S. 569 (1994).

70. *Id.*

71. *Id.* at 583.

whether an alleged parody is a transformative work, which comments on an original work. The Court recognizes parody's creative and valuable aspects and provides a way for authors to create these works.

In its first factor analysis, the Court also specified that the commercial purpose of a work is only one element in the work's purpose and character for fair use purposes.⁷² The Court then explained that the less a new work acted as a market replacement for the old work, the more the new work could mimic the old work.⁷³ This emphasizes parody's transformative quality in that parodies may constitute fair use whether or not parodists profit from their work. Patry's question of "what use was made" is not asking whether the work is commercial, but whether the work is creative.

The answer to this question, however, seems to change when applied to satire. As mentioned in Part II.B., *supra*, the *Campbell* court found that while parody has a clear claim to transformative use, satire does not.⁷⁴ It is unlikely though that Justice Souter intended to create a dichotomy between parody and satire and, as Patry writes, that "would indeed be ironic given *Campbell's* statutory efforts to consign to the dustbins of history *Sony's* ill-advised bivalent distinction between commercial and noncommercial uses."⁷⁵ Notably, in *Blanch v. Koons*⁷⁶, the Court of Appeals for the Second Circuit found fair use where Koons, a well-known artist, used a copyrighted image in a collage painting to criticize our consumer driven society.⁷⁷ The court recognized Koons' satirical purpose, but decided that the four factors ultimately balanced in his favor.⁷⁸

72. *Id.* at 584.

73. RODNEY A. SMOLLA, 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 21:12 (2012).

74. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581-82 (1994).

75. PATRY, *supra* note 42, at §10:88; *see Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984) (a fair use discussion requires weighing of a commercial activity).

76. *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

77. *Id.*

78. *Id.* at 254-55.

2. Under the Third Factor, Parody Is Considered a Comment on an Original Work

Next, the third factor, which considers the amount and substantiality of copyrighted material used, is related to the first factor and emphasizes how parody comments on an original work. The courts have recognized that parodies must use more than a “fleeting evocation of an original” work to make its point⁷⁹ and generally follow the “conjure up” test.⁸⁰ The “conjure up” test suggests that a parodist may take enough to remind his audience of the parodied work.⁸¹ How much is enough, however, is an unanswerable question. The Court also warned lower courts against assuming the role of art critic.⁸² The judge should not evaluate the success or artistry of a parody, but rather whether the work transforms or comments on an original work.⁸³

3. Under the Fourth Factor, Parody Is Considered to Serve a Different Market Function than a Parodied Work

Regarding the fourth factor, the Supreme Court has stated that a parody serves a different market function than a parodied work and is unlikely to act as a market substitute for that work.⁸⁴ The role of the courts is to distinguish “[b]iting criticism [that merely] suppresses demand [and] copyright infringement [which] usurps it.”⁸⁵

4. The Fair Use Doctrine has Drawbacks, but Overall Provides a Valuable Means for Artistic Expression

The Fair Use Doctrine is flexible and provides a way to fairly evaluate unique and various artistic expression. However, it has certain drawbacks: for one, the doctrine does not define parody, but rather, courts slowly molded guidelines for what is parody following a case-by-case basis.⁸⁶ For another,

79. PATRY, *supra* note 42, at § 10:98.

80. *Id.*

81. *Id.*

82. SMOLLA, *supra* note 73.

83. *Id.*

84. *Id.* at 590-93.

85. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (internal citations omitted).

86. *See id.* at 569; *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

the “conjure up” test used to determine the third factor is vague and leaves the judge with great discretion, which can easily undermine the Court’s warning that judges not assume the role of art critic. Finally, the Supreme Court’s reasoning for the fourth factor is not based on empirical studies of the effects of parodies on the markets for their targets. The doctrine, nevertheless, provides a means by which parodists may practice their craft in the United States. Protection is not absolutely guaranteed, but parodists’ rights are given consideration against exclusive copyright.

C. Australia Allows for Reasonable Parody through Fair Dealing

In 2006, the Australian government amended its Copyright Act to allow the use of copyrighted material for purposes of parody or satire. The Australian Copyright Act allows exceptions to copyright through Fair Dealing.⁸⁷ Fair Dealing is an enumerated list of possible defenses against an action for copyright infringement.⁸⁸ The list is exhaustive and includes research and study, review and criticism, news reporting, legal advice, and, most recently, parody and satire.⁸⁹

The Australian government created an exception for parody and satire in response to *The Panel Case*, where a television station brought a copyright infringement suit against another station for broadcasting copyrighted material on a weekly television show.⁹⁰ The television show is described as providing light entertainment centered on “discussions of topics such as current affairs, sports, and the arts” and frequently uses excerpts from other programming to make its point.⁹¹

As Fair Dealing did not include parody or satire at that time, the Australian court analyzed the case under the Fair Dealing exception provided for purposes of news reporting.⁹² However, the outcome raised criticism as the court’s approach

87. *Copyright Act 1968* (Cth) s 41A (Austl.) (providing “[a] fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire”).

