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MUSIC PARODY AND COPYRIGHT: A COMPARATIVE ANALYSIS OF UNITED STATES AND INDIA

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ABSTRACT

The research undertaken herein is conclusive of all the study in its practical as well as theoretical approach. It helps in improving the understanding of Copyright Laws vis-à-vis Parody Music in India and United States. Parody music, in general is the criticism or review of an artistic work and does not violate the rights of the original creator of such artistic work. The creator of Parody music has a defence falling under the category of either fair use or fair dealing and thus no way interferes with the rights of the creator of original work. The research further talks about the factors which are responsible in making the comparison in addition to the benefits of the same. As the jurisdiction of both the countries are different, the issues which may be faced in both the countries along with the similarities they bear upon is dealt under the study. Moreover, the study further shows the applicability of such principles in both the countries and recourse to the owner if the Parody music anyhow interferes with the beneficial interest of the owner. Under the U.S Law, it is fair use which is prominent whereas in India it is the fair dealing. Also, the fair dealing in India provides for the illustrative list and thus differentiates between what is fair use and what is fair dealing. On the other hand, in U.S law provides for the factor which amounts to fair use. Thus, the entire research revolves around how the comparative analysis of the IP law in the category of Copyrights vis-à-vis Parody music helps in drafting a better law for a country.

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I. INTRODUCTION

In today's world, the idea of commercial privacy has assumed enormous significance. As a result of which, numerous conflicts of legal principles have dominated the academic discourse. At the core of this debate is the tussle between right to freedom of expression and right to exclude others from using copyright protected work.

Parody refers to a work, which humorously and critically comments on an existing work in order to expose the flaws of the original work. In order to create a successful parody, the parodist necessarily requires his audience to recognize the original work as well as the manner in which it has been ridiculed.[1] Thus a parody necessarily takes from and is based on a preexisting original work. This then inherently creates a conflict between the creator of the original work and the parodist since no one likes to be criticized or ridiculed. This translates into no license being granted by the holder of the copyright to a parodist. This harms freedom of speech since substantial use of copyrighted work is prohibited without the permission of the copyright owner and moreover, permission to create a parody is unlikely to be given. It is in this context that the defense of fair use can be utilized by the parodist for not to attract any liability for copyright infringement.[2] It is a form of work where on in a form of humor/satire passes a comment on an already existing work. Primary defense of Parody against copyright infringement is its fair use or fair dealing. It is a well-established fact that Unites States legal system has progressed far more than its' Indian counterpart in the issues of copyright vis-à-vis Parody music. Indian courts had often looked into the techniques followed by its' United Sates counterpart while dealing with issues of copyright, per se.

Fair use doctrine is one of the most important aspects of Copyright Law which draws a line between a legitimate, bonafide fair use of a work from a malafide blatant copy of the work.

[1] ibid 466
[2] Michael Spence, 'Intellectual Property and the Problem of Parody', [1998] 114 Law Quarterly Review 594 596-601

II. EXAMINING THE FOUNDATIONS OF FAIR USE QUA PARODY

The Doctrine of Fair Use in the United States finds its beginning in the Judge Story's 1841 ruling in *Folsom v Marsh*.[3] However, in order to appreciate its evolution, it is pertinent to note, how the Copyrights were themselves perceived at the time and also the context in which the doctrine was evolved from judicial pronouncements.

In United Kingdom, in the late-1700s, there were two notions that prevailed regarding the nature of Copyrights. The first notion viewed copyright as a *privilege* that was regulated by Statute and in so far as the Statute of Anne[4] declared that copyrights would vest with an author of the work for a period of 14 years and was subject to one extension period. It was a utilitarian conception that viewed the instrument of Copyright as a means to achieve greater social goals.[5] This is evidenced from the very title of the enactment which reads "*An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned*".[6] An alternative, competing notion was also widely in acceptance. Under this second view, Copyrights in common law were not merely a *privilege* but rather they were a part of the author's *property*. Courts often had a recourse to the natural law and on various occasions claimed that there existed an independent Copyright in common law protecting the natural products of an individual's intellectual labour – and consequently affirmed that Copyright under common law enjoys perpetuity.

