Where the bloody hell does parody fit in Australian copyright law?

*Nicolas Suzor**

This article examines the role of the recently introduced fair dealing exception for the purposes of parody and satire in Australian copyright law. Parody and satire, while central to Australian expression, pose a substantial challenge for copyright policy. The law is asked to strike a delicate balance between an author's right to exploit their work, the interests of the public in stimulating free speech and critical discussion, the rights of artists who rely on existing material in creating their own expression, and the rights of all artists in their reputation and the integrity of their works. This article highlights the difficulty parodists and satirists have historically faced in Australia and examines the potential of the new fair dealing exceptions to relieve this difficulty. This article concludes that the new exceptions have the potential, if read broadly, not only to bridge the gap between humorous and non-humorous criticism, but also to allow for the use of copyright material to critique figures other than the copyright owner or author, extending to society generally. This article will argue that the new exceptions should be read broadly to further this important policy goal while also being limited in their application so as to prevent mere substitutable uses of copyright material. To achieve these twin goals, I suggest that the primary indication of fairness of an unlicensed parody should be whether or not it adds significant new expression so as not to be substitutable for the original work.

Introduction

In March 2006, Dan Ilic from Downwind Media created a spoof of Tourism Australia's controversial 'Where the bloody hell are you?' television advertisement.[1] Ilic's production used the same style and structure as the original, but replaced the positive images with biting commentary on topical issues, including Australia's mandatory detention migration policy, racial intolerance and the Cronulla riots, and brutal treatment of indigenous Australians by Australian police. Tourism Australia forced Downwind Media to remove the spoof from its website, claiming that it infringed copyright in the music backing the video.[2] The soundtrack was eventually reworked with different music and four new versions were posted on Downwind Media's website, where they are still available today.

This story could have had an entirely different outcome. Had Tourism Australia proceeded to court, Ilic's production may have been held to infringe

* BInfTech/LLB, LLM (QUT); PhD Candidate (iCi). This article was only possible through the support of the ARC Centre of Excellence for Creative Industries and Innovation and Professor Brian Fitzgerald. I am also deeply indebted to Kylie Pappalardo, Dale Clapperton, Catherine Bond and Jessica Coates for their helpful comments on earlier drafts.

1 Downwind Media, 'Where The Bloody Hell Are You? Spoof', at <http://www.downwindmedia.com/wtfru.html>.

2 D Braithwaite, 'Tourism spoof not bloody funny', *Sydney Morning Herald*, 27 March 2006, at <http://www.smh.com.au/articles/2006/03/27/1143330976912.html>.

the copyright material underlying Tourism Australia's advertisement.[3] The primary test used for determining infringement is whether there is an objective similarity to the original;[4] this will often be satisfied by a parody, as the parody must bring to mind the original in order to be effective.[5] Copyright law in this instance could easily have been misused — employed not to protect the value of a copyright work, but in order to silence a humorous and highly critical look at Australia's public image.

The same analysis holds true for that favourite painting of copyright scholars, Duchamp's 'L.H.O.O.Q.'. At first glance, it is but a mere copy of Da Vinci's 'Mona Lisa' (not protected by copyright), with only a childish addition of a moustache, a goatee and the letters 'L.H.O.O.Q.'[6] underneath. These additions, however, completely change the nature of the work, and provide a biting critique on society's conception of beauty and treatment of women. The painting has challenged copyright scholars to define when representations of existing works infringe copyright, just as Duchamp's work challenged critics to define when existing objects, presented in a new light, could be new art.[7] Until recently, the copyright hypothetical at least could be easily answered in Australia. Duchamp's work clearly reproduces a substantial part of Da Vinci's work, and if the 'Mona Lisa' were still protected by copyright, Duchamp would be liable. Duchamp would have had no defence under Australian law, as 'L.H.O.O.Q.' is neither criticism or review, nor is it news reporting, research, study or professional advice.

Recently, the Australian government introduced a new exception to copyright infringement for the purposes of parody *and* satire.[8] This duality is important because it provides a larger scope than the equivalent exception under US law. Parody is generally taken to mean humorous imitation of a particular work; while satire, in the copyright law construction, extends to using a work to critique or ridicule other facets or members of society.[9]

Historically, it has been very difficult for Australians to legally use copyright material to mock or humorously critique public figures or policies. As both parody and satire are art forms which require some degree of copying of the original material, Australia's copyright law imposed a significant barrier to this form of legitimate expression. The new exception will hopefully support Australia's rich tradition of criticising or exposing folly through the

3 Courts have previously held that a visual comparison between two different films can show substantial reproduction of the underlying screenplay, even where there were significant differences in characters and setting: see *Zeccola v Universal City Studios Inc* (1982) 46 ALR 189.

4 *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465.

5 See *Campbell v Acuff-Rose Music* 510 US 569 at 580–1 (1994). See also K Garnett et al, *Copinger and Skone James On Copyright*, 14th ed, Sweet & Maxwell, London, 1999, pp 9–18: 'In general, a substantial part of the work is much more likely to be taken when parodying an artistic work or a musical work than when parodying a literary work.'

6 When pronounced, the letters L.H.O.O.Q. sound like the sentence 'she has a hot arse' in French.

7 See K Pettigrew, 'Portrait of a Commodities Broker as Thieving Artist: Parody, Fair Use and Contemporary Art' (1993) 2 *Arts & Ent L Rev* 1 at 2, distinguishing appropriation art from plagiarism.

8 Copyright Act 1968 (Cth) ss 41A, 103AA.

9 See *Campbell v Acuff-Rose Music* 510 US 569 at 580–1 (1994).

use of humour,[10] and provide the certainty that artists, from Marcel Duchamp to Downwind Media to the amateur online remixer, need before they can invest in the production and dissemination of legitimate parody and satire.

This article will sketch the position under the previous law, highlighting the difficulty parodists and satirists faced in Australia, in order to situate the new fair dealing defences introduced in 2007 in a solid historical context. The new fair dealing defences provide a broad exception to copyright infringement for the purposes of parody and satire that has the potential not only to bridge the gap between humorous and non-humorous criticism, but also to allow for the use of copyright material to critique figures other than the copyright owner or author, extending to society generally. This article will argue that the new exceptions should be read broadly to further this important policy goal while also being limited in their application so as to prevent mere substitutable uses of copyright material. To achieve these twin goals, I suggest that the primary indication of fairness of an unlicensed parody should be whether or not it adds significant new expression so as not to be substitutable for the original work.

Parody and satire pose a substantial challenge for copyright law. The law is asked to strike a delicate balance between an author's right to exploit their work, the interests of the public in stimulating free speech and critical discussion, the rights of artists who rely on existing material in creating their own expression, and the rights of all artists in their reputation and the integrity of their works. This article asks whether this balance has been struck by the new exception, and concludes that it will be if courts in the near future are able to take a broad approach to interpreting 'parody', 'satire' and 'fair dealing'.

The importance of exempting parody from copyright infringement

Parody is often given greater leeway in copyright law than other forms of copying. The reasoning for this privileged position rests upon the acknowledgement that critical and expressive speech is necessary and desirable in a healthy society.[11] Because parody relies upon copying or imitation, it would typically infringe copyright in the source material if made without permission of the copyright owner. In most cases, however, the copyright owner is likely to value the ability to insulate themselves from criticism much more than the potential parodist can afford to pay in licence fees.[12]

Because parody is an expressive art form, and is not likely to interfere with the legitimate market of the source material (except to the extent that any

10 See S McCausland, 'Protecting "A fine Tradition of Satire"' (2007) *European Intellectual Property Review* 287.

11 See M Sainsbury, 'Parody, satire and copyright infringement: The latest addition to Australian fair dealing law' (2007) 12 *MALR* 292 at 302:

> parody and satire is not just mere reproduction — it is a transformative use which creates something new for society. Parody and satire can provide important social commentary and channel negative opinion in a non destructive way. To limit this opportunity would impinge on freedom of speech and deprive society of a form of entertainment and amusement.

12 M Weir, 'The Parodist's Nirvana: Droit Moral and Comparative Copyright Law: Part One' (1994) *Arts & Ent L Rev* 49 at 50.

criticism of the source material would impair its potential market), achieving the balance in copyright law favours allowing unlicensed parodies. Providing copyright owners with the ability to veto parody provides no further incentives to create expressive works.[13] Australia's recent introduction of a new fair dealing exception finally provides some leeway and certainty for Australian creators.

There are three main arguments usually raised against allowing parody as an exception or a defence to copyright infringement. The first is that parodies can be substitutable for the original, and thereby reduce the ability of the copyright owner to license their material. The second is that the parody may expose the original to ridicule or criticism, and thereby reduce its sales. The third is that the copyright owner is losing out on the rights to license the parody work.

The first point crucially delineates true parodies from mere imitations and should be the most important factor in any fair dealing analysis. True parodies of a copyright work are very rarely substitutable for the original work and accordingly will not impair the market for the original work.[14] A prominent example is the novel 'Gone With the Wind' — a classic romance set in the US Civil War. The author Alice Randall created a parody novel, 'The Wind Done Gone', which highlighted the plight of black slaves in the same setting as the original. It is difficult to suggest that people looking for the romance story would be satisfied with the political commentary (and vice versa).[15] In this case, the use of copyright material did not interfere with the market for the original, and was permissible. Similarly, it is difficult to imagine Duchamp's mustachioed Mona Lisa seriously limiting the market for Leonardo Da Vinci's masterpiece (were it covered by copyright). On the other hand, where a given unlicensed use of copyright material is in fact substitutable for the original, it is unlikely to be a true parody.[16]

The second objection does not stand on its own. There is no basis (notwithstanding moral rights) for the proposition that a copyright owner should have the ability to veto criticism or even ridicule of his or her work. In determining whether a parody impaired the market for an original song in *Campbell v Acuff-Rose*, the US Supreme Court recognised that:

> The only harm to derivatives that need concern us . . . is the harm of market substitution. The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright than the like threat to the original market.[17]

This case demonstrates that it is not properly the domain of the economic aspect of copyright law to isolate a work from criticism or ridicule. Authors

13 See M Lemley, 'Property, Intellectual Property, and Free Riding' (2005) 83 *Texas L Rev* 1031.

14 See W Patry and S Perlmutter, 'Fair use misconstrued: profit, presumptions, and parody' (1993) 11(3) *Cardozo Arts & Ent LJ* 667 at 693.