88. *Id.*

89. *Id.*

90. Mee, *supra* note 32, at 58-64.

91. *Id.* at 58.

92. *Id.* at 57-60.

relied heavily on the judges' impression of fairness and resulted in varying opinions on which broadcasts, under the news reporting exception, were fair and which were not.⁹³

Following significant outcry from the legal, media, and entertainment sectors, the Australian legislature decided to add parody and satire to the list of exceptions considered Fair Dealing.⁹⁴ The legislation states that where a person or organization can demonstrate that their use of copyright material is parody or satire there is no infringement of copyright.⁹⁵

In order to determine whether an act is Fair Dealing, the court must conduct an objective assessment of how and why the material is used.⁹⁶ In the case of parody or satire, the court will first determine whether the copyright user is genuinely using material for parody or satire.⁹⁷ This is somewhat difficult because the legislation left parody and satire undefined, and Australian courts have not yet considered either term.⁹⁸ However, in an information sheet published in February 2012, the Australian Copyright Council stated that "it is likely that a court would look at dictionary definitions of the words to work out what they mean" and gave definitions from the *Macquarie Dictionary*.⁹⁹

After the court determines that a use is for parody or satire, it makes the objective assessment of whether the use is fair in that specific context.¹⁰⁰ Some factors that a court may consider when determining Fair Dealing include: whether the material is published or unpublished, the nature of the material, the nature of the use, the possibility of obtaining permis-

93. *Id.* at 62-64.

94. *Id.* at 56, 63.

95. *Id.* at 69-70; *Copyright Act 1968* (Cth) ss 41A, 103AA (Austl.).

96. *Short Guide to Copyright, supra* note 54.

97. *Id.*

98. *Fair Dealing: Information Sheet G079v06*, AUSTRALIAN COPYRIGHT COUNCIL, (Feb. 2012), available at <http://www.copyright.org.au/find-an-answer/> (select "Fair Dealing: What Can I Use Without Permission (G079v06)").

99. *Id.*; The definitions given are:

"Parody": 1. A humorous or satirical imitation of a serious piece of literature or writing. 2. The kind of literary composition represented by such imitations. 3. A burlesque imitation of a musical composition. 4. A poor imitation; a travesty.

"Satire": 1. The use of irony, sarcasm, ridicule, etc. in exposing, denouncing, or deriding vice, folly etc. 2. A literary composition, in verse or prose, in which vices, abuses, follies etc. are held up to scorn, derision, or ridicule. 3. The species of literature constituted by such composition.

100. *Short Guide to Copyright, supra* note 54.

sion from the rights holder, and whether there was any impropriety in obtaining the material.¹⁰¹ These factors are considered “by the criterion of a fair minded and honest person.”¹⁰²

Even if a court finds in a parodist’s favor based on the factors above, parodists must still prove that their use is “reasonable” to survive a moral rights violation claim. The Australian Copyright Act gives authors the right to maintain the integrity of their work and not to have the work subjected to derogatory treatment,¹⁰³ and the new Fair Dealing legislation does not restrict moral rights, let alone address the issue.¹⁰⁴ A government issued white paper suggests that whether a use is reasonable depends on several factors including the nature of the work; the purpose, manner, and context for which it is used; relevant industry practice; whether the work was created in the course of employment or under a contract of service; and, if there are two or more authors, their views about the failure to attribute or derogatory treatment.¹⁰⁵

In naming parody and satire as permissible uses, Australian Fair Dealing appears effective on its face. However, the actual process to find a Fair Dealing use is still in its infancy. While there is a chance that a parodist may overcome a moral rights claim, without more clearly defined legislation or judicial guidance, this is a gamble for any parodist. Nevertheless, Australia’s efforts to make parody and satire permissible uses within its copyright law are commendable.

Japan can learn from Australia’s failed attempt to address parody under an exception intended for a different type of use and the ambiguities in its current legislation especially in regards to what constitutes parody and satire. In addition, Japan can learn how to reconcile an exception with moral rights.

D. France Allows Parody as an Exception to Copyright and Restricts Moral Rights Claims to Instances Where a Parody Injures or Degrades the Original Author

Unlike Australia, France restricts what scholars call a

101. *Id.*

102. *Id.*

103. *Copyright Act 1968* (Cth) s 195AI (Austl.).

104. *Short Guide to Copyright*, *supra* note 54.

