

## 'If Parody Does Not Prickle It Does Not Work': Reflections on the Interpretive Challenges of Dark Parody in the Dutch and South African Courts

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Focusing on the nexus of humour and the right to free speech, this article introduces the concept of 'dark parody' to address parodies that reuse existing material with a dark, humorous twist and explores how courts deal with two of the main interpretive challenges presented by a 'dark parody': (1) interpreting the distance between the parody and the copyright/trademark protected work it parodies, and (2) its use of dark humour. Using a metahermeneutic approach, the article analyses how the main features of parody, the legal criteria applied to parody in courts of law, and the role of dark humour influence the judicial interpretation process regarding (dark) parody in the context of copyright and trademark law. Based on this analysis, the article proposes the theoretical framework of 'parodic distance' to address the interpretive challenges systematically presented by dark parody via six main categories—content, style, context, message, function and affect—from which the distance between a parody and the original can be interpreted. Applying this framework to two case studies [Mercis c.s. v. Punt.nl, Court of Appeal of Amsterdam; Laugh It Off Promotions v. South African Breweries, Constitutional Court of South Africa], the article provides a comparative analysis of how these courts currently deal with interpretive issues surrounding dark humour in copyright and trademark law and shows how the framework of parodic distance can be a potentially useful conceptual tool that provides a shared vocabulary to complement judicial interpretation and legal discourse at the nexus of dark parody and the law.

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## Introduction

Parody, as a humorous expression of artistic creativity, invites critical and reflective thinking about topics and tensions that often remain invisible or just under the surface in democratic societies. As suggested by Judge Sachs in his concurrent vote on the judgement in the case of *Laugh It Off Promotions v. South African Breweries* (Constitutional Court of South Africa, CCT42/04, 27 May 2005), ‘if parody does not prickle, it does not work’ (para. 75). In other words, parody *provokes, confronts* and *challenges* the audience. For this article, I define the concept of parody as follows:

Parody is a creative work that *imitates*—i.e., reproduces elements from—an original work in a recognisable manner, while simultaneously *transforming*—i.e., changing aspects of—this original work in a variety of ways, often with *humorous intent or effect*. Parody can fulfil a range of *functions* and has the ability to evoke many different *emotions* from an audience.<sup>1</sup>

While there are different perspectives and approaches to defining parody itself, legal scholars agree that parody plays an important role in a democratic society, such as expressing critical commentary on social issues. This situates parody within the tension between the right to free speech (Art.19 Universal Declaration of Human Rights) and the right to (intellectual) property (Art. 17 UDHR) (cf. Breemen and Breemen, 2022; Godioli and Young, 2023; Jacques, 2019; Jacques and Derclaye, 2023; Lai, 2019). This is especially true for instances of what I propose to call dark parody—a parody that imitates an existing work and transforms it with dark humour. Dark parody can use various types of dark humour to relocate an original work into the context of a situation or event considered socially or culturally taboo. This article adopts the tentative definition of dark humour presented by Godioli (2024), who defines dark humour in general as ‘a type of humour where at least one of the scripts is normally associated with feelings of sadness, grief or horror’ (129).<sup>2</sup> Even though this article focuses mainly on the interpretive challenges presented by dark parody in the realm of free speech and intellectual property (IP) law, dark parody also presents notable challenges concerning free speech and other fundamental rights, such as the right to dignity (Art. 1 UDHR) in cases where dark parody functions as a vehicle for communicating (implicitly) discriminatory messages, such as racist, sexist and ableist statements, blurring the boundaries with hate speech.

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<sup>1</sup> Although this is my own definition of parody, it is based on various scholarship on parody such as Genette (1987) Hutcheon (2000), Dentith (2000), Jacques (2019), and Breemen and Breemen (2022).

<sup>2</sup> The concept of scripts used in this definition refers to linguistic theories of humour such as the General Theory of Verbal Humour (cf. Attardo, 2001; 2017; 2020) that describes humour via the concept of ‘script opposition’—i.e., the incongruity that underlies humorous texts and communication.

This article argues that the interpretation of the distance between a (dark) parody and the original work and the interpretation of dark humour are two of the main interpretive challenges courts deal with when confronted with a dark parody in the context of copyright and trademark infringement allegations. Dark parody offers an ideal case study to explore these two interpretive challenges in the broader framework of humorous expression as part of the fundamental human right to freedom of expression. In parody disputes, judges are tasked with balancing the interest of copyright and trademark rights holders against the parodist's right to freedom of expression, including artistic expression such as dark parody, and these interpretive challenges play an important role in the judicial interpretation in this balancing exercise.

The theoretical approach used to reflect on the judicial interpretive process concerning dark parody will be meta-hermeneutics, a term coined by Korthals Altes (2014) in the field of narratology. She defines meta-hermeneutics as an *approach* and type of *reflection* that 'relates interpretive argumentations to their underlying value-laden conceptions and pathways' (99). Adapting meta-hermeneutics as an approach to the nexus of humour and the law, its application to judicial interpretation practices focuses on reconstructing the conventional paths along which judges and courts of law construct meaning, investigates the concepts used by courts, and explores why, when and how courts interpret a parody as 'distant enough' from the original work to be allowed as a humorous expression of IP-protected material. How the distance between a (dark) parody and an original work is interpreted plays a fundamental role in judicial decision-making, as it provides the grounds for the decision to allow or prohibit said parody. As the analysis of the case studies will show, a systematic approach to interpreting this distance is lacking in current judicial interpretive practices, which can lead to inconsistent outcomes.