15 *SunTrust Bank v Houghton Mifflin Co* 268 F 3d 1257 at 1275–6 (2001).

16 See Weir, above n 12, at 54.

17 *Campbell v Acuff-Rose Music Inc* 510 US 569 at 593 (1994).

of copyright material are already shielded in this manner by moral rights and defamation law, and it would be unnecessary to protect these interests by extending the economic rights.

The third objection, that allowing unlicensed parodies removes the ability of a copyright owner to benefit from licensed parodies, is a circular example of property fetishism. The ability to license parodies can only exist through the operation of copyright law. When determining the level of the monopoly that copyright law should grant, it is facile to rely on the argument that any level of protection less than absolute protection is an economic loss compared to the returns that would otherwise be granted if the level of protection were higher.

This principle is reinforced by the recognition that copyright owners cannot claim lost revenue on licences that they would not issue.[18] In the United States, copyright law typically excuses unlicensed parody on the basis that a copyright owner is highly unlikely to license uses of their material which reflect critically on themselves or their works. This point was recognised by the US Supreme Court in *Acuff-Rose*, where the court said that:

> there is no protectible derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.[19]

Without the benefit of a fair use defence, Australian courts have historically had some difficulty linking a copyright owner's refusal to license transformative uses to a finding of non-infringement. For example, in *Universal v Miyamoto*, Wilcox J recognised a reluctance to license remixes of sound recordings, but did not accept that it had any bearing on infringement or damages when a DJ proceeded to remix those recordings in the only way he could — illicitly.[20]

This case provides an excellent example of the power of copyright owners to stifle creativity by refusing to license their exclusive rights under copyright law. United States' courts, in contrast, have been able to use the fair use defence to consider the low potential for real economic harm where a copyright owner was unlikely to enter a particular market.[21]

The fact that copyright owners refuse to license their works indicates a potential market failure. Restricting the ability of creators to make unlicensed transformative uses of copyright material where there is little to no possibility that they *could* acquire a licence means simply that copyright law is helping the market to stifle creativity in particular areas. If neither the copyright owner nor any licensed users are likely to engage with a subject in a particular way that is not substitutable for the original work, then allowing unlicensed users to do so does not diminish the copyright owner's revenue or the value of the work in any way except insofar as the copyright owner derives benefit from being isolated from criticism or other negative inferences.

---

18 Weir, above n 12, at 50.

19 *Campbell v Acuff-Rose Music Inc* 510 US 569 at 592 (1994).

20 *Universal Music Australia Pty Ltd v Miyamoto* (2005) 62 IPR 605 at [14].

21 See, eg, *Mattel, Inc v Pitt* 229 F Supp 2d 315 (2002). See further M Rimmer, 'Valley of the dolls — brand protection and artistic parody' (2004) 16(10) *AIPB* 8.

While this article is concerned primarily with parodies and satires, it is important to note that Australian copyright law still needs to evolve to resolve these broader allocative inefficiencies with regards to transformative works generally. The introduction of a broad fair-use defence was rejected in Australia,[22] and this leaves Australian creators at a great disadvantage to their counterparts in the United States. In order to remedy this imbalance, it is likely that further legislative reform will be required.

This article begins with the proposition that the balance inherent in copyright law requires that parodies and satires can be produced and disseminated without permission from the owner of copyright in the source material. The only remaining question is one of the applicable limits of parody and satire. One of these limits at which such use should not be allowed is the point at which the parody or satire becomes substitutable for the original work — the point at which the benefit of the critical use is outweighed by the actual loss to the original author. The examples cited at the beginning of this article, of Downwind Media's spoof advertisement and Marcel Duchamp's 'L.H.O.O.Q.' are presumed to be paradigmatic scenarios which should be permissible under a balanced copyright regime, and are accordingly used throughout this article as an approximate measure of whether the balance has been struck.

The historical position in Australia

It became abundantly clear after *TCN Channel Nine v Network Ten*,[23] that Australian copyright law was inappropriately equipped to give certainty to parodists. Channel Nine brought suit against Network Ten for copyright infringement of Channel Nine's television broadcasts. Network Ten's show 'The Panel' recorded broadcasts made by Channel Nine (and other networks), and played short clips from those broadcasts, which were discussed by the guests and hosts of the program. The litigation was complicated and drawn out, and the result was less than satisfactory in that no clear principles were expressed. Would-be parodists and their legal advisers were left in a difficult position — they had no way of knowing whether any given use of copyright material would be substantial or, if so, whether it would be excusable under one of the fair dealing defences.[24]

---

22 Hon Philip Ruddock, 'Major copyright reforms strike balance', Press Release, 14 May 2006, at <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balace_-_0882006>.

23 *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273; 205 ALR 1 (*The Panel*).

24 It is important to note that this did not mean that Australia's fine tradition of poking fun at the follies of others was completely halted. Rather, popular figures (like ABC's 'The Chaser') who were prepared to risk potential lawsuits were able to continue, and underground or small-scale producers could weigh the lack of certainty against the low risk of being caught and sued. Acknowledging this, this article focuses on the need to provide certainty to enlarge the pool of parodists, and the desire, moreover, that copyright law reflect both the ideals and the realities of the production of parody and satire. The real risk of an inefficient and poorly balanced law is not to those who can afford to evaluate and manage the risk, but to those few who may find themselves, by chance or by virtue of the nature of their commentary, the target of concerted efforts to silence them.

With regard to the fair dealing defences, the decisions in the Federal Court reflect a largely unstructured approach to fair dealing.[25] The definitions of 'criticism', 'review' and 'news' are drawn quite restrictively,[26] meaning that there is little room for unlicensed users to use copyright material to make a general comment on society or unrelated works, and little certainty where copyright material is being discussed but no solid judgment is passed.[27] Further, the question of 'fairness' was to a large extent overlooked at both first instance and on appeal to the Full Federal Court.[28] The highly subjective approach to the questions raised by each taking of copyright material means that there is great uncertainty now as to how parodists can use copyright material.

Very few of the uses in question in that case could be seen to be substitutes for the original broadcasts. The average viewer is not likely to stop watching Channel Nine's current affairs or news programs in the expectation that they can receive the same information and entertainment from Network Ten's weekly comedy show. Channel Nine's programs have an advantage in being put out to air up to a week earlier than 'The Panel', and the comedic treatment on 'The Panel' is of a much different nature than the often serious broadcasts depicted. The fact that some of the clips were 'highlights' of a particular program does not mean that an average viewer of the original program would choose not to watch it in favour of 'The Panel'. It follows that there could be no substantial economic loss to Channel Nine.

Network Ten clearly benefits by being able to reproduce Nine's broadcasts, but this benefit is not at the expense of Channel Nine. The claim that Network Ten is 'free-riding' on Nine's productions does not give Nine a valid claim that it should be entitled to the full value of its broadcasts under copyright law.[29] Nine is entitled to protect the *value* of its broadcasts, but should not be entitled to exercise control over uses of those broadcast which are socially beneficial and do not interfere with that value.[30]

Channel Ten may have been able to produce 'The Panel' without relying on broadcasts from other networks. However, not only would this have been less

25 See M Handler and D Rolph, '"A real pea souper": The Panel Case and the development of the fair dealing defences to copyright infringement in Australia' (2003) 27(2) *MULR* 381 at 390.

26 See, eg, *De Garis v Neville Jefress Pidler* (1990) 37 FCR 99 at 107; 95 ALR 625, where Beaumont J narrowly constrained the definition of 'criticism' to requiring 'judgment', and 'review' as the end result of that criticism.

27 *TCN Channel Nine Pty Ltd v Network Ten* (2001) 108 FCR 235; 184 ALR 1; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417; 190 ALR 468.

28 Handler and Rolph, above n 25, at 402, citing as an example Finkelstein J's statement after examining the purpose of news reporting with regards to the clip showing Boris Yeltsin that '[t]hat is all that is required for fair dealing under s 103B(1)(b)'. *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417; 190 ALR 468 at [20].

29 See Lemley, above n 13.

30 See M de Zwart, 'Seriously entertaining: *The Panel* and the future of fair dealing' (2003) 8(1) *MALR* 1 at 16–17, noting that:

> '*The Panel* . . . provides a good example of circumstances in which a licence would not be granted', and that '[i]t is essential to avoid accepting the conclusion that copyright owners have a right to charge for all uses of a work . . . Parody and criticism provide some insights into the broader social function of copyright, highlighting the need for public interests to be recognised alongside those of the copyright owner'.

efficient, but a significant portion of the value of the show would be lost because the panellists would not be able to comment on the broadcasts in a way that the viewers could understand if they had not seen the original broadcasts. Essentially, the humorous commentary engaged in by the panellists would be practically impossible, and a significant opportunity for public criticism of the media would be lost.[31] If the uses of copyright material in *The Panel* were damaging to Channel Nine's use of the same material, then Channel Nine may have a valid argument that their work has unfairly been reproduced to their detriment. The only loss that Nine suffers, however, is a potential loss of popularity to its competitor — a loss which should not be protected by copyright. Conversely, if required to do so, Network Ten would be unlikely to be able to obtain copyright licences to satirise television broadcasts. The finding that some of Network Ten's uses infringed copyright is unsatisfactory because it provides little certainty for potential users and effectively means that satirical commentary using copyright material is not practical in Australia.

It is difficult to reconcile the different judgments in *The Panel*. The uncertain and restrictive approach to criticism and review in Australia has placed a great limit on the ability of Australians to engage in parody of copyright material.[32] It is difficult, for example, to be sure whether Downwind Media's spoof of 'Where the bloody hell are you?' would qualify as a critique of Tourism Australia's production, or whether Duchamp's 'L.H.O.O.Q.' is a criticism of Da Vinci's 'Mona Lisa'. Both of these works are highly critical of society, but pass little obvious judgment on the source material itself. Following the analysis of *The Panel*, it is unlikely that either of these uses would be excused by the fair dealing defence of criticism and review. The balance that copyright law is meant to uphold is accordingly not met in these situations.