105. *Id.*

pure version of moral rights in order to allow parody.¹⁰⁶ France's Intellectual Property Code states that "an author shall enjoy the right to respect for his work," and the Code protects "all works of the mind, whatever their kind, form of expression, merit or purpose."¹⁰⁷ The Code further recognizes three principles in relation to moral rights.¹⁰⁸ These principles are that 1) the right attaches to authors;¹⁰⁹ 2) authors have complete control over how their work is presented to the public;¹¹⁰ and 3) the general public, third parties, or the courts cannot dictate or substitute their judgment for how the author's works should be used.¹¹¹

Despite strong moral rights, French law holds that authors should not abuse their rights through frivolous claims.¹¹² Instead, French courts emphasize the type and genre of a work that uses copyrighted material, to determine whether to uphold a moral rights claim.¹¹³ As the French Intellectual Property Code states that parody is a permitted use,¹¹⁴ it is a complete defense against a moral rights claim.¹¹⁵ This is especially instructive for Japan, which adopted its conception of moral rights from France.

III. JAPANESE COPYRIGHT LAW IS UNABLE AND HAS CONSISTENTLY FAILED TO PROPERLY ADDRESS PARODY

The three legal regimes discussed in Part II, *supra*, developed judicial mechanisms for evaluating parody, or have legislatively allowed for parody within their copyright law with the U.S. accomplishing both. They also vary by the degree to which they provide authors with moral rights. Despite varying legal, literary, and artistic traditions, all determined that it is important for their legal systems to allow parody and sat-

106. Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 88-89 (1996).

107. Code de la Propriété Intellectuelle.

108. Code de la Propriété Intellectuelle; Thomas P. Hedio, *The Moral Right of Integrity and the Global Information Infrastructure: Time for a New Approach*, 2 U.C. DAVIS J. INT'L L. & POL'Y 211, 246 (1996).

109. Hedio, *supra* note 108.

110. *Id.*

111. *Id.*

112. *Id.* at 247-248.

113. *Id.* at 248.

114. Code de la Propriété Intellectuelle.

115. *Id.*

ire. This speaks to the importance of parody to those societies.

These legal regimes are diverse with the United States and Australia following the common law and France a civil law system. Japan follows a civil law tradition based on French theory and German procedure.¹¹⁶ It also has adopted several of the United States' legal concepts such as judicial review through its Constitution, which was written under the United States' occupation post-World War II.¹¹⁷ Its copyright law in particular is based on Continental European concepts including strong moral rights to which it adds the view that copyright should protect authors' works as cultural properties.¹¹⁸

So far, Japan's copyright law has been unsuccessful in properly evaluating parody. This is evidenced in the varying opinions from three levels of courts for what has been called Japan's "leading case on parody,"¹¹⁹ the Mad Amano case. The varying opinions and the Supreme Court of Japan's ultimate reliance on moral rights to find against the parodist reveal a landscape marked by a fundamental misunderstanding of parody. Japan should learn from the examples of the United States, Australia, and France, who successfully crafted exceptions for parody and satire, and bolster its Copyright Act's purpose to protect and promote the country's cultural properties.

A. Japan Based its Copyright Law on Continental European Copyright Concepts and Cultural Property Values

Japan enacted its first comprehensive copyright legislation on March 4, 1889, and signed on to the Berne Convention¹²⁰ on April 18, 1899, at the behest of Great Britain and Germany in order to respect foreign copyright in exchange for the par-

116. CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN A COMPARATIVE ANALYSIS* 20-23 (2008).

117. *Id.*

118. GANEA, *supra* note 13.

119. *Id.* at 69.

120. See WIPO Treaties – General Information, WIPO, <http://www.wipo.int/treaties/en/general/> (last viewed October 24, 2011). The Berne Convention is a copyright treaty administered by the World Intellectual Property Organization (WIPO), the successor organization to the United International Bureau for the Protection of Intellectual Property (BIRPI).

tial abolishment of the unequal treaties.¹²¹ In drafting its copyright legislation, the Japanese government sent Rentaro Mizuno, a government official, to Europe and the United States to study the copyright concepts in those legal regimes.¹²² Mizuno ultimately based Japanese copyright law on Continental European concepts and drafted the Author's Rights Act (*Chosakuken*).¹²³ Japan adopted its current law, the Copyright Act of 1970, when the Author's Right Act became increasingly unable to cope with new technologies.¹²⁴

The current law maintains its Continental European roots through the *droit d'auteur* philosophy which recognizes authors' natural right to their personal creations.¹²⁵ This is reflected in the division of creation rights into economic and moral rights.¹²⁶ This is in strong contrast to the United States, which is primarily concerned with economic rights and recognizes only a narrow set of moral rights for visual art works.¹²⁷

Additionally, as mentioned in Part I, *supra*, the Japanese Copyright Act's purpose is to protect the cultural property of Japan:

The purpose of this Law is, by providing for the rights of authors and the rights neighboring thereon with respect to works as well as performances . . . to secure protection of the rights of authors, etc., having regard to a just and fair exploitation of these *cultural properties*, and thereby to contribute to the development of culture.¹²⁸

Describing copyrighted work as *cultural property* rather than as an economic asset suggests a strong preference for author rights over user rights. In contrast, the United States' Constitution grants to Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited

121. The unequal treaties are treaties signed during the 19th and 20th centuries between Western powers and Qing Dynasty Japan and Tokugawa Japan as a result of China and Japan succumbing to Western military aggression. See MICHAEL R. AUSLIN, *NEGOTIATING WITH IMPERIALISM: THE UNEQUAL TREATIES AND THE CULTURE OF JAPANESE DIPLOMACY* (2006); GOODMAN, *supra* note 116, at 3.