This article aims to create a theoretical framework that addresses this lack of systematic test for interpreting the distance between a (dark) parody and an original work. It does so by weaving together insights from both humanities-based humour research and legal scholarship on intellectual property law, which each have their own vocabulary, concepts and assumptions. This means that the article has a strong theoretical focus and that the case studies serve mainly to illustrate the workings of the theoretical framework. The resulting framework is meant as a conceptual tool to support courts in developing an interpretation that considers all the complexities of the (dark) parody under review, creating a stable ground for their decision-making impacting freedom of expression. This is especially important when dealing with dark parody, as the dark humour adds another layer of complexity to interpreting the meaning and impact of said parody. Through their dark humour, dark parodies touch

upon what Tsakona (2020) has called ‘metapragmatic stereotypes’ of humour—i.e., the internalised models of humour people have, and ‘how it should be used, when, why, and for what purposes’ (16). Dark parodies thus not only deal with the legal framework of intellectual property law and the right to freedom of expression but also relate to issues of morality, cultural values and societal beliefs about humour.

The first section shows how the interpretation of parody by courts is based on the resonances between the main features of parody and the legal criteria in copyright and trademark law and introduces the new concept of ‘dark parody’ to illustrate how parody can be a medium for expressing different types of dark humour. Based on these resonances, the second section proposes the interpretive framework of ‘parodic distance’ for a systematic approach to interpreting both the distance between a dark parody and the original and the (type of) dark humour used. The last section provides a comparative analysis of two case studies revolving around dark parody: *Mercis c.s. v. Punt.nl* (Court of Appeal of Amsterdam, LJN:BS7825, 13 September 2011) and *Laugh It Off Promotions v. South African Breweries* (Constitutional Court of South Africa, CCT42/04, 27 May 2005). A close reading and comparative analysis of the interpretive behaviour of the courts in both cases offers a deeper understanding of the values underlying the legal protection of dark parody in both legal systems.

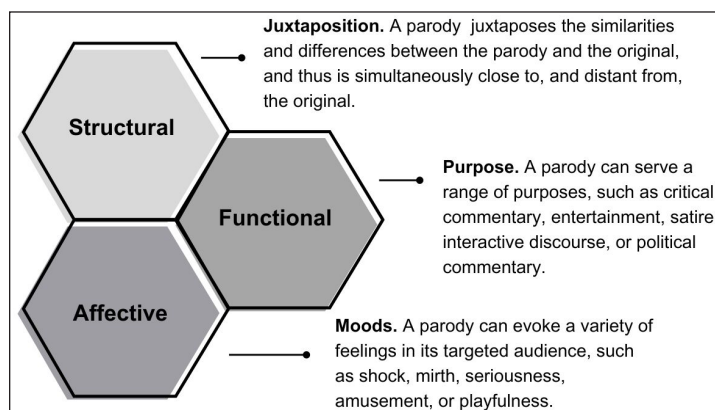
### **Interpreting (Dark) Parody in Copyright and Trademark Law**

Korthals Altes (2014) introduced meta-hermeneutic narratology to the field of literary studies to investigate the conventions intervening in the meaning-making process, which affect the reading experience, the relevance ascribed to a literary work, and expectations a reader has regarding ethos (122). While designed to analyse the process of narrative interpretation, meta-hermeneutics can be adapted to the process of interpretation in general, as it is an approach that ‘strives to gain insight into the processes and conditions of how people interpret’ (Korthals Altes, 2014: 37). As such, a meta-hermeneutic approach to judicial interpretation of (dark) parody offers a way to reconstruct the various interpretive routes judges take to make sense of a (dark) parody in light of copyright and trademark law and invites reflection on the values and interpretive procedures on which the divergent responses by courts to dark parody are based.

#### ***The structural, functional, and affective features of parody***

Following legal scholarship on parody in the context of copyright law (Breemen and Breemen, 2022; Jacques, 2019) and literary scholarship on parody (Genette, 1997; Hutcheon, 2000), I propose to summarise the features of parody into three main categories: structural, functional, and affective (see **Figure 1**). Based on Genette’s (1997) literary theoretical insights regarding parody, Breemen and Breemen (2022) define the

structural features of parody as an ‘imitation, recognition of the original subject or a close relationship between the parody and the original work’ (468). The structural features of a parody, then, are the evocation of both a closeness with and a distance from an original work. Parody both transforms the text and imitates and reproduces a certain amount of an original work. Essential is that a parody acknowledges this reproduction, which is necessary for audiences to recognise it as a parody (Jacques, 2019: 13).



**Figure 1:** The three main features of parody. Image created by the author using Canva.

The functional features of a parody illustrate how a parody can have a range of functions that are satirical or ironic, such as providing social or political commentary, creating entertainment by provoking laughter, or conveying criticism (Jacques, 2019: 5). Lastly, Breemen and Breemen (2022) show how parodies can display a range of moods, such as amusement, play, irony, satire, humorousness, and seriousness. I propose to call these moods the *affective* features of parody, as a parody ‘by its own nature, seldom causes feelings of indifference on the part of the targeted public’ (Ramalho, 2009: 71).

Parodies thus hold a structural tension between the imitation and transformation of existing work, can fulfil a variety of different functions, and display (and evoke in the audience) a range of moods. The structural paradox of imitation and transformation inherent to parody is acknowledged in judicial interpretation. For example, in his concurrent vote in the *Laugh It Off Promotions* case, Judge Sachs states that:

Good parody is both original and parasitic, simultaneously creative and derivative. The relationship between the trademark and the parody is that if the parody does not take enough from the original trademark, the audience will not be able to recognise the trademark and therefore not be able to understand the humour. Conversely, if the parody takes too much it could be considered infringing, based upon the fact that there is too much theft and too little originality, regardless of how funny the parody is (para. 76).

Parody, then, is a balancing act in and of itself—it balances imitation and reproduction with creative transformation. This structural balancing act at the centre of the parody itself seems echoed in the balancing exercise judges engage in when considering if a parody keeps enough distance from the original work to be a lawful expression instead of a copyright or trademark infringement. Indeed,

parody typically is situated in the very middle of the tension that exists between copyright law and freedom of expression ..., arguably precisely due to the close relationship that is required between the parodied work and the parody (Breemen and Breemen, 2022: 473).

Parody thus offers a way to examine the tension between freedom of expression and copyright and trademark law.

