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ARTICLE

Laughing Is Not an Exception! An Italian Perspective on the Autonomous Protection of Parodies Beyond Elaboration

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Abstract This paper analyses the legal regime of parodistic work from an Italian and European copyright law perspective. Taking into consideration that the Italian Copyright Act does not contain any specific parody exception, the author maintains that parodistic works cannot fall within the scope of the quotation and criticism exception. Based on the fact that, as is well known, EU copyright law does not allow Member States and national courts to apply a general "fair use" doctrine to support the lawfulness of using another's work for parodistic purposes, it is argued that the use of a previous work to create a new parodistic work falls beyond the scope of copyright protection, and that the creation and commercialisation of a parodistic work cannot be prohibited by the author of the parodied work, since the former does not amount to an elaboration of the latter.

Keywords Copyright · Derivative works · Right of elaboration · Parody

1 Introduction: Parodies and the Right of Elaboration

As is well known, copyright law grants authors the exclusive right to exploit their works of authorship for commercial purposes. From an Italian law perspective, this is stated in Art. 12(2) of the Italian Copyright Act,[1] according to which the author shall have "the exclusive right to the economic utilisation of the work in any form or manner, whether original or derivative". Italian copyright law thus confers on the

[1] Legge 22 aprile 1941, n. 633 sulla protezione del diritto d'autore e di altri diritti connessi al suo esercizio (known as: "Legge sul diritto d'autore").

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copyright owner first and foremost the exclusive right of economic exploitation of the work as such, and thus, in particular, the right to publish,[2] reproduce,[3] transcribe,[4] perform,[5] distribute,[6] and communicate the protected work to the public.[7]

But, as is clear from the phrasing of the aforementioned Art. 12(2), copyright protection extends well beyond the mere utilisation of the work as such, and also confers on the author the exclusive right to further elaborate the work.[8]

This is clarified in other provisions of the Italian Copyright Act. Namely, Art. 18 specifies that the copyright owner also has the exclusive right of elaboration, which concerns "all forms of modification, adaptation and transformation of a work"; while Art. 4 defines the concept of "derivative" or "elaborated" works as "works of a creative character derived from any [other protected] work, such as translations into another language, transformations into any other literary or artistic form, modifications and additions constituting a substantial remodelling of the original work, adaptations, arrangements, abridgements and variations which do not constitute an original work", and states that these derivative works shall also be protected by copyright, provided they do not "entail a prejudice to the rights subsisting in the original work".[9] Italian copyright law hence, like every copyright law of the countries that are parties to the Berne Convention[10] and the TRIPS Agreement,[11] prohibits both the unauthorised use of others' works as such, as well as the elaboration of others' works to create new derivative works.

With this in mind, it is a classic issue in copyright law, and in Italian copyright law in particular, whether parodying another's work constitutes a lawful activity or a form of plagiarism of the original work.[12] In general terms, parody consists of the reuse and partial reproduction of an earlier work (the parodied work) to create a new

[2] Art. 12(1) of the Italian Copyright Act.

[3] Art. 13 of the Italian Copyright Act.

[4] Art. 14 of the Italian Copyright Act.

[5] Art. 15 of the Italian Copyright Act.

[6] Art. 17 of the Italian Copyright Act.

[7] Art. 16 of the Italian Copyright Act.

[8] In general, on the right of elaboration in copyright law, *see*, for instance, Goldstein (1983); Reese (2008); Samuelson (2012).

[9] For the concept of "derivative work" in Italian law ("*opera derivata*" or "*opera elaborata*"), *see*, in particular, Albertini (2015).

[10] Art. 12 of the Berne Convention for the Protection of Literary and Artistic Works states that: "Authors of literary or artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works".

[11] As is well known, Art. 9 of the TRIPS Agreement states that: "Members shall comply with Articles 1 through 21 of the Berne Convention and the Appendix thereto". Hence, all TRIPS Member States must also comply with the provisions of the Berne Convention.

[12] The legal literature on parody and copyright is abundant. *See e.g.* Smith (1993); Merges (1993); Jongsma (2017); Jacques (2019). For authors who have addressed the issue of parody with specific regard to Italian law, *see* Musatti (1909); Piola Caselli (1927); Fabiani (1985); De Sanctis (1990); Spina Ali (2015).

work having comic, burlesque or satirical purposes (the parodistic work).[13] In this context, parody should not be confused with satire.

While both literary genres employ humour as a tool for criticism, their purposes differ significantly.[14] By definition, a parody is a comedic attack on a specific work by another author, and in *Deckmyn*[15] the CJEU clarified that the essential characteristics of a parody are "to evoke an existing work whilst being different from it; and to be an expression of humour or mockery". Satire, on the other hand, even when it uses another work as the vehicle for the message, offers a broader commentary and criticism about society, and does not have that specific creative work as the main target.

Thus, the essential element of parody – which distinguishes it from satire – is that the parodied work is clearly identifiable by the audience; so much so that it is generally believed that the parodistic operation is all the more successful the more it preserves in a manifest way the recognisable elements of the original.[16]

With this clarification in mind, parodistic works would seem to fall within the category of derivative works referred to in Art. 4 of the Italian Copyright Act. And, in fact, although this provision does not mention parodies expressly, the list contained therein on the one hand is merely illustrative in nature, and on the other hand proceeds with very broad categories so that parody could well fall in particular under "modifications [...] that constitute a substantial remake of the original work" or under "transformations into another literary form".

If this is the case, however, the very existence of the parodistic genre would be in jeopardy, as authors would hardly grant to others the right to make a parody out of their own work.[17]

Hence, in order to allow the parodistic use of others' works, three alternative paths can be envisaged: either (i) it is necessary to find a copyright exception or limitation in the legal system that, in order to safeguard third parties' rights, allows the exploitation and use of another's work for the purpose of parody even without the authorisation of the author of the original work; or (ii) one could rely on other general principles of copyright law to maintain that the free use of a work for parody purposes should be allowed despite the lack of an express exception or limitation; or (iii) one must conclude that parodistic works do not constitute derivative works at all, but rather autonomous new works of authorship that are entirely independent of

[13] On the concept of parody in literature and art, *see e.g.* Giannetto (1977); Rose (1993); Hutcheon (2000).

[14] For a better understanding of the differences between parody and satire, *see* Kreuz and Roberts (1993) and Mayr (2003).

[15] ECJ, 3 September 2014, C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others*, para. 20.

[16] Mayr (2003), p. 279, according to whom "parody is not, in short, such if it does not immediately call to mind the work parodied: and to do so it must necessarily contain and reproduce a relevant set of elements of the original work" (author's own translation). For similar arguments in case-law, *see* Rome County Court, 18 November 1966, Il diritto d'autore 38, p. 534; Rome County Court, 29 August 1978, Il diritto d'autore 49, p. 967.

[17] Cogo (2016a, b), p. 108. On this problem, *see also* Yen (1991).

the parodied one, and whose creation is therefore freed from the exclusive right of elaboration of the original work.