These diametrically opposed views were urged before the House of Lords in 1774 in *Donaldson v Beckett*[7] which ultimately held that Copyright was a mere statutory creation, thus reaffirming the utilitarian underpinnings of Copyrights rather than the view that Copyright was a natural entitlement of intellectual labour. Although in history, were in the context of the law in the united kingdom, it is evident that this inspired the inclusion of the Copyright Clause in the US Constitution which vested powers in the Congress to ""promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective

[3] Folsom v. Marsh, 9. F. Cas. 342 (C.C.D. Mass. 1841)
[4] Copyright Act 1710, 8 Ann. c. 19 (Eng)
[5] Tyler T. Ochoa & Mark Rose, The Anti-Monopoly Origins of the Patent and Copyright Clause, 49 J. COPYRIGHT SOC'Y U.S.A. 675 (2002).
[6] Copyright Act 1710, 8 Ann. c. 19 (Eng)
[7] Donaldson v Becket (1774) 2 Brown's Parl. Cases (2d ed.) 129, 1 Eng. Rep. 837

Writings and Discoveries."[8] Accordingly the United States Supreme Court in *Wheaton v. Peters*[9] unambiguously established the utilitarian or instrumental conception by affirming the ruling in *Donaldson* in American intellectual property jurisprudence.

A consequence of the utilitarian underpinnings of the English and American Copyright system[10] was that in situations where another work purported to transform a pre-existing work, it was presumptively justifiable.[11] As the instrumentalist conception prioritized the dissemination of information rather than an author's entitlement, the Courts were primarily concerned with the nature of the work that the original work was *put to* rather than engaging the substantiality of the original work that was borrowed. Anglo-American jurisprudence from this era is rife with examples of such cases. For instance, translations[12] and abridgements[13] were all considered to not infringe the works they were dependent upon as they helped to achieve the objectives of the Copyright system. This notion was popular in the United Kingdom while the United States courts were inconsistently applying the principle.

It was in this context that the decision in *Folsom v. Marsh*[14] and its application of the Fair Use doctrine, has radically transformed Copyright jurisprudence. In Folsom case, the Court fashioned that Copyrights were to be treated as a sub-set of property rights. In a case regarding whether an abridged version of a biography infringed the original work, the Court reintroduced the natural law notions of workmanship and observed that the abridged version might be very meritorious, however, the merit of the allegedly infringing work was not relevant in so far as issues of infringement were concerned. Rather, it was the portion of the original work that was *unfairly* misappropriated which turned to be the decisive factor on the question of infringement. Transformative works were henceforth not considered to be presumptively justified; instead the use of the previous work would have to be *fair*. This notion of fairness is the bed rock of the fair use doctrine today, which reintroduced the natural law entitlement to one's intellectual labour. It is therefore evident why the *portion* and *nature* of borrowing become central to the fair use enquiry

[8] U.S. CONST. art. 1, § 8, cl. 8.
[9] 33 U.S. 591 (1834).
[10] Mark A. Lemley, Romantic Authorship and the Rhetoric of Property, 75 TEx. L. REV. 873, 895-96 (1997)
[11] Id.
[12] Burnett v Chetwood, 35 Eng. Rep. at 1009; Stove v Thomas, 23 F. Cas. at 201
[13] Gyles v Wilcox, 26 Eng. Rep. 489 (Ch. 1740)
[14] Folsom v. Marsh, 9. F.Cas. 342 (C.C.D. Mass. 1841)

and the merit of the new (allegedly infringing) work or its contribution to the progress of the Arts, comparatively became irrelevant. The Fair Use doctrine, in its evolution was therefore a site for contestation on redefining and understanding the very nature of copyrights.

III. IMPACT OF STATUTORY FRAMEWORK AND INTERNATIONAL OBLIGATIONS

Beginning with the discussion on the framework in the United States, it has been observed that when the question comes before the court to determine what is fair, the courts seek to pick up a cue from Title 17 of the Unites States Code.