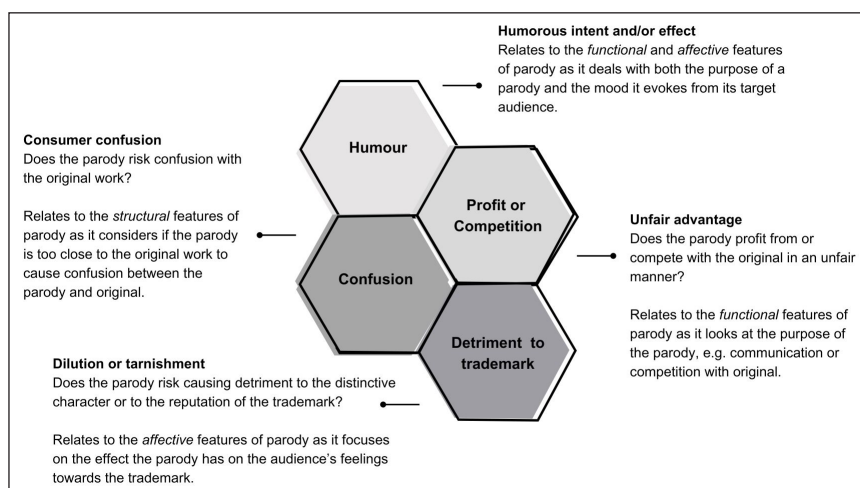
#### ***Parody in copyright and trademark law***

In the context of copyright law, Jongmsma (2017) identified three common explicit criteria regarding the legal permissibility of parody employed by the national courts of Belgium, France, Germany and The Netherlands, namely (1) humorous intention, (2) absence of intention to either profit from or compete with the original work, and (3) the absence of risking confusion between parody and original work. In addition, he outlined various implicit criteria that play a role in some courts, such as the absence of harmful intention, the importance of originality, the borrowing of original work limited to necessary elements, original work as the target of the parody, and the importance to respect moral rights (654-664). In the context of trademark law, Ramalho (2009) identified three legal criteria courts generally consider in the European legal regime and the national courts of Germany, France and Spain when dealing with the interpretive challenges of (dark) parody: (1) likelihood of confusion, (2) unfair advantage, and (3) potential detriment to the distinctive character or reputation of a trademark—i.e., dilution or tarnishment. As there is an overlap between the legal criteria regarding parody in copyright and trademark law, I propose to summarise these legal criteria via four main categories: humour, confusion, profit or competition, and detriment. These categories reflect both the main aspects courts consider in parody disputes and the cultural and societal values that underly these legal criteria, which influence the judicial interpretive process.

The *humour* category is related to the legal criteria of humorous intent or effect of the parody; this category considers the use and role of humour in the parody and underlines the status of a parody as a humorous expression of IP-protected material. As it deals with both the purpose of a parody and the mood it evokes from its target audience, this category is one of the ways a parody transforms the original work via a parody's functional and affective features. The *confusion* category underlines the importance courts place on

the legal criteria of the likelihood of confusion between the parody and the original work; this category resonates with a parody's structural feature as it considers how much and what elements the parody reproduces from the original work. The *profit or competition* category considers if the parody profits or intends to profit from or compete with the original work and is also related to the principle of unfair advantage. In trademark law, when dealing with well-known trademarks that have a reputation, the likelihood of confusion criteria is often considered insufficient for deciding on the permissibility of a trademark parody. In these cases, courts can lean on the criteria of unfair advantage. The rationale behind the unfair advantage principle is to protect the trademark right holder against a parody's use of the trademark in a manner that results in unfair competition with the parodied trademark and can be considered free riding—i.e., 'the obtaining of more benefits than one's fair share at the expense of others' (Ramalho, 2009: 69). This category is closely related to the functional features of parody, as it considers the purpose of the parody, such as communication or competition with the original work.

Lastly, the category of *detriment* refers to the implicit legal criteria of absence of harmful intent in copyright law and the principle of detriment to the distinctive character (dilution) or reputation of the trademark (tarnishment) in trademark law.<sup>3</sup> This category relates mainly to the affective features of parody, as it focuses on the emotional effect the parody has on its targeted audience. The rationale underlying the detriment principles is to protect the commercial investment of the trademark holder against both blurring the uniqueness of the trademark and the creation of a negative mental association with the trademark in the mind of the consumer and public caused by the parody. See **Figure 2** for a visual summary of the four main categories of legal criteria.



**Figure 2:** The four main categories of legal criteria for parody in the context of copyright and trademark law. Image created by the author using Canva.

<sup>3</sup> In legal discourse, tarnishment refers to the use of a trademark in a way that is detrimental to its reputation.

### ***Dark humour and parody: Introducing the concept of 'dark parody'***

The category of detriment is especially relevant when dealing with parodies that reuse an existing work and transform it with dark humour. Here, I propose to introduce the concept of 'dark parody' to address these particular types of parodies. Since dark humour is a main characteristic of dark parody, the definition of dark humour and three basic types of dark humour proposed by Godioli (2024) are useful to better understand and interpret dark parody and its legal protection in the context of copyright and trademark law. Godioli (2024) defines dark humour as a humorous expression in which one of the scripts creating the incongruity necessary for humour can consist of

three fundamental elements: (1) A sinister event, subject or scenario that usually has a taboo status, at least in the sense that it should not be addressed within a humorous context; (2) The victim(s) of said event; (3) The perpetrators (when applicable, as is the case with a crime), enablers or passive bystanders of the sinister event referenced (131).