The state of Australian copyright law after *The Panel* was so uncertain that it was impossible to determine whether a parody would constitute an infringement, except in cases where only the most trivial or de minimis portions of copyright material was used. Even where uses may not in fact turn out to be infringing, the risk involved in evaluating any given use created a situation where there could be no certainty for would-be users of copyright material. Despite a majority of the High Court dismissing the statement, there certainly appeared to be some truth in the maxim that 'what is worth copying is prima facie worth protecting'.[33]

David Brennan suggests that such unlicensed parodies may be excusable

---

31 See M de Zwart, 'Copyright in television broadcasts: *Network Ten v TCN Channel Nine*: "A case which can excite emotions"' (2004) 9(4) *MALR* 277 at 289, noting that:

> *The Panel*, though humorous, makes an important contribution to media debate — perhaps not with the same level of insight and seriousness as ABC's Media Watch, but it reaches a large audience and hopefully prompts them to think a little deeper about some of the programmes they are watching, their quality, their message and production values.

32 Handler and Rolph, above n 25, at 400.

33 *University of London Press v University Tutorial Press* [1916] 2 Ch 601 at 610 per Peterson J, cited with approval by Callinan J in dissent in *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273; 205 ALR 1 at [143], rejected by the majority in the same case at [14]. See further Sackville J's objection to the test's 'bootstraps' quality: *Nationwide News v Copyright Agency Ltd* (1996) 65 FCR 399 at 417–18; 136 ALR 273; and

under Australian law without recourse to arguments under fair dealing. Brennan notes that 'there appears in Anglo-Australian law a tendency for courts to treat parody as non-infringing exercises of copyright under some unwritten rule'.[34] Whether such an unwritten rule existed prior to the introduction of the new exception, its application in any particular circumstance was certainly unclear at best. Parodists, particularly amateur creators, have an increasing need for certainty as enforcement mechanisms are simplified[35] and intermediaries are co-opted to enforce copyright restrictions,[36] but the costs of obtaining legal advice or defending an action remain prohibitively high. These costs greatly limit the benefits of cheaper digital editing and dissemination that new technologies have brought parodists and other social commentators.[37] The tension and uncertainty raised by cases like *The Panel* highlight the disparity between Australia's restrictive fair dealing tests and the US fair use defence, which provides greater latitude for parody.[38]

Fair dealing for the purposes of parody and satire

The position under the old law was highly dissatisfying for users of copyright material in Australia. The question of substantiality was constructed quite narrowly, such that the parodic purpose of the use had little predictable bearing on the finding of infringement.[39] The construction of criticism or review was similarly very closely drawn such that a user of the copyright material had to be explicitly passing judgment on the material or the material's author in order to be certain of falling within the defence. These two factors

---

Lindgren J's warning that '[r]esort to maxims or brief or pithy statements of the law may mislead': *Eagle Homes Pty Ltd v Austec Homes Pty Ltd* (1999) 87 FCR 415; 161 ALR 503 at [103].

34 D Brennan, 'Copyright and Parody in Australia: Some Thoughts on *Suntrust Bank v Houghton Mifflin Company*' (2002) 13(3) *AIPJ* 161 at 164.

35 See, eg, the recent introduction of an infringement notice scheme which allows police officers to issue on-the-spot fines for copyright infringement: Copyright Act 1968 (Cth) s 113B; Copyright Regulations 1969 (Cth) Pt 6A.

36 Intermediaries typically have little incentive to investigate whether any particular use is infringing or not, and are likely to adopt a risk-adverse position of removing material that is subject to a copyright complaint without further investigation. See N Suzor, 'Privacy v IP litigation: preliminary third party discovery on the internet' (2004) 25(3) *Aust Bar Rev* 227.

37 It is particularly amateur creators who are at risk here — platforms like YouTube make it easier for amateurs to have their voice heard, but the lack of a traditional publisher also means these amateurs rarely have the institutional support in copyright clearances and risk assessments.

38 At the time that the Copyright Amendment Act 2006 (Cth) was being drafted and debated, there was quite a lot of controversy about the lack of a 'fair use' style exception being introduced. For an excellent overview of the process, see C Bond, A Paramaguru and G Greenleaf, 'Advance Australia Fair? The Copyright Reform Process' (2007) 10 *Jnl of World Intellectual Property* 284.

39 *Schweppes Ltd v Wellingtons Ltd* [1984] FSR 210; *Williamson Music Ltd v Pearson Partnership* [1987] FSR 97. See also the judgments in *The Panel (No 1)* at first instance and at the Full Federal Court, examined below: *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235; 184 ALR 1 at [16] per Conti J; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2005) 145 FCR 35; 216 ALR 631 at [59] per Hely J; but cf *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2005) 145 FCR 35; 216 ALR 631 at [38] per Finkelstein J.

combined meant that almost all parodies and satires would be substantial reproductions of the original copyright material, and that the defence of fair dealing for the purposes of criticism or review was very hard to rely on with any sufficient level of certainty. Australian creators were at a significant disadvantage to their US counterparts, where parody was generally permissible under the fair use defence.

Fair use and the contrasting position in the United States

Fair use, unlike fair dealing, is an open ended exception to copyright infringement. The doctrine allows people to make some socially beneficial (but usually low-value) uses of copyright material without obtaining a licence. Unlike fair dealing, fair use does not necessitate that the use fits into a narrow purposive category. Fair use allows the judiciary to flexibly excuse certain uses of copyright material as the circumstances require. Judge Pierre Leval of the US District Court for the Southern District of New York wrote (extrajudicially) that:

> Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.[40]

Fair use, like fair dealing, exists in part because it is recognised that copyright material forms the inputs for further creation, and to deny use in all cases will unduly burden the creation of new works.[41]

In the United States, fair use as an exception to copyright infringement involves the consideration of four factors:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.[42]

In *Campbell v Acuff-Rose*,[43] the US Supreme Court was asked to determine whether a rap parody of Roy Orbison's song, 'Oh, Pretty Woman', could be a fair use under US law. The court rejected both the argument that parody should presumptively be regarded as fair, and the argument that commercial re-uses should presumptively be regarded as unfair. The central purpose of the first fair-use factor, the purpose and character of the use, 'is to see . . . whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the

40 P Leval, 'Toward a Fair Use Standard' (1990) *103 Harv L Rev* 1105 at 1110.

41 See the famous quote by Story J in *Emerson v Davies* 8 Federal Cases 615 at 619 (1845):

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.

42 17 USC § 107.

43 510 US 569 (1994).

first with new expression, meaning, or message'.[44] The court noted that:

> the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.[45]

The court held that even though the parodists may have taken the 'heart' of the original, they took no more than was necessary to conjure up the song for parody.[46]

The position in the United States is significantly more lenient for would-be parodists than that which previously existed in Australia. This left Australian artists at a significant disadvantage, which was particularly highlighted during the 'harmonisation' process which resulted from the *AUSFTA*.[47] Chapter 17 of the *AUSFTA* was designed to bring Australian intellectual property laws more in line with the US position, but the process raised concerns that this would mean importing the more restrictive components of US law without importing the counterbalancing exceptions which benefit US creators.

The Australian approach — a purposive dealing exception

In May 2005, the Commonwealth Attorney-General's Department released the *Fair Use and Other Copyright Exceptions Issues Paper*,[48] which called for submissions on whether the Copyright Act 1968 (Cth) should include a general fair use exception or any new specific fair dealing exceptions. One possibility advanced which seemed generally uncontroversial was the introduction of a specific fair dealing exception for parody, pastiche and caricature.[49] When an exposure draft of the Copyright Amendment Bill 2006 was introduced, it contained a limited exception for parody and satire. In the

---

44 Ibid, at 579 (citations omitted).

45 Ibid.

46 Ibid, at 589.

47 *Australia — United States Free Trade Agreement*, opened for signature 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).

48 Available at <http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf>

49 Copyright Agency Limited, Submission to the Attorney-General's Department *Fair Use and Other Copyright Exceptions* review, at [54], (CAL submission) at <http://www.copyright.com.au/reports%20&%20papers/CAL%20Fair%20Use%207%20July%202005%20~%20final.pdf> (only parody, not humorous use without comment on the original); Copyright in Cultural Institutions, Submission to the Attorney-General's Department *Fair Use and Other Copyright Exceptions* review, p 14, (CICI submission) at <http://www.nma.gov.au/libraries/attachments/about_us/cici/fair_use_submission/files/9810/CICI%20submission_AGD%20fair%20use%20review.pdf>; Australian Subscription Radio and Television Association, Submission to the Attorney-General's Department *Fair Use and Other Copyright Exceptions* review, p 6, (ASTRA submission) at <http://www.astra.org.au/content/pdf/FairUseJuly05.pdf>; Intellectual Property Research Institute of Australia, Submission to the Attorney-General's Department *Fair Use and Other Copyright Exceptions* review, pp 29–30, (IPRIA submission) at <http://www.ipria.org/research/IPRIA%20&%20CMCL%20Fair%20Use%20Submission.pdf>; Electronic Frontiers Australia, Submission to the Attorney-General's Department *Fair*

form in which it was introduced, use of copyright material for parody and satire was to become non-infringing, but only if (a) the use amounted to a special case; (b) the use did not conflict with a normal exploitation of the subject matter; and (c) the use did not unreasonably prejudice the legitimate interests of the copyright owner. The wording of the exception was drawn from the requirements of the three-step test expressed in Art 9(2) of the Berne Convention.[50]

The restrictive wording of the proposed exception was criticised in the Senate Legal and Constitutional Affairs Committee.[51] In response, the Australian government created new exceptions in Pts III and IV of the Copyright Act, which simply provide that:

> Section 41A: A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.
>
> Section 103AA: A fair dealing with an audiovisual item does not constitute an infringement of the copyright in the item or in any work or other audiovisual item included in the item if it is for the purpose of parody or satire.

These new exceptions took effect on 11 December 2006. The wording of the exceptions as enacted is much simpler than the original proposal, and does not require someone relying on the defence to prove that their use was a special case, that it did not interfere with a normal exploitation of the source material, and that it did not unreasonably prejudice the legitimate interests of the copyright owner. Proving each of these elements would have imposed an undue burden on the would-be parodist, and the Australian government has rightly interpreted its international obligations to allow it to categorically state that parody and satire are special cases which will automatically meet these requirements, as long as they are fair.

The new exceptions hopefully close the gap between serious and funny critiques in Australian copyright law, and provide some certainty to producers of parody and satire who previously could not be assured that their work would fall within the definition of criticism or review. Whether the changes achieve this goal will depend greatly upon future judicial interpretation of the legislation.