2 The (Missing?) Italian Parody Exception

Starting from the first of these scenarios, the discussion must necessarily start by observing that whereas some countries have adopted a system of open-ended copyright exceptions and limitations,[18] in other jurisdictions these are peremptory in nature.[19]

The Italian Copyright Act falls within the latter category, as the use of protected material without the consent of the copyright owner is only allowed in the specific circumstances set forth in Arts. 65 to 71^{decies} and in a few other provisions of the Act. Outside these cases, courts are not allowed to find other uses of protected works lawful on the basis of more general and flexible principles, as is the case in those jurisdictions where the fair use doctrine applies.[20]

This is in line with EU copyright law, as the InfoSoc Directive[21] "provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public",[22] foreclosing any possibility for Member States to introduce any exception or limitation beyond those enumerated in the Directive.[23]

[18] The most well-known example of open-ended exceptions and limitations can be found in the U.S. Copyright Act, which in Sec. 107 establishes the so-called "fair use doctrine". In particular, under U.S. copyright law, any kind of use of a protected work can be deemed "fair" by judges on the basis of a four-step analysis that must take into account: (i) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (ii) the nature of the copyright work; (iii) the amount and substantiality of the portion used in relation to the copyright work as a whole; and (iv) the effect of the use upon the potential market for, or value of, the copyright work. On the fair use doctrine in the U.S., *see e.g.* Weinreb (1990); Patterson (1992). With specific regard to parody as fair use, *see* Posner (1992). For some judgments by U.S. courts that have found parody admissible under the fair use doctrine, *see Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *Blanch v. Koon*, 467 F.3d 244 (2d Cir. 2006).

[19] For an analysis on how the two different systems work and how they differently impact copyright policy, *see* Ottolia (2010); Balganesh and Nimmer (2017).

[20] For a general overview of how the exhaustive list of exceptions and limitations works, *see* Ubertazzi (1994); Ricolfi (1996); Abriani (2002); Sarti (2009); Margoni (2012).

[21] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[22] Directive 2001/29/EC, Recital 32. This has also been confirmed by the CJEU, *e.g.* ECJ, 29 July 2019, C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, para. 56.

[23] In favour of the introduction of a "fair use" doctrine in EU copyright law, *see* Senftleben (2011); Piotraut (2012); Geiger, Gervais and Senftleben (2014).

Amongst these exceptions and limitations, Art. 5(3)(k) of the InfoSoc Directive allows Member States to introduce in their domestic legislation the free use of protected intellectual works "for the purpose of caricature, parody or pastiche".

The Directive, however, does not specify what parody means; the contours of this notion have therefore been defined by legal scholars and case-law, especially by the European Court of Justice, which was called upon to rule on the issue, namely in *Deckmyn*.[24]

On that occasion, the ECJ clarified first and foremost that "parody" constitutes an autonomous legal concept within the EU legal framework, which as such must be interpreted uniformly in all Member States.[25] Then, leveraging on the ordinary meaning of the term in everyday language,[26] it has outlined a rather broad definition of parody, specifying that its essence lies in the twofold fact of: (i) clearly evoking an earlier work, while presenting perceptible differences from it; and (ii) having a humorous or mocking character.[27] In addition to this, the Court clarified that the notion of parody is not subject to further requirements, and thus, in particular, it does not have to present an "original character" in order to be lawful.[28]

Except for authorising "temporary acts of reproduction" according to Art. 5(1), the copyright exceptions and limitations provided for in Art. 5(2) and (3) of the InfoSoc Directive are not mandatory, and each Member State is given complete discretion whether or not to adopt them in their domestic copyright law.[29] The Italian legislature has not availed itself of the option provided for in Art. 5(3)(k), and thus has decided not to introduce in the Italian Copyright Act an *ad hoc* provision expressly authorising the free use of protected works for parodistic use.[30]

Article 17(7) of the more recent DSM Directive[31] provides that EU Member States must ensure that users are able to rely on exceptions or limitations for quotation, criticism, review and use for the purpose of caricature, parody or pastiche when uploading and making available content generated by users on online content-sharing services. Marking an important shift from the InfoSoc Directive, the wording of the DSM Directive is clear in making the parody exception mandatory for all Member States.[32] The provision, however,

[24] ECJ, 3 September 2014, C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others*. This case has been widely commented on: *see e.g.* Rosati (2015a); Rosati (2015b); Boggio (2015); Seville (2015); Banterle (2016); Jongsma (2017); Schwabach (2021).

[25] *Deckmyn*, para. 15: "[i]t is clear from that case-law that the concept of 'parody', which appears in a provision of a directive that does not contain any reference to national laws, must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union".

[26] *Deckmyn*, para. 19.

[27] *Deckmyn*, para. 20.

[28] *Deckmyn*, para. 21.

[29] For a reconstruction of the path and reasons that led the European legislature to adopt this distinction between mandatory and optional exceptions, *see* Sganga (2021). For criticism of this approach, *see also* Sganga (2021) and Guibault (2010).

[30] For a historical reconstruction of the parliamentary debate concerning whether to introduce a parody exception in Italian copyright law, *see* Spina Ali (2021), p. 415.

[31] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

[32] Sganga (2021), p. 477.

is likewise clear in specifying that such exception is mandatory only when "uploading and making available content generated by users on online content-sharing services". Italy has thus recently introduced a parody exception in its Copyright Act, but this exception can be invoked only for specific online activities.[33]

Prima facie one should therefore conclude that in Italy parodying a previous work without the prior consent of the author is never allowed, at least in offline activities. This statement, however, is too simplistic. In fact, before reaching such a conclusion one must verify whether, despite the lack of an express provision to this effect, parody may nevertheless be deemed lawful on the basis of other provisions or general principles of Italian copyright law.

A first thesis, against the admissibility of the parody exception in Italian copyright law, could be based on the well-known hermeneutical principle according to which *ubi lex voluit dixit, ubi nolit tacuit* (if the law means something, it says it; if it does not mean something, it does not say it), and consider that, by deciding not to implement Art. 5(3)(k) of the InfoSoc Directive, the Italian legislature has manifested its clear intention not to allow the use of others' works for parodistic purposes.

However, this argument is not decisive. In fact, one could also examine the opposite consideration that the non-transposition of Art. 5(3)(k) stems from the fact that the Italian legislature considered such a transposition redundant precisely because within the Italian Copyright Act there is already a rule or principle allowing the free parodistic use of a previous work.

3 Parody as Criticism or Quotation?

The lawfulness of parody has sometimes been invoked before Italian courts on the basis of Art. 70 of the Italian Copyright Act,[34] according to which "the abridgment, quotation or reproduction of fragments or parts of a work and their communication to the public for the purpose of criticism or discussion, shall be permitted within the limits justified for such purposes, provided such acts do not conflict with the commercial exploitation of the work".[35]

In a recent important judgment involving the parodistic use of the well-known fictional character "Zorro" in a television advertisement,[36] the Italian Supreme Court supported this thesis, and clarified that "the right of criticism and discussion

[33] Art. 102^{nonies} of the Italian Copyright Act: "Users, when uploading and making available content they generate through an online content sharing service provider, may avail themselves of the following exceptions or limitations to copyright and related rights: (a) quotation, criticism, review; (b) use for the purpose of caricature, parody or pastiche".

[34] *See*, for instance, Rome District Court, 29 September 2008, AIDA – Annali italiani del diritto d'autore, della cultura e dello spettacolo 19, p. 760.

[35] For an analysis of the quotation exception under Italian copyright law, *see* Gambino (2002); Mayr (2003); Sappa (2019); and Visentin (2022).

[36] Italian Supreme Court, 30 December 2022, No. 38165. An English translation of the judgment can be found in IIC 54, p. 953. The case has been widely commented on by legal scholars: *see e.g.* Fabris (2023); Caso (2023); Manstretta (2023).

may be exercised in different ways, including through irony as in satire, or through use of a comic and burlesque register, as in parody. In such cases, grotesque provocation is used to ridicule characteristic elements of a work".[37] And therefore, according to the Supreme Court, the choice of the Italian legislature not to transpose Art. 5(3)(k) of the InfoSoc Directive "can be ascribed to the fact that Article 70 already includes the exception of parody, understood as an expression of the right to criticise and discuss a protected work".[38]

This reasoning, however, is not convincing.