"In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(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."[15]

The reason for the same is that the Indian Legislation for Copyright i.e. Copyright Act, 1957 is blessed with ambiguities which make it imperative for the Indian Court to refer to foreign jurisdictions especially Unites States.

According to the Copyright Act, 1957,

"(1) the following acts shall not constitute an infringement of copyright, namely: —

[15] Copyright Act of 1976, s 107

(a) a fair dealing with a literary, dramatic, musical or artistic work 1[not being a computer programme] for the purposes of— 1[(i) Private use including research;]

(ii) criticism or review, whether of that work or of any other work;"[16]

While dealing with the question as to when a musical parody shall constitute fair use and when not, one needs to refer to the copyright law of India as well as the United States. Copyright law in United States and India are substantially similar in nature for the simple reason that both adhere to the TRIPS agreement. India signed the TRIPS agreement in 1994[17], whereas the United States was one of the primary states on whose behest TRIPS agreement was drafted. TRIPS agreement came into force on 1st January, 1995.[18]

A. EXAMINING THE IMPACT OF TRIPS AND THE BERNE CONVENTION

International treaty framework that regulates the ambit of Fair Use:

a. Berne Convention
b. TRIPS – Article 13

The Berne Convention as it was drafted in 1886 provided an absolute 10 year Copyright term to the author that was not subject to any exceptions, it was felt that this guaranteed a simple protection and could foster the creation of a stable copyright regime.[19] However this was seen to be inadequate and consequently it was amended in 1967 to add an explicit authorial reproduction right and an exception to it was enumerated in Article 9 of the convention.[20] Paragraph 2 of Article 9 lays down the controversial three-step test to create exemptions to the acts of infringement that would otherwise violate the author's exclusive reproduction right. The drafting history and the

[16] Copyright Act of 1957, s. 52(1)(a)
[17] Anand Nandkumar, Was the TRIP Worthwhile? < http://www.forbesindia.com/printcontent/29302 > accessed 9 December 2017
[18] Overview: the TRIPS Agreement < https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm > accessed 9 December 2017
[19] Report Of The Committee (Svante Bergstrom), In International Bureau Of Intellectual Property, Berne Convention Centenary (1886–1986) 196, Paras. 78–86 (1986).
[20] Sam Ricketson & Jane C. Ginsburg, International Copyright and Neighbouring Rights: The Berne Convention and Beyond (2d Ed. 2006)

many official commentaries/guidebooks provide a significant insight into the operability of the exemption.

The initial discussions[21] the negotiators approached the creation of exemptions through creating a list that allowed for exemptions for reproductions of works in three cases – i.e. for private use, for judicial or administrative purposes or if it was not prejudicial to the legitimate interests of the author or the exploitation of his/her works. Eventually it was felt that an overriding principled approach would better help unify Copyrights across jurisdiction and the present text of Article 9(2) was adopted.

Article 9(2) as it now reads:

"*It shall be a matter for legislation in the countries of the Union to permit the reproduction of such 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 interests of the author*."[22]

Before we get into the very nature of this test and to the compliance requirements of fair use/fair dealing, a keen reference to the relevance and centrality of the text is required as adopted for the first time in the Berne Convention. The text of Article 9(2) has attained a degree of centrality in Copyright exceptions discourse as it has been adopted into various multilateral treaties such as the WTO/TRIPS, WCT and WIPO, with its application now stretching into regulating digital technologies that could not have been contemplated when the text was coined. Of particular importance is its addition in the TRIPS agreement. Owing to the incorporation of the Berne Convention in Articles 1-20 of the TRIPS, the convention becomes directly applicable in TRIPS jurisprudence and in any event, Article 13 of the TRIPS incorporates, with some minor modifications, the text of Article 9(2) of the Berne Convention.[23]

During the drafting of the TRIPS, it was felt that there was a need for additional requirements over the Berne criteria. A few distinctions between the Berne standard and the TRIPS standard are

