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Reconsidering the Need for a Parody Exception in the Japanese Copyright Act

The EU Parody Exception as a Source of Inspiration

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The present paper is a shortened version of the master's thesis "Reconsidering the need for a parody exception in the Japanese Copyright Act – Towards a European Union-style exception?", submitted by the author, as part of the final examination for the degree of Master of Intellectual Property and ICT Law, KU Leuven, Belgium. The author thanks the editors for accepting this shortened reprint for publication in the Journal of Japanese Law and thanks Prof. Marc DERNAUER for supervising the publication process. The author is grateful to Prof. Alain STROWEL, Prof. Vincent CASSIERS, Prof. Tatsuhiro UENO, and Prof. Yasuto KOMADA for their helpful comments and advice.

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INTRODUCTION

1. Laundry list. The Japanese Copyright Act[1] ('JCA') protects 著作物 *chosaku-butsu* [work(s)], a 'work' meaning "a creatively produced expression of thoughts or sentiments that falls within the literary, academic, artistic, or musical domain".[2] There are thus two constitutive elements: an expression (exclusion of ideas), combined with creativity. Section 3, Subsection 5 (Arts. 30 to 50) of the JCA provides for a so-called 'closed list' or 'laundry list' of limitations and exceptions to copyright, such as private copying (Art. 30 JCA), reproduction in libraries (Art. 31 JCA), the freedom of quotation (Art. 32 JCA, *infra* no. 2), reproduction in schools and other educational institutions (Art. 35 JCA), etc.[3]

2. Art. 32 JCA. Unlike countries like the United States ('fair use'), Canada ('fair dealing'), or France, Japan has no legal provision permitting parody (hereinafter referred to as 'parody provision' or 'parody exception'). Art. 32 JCA provides only for freedom of quotation (引用 *in'yō* [quotation]), rather than the freedom of serious parody. It states:

> "It is permissible to quote and thereby exploit a work that has been made public. In such a case, the work must be quoted consistent with fair practices and within a scope that is justified for the purpose of the quotation, such as for example news reporting, critique or research".[4]

This article allows for commentary or explanation, rather than for teasing.[5] As we will see, the Japanese Supreme Court has refused to recognize parody as a valid form of quotation.[6] Mariko A. FOSTER explains:

> "[I]t is difficult to apply the quotation exception in a manner that allows for parody. As a transformative work, parody is different from a quotation that the Japanese Copyright Act exception contemplates. The quotation exception covers quoting for academic research, news reporting, or other similar purposes. Those works do not take more from

1 著作権法 *Chosaku-ken-hō* [Japanese Copyright Act], Law No. 48/1970 (hereinafter JCA).

2 Art. 2 (1) (i) JCA.

3 Y. M. PELC, Achieving the Copyright Equilibrium: How Fair Use Law Can Protect Japanese Parody and Dojinshi, Southwestern Journal of International Law 2017, 398, 404.

4 Art. 32 JCA ('Quotation'). Translation by the author based on the translation provided by the Japanese Law Translation Project at the Japanese Ministry of Justice, at *http://www.japaneselawtranslation.go.jp*.

5 Y. KOMADA, Exceptions and Limitations (Lecture 11) (Copyright Law in Japan, Waseda University Graduate School of Law 2018) slide 2; Y. KOMADA, Exceptions and Limitations (Lecture 13) (Copyright Law in Japan, Waseda University Graduate School of Law 2018) slide 40.

6 See *infra* nos. 31 *et seq*.

the other work than necessary, create a clear distinction between the works, and can subordinate the used work because of their nature. A parody, however, is not simply quoting a targeted work, but transforming that work into something new".[7]

3. Research outline. Observing different countries equipped with parody provisions might provoke juridical Pavlovian reactions. While arguments surely can be raised in favor of a parody provision (Part 1), it is important to keep in mind that law and society are intrinsically related. Before discussing whether a certain parody provision would fit Japan, one should therefore legitimately ask: *does Japan even need a parody provision to begin with*? One might, for example, be surprised to learn that the Japanese do not have their own word for 'parody', but instead use the loanword パロディ *parodi* [parody]. Part 2 of this paper therefore looks at the broader context surrounding parody, to avoid such Pavlovian reactions. After briefly describing what characterizes Japanese humor (I.), and after discovering that parody is actually deeply rooted in the Japanese culture (II.), we will analyze why and how parody in Japan is, still today, quite unique (III.). References to (rather) scarce case law will be made where appropriate. To maintain a clear structure, these court rulings are, however, bundled together and discussed separately (V.). The reader can choose to read them directly as soon as they appear in the paper by going back and forth from one section to the other – clear references to the judgments are each time made in the text – or read them afterwards. The merit of the latter method is that the reader can, with the Japanese case law still fresh in mind, turn to Part 3 of the paper. Part 3 looks at the EU parody provision, as interpreted by the Court of Justice of the European Union (CJEU) in the Deckmyn case.[8] The purpose will be to analyze whether Japan could benefit from introducing an EU-style parody exception in its Copyright Act. In Part 4, we formulate our conclusion.

4. Methods and research questions. The main research question is the following: Could Japan benefit from introducing an EU-style parody exception in its Copyright Act?

This question is subdivided into several sub-questions. In summary, the paper is:

– Descriptive and evaluative: it describes and evaluates how Japan deals (or does not deal) with parody. What is the (legal) status of parody in Japan? Does Japan need a parody provision?
– Comparative: What is the legal status of parody in the EU?

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7 M. A. FOSTER, Parody's Precarious Place: The Need to Legally Recognize Parody as Japan's Cultural Property, Seton Hall Journal of Sports and Entertainment Law 2013, 313, 337.

8 Also referred to in this paper as simply "Court of Justice".

– Normative: How and why could the EU parody exception serve as a source of inspiration for Japan?

PART 1. ARGUMENTS IN FAVOR OF A PARODY PROVISION

I. A CURRENT LEGAL FRAMEWORK IN FAVOR OF AUTHORS

5. Purpose of the JCA. Art. 1 JCA defines the purpose of the Act as follows:

"[T]o provide for authors' rights and neighboring rights with respect to works, as well as with respect to performances, phonograms, broadcasts, and cablecasts, and to ensure protection for the rights of authors and other such persons while according attention to the fair exploitation of these cultural products, and thereby to contribute to cultural development".[9]

At first glance, the text appears well-balanced and gives the impression that the rights of authors are well-protected, while giving due attention to cultural development through fair exploitation. The reality, however, is different. Hiroshi SAITŌ observes:

"Even though the Act requires due regard to the fair exploitation, the rights of authors may be limited only in exceptional cases [and] when interpreting and applying provisions on limitations of rights, we need to keep in mind that those provisions are 'exceptional'."[10]

These provisions should therefore be interpreted narrowly. Tatsuhiro UENO opines:

"[The JCA] faces a new challenge of preventing overprotection and its adverse effects... Based on the understanding that the purpose of the JCA is to maintain a balance between authors and users, we should not unquestioningly accept the premise that the JCA 'primarily aims to protect authors'."[11]

According to UENO, Japan should "review the long-standing practice of placing a higher priority on the protection of authors' rights".[12]

6. Strong moral rights. The JCA guarantees moral rights for authors: 公表権 *kōhyō-ken* [the right to make the work public] (Art. 18 JCA), 氏名表示権 *shimei hyōji-ken* [the right of attribution] (Art. 19 JCA), and 同一性保持権 *dōitsu-sei hoji-ken* [the right to integrity] (Art. 20 JCA). For our discussion, the right to integrity is the most interesting one. It is defined as the right to preserve the integrity of one's work and its title against any alteration, dele-

9 Art. 1 JCA ('Purpose').

10 As quoted in T. UENO, Rethinking the Provisions on Limitations of Rights in the Japanese Copyright Act – Toward a Japanese-Style "Fair Use" Clause, International Association for the Protection of Intellectual Property, AIPPI Journal 2009, 159, 163.

11 UENO, *supra* note 10, 164.

12 UENO, *supra* note 10, 161–164.

tion, or other modification contrary to the author's wishes.[13] Mariko A. FOSTER comments that Art. 20 JCA "reaches beyond [Art. 6bis of] the Berne Convention *to prohibit work that the artist does not approve of, even though that work may be non-prejudicial to the artist*"[14] and as such "hinders free expression".[15] She recommends that Japan limit moral rights for (among others) parody and satire, taking France's approach as an example.[16] Samantha S. PEASLEE comments that Art. 20 JCA "means that any sort of transformation of a work, even if for non-commercial or parody purposes, would violate the author's right to integrity".[17] Below (nos. 31 *et seq.*) the 'Parody-montage' case is discussed, which touches upon the right to integrity.

7. Exclusive rights. For the sake of completeness, we should also mention that the JCA guarantees several exclusive rights for authors, such as the 複製権 *fukusei-ken* [right of reproduction] (Art. 21 JCA) and the 翻案権 *hon'an-ken* [right of adaptation] (Art. 27 JCA).[18] The latter is particularly relevant when it comes to parody. It has been clarified by the courts in the 'Esashi Oiwake' case and the 'Taiga Dorama Musashi' case, see *infra* nos. 43 and 44.

II. FREEDOM OF EXPRESSION AND LEGAL CERTAINTY

8. Reconciling copyright and freedom of expression? Art. 21 of the Constitution of Japan guarantees 表現の自由 *hyōgen no jiyū* [the right to free speech]: "Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed"[19]. Ryu KOJIMA writes that "[b]y nature, copyright has always had a complex and intimate relationship with the problem of freedom of expression".[20] Copyright serves as "the en-

13 Art. 20 JCA ('Right to Integrity'); R. KOJIMA, Copyright and Freedom of Expression: From the Perspective of Cultural Policy and Role of Intermediaries, 5, at *http://www.law.kyushu-u.ac.jp/programsinenglish/conference2010/draft16.pdf*.

14 FOSTER, *supra* note 7, 338 (emphasis supplied).

15 FOSTER, *supra* note 7, 338.

16 FOSTER, *supra* note 7, 341: She comments that Japan "should follow France's approach, which allows an author to evoke a moral rights claim only where a parody injures or degrades that author".

17 S. PEASLEE, Is There a Place for Us: Protecting Fan Fiction in the United States and Japan, Denver Journal of International Law and Policy 2014, 199, 224.

18 Art. 27 JCA ('Translation Rights, Adaptation Rights, and Other Rights'): "The author of a work has the exclusive right to translate that work, compose a musical arrangement of it, reformulate it, dramatize it, make a cinematographic adaptation of it, or otherwise adapt the work".

19 Art. 21 日本国憲法 *Nihon-koku Kenpō* [The Constitution of Japan], 1946.

20 KOJIMA, *supra* note 13, 2.

gine of free expression"[21] by acting as an incentive to create and disseminate works, but at the same time it limits the freedom of expression of others. A fair balance between copyright and freedom of expression of others should be struck (see Deckmyn case). One may argue that this is currently not the case. As there is no parody exception, "using another person's work in a parody must be considered a copyright infringement as long as the creative expression presented in the original work remains perceptible in the parody".[22] To parody another's work – *i.e.* to exercise one's freedom of expression – is thus potentially risky. In May 2020, for example, a parody of the Tōkyō Olympic logo was withdrawn because it was considered offensive and a violation of copyright by the local organizing committee.[23] The absence of a legal framework hinders legal certainty – one of the pillars of the rule of law – for Japanese parodists.[24] This is even more problematic nowadays in a digital world, where everyone can parody another's work more easily and quickly than ever.[25] The freedom of expression of parodists is a strong argument in favor of legal reform (and thus more legal certainty): "A legal system that provides legal certainty guides those subject to the law. It permits those subject to the law to plan their lives with less uncertainty".[26] In particular, one could argue that in a democratic society, freedom of expression and legal certainty surrounding parody are all the more necessary for those expressions which are uncommon, offensive, or challenge the *status quo*: "du choc des idées jaillit la lumière"[27] (Nicolas BOILEAU).[28] Such expressions are likely to be found in weapon and target parodies (see *infra* nos. 19 and 20, respectively). Of course, a parody exception should not be construed too broadly so as to favor parodists in a disproportionate way. Below, the 'Who Moved My Cheese' case (see no. 39), which briefly touches upon the freedom of expression, will be discussed.

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21 *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985) cited in KOJIMA, *supra* note 13, 6.

22 UENO, *supra* note 10, 161. Discussed also *infra in* nos. 47 *et seq*.

23 S. MURAKAMI, Tokyo 2020 logo satire pulled after furore, Reuters, 22 May 2020, at *https://www.reuters.com/article/us-olympics-2020-logo-idUSKBN22Y162*; Y. AKADA / C. ARA / N. NISHIMURA, Olympic logo row test of what level of satire is seen as tolerable, The Asahi Shinbun, 27 May 2020, at *http://www.asahi.com/ajw/articles/13407707*.

24 J. R. MAXEINER, Some Realism about Legal Certainty in the Globalization of the Rule of Law, Houston Journal of International Law 2008, 27, 30.

25 KOJIMA, *supra* note 13, 3.

26 MAXEINER, *supra* note 24, 30.

27 At *https://www.kuleuven.be/thomas/page/citaten/label/1846/.*

28 S. JACQUES, The Parody Exception in Copyright Law (2019) 142–143; *Cf. Handyside v. The United Kingdom*, 5493/72, Council of Europe: European Court of Human Rights, 4 November 1976, at point 49, al. 2.

PART 2. PARODY IN JAPAN: LEGAL ASPECTS WITHIN THE BROADER CONTEXT

I. HUMOR IN JAPAN

9. Japanese humor, an oxymoron? Humor is universal, but it is not universally the same. For our discussion, several elements of Japanese humor are worth mentioning (and especially those elements which differ from the West). A first element is that, typically, Japanese humor is mainly used in inner circles. These include family and friends but also so-called 笑いの場 *warai no ba* [laughter places].[29] This probably explains why "the use of humor as a 'weapon' [or in a manner suggesting] hostility, aggression, superiority, and rivalry […] is not [a] common purpose of using humor in Japan".[30] Roger PULVERS describes Japanese humor as 'harmless fun' and as '*not* in your face'.[31] Humor between strangers or new acquaintances is rare. Sachiko KITAZUME explains why Westerners sometimes (mistakenly) consider Japanese to be humorless:

> "[T]he big difference between Japan and many other societies is that the Japanese do not employ humor as a lubricant in public communication, but exercise it only in private, intimate circles. It is true that the Japanese seldom present jokes in public, especially in a context where people expect seriousness".[32]

Below, some other elements which characterize Japanese humor are briefly considered.

10. Cultural differences. A second difference with the West is the topics of jokes. Politics, the Imperial House, taboos, wars, other religions, international affairs, etc. are, for example, not often joked about, while they are popular themes in the West. Humor and jokes essentially take place in inner circles and the topics of jokes usually cover everyday life happenings and amusing personal experiences (as is typically the case in 漫才 *manzai*[33]):

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29 K. OSHIMA, An Examination for Styles of Japanese Humor: Japan's Funniest Story Project 2010 to 2011, XXII Intercultural Communication Studies 2013, 91, 104 and 106; J. M. DAVIS, Introduction, in: Davis (ed.), Understanding Humor in Japan (2006) 1, 3; D. STRUCK, Take My Samurai...Please, Washington Post, 1 August 2000, at *https://www.washingtonpost.com/archive/politics/2000/08/01/take-my-samurai-please/171f21e9-3d5d-46e1-9352-eea0671a2035/*.

30 OSHIMA, *supra* note 29, 104.

31 R. PULVERS, Humor may be universal, but Japan's is largely its smut-free own, The Japan Times, 9 August 2009 (emphasis in original), at *https://www.japantimes.co.jp/opinion/2009/08/09/commentary/humor-may-be-universal-but-japans-is-largely-its-smut-free-own/*.