It is true that Art. 70 of the Italian Copyright Act allows the active use of a previous work for the purpose of criticism or quotation either in a purely reproductive or in an elaborate form, such as by summary or translation into another language. It is also true that the provision has precisely the dual purpose of allowing greater circulation of a work's creative or informational content and enabling its exploitation to create new intellectual works.[39]

On the other hand, however, the provisions on copyright exceptions and limitations constitute a derogation from the general principles of copyright protection; they are thus exceptional in nature,[40] and as such they should be interpreted restrictively.[41] In other words, the rules establishing exceptions and limitations to copyright constitute derogative rules, articulated in a series of conditions that are exhaustively listed and all equally necessary for their application. This is also in line with the EU copyright *acquis communautaire*,[42] as the ECJ has

[37] Italian Supreme Court, 30 December 2022, No. 38165, IIC 54, p. 959.

[38] Italian Supreme Court, 30 December 2022, No. 38165, IIC 54, p. 960.

[39] Bertani (2011), p. 339.

[40] On the exceptional nature of the provision establishing exemptions and limitations to copyright, *see e.g.* Greco and Vercellone (1974), p. 171; Auletta and Mangini (1977), p. 167; Ubertazzi (1994), p. 67; Abriani (2002), p. 109; Leistner (2011), p. 417; Galopin (2013), p. 431; and in case-law, *see e.g.* Italian Supreme Court, 7 March 1997, No. 2089, Giurisprudenza italiana 150(1), p. 1191; Italian Supreme Court, 19 December 1996, No. 11343, Rivista di diritto industriale 46(2), p. 75; Milan District Court, 12 February 2000, AIDA – Annali italiani del diritto d'autore, della cultura e dello spettacolo 9, p. 720; Trento District Court, 22 February 2000, AIDA – Annali italiani del diritto d'autore, della cultura e dello spettacolo 9, p. 721; Milan Court of Appeal, 26 March 2002, AIDA – Annali italiani del diritto d'autore, della cultura e dello spettacolo 12, p. 912. However, for the opposite thesis that denies the exceptional nature of these provisions, *see* Piola Caselli (1943), p. 441; Galletti (2002), p. 168; Pennisi (2005), p. 187; Angelicchio (2005), p. 576; Spolidoro (2007), p. 192.

[41] *See*, for instance, Ubertazzi (1994), p. 76, who points out that the free use of the work for the purpose of citation is allowed only when it is aimed at expressing protected opinions under Arts. 21 and 33 of the Italian Constitution, and not also when it is functional to the performance of economic activities. For case-law applying a strict interpretation of the provisions on copyright exceptions and limitations, *see* Rome District Court, 5 October 2016, AIDA – Annali italiani del diritto d'autore, della cultura e dello spettacolo 26, p. 895. For the opposite thesis, which excludes the exceptional nature of these provisions and maintains that they can be applied by analogy, *see* Santoro (1966), p. 375.

[42] *See* Senftleben (2012), p. 349, who underlines that: "Under the Continental-European approach, use privileges are included in a closed catalogue of exceptions that are circumscribed narrowly and often interpreted restrictively by the courts".

clarified that, in accordance with general principles of EU law, exceptions and limitations must be interpreted restrictively and "in the light of the need for legal certainty for authors with regard to the protection of their works".[43]

Article 70 of the Italian Copyright Act subjects the citation exception in particular to a double quantitative and functional limit.

As per the functional limit, by following a restrictive interpretation one should be able to invoke the exception under Art. 70 for the sole purpose of criticising or discussing another's work, and hence for making the subject of such critical reflections known to the public through the exposition of the author's thought, style and theses.[44] Conversely, parody by definition exploits a previous work to provide a comic or humorous effect; hence, it does not appear to have a direct purpose of criticism or discussion as intended by Art. 70.[45] This is all the more so if one considers that the main characteristic of a parody is to deform the meaning of the parodied work, to distort its conceptual content and to arouse in the audience feelings that are antithetical to those provoked by the original work. And hence a parody, as a burlesque disguise of a serious work, appears to be diametrically opposed to a criticism or a comment, which presupposes an earnest analysis of the original work as such.[46]

Secondly, as per the quantitative limit, the exception set forth in Art. 70 is applicable only to "fragments or parts of a work".[47] Thus, even if one should maintain that parody could fall under the scope of Art. 70 as a form of criticism, the parodistic use of another's work should be permissible exclusively where the parody contains only brief or partial quotations from the parodied work; and not also in those cases where the use of creative elements of the original work is more substantial and constitutes the core of the parodistic work.[48] Again, this appears to be incompatible with the very definition of parody that, as already seen, requires the

[43] ECJ, *Infopaq International A/S v. Danske Dagblades Forening*, C-5/08, EU:C:2009:89, para. 56. The restrictive interpretation also seems to be mandated by Recital 9 of the InfoSoc Directive, which requires a high degree of protection for the exclusive rights of authors: "[a]ny harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation".

[44] Ascarelli (1960), p. 743; Greco and Vercellone (1974), p. 171; Cartella (1980), p. 409; Ubertazzi (1994), p. 79. For case-law, *see e.g.* Rome District Court, 26 November 2021, AIDA – Annali Italiani del diritto d'autore, della cultura e dello spettacolo 31, p. 1047, stating that the reproduction of parts of another person's intellectual work not justified for purposes of criticism or scientific research is not covered by Art. 70; Milan District Court, 2 March 2009, AIDA – Annali Italiani del diritto d'autore, della cultura e dello spettacolo 18, p. 822.

[45] For the thesis according to which the quotation exception should not be applicable to parodistic works because parody cannot be brought back into the sphere of criticism *stricto sensu*, *see* Fabris (2021), p. 905, and other authors quoted therein. In case-law, *see e.g.* Milan District Court, 29 January 1996, AIDA – Annali italiani del diritto d'autore, della cultura e dello spettacolo 5, p. 669, which refused to assimilate parody to quotation because the two have a different function.

[46] As stated by Gervais (2013), p. 839, "a work that quotes generates a message that does not transform the primary work. Instead, it uses the primary work as support or illustration".

[47] In favour of this restrictive interpretation, *see* Piola Caselli (1943), p. 455; Ascarelli (1960), p. 743; Greco and Vercellone (1974), p. 171; Valenti (1999), p. 88; Ercolani (2004), p. 292; for case-law, *see* Milan Court of Appeal, 25 February 2002, AIDA – Annali Italiani del diritto d'autore, della cultura e dello spettacolo 11, p. 886.

[48] Italian Supreme Court, 8 February 2022, AIDA – Annali Italiani del diritto d'autore, della cultura e dello spettacolo 31, p. 833.

parodied work to be clearly identifiable by the audience, which in turn presupposes the substantial reproduction of elements of the original work.

While the quotation exception has traditionally been interpreted in this restrictive sense, in the aforementioned *Zorro* case the Italian Supreme Court has followed a different path. In particular, the Court has found that the principle of the fair balance between fundamental rights coined by the ECJ prevails over the restrictive interpretation based on the assumption that copyright limitations constitute exceptional provisions.[49] Indeed, in the more recent ECJ jurisprudence, the formula of the fair balance between opposing rights has served precisely the scope of giving flexibility to the interpretation of copyright exceptions and limitations, which have traditionally been condemned to be caged in the narrow meshes of restrictive interpretation.[50] In the wake of this new trend in European case-law, the Italian Supreme Court hence seems to have abandoned the traditional restrictive hermeneutic canon, and clarified that the limit to which parody is subject, in itself, is the safeguarding of the fair balance between the interests and rights of the copyright holder and the freedom of expression of those who avail themselves of the parody exception: the conditions for safeguarding the balance are inscribed in Art. 70 of the Italian Copyright Act.[51]

This interpretation, however, is not convincing, for at least three reasons.