[21] Claude Masouye, World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), At 55, Comment 9.6
[22] Article 9(2), Berne Convention
[23] Article 13, TRIPs

worth noting. The TRIPS agreement, rather than being restricted solely to the author's right of reproduction, explicitly includes all exclusive rights that come with a Copyright. Further, Article 13 of the TRIPS doesn't explicitly include a right to make exceptions like the Berne Convention, it rather exhorts that states *shall* comply with the three-step test in the case of any abridgement of the rights of a copyright owner.[24] Despite the efforts to clarify the standard, the TRIPS agreement made no progress in defining or further elaborating on the rather ambiguous criteria and is a cause of concern among the WTO Contracting Parties.[25]

Owing to the compulsory dispute settlement under the WTO covered agreements, the dispute settlement panel in *United States – Section 110(5) Of The US Copyright Act*[26] had the occasion to judicially apply the treaty provision (as the matter did not particularly involve the compliance of the fair use doctrine, there is no need to further examine the panel report here). It is readily apparent that the three-part test is of immense significance as regard exemptions to Copyrights.

The 1974 Guidebook authored by Dr. Maseyou,[27] view the three parts of the test as constituting an inseparable whole that would have to be applied simultaneously and cumulatively. He identifies the three parts to refer to the three simultaneous requirements that the exemption, which would have to necessarily be through the process of legislation, to cater to *certain specific circumstances,* that the use did not create an encumbrance to the *legitimate interests of the author* and that it *not interfere with the exploitation of the original work.* For an exemption to qualify under this test, it would have to comply with all three limbs. Dr. Fiscor, writing in 2003,[28] indulges in a more detailed treatment than his predecessors on the interpretation of the provision.

While it is beyond the remit of this review to elaborately discuss the varied interpretations of the three-part test, the following passage will attempt to shed light on the compliance of the Indian

[24] Sam Ricketson & Jane C. Ginsburg, International Copyright and Neighbouring Rights: The Berne Convention and Beyond (2d Ed. 2006

[25] World Trade Org., Review of Legislation on Copyright and Related Rights-United States, IP/Q/USA/1 (last modified Oct. 30, 1996) <http://www.wto.org/wto/ddf/ep/public.ht

[26] Panel Report, DS-160

[27] Claude Masouye, World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), At 55, Comment 9.6

[28] Dr. Mihaly Ficsor, World Intellectual Property Organization, Guide to the Copyright and related rights treaties administered by WIPO and glossary of copyright and related rights terms, 56-60, comments bc9.11–9.29 (2003)

and American fair dealing/fair use provisions with the three-part test to illustrate the nature of this inquiry and to highlight the points of contestation.

The compliance of US Fair Use law with the TRIPS standards has been extensively discussed in the context of parodies and in the context of software or computer program reverse engineering. Courts have found[29] that a consequence of the principle that ideas are not per se protectable which implies that both parodies and reverse engineering programs would be fair use. However, many European and Commonwealth countries do not recognize both of these are being part of their exemptions to Copyright, with the US in particular pressurizing other jurisdictions to *not to* adopt its fair use standard.[30] Commentators have opined that at least in the case of reverse engineering, the US would fail as it fails to meet two of the three requirements.[31] First, that because the judicial dicta in *Sega* did not relate to any specific instances, it would fail the first limb of the test and as it prejudiced the legitimate interests of the original copyright owners, but now exposing their software, it would also fail the second test. Further, the four-factor test that is mentioned in section 107 of the US Copyright Statute are also opined to be too broadly worded to qualify the requirement of specificity.[32]

When the fair use doctrine is contradistinguished with Section 52 of the Indian Copyright Act, it is evident that the compliance of the first test is unlikely to be an issue. Fair dealing under Indian copyright law requires that it fall under one of the uses that finds mention under Section 52 thus ensuring specificity. However, specificity alone would not ensure compliance. As was observed by commentators in the wake of the DU Photocopy judgement[33] there is a significant likelihood that various aspects of India's fair dealing provisions in both software and the reproduction of books in the course of instruction would fail to be in compliance with Article 13 if Section 52 were to be challenged at the WTO.[34]

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[29] Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569

[30] Crystal D. Talley, Japan's Retreat from Reverse Engineering: An Unnecessary Surrender, 29 CORNELL INT'L L.J. 807, 836