32 S. KITAZUME, Do the Japanese Have a Sense of Humor?, Society 2010, 35.

33 Japanese double act comedy.

"the more exclusive[ly] stories are understood by certain members of a group, the funnier it becomes for the member".[34] A third element is that

> "Japanese society is considered as one of high context society which means the range of normal or expected pattern is narrower rather than wider [as found] in low context society. In order to create humor, one only needs to take a small step out of the normal range".[35]

Furthermore, as values such as 和 *wa* [harmony] and 'community' are deeply embedded, humor is avoided because of its unpredictability, as difficult feelings may arise because of a gag gone awry.[36] A last element, though one perhaps less true or even obsolete today, is that traditionally "many felt that public laughter was shameful"[37] and that "people [were] taught from childhood that it is shameful to be laughed at by others".[38] In her book 'Understanding Humor in Japan', Jessica M. DAVIS explains how in Japan's 恥の文化 *haji no bunka* [shame culture][39] – which can be contrasted with 罪の文化 *tsumi no bunka* [guilt cultures] in the West – there "lies a wariness toward laughter and being laughed at which, although in some senses universal […], operates with particular force".[40] It is against this background that parody should be examined.

II. PARODY IS DEEPLY ROOTED IN THE JAPANESE CULTURE

11. Edo Japan. While we can find early forms of parody and sarcasm in picture scrolls dating back to the 12th century in Japan, the best early records of parody can be found in the Edo period (1603–1868), when parody

34 OSHIMA, *supra* note 29, 106.

35 OSHIMA, *supra* note 29 writes: "For example, a man in a hurry running into a house with his shoes on seems funny to Japanese because he is expected to take his shoes off when he walks into a house. However, the same scene means nothing funny or strange to people with different customs".

36 R. ANDREW, Intercultural Communication and the Essence of Humour, 宇都宮大学国際学部研究論集 Utsunomiya Daigaku Kokusai Gakubu Kenkyū Ronshū 29 (2010) 25.

37 ANDREW, *supra* note 36.

38 S. ODA, Laughter and the Traditional Japanese Smile, in: Davis (ed.), *supra* note 29, 15, 16. See also OSHIMA, *supra* note 29, 103–104; PULVERS, *supra* note 31; ANDREW, *supra* note 36, 25 and 28; ODA, *supra* note 38, 16 and 24.

39 This term was first used by Ruth BENEDICT in her book 'The Chrysanthemum and the Sword: Patterns of Japanese Culture*'* (1946) to describe the Japanese culture (in comparison to 'guilt cultures' of the West). She wrote that "[t]rue shame cultures rely on external sanctions for good behavior, not, as true guilt cultures do, on an internalized conviction of sin" (R. BENEDICT, The Chrysanthemum and the Sword: Patterns of Japanese Culture (1946) 223).

40 DAVIS, *supra* note 29, 3. See also P. KENT, Shame as a Social Sanction in Japan: Shameful Behaviour as Perceived by the Voting Public, Japan Review 1992, 97, 98.

first appeared as a literary genre. Why at that point in time? Roland SCHNEIDER gives the following explanation: "[Two] conditions must be met before parody can be successfully established".[41] The first one is that "[t]he parodied original must be well known. A medium of circulation is therefore required. In fact, the medium was the printed book".[42] Secondly, "[t]he genre parodied must have already passed its literary historical prime. Such, in the Edo period, was the case for 'poem tales' [for example]".[43] Parodies appeared in different literary forms – including "*kana-zōshi* (booklets in vernacular prose)",[44] "*senryū* (satirical haiku), *kibyōshi* (satirical pictorial books), and *kyōka* (wild poetry)"[45] (*infra* no. 12) – and was done by adapting older texts into amusing new versions.[46]

12. Kyōka. Japan has a longstanding tradition of adaptation of famous poems (和歌 *waka*). Historically, this is illustrated by 狂歌 *kyōka* (literally 'wild' or 'mad' poetry), "a parodic and popular form of the […] waka, [written] as a form of amusement or diversion".[47]

Table 1 – Adaptation of a waka into a kyōka

Waka[48] poem by the priest 西行 Saigyō (1118–1190):

吉野山	*Yoshinoyama*	Mount Yoshino:
去年の枝折りの	*Kozo no shiori no*	I will change my path
道かへて	*Michi kaete*	From last year's broken twig
まだ見ぬ方の	*Mada minu kata no*	And view cherry blossoms
花をたづねん	*Hana o tazunen*	I have not seen yet

紀定丸 Ki no Sadamaru (1760–1841) parodied Saigyō's elegant *waka* poem as follows in the form of a *kyōka*[49]:

41 R. SCHNEIDER, Parody in Japanese Literature – Parody as a Mode of Reception in Edo period Literature –, 国際日本文学研究集会会議録 [Proceedings of international conference on Japanese literature] (1988) 166, 166.

42 SCHNEIDER, *supra* note 41.

43 SCHNEIDER, *supra* note 41.

44 SCHNEIDER, *supra* note 41.

45 SCHNEIDER, *supra* note 41.

46 FOSTER, *supra* note 7, 315; M. REPP, Buddhism and Cartoons in Japan: How Much Parody Can a Religion Bear?, Japanese Religions 31-2 (2006) 187, 187.

47 H. SHIRANE, Early Modern Japanese Literature: An Anthology, 1600–1900 (2008) 256.

48 Explanation of this *waka*: "The author, Saigyō, had broken off a twig when visiting the previous year in order to show the way to the best spot for viewing the cherry blossoms, but this year he would purposely avoid the old path and explore a part of Mount Yoshino he had never been to before. The poem captures to perfection the delicate spirit of familiarity and change" (R. TANAKA, Forgotten Women: Two Kyōka Poets in the Temmei Era, in: Davis (ed.), *supra* note 29, 111, 113).

49 Explanation of this *kyōka*: "Sadamaru skillfully crafted his kyōka so that the title and first two lines sound almost identical to Saigyō's (only two syllables in

吉野山	*Yoshinoyama*	Mount Yoshino:
去年の枝折りを	*Kozo no shiori o*	The flowers are in full bloom
見ちがえて	*Mi chigaete*	I wander around
うろつくほどの	*Urotsuku hodo no*	Having mistaken the twig
花盛りかな	*Hanazakari kana*	I broke last year

Source: R. TANAKA, Forgotten Women: Two Kyōka Poets in the Temmei Era, in: Davis (ed.), Understanding Humor in Japan (2006) 113–114.

"The humor of kyōka essentially derives from placing something vulgar, low, or mundane in an elegant Japanese form or context. […]"[50]. Traditionally, *kyōka* had a strong tendency to veer into parody.[51] A more 'straightforward' parody of a *waka* in the *kyōka* form is the following poem:

Table 2 – 'If Only There Were No ~~Cherry Blossoms~~ Women?'

If cherry trees	If all women
would only vanish	would only vanish
from the world	from the world
Our hearts might be	Men's hearts might be
serene each spring!	happy and serene.
在原業平 Ariwara no Narihira.	(a) *Kyōka* by 蜀山 Shokusan (19th C)
Kokinshū (905) waka #84	

Source: R. D. GILL, Mad in Translation (2009) 190.

13. Copy-culture. Parodies were not exclusively limited to literature. A prime example is the painting on a folding screen 風神雷神図 *Fūjin raijin zu* [Wind God and Thunder God screen] by 俵屋宗達 Sōtatsu TAWARAYA. This painting (see *infra* Image 1) from the first half of the 17th century portrays the Wind God and the Thunder God and is one of Japan's 国宝 *kokuhō* [national treasures]. A century later, 尾形光琳 Kōrin OGATA made a similar but still different folding screen *Fūjin raijin zu* (Image 2). It is a work that is filled with respect towards TAWARAYA. Another century later, 酒井抱一 Hōitsu SAKAI made his version of '*Fūjin raijin zu*' (Image 3). The latest version is the '*Fūjin raijin zu*' painted by 山本太郎 Tarō YAMAMOTO in

Sadamaru's version have been changed, as shown below in bold in the relevant lines), but as a result they give a totally different meaning:
Saigyō: *Yoshinoyama kozo no shiori **no** michi kaete* (changing paths)
Sadamaru: *Yoshinoyama kozo no shiori **o** mi chigaete* (making a mistake)
The first three lines of the kyōka thus make one long and very elegant pun on an original poem familiar to the audience of the time" (TANAKA, *supra* note 48, 114.).

50 SHIRANE, *supra* note 47, 256.

51 SHIRANE, *supra* note 47, 16; R. STEVENSON, Windfall Apples: Tanka and Kyoka (2010) xi+xiii.

2000, featuring the characters 勇者ライディーン *Yūsha Raidīn* [Brave Raideen] and 仮面ライダーV3 *Kamen Rider V3* (Image 4).[52]

Image 1 –Sōtatsu TAWARAYA (17th C)

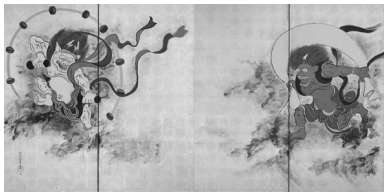


Image 2 – Kōrin OGATA (18th C)

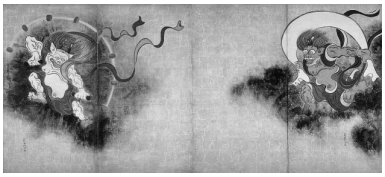


Image 3 – Hōitsu SAKAI (1821)

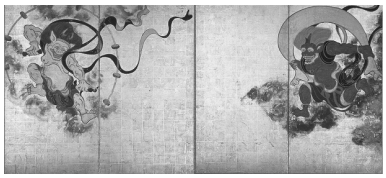
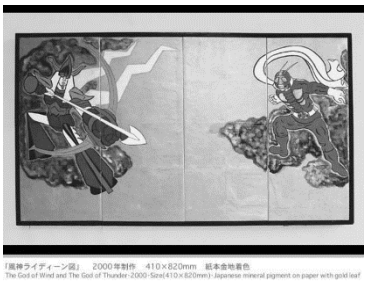


Image 4 – Tarō YAMAMOTO (2000)



Source for Images 1 to 3: WIKIPEDIA, '風神雷神図 [*Fūjin raijin zu*]' (2020), at *https://bit.ly/2YWyoBR*, accessed 30 March 2020 (for the purpose of reproduction, the colour images have been changed to black-and-white images).
Source for Image 4: Original source appears to be the *http://www.h7.dion.ne.jp/~nipponga/* (link no longer valid) where Tarō YAMAMOTO has presented some of his works in the past. On his present website (*https://nipponga.jimdofree.com/作品集-works-1998-2009/2000 年/*) Tarō YAMAMOTO only displays a similar work, corresponding to the left part of Image 4. Tarō YAMAMOTO'S work (Image 4) features the characters Yūsha Raidīn [Brave Raideen] (left) (allegedly created by Yoshitake SUZUKI and Yoshikazu YASUHIKO) and 仮面ライダーV3 Kamen Rider V3 (right) (allegedly created by Shōtaro ISHINOMORI).

The examples above are just snapshots, but they show that parody is not something new in Japan. Rather, it is deeply rooted in the Japanese culture.[53] Yet as this chapter already suggests, it will become clear that, still

52 Art. 27 al. 2 文化財保護法 *Bunka-zai hogo-hō* [Act on Protection of Cultural Properties], Law No. 214/1950; K. FUKUI [福井健策], 誰のための著作権か [Who Is Copyright For?] (2014), at *https://youtu.be/PyyC0epe_Oc*, as transcribed at *http://dotplace.jp/archives/13380*.

53 FUKUI, *supra* note 52.

today, what we could call 'Japan's parody culture' is very unique. Section III. will make clear that Japan has an important *niji sōsaku* culture.

III. PARODY TODAY: NOTHING NEW UNDER THE SUN?

1. Dōjin-shi and Niji sōsaku

14. Dōjin-shi . Not surprisingly, today parodies can be found in many different forms and mediums (online and offline), such as in manga (Japanese comics) and anime (Japanese animation), photographs, videos, etc.[54] Parodies in Japan are particularly common in the 同人誌 *dōjin-shi* culture, a unique Japanese phenomenon.[55] *Dōjin-shi* (hereinafter not italicized) can be defined as

"[mostly] amateur created manga [i.e. Japanese comics] which are commonly based upon existing manga storylines or characters and are created and distributed without authorization from the authors".[56]

About 75% of them are 'parodies', according to Kensaku FUKUI (but without defining what he understands by 'parody'). While (most of the) dōjinshi clearly violate Japanese copyright law, this market peacefully[57] coexists with the manga industry.[58] The Comic Market (also known as the Comiket or Comike),[59] a biannual dōjin-shi fair organized in Tōkyō, attracts 500,000 attendees per convention, making it the "largest fan convention in the world".[60] Yoshimi PELC's observation on this co-existence is particularly interesting:

"[L]itigation does not make economic sense in Japan, given the fact that dojinshi usually sell only some hundred copies for around five dollars each, making the damages amount quite low. In addition to the economic disincentive, some professional manga artists are

54 PARODY WORKING TEAM パロディワーキングチーム, パロディワーキングチーム報告書 [Parody Working Team Report] (2013) 23–24.

55 FOSTER, *supra* note 7, 315.

56 M. DE ZWART, Japanese Lessons: What Can Otaku Teach Us about Copyright and Gothic Girls, Alternative Law Journal 35 (2010) 27, 28.

57 DE ZWART (*supra* note 56, 30) observes: "The sole cited example of an infringement action being brought against a dojinshi creator related to a dojinshi series featuring a Pokemon displayed in a pornographic manner. In that case Nintendo prompted a criminal investigation of a dojinshi series leading to the arrest of the author, who was imprisoned for 22 days and fined approximately $800. […] [T]he mere fact that this isolated incident attracted so much attention and provoked such an intensely shocked response from the infringer, indicates how rare and unexpected such a prosecution was".

58 DE ZWART, *supra* note 56, 28; FUKUI, *supra* note 52.

59 Comic Market コミックマーケット, Comiket コミケット or Comike コミケ.

60 FUKUI, *supra* note 52.

lenient towards dojinshi because they became professionals themselves after their success in the dojinshi market".[61]

These reasons, coupled with "the industry's historical practice of 'borrowing', which may be rooted in the traditions of Confucianism",[62] "the general tendency of Japanese people to avoid litigation",[63] and the belief "that dojinshi has some positive impact on [the] original works"[64] are likely to explain this laissez-faire attitude. Perhaps, too, Japan simply does not have enough lawyers and resources to manage cases like these.[65] When interviewed, right holders and legal practitioners, however, seem to refer to yet another reason than those mentioned above: the reputational damage that may arise when taking action against fans.[66]

15. Niji sōsaku. An important distinction which is illustrative of the Japanese parody culture is the one between 二次創作[67] *niji sōsaku* and 二次的著作物 *nijiteki chosaku-butsu*. *Nijiteki chosaku-butsu* or 'derivative work' is a legal concept defined in Art. 2 (1) (xi) JCA: "a work that a person creates by translating, composing a musical arrangement of, reformulating, dramatizing, making a cinematographic adaptation of, or otherwise adapting a pre-existing work".[68] The authorization of the original author is necessary to make a *nijiteki chosaku-butsu* (hereinafter 'derivative work'). For example, if one wants to make a film out of a comic, the authorization of the author of the comic will be initially needed to avoid copyright infringement. This concept should not be confused with *niji sōsaku* (hereinafter not italicized). This term, for which there is no exact correct English translation, translates literally and somewhat misleadingly as 'derivative work'. It is however a broader, non-legal concept, one used to refer to *creations based on a pre-existing work*. Let us call this niji sōsaku *sensu lato* – it will quickly become clear why. Taking an underlying work to make something new (different) out of it is thus a niji sōsaku *sensu lato*.[69]

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61 PELC, *supra* note 3, 405–406.

62 PELC, *supra* note 3, 406.

63 PELC, *supra* note 3, 406.

64 PELC, *supra* note 3, 406.

65 L. LESSIG, Free Culture: The Nature and Future of Creativity (2004) 25–28; G. GREENLEAF / D. LINDSAY, Public Rights: Copyright's Public Domains (Cambridge University Press 2018) 534–535; PELC, *supra* note 3, 405–406.

66 S. SCHROFF, Where to Draw the Line: The Difference between a Fan and a Pirate in Japan, International Journal of Cultural Policy 2019, 433, 440–441.