First of all, one must consider that: (i) the InfoSoc Directive "provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public";[52] (ii) the ECJ has established that "the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly";[53] and (iii) the InfoSoc Directive gave EU Member States the option to introduce a specific copyright exemption or limitation "for the purpose of caricature, parody or pastiche", but the Italian legislature has not exercised this faculty. Given these premises, one must conclude that the Italian legislature should have availed itself of the possibility of introducing such a specific provision, while in default Italian courts are not allowed to interpret an exceptional provision by analogy to allow for a free use of protected works not provided by the Act.

Secondly, the fact that the parody exemption in the InfoSoc Directive is not mandatory but merely optional has another important consequence for the placement of this provision within the hierarchy of the sources of law. In fact,

[49] Italian Supreme Court, 30 December 2022, No. 38165, IIC 54, p. 960. This thesis is not new and has been suggested by a number of legal scholars before: *see e.g.* Meli (1997), p. 86; Angelicchio (2005), p. 576; Pennisi (2005), p. 229; Bertani (2011), p. 229; Galletti (2002), p. 168.

[50] *See* the well-known ECJ "Trilogy": ECJ, 29 July 2019, C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*; ECJ, 29 July 2019, C-476/17, *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben*; ECJ, 29 July 2019, C-516/17, *Spiegel Online GmbH v. Volker Beck.* On this new interpretative trend of the ECJ, *see e.g.* Sganga (2019), p. 670; Hui and Döhl (2021), p. 852.

[51] Italian Supreme Court, 30 December 2022, No. 38165, IIC 54, p. 961.

[52] Recital 32 of the InfoSoc Directive.

[53] ECJ, 29 April 2004, C-476/01, *Felix Kapper*, para. 72.

the optional nature of this EU provision implies that: (i) it is not "self-executing" in the domestic legal system;[54] and as a consequence (ii) it does not prevail over conflicting national provisions. By contrast, Art. 2 of the same Directive establishes that "Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part". This provision is mandatory and thus, according to the general principles of EU law, it shall prevail over conflicting internal rules of EU Member States. In other words, only the rules guaranteeing the proprietary incentive to authors enjoy "Community coverage", and not the rules protecting the general interest in the dissemination of works; this distinction underpins the traditional thesis that recognises the general nature of the former and the exceptional (and thus limited) scope of the latter.[55]

Finally, according to settled case-law of the ECJ, Member States that have decided to transpose an optional exception or limitation among those that a directive authorises must regulate it in conformity with EU rules, and may not instead specify its parameters in a non-harmonised manner.[56] In other words, Member States can decide whether or not to implement any of the optional exceptions and limitations provided for by the InfoSoc Directive, but once they have decided to implement one, they have no room to manoeuvre concerning the boundaries of these exceptions.[57] This is particularly relevant in cases where a Member State has already regulated a specific copyright exception that the Directive allows, but with different parameters. In this case, the courts of that Member State should align the national legislation with that contained in the Directive by way of interpretation. Article 5(3)(d) of the InfoSoc Directive grants Member States the option to introduce a specific copyright exception in the case of "quotations for purposes such as criticism or review". And hence Italian courts are bound to interpret the national quotation exception in conformity with EU law and the ECJ's case-law.

In his opinion in *Painer*, Advocate General Trstenjak has formulated a restrictive interpretation of the quotation exception under Art. 5(3)(d) of the InfoSoc Directive, by underlining three requirements as follows: (i) third-party intellectual property must be reproduced without modification in identifiable form; (ii) the fact that quotation is for purposes such as criticism or review is not sufficient in itself, but

[54] As is well known, a provision contained in an EU Directive has a direct vertical effect in Member States only when it is clear, precise and unconditional. *See* ECJ, 5 February 1963, C-26/62, *NV Algemene Transport – en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, p. 13. On this topic, *see* Robin-Olivier (2014).

[55] Abriani (2002), p. 112.

[56] ECJ, *Deckmyn*, para. 16.

[57] Rosati (2015a), p. 521, according to whom "it appears that Member States' freedom to fine-tune the breadth of resulting national exceptions and limitations may be much narrower than has been understood so far"; Spina Ali (2021), p. 416.

"there must also be a material reference back to the quoted work in the form of a description, commentary or analysis"; and (iii) "the quotation must be a basis for discussion".[58] In its judgment on the same case, the ECJ has only marginally addressed the issue of the quotation exception, but stated that it is intended "to preclude the exclusive right of reproduction conferred on authors from preventing the publication, by means of quotation accompanied by comments or criticism".[59]

Later, in *Spiegel Online*, the ECJ clarified that the user of a protected work wishing to rely on the exception for quotations "must necessarily establish a direct and close link between the quoted work and his own reflections, thereby allowing for an intellectual comparison to be made with the work of another, since Article 5(3)(d) of Directive 2001/29 states in that regard that a quotation must *inter alia* be intended to enable criticism or review".[60]

More precisely, in *Pelham* the ECJ established the so-called "dialogue requirement" for the application of the quotation exception.[61] First of all, the Court observed that, since the InfoSoc Directive gives no definition of the term "quotation", the meaning and scope of that term must be determined by considering its usual meaning in everyday language.[62] The Court then observed that

> the essential characteristics of a quotation are the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user, since the user of a protected work wishing to rely on the quotation

[58] Opinion of Advocate General Trstenjak delivered on 12 April 2011, C-145/10, *Eva-Maria Painer v. Standard Verlags GmbH and Others*, C-145/10, para. 210: "[t]he notion of quotation is not defined in the directive. In natural language usage, it is extremely important for a quotation that third-party intellectual property is reproduced without modification in identifiable form. As is made clear by the general examples cited in Article 5(3)(d) of the directive, according to which the quotation must be for purposes such as criticism or review, this is not sufficient in itself. There must also be a material reference back to the quoted work in the form of a description, commentary or analysis. The quotation must therefore be a basis for discussion".

[59] ECJ, 7 March 2013, C-145/10, *Eva-Maria Painer v. Standard VerlagsGmbH and Others*, para. 120.

[60] ECJ, 29 July 2019, C-516/17, *Spiegel Online GmbH v. Volker Beck*, para. 79. The same seems to hold true under German copyright law. Section 51 of the German Copyright Act (*Urheberrechtsgesetz*) provides the quotation exception as follows: "It is permitted to reproduce, distribute and communicate to the public a published work for the purpose of quotation insofar as such use is justified to that extent by the particular purpose. This is, in particular, permitted where (1) subsequent to publication individual works are included in an independent scientific work for the purpose of explaining its content, (2) subsequent to publication passages from a work are quoted in an independent literary work, (3) individual passages from a released musical work are quoted in an independent musical work". German doctrine and jurisprudence in fact maintain that the quotation must constitute proof and an example ("*Beleg*") to support the assertions of the citing author. In this way, even in German law one can note a particularly restrictive approach to the citation exception, which is applicable only where an instrumental link can be found between the cited work and the citing work, in which the former must be of a secondary character compared to the second. For this analysis in German legal doctrine, *see* Adeney and Antons (2013); and in case-law, BGH, 4 December 1986, GRUR 1987, p. 362.

[61] For an analysis of the "dialogue requirement", *see* Senftleben (2020a), p. 764; Senftleben (2020b), p. 317.

[62] ECJ, 29 July 2019, C-476/17, *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben*, para. 70.

> exception must therefore have the intention of entering into "dialogue" with that work.[63]

On the contrary, if the quoted work has become an integral part of the quoting one, as is the case with parodies, the very definition of "dialogue" is not fulfilled and the quotation exemption is not applicable.

As a consequence, one should conclude that, in the absence of a specific parody exemption within the Italian Copyright Act, Italian courts are not allowed to bring back through the window of Art. 70 what has not been allowed to enter through the main door.