[31] John A. Williams, Can Reverse Engineering of Software Ever Be Fair Use? Application of Campbell's "Transformative Use" Concept, 71 WASH. L. REV. 255, 26

[32] A Coleman, Copyright Exceptions: The Digital Impact (2005), 253–264

[33] The Chancellor, Masters & ... vs Rameshwari Photocopy Services, Delhi High Court, RFA(OS) 81/2016

[34] Eashan Ghosh, Fundamental Errors in Fundamental Places: A Case for Setting Aside the Delhi University Photocopying Judgement, Volume 9 Issue 1-2 (2016), NUJS Law Review

While the present paper is limited in scope to the applicability of the fair use doctrine to parodies, in understanding the implications of multilateral agreements. It would nonetheless be imperative to understand how the three-part test is understood in different contexts.

The primary difference between United States and Indian jurisdiction vis-à-vis fair use is that United States law uses the term "fair use" whereas the common law jurisdictions such as India use the term "fair dealing". One of the earliest case laws on the subject of "fair use" in US is that of Folsom v. Marsh[35]. This case is often regarded as the locus classicus in the field of fair use in United States. In the instant case, Justice Joseph Story gave the four factors that determine the fair use. Later on, these factors were codified under Copyright Act, 1976.[36] Fair dealing, a concept under India seeks to give strength to the Freedom of expression enshrined under Article 19 of The Constitution of India, 1950.

In contrast to the Indian Law, fair use under United States code enlist the four factors that shall be put to use while deciding what is fair use and what is not. Whereas, the Indian Copyright act provides a list as to what shall constitute Fair dealing and what not. Thus, the approach while deciding whether parody music infringes copyright law in United States and India shall involve different strategies. In India, the author of parody music shall have to satisfy the four factors laid down under Section 107 of Copyright Law of United States.

Whereas in India, such author shall have to satisfy that his product i.e. parody music does not intend to compete with the original work and also that it does not seek to make "improper use" of such work.

While dealing with the question of what is "improper use", Hon'ble Kerala High Court observed in the case of *Civic Chandran v. Ammini Amma*[37] that as long as a parody work seeks to criticize the original work, it does not constitute improper use within the meaning of copyright law.

As Intellectual Property Law is such field of law which is very versatile and changes drastically. In order to keep a check, and implement newer provisions relating to IP law in a country, such country needs to analyse and understand the newer concepts and provisions from other countries

[35] [C.C.D. Mass. 1841] 9. F.Cas. 342
[36] Copyright Act of 1976, s. 107
[37] [1996] PTR 142

in order for a better legislation and implementation[38]. The intellectual property law is changing at a dynamic pace, and thus needs a thorough research on the laws of different countries. Parody, is a concept underlying in the backdrop of literary, and artistic work mainly. TRIPS (Trade Related aspects of Intellectual Properties) is also one of the main agreements which requires attention and validation of the countries looking for newer dynamics of intellectual property. TRIPS provide for the minimum requirements which needs to be fulfilled by each member of the agreement.

IV. A CROSS-JURISDICTIONAL APPROACH OF FAIR USE IN THE REALM OF PARODY

The law enumerated under Section 52 of Copyright Act, 1957 of India is limited in nature as it provides an illustrative list as to what shall constitute fair use and what shall not. Whereas the four factors listed under the United States Copyright Act of 1976, provides the four factors that the courts shall consider while deciding as to what fair use is and what is not.

Thus, the Indian copyright legislation has been limited and confined as far as its' dealing with fair use is concerned. Whereas, the United States Legislation has adopted a flexible approach in its' dealing with the Doctrine of Fair Use. However, the same has not deterred the Indian Courts from referring to the factors laid down under US law as the same are put to use from time to time in suitable cases. Thus, it is pertinent to mention that India still has a long way to go in developing a full-proof law vis-à-vis fair dealing. The cue can be sufficiently picked up from the United States' approach towards the Doctrine of Fair Use so that a balance can be created between Freedom of Speech such as expressing one's opinion through musical parody and improper use of a copyrighted work which is the original work.

