A Paradise for Parodies: The need to introduce a defence of parody to the Copyright Law of New Zealand

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Introduction

Parody is a cultural phenomenon and has long since been a significant vehicle for creative expression. However, despite the societal, artistic and cultural value parodies have, copyright law extinguishes them from legal protection. It is the unusual dichotomous nature of parody, in that a parodist is both a user and creator that deems parody a problem for copyright law. As a user, a parodist will necessarily engage in the substantial taking of another's material to make their parodying effect recognisable. When a parodist takes these elements of the parodied work, this combination is seen simply as a derivative work. Copyright law, for good reasons, assigns the copyright holder the exclusive right to make and sell derivative works. Thus parody is deemed prima facie infringement of copyright. As a creator, a parodist seeks to convey a new and original expression through producing a work of incongruity between itself and the source work. Not only does the clash of parody and copyright cause disquiet, but also the disputed definition of parody is problematic. The task of understanding the boundaries and scope of parody has caused much judicial debate.

Various jurisdictions have acknowledged parody as an art form worth protecting. The United States, Canada, Australia, and most recently the United Kingdom have recognised the importance of parody through affording them statutory protection. In doing so, each jurisdiction have sought to strike an adequate balance between an author's right to exclusive control of their work, and the public interest in the use of their work. Through the introduction of a specific defence for works of parody, the clash between parody and copyright law is resolved.

However, while these jurisdictions have admirably made this legal shift, I contend that each have failed to do two key things: i) accommodate for all valuable forms of parody, and ii) provide adequate guidance as to the application of the defence. This dissertation therefore advises how these failings can be avoided should the defence be adopted in New Zealand.

This dissertation aims to convince the reader that a defence of parody should be introduced to the copyright law of New Zealand. The impetus behind arguing for an introduction of the defence is to properly recognise the social benefits that arise from the dissemination of parodies. The creativity a parodist injects into a previous work deserves legal recognition for it is a valued form of original expression. A further aim of this dissertation is to advise how New Zealand can avoid the misguided interpretation of parody observed in other jurisdictions.

Chapter one of this dissertation explores the cultural conceptions of parody that are reflected in the legal conceptions that have derived. The Chapter goes on to show why the incorporation of a defence of parody in New Zealand's copyright law is justified. The problematic relationship between parody and copyright law is then examined.

Chapter two dissects the contested legal conceptions of parody and how they have been harnessed in varying jurisdictions. Chapter two importantly extracts the concepts that the law should mandate as worthy of legal protection. In critically evaluating each legal concept, a legal conception for New Zealand is fashioned.

In my closing chapter, I share the defence I recommend New Zealand should adopt. The defence adequately affords parody legal protection, while ensuring such protection does not unacceptably encroach on the rights of copyright holders. The test caters for the fact that over-protection of parody lies contrary to the underlying policies of copyright law, while acknowledging that under-protection of parody is a disservice. It is a delicate balance to strike, however I believe my defence and envisaged application of the defence achieves this balance. In doing so, parodists are afforded the legal paradise they deserve.

Chapter One: The problem with parody

Introduction

The aim of this chapter is to illustrate why and how the lack of legal protection to works of parody is a problem. First, I will explain the cultural conceptions of parody in order to grasp the varying forms parody can take. These conceptions are important as they form the basis for the legal conceptions explored in Chapter two. I will then discuss why parody is valuable and therefore constitutes justified use of copyright material. Following this, the chapter demonstrates how parody clashes with the law of copyright, and thus the unsatisfactory position of our copyright law is established.

A. Parody culturally

Simon Dentith said that, "the discussion of parody is bedevilled by disputes over its definition."[1] This statement not only holds for parody culturally, but also legally.
The disagreement as to how parody is understood is due to its wide application, and differing national usages.[2] As a result, the derived conceptions of parody lie on a spectrum. Literary theorist Linda Hutcheon alluded to this spectrum when she said: "what is remarkable about modern parody is its range of intent – from the ironic and playful to the scornful and ridiculing".[3] The conceptions of parody can be divided into three groups: target, neutral and humorous instances of parody. In doing so, the said spectrum can be understood.