In essence, scripts are 'ideas, thoughts or meanings' (Attardo, 2020: 116) that are activated in the mind of the audience by the text. The opposition of scripts creates a humorous incongruity that triggers 'a shift from the automatic interpretation of a given sentence or situation, to a more unusual or unpredictable one' (Godioli, 2024: 128). Based on these three elements, Godioli (2024) distinguishes three fundamental variants of dark humour—*taboo-breaking*, *disparaging* and *sarcastic* dark humour. As taboo-breaking dark humour aims to question the status of a given 'dark' event or subject as taboo by making it part of the humorous expression, I argue this type of dark humour relates to the affective feature of dark parody through the *pleasure* of the cognitive reward an interpreter derives from the playful conflict of emotions generally regarded as opposites (such as mirth and horror) or the psychological and/or emotional *relief* that an interpreter experiences by using taboo-breaking dark humour as a way to cope with realities that are experienced as unpleasant or traumatic. The functions of this type of dark parody could be interpreted as *entertainment*, *a coping mechanism* or *criticising of the taboo status of the subject* (Godioli, 2024: 134). In contrast, disparaging dark humour targets the victims of the dark event evoked by the humorous expression, thereby reinforcing negative prejudices about its target. Since the victim(s) of a dark scenario is the target of disparaging dark humour, this type of dark humour relates to the affective dimension of a dark parody through the pleasure derived from *feelings of superiority* towards the target of the parody. Borrowing from Raul Perez's work on racist humour, I suggest calling this emotional state and affective mechanism 'amused contempt'—i.e., feelings of pleasure and amusement from feeling superior towards the

targeted victims.<sup>4</sup> If the humorous aspect of a dark parody is interpreted as disparaging dark humour, the functional feature of dark parody can be a *reinforcement of negative prejudices* that can be harmful to the target of the dark parody. Lastly, as the intention behind sarcastic dark humour is to expose someone's inhuman behaviour, I argue that the relation between sarcastic dark humour and the affective feature of parody lies in the *pleasure or satisfaction* derived from holding someone else accountable for their inhumanity and relates to the functional feature of dark parody that *exposes inhumane or unethical behaviour* of its target. At times, it can be difficult to distinguish between disparaging and sarcastic dark humour, as the latter often reproduces disparaging humorous expressions by other people in a satirical way to criticise this behaviour (Godioli, 2024: 137). **Table 1** offers a visual summary of how the three types of dark humour can relate to the functional and affective features of dark parody:

	TABOO-BREAKING	DISPARAGING	SARCASTIC
FUNCTION	entertainment coping mechanism criticism taboo status of a subject	reinforcement of negative stereotypes or prejudices	criticism/exposure of inhuman behaviour or way of thinking
AFFECT	pleasure of cognitive reward relief from uncomfortable emotions	amused contempt	moral emotions

**Table 1:** The resonances of functional and affective features and the three types of dark humour.

Due to its provocative and shocking nature, dark parody is not only a place where the boundaries between freedom of expression and intellectual property law intersect but also a space where the limits of humorous expression are subject to discussion. In general, humorous expression is legally protected by the right to freedom of expression (Article 19 of the International Covenant on Civil and Political Rights), which includes humorous expressions that are provocative or shocking.<sup>5</sup> However, dark humorous expressions seem to encounter the limit of the right to freedom of expression faster than other forms of humorous expression, especially when interpreted as disparaging dark humour. As the analysis of the case studies in section three will illustrate, courts tend to interpret dark parody as an expression of disparaging dark humour, which then can be considered unlawful concerning the legal criteria of harm and detriment to the reputation of a trademark or original work. While disparaging dark humour is generally considered a harmful expression that is subject to legal restriction, I argue

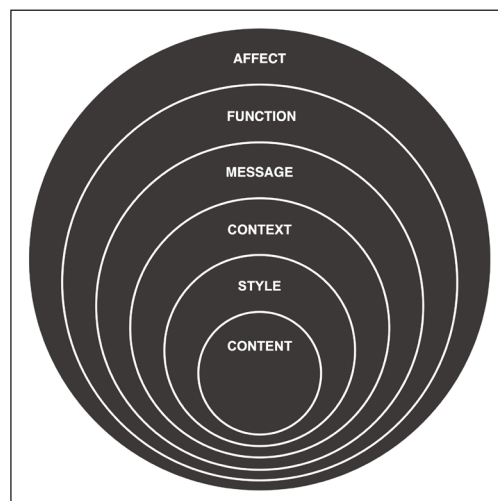
<sup>4</sup> In his book *The Souls of White Jokes* (2022), Perez coins the term 'amused racial contempt' to describe the shared emotional state and affective mechanism through which white people derive amusement, pleasure and solidarity from laughing at people of colour (Perez, 2022: 8).

<sup>5</sup> The ICCPR is a multilateral treaty that is legally binding for the countries that sign it to respect an individual's civil and political rights, and Article 19 encompasses the right to freedom of expression.

that taboo-breaking and sarcastic dark humour embodies an important aspect that the right to freedom of expression aims to protect, namely the opportunity to reflect on and challenge dominant ways of thinking, and to expose unethical behaviour. By creating a conceptual tool and shared vocabulary to distinguish between different types of dark humour and how they relate to the distance between the dark parody and the original work, this article aims to support courts in navigating the questions surrounding the legal protection of these types of humour that, while being provocative and shocking, can also play an important role in democratic societies.

### The Interpretive Framework of ‘Parodic Distance’

As the previous section has shown, interpreting both the distance between a parody and the original work, and the meaning and function of dark humour are two of the main interpretive challenges judges face when dealing with dark parody in the context of copyright and trademark law. To address these interpretive challenges, this section proposes an interpretive framework that I call ‘parodic distance’ to conceptualise how the distance between a dark parody and the original work can be interpreted via six categories: content, style, context, message, function, and affect. This framework builds on the resonances between the structural, functional and affective features of a (dark) parody and the main categories of the legal criteria regarding parody in copyright and trademark law discussed in the previous section. Each category considers the distance between the parody and the IP-protected material and how it can be interpreted from a different perspective. **Figure 3** offers a visual representation of the relation between these categories.



**Figure 3:** The nested model of the parodic distance framework, showing how each category relates to the other. Image created by the author using Canva.