4 No Room for Parody as a Copyright Exception or Limitation Under Italian Copyright Law

Upon closer analysis, however, it does not seem necessary to resort to an extensive interpretation of the quotation exception under Art. 70 of the Italian Copyright Act in order to admit the lawfulness of parodistic works. In fact, several other arguments have been put forward to support the lawfulness of using another's work for parodistic purposes.

The first of these theses is based upon the principle of the idea/expression dichotomy, and on the assumption that parody would merely take over non-protectable elements of the original work to build a different work on or around it.[64] If theoretically this argument might seem correct, on closer inspection it looks too simplistic and does not seem to be applicable to parodistic works as defined by the ECJ.

In fact, this thesis overlooks the structural dimension of parody, which must always strike a certain balance between elements copied from the parodied work on the one hand, and elements of originality on the other hand. As stated by Advocate General Cruz Villalon in his opinion in *Deckmyn*, in fact,

> to a greater or lesser extent, a parody is always a copy, for it is a work that is never completely original. On the contrary, a parody borrows elements from a previous work (regardless of whether or not that work is, in turn, entirely original) and, as a matter of principle, these borrowed elements are not secondary or dispensable but are, rather, essential to the meaning of the work.[65]

[63] ECJ, *Pelham*, para. 71. For a criticism of the dialogue requirement, *see* Bently and Aplin (2019).

[64] Santoro (1968), p. 14. For an application of this argument in case-law, *see* Milan District Court, 1 February 2001, AIDA – Annali italiani del diritto d'autore, della cultura e dello spettacolo 10, p. 804. On the basis of the same reasoning, Spedicato (2013), p. 124, maintains that quotation should always be admissible because it reproduces previous works to refer to its unprotected content, without appropriating its expressive form. *Contra* Spina Ali (2021), p. 419.

[65] Opinion of Advocate General Cruz Villalon delivered on 22 May 2015, C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others*, para. 50.

Thus, a parody always copies part of the expressive elements of the parodied work; conversely, a work that merely borrows the non-protectable idea at the basis of a previous work, without copying any of its expressive elements, is not a parody in the legal sense as defined by the ECJ.

A second thesis maintains that parodies should be lawful on the basis of a restrictive interpretation of the exclusive rights conferred by copyright law. In fact, some scholars have put forward the view that the reproduction right and other patrimonial rights conferred by copyright would not cover all possible forms of economic utilisation of the protected work, but would prohibit only those that compete with the normal economic exploitation of the work carried out by the copyright holder.[66] Under this interpretation, parodies would be *per se* lawful because, despite being forms of parasitism of the parodied work, they do not compete with it and do not take market share away from the author of the original work.[67]

While it is true that the parody work does not generally compete with the original work, this thesis is not convincing in its premises. In fact, as seen above, Art. 12 of the Italian Copyright Act grants authors "the exclusive right to the economic utilisation of the work in any form or manner". The Italian legislature has hence defined the scope of the economic exploitation of the work by means of a general clause[68] and did not follow the model, used for example in common law countries as well as in EU[69] and international law, that instead resorts to a peremptory list of authors' rights.

In fact, if according to some scholars copyright is structured as an exclusive right with a mere negative content, which entrusts authors with the power to prohibit specific uses of their own works to protect investments and to avoid free-riding by possible competitors (*ius excludendi omnes alios*),[70] according to others it is instead structured as a right with a positive content as well, consisting of the power of exclusive use and enjoyment, including direct enjoyment of the work in any form (*ius utendi ac fruendi*).[71]

The thesis focusing on the negative content of copyright moves from the structural difference between the appropriation techniques of intellectual property and civil property. It emphasises that while *res corporales* are typically preordained to satisfy the owner's interest in the full, free, direct and unconditional enjoyment of the tangible good, the resources of intellectual property would instead be exclusively destined to be exploited in relations with third parties, through the sale of individual specimens or the licensing of reproduction and distribution rights.

[66] Santoro (1966), p. 375; and in case-law, *see* Milan Court of Appeal, 18 April 2017, AIDA – Annali italiani del diritto d'autore, della cultura e dello spettacolo 26, p. 1155.

[67] Metafora (2001), p. 782; in case-law, *see e.g.* Milan District Court, 29 January 1996, Il Foro Italiano 119, p. 1432; Naples District Court, 15 February 2000, Il diritto d'autore 71, p. 471.

[68] The same model is followed, for instance, by France (Art. 122-1 Loi 1 julliet 1992); Germany (Art. 15 Gesetz über Urheberrecht und verwandte Schutzrechte); and Spain (Art. 17, law 12-3-1996): *see* Bertani (2011), p. 160: Cogo (2016a, b), p. 415.

[69] *See* Visentin (2022), p. 842, who underlines that European law, unlike Italian law, does not provide a general clause that gives the author the exclusive right to use the work in any form and manner, but rather regulates specific patrimonial rights under the copyright umbrella.

[70] Auteri (2005), p. 8; Comporti (2011), p. 54.

[71] Messinetti (1970), p. 187; Bertani (2006), p. 23; Bertani (2011), p. 304.

This seems to be true with regard to international and EU copyright law. In fact, the Berne Convention grants authors "the exclusive right to authorise" third parties to carry out a series of specific activities involving the economic exploitation of their works. Similarly, the European directives have consistently qualified copyright in terms of "rights to authorise or prohibit" third parties from specific economic uses of the work.[72] The formula chosen by the European legislature therefore refers first of all to the *ius arcendi*, i.e. the power to prevent others from exploiting the protected work, and then brings together, as the other side of the coin, the "right to authorise" the use of the same work by third parties.

The Italian Copyright Act seems instead to structure copyright law in a different key, as it not only grants authors the right to authorise or prohibit third parties from using their protected works, but it expressly confers on them "the exclusive right to economically exploit the work in any form and manner".[73] The Act then specifies in Arts. 12 to 18 some of the exclusive rights inherent to copyright, but this list does not exhaust the forms of exploitation of the work that the law reserves to the author.[74] Thus, one should conclude, in particular, that Italian copyright law recognises authors' control over any form of economic exploitation of their intellectual creation, even when it involves non-competitive uses of the same works by third parties.[75]

Futhermore, the thesis that limits copyright protection to commercially competitive uses seems to be in contrast with international law and the EU *acquis communautaire*, and particularly with the well-known three-step test under Art. 9(2) of the Berne Convention and Art. 5(5) of the InfoSoc Directive.[76]

As is well known, Art. 9(2) of the Berne Convention provides that "it shall be a matter for legislation in the countries of the Union to permit the reproduction of [protected] 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". Similarly, Art. 5(5) of the InfoSoc Directive specifies that "[t]he exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder". These provisions thus establish that national legislators can provide for copyright exceptions and limitations provided these respect three requirements, namely: (i) they must be applicable only in specific cases provided for by law, and cannot be overly broad; (ii) the free uses allowed by these provisions must not conflict with the normal exploitation of the work by the copyright holder, and should not "rob right holders of a real or potential

[72] Arts. 2–4 InfoSoc Directive; Arts. 1(1) and 3 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; Arts. 2 and 9 Council Directive 93/83/EEC of 7 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission. *See also* Cogo (2016b), p. 415.

[73] Art. 12(2) of the Italian Copyright Act.

[74] Visentin (2022), p. 842.

[75] Ubertazzi (1994), p. 72; Bertani (2000); Sarti (2002); Bertani (2011), p. 23.

[76] For an in-depth analysis of the three-step test, *see* Ricketson (1987), p. 482; Senftleben (2004).

source of income that is substantive";[77] and (iii) they should not "do disproportional harm to the copyright holder".