Use and Other Copyright Exceptions review, (EFA submission), at <http://www.efa.org.au/Publish/efasubm-agd-fairuse2005.html>; Law Council of Australia, Submission to the Attorney-General's Department *Fair Use and Other Copyright Exceptions* review, pp 8 11, (LCA submission) at <http://www.lawcouncil.asn.au/sublist.html?year=2005>. But cf Australian Copyright Council, Submission to the Attorney-General's Department *Fair Use and Other Copyright Exceptions* review, p 8, (ACC submission), <http://www.copyright.org.au/pdf/acc/Submissions/X0503.pdf>; and National Association for the Visual Arts, Submission to the Attorney-General's Department *Fair Use and Other Copyright Exceptions* review, p 4, (NAVA submission) at <http://www.visualarts.net.au/nava/PDFs/NAVA%20Fair%20Use%20submission.pdf> (arguing that such an exception would reduce the utility of the recently inserted moral rights provisions).

50 Berne Convention for the Protection of Literary and Artistic Works.

51 Standing Committee on Legal and Constitutional Affairs, Senate, *Report into the Copyright Amendment Bill*, 2006, at [3.67]–[3.72], at <http://www.aph.gov.au/senate/committee/legcon_ctte/copyright06/report/report.pdf>.

Interpreting the Australian exceptions

There are four main factors to be considered when determining whether an unlicensed parody or satire will be permissible in Australia. Firstly, the copyright owner must show that the parody or satire reproduces a substantial part of the original. Next, the user who wishes to rely on the new exception must show that his or her use is either a 'parody', or that it is a 'satire'. Finally, the user must show that his or her use of the source material was 'fair'. This article will consider each of these in turn.

Reproduction of a 'substantial part'

Often, parodists will not take the whole of a copyright work, but will use a smaller portion. Whether it is an infringement of copyright to reproduce or communicate a portion of copyright material will depend on whether that portion is a substantial part of the original. Section 14(1) of the Copyright Act provides that:

> (a) a reference to the doing of an act in relation to a work or other subject-matter shall be read as including a reference to the doing of that act in relation to a substantial part of the work or other subject-matter; and
> (b) a reference to a reproduction, adaptation or copy of a work shall be read as including a reference to a reproduction, adaptation or copy of a substantial part of the work, as the case may be.

Australian courts approach the question of substantiality as a question of fact and degree.[52] The determination is to be made primarily with reference to the quality, not quantity, of the portion taken.[53] While Australian courts seemed reluctant to do so, there was some room to consider the context of the use in the determination of substantiality in order to excuse parodies under the old law.[54] This proposition draws some support from Younger J's obiter dicta in a 1916 English decision, *Glyn v Weston*, that 'the older cases insist upon the necessity of establishing that the alleged piracy is calculated to prejudice the sale or diminish the profits or supersede the objects of the original work'.[55] The judge continued, noting that:

> no infringement of the plaintiff's rights takes place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result.[56]

This proposition was cited with approval by the Queen's Bench in 1960 in *Joy Music v Sunday Pictorial Newspapers*, where McNair J held that a literary parody of the lyrics of the popular song 'Rock-a-Billy' did not reproduce a

52 *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 283, 287–8; [1964] 1 All ER 465; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2005] HCATrans 842 (unreported, McHugh and Kirby JJ, 7 October 2005).

53 *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 293; [1964] 1 All ER 465; *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 305; 111 ALR 385 at 389 (Mason CJ dissenting), quoted with approval in *Data Access Corp v Powerflex Services Pty Ltd* (1999) 202 CLR 1; 166 ALR 228 at [84].

54 See A Buckland, 'Rap, parody, and fair use: Luther R Campbell aka Luke Skywalker, et al v Acuff-Rose Music, Inc' (1995) 17(4) *Syd LR* 599 at 607–8.

55 *Glyn v Weston* [1916] 1 Ch 261 at 268.

56 Ibid.

substantial part of the lyrics, on the basis that the parody was 'produced by sufficient independent new work'.[57] The parody was accordingly not a reproduction of the song, but a new original work derived from the song.[58]

The suggestion that parody could provide a defence to copyright infringement which was raised by *Glyn v Weston* and *Joy Music* was swiftly rejected in two mid-1980's English decisions, *Schweppes v Wellingtons*[59] and *Williamson Music v The Pearson Partnership*.[60] In *Schweppes*, the defendant sold soft drink bottles with a label which closely resembled the well known 'Schweppes' label, except that it had been changed to 'Schlurppes', and contended that while they had taken a substantial part, their use was an excusable parody, relying on *Joy Music*. Falconer J refused to follow *Joy Music*, holding that the label was infringing:

> The fact that the defendant in reproducing his work may have himself employed labour and produced something original, or some part of his work which is original, is beside the point if none the less the resulting defendant's work reproduces without the licence of the plaintiff a substantial part of the plaintiff's work. The test every time in my judgment is, as the statute makes perfectly plain: Has there been a reproduction in the defendant's work of a substantial part of the plaintiff's work?[61]

In *Williamson Music*, the plaintiffs were the exclusive licensees of copyright in the well known song 'There is Nothin' Like a Dame', which the defendants had parodied to advertise a service of express coaches. Baker J held that the relevant test was the substantial part test of Falconer J, and there was no special treatment to be given to parodies.[62]

Shortly after these two decisions, Foster J in the Federal Court of Australia adopted very similar reasoning. In *AGL Sydney v Shortland County Council*,[63] the applicant had produced an advertisement promoting the use of gas appliances in new homes. The respondents created an advertisement in response, supporting the benefits of using electricity over gas. The new advertisement was 'clearly similar to the AGL advertisement in scene, dialogue and general format'.[64] A comparison of the two advertisements led Foster J to note that it:

> is perfectly clear that the second advertisement was carefully crafted in an attempt to avoid infringement of the applicant's copyright by merely taking sufficient of the AGL advertisement to remind viewers of it without taking what could properly be described as a substantial part of it.

The judge followed the principle enunciated in *Joy Music* that substantiality should be determined by looking at the 'essential feature of the work which is alleged to have been subject to copyright'.[65] He did not, however, engage in discussion of the question raised in *Joy Music* of whether the new

57 [1960] 2 QB 60 at 70–1; [1960] 1 All ER 703 at 708.
58 Ibid.
59 [1984] FSR 210.
60 [1987] FSR 97.
61 [1984] FSR 210.
62 [1987] FSR 97 at 106.
63 (1989) 17 IPR 99.
64 Ibid, at 100.
65 Ibid, at 104, quoting *Joy Music Ltd v Sunday Pictorial Newspapers (1920) Ltd* [1960] 2 QB 60 at 68–9; [1960] 1 All ER 703 at 707.

advertisement was 'produced by sufficient independent new work'. Foster J did quote Younger J's statement in *Glyn v Weston* that there is no infringement where significant new labour had created an original result, and noted that it had '[appeared] to have won general acceptance'.[66] He avoided this conception of substantiality, however, on the basis that it applies only to parodies, and the statute 'grants no exemption, in terms, in the case of works of parody or burlesque'.[67] Accordingly, Foster J held that the question 'must necessarily remain whether an infringement of copyright has occurred as a result of a substantial taking from the parodied work'.[68]

These three cases indicate that a potential exception for parody, or at least greater leeway afforded to parody as part of the substantial part test, was rejected by Australian and English courts. Burrell and Coleman, examining *Schweppes* and *Williamson Music*, noted that:

> it now seems reasonable to conclude that a nascent exception for parodies has been killed off by two judgments which do not consider the potential rationale for affording parodies special treatment, the history or function of the substantial part test, or whether it was appropriate to decide the extent to which parodies are entitled to special treatment in cases which were arguably not examples of true parody at all and which pay little attention to what was actually said in *Glyn* and *Joy Music*.[69]

Burrell and Coleman also note Foster J's conclusion in *AGL Sydney v Shortland County Council* that the advertisement in reply was probably not a parody in any event.[70] Burrell and Coleman conclude that a valuable opportunity to examine the treatment of parodies was lost without examination, and that the debate was foreclosed notwithstanding that there were four conflicting first instance decisions, the two more recent of which were not delivered at a full trial.[71]

A decade later, Conti J in *The Panel* at first instance examined the authorities and appeared to be persuaded by Ricketson's conclusion that parody does not represent:

> a separate or distinct defence or justification for what otherwise might be an infringing use . . . Anglo-Australian courts have tended to play down the parodic intent of an allegedly infringing use, although it may tip the balance in a case where all other factors are equal.[72]

Conti J also cited *Copinger and Skone James on Copyright* for the consideration that parody may be 'possibly relevant to fair dealing for purposes of criticism and review'.[73] As to substantiality, Conti J accepted that the question should be resolved not only by reference to the quantity and

66 *AGL Sydney v Shortland County Council* (1989) 17 IPR 99 at 105.
67 Ibid.
68 Ibid.
69 R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge University Press, 2005, p 266.
70 Ibid, citing *AGL Sydney v Shortland County Council* (1989) 17 IPR 99 at 105.
71 Burrell and Coleman, above n 69, p 267.
72 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235; 184 ALR 1 at [16], quoting S Ricketson, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, 2nd ed, Thomson Lawbook Co, 1999, at [9.35].
73 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235; 184 ALR 1 at [17], citing Garnett et al, above n 5, at [9.18].

quality of the copyright material taken, but also by considering whether harm has been caused to the copyright owner's commercial interests,[74] and 'the object or purpose of taking' copyright material.[75]

When *The Panel* was remitted to the Full Federal Court, Finkelstein J, with whom Sundberg J agreed, noted that the 'test of substantiality . . . is not confined to an examination of the intrinsic elements of the plaintiff's work', but 'may involve a broader enquiry . . . which encompasses the context of the taking'.[76] Other factors which must be considered include 'the economic significance of that which has been taken'[77] and 'the use which the defendant makes of the copied portion of the plaintiff's work'.[78] Finkelstein J rejected the construction of the trial judge, who suggested that the principle enquiry should be concerned firstly with quantity, but significantly also with 'whether harm has been caused to the plaintiff's commercial interests'.[79] Finkelstein J accepted, however, that in cases where a visual comparison could not yield an answer to whether a substantial part has been used, it 'would be necessary to consider factors such as the plaintiff's financial interest as well as the defendant's purpose to resolve the issue'.[80] He found that five of the extracts were not a substantial part of the source broadcasts, on the basis that they were insignificant in the context of Nine's program, but also because 'the taking of these extracts caused absolutely no injury to Nine's interests'.[81]