67 Also known as 二次創作物 *niji sōsaku-butsu*.

68 Art. 2 (1) (xi) JCA.

69 H. NISHIGUSHI, 二次創作と著作権侵害 [Niji Sōsaku and Copyright Infringement], 知財ぷりずむ Chizai Prizumu 14 (2016) 19, 20; S. IKEMURA, 「二次創作」文化を巡るアレコレ： 二次創作と著作権の曖昧な関係 [Some Topics Relating to the Culture of

16. Niji sōsaku, a vague concept. Niji sōsaku *sensu lato* is a general concept which encompasses the legal concept 'derivative work'. A derivate work is necessarily a niji sōsaku, but the converse does not hold true. For example, if one writes a novel and, to this end, copies the abstract outline of an underlying cartoon, the result will be a niji sōsaku. It will however not be a derivative work, as abstract outlines and the like are not copyright protected (*infra* no. 24 'The Taxi to Hell' case and no. 25). Niji sōsaku *sensu lato* is thus a broad concept which also covers cases where ideas, concepts or abstract outlines are borrowed from an underlying work and where the authorization of the original author is not necessary. It also covers cases where the new creation is not an 'adaptation' (in the legal sense, see *infra* nos. 7, 43, and 44) of the underlying work. In practice,[70] and this is where it becomes tricky, the term 'niji sōsaku' is often used – *sensu stricto* we could say – in the context of dōjin-shi and fan-made creations to refer to *unauthorized creations made by fans, based on a pre-existing work*. Now, two remarks need to be made regarding niji sōsaku *sensu stricto*. First, they (mostly) constitute copyright infringement, as they are made without the authorization of the original author. Secondly, they are often referred to as 'parodies' by the Japanese. Put differently, a lot of 'parodies' in Japan can be found in niji sōsaku (especially *sensu stricto* but also *sensu lato*).[71] Why is it that this niji sōsaku culture has been able to flourish, while most of the niji sōsaku creations are likely to constitute copyright infringement?

17. 'Aun no kokyū'. We can distinguish three situations in which parodies and niji sōsaku are *de facto* allowed in Japan: first, where the copyright owner is not aware of the parody; secondly, when it is allowed by the *omekoboshi*[72] お目こぼし [connivance] of the copyright owner because of the

"Niji Sōsaku". The Ambiguous Relationship Between Niji Sōsaku and Copyright], 京女法学 Kyōjo Hōgaku 19 (2017) 23–24.

70 In the TPP negotiations at the National Diet (Japanese Parliament), for example.

71 S. ABE [安倍晋三], 第 190 回国会 衆議院 環太平洋パートナーシップ協定等に関する特別委員会 第 4 号 [190nd Diet Session – House of Councilors Special Committee on Trans-Pacific Partnership Agreement, etc. No. 4] (国会会議録検索システム [Minutes of the Diet – Search system], 8 April 2016) at 078; IKEMURA, *supra* note 69, 24–25; K. FUKUI [福井健策], 第 192 回国会 衆議院 環太平洋パートナーシップ協定等に関する特別委員会 第 10 号 [192nd Diet Session – House of Councilors Special Committee on Trans-Pacific Partnership Agreement, etc. No. 10] (国会会議録検索システム [Minutes of the Diet – Search system], 31 October 2016) at 004; FUKUI, *supra* note 52; Y. SAITŌ [斎藤嘉隆], 第 192 回国会 参議院 環太平洋パートナーシップ協定等に関する特別委員会 第 7 号 [192nd Diet Session – House of Councilors Special Committee on Trans-Pacific Partnership Agreement, etc. No. 7] (国会会議録検索システム [Minutes of the Diet – Search system], 21 November 2016) at 090.

72 At the 192nd Diet Session, Hideya SUGIO, when talking about the Comike and (what he calls) Japan's コピー文化 *kopī bunka* [copy-culture]), also referred to this notion.

small scale of the infringement; and, thirdly, cases where the copyright owner has given authorization.[73] Dōjin-shi typically fall under the second case where copyright owners turn a blind eye to what is happening.[74] Thus, there is tacit consent. Of course, there is a limit to how far one can go. We can cite to the 'Pokemon Dōjin-shi ' case[75] (see *supra* note 57), the 'Doraemon Last Episode Dōjin-shi '[76] case (compare Image 5 and Image 6), or the 'Tokimeki Memorial Adult Anime' case (see *infra*, no. 40) as examples.

Image 5 – Cover of an original Doraemon (ドラえもん) manga by manga artist 藤子・F・不二雄 Fujiko F. Fujio (pen name for Hiroshi FUJIMOTO 藤本弘)

Image 6 – Cover of the infringing Doraemon dōjin-shi by 田嶋・T・安恵 Dajima T. Yasue (pen name)

Source Image 5: 株式会社藤子・F・不二雄プロ Fujiko F Fujio Productions Ltd and 株式会社 小学館 Kabushiki Gaisha Shōgakukan, Tōkyō, at *https://bit.ly/3f9tjN6.*
Source Image 6: Rightholder unknown, retrievable at *https://hasebow.exblog.jp/3271465/.*
(For the purpose of reproduction, the color images have been changed to black-and-white images.)

He said that the Japanese tradition has allowed – and stills allows – the Comike and the 'copy-culture' through *omekoboshi*, as long as they are not excessive (H. SUGIO 杉尾秀哉, 第 192 回国会 参議院 環太平洋パートナーシップ協定等に関する特別委員会 第 5 号 [192nd Diet Session – House of Councilors Special Committee on Trans-Pacific Partnership Agreement, etc. No. 5] (国会会議録検索システム [Minutes of the Diet – Search system], 16 November 2016) at 033.

73 Art. 63 JCA ('Authorization to Exploit Works').

74 T. OKADA [岡田斗司夫] / K. FUKUI [福井健策], なんでコンテンツにカネを払うのさ？: デジタル時代のぼくらの著作権入門 [Why pay for content?: An introduction to our copyright in the digital age] (2011) [no page numbering].

75 「ポケモン同人誌事件」.

In the 'Tokimeki Memorial Adult Anime'[77] case (*infra* no. 40), the Tōkyō District Court refused to give a special treatment to dōjin-shi. As explained by Kensaku FUKUI, dōjin-shi creators are constantly adjusting their actions, trying to go as far as possible without being reprimanded. According to him, the Japanese 二次創作文化 *niji sōsaku bunka* [niji sōsaku culture] has been nurtured by 阿吽の呼吸 *aun no kokyū* [literally 'aun breathing'], meaning 'being perfectly in unison', 'perfect synchronicity', or "thinking or feeling in unison with others and anticipating their thoughts/actions".[78] In his view, the Japanese are not really good at resolving things by negotiating or at creating clear rules. However, *aun no kokyū* is something Japanese are good at doing, and this perhaps explains why the niji sōsaku culture that Japan boasts to the world has blossomed so far. And clearly it has supported 'Cool Japan'.[79] Dōjin-shi is typically a Japanese phenomenon showing that "the idea that 'more' protection leads to 'better' intellectual property prod-

76 「ドラえもん最終話同人誌事件」. This case was about a dōjin-shi in which the manga artist had written (without authorization) a suitable end for Doraemon, a famous manga. His cartoons resembled the original very much and the story was fitting and very touching, even leading to a misunderstanding among certain people on whether er this was an official Doraemon manga. The case ended with a settlement: the mangaartist apologized, promised to never do it again, and a portion of the profits the artist had earned was paid to Fujiko F Fujio Productions Ltd.

77 Makoto ITŌ calls it the 'Tokimeki Memorial Parody Video' case 「ときめきメモリアル」パロデイビデオ事件 (M. ITŌ [伊藤真], 具体的事例から見る日本におけるパロディ問題 [Issues about "Parody" in Japan: From the point of view of many specific cases], パテント Patento 66 (2013) 4, 7–8.

78 TS TECH, TS TECH Report 2013 (2013) 17, at *http://www.tstech.co.jp/english/csr/uploads/ira20130717a.pdf*. See also R. KARATSU, Innovation as Conservation: Reflexivity, National Cinema, and Male Hegemony in Takeshi Kitano's Hana-bi, Arts. 7 (4) (2018) 6.

79 "Cool Japan is an initiative [of the Cabinet Office (Japan)] to further strengthen the ties between Japan and other countries (in such areas as economics, culture, and diplomacy)" (CABINET OFFICE, GOVERNMENT OF JAPAN, Cool Japan Strategy *https://www.cao.go.jp/cool_japan/english/index-e.html*; Cabinet Office [内閣府], Government of Japan, クールジャパン戦略 [Cool Japan Strategy]). It refers to what the world can consider as 'cool', Japan's attractiveness. It is not limited to food, anime, pop culture, etc.; rather, it has the potential to expand and to be targeted in various fields, reflecting the interest of the world. By gaining the world's sympathy, Japan wants to enhance its 'brand' power and strengthen its soft power by increasing the number of foreigners who have an affection for Japan (Japanese fans). See also K. FUKUI [福井健策], 二次創作 ～パロディ・リミックス・サンプリングの限界は? [Niji sōsaku – parody, remix, sampling, their limit?] (3 October 2014), at *https://japan.cnet.com/article/35054598/* and *https://japan.cnet.com/article/35054598/2/*; FUKUI, supra note 55.

ucts or increased innovation in a lockstep, linear fashion, may not be entirely accurate".[80]

2. *Classification of Parody*

18. Multi-functionality. As Sabine JACQUES rightly observes:

> "[P]arody is multi-functional: provoking laughter, conveying criticism, providing (positive or negative) social or political commentary, paying homage, and developing or testing artistic or musical rules and techniques. Furthermore, the target of the parody may vary, to include the underlying work itself, other works, a style or something completely unrelated".[81]

Below, we classify parody in four categories: target parody, weapon parody, remix parody, and homage parody.[82] We will see that only two of them are popular in Japan. Indeed, to quote Sabine JACQUES again, "'parody' is open-textured and contextual".[83]

19. Target parody. The first category is ターゲット型のパロディ *tāgetto-gata no parodi* [target parody]. This is "a work which criticizes the original work by turning over its internal theme, the world view or the sense of value fixed in that work".[84] Examples are the 'Who Moved My Cheese' case (see *infra* no. 39) and 'L.H.O.O.Q'[85] by Marcel DUCHAMP.

20. Weapon parody. The second category is ウェポン型のパロディ *wepon-gata no parodi* [weapon parody]. This is "a work which expresses its author's views on more general things: our society, certain contemporary ideas, life-styles, politics and so on by using the expression of the original work".[86] Examples include the 'Douces transes'[87] case in France, 'Der

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80 S. MEHRA, Copyright and Comics in Japan: Does Law Explain Why All the Cartoons My Kid Watches Are Japanese Imports, Rutgers Law Review 55 (2002) 155, 190.

81 JACQUES, *supra* note 28, 5.

82 If we compare these concepts to the U.S., 'target parody' would correspond to the U.S. concept of 'parody' (which the U.S. defines more narrowly), and 'weapon parody' to the U.S. concept of 'satire' (T. UENO [上野達弘], 文化庁 文化審議会 著作権分科会 法制問題小委員会 第一回 (非公式議事録) [Minutes of the Japanese Agency for Cultural Affairs – Cultural Council – Copyright Working Group Legal Subcommittee (First Session)] (2012).

83 JACQUES, *supra* note 28, 7.

84 KOMADA, *supra* note 5 (lecture 13), slide 27.

85 Read fast in French as 'elle a chaud au cul'.

86 KOMADA, *supra* note 5 (lecture 13), slide 28.

87 A case about a parody of the song Douce France by Charles Trenet; see Cass. Civ. 1, 12 January 1988, n°85-18787, *https://bit.ly/2YYTJL5*.

unseriöse Staat'[88] case in Germany, or the 'Parody-montage' case (see *infra* no. 31 *et seq.*) in Japan.

21. Remix parody. The third category, リミックス型のパロディ *rimikkusu-gata no parodi* [remix parody], refers to "a work made by mixing a foreign (or irrelevant) element into the original work with no purpose of criticizing something but bringing a funny effect".[89] Parody videos of the film 'Der Untergang' (Downfall) or parodies of the Japanese hit song 'Lemon' (Kenshi YONEZU) are examples of this.[90] Remix parodies are popular in Japan and can (historically) be found, for instance, in poetry (*kyōka*, *supra* no. 12), songs (for example 替え歌 *kae-uta*[91]– *e.g.* during the COVID-19 crisis[92]), and even paintings (see '*Fūjin raijin zu*' painted by Tarō YAMAMOTO (see *supra* no. 13, Image 4)).

22. Homage parody. Let us call the last category オマージュ型のパロディ *omāju-gata no parodi* [homage parody]. It refers to a work that copies, imitates, modifies, or complements the original work out of affection or respect,

88 Defendant published the weekly magazine 'Focus', Issue 13 of 1999, under the heading "The 'dubious' state" (Der Unseriöse Staat). It criticized the German Parliament for allegedly wasting the national budget. The judgment of the German Bundesgerichtshof is available at *https://bit.ly/3fMfwfd*.

89 KOMADA, *supra* note 5 (lecture 13), slide 29.

90 Parodies of 'Lemon' include, among others, replacing some words in the song by 'banana', see *https://youtu.be/W7CmtxOWhPk* (11.900.000+ views in August 2020) or one man singing and another man punching and kicking him (first in harmony with the song and later for no reason), see *https://youtu.be/j-nH3vVUX34* (9.000.000+ views in August 2020).

91 Meaning 'substitutional song': "new lyrics [are] simply added to an already well-known melody" (T. NAKAMURA, Early Pop Song Writers and Their Backgrounds, Popular Music 10 (1991) 263, 271). *Kae-uta* are "a long-standing folk practice often done playfully or in parody" (M. D. FOSTER, The Book of Yokai: Mysterious Creatures of Japanese Folklore (2015) 255, fn. 4). According to T. NAKAMURA, "the almost complete absence of a sense of copyright undoubtedly helped the practice to flourish" (T. NAKAMURA, *ibid*, 271).

92 A recent and telling example associated with the Japanese government's call to the population for self-restraint during the COVID-19 crisis is the *kae-uta* '自粛して *Jishuku shite*' [literally: 'do self-restraint'] performed by musician Ryōji TAKARABE 財部亮治, as a *kae-uta* of '女々しくて *Memeshikute*' ['It's feminine'], a song by ゴールデンボンバー Golden Bomber. Golden Bomber answered in a tweet saying "Thank you for using my song. I want my song to be used freely" (使って頂きありがとうございます。僕の曲は自由に使って頂きたいです *Tsukatte itadaki arigatō gozaimasu. Boku no kyoku wa jiyū ni tsukatte itadakitai desu*), accompanied by a rearranged version of Ryōji TAKARABE's *kae-uta*. See at *https://youtu.be/BC9P3DSZu0A* (Golden Bomber's original song), at *https://youtu.be/vO4oYfIRqus* (TAKARABE's *kae-uta*) and at *https://bit.ly/2zloG1i* (Golden Bomber's tweet with a rearranged version of the *kae-uta*).

with no intention of criticizing the original work. Applied to Japan, this category mainly includes niji sōsaku (*sensu stricto*, see *supra* no. 15), such as (typically) dōjin-shi or fan art, but it is not limited to it.[93] As an example, the '*Fūjin raijin zu*' painted by Kōrin OGATA and Hōitsu SAKAI (see *supra* no. 13, respectively Image 2 and Image 3) fall under this category.[94]

3. Idea-expression Dichotomy in Copyright Law

23. Ideas are free. 'Works' are the protected subject matter of copyright. Under the JCA, a 'work' means "a creatively produced expression of thoughts or sentiments that falls within the literary, academic, artistic, or musical domain".[95] According to the doctrine of 'idea-expression dichotomy' (see 'Esashi Oiwake'[96] case, *infra* no. 43), only expressions are protectable under copyright, not mere ideas. Borrowing someone's idea is allowed; exploitation (adaptation or reproduction) of another's work is not. To borrow an abstract outline is allowed; to use someone's story is not.