Etymologically speaking, parody originates from the Greek word *paroidia* which is a compound of two words: *para* and *odê*.[4] One translation of *para* means 'counter'. As such, schools of thought have held ridicule, distortion and mockery as essential elements of parody.[5] This view has penetrated the popular perception of parody

[1] Simon Dentith *Parody: The New Critical Idiom* (Routledge, New York, 2000) at 10.
[2] Dentith, above n 1, at 10.
[3] Linda Hutcheon *A Theory of Parody: The Teachings of Twentieth-century Art Forms* (University of Illinois Press, 1985) at 6.
[4] Burr, "Artistic Parody: A Theoretical Construct" 14Cardozo Arts and Entertainment Law Journal65 at 72: *para* means beside, alongside, near; and "odê" mean 'song'.
[5] Christian Rütz "Parody: A Missed Opportunity?" (2004) 3 I.P.Q. 284 at 286.

reflected in the dictionary definition that defines parody as a "specific work of humorous or mocking intent, which imitates the work of an individual author … so as to make it appear ridiculous."[6] This concept interprets parodies as targeting the original, and has been coined 'target' parodies.[7]

Other conceptions do not insist upon targeting of the original and allow for parody to target a matter beyond the scope of the original. This understanding often blurs parody with its sibling, satire. In response to this blurring, Margaret Rose asserts that parody employs the original "as a constituent part of its own structure" but does not need to come at the expense of the original.[8] By contrast, satire does not depend on the original and is more for the purpose of ridicule. Thus, while parodies and satire may both criticise something beyond the source work, a parody will necessarily depend on the source, whereas a satire merely borrows the source work.[9]

Then there are some definitions that do not insist upon criticism at all – the neutral instances of parody. This conception derives from an alternative translation of the Greek word '*paroidia'* as meaning 'a song sung alongside another'. On this account, a neutral relationship between the parody and the original is depicted.[10] This neutral conception of parody is also found among Roman literature where the term parody was used "to refer to a more widespread practice of quotation, not necessarily humorous, in which both writers and speakers introduce allusions to previous texts."[11]

Other theorists value parody primarily for their contribution to humour and entertainment. Rose employed this thought when she defined parody as the "comic refunctioning of performed linguistic or artistic material."[12] Rose also stresses that the

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[6] Ellen Gredley and Spyros Maniatis, "Parody: A Fatal Attraction? Part 1: The Nature of Parody and its Treatment in Copyright" (1997) 19 Eur. I.P. Rev. 339 at 341.
[7] Michael Spence, "Intellectual Property and the Problem of Parody" (1998) 114 Law Q Rev. 594, at 594.
[8] Margaret A. Rose, *Parody: Ancient, Modern and Post-modern* (Cambridge University Press, Cambridge, 1993) at 81. Rose also explains that it is the incongruity between the recognisable original and the re-creation of that work achieves parodic purpose.
[9] Rose, above n 8, at 81.
[10] Rütz, above n 5, at 286.
[11] Dentith, above n 1, at 10.
[12] Rose, above n 8, at 52.

comical side of parody has been its primary identifier since its earliest introduction in ancient Greece.[13]

Culturally, defining parody is problematic. On one end of the spectrum theorists require parody to target and critique the original work. Others accept targeting of something beyond the source work. Alternatively, a parody may not need to target at all, and instead may be a source of entertainment and humour. The only aspect of congruity among these conceptions is that parodies closely imitate the source work for a purpose.

B. Parodies as a justified use of copyright material

While the definition of parody is contestable, the value that parody has as an important means of creative expression is not. This dissertation argues that a defence of parody should be introduced into the copyright law of New Zealand. It is therefore important to take time and clarify why parody is an expression worth protecting in the eyes of the law.

Introducing a parody defence is justified and this argument is substantiated based on the claim that the defence of parody promotes freedom of expression. This fundamental democratic right is one of the most cited justifications for the parody defence. Particularly, freedom of expression is said to underpin the development of parody law in America[14] and was a primary reason for the introduction of the defence of parody and satire to Australian copyright law in 2006.[15]

The discussion first examines freedom of expression in New Zealand and its force in copyright law. I then illustrate how the defence of parody, as a form of creative expression promotes freedom of expression. Particularly, this creative expression has value in two circumstances: i) in society generally and ii) as advancing culture.