[38] M. Adams & J. Griffiths, 'Against "Comparative Method": Explaining Similarities and Differences' (Cambridge University Press 2012)

A. FAIR USE IN INDIA

The defence of fair use is provided for in Section 52 of the Copyright act which states among other things, that a fair dealing with a literary work for the purpose of criticism or review, whether of that work or of any other work shall not constitute infringement of copyright.

In the case of *M/s. Blackwood & Sons Ltd. v. A.N. Parasuraman*, it has been observed that in order to constitute a fair dealing there must be no intention on the part of the alleged infringer, to compete with the copyright holder of the work and to derive profits from such competition and also, the motive of the alleged infringer in dealing with the work must not be improper.[39]

Ayush Sharma, in his paper titled 'Indian perspective of Fair dealing under Copyright Law: Lex lata or Lex Ferenda?' argues that the four-factor test while has been adopted from the U.S. by the Indian judiciary, this test has been applied in limited contexts and there is no holistic view of how the issue would deal with its myriad factors. He states that the doctrine is an indisputable necessity and that the courts instead of trying to incorporating fair use by dealing with a literary work for the purpose of criticism or review, whether of that work or of any other work shall not constitute infringement of copyright. He conducts a thorough survey of the cases on fair use or fair dealing as it is called in the commonwealth and creates an analysis of the four factors that the U.S follows to determine fair dealing and looks at how much these factors have been considered by the Indian Courts.

ON PARODY AS FAIR USE IN INDIA

Rahul Saha and Sryon Mukherjee in their paper titled 'Not so funny now is it – the serious issue of parody in Intellectual property law'[40] discuss American and Indian case law to put forth the argument that parody constitutes fair use and thus does not violate copyright law.

They note that to successfully avail of the fair use defence in India, a parodist has to satisfy two conditions: (i) he must not intend to compete with the copyright holder and (ii) he must not make improper use of the original. The first condition, which is essentially the market substitution test,

[39] *M/s. Blackwood & Sons Ltd. v. A.N. Parasuraman* AIR 1959 Mad. 410
[40] Rahul Saha, Sryon Mukherjee 'Not so funny now is it – the serious issue of parody in Intellectual property law' [2009] 2 Indian Journal of Intellectual Property Law

is easily proved, as most parodies do not seek to compete with the original but merely to ridicule or criticize the original in a manner that exposes its flaws. As far as the second condition is concerned, they state that it is doubtful as to what is meant by improper use and whether a parody is an instance of such use. The Kerala High Court judgment in *Civic Chandran v. Ammini Amma*[41] is illustrative.

The artistic work challenged in Civic Chandran was not a parody as such, but a counter drama, as expressively termed by the Court. The original work in question was Ningal Enne Communistakki – a well-known drama written by Thoppil Bhasi, a famous Malayalam playwright. The play dealt with some of the burning social and political problems of those days, specially espoused by the Communist Party of India before its split and had considerably aided the undivided Communist Party of India to come to power in Kerala in the 1957 assembly elections.

On the other hand, the counter drama written by the appellant, Civic Chandran, was intended to convey the message that though the party had succeeded in coming to political power, it had forgotten the depressed classes who were instrumental in its success, and who had made substantial sacrifices for the party. The counter drama used substantial portions of the original, with some alterations required for its purpose. The characters and dialogues in the original were also reproduced in some instances.[42]

The Court held that the reproduction was not a misappropriation for the purpose of producing a play similar to the original. Rather, the purpose was to criticize the idea propagated by the original drama, and to expose to the public that it had failed to achieve its real object. Furthermore, it was noted that there was no likelihood of competition between the two works in question. It was held that since the copying was for the purpose of criticism, it amounted to fair dealing and did not constitute infringement of the copyright.