122. Rentaro Mizuno Museum, *Rentaro Mizuno and the Old Copyright Law*, <http://space.geocities.jp/keiun24/chosakuhou-mizuno.htm> (last visited Apr. 15, 2013).

123. GANEA, *supra* note 13, at 6; Rentaro Mizuno Museum *supra* note 122.

124. GANEA, *supra* note 13, at 11.

125. See generally Chosakukenhō, arts. 18-20.

126. See *id.* at arts. 18-20 for moral rights and arts. 21-28 for economic rights.

127. 17 U.S.C. §106A (2006).

128. Chosakukenhō.

Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹²⁹ In the United States the goal is clearly economic and achieved by balancing an author's rights against society's economic and social progress.¹³⁰

B. Japan's "First Parody Case" Shows that Japanese Courts Are Not Unified in How to Address Parody Under Japan's Copyright Act

In 1966, a famous Alpine photographer took a photo of six downhill skiers leaving parallel zigzag tracks as they came down a snowy alpine slope in St. Christoph, Austria.¹³¹ The photo was featured in the calendar "Ski 67" in Japan.¹³² Using this photo, the artist Mad Amano created a black and white photo montage with a larger than life Bridgestone tire rolling over the ridge of the alpine slope; the tire's tread matched the skiers' zigzag tracks.¹³³ Mad Amano created the parody to warn of the dangers in overdeveloping alpine ski resorts.¹³⁴ He published the montage as part of the series "Mad Amano's Strange World" in the 1967 edition of *Nikkei Gendai*, a magazine, and in a collection of his parody works.¹³⁵ Outraged, the photographer sued Mad Amano for copyright infringement, and the case's journey through the Japanese court system reveals a haphazard decision-making process.

The case started at the Tokyo District Court, which granted damages to the photographer based on copyright infringement because Mad Amano used the work without the photographer's permission and did not quote the photograph in a manner which preserved the plaintiff's purpose.¹³⁶ Specifical-

129. U.S. CONST. art. I, § 8.

130. See Geoffrey R. Scott, *A Comparative View of Copyright As Cultural Property In Japan And The United States*, 20 TEMP. INT'L & COMP. L.J. 283, 283-345 (discussing how, in the United States, principles such as capitalism, individuality, etc. commoditize human effort).

131. Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 20, 1972, Sho 46 (wa) no. 273, 289 HANREI TAIMUZU [HANTA] 77, available at <http://www.courts.go.jp/hanrei/pdf/7805A1DAB05D83AC49256A76002F8A63.pdf> (Japan).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Saikō Saibansho [Sup. Ct.] Mar. 28, 1980, Sho 54 (o) no. 923, 415 HANREI TAIMUZU [HANTA] 100, available at http://www.courts.go.jp/hanrei/pdf/js_20100319121451062181.pdf (Japan); Tōkyō Kōtō Saibansho [Tokyo High Ct.] May

ly, the court explained that to quote another work means to quote it by brief description.¹³⁷ Mad Amano's work constituted an infringement because he did not properly quote, but rather modified the thought and sentiment of the original work.¹³⁸ In essence, he transformed the work into a parody.

On appeal, the Tokyo High Court dismissed the lower court's opinion, finding instead that Mad Amano's work was parody and that he modified the plaintiff's photograph to criticize its glamorization of alpine skiing.¹³⁹ The court indicated that one must measure a use for parody by the work's character and purpose because a parody uses another work to fulfill its purpose and to create its own unique artistic creation.¹⁴⁰ The court also specified that it dismissed the claim under Article 21(1) of the Japanese Constitution, which protects free expression.¹⁴¹ In making this finding, the court appears to have applied a reasonableness test and stated that Mad Amano's use of the photograph did not unreasonably infringe on the original author's copyright and integrity.

This is a more appropriate analysis for parody than the analysis provided by the Tokyo District Court. The Tokyo High Court did not find infringement simply because either the author never gave permission or the parodist created an improper quote by altering the original work. Rather, like the United States Fair Use Doctrine, discussed in Part II.B., *supra*, it emphasizes the importance of evaluating a parody's character and purpose (i.e., whether the parody is a transformative work). The High Court also interestingly couples

19, 1976, Sho 47 (ne) no. 2816, 226 HANREI TAIMUZU [HANTA] 194, available at <http://www.courts.go.jp/hanrei/pdf/BA4D7DCD0AC151CE49256A76002F89AE.pdf> (Japan); Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 20, 1972, Sho 46 (wa) no. 273, 289 HANREI TAIMUZU [HANTA] 77, available at <http://www.courts.go.jp/hanrei/pdf/7805A1DAB05D83AC49256A76002F8A63.pdf> (Japan).