The interpretive framework of parodic distance can be considered an exercise in interpretive comparison between a parody and the original work in six different ways that build on each other. The category of *content* forms the basis of the framework, as it observes the parody and looks at what is there. From this perspective, the interpretation of parodic distance considers the similarities between the parody and the original work in what, and which, amount of the original work the parody imitates and reproduces. The category of *style* builds on this category as it centres on how the content is presented by the parody. Looking at parodic distance from this perspective means considering the similarities and differences between a parody and the original not based on how much of the original work is imitated, but how the original work is imitated and reproduced. Both content and style are closely related to the structural features of parody and the legal category of confusion. The *context* category interprets the parodic distance by looking at the context into which an original work is relocated and thus considers where the original work is relocated to. Building on the previous categories, interpreting the parodic distance via the category of context means looking at how a parody relocates the imitated amounts of the original work to a different social, political, commercial, or cultural context via a specific medium, for example, memes, T-shirts, or images on the internet. It is thus closely linked to a parody's structural feature and the legal category of confusion. The *message* category considers the parodic distance by looking at what the parody says and compares this with the message of the original text. It thus considers the communicative aspect of the parody. This category relates closely to the functional and affective features of parody and therefore the legal categories of humour and detriment. The *function* category builds on the previous categories and looks at the purpose of the parody and asks the interpretive question if the parody has a commercial, entertainment, social or political purpose. It considers the aim of a parody in juxtaposition with the aim of the original work and is closely connected to a parody's functional feature and the legal category of competition or profit. Lastly, the category of *affect* interprets the parodic distance by looking at the emotional response to a parody such as amusement, mirth, indignation, shock etc. In the case of dark parody, there is an additional affective response based on socio-cultural beliefs surrounding humour production, namely the belief that the subject matter should not be subjected to humorous treatment. Depending on the type of dark humour used by the parodist, the affective distance can be interpreted as pleasure of cognitive reward, relief from uncomfortable emotions, amused contempt, or emotions related to ethical beliefs. The interpretive category of affect thus relates closely to the affective features of a dark parody and the legal category of detriment.

Since the framework of parodic distance is based on insights from literary studies, humour studies and legal scholarship on parody, it is important to highlight that courts

do consider these aspects in their interpretation of parodic distance when dealing with (dark) parody in the context of copyright and trademark law. However, as the analysis of the judicial interpretation in the two case studies in the following section will show, due to the lack of a consistent test for evaluating the distance between a parody and original work, these aspects are generally closely entangled with each other and not every aspect is considered in each parody-dispute, which often results in divergent interpretations and unpredictable decisions regarding the legal permissibility of dark parodies.

## **Dark Parody in the Dutch and South African Courts: A Comparative Analysis**

### ***Dark Miffy: reimagining Miffy with taboo-breaking dark humour***

In 2009, Miffy, the famous and beloved Dutch children's figure of a rabbit created by Dick Bruna, was at the heart of a dark parody dispute at the Amsterdam District Court.<sup>6</sup> The case revolved around the online publication of seven images portraying Miffy in relation to drug use and terrorism, generally considered topics with a taboo status in humorous expression. Bruna and Mercis considered the use of Miffy in these images as an infringement of their copyright and trademark rights.<sup>7</sup> Punt.nl, the hosting provider of the websites that published the images, invoked the parody exception as a defence. The Netherlands has an explicit exception for parody incorporated in copyright law (Art. 18b) and the legal treatment of parody in the national court of the Netherlands includes the criteria for humorous intention or humorous result, absence of competitive motivation, and absence of risking confusion between parody and the original work (Jongsma, 2017: 656-7). The parody exception in Dutch copyright law adds one specific requirement to determining the lawfulness of a parody, namely that the parody is 'in accordance with what is regarded as reasonably accepted under rules of social custom' (Art. 18b). The Netherlands has no explicit exception for parodies in trademark law, and while a trademark parody is allowed to reproduce elements of the trademark, it should be distanced from the trademark. In other words, it 'should be sufficiently clear that the parody does not originate from the trademark owner' (2009, para. 4.7; translation my own).<sup>8</sup>

The proceedings focused on the question of whether the images fell under the parody exception, which would justify the publication of the images online. As such, the judicial interpretation of the images centred mainly on interpreting the distance between the parody and the original and determining if this distance was 'sufficient'. The Amsterdam District Court first established Miffy as an original work protected by

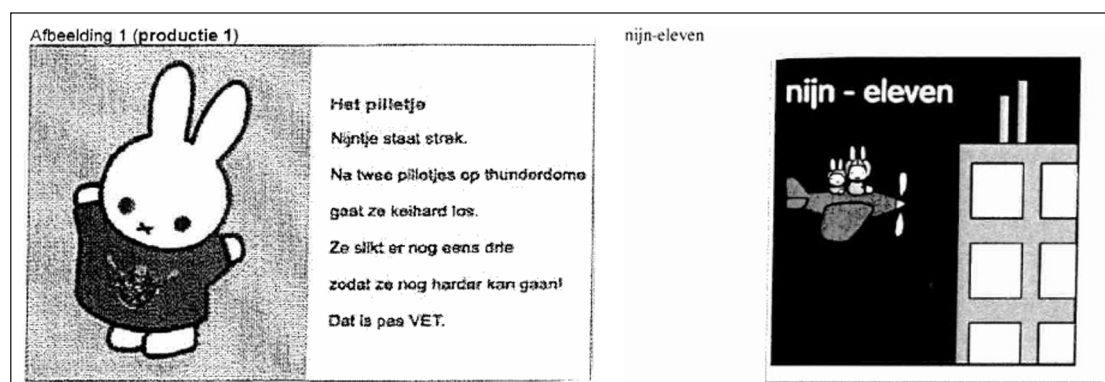
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<sup>6</sup> Unless stated otherwise, all translations of the citations from the cases ECLI:NL:RBAMS:2009:BK7383 and ECLI:NL:GHAMS:2011:BS7825 are mine.

<sup>7</sup> Mercis is the company that owns the copy and trademark rights for Miffy.