In reaching this conclusion, Finkelstein J attempted to import considerations drawn from the US fair use doctrine into the question of substantiality. He cited the seminal analysis of Story J in *Folsom v Marsh*, setting out what would eventually be codified into the US fair use defence:

> It is certainly not necessary, to constitute an invasion of copyright, that the whole of the work should be copied, or even a large portion of it, in form or in substance. If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto . . . Neither does it necessarily depend upon the quantity taken . . . [i]t is often affected by other considerations, the value of the materials taken, and the importance of it to the sale of the original work . . . In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[82]

In the same case, Hely J noted that there are some authorities which 'indicate that in deciding the quality or importance of the part taken, regard must be

74 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235; 184 ALR 1 at [44]–[45].
75 Ibid, at [46]. See also [24].
76 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2005) 145 FCR 35; 216 ALR 631 at [15].
77 Ibid, at [11].
78 Ibid, at [13].
79 Ibid, at [24], criticising *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235; 184 ALR 1 at [24].
80 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2005) 145 FCR 35; 216 ALR 631 at [38].
81 Ibid, at [38].
82 Ibid, at FCR [14], citing *Folsom v Marsh* 9 Federal Cases 342 at 348 (CCD Mass, 1841) (Story J).

had, inter alia, to the nature and objects of the selection made'.[83] The judge held, however, that '[i]nfringement of copyright does not have a mental element of purpose or intention',[84] and that the fact that the material was used for a wholly different purpose to that which it was originally broadcast 'says little, if anything, about whether those segments are a material part of the source broadcast'.[85] Hely J accordingly rejected the suggestion that the purpose of the taking of copyright material was relevant to the substantiality of the amount taken.

Network Ten applied to the High Court for special leave to appeal the Full Federal Court's findings on substantiality, on the basis that the tests used were unclear.[86] Kirby and McHugh JJ reiterated that the question was one of fact and degree, not of law. The factors enunciated by Finkelstein J were indicative of his reasoning, but were not legal tests. It was accordingly not for the High Court to provide a legal test for determining when a portion of material will be a substantial part of a larger whole. The judges declined to consider whether Finkelstein J's reasoning was flawed, apparently leaving the question of whether the court should consider the context of the taking open.

The construction of the question of substantiality as a factual question would not preclude consideration of the context in which copyright material is used. Nor would such a consideration necessarily over-stretch the question of substantiality. In *Nationwide News v CAL*, Sackville J recognised the necessity of assessing substantiality with 'reference to the interest protected by the copyright'.[87] He quoted *Copinger and Skone James on Copyright*:

> In deciding [the quality or importance of the part taken], regard must be had to the nature and objects of the selection made, the quantity and value of the materials used, and the degree to which the use may prejudice the sale, or diminish the profits, direct or indirect, or supersede the objects of the original work . . . In short, the question of substantiality is a matter of degree in each case and will be considered having regard to all the circumstances.[88]

Both judgments in *The Panel (No 2)* in the Full Federal Court recognised that the question of substantiality should be resolved with regard to the interests served by copyright.[89] When the High Court considered *The Panel*, however, Kirby J in dissent rejected the idea that the interpretation of the Copyright Act could be guided by theoretical principles:

> If one is truly looking for the 'purpose' of the Act, that purpose must be found not in some a priori view about the merits, or desirability, of the copyright in their

83 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2005) 145 FCR 35; 216 ALR 631 at [58].
84 Ibid.
85 Ibid, at [60].
86 *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2005] HCATrans 842 (unreported, McHugh and Kirby JJ, 7 October 2005).
87 *Nationwide News v CAL* (1996) 65 FCR 399 at 418; 136 ALR 273; this proposition was endorsed by the UK House of Lords in *Newspaper Licensing Agency Ltd v Marks and Spencer plc* [2003] 1 AC 551 at 561; [2001] 3 All ER 977 at 985.
88 *Nationwide News v CAL* (1996) 65 FCR 399 at 418; 136 ALR 273, quoting K Garnett et al, *Copinger and Skone James on Copyright*, 13th ed, Sweet & Maxwell, London, 1991, p 175.
89 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2005) 145 FCR 35; 216 ALR 631 at [54] per Hely J; [17] per Finkelstein J.

> television broadcasts which the respondents assert. Ultimately, that purpose must be found in the command of the Parliament, expressed in the Act.[90]

While the concept that the question of substantiality should be determined with 'reference to the interest protected by the copyright'[91] is familiar to Australian law, Australian courts have not been willing to read substantiality to accommodate unlicensed parodies or satires as non-infringing uses of copyright material. While it appears unfortunate that Australian courts have not explicitly considered the purpose of a use in relation to substantiality, this approach could never have achieved an adequate balance. Where all, or nearly all, of a copyright work is used for a parody or a satire, there can usually be no question of substantiality. A narrow conception of substantiality may provide leeway for Ilic's 'Where The Bloody Hell Are You?' spoof, on the basis that it reproduces the structure and composition rather than the expression of the original, but Duchamp's 'L.H.O.O.Q.', for example, reproduces the 'Mona Lisa' in its entirety. In a system which presupposes liability on proof of copying, these types of uses must be able to rely on a defence to copyright infringement.

In some cases, parodies and satires, as well as other transformative uses of copyright material, may be held to not reproduce a substantial part of the original material. There appears to be some room for Australian law to continue to develop in this manner, and questions of context and purpose have not yet been completely banished from the discussion of substantiality. In many cases, however, transformative uses will reproduce a substantial part of the original. The next steps, then, will be to consider whether they are made for the purpose of either parody or satire.

Parody

Determining whether a use is made for the purposes of parody requires the court to distinguish between true parodies and material that is used for another purpose. In *The Panel* certain uses were not considered to be criticism or review because they were merely rebroadcasting material which was funny in its own right.[92] It is likely that it is these types of uses which will cause the most difficulty for an analysis of the parody or satire exception.

Take, for example, the Back Dormitory Boys (or the 'Back Dorm Boys'), a Chinese basketball-jersey sporting duo who achieved worldwide notoriety with their lip-synching music videos to the Backstreet Boys' songs 'As Long As You Love Me' and 'I Want It That Way', produced on a low quality webcam in their dormitory. The video has earned them sponsorship deals and a five year contract with a Beijing talent agency.[93] It is not clear, however, whether music videos which put their talents in the spotlight would infringe copyright in the music, lyrics and sound recordings of the Backstreet Boys' songs.

The question of whether the video is a parody is a question of fact. Parody

---

90 *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273; 205 ALR 1 at [89].
91 *Nationwide News v CAL* (1996) 65 FCR 399 at 418; 136 ALR 273.
92 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235; 184 ALR 1.
93 'Out of the dorm', *The Economist*, 6 April 2006, at <http://www.economist.com/world/asia/displaystory.cfm?story_id=6776404>.

is not defined in the Copyright Act, and it is likely that courts will use its ordinary dictionary meaning. The *Oxford English Dictionary* relevantly defines 'parody' as:

> A literary composition modelled on and imitating another work, esp a composition in which the characteristic style and themes of a particular author or genre are satirised by being applied to inappropriate or unlikely subjects, or are otherwise exaggerated for comic effect. In later use extended to similar imitations in other artistic fields, as music, painting, film, etc.[94]

In *Rogers v Koons*, the US Court of Appeals held that parody or satire 'is when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original'.[95] In *Campbell v Acuff-Rose*, the US Supreme Court described parody:

> For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works.[96]

The Supreme Court continued to distinguish parody from other uses, noting that where:

> the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.[97]

Whether a particular use is a parody or not will turn on the circumstances of the case. In the Back Dorm Boys video, the music is unchanged from the original but is accompanied by exaggerated dancing. It is likely that the video is a parody of the Backstreet Boys' dancing styles, as well as a comedic send up of the tendency of boy bands to lip-synch their productions. On the other hand, it would be open for a court to find that the video was not holding up the original to ridicule, but was rather a slavish imitation of the Backstreet Boys' copyright material. The test appears to be a subjective one — the wording of the legislation is '*for the purpose* of parody or satire'.[98] In *De Garis v Neville Jefress Pidler*, it was the purpose of the person relying on the defence which was of prime importance for the defence of research and study.[99] In this scenario, the preliminary question would appear to turn on whether the Back Dorm Boys were actually engaging in parody, or merely attempting to reproduce the Backstreet Boys' production. This is a question for the finder of fact, but it is likely that the exaggerated dancing and facial

94 *Oxford English Dictionary*, 'parody, n 1 a' (draft revision, June 2005).
95 *Rogers v Koons* 960 F 2d 301 at 309–10 (US Court of Appeals, 2nd Cir, 1992).
96 *Campbell v Acuff-Rose Music* 510 US 569 at 580 (1994).
97 Ibid.
98 Copyright Act 1968 (Cth) ss 41A, 103AA (emphasis added).
99 *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99; 18 IPR 292; 95 ALR 625.

expressions of the Back Dorm Boys are sufficient indicia of a parody (an argument backed by the assumption that they couldn't possibly be serious).[100]

The definition of parody should be used here to differentiate legitimate parodies from illegitimate rip-offs. Uses which merely reproduce copyright material without making any critical or humorous comment should not be protected as parody. A primary indicator would be whether the parody work is directly substitutable for the original, or could be confused with the original.[101] Using this construction, courts should be able to easily distinguish between situations where a copyright work is used for its own sake, rather than used as the basis of the new author's expression. The former should not be excused, but the latter should be given significant latitude in copyright law. It is open for the trier of fact to find that the Back Dorm Boys' video is a humorous imitation which is highly unlikely to provide a substitute for the original Backstreet Boys' production, and should therefore be excused as a legitimate parody. It would be equally possible, however, to find that the motive for creating the spoof video was merely to find an excuse to reproduce the musical works and sound recordings in their entirety, in which case it is not a true parody. There is no easy rule here — this factual question will always depend on the circumstances.