How does this apply to parody? Sabine JACQUES writes the following:

> "The essence of parody seems to be that it seeks to convey a message by making a creative reference to an earlier work, or body of works".[97] "Parody acknowledges its borrowings and depends upon the sharing of ciphers between the parodist and the public. Without this signalling of the borrowings, the public would be unable to recognize the work as a parody".[98]

Monika BIMBAITE goes as far as saying that "[i]n order for the parody to be successful it inevitably involves copying the expression of the author and often taking the heart of the work and putting it to comical uses".[99] While the first half of her sentence is a bit exaggerated – the word "inevitably" seems inappropriate – it has the merit of making clear that a parody will in almost all cases (have to) borrow more than just the idea of the original work to be recognizable and (therefore) successful.

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93 PARODY WORKING TEAM, *supra* note 54, 28.

94 At the 192nd session of the Diet, Hideya SUGIO said: "In fact, some say that one of the national traits of Japan is that it loves parody". As an example, he explicitly referred to the '*Fūjin raijin zu*' by Kōrin OGATA as being a parody of Sōtatsu TAWARAYA's '*Fūjin raijin zu*' (see *supra* no. 13) (H. SUGIO, *supra* note 72, at 033).

95 Art. 2 (1) (i) JCA.

96 Supreme Court, 28 June 2001, 民集 Minshū 55, 837; R. KOJIMA, Japan, in: Hilty / Nérisson (eds.), Balancing Copyright – A Survey of National Approaches (2012) 580–581.

97 JACQUES, *supra* note 28, 15.

98 JACQUES, *supra* note 28, 13.

99 M. BIMBAITE, When Is a Parody a Violation of Copyright, International Journal of Baltic Law 1 (2002) 15, 23.

24. Abstract outlines are free. It follows from the idea-expression dichotomy that borrowing an abstract outline is allowed, while using someone's story is not. In the 'The Taxi to Hell' case, the plaintiff was a manga artist and copyright holder of the manga 先生，僕ですよ *Sensei, boku desu yo* [Doctor, it's me!]. Defendant, Fuji TV (TV station) had broadcasted a TV program (horror program) entitled 地獄のタクシー *Jigoku no takushī* [The Taxi to Hell]. The legal question was whether the latter was an adaptation of the former. The Tōkyō District Court found the following differences between the two:

Table 3 – Comparison between 'Doctor, it's me!' and 'The Taxi to Hell'

'Doctor, it's me!'	'The Taxi to Hell'
The main character (MC, a surgical doctor) feels joy when abusing laboratory mice.	MC doesn't abuse the mice. He is simply arrogant and thinks little of the lives of patients and animals.
MC says "it is not a pet but a laboratory animal that we raise to kill. You idiot !".	MC says "the medical treatment, it's money" "all patients and animals are for our laboratory" "the doctor is God, so almost everything is permitted".
MC gets up and realizes that he cannot move on the operation-table. The mouse injects him with […] carcinogenic substances.	MC being drunk takes a taxi. The taxi brings him to the hospital. There he meets a ghost of his patient who says "give my heart back!".
The mouse gets […] revenge on MC by doing an operation without anaesthesia.	The taxi driver, the mouse, repeats the opinion of MC (the doctor is God).
MC gets killed.	The mouse brings MC to Hell by his car.

Source: Yasuto KOMADA, 'Subject Matter of Copyright (Lecture 2)' (Copyright Law in Japan, Waseda University Graduate School of Law, 2018) slides 12–13.

The District Court concluded "that the common points between these [two] works belonged to the *abstract outline* (the surgical doctor who thinks little of the lives of laboratory animals will be attacked by the laboratory mouse in human shape), and held that there was no infringement".[100] Although this is not a parody case, it could be applied by analogy to parodies as well.

25. 'Good artists copy, great artists steal'.[101] In almost all cases, parodists in Japan will lose *if* the case goes to trial. One way to win the case is to try to rely on the idea-dichotomy case. When an idea, title, or abstract

100 Translation as provided by Y. KOMADA, Subject Matter of Copyright (Lecture 2) (Copyright Law in Japan, Waseda University Graduate School of Law 2018) slide 15 (emphasis supplied). See also Tōkyō District Court, 29 June 1998, overview available at *https://bit.ly/2WMy5ad*; KOMADA, *ibid*., slides 11–13 and 15.

101 Pablo PICASSO.

outline of a work is used, the permission of the original author is not necessary. A good representative example is the science-fiction novel 日本沈没 *Nippon chinbotsu* [Japan Sinks] by 小松左京 Sakyō KOMATSU. It has been parodied[102] in the short novel 日本以外全部沈没 *Nihon igai zenbu chinbotsu* [The World Sinks Except Japan] by 筒井康隆 Yasutaka TSUTSUI (Image 7). As the titles already suggest, the story of the latter is completely different: everything is sinking except Japan. So, as this parody borrows only the title and the abstract outline, it complies with the current law. But many parodies use more than that.[103]

Image 7 – Cover of the novel Nihon igai zenbu chinbotsu by Yasutaka TSUTSUI[104]

102 The Japanese title of the parody (Image 7) is actually funnier than the English translation suggests. If we compare the two titles in Japanese (日本沈没 *versus* 日本以外全部沈没), we can notice that the latter (日本+以外全部+沈没), the parody version, contains the former (日本+沈没) and thus keeps the same word order (order of the characters), which is not the case in English. We can see that on the cover of the parody book (日本以外全部沈没), the kanji (ideograms)日本 and 沈没 that were contained in the original title were printed in a big font, while the added ideograms 以外全部 were printed in a much smaller font. This is a kind of *tmesis* which emphasizes the parody.

103 FUKUI, *supra* note 79; FUKUI, *supra* note 52.

104 Source for Image 7: 株式会社 徳間書店 Tokuma Shoten Publishing Co., Ltd., Tōkyō. Image retrievable at *https://www.kinokuniya.co.jp/f/dsg-01-9784198917654* (for the purpose of reproduction, the color image has been changed to a black-and-white image).

IV. LAW AND SOCIETY

26. Parody as a tool. We have seen that remix parody and homage parody are deeply rooted in the Japanese culture. Even today, they are much more popular than weapon or target parodies. Considering the characteristics of both Japanese humor and the Japanese (historical) parody culture, this should not come as a surprise. In contrast to weapon and target parodies, remix and homage parodies both have in common that they do not aim to seriously criticize something. There is a very limited number of cases in Japan where the copyright holder forbids them. We can only agree with Yasuto KOMADA, who suggests that, perhaps, "[f]or many Japanese, parodies are no more than *tools of enriching [their] culture?*".[105] "We have a long tradition of adaptation of famous poems (waka) [a]nd we are still so vigorous in teasing something by-reusing other's cultural products",[106] he comments. Or maybe, he continues, "Japanese are [more] fragile against […] brutal criticisms"[107] compared to other nations.[108]

27. Law as a tool, not as a solution? "One day in June 1994, Lou Montulli sat down at his keyboard to fix one of the biggest problems facing the fledgling World Wide Web – and, as so often happens in the world of technology, he created another one".[109] In a speech on 'Technology and Society' in 1998, Neil POSTMAN (author and cultural critic) raised several questions to reflect upon the need for new technologies: (1) "What is the problem to which this technology is a solution?";[110] (2) "Whose problem is it?";[111] and (3) "Suppose we solve this problem […], what new problems might be created because we have solved the problem".[112] These excellent questions can be applied *mutatis mutandis* to the need for new laws, and *in casu* to the need for a parody provision:

1) "What is the problem to which a parody provision is a solution?"[113] The biggest problem for parodies is that they (in principle) constitute copy-

105 KOMADA, *supra* note 5 (lecture 13), slide 40.
106 KOMADA, *supra* note 5 (lecture 13), slide 30.
107 KOMADA, *supra* note 5 (lecture 13), slide 39.
108 KOMADA, *supra* note 5 (lecture 13), slides 30, 34 and 39–40.
109 J. SCHWARTZ, Giving Web a Memory Cost Its Users Privacy, New York Times, 4 September 2001, at *https://www.nytimes.com/2001/09/04/business/giving-web-a-memory-cost-its-users-privacy.html*.
110 N. POSTMAN, Technology and Society 2/7 (1998), at *https://youtu.be/13bXaYsn33U* accessed 5 April 2020.
111 POSTMAN, *supra* note 110.
112 N. POSTMAN, Technology and Society 3/7 (1998), at *https://youtu.be/HpUbhrzSPnY* accessed 5 April 2020.
113 POSTMAN, *supra* note 110.

right infringement (see also our discussion above about legal certainty, freedom of expression, etc. in Part 1– II.).

2) "Whose problem is it?"[114] Remix and homage parodies are regulated by social practices and do not therefore cause many problems for people in practice. Weapon and target parodies are not (yet?) so popular in Japan, but the absence of a legal framework is potentially problematic for everyone who would like to parody a work.
3) "Suppose we solve this problem […], what new problems might be created because we have solved the problem"[115] Tacit rules and social practices exist in Japan (for remix and homage parodies). Introducing a parody provision could break down this well-balanced social equilibrium, negatively impacting Japanese culture and the economy. Regarding weapon and target parodies, no serious problems are likely to come up. There is a possibility that, once a parody exception is created, more 'serious' parodies will start to flourish in Japan – but that is a 'consequence' and not a 'problem'.

28. Concluding remarks. Is there a *need* for a parody provision in Japan? It seems that there is currently no *real* or *urgent* need to address homage parody, except for the rather 'theoretical' legal uncertainty that currently exists. The same seems to be true for remix parody, albeit maybe in a less far-reaching sense. In any case, they *do not immediately justify a parody provision*, or *at least not on their own*. From the perspective of legal certainty and freedom of expression and taking into account the answers to the three questions above, there is however a *rather strong argument in favor of a parody provision for weapon and target parodies*, especially as these kinds of parodies (can) contain (serious) criticism. The original authors are thus more likely to oppose these parodies than is the case with remix and homage parody. The individuals who engage in such activities, albeit a minority of people, thus need to be protected. The rather simple counterargument that these types of parody are not so popular in Japan does not outweigh the benefits of introducing a parody exception. Also, it might be exactly *because* Japan has no parody provision that these types of parody are still rare (speculative argument).

In Part 3, we shift our focus to EU law to see whether it could serve as a source of inspiration for Japan or even offer an adequate solution.

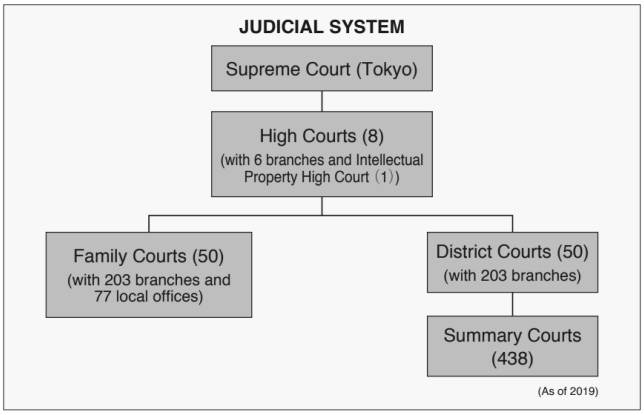
114 POSTMAN, *supra* note 110.
115 POSTMAN, *supra* note 112.

V. Relevant Japanese Case Law

29. Judgments. There are not many parody-related judgments in Japan.[116] The Parody Working Team (see *infra* no. 45), for example, only mentioned two parody-related cases in its report: the landmark 'Parody-montage' case and the 'Who Moved My Cheese?' case.[117] Both deal with parody specifically and illustrate how the parody defense has been rejected by courts in Japan.[118] Below, we discuss these two cases as well as a selection of other cases relevant for parody.

30. Court system. For the purpose of this paper, it is useful to bear in mind that district court judgments can be appealed at the high courts. High court judgments can be appealed at the Supreme Court, the highest court in the country (see Figure 1). The Intellectual Property High Court is a special branch of the Tōkyō High Court.[119]

Figure 1 – Judicial System in Japan



Source: Supreme Court of Japan, Courts in Japan (2020) 1 (see *supra* note 119, for the purpose of reproduction, the color image has been changed to a black-and-white image).

116 Bunka shingi-kai chosaku-ken bunka-kai [文化審議会著作権分科会, Cultural Council Copyright Subcommittee], 報告書 [Report] (2011) 52, at *https://bit.ly/2WpOySA*.

117 Parody Working Team, *supra* note 54, 21–22; Y. Tsujimoto [辻本良知], 日本におけるパロディと知的財産権に関する一考察 [A Study on Parody and Intellectual Property Rights in Japan], 知財ぷりずむ Chizai Prizumu Vol. 15, Nr. 177 (2017) 7–9.

118 Foster, *supra* note 7, 2.

119 Supreme Court of Japan, Courts in Japan (2020) Judicial System in Japan, 5, at *https://www.courts.go.jp/english/vc-files/courts-en/file/2020_Courts_in_Japan.pdf*.

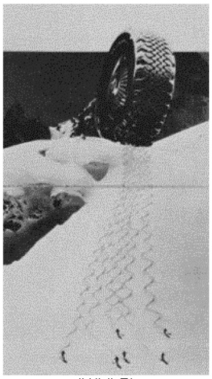
Unless indicated otherwise, Japanese judgments mentioned in the paper are available only in Japanese and can be found on the official website of the Japanese Supreme Court.[120]

1. The 'Parody-Montage' Case: Parody and Quotation

Image 8 – Photo by Yoshikazu SHIRAKAWA[121]

〈原告作品〉

Image 9 – Photo-montage by Mad Amano[122]



〈被告作品〉

31. Facts. The 'Parody-montage' case is the leading case on parody in Japan. The case concerns a color photo of six people skiing on an alpine slope in Austria (Image 8), taken by 白川義員 Yoshikazu SHIRAKAWA, a professional photographer. The photo was reproduced and published in the calendar 'SKI'67 volume 4'. Mad Amano, a graphic designer, trimmed and turned SHIRAKAWA's photo into a monochromatic one and subsequently created a parody-montage by adding a picture of a larger-than-life Bridgestone tire to the original photo (Image 9). The montage, entitled 'Mad Amano's Strange World' was published in the 1957 edition of the weekly photo magazine Nikken Gendai, this being done without SHIRAKAWA's prior consent and without crediting his name. Mad Amano argued that the giant tire was a symbol for a car and that the ski tracks were a metaphor for the wheel tracks of cars, while the skiers represent persons running away

120 *https://www.courts.go.jp/index.html*.

121 Source of Image 8 and comment on the case: SAEGUSA & PARTNERS, パロディ・モンタージュ事件 ['Parody-Montage case'], 特許業務法人 三枝国際特許事務所 [SAEGUSA & Partners], 24 December 2015, at *https://www.saegusa-pat.co.jp/copyrighthanrei/1988/*, accessed 29 March 2020.

122 Source of Image 9, *supra* note 121.

from the car. It is a caricature of the world, threatened by the current state of automobile pollution.[123]

32. District and High Court. SHIRAKAWA sued Mad Amano before the Tōkyō District Court for copyright infringement. The District Court analyzed the case under (old) Art. 30 JCA[124] ('Quotation') and held that Mad Amano's work could not be considered a quote under that article. It therefore found copyright infringement and granted damage relief to the plaintiff.[125] The Tōkyō High Court considered the photo-montage to be a parody and reversed this judgment. It ruled that, although the snowy mountain landscape of the photograph is used as is, by combining this with a huge image of a tire, a fictional world emerges, and the thoughts and emotions expressed in the original photograph are converted into satire and ridicule. It also looked at *the way* the original work was quoted and considered the technique of the photo-montage to be a socially accepted form of artistic expression, and the court (even) made a reference to the American concept of fair use.[126]

33. Supreme Court.[127] The Supreme Court analyzed the case under (old) Art. 30 JCA and, importantly, mentioned two conditions for a valid quotation: a *separability condition* (明瞭区別性 *meiryō kubetsu-sei*) and a *principal-accessory condition* (主従関係 *shujū kankei*). "[T]he cited work in the work citing should be clearly discernible as it is, and the latter should be principal while the former should be accessory".[128] The Supreme Court ruled that the photo-montage was not principal in this case, but accessory. It held that the use of another's work in one's own work, without the author's consent, is limited to the situation where the *essential characteristics* – here the snow slope – of the cited work *cannot be directly perceived* in the work citing. As they could be perceived here, the Court concluded that the copyright exception for quotation could not apply. The use of the photograph was regarded by the Court as a modification that infringed the photographer's right to integrity. The Supreme Court overturned the High Court's

123 Tōkyō District Court, 20 November 1972, Case No. 1971 wa 8643; PELC, *supra* note 3, 405; FOSTER, *supra* note 7.

124 Which corresponds to current Art. 32 JCA.

125 Tōkyō District Court, *supra* note 123.

126 Tōkyō High Court, 19 May 1976, Case No. 1972 ne 2816; P. GANEA / C. HEATH, Chapter VI – Economic Rights and Limitations, in: Ganea / Heath / Saitō (eds.), Japanese Copyright Law: Writings in Honour of Gerhard Schricker (2005) 69.