<sup>8</sup> 'Het moet voldoende duidelijk zijn dat de parodie niet afkomstig is van de merkgerechtigde' [2009, para. 4.7].

copyright law and that the contested images reproduced the copyrighted features of Miffy. The Court allowed five of the seven images based on the Dutch parody exception in copyright law, because of their ‘humorous intent, lack of competitive intent and lack of likelihood of confusion’ (2009, para. 4.3).<sup>9</sup> For the Court these images held sufficient distance from the original work. However, the Court decided that the images ‘Nijntje staat strak’ [Miffy under influence] and ‘nijn-eleven’ (see **Figure 4**), did not need to be considered in relation to the Dutch parody-exception in copyright law, and only considered these images in relation to trademark law.<sup>10</sup> In the context of trademark law, the Court considered if the parody circulated in goods and services— i.e., commercial purpose—, if the parody, without due course, took unfair advantage of the trademark, or if it was detrimental to the distinctiveness or reputation of the trademark. In relation to the images ‘Nijntje staat strak’ and ‘nijn-eleven’, the Court determined that there was no commercial purpose and that the images did not take unfair advantage of the trademark. However, the Court stated that the images were almost identical reproductions of the original work and thus did not keep sufficient distance from the trademark and were ‘detrimental to the reputation of the trademarks because Miffy is associated with drug use and terrorism’ (para. 4.9).<sup>11</sup>



**Figure 4:** The contested images ‘Nijntje staat strak’ and ‘nijn-eleven’. Images: unknown author, published in the case of *Mercis c.s. v. Punt.nl*, 2009: para. 2.3.

In 2011, however, the Amsterdam Court of Appeal overturned this decision and stated that both ‘Nijntje staat strak’ and ‘nijn-eleven’ can evidently be identified as a parody via

<sup>9</sup> ‘de humoristische bedoeling, het ontbreken van concurrentiebedoelingen en het ontbreken van verwarringsgevaar’ (2009, para. 4.3).

<sup>10</sup> ‘staat strak’ is a Dutch expression that means being under the influence of stimulants.

<sup>11</sup> ‘afbreuk aan de reputatie van de merken omdat Nijntje in verband wordt gebracht met drugsgebruik en terrorisme’ (2009, para. 4.9).

the greatly enlarged eyes and the added image on the shirt in [Nijntje staat strak] and the added apartment building in [nijn-eleven], ... combined with the accompanying texts ... while maintaining the recognizability of the original necessary for a parody, sufficient distance from the original has been taken so that the parody cannot be considered a blind copy (2011, para. 4.13).<sup>12</sup>

In their approach to the interpretive challenges of the dark parodies ‘Nijntje staat strak’ and ‘nijn-eleven’, the Amsterdam District Court and the Amsterdam Court of Appeals focused mainly on the similarities and differences in content and style between the parodies and the original work in relation to the parody-exception in Dutch copyright law. In the context of trademark law, however, the Amsterdam District Court also considered the function of the parodies—i.e., do they have a commercial purpose, or does it take unfair advantage of the trademark—and the affect presented by the parody—i.e., are the parodies detrimental to the trademark’s reputation without due cause. The Amsterdam District Court even decided that freedom of expression did not constitute due cause to allow the images, as they did not express an opinion or contribute to the public debate. The difference in judgement by both courts on the admissibility of ‘Nijntje staat strak’ and ‘nijn-eleven’, illustrates how the absence of a framework that supports a systematic interpretation of dark parody has significant consequences for the legal protection of taboo-breaking dark humour.

#### ***The ‘Black Labour, White Guilt’ parody: Reimagining beer with sarcastic dark humour***

The *Laugh It Off Promotions v. South African Breweries* case (Constitutional Court of South Africa, CCT42/04, 27 May 2005) centres on dark parody and trademark law. This trademark infringement case revolves around a dark parody of the well-known trademark Carling Black Label (‘America’s lusty lively beer; Black Label; Carling Beer; enjoyed by men around the world’) by the clothing company Laugh It Off Promotions CC, who printed their parody on T-shirts with the intent of social commentary and profit (Godioli and Young, 2023: 29). The T-shirt presented a print with a strong likeness to the Black Label trademark with the text ‘Africa’s lusty lively exploitation since 1652; black labour; white guilt; no regard given worldwide’. The owner of the trademark, South African Breweries (SAB) brought legal action to prohibit the use of its trademark by Laugh It Off Promotions, arguing that the parody caused economic harm and damage

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<sup>12</sup> ‘Door de sterk vergrote ogen en het toegevoegde plaatje op het shirtje in [Nijntje staat strak] en het toegevoegde flatgebouw in [nijn-eleven], in combinatie met de begeleidende teksten ... is, met behoud van de voor een parodie noodzakelijke herkenbaarheid van het origineel, voldoende afstand tot het origineel genomen om de parodie niet als een klakkeloze kopie aan te merken’ (2011, para. 4.13).

to the reputation of its trademark via the offensive and ridiculing parodic message it expressed. In its defence, Laugh It Off Promotions argued that the social criticism the parody expressed is protected by the constitutional right to freedom of expression.

After going through the High Court and the Supreme Court of Appeals, the parody dispute eventually ended up in the South African Constitutional Court. Both the High Court and the Supreme Court of Appeals adopted the interpretation of the parody presented by the plaintiff (SAB), who argued that the meaning of the parodic message is that ‘since time immemorial SAB had exploited and still is exploiting black labour, that it has and should have a feeling of guilt, and that SAB worldwide could not care less’ (para. 20). According to the High Court, this interpretation was ‘evidently correct’ and they did not consider any other alternative interpretations of the trademark parody. Based on this interpretation, the High Court considered the parody to border on hate speech due to its connection to race and found that

the expression on the T-shirt is substantially detrimental to the repute of the marks; that it is likely to create in the minds of consumers a ‘particularly unwholesome, unsavoury, or degrading association’ with the marks because it is an ‘unfair’ and ‘unjustified racial slur’ on the trademark owner ... the message questions the reputation of the marks and by that very act has unfairly and materially tarnished the marks (para. 21).