Assuming the use is a parody, it is not necessarily a parody of all of the copyright material it reproduces. For example, it is possible that the new production is a parody of the music video, but not of the underlying lyrics or musical arrangement. Discounting questions of originality and assuming that copyright subsists in the Backstreet Boys' songs, it is interesting to see that the new defences extend to excuse reproduction of material which is not directly the subject of parody. Importantly, the defence in Pt IV explicitly extends to 'any work or other audiovisual item included in the item'.[102] A parody of a video or sound recording will not, therefore, infringe copyright in the underlying works.

Somewhat confusingly, the defence in Pt III of the Copyright Act is not so broadly worded to include other works. This could mean, for example, that a parody of a collage could conceivably infringe copyright in each of the artistic works it reproduces. This strange result is overcome in the terms of the exceptions, however, which do not stipulate that the parody must be of the particular work in question, but merely that the use must be 'for the purpose of parody or satire'.[103] The defence is not limited to parody or satire of the work itself. It would appear, on the face of the legislation, that reproduction of any work is permissible as long as it is broadly for the purposes of parody or satire of some description and is fair for that purpose.

This broad wording is desirable in an age where mixed media parodies and satires are very popular — the availability of video editing software and video hosting websites makes it much easier now than ever before for individuals with relatively low resources to engage in the creative production and

100 The reader is encouraged to judge for himself or herself. See ewo, 'Chinese Backstreet Boys — That Way', *YouTube*, at <http://www.youtube.com/watch?v=N2rZxCrb7iU>.

101 See Weir, above n 12, at 82, proposing adoption of a primary 'no confusion' test for parody, as expressed by the French Supreme Court of Appeal in a 1988 decision.

102 Copyright Act 1968 (Cth) s 103AA.

103 Ibid, ss 41A, 103AA.

remixing of multimedia works. Fortunately, the possibility of creating parodies of mixed works has been contemplated by the legislature and parody and satire do not have to be of the work itself in order to be excusable. This point is reinforced by the inclusion of parody as well as satire in the exception, which overcomes the difficult distinction which has found its way into US fair use law. It is important to note that the broad wording of the defence suggests that the primarily limiting factor on which works may be used will not be determined by a mechanical interpretation of the target of parody or satire, but a more involved discussion of whether the use was fair for those purposes.

Satire

Satire is relevantly defined in the *Oxford English Dictionary* to mean:

> 1. A poem, or in modern use sometimes a prose composition, in which prevailing vices or follies are held up to ridicule. Sometimes, less correctly, applied to a composition in verse or prose intended to ridicule a particular person or class of persons, a lampoon . . .
>
> 2. b. The employment, in speaking or writing, of sarcasm, irony, ridicule, etc in exposing, denouncing, deriding, or ridiculing vice, folly, indecorum, abuses, or evils of any kind.

The US courts have drawn a distinction between parody and satire on the basis that parody must target the original work, at least in part, while satire does not.[104] This distinction has led to broad protection in the United States for parody, but not for satire:

> Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.[105]

Accordingly, reproducing copyright material to hold the subject matter itself up to ridicule is usually acceptable as 'parody' under US law, whereas using copyright material to criticise or ridicule other persons or subjects is called 'satire' and is usually not acceptable without permission.

In *Rogers v Koons*,[106] Rogers had taken a photograph of a couple holding a litter of puppies, which had been widely commercialised in postcards, an anthology and as a signed print. Koons found one of the postcards of the black and white photograph, and had the scene carefully recreated in four identical wood sculptures, painted in blue, with garish, accentuated features. Koons displayed and sold three of the four sculptures for USD$367,000. The sculptures were clearly copied from the photograph.[107] The Second District Court of Appeals turned to the four-factor fair use analysis and held that the first factor (purpose and character of the use) weighed against Koons, on the basis that they were commercial in nature, Koons had acted in bad faith by removing the copyright mark from the postcard prior to sending it to the sculptors to copy and, although the sculptures may have been a parody of

104 *Campbell v Acuff-Rose Music* 510 US 569 at 580–1 (1994).
105 Ibid.
106 *Rogers v Koons* 960 F 2d 301 (US Court of Appeals, 2nd Cir, 1992).
107 Ibid, at 308.

society, they were not a parody of the photograph itself.[108] The court also found that the other three factors weighed against Koons: the original photograph was original and expressive;[109] the sculptures copied an impermissible amount from the photograph;[110] and the potential market for licensed sculptures from the photograph or of any other reproductions would be prejudiced by Koons' sculptures.[111]

The *Koons* case highlights the somewhat arbitrary distinction that US courts have drawn between parodies and satires, where unlicensed parodies may be excused but not unlicensed satires. Parody is given greater latitude in US copyright law on the basis that it is useful as criticism and should be encouraged, and necessarily needs to 'conjure up' the work that it is criticising in order to be effective.[112] Because the owner of copyright is unlikely to license critical uses, parody is given more freedom to copy without infringing the copyright owner's exclusive rights.[113] Parodies, by their nature, must therefore be critical of the work parodied.

It has been suggested that the greater latitude given to parody, as opposed to other forms of re-use, is a distinction which is artificial and difficult to enforce.[114] It is unclear why parody should be privileged above these other types of re-use or, more accurately, why other types of expression are not accorded the same protection as parody, particularly since literary theory is not able to easily and reliably separate parody from other forms of expression.[115]

Drawing a distinction between criticism of the copyright subject matter and using the subject matter to criticise or ridicule other elements of society places a significant and useful form of expression outside of the protection of copyright law. Satire is not protected on the assumption that if the criticism is not levelled at the work or its author, then copyright licences will not unduly be withheld. This assumes that either the owner of copyright would be happy to license her or his work for an attack on other values, or a general satire of society does not need to reuse the specific work in question.

This reasoning is flawed because the fact that criticism is not targeted specifically at the work or the owner of the work does not mean that a copyright licence will necessarily be easy to obtain. Copyright owners may

---

108 Ibid, at 309–10.
109 Ibid, at 310.
110 Ibid, at 311.
111 Ibid, at 312.
112 *Campbell v Acuff-Rose Music Inc* 510 US 569 at 581 (1994).
113 See R Posner, 'When is Parody Fair Use?' (1992) 21 *Jnl of Legal Studies* 67.
114 See E Gredley and S Maniatis, 'Parody: A Fatal Attraction? Part 1: The Nature of Parody and its Treatment in Copyright' [1997] 7 *EIPR* 339 at 343: 'Basing a legal theory on the distinction between [parody and satire] may, however, lead the courts into the need to devise near impossible distinctions between satiric parodies and parodic satires.'
115 Gredley and Maniatis note that the popular and legal definitions of parody require 'a specific work of humorous or mocking intent, which imitates the work of an individual author or artist, genre or style, so as to make it appear ridiculous', but ignore other literary definitions, such as 'a unique form of literary or artistic criticism, which achieves its end through analytical mimicry'; 'a device which can be employed in other genres, such as satire'; 'a "comic refunctioning" of pre-existing material'; 'a genre which involves the intentional appropriation and ironic reworking of pre-existing works or forms, but with no ridiculing or even comic intent': ibid, at 341.

not like to be associated with a particular critical viewpoint, or may not wish to be seen to endorse criticism of popular figures.[116]

In *Dr Seuss v Penguin Books*, the use of Dr Seuss' characteristic style to tell the story of the O J Simpson murder trial was a satire, not a parody, because it did not hold Dr Seuss' style up to ridicule.[117] In that case, the US District Court held that:

> While a general satire of social conditions is certainly a creative work having social value, the potential satirist has many alternatives to pilfering the protected expression of a copyrighted work, rendering the choice to adopt the protected elements of a work currently enjoying copyright protection an unreasonable attempt to cash in on another's creativity. The satirist (or one intending to parody an author but not any particular work) may freely evoke another artist by using the artist's general style. The satirist may also freely plunder the myriad familiar works already in the public domain through the expiration of copyright protection. Only when the satirist wishes to parody the copyrighted work itself does the taking of protected expression from that work become permissible, and even then, only in such amounts as is required to fulfill the parodic purpose. Of course, allowing free taking of distinctive elements from a work in current favor might produce a more effective satire. The court, however, must balance the interests of the public, the copyright owner, and the parodist.[118]

This reasoning is also flawed in its assumption that a critique does not need to rework a specific work to make a general comment on society. This suggests that the would-be satirist will be able to either obtain a licence from *some* copyright owner, or forgo the use of copyright works, in order to make his or her statement. While recognising that using copyright material may be the best vehicle to convey the critical message of the author, the court in *Dr Seuss* dismissed that conclusion in favour of the interests of the copyright owner. This is not a desirable result — while it may be possible to make a satirical statement about society without reusing copyright material, it will often be significantly more difficult, or the force of the message may be significantly diminished.[119] Balancing this much impoverished form of

---

116 It is interesting to note that in almost all cases, a fair parody will be easily distinguishable from the original, and thus will not impute any support from the copyright owner; a positive act of granting a license for such parody, however, may well be interpreted as support for the parodist's message. This consideration adds weight to the proposition that parodies are unlikely to be efficiently licensed, even where the parody itself would be unlikely to result in damage to the copyright owner.

117 *Dr Seuss Enterprises, LP v Penguin Book USA, Inc* 924 F Supp 1559 (US DC, SD Cal, 1996).

118 Ibid, at 1567–8.

119 Neil Netanel uses the example of the satirising of Disney characters in *Disney v Air Pirates* 581 F 2d 751 (1978):

> There are, of course, many ways to challenge romanticized imaginings of American life. But the humorous denigration of a cultural icon that immediately brings those imaginings to mind may be a particularly potent way to do so. And in that regard, it is highly unlikely that, having been thwarted by Disney, the comic book creators could have obtained a license from Time Warner or another Disney competitor to use any of those entities' proverbial characters in a similar manner for a similar purpose.

N Netanel, 'Market Hierarchy and Copyright in Our System of Free Expression' (2000) 53 *Vanderbilt L Rev* 1879 at 1910.

expression against the insubstantial or almost insubstantial actual loss to the copyright owner, it is hard to see why the distinction between parody and satire should be upheld.