137. Keiji Sugiyama, *The First Parody Case in Japan*, 10 E.I.P.R 285, 286 (1987).

138. *Id.*

139. Tōkyō Kōtō Saibansho [Tokyo High Ct.] May 19, 1976, Sho 47 (ne) no. 2816, 226 HANREI TAIMUZU [HANTA] 194, available at <http://www.courts.go.jp/hanrei/pdf/BA4D7DCD0AC151CE49256A76002F89AE.pdf> (Japan).

140. *Id.*

141. Nihonkoku Kenpo [Kenpo] [Constitution], Art. 21 (Japan) (providing that "1) freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed; 2) no censorship shall be maintained, nor shall the secrecy of any means of communications be violated."); Tōkyō Kōtō Saibansho [Tokyo High Ct.] May 19, 1976, Sho 47 (ne) no. 2816, 226 HANREI TAIMUZU [HANTA] 194, available at <http://www.courts.go.jp/hanrei/pdf/BA4D7DCD0AC151CE49256A76002F89AE.pdf> (Japan).

the United States' Fair Use Doctrine analysis with free speech. While the U.S. Fair Use Doctrine and the First Amendment are not always in sync within United States Law,¹⁴² Japanese Law's application of a reasonableness test would make it possible to apply both a Fair Use-type analysis and free speech simultaneously. In fact, on closer inspection, it appears that this reasonableness test follows the same balancing test of the nature and purpose of parody. The High Court's application of Article 21(1) most likely will not provide protection to parody generally, but rather on a case-by-case basis.

The High Court's analysis, however, was overturned because the photographer appealed his case based on an infringement of his moral rights to the Supreme Court of Japan, which reversed the High Court's judgment.¹⁴³ The Supreme Court relied on the exception for quotations for criticism and news reporting, concentrating on the need for a clear separation between the copyrighted work and the using work.¹⁴⁴ Specifically, the Court stated that "[i]n cases where use is made of another's copyrighted photograph for the purpose of a montage, the new work must be the major, and the other only a minor part."¹⁴⁵ The Court held that although the original work changed as a result of this particular quotation, "the essential characteristics of the original work can still be perceived."¹⁴⁶ Therefore, the Court found that Mad Amano's work was not a quotation, but a modification which infringes the author's moral right of integrity.¹⁴⁷

The Supreme Court remanded the case back to the Tokyo District Court, which, based on the Supreme Court's holding, found that Mad Amano's work infringed the photographer's moral right to integrity.¹⁴⁸ As elaborated below, the case's

142. See discussion in Part II.B., *supra*.

143. Saikō Saibansho [Sup. Ct.] Mar. 28, 1980, Sho 54 (o) no. 923, 415 HANREI TAIMUZU [HANTA] 100, available at http://www.courts.go.jp/hanrei/pdf/js_20100319121451062181.pdf (Japan).

144. Chosakukenhō, art. 32; Saikō Saibansho [Sup. Ct.] Mar. 28, 1980, Sho 54 (o) no. 923, 415 HANREI TAIMUZU [HANTA] 100, http://www.courts.go.jp/hanrei/pdf/js_20100319121451062181.pdf (Japan).

145. GANEA, *supra* note 13, at 69-70.

146. Sugiyama, *supra* note 137, at 287.

147. Saikō Saibansho [Sup. Ct.] Mar. 28, 1980, Sho 54 (o) no. 923, 415 HANREI TAIMUZU [HANTA] 100, available at http://www.courts.go.jp/hanrei/pdf/js_20100319121451062181.pdf (Japan); Sugiyama, *supra* note 137, at 287.

148. Saikō Saibansho [Sup. Ct.] Mar. 28, 1980, Sho 54 (o) no. 923, 415 HANREI

journey through the Japanese court system reveals how Japan's Copyright Law is unable to properly address parody and that the Japanese Supreme Court fails to recognize parody's unique characteristics.

C. The Exception for Quotations is Ineffective in Determining Whether a Parody is Permissible Use because it Ignores Parody's Transformative Nature

The Supreme Court of Japan analyzed Mad Amano's parody under an exception that allows a user to quote a published work.¹⁴⁹ The exception states:

A work of authorship already made public may be utilized by way of quotation. In such instance, the quotation shall conform to fair practice and fall within a reasonable extent for purposes such as news reporting, criticism, research, etc.¹⁵⁰

With regards to parody, the Supreme Court stated that the parody must be clearly distinguishable from the used work or it will constitute infringement.¹⁵¹ This is perhaps an appropriate way to determine whether quotations used in news reports or research articles are infringing uses. It is inappropriate, however, in determining the legitimacy of a use for parody.¹⁵²

A parody must use a work in whatever way that will make its point.¹⁵³ As a result, it is often difficult to separate the parody from the targeted work. For instance, in parodying *Who Moved My Cheese?*, the authors of *Where Did the Butter Melt?*, mentioned in Part I, *supra*, used a similar storyline

TAIMUZU [HANTA] 100, available at http://www.courts.go.jp/hanrei/pdf/js_20100319121451062181.pdf (Japan); Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Feb. 23, 1983, Sho 55 (ne) no. 911, 1069 HANREI JIHŌ [HANJI], available at <http://www.courts.go.jp/hanrei/pdf/5277F2A136999F7149256A76002F8A45.pdf> (Japan). For explanation of further developments in this case see Sugiyama, *supra* note 137, at 287.