In addition, both courts determined the right to freedom of expression irrelevant to the defence, as Laugh It Off Promotions used the brand on T-shirts to generate profit and the courts considered the medium (the T-shirt) unnecessary to convey the message, i.e., the criticism could be expressed in other ways than the T-shirt with the strong likeness of SAB beers. The South African Constitutional Court disagreed and overturned the decision of the Supreme Court of Appeals. While Judge Moseneke, who delivered the judgment of the Constitutional Court, agreed that the trademark enjoys protection against usage that causes material damage to its reputation, he argued that SAB failed to establish the likelihood of economic harm. However, he explicitly refused to consider if the dark parody would be protected by the constitutional right to freedom of expression, deeming the trademark parody admissible ‘based on technical grounds in light of the Trademarks Act’ (Godioli and Young, 2023: 29). In this case, then, the courts considered only the categories of function and affect in their interpretive process—they only looked at the potential economic harm to the trademark holder due to the parody causing detriment to the trademark’s reputation, and only allowed the parody based on the lack of evidence that supported the claim of economic damages by the plaintiff.

### ***A comparative analysis: The framework of parodic distance***

As the analysis of the case studies showed, a systematic approach to the interpretive challenges of dark parodies is lacking in current judicial interpretive practices and leads to inconsistent outcomes. In both case studies, the courts' initial interpretation of both the distance between the dark parody and the original, and the use of dark humour, led to a decision to prohibit the dark parody and thus contract freedom of expression, which was then overturned in subsequent appeal cases. In addition, it is worth noting that the court claimed (part of) their interpretation to be 'evident' without offering detailed arguments for this claim in both cases. In the Miffy case, the Amsterdam Court of Appeals stated that the likeness of Miffy was 'evidently' parodic use (para. 4.13), and in the Laugh it Off case the Supreme Court of Appeals claims the interpretation of the trademark parody as bordering on hate speech as 'evidently correct' (para. 20; 60).

I argue that the claim of a particular interpretation of an expression being evident is a superficial argument at best, and a problematic one at worst, as it ignores the complexity of the meaning expressed by a dark parody, and it conveys a lack of transparency regarding the assumptions and values underlying a particular interpretation. As both case studies show, it is clearly not evident when a parody holds enough distance from an original work or when the dark humour used can be considered hate speech (disparaging dark humour), a challenge to metapragmatic stereotypes about humour (taboo-breaking dark humour), or exposing inhuman attitudes (sarcastic dark humour). The parodic distance framework offers courts a conceptual tool to deal with the interpretive challenges of dark parody in a systematic way, and creates a shared vocabulary to both address the complexity of dark parodies and make the underlying assumptions and values in the judicial interpretation process visible. To illustrate this, the next section analyses the 'nijn-eleven' and the 'Black Labour, White Guilt' parodies from all six interpretive categories, and provides a comparative overview at the end.<sup>13</sup>

From the content category, the 'nijn-eleven' parody reproduced the airplane with Miffy identically from the original book cover, added an apartment building on the right side of the airplane, and changed the text from the original 'Nijntje vliegt' [Miffy flies] into 'nijn-eleven'. Looking at the style, the 'nijn-elven' parody is an exact imitation of the original work, the building is drawn in the exact same style of the original and the lettering used is also similar to the original. From the context category the

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<sup>13</sup> For the sake of clarity of the analysis as well as the comparison later with the African Breweries case, I have chosen to focus only on the 'nijn-eleven' parody. My choice to focus on the 'nijn-eleven' parody instead of the 'nijntje staat strak' parody is based on the argument that the linking of innocent children's figure to Islamic terrorism creates a more extreme opposition of scripts to analyse with this framework.

‘nijn-eleven’ parody relocates the well-loved children’s character to the context of the 9/11 terrorist attacks on the Twin Towers in 2001 by portraying Miffy in an airplane flying towards the building and using the text ‘nijn-eleven’, a humorous wordplay on the Dutch word ‘Nijntje’ [Miffy] and English word ‘nine’, which sound similar. The message, since the parody portrays a sinister event and not the victims or perpetrators of the event, could be interpreted as questioning terrorism as a subject with taboo status in humorous expression or questioning the ‘innocent’ character of Miffy. Regarding the interpretive category of function, the ‘nijn-eleven’ parody could be considered a simple entertainment because of the pun, which is only directly understandable for Dutch speakers, and the taboo-breaking effect of the dark humour. From the affect category, the parody can be interpreted as generating a feeling of pleasure from the cognitive reward of dealing with opposite emotions, for example mirth from the humorous pun and feeling horrified to be laughing at a parody that makes the 9/11 terrorist attacks the subject of humorous expression. Considering the interpretive challenge of dark humour presented by the dark parody, the ‘nijn-eleven’ parody could be interpreted as taboo-breaking dark humour, which engages in the questioning of a subject’s cultural and social taboo status—an important role of humorous expression protected by the right to freedom of (artistic) expression.

Based on this systematic analysis, it becomes clear that even though ‘nijn-eleven’ is identical in style, in terms of content, context, message, function, and affect, the parody is quite different from the original work by Dick Bruna. Applying the parodic distance framework offers a fundamentally different interpretation compared to the interpretation of the Amsterdam District Court and challenges the Court’s argument that the ‘nijn-eleven’ parody causes detriment to the trademark’s reputation without due cause. By showing how the use of dark humour in the ‘nijn-eleven’ parody can be interpreted as taboo-breaking dark humour, the analysis argues that the parody challenges the metapragmatic stereotypes about humour in Dutch society, which, arguably, can be considered an important contribution to the public debate. In addition, the interpretation resulting from the application of the parodic distance framework questions the claim of the Amsterdam Court of Appeals that the distance between the parody and original work is ‘evident’, as the interpretation and decision of the Amsterdam District Court was significantly different.