127 Supreme Court, 28 March 1980, 民集 Minshū 34-3, 244.

128 Translation as provided by KOMADA, *supra* note 5 (lecture 11), slide 6.

ruling and remanded[129] the case. The majority opinion of the Court totally ignored the parody defense presented by the defendant.

34. Concurring opinion. Chief Justice 環昌一 Shōichi TAMAKI wrote a concurring opinion with the following opening sentence: "I believe that the above opinion of the court does not ignore or deny the significance or value of the expression which is usually called a parody (its concept and content are not necessarily clear)".[130] He argued that Mad Amano could have avoided an infringement had he taken a photo of the snow slope by himself, arguing the following:

"[T]he possibility of expression by parody as intended by the jōkoku appellee is not entirely denied [in the present case] (for example, the jōkoku appellee may take a photograph which imitates the form of expression of the Photograph within the scope considered to be necessary for a parody and apply the montage method to this)"[131].[132]

35. However, several elements should be taken into account when reading this concurring opinion. First, it took the photographer SHIRAKAWA two months to obtain a permit for shooting, a process described as 'extremely difficult'. Secondly, SHIRAKAWA cooperated with skiers to take the picture. Thirdly, he is a professional photographer who mainly shoots ski-themed pictures.[133] Did Mad Amano get too much credit from SHIRAKAWA's work, without paying a penny? Was it unrealistic to secure SHIRAKAWA's prior authorization to use the photo as a parody? Mad Amano himself surely could not have taken such a beautiful picture. One could argue that he could have hired a professional photographer – specialized perhaps in ski-themed photographing – to take a similar fitting picture for him, but is that not setting the bar too high? And would it still have been as humorous? This case raises many interesting questions. Regarding parody, the Court's

129 It remanded the case to the Tōkyō High Court (23 February 1983), after which there was a second appeal to the Supreme Court (30 May 1986). The case was then remanded to the High Court, but it finally ended with an amicable settlement. These subsequent cases are not discussed here as they concern the issue of damages (K. SUGIYAMA, The First Parody Case in Japan, European Intellectual Property Review 9 (1987) 285, 289; K. SUZUKI [鈴木康平] / M. MATSUNAWA [松縄正登], フォトコラージュの諸問題:ー著作権，技術，社会倫理上の問題を中心として [Various Problems of the Photograph Collage – Problems of Copyright, Technology and Social Ethics], 日本感性工学会論文誌 Nihon Kansei Kōgaku-kai Ronbun-shi 12-1 (2013) 123, 125.

130 Supreme Court, *supra* note 127, 252.

131 Supreme Court, *supra* note 127, 254.

132 Supreme Court, *supra* note 127, 254. See also T. UENO, Flexible Interpretation of the Provision of Quotation in Japan, in: Liu (ed.), Annotated Leading Copyright Cases in Major Asian Jurisdictions (2019) 297; FOSTER, *supra* note 7, 335.

133 Tōkyō District Court, *supra* note 123.

judgment can be said to be problematic, as "to be effective, parody must incorporate a sufficient quantity of important or characteristic elements of the initial work".[134] However, if we follow the Supreme Court's ruling, the cited work should necessarily be accessory. M. A. FOSTER comments that "the case's journey through the Japanese court system reveals how Japan's Copyright Law is unable to properly address parody and that the Japanese Supreme Court fails to recognize parody's unique characteristics".[135] It is concededly easy to criticize the Supreme Court. Whereas the Court may have indeed rendered a fair judgment regarding the 'conditions' for a valid quotation – as was demonstrated in subsequent cases (*infra* nos. 36 and 37, the 'Tsuguharu Fujita' and 'Farewell to Gōmanism' cases) – the judgment fails to take account of the institution of parody or its specifics, and the Court did not interpret the quotation exception broadly enough to encompass parody. Still, it must be recalled that the Supreme Court rendered its judgment in 1980. In a country where weapon and target parodies were not (and still are not) common, the judgment should thus not surprise us. Could the judgment be read as a signal to legislators to take action?

2. The 'Tsuguharu Fujita' Case: Separability and Accessory Conditions

36. 'Tsuguharu Fujita'. Under the present law, the separability condition and the principal-accessory condition, mentioned above, continue to be used. In a case known as the 'Tsuguharu Fujita' case, the appellant had reproduced a painting of Tsuguharu FUJITA and added it as a supplementary illustration to an art history article written by 'C', featured in a book published by the appellant. The appellant had not requested the consent of the appellee – the surviving spouse of Tsuguharu FUJITA who had inherited the copyright – as the appellant considered the illustration to be a quotation under Art. 32 JCA. The Tōkyō High Court applied the two conditions. It considered that the first condition was met but not the second one:

"[T]he insertion of the picture drawn by a famous painter into the […] art history [article] was not a citation provided for in Art. 32, for the inserted picture was still *worthy of appreciation* and turned out to be principal rather than accessory".[136]

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134 Y. GENDREAU, Exceptions for Quotation and Parody. The Adaptation Right, in: Proceedings of the ALAI Study Days ALAI 2008, Copyright and freedom of expression (2008) 324, 329.

135 FOSTER, *supra* note 7, 335–336.

136 'Tsuguharu Fujita' case (藤田嗣治絵画複製事件), Tōkyō High Court, 17 October 1985, Case No. 1985 ne 2293; translation as provided in KOMADA, *supra* note 5 (lecture 11), slide 8 (emphasis supplied).

3. The 'Farewell to Gōmanism' Case: Separability and Accessory Conditions

37. Facts. In another case, the use in question was found to be a valid for of quotation. The case involved 上杉聡 Satoshi UESUGI, a contemporary history researcher, and 小林よしのり Yoshinori KOBAYASHI (plaintiff and appellant). KOBAYASHI is a right-wing manga (Japanese cartoon) artist known for his controversial political commentary cartoons (which find a wide audience). In his manga, "[Kobayashi] himself appears and presents his arguments on the last page just after saying 'may I be gōman (arrogant) enough to declare the following'".[137] UESUGI wrote and published a book 脱ゴーマニズム宣言 *Datsu gōmanism sengen* (hereinafter 'the book') which translates in English as 'Farewell to My Arrogant Declarations'. The book criticized KOBAYASHI's thoughts and contained fragments (cuts) of KOBAYASHI's manga 新ゴーマニズム宣言 *Shin gōmanism sengen*, which could be translated as 'My Arrogant Declarations Neo' (hereinafter 'the manga'). KOBAYASHI filed a lawsuit against UESUGI, claiming that the book contained 57 fragments[138] of his manga, which were reproduced without his permission.[139]

38. Rulings. The Tōkyō District Court followed the photo-montage case of the Supreme Court regarding the two conditions for quotation and ruled that all the quoted fragments fulfilled the conditions.[140] In appeal, the Tōkyō High Court followed the District Court regarding the conditions for quotation. Two arguments raised by KOBAYASHI are noteworthy. First, he argued that "[i]f the fragments are all taken out from Uesugi's book, the readers will not find the context of [Uesugi]'s criticism [and therefore] [Uesugi]'s criticism is not principal".[141] The court rejected this argument stating that UESUGI "inserted the fragments in order to indicate the argu-

137 KOMADA, *supra* note 5 (lecture 11), slide 9.

138 All the fragments used by UESUGI in his book are attached as a separate annex to the Tōkyō District Court judgment, 31 August 1999, Case No. 1997 wa 27869, retrievable at *https://bit.ly/2xYPLHo*.

139 'Farewell to Gōmanism' case (脱ゴーマニズム宣言事件), Tōkyō High Court, 25 April 2000, Case No. 1999 ne 4783; SAEGUSA & PARTNERS, 脱ゴーマニズム宣言事件 ['Farewell to Gōmanism' case], at *https://www.saegusa-pat.co.jp/copyright hanrei/1981/*.

140 'Farewell to Gōmanism' case (脱ゴーマニズム宣言事件), Tōkyō District Court, 31 August 1999, Case No. 1997 wa 27869; R. M. MULLINS, The Neo-Nationalist Response to the Aum Crisis A Return of Civil Religion and Coercion in the Public Sphere?, Japanese Journal of Religious Studies 39 (1) (2012) 99, 107; M. A. THORN, Petit Nationalism and Manga, The Japan Times ST – Opinion, 8 July 2005, at *https://bit.ly/2Z20rjk*, accessed 28 March 2020.

141 KOMADA, *supra* note 5 (lecture 11), slide 12.

ments which he wanted to criticize".[142] The second argument raised was as follows: "[t]he fragments have a great amount of economic value or informative power which [are] far [greater] than those of [Uesugi]'s criticism".[143] The Court also rejected this argument and "confirmed that it was still possible to say that [Uesugi]'s texts are principal even if they are inferior to the fragments in their economic value or informative power".[144]

1) *Cartoon fragments.* The High Court judgment is, furthermore, relevant (specifically) for manga as it draws some lines between permissible and non-permissible modifications of manga fragments under Art. 20 JCA[145] ('Right to integrity'). Among others, the High Court acknowledged that all the fragments used fulfilled the requirements of quotation, but it held, in contrast to the District Court, that one fragment (fragment no. 37, *infra* Image 11) out of the 57 violated KOBAYASHI's right to integrity (compare *infra* Image 10 and Image 11).[146]

Image 10[147] – Position of the panels (frames) in KOBAYASHI's manga

Panel 1 *Panel 2* *Panel 3*

142 KOMADA, *supra* note 5 (lecture 11), slide 12.

143 KOMADA, *supra* note 5 (lecture 11), slide 13.

144 KOMADA, *supra* note 5 (lecture 11), slide 13.

145 Art. 20 ('Right to Integrity'):

"(1) The author of a work has the right to preserve the integrity of that work and its title, and is not to be made to suffer any alteration, deletion, or other modification thereto that is contrary to the author's intention.

(2) The provisions of the preceding paragraph do not apply to the following modifications:

[…]

(iv) a modification other than as set forth in the preceding three items, which is found to be unavoidable in light of the nature of the work and the purpose and circumstances of its exploitation".

146 'Farewell to Gōmanism' case (脱ゴーマニズム宣言事件), Tōkyō High Court, 25 April 2000, *supra* note 139; SAEGUSA & PARTNERS, *supra* note 139.

Image 11[148] *– The panels as rearranged in* UESUGI*'s book (fragment 37) – Panel 1 of Kobayashi's manga has been moved below Panel 2 and 3.*

4. The 'Who Moved My Cheese?' Case: Limits on the Freedom of Parody

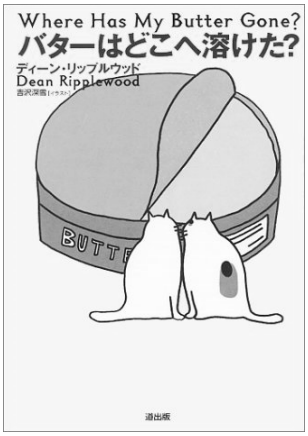
39. Cheese versus butter. Another famous parody case is the 'Who Moved My Cheese?' case. The plaintiff (hereinafter 'X') in the case was the translator and publisher of the book 'Who Moved My Cheese', *infra* Image 12. The defendant (hereinafter 'Y') was the publisher of the book 'Where Has My Butter Gone?', Image 13.

147 Source of Image 10 and comment on the case: A. OBATA [小畑明彦], 他人の著作物を「引用」として利用が許される場合について [About Cases Where the Use of Another Person's Work has been Approved as 'Quotation'], 著作権・裁判例で引用と認められたケース Vol. 105 [Copyright Law Cases recognized as quotations by Courts, Vol. 105], 3 September 2018, at *https://library.jpda.or.jp/rights_protection/2529.html/,* accessed 25 May 2021.

148 Source of Image 11: Annex to 'Farewell to Gōmanism' judgment, Tōkyō District Court, 8 November 1999 (fragment 37, page 64 in the annex), retrievable at *https://bit.ly/2xYPLHo*.

Image 12[149] *– 'Who Moved My Cheese?'*

Image 13[150] *– 'Where Has My Butter Gone?'*



Y's book is a parody of X's book. Both books are summarized below (*infra* Table 4).

Table 4 – Summaries of 'Who Moved My Cheese?' and 'Where Has My Butter Gone?'

'Who Moved My Cheese?'	'Where Has My Butter Gone?'
"[Two] tiny persons (dwarves) living in the labyrinth beside a big cheese. The cheese disappears suddenly. [The two] dwarves are always discussing […] the reason [behind this] and wait for the appearance of another cheese. One of them leaves the original place to search for another cheese. This dwarf succeeds in finding a new cheese after having many anxieties. *Lesson:* recognize the changes of environment and try to adjust yourself to them. It is the only way to reach a happy life".[151]	"[Two] cats living in the forest beside a big butter. The butter disappears suddenly. One of them leaves the original place to search for another butter. The other cat admits that the world has changed, and she determines to find another style of quiet life. Finally, the cat who left realizes that her friend is right. *Lesson:* it is stupid to persist in the thing that was lost and to search for it. It is more important to stay calm and find a happiness in the changing world".[152]

Source: Yasuto KOMADA, 'Exceptions and Limitations (Lecture 13)' (Copyright Law in Japan, Waseda University Graduate School of Law, 2018) slides 10–13.

149 Source of Image 12: FUSOSHA Publishing Inc., Tōkyō, at *https://www.fusosha.co.jp/special/cheese/img/img1.jpg?fbclid=IwAR08ayf0QH3HTwREGOkhl_CkdnPrnlpviGPQ2PemW1szzzMz8lyjkOnU2Uc* (for the purpose of reproduction, the color image has been changed to a black-and-white image).

150 Source of Image 13: Michi Shuppan Kabushiki Kaisha, Tōkyō, at *http://www.u-pat.com/IMG/d-23-2.jpg* (for the purpose of reproduction, the color image has been changed to a black-and-white image).

The Tōkyō District Court found a copyright infringement, more precisely infringement of the right of adaptation,[153] as sentences in 14 parts of Y's book resembled the corresponding sentences of X's book, or used exactly the same expressions as X's book (with the only differences being the name of the characters or the word cheese being replaced by butter). The Court explicitly referred to the 'Esashi Oiwake' case and applied what is known as the ECPD test (see *infra* no. 44 'Esashi Oiwake' case, and no. 45). Regarding parody specifically, the court ruled that "parody occupies a certain area of literature, but *the freedom of parody should be delimited by copyright*".[154] The defendants tried to rely on their freedom of expression, as protected by the Constitution. The Court rejected that argumentation, ruling that the freedom of expression is limited by the copyright of others.[155]

5. The 'Tokimeki Memorial Adult Anime'[156] Case: Dōjin-shi

40. No special treatment. The plaintiff in this case was the company Konami, which had created and distributed the game「ときめきメモリアル」*Tokimeki memoriaru* [Tokimeki Memorial]. The defendant, who works under the name 'Shane', is described in the judgment as someone who creates and sells animation, photos, and parody-related works. Tokimeki Memorial is a love simulation game for PlayStation[157] (*infra* Image 14). The game is about a fictional high school, Kirameki High School. The goal of the game is to perform various actions during three years of high school,

151 KOMADA, *supra* note 5 (lecture 13), slides 10–11.

152 KOMADA, *supra* note 5 (lecture 13), slides 12–13.

153 On this notion, as interpreted by the Japanese courts, see no. 43 ('Esashi Oiwake' case) and no. 44 ('Taiga Dorama Musashi' case). The 'Who Moved My Cheese' judgment (p. 6) refers explicitly to the 'Esashi Oiwake' case.