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[13] Rose, above n 8, at 52.
[14] Rütz, above n 5, at 309.
[15] Commonwealth , *Parliamentary Debates*, House of Representatives, 19 October 2006, 2 (Philip Ruddock, Attorney-General) as cited in Anna Spies "Revering Irreverence: A Fair Dealing Exception for both Weapon and Target Parodies" (2011) 34(3) UNSW Law Journal 1122 at 1136).

i) Freedom of expression

The right to freedom of expression is statutorily recognised under the New Zealand Bill of Rights Act 1990.[16] The 1990 Act does provide that the rights afforded by the Act do not prevent Parliament from passing laws inconsistent with those rights, nor do they repeal previous statutes.[17] However, the 1990 Act states that all statutes are to be interpreted in a manner consistent with the rights afforded where possible.[18]

The importance of the right is further reflected in the widespread approach of the judiciary to factor in freedom of expression when deciding whether or not to grant injunctions in copyright cases. Importantly, Lord Phillip accepted that while freedom of expression might not be necessarily in the finding for or against copyright infringement, it might be an important factor in the Court's exercise of its discretion to grant an injunction.[19]

Through statutory recognition of the right and judicial regard to the right, we see that the right carries significant weight. Worth disclosing is that this dissertation does not seek to use the right of freedom of expression as justification to grant unfettered power to parodists over copyright holders. The law has and should continue to temper freedom of expression with the rights of copyright holders. As Blanchard J stated, "[s]ection 14 does not provide a guarantee of a right to appropriate someone else's form of expression."[20]

Having established freedom of expression as a valued right in New Zealand, I will now illustrate specifically how parody, as a creative mode of expression, promotes this right.

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[16] New Zealand Bill of Rights Act 1990 (NZBORA), s 14 which states: "Everyone has the right of freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form".
[17] New Zealand Bill of Rights Act 1990, s 4.
[18] New Zealand Bill of Rights Act 1990, s 5.
[19] This assertion echoes Human Rights Act 1998 (UK) s 12(4) which requires courts to consider freedom of expression when the decision to grant injunctive relief is approached.
[20] *Televisions New Zealand Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91, 95 (HC) per Blanchard J.

a) Creative expression has societal value

Society values freedom of expression for it supports the communication of original and creative expressions. Regardless of the conception adopted, parodies are a form of creative expression. It follows that these creative expressions further promote freedom of expression and are valued by society. Specifically, these creative expressions are valued for their productive nature and participation in social dialogue.

Regardless of the conception adopted, parodies are productive in that they produce a work of creative originality. It is this productive nature of parodies that society values. Mark Rose alluded to the productive nature of works in general, when considering the underpinning of copyright law. The idea portrayed is that cultural innovations and developments are not the creations of something entirely new, rather they involve combining, modifying or extending in a new way, works that already exist. It is this drawing upon an available pool of already existing cultural innovations that parodies do. New works only exist as a result of a tradition that precedes them, even if this resource is used to reflect them in a new direction.[21] This new direction is the aim of a parodist, and in doing so their work is productive.

This productive form of creativity was part of a key rationale behind the recommendation of the Hargreaves Review to introduce the parody defence into the law of United Kingdom. Professor Hargreaves stated, a "healthy creative economy should embrace creativity in all its aspects."[22] The economy benefits from the type of creativity involved in imitation.

In terms of social dialogue, critical parodies are a form of healthy, social and artistic criticism, and excluding parodic criticism silences this powerful expression.[23] Criticism is therefore a valued and important element of free speech and we ought to protect "works we have reason to fear will not be licensed by copyright holders who

[21] Mark Rose *Authors and Owners: The Invention of Copyright* (Harvard University Press, Cambridge, 1993) at 3.
[22] Ian Hargreaves *Digital Opportunity: A Review of Intellectual Property and Growth* (United Kingdom Intellectual Property Office, May 2011) at 5.37.
[23] Spies, above n 15, at 1138.