When applying the interpretive framework of parodic distance to the parody of ‘Black Labour, White Guilt’, the categories of content and style illustrate how the parody imitates the Black Label trademark style while simultaneously changing most of the textual elements by replacing ‘Black Label’ with ‘Black Labour’, ‘Carling Beer’ with ‘White Guilt’ and ‘America’s lusty lively beer [...] Enjoyed by men

around the world' with 'Africa's lusty lively exploitation since 1652 [...] No regard given worldwide'. The dark parody thus alters the wording of the trademark while copying its style. On a context level, the parody can be interpreted as relocating the trademark into the social, political and cultural context of black labour exploitation as well as a physical relocation of the trademark from beer bottles to T-shirts. The exploitation of black labour generally tends to be considered a taboo subject for the usage of humorous expression and, as seen in the judgement of the High Court (who interpreted it as bordering on hate speech) can easily be interpreted differently than intended by the parodist. While the High Court and the Supreme Court of Appeals interpreted the parodic message as a racial slur on the trademark owners, Judge Sachs, in his concurring vote on the judgement from the Constitutional Court, interpreted the message as intended by Laugh It Off Promotions: namely, to expose how much power brands hold in society. The function, then, could be interpreted as a social criticism targeting the position of power brands hold in cultural and social life, instead of causing harm to the brand's trademark. Lastly, from the perspective of affect the High Court and Supreme Court of Appeals considered the parody to create a degrading association between the trademark and the exploitation of black labour, likely interpreting the use of humour in the parody as disparaging dark humour. Judge Sachs' interpretation, however, shifts the interpretation from disparaging to sarcastic dark humour, as he recognises the use of humour as the intent to make people laugh by ridiculing the dominant position of power well-known brands enjoy in society. This illustrates the blurred lines between disparaging and sarcastic dark humour, and only through a systematic analysis, it becomes clearer why interpreting the dark humour used by the 'Black Labour, White Guilt' parody as sarcastic dark humour seems more plausible.

Similar to the case of the 'nijn-eleven' parody, the application of the parodic distance framework results in a significantly different interpretation of both the distance between the parody and the trademark, and the type of dark humour used by the parody. While the Constitutional Court's decision to overturn the judgement from previous courts is in line with the interpretation suggested by the parodic distance framework, it is worth underlining that this decision was only based on the lack of evidence supporting the claim of economic damages presented by the plaintiff. It is worth asking, then, how the Court would have navigated the legal protection of the dark parody, which conveyed valuable social criticism via its use of sarcastic dark humour, had this lack of evidence not been the case. **Table 2** below offers a comparative overview of the systematic analysis of both dark parodies with the parodic distance framework.

	<i>Mercis c.s. v. Punt.nl</i>	<i>Laugh It Off Promotions v. South African Breweries</i>
<b>Content</b>	Reproduction and addition of textual and visual elements	Reproduction of elements but mainly change in wording
<b>Style</b>	Reproduction	Reproduction
<b>Context</b>	Relocation to 9/11 terrorist attacks (sinister event)	Relocation to exploitation of black labour by companies (perpetrators sinister scenario)
<b>Message</b>	Questioning taboo status 9/11 or the innocent character Miffy	Exposing the power of brands in society
<b>Function</b>	Entertainment and reflection	Social criticism (communication) v. advertisement (commercial)
<b>Affect</b>	Cognitive reward opposite emotions	Moral emotions

**Table 2:** Comparative overview interpretation dark parodies ‘nijn-eleven’ and ‘Black Labour, White Guilt’.

## Conclusion

This article has shown that dark parody is regularly found at the heart of copyright and trademark infringement cases and is thus closely related to the question of the legal protection of humorous expression under the right to free speech. The use of dark humour in parodies makes the invisible metapragmatic stereotypes about humour—i.e., the cultural beliefs and taboos regarding what can be the subject of humorous expression and what cannot—visible. This complicates the already complex interpretation of humorous uses of IP-protected material, such as dark parodies, even more. Interpretation, as the metahermeneutic approach in this article has demonstrated, plays a fundamental role in legal decision-making surrounding dark parody, which impacts the right to freedom of expression. Weaving together insights from humour theory, literary studies and legal scholarship on intellectual property law, this article proposed a new way of thinking about how to navigate the interpretation of a complex form of humorous expression—i.e., dark parody—in the context of humour and the law. Reflecting on the interpretive challenges courts face when dealing with dark parody provided the opportunity to create what I have called the ‘parodic distance’ framework: a conceptual tool that offers both a systematic approach to deal with these interpretive challenges and a shared vocabulary to support courts in navigating the complex process of interpreting both the distance between parody and original, and their use of dark humour.

Applying the framework of parodic distance to the judicial interpretation process of both case studies showed how this interpretive framework can be used to systematically address the interpretive challenges posed by distance and dark humour. While the analyses resulting from the systematic application of the parodic distance framework

supported the Amsterdam Court of Appeal's and the Constitutional Court of South Africa's decisions, they also presented a sharp contrast to the interpretation of parodic distance and dark humour by previous courts, and questioned the courts' reliance on the claim that (a part of) their interpretation was evident. In addition, the application of the parodic distance framework provided a more elaborate explanation of how and why the parody held sufficient distant from the original work, and illustrated the role taboo breaking humour and sarcastic dark humour played in the 'nijn-eleven' and 'Black Labour, White Guilt' parodies. The cases discussed in this article centred on the use of taboo-breaking and sarcastic dark humour in dark parodies at the heart of two legal cases, but did not yet consider dark parodies using disparaging dark humour in relation to the copyright and trademark law. Two relevant cases can be mentioned here, namely the case of *Deckmyn v. Vandersteen* (Court of Justice of the European Union, C-201/13, 3 September 2014) and the case of *Furie v. Infowars* (United States District Court for the Central District of California, CV 18-1830-MWF, 16 May 2019). Both legal cases deal with dark parodies that use IP-protected material—Spike and Suzy (Suske en Wiske in Dutch) and Pepe the Frog respectively—and co-opted by the alt-right to disseminate discriminatory messages under the guise of 'humour' and parody. These cases could offer a possible avenue for further research into the judicial interpretation process and the legal protection (and limits) of dark parody, and dark humour in general, in the context of intellectual property law. As the analysis of the judicial interpretation in the case studies considered in this article demonstrated; how courts deal with the interpretive challenges posed by dark parody strongly influences their decision to either allow or prohibit the dark parody, and thus either expand or contract freedom of (humorous) expression.

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