To return to Downwind Media's 'Where the bloody hell are you?' spoof, it is unclear whether this would constitute parody or satire under the US fair use test.[120] It is clearly a satire of Australian public policy, but it also seems to be a parody of Tourism Australia's spin-doctoring campaign. The use of a test which relies on such an artificial dichotomy between parody and satire is unsatisfactory, because it provides little certainty to critical creators and no protection for satirical expositions of society. While Downwind Media could certainly have created a video which criticised Australia's immigration policy without using the theme, settings or music from Tourism Australia's video, it would have suffered from not being able to contextualise itself within the framework of Australia's public image marketing, and such a video may not have reached as wide an audience without the humorous and ironic referencing to the original advertisement.

The fact that a parody or satire is not targeted specifically at the work or the owner of the work does not mean that a copyright licence will necessarily be easy to obtain. If parody and satire are to be valued because they are critical, a requirement that a user obtain a licence will greatly restrict the range of potential expression. Copyright owners may not like to be associated with a particular critical viewpoint, or may not wish to be seen to endorse the criticism of their political or economic allies. Of course, the argument then returns to the point that if a parodist is not criticising the work being used, they should in theory be able to use any other work to get the same message across.

Geri Yonover contextualises the arbitrary nature of the distinction between parody and satire by using Duchamp's 'L.H.O.O.Q.' as an example.[121] Under US law, it is possible that the mustachioed Mona Lisa would be a parody and allowable as fair use, but it is also arguable that it is not a parody at all because it does not comment on either the Mona Lisa or Da Vinci. The application of the US fair use defence is by no means clear in such a case. This lack of certainty is not desirable — even though Duchamp's modifications may be quantitatively small, the entire character of the Mona Lisa is changed and there is no reasonable chance that a potential consumer of Da Vinci's expression would be satisfied by Duchamp's (to the exclusion of Da Vinci's). Duchamp's work is clearly an important criticism of Western art and would have no adverse affects on the market for the original; to refuse to allow it to be created without licence on the basis that it is a satirical work and not a parody would seem to be a very confusing result.[122]

To draw solid legal barriers between parody and satire ignores the close

---

120 See *Elsmere Music v NBC* 482 F Supp 741 (SD NY 1980) aff'd 623 F 2d 252 (2d Cir 1980), where it was held that a skit featuring a musical tune 'I Love Sodom' was a fair use parody of the State of New York's advertisement, 'I Love New York', despite the fact that the parody did not target the song itself: cf *MCA, Inc v Wilson* 425 F Supp 443 (SD NY 1976) and *Walt Disney Productions v Mature Pictures Corp* 389 F Supp 1397 (SD NY 1975).

121 G Yonover, 'Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use' (1996) 14 *Cardozo Arts & Ent LJ* 79 at 122.

122 See P Krieg, 'Copyright, Free Speech, and the Visual Arts' (1984) 93 *Yale LJ* 1565 at 1584, considering a first amendment defence to copyright infringement:

relationship and permeable boundaries that all these uses have in literary and artistic practice. Fortunately for Australian users, the new exception that has been created removes this arbitrary distinction. It appears that the Australian government has recognised that satirical uses are also unlikely to be licensed by copyright owners, and has extended the defence accordingly. The broad wording of the new exceptions relieves courts from the arduous task of distinguishing between parody and satire, something which literary critics, let alone judicial officers, find difficult to do.[123] Under the new legislation, it does not appear that it will be relevant whether a user of copyright material is engaging in criticism of the source material or its author, or whether he or she is merely using that work to critique another person or facet of society, as long as his or her use is fair.[124]

In 2007, cartoonist Bill Leak was threatened with legal action by the owners of copyright in Herge's Tintin works if he did not cease depicting Kevin Rudd as Tintin.[125] Leak admitted that his cartoons were parodies of Rudd, but not of Tintin; his use of Tintin was an appropriate analogy given that 'Rudd looks like the little bloke who is taking on the big adventure and who just might prevail in the end'.[126] In the United States, it would appear that this type of use would not be permissible because it is not a parody of either Tintin or Herge. Fortunately, this appears to be exactly the sort of use envisaged by the drafters of the new Australian exception — indeed, the Attorney-General, in introducing the new exception, explained that it 'promotes free speech and Australia's fine tradition of satire by allowing our comedians and cartoonists to use copyright material for the purposes of parody or satire'.[127] The Belgian firm that owned copyright in Tintin eventually conceded that under Australian law Leak would be free to portray Kevin Rudd as Tintin, but claims that Leak 'cannot "commercialise" the image by selling copies to the public'.[128]

This example highlights the critical importance of removing the distinction between parody and satire in the new Australian exception. Even when a proposed use is not critical of the original work or its author, a risk averse copyright owner often has little incentive to license satirical works, given the potential for negative public perceptions and high transaction costs in copyright negotiations. As the importance of branding and public image continues to rise, any uses of copyright material which do not conform to the copyright owner's promotional policy, whether or not they are critical of the

---

Duchamp's First Amendment defense should clearly prevail. Although he added but two black lines to an art print, Duchamp clearly conveyed original, conceptual expression through his work. L.H.O.O.Q., a critical condemnation of the traditional precepts of Western art, added to a legacy of aesthetic interpretation. Furthermore, despite the minimal alteration to the original work, it is unlikely that potential purchasers would consider L.H.O.O.Q. a desirable substitute for the Mona Lisa.

123 See L Hutcheon, *A theory of parody: the teachings of twentieth-century art forms*, Methuen, 1985.

124 See M De Zwart, 'The Coypright Amendment Act 2006' (2007) 25(1) *Copyright Reporter* 4 at 18.

125 See R Sorensen, 'Satire, with apologies to Herge', *The Australian*, 1 June 2007.

126 S Jackson, 'Belgians do what PM can't: banish TinTin', *The Australian*, 31 May 2007.

127 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 2006, pp 1–2 (Hon Philip Ruddock).

128 P Wilson, 'Leak in the clear over Tintin', *The Australian*, 4 June 2007.

material or the owner, are likely to be disallowed. So, for example, getting a licence to use a popular copyright image for social or political commentary (absent any right to freedom of political communication), or to express anything that the copyright owner does not want to express, is likely to be extremely difficult. To suggest that Leak could have simply asked for permission to use Tintin's likeness to criticise Rudd is as laughable as the comics themselves.

Both parody and satire are expressive forms which sometimes require the use of copyright material to be effective, and neither are likely to be licensed by the copyright owner. The extent to which they impair the market for the original, if at all, is a factor which will impact on the fairness of the use, and could be used to distinguish legitimate parodies or satires from illegitimate rip-offs. Distinguishing between uses which are critical of the original work or its author and those which are critical of a third party or society in general as a threshold question, however, is not supported by either the text of the defence or the theory which underpins it.

'Fair'

Having passed the threshold purposive test, the more difficult question will be in determining whether a particular use is fair. Fairness is always a question of fact and degree,[129] and will depend on the circumstances of the case.[130] In evaluating fairness, courts will examine many factors including the purpose and character of the use and the nature of the copyright work, the amount and substantiality of the portion used in relation to the work as a whole (both quantitatively and qualitatively), and the effect on the potential market for the source material, but 'after all is said and done, it must be a matter of impression'.[131]

The concept of fairness is likely to be the single most important factor in distinguishing parodies from illegitimate rip-offs. One significant danger would be for courts to use the consideration of quantitative and qualitative proportions as the primary limiting factors in determining fairness. Parodies and satirical productions often need to reproduce all or almost all of the source material in order to achieve their purpose. Duchamp's 'L.H.O.O.Q.', for example, would be of little value if it did not reproduce the 'Mona Lisa' in its entirety. If courts do not take a generous approach to determining how much is 'fair' to reproduce for parody and satire, the implication will be that the new defences will have little practical application. Instead of focusing on qualitative or quantitative proportions, it would be preferable for courts to focus on the effect on the potential market for the source material as a primary indicator of fairness. Purely substitutable uses, which displace the market for the original, should not be excused as parody or satire. On the other hand, as

129 *Hubbard v Vosper* [1972] 2 QB 84 at 94 per Lord Denning MR; [1972] 1 All ER 1023.

130 *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12 per Gibbs CJ; 6 ALR 193.

131 *Hubbard v Vosper* [1972] 2 QB 84 at 94 per Lord Denning MR; [1972] 1 All ER 1023. For an excellent discussion of the US four-factor fair use test in relation to the Australian exceptions, see M Sainsbury, 'Parody, satire and copyright infringement: The latest addition to Australian fair dealing law' (2007) 12 *MALR* 292 at 310–17.

true parodies or satires are rarely likely to be substitutable for the source material, the effect on the potential market will often be small or non-existent, and the use is more likely to be fair.

In this regard, care must be taken to differentiate negative effects on the market for the source material caused by legitimate criticism from those caused by illegitimate substitution. It will also be important to avoid rigorously examining the content of the parody or satire — it is the taking of the copyright material which must be fair and not the message itself — that is the proper subject matter of a defamation action. As Lord Denning noted, fairness, overall, is a matter of impression. In parody and satire, as in the other exceptions, it must depend on the circumstances of the use.[132] While it may be difficult to set out any determinative factors, ordinary principles of fairness would show a spectrum of uses; mere commercial rip-offs and uses which more closely resemble the subject matter of passing off actions are much less likely to be fair than clear parodies which are clearly distinguishable and not substitutable for the original.

Determining fairness may be much more difficult in complex cases, where a parody reproduces more than one copyright work or other subject matter. Returning to the example of the Back Dorm Boys, the parody video reproduces the entirety of the musical work, the lyrics and the sound recording of the Backstreet Boys' song. It arguably does so in order to parody the Backstreet Boys' dancing style and expression, as well as to satirise the role of boy bands and manufactured music in our culture. Whether this is 'fair' is open to interpretation. This question comes dangerously close to begging the court to consider the merit of the artistic choices made by the users of the copyright material, and there are very strong arguments that courts are ill-suited to this type of decision-making.[133]

It would be dangerous for courts to consider too deeply the relationship between the material used and the subject matter of a parody or satire. While it is certainly true, as Conti J said in *The Panel* of criticism and review, that parody must be 'genuine and not a pretence for some other form of purpose',[134] as long as a work has been used legitimately for parody, it would be unfortunate to devote significant analysis to whether, in all fairness, the parodist or satirist should have used another work or have used a smaller proportion of that work. The defence, as enacted, is drafted in very broad terms and has the potential to allow many forms of creative expression which are harmless to 'the interest protected by copyright'.