149. Saikō Saibansho [Sup. Ct.] Mar. 28, 1980, Sho 54 (o) no. 923, 415 HANREI TAIMUZU [HANTA] 100, available at http://www.courts.go.jp/hanrei/pdf/js_20100319121451062181.pdf (Japan).

150. Chosakukenhō, art. 32.

151. Saikō Saibansho [Sup. Ct.] Mar. 28, 1980, Sho 54 (o) no. 923, 415 HANREI TAIMUZU [HANTA] 100, available at http://www.courts.go.jp/hanrei/pdf/js_20100319121451062181.pdf (Japan).

152. A parody will most likely always meet the first criteria because a parody necessarily uses a public work.

153. See Part II.A, *supra*.

and prose in order to evoke the original book.¹⁵⁴ It is not possible to separate the different elements and categorize them as either being “from the original” or “new to the parody.” The parodist should, ideally, transform the parodied work through their own work into a new creation.

Furthermore, it is difficult to apply the quotation exception in a manner that allows for parody. As a transformative work, parody is different from a quotation that the Japanese Copyright Act exception contemplates. The quotation exception covers quoting for academic research, news reporting, or other similar purposes. Those works do not take more from the other work than necessary, create a clear distinction between the works, and can subordinate the used work because of their nature. A parody, however, is not simply quoting a targeted work, but transforming that work into something new.

D. Japanese Copyright Law's Overbroad Moral Rights Unduly Restrict Parody

Japan's Copyright Act contains three moral rights for authors, enumerated in Articles 18, 19, and 20. Article 18 protects authors' right to disclose their work to the public.¹⁵⁵ This allows authors to choose either when to present their work to the public or whether to present their work at all.¹⁵⁶ Article 19 provides that “the author shall have the right to determine whether his true name or pseudonym should be indicated on the original work and when his work is offered to or made available to the public.”¹⁵⁷ This allows authors to decide whether and how they want to be identified in the context of their work.¹⁵⁸ Any derivative work must indicate the name of the original author.¹⁵⁹ Finally, Article 20 provides that “the author shall have the right to preserve the integrity of his work and its title against any distortion, mutilation or other modification against his will.”¹⁶⁰ This means that any unau-

154. Takashi B. Yamamoto, *The “Who Moved My Cheese?” Case* (2002), available at <http://itlaw.jp/cheese.pdf>.

155. Chosakukenhō, art. 18.

156. GANEA, *supra* note 13, at 45.

157. Chosakukenhō, art. 19.

158. GANEA, *supra* note 13, at 45.

159. *Id.*

160. Chosakukenhō, art. 20.

thorized change to an author's work is an infringement of the author's right to integrity.¹⁶¹ The idea that this right protects against modification of an author's will renders any unauthorized changes, that may add value or improve upon a previous work, infringement as well.¹⁶²

Japan has stronger moral rights than those required by the Berne Convention, despite having derived its Copyright Act from it.¹⁶³ The Berne Convention's Article 6*bis* grants authors moral rights as follows:

An author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.¹⁶⁴

The main difference between Article 6*bis* and moral rights under the Japanese Copyright Act is that Article 6*bis* only prohibits works of parody that "would be prejudicial to [the artist's] honor or reputation."¹⁶⁵ Conversely, the Japanese Copyright Act under Article 20 prohibits *any* use against the "author's will."¹⁶⁶ Article 20 reaches beyond the Berne Convention to prohibit work that the artist does not approve of, even though that work may be non-prejudicial to the artist. This prohibition stifles creative expression which, in turn, hinders free expression.

This obstruction is evident in the ruling on Mad Amano's work. The Supreme Court of Japan held that an infringement of the moral right to integrity occurs whenever there is any unauthorized change to a work or failure to clearly separate the original from the parodied work.¹⁶⁷ Given that parody distorts the parodied work's original message in order to make

161. GANEA, *supra* note 13, at 46.

162. *Id.*

163. *Id.*

164. Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 art.6*bis*, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967, 102 Stat. 2853, 828 U.N.T.S. 11846 (hereinafter "Berne Convention").

165. Compare Chosakukenhō, arts. 20 (providing author with cause of action where his work is modified) with Berne Convention (stating that moral right is limited to instances where author experiences prejudice to honor or reputation).