The second step of the test hence states that the use of a protected work pursuant to an exception or limitation must not conflict with the normal exploitation of the same work. This second step comes logically after the first; therefore, it comes into play only to delimit the applicability of specific exceptions and limitations that must themselves be expressly provided for by national legislators for certain specific cases (referred to in the first step).[78] As a consequence, the fact that the use of a protected work does not compete with the normal exploitation of the work cannot in itself make such use lawful in the absence of a specific provision authorising that free use in special cases.

Finally, according to a third thesis, parody should be deemed lawful on the basis of the constitutional principles protecting freedom of speech and artistic expression.[79] From this perspective, several authors have advocated for a more balanced and flexible application of copyright exceptions and limitations on the basis of fundamental rights.[80]

If it is true that, as seen above, the ECJ has ruled that copyright exceptions and limitations must be interpreted restrictively, the most recent Court case-law has also made clear that the strict reading of these provisions must not undermine their effectiveness and must ensure that their purpose is fulfilled.[81] Starting with the well-known decision in *Promusicae*,[82] the ECJ has begun to emphasise the importance of

[77] Hugenholtz and Okediji (2012), p. 3.

[78] Senftleben (2004), p. 126.

[79] Freedom of speech is protected by Art. 21 of the Italian Constitution ("Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication"), while artistic freedom is protected by Art. 33 ("The Republic guarantees the freedom of the arts and sciences, which may be freely taught").

[80] *See*, for instance, Zeno-Zencovich (2005); Geiger (2006); Griffiths (2013); Ottolia (2016); Griffiths (2018).

[81] *See*, for instance, ECJ, C-429/08, 4 October 2011, C-429/08, *Karen Murphy v. Media Protection Services Ltd*, paras. 162–163: "It is clear from the case-law that the conditions set out above must be interpreted strictly, because Article 5(1) of the Copyright Directive is a derogation from the general rule established by that directive that the copyright holder must authorise any reproduction of his protected work […]. None the less, the interpretation of those conditions must enable the effectiveness of the exception thereby established to be safeguarded and permit observance of the exception's purpose as resulting in particular from recital 31 in the preamble to the Copyright Directive and from Common Position (EC) No 48/2000 adopted by the Council on 28 September 2000 with a view to adopting that directive".

[82] ECJ, 29 January 2008, C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*.

the principle of a fair balance between the fundamental rights protected by EU law, and has elevated it to the foremost tool in its interpretative arsenal.[83] This hermeneutical principle has been applied to the interpretation of copyright exceptions and limitations as well, and the Court has had to determine the extent to which the rules of the Charter of Fundamental Rights of the European Union could influence the interpretation of copyright exceptions.

In doing this, the ECJ has clarified that the three-step test does not allow for the introduction of innominate exceptions and limitations, nor does it define the material content of the various exceptions and limitations provided for by the InfoSoc Directive.[84] On the contrary, it operates as a general additional requirement with respect to the prerequisites for the application of the individual exceptions and limitations specifically set out in the InfoSoc Directive and transposed into domestic law;[85] it cannot be used to identify additional exceptions not provided for by law. In other words, the three-step test as outlined in the InfoSoc Directive leaves no room for opened-ended exceptions and limitations to be determined by national courts on a case-by-case analysis based upon a set of broad principles and/or rules.[86] As a consequence, since the Italian legislature has not expressly qualified parody as a "special case" for copyright exceptions and limitations, Italian judges should not be allowed to qualify the parodistic use of a protected work lawful on the basis of broadly formulated principles contained in the Italian Constitution, as this would

[83] *Promusicae*, para. 68: "the Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality". For comments on this judgment, *see* Sarti (2008); Ubertazzi (2014); Oliver and Stothers (2017); Van Deursen and Snijders (2018). More generally, on the emergence of the concept of a fair balance between fundamental rights and intellectual property law in the ECJ's jurisprudence, *see* Grosse Ruse-Khan (2014); Romano (2015); Sganga (2019); Romano (2021).

[84] ECJ, 3 April 2014, C-435/12, *ACI Adam BV et al. v. Stichting de Thuiskopie*, para. 25: "As is apparent from its wording, that provision of Directive 2001/29 simply specifies the conditions for the application of the exceptions and limitations to the reproduction right which are authorised by Article 5(2) of that directive, namely that those exceptions and limitations are to be applied only in certain special cases, which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder. Article 5(5) of that directive does not therefore define the substantive content of the different exceptions and limitations set out in Article 5(2) of that directive, but takes effect only at the time when they are applied by the Member States".

[85] Sarti (2014), p. 611, according to whom Art. 5(5) of the Infosoc Directive appears clearly formulated to provide for the three-step test as an additional requirement to the prerequisites for the application of the exceptions and limitations punctually regulated by the preceding paragraphs of the rule. *Contra* De Santis (2013), who maintains that the three-step test is directly applicable at the national level to define the contours of exceptions and limitations provided for in the Italian Copyright Act.

[86] From this perspective, a number of scholars have argued, for instance, that the U.S. "fair use" doctrine violates the obligations under the Berne Convention in relation to the three-step test, and in particular the "first step" according to which copyright exceptions and limitations should be allowed only in "certain special cases": *see* Okediji (2000); Ricketson (2002); Cohen Jehoram (2005). *Contra* Newby (1999); Senftleben (2006); Geiger, Gervais and Senftleben (2014).

fail to meet the certainty requirement for "certain special cases" under the three-step test.

As a consequence, the choice by the Italian legislature not to transpose the parody exception provided for by Art. 5(3)(k) of the InfoSoc Directive should foreclose any possibility for Italian courts to qualify the parodistic use of a previous work of authorship as a free use allowed as an exception or limitation to copyright protection.

5 Beyond Elaboration? Parody as an Autonomous Work of Authorship

The fact that parodistic use cannot be qualified as an exception or limitation to copyright protection under Italian law, however, does not automatically entail that parodies should always be deemed as a form of copyright violation.

In fact, an interpretation of the provisions of Arts. 4, 12 and 18 of the Italian Copyright Act in light of the general principles of copyright law leads to the conclusion that in certain cases the parodistic work can be considered legitimate *per se* as an autonomous and stand-alone original work.[87]

As already noted, in fact, copyright law prohibits both the reproduction of previous works as such and their elaboration to create new works based upon them. These provisions on the right of elaboration and on derivative works must be read in conjunction with those regarding the object and scope of protection of copyright, and in particular with the already mentioned principle of dichotomy between idea and expression. According to this fundamental principle, copyright constitutes a legislative technique that only allows the appropriation of the form of expression of a work, and not instead of the information contained therein or of the idea upon which the work is based. In other words, copyright protection invests a work of authorship as it is expressed and manifested in a specific combination of signs belonging to any of the several languages that make intersubjective communication possible;[88] it does not, on the other hand, invest the idea in and of itself, even if original, which always falls into the public domain and can thus be employed by anyone to create new and different works.

Moreover, Art. 1 of the Italian Copyright Act states that copyright protects "works of the mind having a creative character". Creativity is therefore the *condicio sine qua non* for a work of authorship to attract copyright protection. It is not possible to address here the complex issue of what the law means by "creative character" of a work.[89] Suffice it to say that if a more traditional thesis argued that a work is creative when it "reflects its author's personality",[90] a more recent

[87] De Sanctis (1990), p. 149; Gambino (2002), p. 132; Ercolani (2004), p. 75; Spedicato (2013), p. 123; Spedicato (2018), p. 95; Ghidini (2018), p. 182; C*ontra* Algardi (1978), p. 274; Boggio (2015), p. 1143.

[88] Bertani (2011), p. 275.

[89] For a review of the different positions on this topic, *see* Galli (2019), with several bibliographical references.