wish to shield works from criticism".[24] Particularly satirical items are useful in that they add to political, social discussion.[25] Society also values parody for their humorous expression and the entertaining dialogue that they provide, and to limit parodies is to unduly deprive society of this.[26]

The societal value in creative expression is legally significant as fair dealing provisions seek to ensure socially valuable uses of copyrighted works are allowed.[27] The basic premise of allowing works that would otherwise constitute copyright infringement is that there is a social value that outweighs the harm of infringement. This relates to the *Newsmonitor* passage regarding freedom of expression and how this must be tempered with the inherent rights of copyright holders. I believe that the socially valued dissemination of parodies outweighs the harm of infringement, and thereby freedom of expression is appropriately being balanced with the copyright holders interests. This view has been judicially affirmed when in analysing the potential harm to the plaintiffs market, the public benefit in allowing artistic creativity and social criticism to blossom outweighed the plaintiffs' potential harm suffered.[28]

Additionally, we will see that copyright law seeks to balance the incentive to create and disseminate creative expressions, with the public interest in accessing and using these works of creation. In doing so, copyright law can appropriately provide social benefit and value. If copyright holders can prevent parodic creations, this legally allows the limited legal monopoly afforded to these holders to stymie original expression and alternative views. Such does not harmonise with the objective of copyright law.

To conclude, the current standpoint of New Zealand law sits parody antithetical to the social values protected by copyright law. This is unsatisfactory, for parody is a form of creative expression that promotes freedom of expression. Freedom of expression is

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[24] *Campbell v Acuff-Rose Music* 510 US 569 (1994) at 597, per Kennedy J.
[25] Melissa de Zwart "The Copyright Amendment Act 2006: The New Copyright Exceptions" (2007) 25(4) Copyright Reporter 186. De Zwart argues that a parody of social norms and practices may have more public benefit than a parody of a specific work.
[26] Maree Sainsbury "Parody, satire and copyright infringement: The latest addition to Australian fair dealing law" (2007) 12 MALR 292 at 302.
[27] Anne Fitzgerald and Brian Fitzgerald *Intellectual Property in principle* (Lawbook Co., Sydney, 2004) at 168.
[28] *Mattel Inc. v Walking Mt. Prods.* 353 F 3d 792 (9th Cir 2003) at 806.

valued in society and has been recognised as a factor to balance with the rights of copyright holders. In denying explicit protection for parodies, the law inappropriately privatises forms of expression and creative freedoms are curtailed.[29]

b) Creative expression is important for culture

Freedom of expression is important for culture as culture is enhanced by the freedom to express and communicate creative ideas. Parody, as a creative expression, is therefore part of this cultural sphere. In denying parodies legal protection, freedom of expression fails to extend to this important construct of culture. Further, Gibson asserts in her book, that creativity imports cultural distinction into the law of intellectual property.[30] Frankel acutely phrases the relationship between intellectual property law and culture when she says:[31]

> The parameters of intellectual property law are essentially a cultural construct. ... When intellectual property law is seen as a problem for culture, rather than supportive of it – then the law has a credibility problem.

In denying parodies this protection, New Zealand law as Frankel would put it, is a problem for parodists and thus a credibility issue arises.

Parody is specifically prevalent in digital culture. The Digital Age has integrally influenced culture and has become its own niche cultural anatomy. The Digital Age refers to a new emphasis on electronic manipulation of information that influence the way artistic culture is exchanged globally. We live in a golden age of modern pop parody - every news announcement often comes a parodic Twitter account.[32] Virtual reality has even emerged as a recognised artistic practice. Consequentially, global dissemination of parody has accelerated at such an extraordinary pace, that almost nothing can be sacred. In our consumer culture, those universally recognisable images

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[29] Kembrew McLeod *Freedom of Expression: Resistance and Repression in the Age of Intellectual Property* (University of Minnesota Press, Minneapolis, London, 2007) at 9.
[30] Johanna Gibson *Creating Selves: Intellectual Property and the Narration of Culture* (Ashgate Publishing Limited, England, 2006) at 69.
[31] Susy Frankel "From Barbie to Renoir: Intellectual Property and culture" (2010) 41 VUWLR at 9.
[32] William McGeveran "The Imaginary Trademark Parody Crisis (and the real one)" (2015) 90 WALR 713 at 713.