It is therefore evident that Indian law on Fair Dealing, although not clear, leaves plenty of room for arguing that a parody will not infringe copyright. It is important to note is that, in arriving at this holding, the factors considered by the Court were: "(1) the quantum and value of the matter taken in relation to the comments or criticism; (2) the purpose for which it is taken; and (3) the

[41] *Civic Chandran v. Ammini Amma* 1996 PTR 142
[42] n4

likelihood of competition between the two works."[43] This three-fold test is markedly similar to the test used by American judiciary. The only factor omitted is the nature of the copyrighted work – a factor that has been stated to be of little importance as far as parodies are concerned. As for moral rights, the right to publicity, the authors Saha and Mukherjee note has barely had any recognition in the Indian legal scene.

B. FAIR USE IN THE U.S

In the absence of a statutory definition for fair use, the Supreme Court, in Justice Story's words laid down the four factor tests in *Folsom v. Marsh*[44], where it was stated:

"Look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."

These criteria were used to decide fair use cases until the codification of the elements of the test in Paragraph 107 of the United States' Copyright Act.[45]

ON PARODY AS FAIR USE IN THE U.S.

In Saha and Mukherjee's work, the case of *Campbell v. Acuff-rose Music, Inc* is focused for having the most comprehensive analysis of the four fair use factors vis-a vis parodies.

In this case, the U.S. Supreme court decided that a parody based on criticism or comment could be considered as fair use of a copyrighted work. This case concerned a lawsuit brought by the acuff-rose on ground of the fact that that group wrote a rap song parodying acuff-rose's song even after refusal of permission from acuff-rose. When the case came to the Supreme Court, the previous court had held that the parody may cause market harm to the copyright holders and doesn't fall under fair use.[46] The four factors the judges consider are first, the purpose and character

[43] n5
[44] *Folsom v. Marsh* 9 F. Cas. 342, No. 4,901
[45] Leon R. Yankwich, 'Parody and Burlesque in the Law of Copyright', [1955] 33 CAN. B. REV. 1130-1133
[46] Brian R. Landy, 'The Two Strands of the Fair Use Web: A Theory for Resolving the Dilemma of Music Parody', [1993] 54 OHIO ST. L.J. 227

of your use. Second, the nature of the copyrighted work. Third, the amount and substantiality of the portion taken, and finally, the effect of the use upon the potential market.

The Supreme Court defined parody as "the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's work." The relevant question then, for the court was to what extent the work is transformative, i.e., to what extent the new work alters the original with new expression, meaning or message[47] Justice Souter found that the rap group's version rose to the level of parody by virtue of its comments on the naïveté of the original; since it "juxtaposes the romantic musings of a man…with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility."[48]

On the other hand, this law-and-economics school of thought, as Patricia Aufderheide and Peter Jaszi term it, "*simply does not work when noneconomic values are important*," as with scholarly publishing. More recently, courts in America have tended to lean foremost on the factor of transformativeness, asking to what degree the original work is transformed by the reuse and for what purpose[49]

Coenraad Visser provides a useful comparative perspective in his article titled 'The location of the parody defence in copyright law: some comparative perspectives'[50]. He analyses various jurisdictions and finds that they cleave into two camps in creating the defence for parody – either a special exception for parody from copyright infringement or by treating it as part of a general exception from copyright infringement, such as fair use or fair dealing. The United States falls in the latter camp.[51]

E. Scott Fruehwald supports the status quo by arguing that parody should not receive a special status, and should be evaluated under the usual four factors in fair use analysis. He further states that the fair use-analysis should be done on a case-by-case basis having considered the interaction of the factors and the subfactors, instead of creating any presumptions about usage such as

[47] *Campbell v. Acuff-rose Music, Inc* 510 U.S. 569, 581 (1994)
[48] ibid 583
[49] Patricia Aufderheide and Peter Jaszi, Reclaiming Fair Use: How to Put the Balance Back into Copyright (University of Chicago Press 2011) 39
[50] Coenraad Visser, 'The location of the parody defence in copyright law: some comparative perspectives' [2005] 38 The Comparative and International Law Journal of Southern Africa 321-343
[51] Michael C. Albin, 'Beyond Fair Use: Putting Satire in Its Proper Place', [1985] 33 U.C.L.A. L. REV. 518

commercial use being presumptively unfair. His final argument stems from economics and he states that the fair use defense should be applied narrowly to parody since courts can consider the interests of the parodist and the creator of the original in apportioning profits.[52] Judge Leval proposed the 'transformativeness' concept into fair use law in a seminal piece.[53]