154 Translation as provided by KOMADA, *supra* note 5 (lecture 13), slide 14 (emphasis supplied). See also 'Who Moved My Cheese' case (「チーズはどこへ消えた？」事件), Tōkyō District Court, 13 December 2001, Case No. 2001 yo 22103.

155 'Who Moved My Cheese' case, *supra* note 154.

156 This case should not be confused with the 'Tokimeki Memorial Memory Card' case, in which defendant had distributed memory cards for Tokimeki Memorial. "By using the card, the users (the customers) can raise various capabilities of the principal character and facilitate obtaining the confession of love from the heroine of the game. The court confirmed that the use of the card destroyed the game-balance and infringed the right of integrity of the work, and it held that [defendant] who caused the infringement should pay for the damage suffered by [Konami]." (Y. KOMADA, 'Infringement 2 (Lecture 9)' (Copyright Law in Japan, Waseda University Graduate School of Law, 2018), slides 35 and 38; see Supreme Court, 13 February 2001, 民集 Minshū 55, 87.

157 The game also existed for PC and Super Famicon, but in the case at hand Konami had sued defendant for copyright infringement of the PlayStation version of the game.

so that the player of the game obtains a confession of love on graduation day under the legendary tree from Shiori FUJISAKI, the heroine of the game. Without authorization, defendant made an adult animation video called Dogimagi Imagination（どぎまぎイマジネーション, *infra* Image 15) of about ten minutes featuring a character that looked similar to the heroine.

Image 14[158] *– 'Tokimeki Memorial' on PlayStation*

Image 15[159] *– 'Dogimagi Imagination'*

The video was first sold in Akihabara (Tōkyō). Afterwards, the defendant sold serial copies of its work. He was sued before the Tōkyō District Court. Among other assertions, the defendant alleged that his act of producing the video was a personal hobby and a creative activity falling under the dōjin-shi culture, which therefore argued against a copyright infringement. The Tōkyō District Court rejected that argument (without any explanation), and found a copyright infringement (right of adaptation, right of reproduction, and right to integrity).[160] This judgment is interesting because, while dōjin-

158 Source of Image 14: KONAMI HOLDINGS CORPORATION, Tōkyō, at *https://www.konami.com/products_master/jp_publish/dl_pspps3vita_tokimeki_arch/jp/ja/images/tkpk.jpg* (For the purpose of reproduction, the color image has been changed to black-and-white).

159 Source of Image 15: Rightholder unknown, retrievable at *http://www2.biglobe.ne.jp/~tell/DAR/syeen/syeen.html* (For the purpose of reproduction, the color image has been changed to a black-and-white and and the depicted nudity has been partly blurred).

160 'Tokimeki Memorial Adult Anime' case (「ときめきメモリアル」アダルトアニメ事件), Tōkyō District Court, 30 August 1999, Case No. 1998 wa 15575, available in English at *https://bit.ly/35PKI8u* (unofficial translation).

shi can be seen *en masse* at places like the Comic Market,[161] the Court refused to give them special treatment.[162]

6. The 'Satomi Gakuen' Case: Parody Website

41. Facts. Plaintiff ('X') was the creator and operator of the website called 里見学園八剣伝 *Satomi gakuen hakken-den*. The website hosted a web game about a fictional high school 'Satomi Gakuen' (Satomi School). X had created a scenario, a bulletin board, a chat room, and other details for the game. Participants could create a character (high school student) which they could afterwards direct within the given rules. They could also communicate with other players. Defendant ('Y') was a player of X's game who played with character 'Z'. He asked X's authorization to create a website to hold a 'parody event' of X's game, of which Z would be the protagonist. X agreed, but without knowing the specifics of the 'parody event website'. Y's game also took place in Satomi Gakuen and mirrored X's game. After a while, X believed that the existence of Y's website would hinder the operation of his website and sent an email to Y, directing Y to close the website, which Y did. Afterwards, X sued Y for infringement of his right of reproduction and for 不法行為 *fuhō kōi* [damages in tort] (Art. 709 Civil Code[163]).[164]

42. Ruling. Regarding the right of reproduction, the Tōkyō District Court held that the references to 'Satomi Gakuen Hakken-den',[165] 'Satomi Gakuen',[166] 'square',[167] and 'empty classroom'[168] on X's website are very short expressions consisting of one, two, or three words combined together. They are ordinary, mundane expressions, such that they cannot be considered 'creatively produced expressions' (under Art. 2 (1) (i) JCA). Furthermore, the Court held that, even assuming *arguendo* that 'Gakuen Hakken-den' and 'Satomi Gakuen' reflected some sort of creativity, X had authorized the creation of Y's website. Thus, there was no infringement. The Court also rejected X's claim regarding damages in tort. It held that simply creating a website with a structure similar to X's site did not constitute a

161 On this notion, see *supra* no. 14.

162 Itō, *supra* note 77, 8.

163 Art. 709 ('Damages in Torts') 民法 Minpō [Civil Code], Law No. 89/1896: "A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence".

164 'Satomi Gakuen' case (里見学園事件), Tōkyō District Court, 31 January 2007, Case No. 2006 wa 13706.

165 「里見学園八剣伝」.

166 「里見学園」.

167 「スクエア」.

168 「空き教室」.

tort, unless special circumstances exist such as an intent to harm X (which was not the case).[169]

This case is quite special, as X had given his prior consent for Y's parody website (albeit without knowing the specifics of Y's website). The judgment seems, however, transposable *mutatis mutandis* to cases where no prior consent has been given.[170]

7. The 'Esashi Oiwake' and 'Taiga Dorama Musashi' Cases: The Right of Adaptation

The following two cases clarify the extent of the right of adaptation. Although they do not discuss parody directly, they are nevertheless relevant as parody often relates to the right of adaptation. They are therefore briefly discussed below.

43. 'Esashi Oiwake'. This case featured, on the one side, the author of a book and, on the other, NHK (Japan's public broadcasting station) as well as the director of the allegedly infringing program. The author had written a nonfiction book on the folk song 'Esashi Oiwake'. NHK had broadcasted a documentary on 'Esashi Oiwake'. The legal question was whether the narration in the TV program was an adaptation of the author's book prologue. The Supreme Court's judgment is known for ruling that "an adaptation can be affirmed when the **e**ssential **c**haracteristic of the original expression is to be **p**erceptible **d**irectly in the secondary expression ('ECPD')".[171] The Court compared the prologue (which was short) and the narration (which

169 'Satomi Gakuen' case [里見学園事件], *supra* note 164.

170 ITŌ, *supra* note 77, 9.

171 Y. KOMADA, 'Infringement (Lecture 8)' (Copyright Law in Japan, Waseda University Graduate School of Law, 2018) slide 12.

The 'Esashi Oiwake' ruling was applied later in the 'Watermelon' case, amongst others: there the plaintiff had taken a picture of a sliced watermelon for a cooking magazine; defendant had taken a very similar picture, but for a sightseeing catalogue. The Tōkyō High Court overturned the judgment of the Tōkyō District Court and found that it was an adaptation. See 'Watermelon' case, Tōkyō High Court, 21 June 2001, Case No. 2000 ne 750. The Japanese judgment and the two images of the watermelons (annexed to the judgment) can be retrieved on the official website of the Japanese Supreme Court (*supra* note 120).

The ruling was also applied in the 'Memorial Tree' case. In that case the plaintiff's song 「どこまでも行こう」 *Doko made mo ikō* ['Let's go further'] was used for a commercial film for a tire company. The defendant's song 「記念樹」 *Kinen-ju* ['Memorial Tree'] was exploited for a TV program. The Tōkyō High Court affirmed the similarity between the two; see the 'Memorial Tree' case (記念樹事件), Tōkyō High Court, 6 September 2002, Case No. 2002 ne 1516.

In the 'Who Moved My Cheese Case' (*supra* note 154), discussed *supra* no. 39, the Court also explicitly referred to the 'Esashi Oiwake' case, at p. 6 of the ruling.

was long) and held that the points which both works had in common were not creative or were simple ideas. It concluded[172] that the essential characteristics of the prologue were not directly perceptible and that the narration was therefore not an adaptation of the prologue (no infringement); this was in contrast with the Tōkyō District Court[173] and the High Court.[174]

44. 'Taiga Dorama Musashi'. Taiga Dorama refers to the annual year-long historical drama series produced and broadcasted by NHK telling the story of a famous historical figure. The plaintiffs were the heirs of 黒澤明 Akira KUROSAWA, a renowned Japanese film director. The movie at stake was his movie 'Seven Samurai'. Defendant 1 was NHK, which had produced and broadcasted the series 'Musashi', as part of the *Taiga Dorama*. Defendant 2 was the screenwriter of 'Musashi'. Plaintiffs sued defendants for copyright infringement.[175] The Tōkyō District Court cited and applied the above-mentioned ECPD test. It concluded that although the two works had some common points, the essential characteristics of 'Seven Samurai' were not directly perceptible in 'Musashi'. The Intellectual Property High Court confirmed this. In response to a new argument brought by the plaintiffs, it added that copyright protection is granted to 'works' as defined in Art. 2 (1) (i) JCA. No differentiation in protection should be made based on the famousness of a work. Consequently, the outcome of the ECPD test should not vary depending on whether the original work is famous or not. The Court also rejected the plaintiffs' free-riding argument, which was based on Art. 2 (1) (i) of the Unfair Competition Prevention Act.[176] Of course, when watching a movie which shares commonalities with a famous movie, the audience might, based on those commonalities, recall the famous movie. However, the Court adhered to the ECPD test and made clear that 'recalling' does not equate to 'adaptation'.[177]

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172 Supreme Court, 28 June 2001, 民集 Minshū 55, 837.

173 'Esashi Oiwake' case (江差追分事件), Tōkyō District Court, 30 September 1996, Case No. 1991 wa 5651.

174 'Esashi Oiwake' case（江差追分事件), Tōkyō High Court, 30 March 1999, Case No. 1996 ne 4844.

175 Right of adaptation, right of attribution, and the right to integrity.

176 不正競争防止法 *Fusei kyōsō bōshi-hō* [Unfair Competition Prevention Act], Law No. 47/1993.

177 'Taiga Dorama Musashi' case (大河ドラマ武蔵事件), Intellectual Property High Court, 14 June 2005, Case No. 2005 ne 10023; 'Taiga Dorama Musashi' case (大河ドラマ武蔵事件), Tōkyō District Court, 24 December 2004, Case No. 2004 wa 25535; ITŌ, *supra* note 77, 8–9.

PART 3. COMPARATIVE ANALYSIS: THE EUROPEAN UNION

I. NEED FOR FURTHER RESEARCH

45. Research. Comparative research conducted so far on the need to introduce a parody exception provision has focused on countries such as the U.S., Canada, France, and the U.K. Out of these, the U.S.[178] and the possibility of a fair-use (style) clause in Japan has received the most attention.[179] A few years ago, the Parody Working Team, which was set up by the Japanese government (Agency for Cultural Affairs), conducted research on the need for a parody provision in Japan. It looked at the U.S., U.K., France, and Germany, and it then turned to its own country. The research resulted in a paper, published in 2013. Without closing the door for the future, the Team concluded that it could at that time not find consensus among the stakeholders for introduction of a parody provision. Instead of resolving the issue by legislation, it recommended a more flexible approach, such as a broader and more flexible interpretation of the existing regulations, and working with the implied authorization of authors where reasonable. It concluded that a close monitoring of the trends in other countries, as well as more studies and discussions, were necessary.[180] In this fourth part of the paper, we propose to do just that: have a closer look at the EU parody exception.

II. THE DECKMYN CASE OF THE CJEU

46. Belgium submits questions to CJEU. Art. XI. 190, 10° of the Belgian Code of Economic Law,[181] provides for an explicit exception for caricature,

178 Y. KOMADA notes that "some court rulings [in Japan] refuse the implicit existence of 'Fair Use'". He cites the ruling of the Tōkyō District Court, 18 December 1995, which "confirmed that the purpose of the laws to harmonize the protection of exclusive right and the fair exploitations of copyrighted works by delimiting the exceptions and limitations with the detailed provisions from Art. 30 to Art. 50 [JCA], and it held that the defendant's 'Fair Use' argument should fail because its legal basis was lacking" (Y. KOMADA, Exceptions and Limitations (Lecture 10) (Copyright Law in Japan, Waseda University Graduate School of Law, 2018) slide 5).

179 See among others S. WILSON / H. CAMERON, A Comparative Study of "Fair Use" in Japanese, Canadian and US Copyright Law, 法政理論 Hōsei Riron 41 (2009) 244; UENO, *supra* note 10; FOSTER, *supra* note 7; M. SUDO / S. NEWMAN, Japanese Copyright Law Reform: Introduction of the Mysterious Anglo-American Fair Use Doctrine or an EU Style Divine Intervention via Competition Law?, Intellectual Property Quarterly (2014) 1, 40; PELC, *supra* note 3; PARODY WORKING TEAM, *supra* note 54.

180 PARODY WORKING TEAM, *supra* note 54, esp. 29–30.

181 Book XI 'Intellectual Property'.

parody, or pastiche, taking into account 'honest practices'.[182] Belgium introduced this legal exception in 1994[183] in its closed list of exceptions and limitations. As 'parody' was – and is still – not further defined in the law, courts (and scholarship) took up the responsibility of further defining this notion. Overall, Belgian courts had interpreted the parody exception restrictively, leading to only a few victories for parodists.[184] In 2013, however, there was still no legal certainty surrounding this concept. This eventually led the Brussels Court of Appeal to submit preliminary questions to the Court of Justice of the European Union for clarification in the so-called 'Deckmyn' or 'Suske & Wiske' case.[185]

47. Facts of the case. Johan DECKMYN is a member of the Vlaams Belang political party (hereinafter 'VB'). At the new year's reception of the city of Ghent held on 9 January 2011, he distributed calendars for the year 2011. The calendars were also made available online on the VB website. The front page of the calendar (Image 16) was a caricature of the mayor of

182 'Eerlijke gebruiken' or 'usages honnêtes', "which means that the parody may not be exploited at the expense of the original work" (S. DEPREEUW, Afdeling 5 – Uitzonderingen op de vermogensrechten van de auteur, in: Brison / Janssens / Vanhees (eds.), Wet en Duiding Intellectuele eigendom: Reeks Economisch recht – 1 (2012) 53).

Belgian law thus includes an additional requirement as compared to Art. 5.3 (k) of the InfoSoc Directive, 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, OJEC L 167/10), which does not contain this requirement of honest practices (D. JONGSMA, Parody After Deckmyn – A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and The Netherlands, IIC – International Review of Intellectual Property and Competition Law 48 (2017) 652, 654).

183 The exception was originally contained in Art. 22 § 1, 6° of the Belgian Copyright Law of 30 June 1994.

184 See among others, Court of First Instance Brussels ('Trib. Bruxelles'), 19 March 1999, Auteurs & Media 1999/3, 373; Court of Appeal Liège, 6 October 1997, Journal des procès 1997/336, 28; Cour de Cassation, 5 April 2001, Auteurs & Media 2001/3, 400, case note B. MICHAUX; Court of Appeal Brussels, 14 June 2007, Auteurs & Media 2008/1, 23–27, case note D. VOORHOOF; Court of Appeal Ghent, 13 May 2013, Auteurs & Media 2013/5, 355, case note D. VOORHOOF; D. VOORHOOF, De parodie-exceptie als geharmoniseerd EU-concept: op zoek naar een rechtvaardig evenwicht tussen auteursrecht en expressievrijheid, Tijdschrift voor Auteurs-, Media- en Informatierecht (2014) 179, 181, fn. 8.

185 VOORHOOF, *supra* note 184, 179–181; D. VOORHOOF, Brussels hof van beroep met parodie naar HJEU (noot onder Brussel 8 april 2013), Auteurs & Media (2013) 356, 356.

Ghent and explicitly referred to the Suske and Wiske album 'De Wilde Weldoener'[186] of W. VANDERSTEEN (Image 17).