[90] For this thesis, known in Italy as "*creatività qualificata*" ("qualified creativity"), *see* Auteri (2016), p. 581.

approach, more in line with the concept of "originality" developed within the EU *acquis communautaire*, maintains that a work is creative when its expressive form is "discretionary"[91] and the result of its "author's free and creative choices".[92]

This is connected with the provision of Art. 19(2) of the Italian Copyright Act, according to which the protection "extends to the work in its entirety and to each of its parts". Therefore, copyright covers not only the work as a whole but also its individual parts, provided that each of these parts, taken in isolation, is in itself endowed with the necessary requirements for protection, and thus shows first and foremost a creative character.

So clarified, the object and the scope of protection of copyright law, plagiarism-counterfeiting, broadly understood as any form of infringement of somebody else's copyright, consists of the unauthorised reproduction in a later work of the creative expressive forms of an earlier protected work or of parts of that work.

To better understand where parody fits within the protection provided by copyright, it is however necessary to undertake a more in-depth analysis of the concepts of "reproduction", "derivative work" and "elaboration" under copyright law, in order to shed light on the relationship between the right of reproduction and the right of elaboration.[93] In fact, as has been stated, "while the rights of reproduction and derivation are joined at the hip, they differ normatively".[94]

As per the right of reproduction, its violation presupposes the multiplication of copies of a protected work as such, or the reproduction of parts of a protected work in another work. In other words, infringement of the reproduction right entails an increase in the quantity of *corpora mechanica*, while variations in terms of quality or meaning fall outside the scope of the right of reproduction.[95]

However, considerations regarding the importance of the previous cultural substratum for the realisation of new creative works, which are often indebted to those of the past, has led to deem it unreasonable and contrary to the principle of proportionality that every slightest identity or similarity between two works shall always constitute an infringement of the reproduction right.[96] Scholars have therefore questioned the quantitative and qualitative limits of this identity or similarity in order for a reproduction of parts of a previous work to constitute an infringement.[97]

[91] For this thesis, known in Italy as "*creatività semplice*" ("simple creativity"), *see* Bertani (2011), p. 288.

[92] ECJ, 1 December 2011, C-145/10, *Eva-Maria Painer v. Standard VerlagsGmbH and Others*, para. 90, and the case-note by Ottolia (2010).

[93] As underlined by Spina Ali (2021), p. 424: "the relationship between the right of adaptation and the one of reproduction is a matter of controversy at the domestic, comparative and international level". In fact, while some countries consider the right of adaptation as a *genus* of the right of reproduction, others see it as a fully independent right.

[94] Gervais (2013), p. 839. *Contra* Nimmer and Nimmer (2010), §8.09, who argue that the derivative right is superfluous because any infringement of the right of elaboration is by itself an infringement of the reproduction right as well.

[95] Spina Ali (2021), p. 420.

[96] For this argument, *see* Cogo (2016a).

[97] Cogo (2016a); Visentin (2022), p. 843.

According to a first thesis, an analytical comparison of the common parts between two works should prevail, in order to sanction even partial counterfeiting.[98] According to a different thesis, it would instead be necessary not only to make an analytical comparison between the original work and the subsequent one, in order to highlight the similarities between them, but also a synthetic and holistic comparison of the two works as a whole, aimed at highlighting their representative individuality, so as not to exceed the degree of protection when the two works are different in their essential features.[99] The most recent case-law seems to follow the second approach. In fact, the Supreme Court has established that, although the reproduction right protects any use that can be made by the author in the form of multiplication of the work capable of entering the market, to qualify as a copyright infringement it is nevertheless necessary that the identity or similarity of the subsequent work with respect to the previous one exceeds a certain quantitative and qualitative threshold, the setting of which also depends on the type of works being compared.[100] In any case, what matters for the violation of the reproduction right is the slavish imitation of specific expressive elements of a previous protected work.

On the other hand, the creative elaboration referred to in Art. 18 of the Italian Copyright Act differs from counterfeiting in that, while the latter consists in the substantial reproduction of the (expressive form of the) original work, with differences of mere detail that are the result not of a creative contribution but of disguised counterfeiting, the former is characterised by an elaboration of the original work with a recognisable creative contribution.[101]

The right of elaboration thus goes beyond the right of reproduction, because it grants protection "over new expressive elements that are untraceable in the original work",[102] but that are "based upon" a previous work. From this perspective, one could argue that the right of elaboration constitutes an exception to the idea/expression dichotomy, as it grants copyright owners control over their works of authorship beyond the slavish reproduction of their expressive elements, and also against the appropriation of the main original elements of content that contribute to a work's representative individuality.[103]

[98] Greco and Vercellone (1974), p. 360.

[99] Ascarelli (1960), p. 864; Spedicato (2013), p. 130; Cogo (2016a). For case-law, *see* Italian Supreme Court, 19 February 2015, No. 3340; Italian Supreme Court, 26 January 2018, No. 2039.

[100] Italian Supreme Court, 19 February 2015, No. 3340; Italian Supreme Court, 26 January 2018, No. 2039.

[101] Goldstein (1983), p. 217; Von Lewinski (2008), p. 143.

[102] Spina Ali (2021), p. 425.

[103] In analysing the evolution of the right of elaboration under U.S. copyright law, Gervais (2013), p. 792, underlines that the right of elaboration "opened up a new path for copyright under which substantial as well as literal copies could infringe".

To better understand how far the scope of copyright protection extends, it is useful to resort to the theory that breaks down the object of copyright protection into the "external form" and "internal form", as opposed to the content, which in itself cannot be protected.[104]

The external form is the form in which the work appears in its original version, in that specific combination of signs belonging to any of the different languages that make intersubjective communication possible:[105] it is that which is immediately perceptible by the senses of sight and hearing. The external form is therefore the set of words and sentences (in literary works); the combination of lines, colours and volumes (in works of figurative arts); and melody, harmony and rhythm (in musical works). The internal form, on the other hand, is the expository structure of the work, which consists in the sequence and choice of topics for literary works; in the essential passages of musical discourse and in the notes determining the line of the melody in musical works; and in the lines and essential proportions of works of figurative art. These relationships between elements of form are not perceptible *sic et simplictier* by the senses, demand higher intellectual activity and cannot be grasped without understanding the thoughts of the author. In other words, the internal form is the result of a coordinating activity of the mind to create a work with a specific structure and significance, of which the external form is an instrument of communication.

Given this tripartition between the idea, external form and internal form, it seems to me that reproduction entails copying the external form of another's work, while elaboration entails borrowing elements of its internal form. Hence, what makes a work a derivative of another work is the fact that it borrows the "general composition"[106] of the original work.

From this analysis, it ensues that while the right of reproduction and the right of elaboration may overlap, they have distinct foundations and respond to different tests.

As a consequence, within the *genus* of derivative works as broadly understood (i.e. works of authorship that to different extents are based on previous works), one could distinguish three different *species* of works according to their level of creativity. Thus, in particular, one can distinguish: (i) at one end of the spectrum, non-creative elaborations that slavishly reproduce the external form of the original work, and hence constitute an infringement of the exclusive reproduction right; (ii) in the middle, creative elaborations as properly understood, which are defined by Arts. 4 and 18 of the Italian Copyright Act, and which copy elements of the internal form of the original work; and finally (iii) at the other end of the spectrum,

[104] As is well known, the distinction between external form and internal form was introduced by Kohler (1907), who in any work of authorship distinguished between an "*aüssere Form*", understood as the means of expression of the work, and an "*innere Form*", identified in the internal order of the work. According to Kohler, both the external and internal form were covered by copyright protection, as compared to the content of the work which is not protectable. On this topic, *see* Are (1963).