166. Chosakukenhō, arts. 20.

167. Saikō Saibansho [Sup. Ct.] Mar. 28, 1980, Sho 54 (o) no. 923, 415 HANREI TAIMUZU [HANTA] 100, http://www.courts.go.jp/hanrei/pdf/js_20100319121451062181.pdf (Japan).

its humorous or critical point, the Supreme Court of Japan's holding makes every parody an infringement of an author's moral rights.¹⁶⁸ Even if a parody met the requirements for quotation, a parodist will always have to pay damages for an infringement of the moral right of integrity when an author raises such a claim. The Court's analysis misses the point of parody, which relies on the distortion of a parodied work, and Japan's government has not provided effective legislation for addressing parody within Japan's copyright law.

IV. USING OTHER LEGAL REGIMES FOR GUIDANCE, JAPAN SHOULD ADOPT A SPECIFIC LIMITATION ON COPYRIGHT FOR PARODY

Given the prevalence of parody in Japanese literary and artistic culture,¹⁶⁹ and the inadequate analysis of parody provided by Japanese courts,¹⁷⁰ the Japanese Diet should adopt a specific limitation on copyright for parody into its Copyright Act. This exception should avoid the mistakes made by Australia with its Fair Dealing exception, adopt the view that parody and satire are transformative works like the United States' Fair Use Doctrine, and restrict moral rights like France. Such an exception will conform to the Berne Convention's Three-Step Test, the international standard for creating exceptions for copyright.

A. *Japan Should Adopt an Exception That Defines Parody and Satire*

Japan must ensure that any exception it adopts is effective in permitting parody and satire and not, like Australia's Fair Dealing, leave the question to individual judges' understanding of parody and satire. The first step is to adopt a working definition for parody and satire. This will control the exception's contours and protect what is parody and satire, while ignoring what is not. Japan may consider legislatively adopting dictionary definitions as it seems Australian courts will do for Fair Dealing.¹⁷¹ Such definitions must be comprehensive,

168. GANEA, *supra* note 13, 71.

169. *See* Part I, *supra*.

170. *See* Part III, *supra*.

171. *Short History of Copyright*, *supra* note 54.

like those found in the OED.¹⁷² Additionally, acknowledging Japan's literary and artistic tradition and its view of copyright as cultural property, the Japanese legislature may also choose to look to existing works to develop the contours of Japanese parody and satire. Defining parody and satire is, undeniably, difficult and may raise issues in the future. However, it is also an effective method of ensuring that parody and satire is actually protected. At the most basic level, definitions of parody and satire should provide that both terms serve the purpose of criticism and humor and target an original work or its subject and surrounding.

B. Japan's Exception for Parody and Satire Must Be Informed by the Conception of Parody and Satire as Transformative Works

The definition should also incorporate the idea of parody and satire as transformative works. The Fair Use Doctrine's first and third factors highlight these aspects of parody and, for purposes of this article, satire.¹⁷³ Transformative works are clearly not reproductions of original works because parodists add their own expression to create a new work. Transformative works that make fun of an original work are also not derivative works because it is unlikely that original authors would criticize their own work through parody or satire. Using the *doujinshi* as an example, individuals who create episodes of *Pokemon* that are similar to the general narrative and style of the cartoon, but with a few new characters most likely committed a copyright violation. However, an individual who creates episodes using *Pokemon* characters and mimics the general narrative and style in order to make fun of the cartoon has created what Nintendo most likely had no intention of creating.

Additionally, Japan's adoption of the transformative concept should not include vague tests like the United States' "conjure up" test. Where a work is a different expression than an original and employs humor to the detriment of the original work, the parody or satire moves beyond the normal exploitation of the original work and should be free from copyright liability.

172. See Part II.A, *supra*.

173. See Part II.B, *supra*.

The Fair Use Doctrine's fourth factor bolsters the idea that transformative work like parody and satire are beyond an original work's normal exploitation. As discussed in Part II, *supra*, parodies fill a separate market—the parody market—from the markets for original works.¹⁷⁴ While there is no empirical evidence to support these ideas, the Japanese *doujinshi* trend suggests that it may be true given that manga and anime authors of parodies are not regularly bringing copyright infringement cases against *doujinshi* creators.¹⁷⁵ In some cases, successful *doujinshi* even raised interest in an original work and enhanced the original's marketability.¹⁷⁶

The concept of parody and satire as transformative works should inform the definitions Japan adopts for parody and satire. This concept demonstrates how parody and satire are different works than the original used and that they fulfill a different purpose—that of criticism. It also shows that parody and satire are not uses normally contemplated by original authors and, therefore, cannot be considered derivative works. With this basic understanding of parody and satire, the definitions Japan chooses to adopt become legally justifiable.