It is the interest protected by copyright which should be the primary factor in determining whether a particular use is fair or not. The early videos

132 *Hubbard v Vosper* [1972] 2 QB 84 at 94 per Lord Denning MR; [1972] 1 All ER 1023.

133 See L Greenberg, 'The Art of Appropriation: Puppies, Piracy, and Post-Modernism' (1992) 11 *Cardozo Arts & Ent LJ* 1 at 29, arguing against the finding that a sculptured caricature of a photograph of a couple holding a litter of puppies (in *Rogers v Koons*), was not 'criticism': 'it is not the proper role of the court to be making pronouncements about what does and does not constitute proper criticism in the realm of the visual arts. By refusing to recognize the critical nature of the work, the court emphasizes its unsuitability to act as an art critic.' See further Pettigrew, above n 7, criticising the court's decision in *Rogers v Koons* for a lack of understanding of the creative practices of appropriation artists.

134 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235 at 285; 184 ALR 1.

produced by the Back Dorm Boys reproduced the Backstreet Boys' songs in their entirety, synchronised to different video. Some may argue that they did not need to use the entirety of the sound recording, musical works and lyrics to make their parody. This line of reasoning, while it may be tempting, requires the court to engage in a substantive discussion about how much of a given work should have been used in a given creative endeavour. Certainly, different decisions may have been made, but to use less would equally certainly change the nature of the parody. I suggest that a better approach would be to consider whether so much was used that it changed the purpose of the taking, and whether the amount used unreasonably prejudices the legitimate interests of the copyright holder (to take the language of Art 9(2) of the Berne Convention, which governs the implementation of copyright exceptions).

For example, a court could resolve this question by asking whether the addition of extra video was merely an excuse to reproduce the entire song, in which case it is not a true parody. If it is a parody, the court must then determine fairness, and rather than asking whether the parodist could have used less and still made their point, a court would be better served by avoiding the artistic question and asking whether the amount used unreasonably prejudices the interests protected by copyright. In this case, it is unlikely that any customer, looking for the Backstreet Boys song, would be satisfied by the version created by the Back Dorm Boys. The video created by the Back Dorm Boys is creative in its own right, and does not supplant the market for the original song — it accordingly does not limit the ability of the Backstreet Boys to commercialise and distribute their own material. I suggest that this should be the primary test of whether a use is fair or not, and that qualitative and quantitative considerations should only be secondary concerns.

If courts place too much importance on quality or quantity, many creative parodies and satires will not be able to be legally created. Quantitatively, both parody and satire often make use of the entire work. The decision to do so should not presumptively weigh against a user. Qualitatively, there is often a need to take the most important parts of a copyright work. Indeed, to restrain creators to only using unimportant or trivial material, as was done in *The Panel*, would significantly reduce the utility of the new defence. Imposing strict limits on the quantity or quality of the source material used, rather than investigating the substitutability of the parody or satire for the original, is likely to significantly reduce the certainty and practical application of the new defences. Similarly, having developed a defence which does not appear to differentiate between parody or satire of the copyright work and parody or satire of another subject, it would seem disingenuous to unduly restrict the concept of fairness depending on whether or not the user could have used another work instead of the work in question.

One final consideration that will heavily impact on the utility of the new exceptions is the development of Australian moral rights jurisprudence. In order for these defences to have any real effect, courts will have to extend the reasonableness defence to the infringement of the moral right of integrity to explicitly allow parody and satire.

A note on the moral right of integrity

This article does not consider the limits which may be imposed on parodies by other areas of law — most commonly, defamation, passing off and the moral right of integrity. It is appropriate, however, to note that the newly introduced moral right of integrity is unlikely to place too stringent a limit on parodies and satires. Indeed, when moral rights were inserted into the Copyright Act 1968, the then Commonwealth Attorney-General noted that:

> it should be emphasised that the introduction of moral rights, in particular the right of integrity, is not intended to impede or adversely affect the time-honoured practices of parody and burlesque. The moral right of integrity is not intended to stifle satire, spoof or lampoon any more than does the existing law of defamation.[135]

Infringement of the moral right of integrity requires a derogatory treatment of the copyright work or film which unreasonably prejudices the author's honour or reputation.[136] If an objective approach is taken to the phrase 'prejudicial to the author's honour or reputation', true parodies are unlikely to be caught as although the original work will be recognisable and the parody may be derogatory, the parody will usually be easily distinguishable as a parody — a reasonable person would be unlikely to associate the derogatory treatment with the original author.[137] If, on the other hand, a subjective approach is taken, more weight may be given to the opinions of the original author and parodies are likely to more often infringe the moral right of integrity.[138]

Even where a parody is found to treat the original work in a derogatory manner, however, it would seem sensible to conclude that parody and satire

---

135 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 June 1997, pp 5547–8 (Hon Daryl Williams QC).

136 Copyright Act 1968 (Cth) ss 195AI, 195AJ (literary, dramatic, and musical works), 195AK (artistic works), 195AL (cinematograph films), 195AS (reasonableness).

137 See S Ricketson and C Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, Thomson Lawbook Co, at [10.110]. See also K Garnett et al, above n 5, at [11-44]–[11-46], preferring an objective test. See further the appellate decision in *Carmina Burana*, which considered the meaning of the term 'debase' under the repealed s 55(2) of the Copyright Act 1968 (Cth) in relation to a techno remix of the *O Fortuna* movement of Carmina Burana: *Schott Musik International GmbH v Colossal Records of Australia* (1997) 75 FCR 321; 145 ALR 483. Hill J (in minority) preferred an objective test, and noted at FCR 333 that '[a] reasonable person, in my view, would distinguish the techno version from the original as different in style and approach, while recognising that the techno version in no way detracted from the original'. Wilcox J held that a subjective test was required, but noted at FCR 324 that '[i]t is difficult to think an adaptation that has its own integrity could be so characterised, even if it is musically inferior and however radical or distasteful (to some) it may be.' Similarly, Lindgren J favoured a subjective test, but held at FCR 338 that 'an arrangement will be less likely to be a debasement where, as here, it is an arrangement which "makes available" the original musical work to the musical tastes of a different period of time or of a different subculture, or (as here) of both, and which thereby acquires its own integrity'.

138 Christopher Aide argues that romantic theory justifies the approach taken by the court in *Snow v Eaton Centre*, where the court indicated 'that if the author of a work was not irrational, then the author's word on the matter was sufficient': C Aide, 'A More Comprehensive Soul' (1990) 48(2) *Uni of Toronto Faculty of L Rev* 211 at 226: cf P Loughlan, 'The Right of Integrity: What is in that Word Honour? What is in that Word Reputation?' (2001) 12(4) *AIPJ* 189 at 195, arguing that:

> The words [prejudice to honour or reputation] should ... be given their full force, incorporating a fully objective test for derogatory treatment, and neither read down nor

can be reasonable excuses for derogatory treatment.[139] In fact, the opposite result would be absurd. Parody and satire are stinging art forms — it is likely that many works of this kind will be prejudicial to the honour or reputation of the original author. It would seem highly counter-intuitive for parliament to introduce broad exceptions to copyright infringement for parody and satire if a significant proportion of parodies and satires are likely to be restrained by the operation of the moral right of integrity. Interpreted this way, the interoperation of both moral rights and economic rights has the potential to provide a regime which is fair and beneficial to all authors — providing the ability to reinterpret existing expression but limiting dealings which are unreasonably harmful to their personality interests.[140]

Conclusion

Until very recently, Australian users of copyright material have had very little legal certainty in creating parodies and satires. The new exceptions to copyright infringement have the potential to significantly promote the balance in copyright law between the rights of copyright owners and the ability of new creators to create. The use of copyright material for parody and satire depends upon an exception to infringement because of the reluctance of copyright owners to license such uses. Without such an exception, the uses which are granted licences will typically only be the safe or uncritical uses which add little to public discourse. The Australian government's recognition of this important principle is a significant step forward in Australian copyright law. The extension of the defence beyond parody to include satire, if interpreted broadly, will avoid duplicating the great difficulties that courts have had in interpreting the fair use defence in the United States. Because copyright material is no more likely to be made available under licence for satire than it is for parody, the inclusion of satire in the defence has the potential to greatly enhance the ability of Australians to engage in healthy public discourse.

In order for the potential raised by the new exceptions to be realised, it will be crucial for Australian courts to interpret the exceptions broadly and in line with the objects of copyright law. This article argues that copyright law should not be used as a tool to stifle creativity, but that it must instead be focused on protecting the real value of copyright material. The question of fairness should be resolved with a critical eye to the realities of creative expression and licensing in Australia. Uses of copyright material which are merely substitutable for the original works should rarely be protected under the new

---

glossed over by the courts, despite the persuasive arguments which will undoubtedly be made to the contrary in the hard cases which lie ahead.

139 See K Giles, 'Mind the gap: parody and moral rights' (2005) 18(5) *AIPLB* 69 at 72; Brennan, above n 34, citing Commonwealth Attorney-General's Department, *Proposed Moral Rights Legislation for Copyright Creators*, Discussion Paper, AGPS, Canberra, June 1994, p 49; Sainsbury, above n 11.

140 In a recent article, Maree Sainsbury, above n 11, at 317 notes that while there is little certainty in this area: '[t]he law is drafted with enough flexibility to be applied in a way such that moral rights cannot be used to protect the author's ego and stifle criticism of his or her work and the fair dealing defence cannot be used in relation to parody of satire which is damaging to the author's honour and reputation.'

exceptions for parody and satire. On the other hand, uses which are true parodies or satires are unlikely to damage the market for the original work, and should generally be permissible. When considering market harm, courts should exclude harm caused by legitimate criticism, and should read down claims of lost potential licensing revenue in light of a general aversion of copyright owners to licence parody and satire.

The introduction of the new defences for parody and satire come at a very welcome time in Australian copyright law, which has exhibited very visible signs of straining under the pressures of heavy enforcement and restrictive licensing practices. The new defences provide much needed breathing space for Australian creators, and a broad interpretation would ensure that some balance is returned to copyright law. Achieving this balance is of paramount importance to ensure not only that authors continue to have an incentive to create, but that the costs of creativity are not prohibitively high. There remains a large gap in copyright law which prevents users of copyright material from creating non-humorous transformative uses, such as remixes and mashups, but this new exception is certainly a step in the right direction.