[105] Bertani (2011), p. 275, who defines a work's expressive form as "*[una] specifica combinazione di segni appartenenti ad una qualsiasi tra le diverse lingue che rendono possibile la comunicazione intersoggettiva*".

[106] For a similar thesis, *see* Lucas, Lucas and Lucas-Schloetter (2012), p. 226.

elaborations so creative that they themselves constitute original works,[107] as they do not copy either the external or the internal form of another work.[108]

In the first case, the work lacks any creative character necessary for the emergence of a protectable work of authorship, so that one cannot speak of a derivative work, but only of plagiarism disguised as elaboration. In the second case, the derivative work constitutes a work of authorship in its own right and can benefit from independent protection, but it still falls within the scope of Art. 4 of the Italian Copyright Act. This means that it is protected "without prejudice to the existing rights in the original work", and as a consequence its economic exploitation is subject to the prior authorisation of the author of the original work under Art. 18. In the third case, on the other hand, not only does the elaboration benefit from autonomous protection, but its economic exploitation is not even exposed to the veto of the author of the original work, since it has such a level of creativity as to be qualified as a "stand-alone" work, in which the reference to the basic work represents a mere inspiration.

An essential characteristic of the elaborated work is in fact the existence of a clear relationship of intrinsic derivation with the original work, of which it retains all the essential elements, and so in particular what has been characterised as the "ideological content of the work". Traditional examples of derivative works are translation into another language and adaptation of a literary work into a movie. In both cases, the authors of the translation and of the adaptation do not copy the external form of the original work and make free and creative choices in order to create a new work that has a creative character. The translation and the cinematographic adaptation, however, clearly maintain the same internal form of the work they elaborate so that the structure, the general composition, the meaning and the ideological core of the work remains the same. In other words, in a derivative work "the message embedded in the primary work is not fundamentally altered",[109] but simply expressed in a different way or through a different medium.

Conversely, this relationship of derivation must be considered interrupted where there is a significant "semantic gap" between the two works such that they are harbingers of a different ideological message.

The thesis that identifies the three different types of relationship that can abstractly exist between two works can also be inferred by Art. 2(2) of the Italian Copyright Act, pursuant to which copyright protects, among other things, "musical works and compositions, with or without words, dramatico-musical works, and

[107] For this tripartition of the *genus*, *see e.g.* Stolfi (1915), p. 585; Algardi (1965), p. 401; Ubertazzi (2003), p. 122, footnote 37.

[108] For a similar argument, *see* Gervais (2013), p. 800, who maintains that "the derivative right, properly applied and understood, is situated in a zone between (and occasionally beyond) reproduction, on the one hand, and uses that are inspired by, but not infringing (because they are not 'based upon'), an earlier work, on the other hand"; and Nielander (1997), according to whom "on the continuum between an exact reproduction of protected property, and the creation of original work, lies a gray zone. This zone is a mixture of protected works – printed art, art on digital media, digital art and analog music, and other works recognized as deserving intellectual property protection – that can be mixed and matched with other works to create new works. American law recognizes protection of this form of copying as derivative rights".

[109] Gervais (2013), p. 824.

musical variations that themselves constitute original works". This provisions seems to confirm that copyright only protects the parasitic appropriation of the external and internal form of another's work, and not its transformation into something completely new and original.[110]

This tripartition has also been taken up by Italian case-law with specific reference to parody. In fact, Italian courts have sometimes qualified the parodistic work: (i) as a non-creative parody, and therefore as a plagiaristic work, where the almost slavish reproduction of the original work with minimal non-significant variations has been found; (ii) as a "parodistic creative elaboration", which constitutes a creative work in itself but still retains a derivative link with the original work, and therefore falls within the scope of elaborated works under Art. 4 l.a.; and (iii) as a parodistic work proper, which merely draws inspiration from the original work in terms of themes, subjects and situations, but constitutes a completely autonomous and entirely new work in itself.

Therefore, a parodistic work should be qualified on a case-by-case basis alternatively as an autonomous work, as a derivative work or as a counterfeit work, depending on what elements it borrows from the parodied work and to what extent. In particular, according to the prevailing orientation, a parody is a completely autonomous work when it is characterised by a relationship of radical antinomy to the parodied work, whose conceptual core it does not respect but reverses. In other words, a work properly qualifies as a parody when, notwithstanding the evident utilisation of another's work, it shows a creative contribution such that it completely overturns the message conveyed by the parodied work.[111] Hence, the notion of parody adopted by Italian tribunals not only requires the two constitutive elements identified by the ECJ in *Deckmyn* (i.e. the evocation of a pre-existing work and a humorous character), but also requires a *quid pluris*, that is, a substantial modification of the message conveyed by the original work and its transformation into something completely different.[112]

Thus, to engage in a lawful parody it is necessary that the conceptual overturning of another's work has actually occurred, since it is in the realisation of this antithesis that the autonomous creative contribution of the parodistic work is captured. In this context, Italian case-law has, on the one hand, traditionally excluded from plagiarism parody as a humorous and grotesque reworking and distortion of another's serious work; and has, on the other hand, affirmed its full autonomy with respect to the parodied work, which served only as an inspiration or critical target.

If this is so, it seems to me that the parodistic work – as defined above – is ontologically irreconcilable with the concept of a derivative work; and to speak of parody as a derivative work constitutes a veritable oxymoron. In fact, either i) one is in the presence of a derivative work, which therefore has the same internal form and

[110] Musso (2008), p. 64; Donati (2018), p. 89. *Contra* Spina Ali (2021), p. 419, according to whom "it is unclear why, if the provision expresses a general principle, the legislator decided to formulate it only in relation to musical works".

[111] *See e.g.* Naples District Court, 17 May 1908, Giurisprudenza italiana 61(2), p. 1909; Rome Country Court, 18 November 1966, Foro italiano 90(2), p. 412; Milan District Court, 29 January 1996, Il Foro Italiano 119(2), p. 1432; Tribunal of Naples, 15 February 2000, Il diritto d'autore 2001, p. 471.

[112] Spina Ali (2021), p. 416.

ideological content as the original work: and therefore one cannot speak of parody; or ii) one is in the presence of a parody, which as such completely distorts the ideological content of the original work: and therefore one is by definition outside the scope of the right of elaboration.

If I see it correctly, parody then arises not as an external exception or limitation to copyright protection, but rather constitutes in itself an internal and structural limit to the very object of authorial protection and a delimitation to copyright's own scope of protection.

6 Conclusions

As we have seen, parody occupies a controversial place within Italian copyright law. On the one hand, the legislature has decided not to adopt any statutory parody exception or limitation in the Italian Copyright Act. On the other hand, Italian courts and tribunals have in several cases found that the parodistic use of a previous work falls within the criticism and quotation exemption under Art. 70 of the Italian Copyright Act. This broad interpretation of the criticism and quotation exemption, however, seems to be at odds with EU law and with the InfoSoc Directive. Moreover, as is well known, in EU copyright law there is no room for an open-ended "fair use" doctrine through which Italian courts could deem the parodistic use of a work lawful in the absence of a specific legal provision in this sense.

As a consequence, if one wants to maintain the lawfulness of parodistic works under Italian copyright law, this can be done by means of the interpretation of the concept of "derivative works". Indeed, the relationship of derivation between an original work and a parodied work can be considered interrupted where there is a significant "semantic gap" between the two works such that they are harbingers of a different ideological message. As a consequence, it seems that parodies are ontologically irreconcilable with the concept of derivative works, so that the creation of a new work that "evokes an existing work whilst being different from it", and which is made for the sole purpose of mocking the original work should be deemed lawful *per se* because it does not fall within the scope of protection of copyright law in the first place.

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