Amy Adler critiques the creation of the 'transformativeness' standard as introduced by Judge Leval in 1980 and which was accepted by the supreme court as part of the fair use doctrine. The idea was to protect free speech and foster creativity by greater leeway through fair use for the creators to build on preexisting works. However, she argues that the test has not only failed to accomplish the goal but has in turn stifle creativity[54]. Her argument is that concept of transformativeness is unsuited for the present times as it requires to look for whether the art has 'meaning' or is 'new'. This she argues is not viable in a contemporary society when so much of current art has multiple varying meanings and uses copying as a building block of creativity, rejecting an idea of newness.[55] This flawed test she thus argues has stifled creativity when it was aiming in fact for the contrary.[56]

V. CONCLUSION

In a comparison of the statutes and the judicial pronouncements of the U.S. and India, an argument that springs out is that in the U.S., the judges have more freedom to assess "fair use" and possibly extend these factors to the ever-new areas of technology and copyright content. On the other hand, the Indian boundaries defined for "fair dealing" appear to slant towards the interests of the society and the common people. This being said, however, it appears that the US test may tend to ignore the commercial implications that fair dealing might have upon such use of a work. The balancing act, at least for the Indian legislation, appears to have been found in the conjoint application of the two. Indian courts have now, incorporated vide reference, the *Folsom v. Marsh* test, while

[52] E. Scott Fruehwald, 'The Parody Fair Use Defense after Campbell' [1993] 18 VLA J.L. & Arts
[53] Pierre N. Leval, 'Towards a Fair use standard' [1990] 103 Harv. L. Rev. 1105
[54] Amy Adler, 'Fair Use and the Future of Art' [2016] 91 New York University Law Review
[55] William F. Patry and Shira Perlmutter, 'Fair Use Misconstrued: Profit, Presumptions, and Parody', [1993] 11 CARDOZO ARTS & ENT. L.J. 667, 714-15
[56] Susan L. Faaland, 'Parody and Fair Use: The Critical Question', [1981] 57 WASH. L. REV. 163

adjudging, if fair dealing was in fact "fair" to the real commercial implications that the author suffers.

Though the courts have adapted the US approach from time to time in its decisions, it is noted that the overall defense of fair dealing available in India is yet to be examined, enlarged and defined. Given the fact that the tussle between the fundamental right of freedom of expression and copyright protection has been so intensely debated, it is highly unlikely that these issues would get resolved in the times to come. It can be expected that the unresolved issues that have been highlighted in the conflicting interpretations in the two jurisdictions may resurface. While, there has been a growing acceptance of parody works in several parts of the world, the idea of uninhibited right to indulge in parody certainly needs to be revisited. There should certainly be due recognition to the idea of freedom of expression. However, the need for deference for the copyright protection should not be left out of discussion.

The literature review has given a possible solution to resolve the conflict in the sense that numerous scholars have gone on length to explain the idea of creating a parody exception. However, such a solution is going to have monumental challenges as different jurisdictions have perceived this issue in an entirely different manner. The definitional challenge of parody is the most critical challenge in the way of creating a fair use exception within the domain of copyright law.[57] Another major challenge is going to be with regard to the balance between the rights of parodists and copyright owners.[58]

It is clear from the above discussion that the degree of conflicting views on this issue does not indicate a clear passage even in the near future. The competing interests appear to be equally strong hence, the idea of carving out a balanced normative framework remains an elusive one at best. Despite the numerous challenges flagged by parody exceptions, several legislative and judicial efforts have been made to strengthen it. However, it has also been argued that given the strong market position of parodies, there is a greater immunity even in those jurisdictions who have displayed hostile attitude towards parody music.

[57] Wendy J. Gordon,' Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors', [1982] 30 J. COPYRIGHT Soc. 253, 282-83
[58] Paul Goldstein, 'Derivative Rights and Derivative Works in Copyright' [1982] 30 J. COPYRIGHT L. Soc. 209, 235