Image 16[187] *– Calendar of DECKMYN*

Image 17[188] *– Original comic by VANDERSTEEN*

On the calendar, the original comic character Lambik was replaced by mayor Daniel TERMONT, who lavishly throws money to the people on the street. In the background, "the people picking up the coins were replaced by people wearing veils and people of colour"[189]. Willy VANDERSTEEN's heirs and rights holders demanded the immediate cessation of the distribution of the calendars and the removal of the parody from the VB website.[190]

186 Which can be translated as 'The Compulsive Benefactor'.

187 Source of Image 16: Vlaams Belang, Brussels, at *https://www.vlaamsbelang.org/wp-content/uploads/2016/08/20110111_cartoon_dewildeweldoener.jpg* (For the purpose of reproduction, the color image has been changed to a black-and-white image.).

188 Source of Image 17: Suske and Wiske album 'De Wilde Weldoener' of W. Vandersteen, Amoras II CVOH and WPG Uitgevers België, at *http://suskeenwiske.ophetwww.net/albums/pics/4kl/groot/104.gif* (For the purpose of reproduction, the color image has been changed to a black-and-white image.).

189 Court of Justice of the European Union, 3 September 2014 (Grand Chamber), *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, C-201/13, ECLI:EU:C:2014:2132, *https://bit.ly/2XsH1Uj*, point 9 (hereinafter '*Deckmyn v Vandersteen*').

190 President of the Court of First Instance Brussels ('Voorz. Rb. Brussel'), 17 February 2011, Auteurs & Media 2011/3, 340–343; VOORHOOF, *supra* note 185, 358.

48. Court proceedings. The President of the Court of First Instance of Brussels found the calendar to constitute a copyright infringement, concluding that the requirements of the parody exception were not satisfied. The judge held that the caricature of Lambik had too little originality and was too similar to the cover of VANDERSTEEN's album. This lack of originality meant that the VB parody could not be considered as an intellectual creation and therefore did not meet the basic condition for parody. The judge recognized that it had a humoristic character but observed that this was not the result of a critique on the original album or the Lambik figure; rather, it was a critique of the policy of the city of Ghent. The judge therefore ordered Johan DECKMYN and Vrijheidsfonds VZW[191] to immediately stop using the calendars and the cover, under threat of a Euro 5,000 penalty per established infringement.[192] This decision was appealed before the Court of Appeal of Brussels, which subsequently submitted the following preliminary questions to the CJEU:[193]

"1) Is the concept of "parody" an autonomous concept of EU law?
2) If so, must a parody satisfy the following conditions or conform to the following characteristics:
   – display an original character of its own (originality);
   – display that character in such a manner that the parody cannot reasonably be ascribed to the author of the original work;
   – seek to be humorous or to mock, regardless of whether any criticism thereby expressed applies to the original work or to something or someone else;
   – mention the source of the parodied work?
3) Must a work satisfy any other conditions or conform to other characteristics in order to be capable of being labelled as a parody?"[194]

49. Court of Justice. The Court held that as the EU provision does not contain any reference to the national laws for the purpose of determining its meaning and scope, it should be given an autonomous and uniform meaning. The Court of Justice thus answered the first question affirmatively.[195] It then turned to the second and third questions, which it combined into a single question. Like the Advocate General (AG) (points 45–48 of his

191 Vrijheidsfonds VZW was created in 2005 to support the political party Vlaams Belang financially and materially.

192 President Court, of First Instance Brussel ('Voorz. Rb. Brussel') 17 February 2011, *supra* note 190; D. VOORHOOF, *supra* note 185, 358.

193 VOORHOOF, *supra* note 185, 358–359.

194 *Deckmyn v Vandersteen*, *supra* note 189, point 13.

195 *Deckmyn v Vandersteen*, *supra* note 189, points 14–17; the Court held that "that interpretation is not invalidated by the optional nature of the exception mentioned in Article 5(3)(k) of Directive 2001/29" (point 167).

Opinion[196]), the Court looked at the term 'parody' as encountered in everyday language to extract its usual meaning, finding: "that the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and secondly, to constitute an expression of humour or mockery".[197] The Court did not find as a necessary condition either originality or the conditions set out by the Court of Appeal in its questions (point 13).[198] Furthermore, it underlined the importance of striking a 'fair balance' between the rights of the original author and the freedom of expression of the parodist, while taking into account 'all the circumstances of the case'.[199] Concerning the discriminatory message sent by the calendar's cover, it ruled that it was up to the national court to assess this matter based on the principle of non-discrimination.[200]

50. Umbrella term. Lastly, like the Advocate General (point 46 of his Opinion), the Court did not find it relevant to make a distinction between parody, caricature and pastiche. It follows that the 'parody exception' should thus be understood as an umbrella term encompassing the three terms of 'parody' (*sensu stricto*), 'caricature', and 'pastiche'. This seems the most plausible and most workable interpretation of the Court's judgment. Indeed, "if the CJEU did not intend 'parody' to be used as this shorthand, then it is reasonable to presume that the Court would have taken the opportunity to emphasize the importance of distinguishing between the terms",[201] *quod non*. This approach is consistent with "the current trend amongst Member States to refer to the exception for 'purposes of parody, pastiche and caricature' as 'the parody exception'",[202] and it should be welcomed.[203] This potentially opens the door for other styles, such as satire, to fall under the scope of the parody exception.[204] This discussion also matters for Japan, and it is briefly continued *infra* at no. 58.

51. Situation post-Deckmyn. How have courts in the EU Member States applied the Deckmyn case? Judgments in Belgium,[205] France,[206] and Germa-

196 Opinion of AG CRUZ VILLALÓN, 22 May 2014, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, Case C-201/13, ECLI:EU:C:2014:458, at *https://bit.ly/2V35SfQ*.

197 *Deckmyn v Vandersteen*, *supra* note 189, points 20 and 33.

198 *Deckmyn v Vandersteen*, *supra* note 189, point 21.

199 *Deckmyn v Vandersteen*, *supra* note 189, points 26–27.

200 *Deckmyn v Vandersteen*, *supra* note 189, points 29–30.

201 JACQUES, *supra* note 28, 25.

202 JACQUES, *supra* note 28, 25.

203 JACQUES, *supra* note 28, 26.

204 JACQUES, *supra* note 28, 27.

205 President Court of First Instance Antwerp ('Voorz. Rb. Antwerpen'), 15 January 2015, Auteurs & Media 2015/2, 183–186 (*Tuymans v Van Giel*, heavily criticized in

ny,[207] for example, which share the trait of having rather rich parody case law, show that national judges have generally embraced the Deckmyn requirements and have tried to reconcile them with their legal traditions. It is dangerous to draw too many conclusions from the limited national post-Deckmyn case law in these countries. The judgments seem, however, to suggest that applying the two Deckmyn criteria to a particular case is not the most difficult part of the exercise. The difficulty for the judge rather resides in finding a fair balance between the different rights and interests at stake.

III. Towards an EU-style Parody Exception in Japan?

1. Target and Remix Parodies

52. Deckmyn criteria. As Japan does not have a cultural tradition of target or weapon parody, looking abroad for inspiration for a suitable parody provision is a good idea. In the Deckmyn case, the Court of Justice interpreted the concept of parody broadly. It thus now seems easier to invoke the exception successfully. Under the current regime, a parody has to fulfil two[208] conditions; it should: (1) evoke an existing work, while being noticeably different from it, and (2) constitute an expression of humor or mockery (point 33 Deckmyn). Parodies "directed at or concerned with the original work"[209] ('parody of'), as well as parodies "aimed at a third-party individual or object"[210] ('parody with'), can both fall under the exception.[211] Those two categories coincide with what we have referred to as *'target parody'* (*supra* no. 19) and *'weapon parody'* (*supra* no. 20)*, respectively.* In Section IV. of Part 2 (*supra* nos. 26–28), the need for a parody provision to tackle target parody and weapon parody in Japan has been explained. The few judgments regarding target and weapon parody in Japan

academic literature, see among others: President, Dutch-speaking Enterprise Court Brussels ('Voorz. Nederlandstalige Ondernemingsrechtbank Brussel'), 4 April 2019, *TBH/RDC* 2019/6, 819–825 (*Studio 100 v Greenpeace*).

206 Cour d'appel de Paris (CA Paris), Pôle 5, Chambre 1, 17 December 2019, n° 152/2019, at *https://bit.ly/2WiXola* ('*Bauret v Koons*'); Cass. 1re civ., 22 May 2019, n°18-12.718, *Epouse G. v Le Point*, ECLI:FR:CCASS:2019:C100469, at *https://bit.ly/3bltbWO.*

207 Bundesgerichtshof (German Federal Court of Justice), 28 July 2016, I ZR 9/15, ECLI:DE:BGH:2016:280716UIZR9.15.0, at *https://bit.ly/2YPZRp8* ('Auf fett getrimmt' case).

208 Or actually three, depending on the viewpoint.

209 Opinion of AG Cruz Villalón, *supra* note 196, point 61.

210 Opinion of AG Cruz Villalón, *supra* note 196, point 61.

211 *Deckmyn v Vandersteen*, *supra* note 189, point 33; Opinion of AG Cruz Villalón, *supra* note 196, point 61; Voorhoof, *supra* note 185, 179 and 182.

are, so far, not satisfactory. They show that change is somehow necessary, as discussed just below (nos. 54–55). An 'EU-style parody exception' could, in our view, offer an adequate solution.

53. EU-style parody exception (first attempt). We recommend that Japan introduce a parody provision based on EU law: a so-called 'EU-style parody exception'. A first draft of such an EU-style parody provision could look like this:

> It is permissible to parody and thereby exploit a work, on the condition that the parody (1) evokes an existing work, while being noticeably different from it, and (2) constitutes an expression of humor or mockery.

The EU-style parody provision is based on the objective and subjective criteria of the Deckmyn ruling, rather than on the EU parody provision itself (Art. 5.3 (k) of the InfoSoc Directive). Also, the EU-style parody provision does not contain the words 'caricature' and 'pastiche'. The reason for this is explained below (see no. 58).

54. Target parody. The 'Who Moved My Cheese' case, the only Japanese target parody case discussed in this paper, showed the limits imposed on the freedom of parody. In the absence of a parody provision, the Tōkyō District Court looked at the parodied work from the perspective of the right of adaptation, using the ECPD test as established in the 'Esashi Oiwake' case (the Court even explicitly referred to it). This approach is too reductive and misses the point, as to analyze a parody one should look not only at what the parody borrows from the parodied work but also at *how* the parody differs from the parodied work. An EU-style parody exception could help. Under such a rule the parody is allowed to borrow the essential characteristics of the underlying work; the key question instead being whether there are any 'noticeable differences between the two' so that in the end a fair balance is struck.

55. Weapon parody. In the parody-montage case, the Supreme Court analyzed the parody from the point of view of quotation, establishing two conditions for a valid question. Without mentioning the right of adaptation explicitly, the Court ruled "that the use of another's work in one's own work, without the author's consent, is limited to the situation where the essential characteristics […] of the cited work cannot be directly perceived in the work citing".[212] This is actually no different than the ECPD test. While the conclusions to which the courts arrived in the 'Who Moved My Cheese' and 'Parody-montage' cases are *themselves* not *necessarily* bad, the reasoning the courts used to arrive at these conclusions is not satisfactory.

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212 See *supra* no. 33.

56. Towards an EU-style parody exception. An EU-style parody exception could easily and successfully be introduced in Japan because it combines an objective criterion ('evoke an existing work, while being noticeably different from it') with a subjective one ('constitute an expression of humor or mockery'). The objective criterion takes into account the specificities of the 'parody' genre (umbrella term); this is in contrast to the ECPD test, which arguably addresses 'quotation' effectively but was not designed to address 'parody'. The flexible subjective criterion has the merit of taking into account the different tastes, types, and flavors of humor, which might and do sometimes exist in different countries. This makes the exception malleable and adaptable to Japan (see among others Part 2 – I. 'Humor in Japan'). Humor or mockery may be an eminently subjective criterion, but this should not scare the judge. Indeed, it is not the role of the judge to define what humor is: "[the judge] is [only] expected to determine if the parodist had a humorous intention (successful or not)"[213]. Lastly, like the EU, Japan has a closed-system of exceptions and limitations, which facilitates the introduction of an EU-style parody provision in its JCA.

2. Remix and Homage Parodies

57. A legal basis for remix and homage parodies. At no. 28 in Part 2 – IV., we concluded that remix and homage parodies 'do not immediately justify a parody provision [or] at least not on their own'. As Japan needs a parody exception for target and weapon parodies, this is a good opportunity to also address remix and homage parodies. Indeed, an 'EU-style parody exception' as described above (no. 53) could also cover remix parodies, as remix parodies generally fulfill both the 'objective' and 'subjective' criteria. The same can be said about homage parodies (*e.g.* dōjin-shi), which do not constitute 'mockery' but in our view can be considered as containing a form of (Japanese-specific) 'humor'. This kind of EU-parody exception covering remix and homage parodies should be welcomed and not feared. The social practices have so far created a peaceful atmosphere in which original authors and parodists could co-exist. The introduction of an EU-style parody exception is not likely to affect that. In fact it only *really* intervenes in the pre-litigation phase, by providing a *legal basis* for remix and homage parodies. In the pre-litigation phase, this means that they will not merely be (*prima facie*) accepted socially, which is already the case nowadays, but will additionally be considered to be *prima facie* accepted legally. The EU-

213 "On attend [uniquement] de lui qu'il détermine si le parodiste avait une intention humoristique (réussie ou non)" A. BERENBOOM, Chapitre 3 – Parodie, in: Cornu (ed.), Bande dessinée et droit d'auteur – Stripverhalen en auteursrecht (2009) 115.

style parody exception can also intervene in a later stage, when the case goes to court. But as this only happens in cases where the parodist has crossed a socially acceptable line, the parody exception is not likely to lead to more victories for parodists. Even if the work of the parodist fits the parody definition, authors will still be able to rely on their (strong) moral rights. Moreover, Japan could opt to implement additional safeguards, like the need to take into account 'fair practices' (*cf.* Belgium) or 'rules of social custom' (*cf.* Netherlands). We prefer and propose a *sui generis* safeguard (see *infra* no. 59, *in fine*). In that sense, an EU-style parody exception does not unduly benefit parodists. The provision only *really* benefits them in the pre-litigation phase, while maintaining the current social harmony which Japan needs to protect its rich cultural tradition. In other words, it avoids locking down culture, while encouraging creativity. In this way, an EU-style parody exception perfectly suits the purpose of the JCA as defined in its Art. 1.[214]

3. Other Considerations

58. An understandable provision. We already saw that the Court of Justice did not find it relevant to make a distinction between parody, caricature, and pastiche (*supra* no. 50). In 1991, M-P. STROWEL and A. STROWEL wrote:

> "Even if it is defensible to argue, at least for pastiche and satire, that these are genres distinct from parody, we prefer, for the sake of establishing a definition of parody which would be *'manageable' for legal practitioners,* to consider satire, pastiche and caricature as *instruments of the parodic arsenal, as parodic techniques* […]. This is in line with both continental and American literature, which generally includes under the word 'parody' both pastiche and caricature (or even satire)."[215]

Japan, too, should follow the suggestion made by these two authors and refrain from distinguishing parody, pastiche, and caricature. This is the reason why we did not include the terms 'pastiche' and 'caricature' in the 'EU parody exception', mentioned above (no. 53). The term 'parody', un-

214 *supra* no. 5.