C. *Japan Should Recognize a Restriction on Moral Rights for Cases Involving Parody and Satire*

In the interest of balancing copyright holder and user rights regarding parody, Japan should limit moral rights for certain uses such as parody and satire. Specifically, it should follow France's approach, which allows an author to evoke a moral rights claim only where a parody injures or degrades that author. The Berne Convention's Three-Step Test, discussed in Section D, *infra*, allows a similar restriction. The language used there is "prejudicial to [the author's] honor or reputation." The manifestations of these concepts—injurious, degrading, prejudicial to honor or reputation—may vary from country to country.¹⁷⁷ Japan, in particular, has a strong con-

174. See Mehra, *supra* note 7.

175. See *id.* (making this argument and discussing Nintendo case against *doujinshi* as rare).

176. See discussion on *doujinshi* in Part I, *supra*.

177. MARK D. WEST, SECRETS, SEX AND SPECTACLE: THE RULES OF SCANDAL IN JAPAN AND THE UNITED STATES 68 (2006) (comparing concept of honor in Japan and U.S.).

ception of honor.¹⁷⁸ Honor in Japan “sometimes means reputation, as in the case of a hero who strives to be worthy of the honor in which he is held. . . . [I]t also includes internal feelings that can be described as pride, personal integrity, dignity, or awareness of the worth of one’s character.”¹⁷⁹

As parody is meant to ridicule, it is possible that an author in Japan will argue that the work harmed his honor or reputation. However, a court must draw a distinction between a parody that distorts an original work to make its point and one that attacks the original author himself. Without a restriction on moral rights, an exception for parody and satire will have no real meaning.

D. This Exception to Parody and Satire Conforms with the Berne Convention’s Three-Step Test

As mentioned in the introduction, the Berne Convention’s Three-Step Test provides the standard for creating exception to exclusive copyright protection and Japan may desire to conform to this test. In brief, the Paris Act of 1971 introduced amendments to the Berne Convention that allow member states to create limitations and exceptions to copyright.¹⁸⁰ Section 9(2) of the Paris Act specifically permits limitations and exceptions to the right to reproduction.¹⁸¹ Other international treaties such as the TRIPs Agreement (Article 13) apply Section 9(2) to all exclusive rights in literary and artistic works.¹⁸² The WIPO Copyright Treaty (Article 10) and WIPO Performances and Phonograms Treaty (Article 16) apply Section 9(2) to rights encompassed by their respective treaties.¹⁸³

Section 9(2) of the Berne Convention provides a framework for creating exceptions to copyright:

178. *Id.* at 78-82.

179. *Id.* at 79.

180. Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 s 9(2), July 24, 1971, 1161 U.N.T.S. 18338, *available at* http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf (hereinafter “Paris Act”); *See* WIPO Intellectual Property Handbook: Policy, Law and Use, Chapter 5 International Treaties and Conventions on Intellectual Property 241-262, <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf> (last viewed on October 30, 2011).

181. Paris Act Article 10(1) and (2) provides a similar exception for other free uses of work including quotation and illustrations.

182. GOLDSTEIN & HUGENHOLTZ, *supra* note 36, 294.

183. *Id.* at 61.

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such [literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author.¹⁸⁴

The section provides a Three-Step Test for developing an exception to exclusive copyright. The first step is that a limitation may only permit reproduction in certain special cases; the second step is that the use not conflict with a normal exploitation of a work; and the third step is that a use cannot unreasonably prejudice the legitimate interests of copyright holders.¹⁸⁵

The exception described in this article meets those three steps: the first step requires that any exception or limitation is limited in its coverage and no broad exception or limitation with a general impact is permitted.¹⁸⁶ This is achieved through designating special cases. The exception described above names parody and satire, based on definitions adopted by the Japanese government and informed by United States' Fair Use Doctrine, as special cases.

The second step requires that a reproduction not conflict with the normal exploitation of a work. As explained in Part IV.B, *supra*, parody and satire are transformative works. By their very nature, they are neither reproductions nor derivatives of original works and do not take market share from original works.

Finally, the third step is that reproductions must not unreasonably prejudice the legitimate interests of the author. This step resounds strongly with moral rights, especially with that of an author's right of integrity. As explained in Part IV.C, the claim is limited to what is "prejudicial to [the author's] honor or reputation." As parody and satire attacks a work and not an author, they are not unreasonably prejudicial to an author.

184. *Id.* at 275; Berne Convention, art. 9.2.

185. GOLDSTEIN & HUGENHOLTZ, *supra* note 36, at 155.

186. MIHALY FICSOR, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS 45 BC-9.15, (World Intellectual Property Organization (WIPO) 2003).

V. CONCLUSION

Parody and satire have enriched Japanese literature and art for centuries. In modern society, individuals such as Mad Amano¹⁸⁷ use these genres to voice concerns with Japan's politics, society, and culture and *doujinshi* artists expand markets for existing works.

Japanese courts acknowledge the prevalence of parody in Japanese culture. However, the Supreme Court of Japan refuses to acknowledge parody as permissible expression and Japan's Copyright Act has proven unable to address parody. The result is an environment that is hostile to parodists and leaves them with neither recognition nor defense. By adopting an exception for parody and satire, Japan will not only acknowledge its rich cultural heritage of parody and satire, but also create opportunities to continue creating such works and build upon its own cultural foundations.

187. See Part III.B., *supra*