and brands make up the most targeted for a parodist. Mixed media parodies and satires are hugely popular.[33]

The advancement in technology and availability of video editing software and video hosting makes it much easier for artists with minimal resources to engage in the exercise of remixing multimedia works. The impact of video parody was an exemplar justification to the introduction of the defence of parody as per The Hargreaves Review.[34]

The Digital Age also spurred public support for works of parody by the Creative Freedom Foundation in New Zealand. The point was made that the Internet has radically changed the way we communicate, contribute, and access information to the cultural spheres. A culture of remixes and 'mash-ups' has been created, of which parodies play an important role. By not addressing the cultural reality of copying, New Zealand is rendering important artistic works illegal, hindering culture and thus intruding on freedom of expression.[35]

To conclude, parodies, as a form of creative expression, advance culture. Parodies particularly play an important role in our digital culture, which has allowed for new forms of artistic expressions to emerge. This is important legally as a relationship undoubtedly exists between intellectual property law and culture. Intellectual property law ought to support culture, and should nurture the dissemination of parodies by affording legal protection to them.

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[33] Jani McCutcheon "The new defence of parody or satire under Australian copyright law" (2008) 2 I.P.Q. 163 at 163.

[34] Ian Hargreaves Digital Opportunity: A Review of Intellectual Property and Growth (United Kingdom Intellectual Property Office, May 2011) at 5.35 stated that "Video parody is today becoming part and parcel of the interactions of private citizens, often via social networking sites, and encourages literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy. Comedy is big business."

[35] "Parody and Satire" Creative Freedom NZ <http://creativefreedom.org.nz/goals/parody-and-satire/>.

B. Parody and Copyright

This dissertation seeks to argue that parody deserves recognition and protection under the copyright law of New Zealand. Despite the value parodies have, our framework of copyright law deems parody prima facie infringement of copyright. The following explains why this is.

i) Copyright law in New Zealand.

In order to understand why parody is such a threat to copyright law, it is instructive to explore structural framework of copyright law. Copyright law serves to provide a set of exclusive property rights to owners of copyright worthy material to control the production and use of that work. Moreover, copyright vests in the author the moment the work is created. Such exclusivity provides economic incentive for authors to create and disseminate their expressive works. On a functional level, copyright law seeks to balance this incentive with the public interest in accessing and using these works of creation. Said balance is not achieved if the law stifles creativity due to lack of clarification on the extent to which users can copy certain works.[36]

In order to attract copyright in New Zealand, a work must be "original". It is the author's independent "skill, labour or judgment" expended in creating the work that determines the extent of which the work is original.[37] Copyright subsists in an original provided it falls within one of the following categories: literary, dramatic, musical and artistic works.[38] A key notion to understand is that copyright law does not provide monopolies over the ideas, as affirmed by Wild CJ where his Honour stated: [39]

> Copyright protection is given to literary, dramatic, musical and artistic works and not to ideas, and therefore it is the original skill or labour in execution, and not the originality of thought which is required.

It is this distinction that is reflected in *Newsmonitor* regarding how to temper freedom of expression with copyright law.[40] The view is that while it is true that copyright law

[36] Susy Frankel, *Intellectual Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2011).
[37] *Ladbroke (Football) Ltd v William Hill* [1964] 1 All ER 465.
[38] Copyright Act 1994, s 14(1) (a)-(f).
[39] *Martin v Polypas Manufacturers Ltd* [1969] NZLR 1046, at 1050.
[40] See Jo Oliver "Copyright, Fair Dealing, and Freedom of Expression" 2000 19 NZULR 89.

involves a property right that protects expressions, this property right is confined by the legitimate use of the ideas behind the expression by society.[41]

ii) Parody as prima facie copyright infringement

Infringement of copyright is divided in the 1994 Act into two categories of primary[42] and secondary infringement.[43] This is the most often relied upon ground of infringement[44], and would be the ground for a claim against works of parody. To establishment infringement by copying, the leading test in New Zealand is stipulated in *Wham-O* where Davidson CJ set down the following criteria: i) the reproduction must either be of the entire work or o a substantial part; ii) sufficient objective similarity between the infringing work and the copyright work (or a substantial part of the copyright work) must be present; and iii) a causal connection in that the copyright work must be the source of which the infringing material derived.[45]