215 "Même s'il est défendable de soutenir, du moins pour le pastiche et la satire, qu'il s'agit de genres distincts de la parodie, nous préférons, dans le souci d'établir une définition de la parodie qui soit "maniable" pour des juristes, envisager la satire, le pastiche et la caricature comme des instruments de l'arsenal parodique, comme des techniques parodiques […]. Ce qui va dans le sens de la doctrine, tant continentale qu'américaine, qui englobe généralement sous le mot "parodie" tant le pastiche que la caricature (ou même la satire)" (A. STROWEL / M-P. STROWEL, La parodie selon le droit d'auteur et la théorie littéraire, Revue interdisciplinaire d'études juridiques 26 (1991) 23, 42) (emphasis supplied).

derstood broadly, can suffice. In the Japanese language, while パロディ *parodi* [parody] will sound familiar to most Japanese, the same cannot be said about the terms パスティシュ *pasutishu* [pastiche] and カリカチュア *karikachua* [caricature].[216] Keeping these latter two terms in the text would only create confusion as to their meaning and would likely feel very artificial, 'French', or in any case 'foreign'. It is probably not an exaggeration to say that law professors and linguistics would be the only ones to know what exactly these terms mean. What would be the purpose of introducing a provision that Japanese society could neither understand or relate to and which would be manageable only for legal practitioners?[217]

59. Extra safeguards. Artists might fear that the provision is too broad and gives too much power to parodists. The EU parody exception is actually a well-balanced one. Indeed, artists should not forget that, even though a work fulfils the conditions for parody, the parody still has to be balanced against the moral rights of the artists.[218] Other safeguards are possible. We could ask ourselves, for example, whether Japan could introduce some manner of an 'honest practices' test[219] following the Belgian example. At first sight, this seems a good idea. The introduction of a 'fair practices' test could, in particular, be envisaged as it is a concept that Japan already uses in its current Art. 32 JCA ("the work must be quoted consistent with *fair practices*"[220]).[221] To associate parody with the fair practices test used in Art. 32 JCA ('Quotation') is, however, dangerous. Indeed, a valid quotation under Art. 32 JCA needs to satisfy the separability condition and the principal-accessory condition (*supra* no. 33). To associate parody with the fair practices test potentially bears the risk of associating parody with these two conditions. This should be avoided at all costs. Instead, Japan could consider the Dutch Copyright Act,[222] which seems more appropriate as it requires

216 Although loanwords exist for these two terms too.

217 See K. FUKUI [福井健策], フェアユースを待つだけでなく自分たちに出来ることを [Let's do what we can, not only wait for fair use], BUSINESS LAWYERS, 5 December 2017, at *https://www.businesslawyers.jp/articles/273*, accessed 30 March 2020.

218 The Court of Justice in the Deckmyn case did not touch upon moral rights (right to integrity) because moral rights are not part of the harmonized framework.

219 See *supra* no. 46 and *supra* note 182; for a good example of an analysis of the honest practices test, see *e.g.* Court of Appeal Ghent, 13 May 2013, Auteurs & Media 2013/5, 355.

220 Art. 32 JCA ('Quotation').

221 VOORHOOF, *supra* note 184, 179; D. VOORHOOF, Rechter heeft moeite met toepassing van de parodie-exceptie (case note to Antwerp 11 October 2000), Auteurs & Media 2001, 361–362.

222 Dutch Copyright Act ('Auteurswet'), 23 September 1912, available at *https://wetten.overheid.nl/BWBR0001886/2018-10-11*.

a parody to be "in accordance with what is regarded as reasonably accepted under rules of social custom"[223] (Art. 18b).[224] A reference to 'social customs' would permit Japanese courts to further fill in the parody provision, and it could furthermore serve as a safeguard ensuring that Japan's niji sōsaku culture would be left intact.[225] Yet another solution, would be to take the different 業界慣行 *gyōkai kankō* [industry practices] into account. The Report of the Parody Working Team indeed made clear that one of the major arguments against the introduction of a parody provision was that such an exception would change or negatively impact the different and well-functioning industry practices already in existence.[226] Japan should therefore give this last option priority or at least special attention.

60. Concluding remarks. The EU parody concept, as interpreted by the Court of Justice in the Deckmyn case, is broad and flexible and could be *more* than just 'a source of inspiration' for Japan. The Deckmyn judgment's objective criterion ('evoke an existing work, while being noticeably different from it') and subjective criterion ('constitute an expression of humor or mockery') are two clear criteria which judges can, in our view, apply quite easily. The two Deckmyn criteria are broad enough to successfully cover target and weapon parodies as well as remix and homage parodies.

We recommend that Japan introduce an 'EU-style parody exception' provision in the closed-list of exceptions and limitations of the JCA. When drafting such parody provision, we do not recommend that Japan seek inspiration from Art. 5.3 (k) of the InfoSoc Directive (the EU parody provi-

223 "[M]its het gebruik in overeenstemming is met hetgeen naar de regels van het maatschappelijk verkeer redelijkerwijs geoorloofd is"; translation as provided in JONGSMA, *supra* note 182, 654.

224 When introducing Art. 18b in its Copyright Act, the explanatory memorandum relating to the article included the following observation: "The details of this limitation which has been deliberately left open, will be further implemented in practice. Inspiration can be derived from foreign case law, where conditions such as the humorous intention, the lack of competitive motives and the absence of a likelihood of confusion form constitute elements for the judge to base his judgment on" (loose translation) (Memorie van toelichting bij uitvoering richtlijn auteursrecht en naburige rechten in de informatiemaatschappij 2002 (Kamerstuk 2001–2002) 68, 53).

The reference in Art. 18b to the 'rules of social custom' is vague, but it gives, on the other hand, more leeway to the judge (DWF VERKADE, Tekst & Commentaar Intellectuele eigendom, Karikatuur, parodie of pastiche bij: Auteurswet, Artikel 18b (Navigator 1 March 2020), at *https://www.navigator.nl/document/inod7279a3144cb36ba3a36d9e7a397b51a6?ctx=WKNL_CSL_570*, accessed 9 May 2020).

225 French law has yet another requirement. Art. L122-5, 4° of the Code de la propriété intellectuelle requires that the 'rules of the genre' be taken into account [*lois du genre*].

226 PARODY WORKING TEAM, *supra* note 54, 27–29.

sion), which provides for an exception for 'the purpose of caricature, parody or pastiche'. Rather, the paper has explained that Japan should base its parody provision on the two Deckmyn criteria. It could also complement these criteria with an extra safeguard.

PART 4. CONCLUSION

61. Categorization of parody. As illustrated historically by Japanese poetry, parody is deeply rooted in the Japanese culture. And today as well, "[f]or many Japanese, parodies are no more than tools of enriching [their] culture?"[227] and "[the Japanese] are still so vigorous in teasing something by-reusing other's cultural products".[228] In Japan, these 'cultural products of others' are used as a tool to pay homage, or as a tool to create a remix, rather than as a tool to target the original work or as a weapon aimed at criticizing something else. In other words, remix parody and homage parody are much more popular than target parody and weapon parody. The first two rarely lead to court proceedings as they are often socially tolerated or regulated by social practices. The absence of a statutory provision permitting parody is therefore not really problematic for these two devices. It is however problematic for the less popular target and weapon parodies, for which courts so far have not rendered convincing judgments, as illustrated eminently by the 'Parody-montage' case and the 'Who Moved My Cheese?' case.

62. EU. Belgium introduced a parody provision in 1994. In the absence of a clear legal definition and, above-all, courts failing to come to a harmonised approach, legal uncertainty reigned. Eventually, this led the Brussels Court of Appeal to submit preliminary questions to the Court of Justice in Luxembourg for clarification in the Deckmyn case. The Court of Justice interpreted the concept of parody as an autonomous EU concept. This broad interpretation is helpful for the EU. But not only that. This paper argues that an EU-style parody exception could be easily and successfully introduced into the JCA to fit Japan's (legal) culture.

63. EU parody concept. The EU parody exception, codified in Art. 5.3 (k) of the InfoSoc Directive and interpreted by the Deckmyn case, achieves copyright equilibrium. It combines an objective criterion ('evoke an existing work, while being noticeably different from it') with a subjective one ('constitute an expression of humor or mockery'). So far, lacking anything better, Japanese courts have applied the ECPD test to parody cases. The ECPD test unduly restricts the parody concept and neglects what parody is about. The 'objective criterion' of the Deckmyn ruling can remedy this with

227 *supra* note 105.
228 *supra* note 106.

its determination that the essential characteristic of the original expression might be perceptible directly in the secondary expression (ECPD), but that there could be 'noticeable differences between the two' such that in the end a fair balance is struck.[229] This is the real question. As for the subjective criterion, the judge has to evaluate whether (a) the parody contains some form of mockery or (b) whether the parodist had a humorous intention. This is a flexible criterion which Japan can easily adopt and adapt to take account of the peculiarities of Japanese humor and its rich cultural traditions. The two Deckmyn criteria are, in our view, clear criteria which judges can apply quite easily. While at first sight, the EU parody exception might look (too) broad, one should not forget that moral rights function as an extra safeguard. Furthermore, we recommend that Japan introduce an extra safeguard, as illustrated below.

64. An 'EU-style parody exception' in Japan. We recommend that Japan consider introducing a parody provision inspired by the Deckmyn ruling of the Court of Justice of the European Union, complemented with an extra Japanese-specific safeguard. Such an exception could be introduced in Section 3, Subsection 5 ('Limitations of Copyright') of the Japanese Copyright Act using the following lines:

> （パロディ）
> 「あるパロディ作品が特定の既存著作物を想起させるものの、当該作品がその著作物とは明らかに異なるものであり、かつ、滑稽的又は嘲笑的な表現を構成する場合、各業界の慣行に照らし、パロディ方式による著作物の利用は許されるものとする」。[230]
>
> (Parody)
> It is permissible to parody and thereby exploit a work, on the conditions that the parody evokes an existing work, while being noticeably different from it, and constitutes an expression of humor or mockery, taking into account industry practices.

It is our view that such a parody provision would be able to address the four categories of parody adequately: not only does it offer a flexible exception for target and weapon parodies, it also has the potential to finally offer an adequate legal basis for remix and homage parodies without affecting the social practices which lie at their heart.

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229 See *supra* nos. 43 and 54.

230 For the legal concepts relating to the Deckmyn ruling, we based our Japanese translation on H. TAKAHASHI [高橋寛], パロディに関する一考察 (Deckmyn 対 Vandersteen 事件 欧州連合司法裁判所判決を契機に) [A Study on Parody (Motivated by the Judgment of the Court of Justice of the European Union in Deckmyn v Vandersteen)], 知的財産専門研究 Chiteki Zaisan Senmon Kenkyū 1 (2016) 6.

SUMMARY

Unlike countries like the United States, Canada, or France, Japan has no legal exception permitting parody (パロディ). Article 32 of the Japanese Copyright Act ('JCA') provides only for freedom of quotation. This means that under the current regime, many parodies in principle constitute copyright infringement. The present paper has two major purposes: (1) to investigate how Japan currently deals with (or does not deal with) parody, taking into account the specifics of the Japanese culture, and (2) to demonstrate why and how Japan could benefit from introducing an EU-style parody exception in its JCA. The paper is first and foremost a legal one, but it familiarizes the reader with Japanese cultural concepts, such as niji sōsaku (二次創作), dōjin-shi (同人誌), and aun no kokyū (阿吽の呼吸), all of which are key to understanding the greater context.

Japan has a long tradition of adaptation of poems and, today as well, borrowing the cultural products of others is a socially accepted practice. Against this background, parodies mainly serve as tools to enrich Japanese culture: tools to pay 'homage' or to create a 'remix', rather than tools to 'target' the original work or tools used as a 'weapon' for criticism. In other words, 'remix (リミックス) parody' and 'homage (オマージュ) parody' are much more popular than 'target' (ターゲット) parody' and 'weapon (ウェポン) parody'. The first two rarely lead to court proceedings as they are often regulated by social practices. The absence of a parody exception is therefore not so problematic for them. The less prevelant target and weapon parodies, for which courts so far have failed to render convincing judgments, are the main concern.

In regards to its second purpose, the paper undertakes a comparative analysis with EU law, with special attention given to relevant case law. In 2014, the Court of Justice of the European Union rendered the Deckmyn judgment, thereby giving an autonomous and broad meaning to the EU parody concept. The paper does not limit its analysis to this defining event. It tries to capture the bigger picture by also looking at the pre- and post-Deckmyn periods in some EU Member States, with Belgium – the country from where the Deckmyn case originated – standing at the forefront.

The paper concludes by suggesting that an EU-style parody exception could easily and successfully be introduced into the JCA's closed-system of exceptions and limitations. To this end, the paper offers Japan a concrete proposal, inspired by EU law: a parody provision which holds not only a flexible exception for target and weapon parodies but also the potential of finally establishing an adequate legal basis for remix and homage parodies, without affecting the social practices which lie at their heart.

ZUSAMMENFASSUNG

Anders als die Vereinigten Staaten, Kanada und Frankreich hat Japan keine gesetzliche Ausnahmeregelung für Parodien. Artikel 32 des Japanischen Urheberrechtsgesetzes erlaubt lediglich Zitate. Das bedeutet, dass nach der geltenden Rechtslage viele Parodien grundsätzlich Urheberrechtsverletzungen darstellen. Der vorliegende Beitrag hat zwei wesentliche Ziele: 1. zu untersuchen, wie Japan gegenwärtig mit Parodien umgeht, unter Berücksichtigung der Besonderheiten der japanischen Kultur, und 2. zu zeigen, warum und wie Japan von der Einführung einer Ausnahmeregelung für Parodien in sein Urheberrechtsgesetz nach Maßgabe der in der Europäischen Union (EU) geltenden Kriterien profitieren könnte. Dieser Beitrag ist in erster Linie ein juristischer Aufsatz, möchte die Leser aber auch mit wichtigen kulturellen Konzepten in Japan vertraut machen, so z.B. niji sōsaku (二次創作), dōjin-shi (同人誌) und aun no kokyū (阿吽の呼吸), die wesentlich sind, um den Gesamtkontext zu verstehen.

Japan hat eine gesellschaftlich anerkannte, lange Tradition der Umgestaltung von Gedichten und der Übernahme von kulturellen Schöpfungen anderer, die auch heute noch von Bedeutung ist. Vor diesem Hintergrund werden Parodien generell als ein Mittel zur Bereicherung der Kultur angesehen, jedenfalls soweit sie ein Mittel darstellen, um Respekt vor dem Werk eines anderen zu bekunden oder ein neues künstlerisches Arrangement zu erstellen; nicht dagegen, wenn die Parodie als Mittel genutzt wird, um das Werk eines anderen anzugreifen und die Parodie im Rahmen der Kritik als Waffe einzusetzen. Mit anderen Worten, geistige Schöpfungen durch Neuanordnung eines bekannten Werkes und Schöpfungen zum Zwecke der Respektbezeugung sind in Japan wesentlich verbreiteter als Parodien zur kritisch-angreifenden Auseinandersetzung mit dem Werk anderer. Die erstgenannten Formen der Parodie führen selten zu Gerichtsverfahren, da sie als gesellschaftlich anerkannte Praktiken angesehen werden. Diesbezüglich stellt es somit kein Problem dar, dass es in Japan derzeit keine Ausnahmeregelung für Parodien im Urheberrecht gibt. Problematisch ist das Fehlen einer solchen Ausnahmereglung lediglich für die letztgenannten Formen der Parodie, hinsichtlich derer die japanischen Gerichte bislang keine überzeugenden Kriterien der urheberrechtlichen Beurteilung entwickelt haben.

Im Anschluss an diese Erörterung wendet sich der Beitrag der Analyse des EU-Rechts zu, vor allem der maßgeblichen Rechtsprechung. Im Jahre 2014 hat der Europäische Gerichtshof (EuGH) im sogenannten Deckmyn-Fall ein autonomes und weites Konzept der Parodie entwickelt, das rechtlich relevant für die gesamte EU ist. Der Aufsatz beschränkt sich aber nicht auf die Erörterung dieses zentralen Ereignisses. Er versucht ein weiteres Bild der Rechtslage zu zeichnen, in dem er auch die rechtliche Situation in der EU vor und nach dem

Gerichtsurteil betrachtet, mit besonderem Augenmerk auf die Lage in Belgien, das Land, aus dem der Deckmyn-Fall stammt, mit dem sich der EuGH auseinandergesetzt hat.

Der Beitrag kommt zu dem Schluss, dass die Einführung einer Ausnahmeregelung für Parodien im japanischen Urheberrecht auf der Grundlage der vom EuGH entwickelten Grundsätze ihrer Zulässigkeit einfach und erfolgversprechend möglich ist. Eine solche Regelung könnte in das geschlossene System der bereits bestehenden Ausnahmen und Beschränkungen des Urheberrechtsgesetzes integriert werden. Hierfür macht der Beitrag einen konkreten Regelungsvorschlag, der vom EU-Recht inspiriert ist. Dabei handelt es sich um eine flexible Ausnahmeregelung für Parodien jeglicher Art, ohne die existierende und allgemein anerkannte gesellschaftliche Praxis in Frage zu stellen.

(Die Redaktion)