Due to the limbs of this test, parody constitutes prima facie infringement. A parody transforms a significant part of an original work into a derivative work by distorting or closely imitating it. Therefore parody, by its nature, will reproduce either the entire work or a substantial part of it. Thus satisfying the first limb of the *Wham-O* test. As to the second limb, in order for achieve parodic purpose and be recognised by an audience, a parody must rely heavily on the original work so as to objectively appear as similar to it. The third limb too is satisfied as a parody is directly premised on the work it copies, such that it simultaneously conveys that it is the source work and that it is not the source work.[46] Therefore, parody directly threatens the central restrictions created by copyright law and will be prima facie infringement.

When prima facie infringement is established, the infringer can look to defences for recourse. I will now examine the possible defences available and will highlight the clash between these defences and works of parody.

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[41] Frankel, *Intellectual Property in New Zealand*, above n 36, at 236.
[42] Copyright Act 1994, s 16.
[43] Copyright Act 1994, ss35-39.
[44] Frankel, *Intellectual Property in New Zealand*, above n 36, at 262.
[45] *Wham-O MFG Co v Lincoln Industries* [1984] 1 NZLR 641, 666 (CA) per Davidson CJ.
[46] *Campbell v Acuff-Rose Music*, above n 24, at 579.

iii) Defences to claims of copyright infringement

The limits placed on the rights of copyright owners strives to achieve the balance aforementioned: the balancing of maintaining an incentive to create with the public interest in making use of these creative works. The two defences that may be claimed are explored below.

a) Fair Dealing

The primary source of defence are those located in the fair dealing provisions.[47] A finding of fair dealing legitimises what otherwise would constitute copyright infringement.[48] The defence allows one to make fair use of another's copyrighted material for the purposes of criticism, review and news reporting[49] as well as research and private study.[50] These provisions are how the law attempts to ensure socially valuable uses of copyright works are allowed.

The test of what is 'fair' is fact specific.[51] The factors to take into account are those listed under section 43(3) of the 1994 Act. The test is five-pronged and requires consideration of: the purpose of the copying; the nature of the work copied; the effect of the copying on the potential market for or value of the work; and the amount and substantiality of the part copied."[52]

b) Public interest

One may also claim that use of copyright material is in the public interest.[53] Due to lack of litigation in New Zealand regarding the defence, it is likely that our courts would view United Kingdom authorities as highly persuasive.[54] In the case of *Lion Laboratories* it was suggested that the public interest must be in the exposure of some misdeed or potential wrong.[55] Although, in *Ashdown v Telegraph Group Ltd* it was considered that categorising situations in which the defence might be applied is an

[47] Copyright Act 1994, ss 42, 43.
[48] Frankel, *Intellectual Property in New Zealand*, above n 36, at 348.
[49] Copyright Act 1994, s 42.
[50] Copyright Act 1994, s 43.
[51] *Hubbard v Vosper* [1972] 2 QB 84, at 94 per Lord Denning.
[52] Copyright Act 1994, s 43(3).
[53] Copyright Act 1994, s 225(3).
[54] Frankel, *Intellectual Property in New Zealand*, above n 36, at 339.
[55] *Lion Laboratories Ltd v Evans* [1985] QB 526 (EWCA).

unrealistic task, and that the defence should be more widely interpreted.[56] However, the Court did note that the defence would not absolve most copyright infringement.

iv) The conflict between parody and the defences to copyright infringement

We can discard the public interest defence as being a sound option for a parodist. As observed in *Ashdown*, it will be rare for the public interest to justify the copying of copyrighted material.[57] Thus freedoms to express oneself through parodic work will unlikely supersede the rights afforded under the 1994 Act.

The prospective option for a parodist is to rely on the fair dealing defence of criticism and review. However, while parody is acknowledged as a culturally appropriate form of criticism, parody is not so congruent with this defence for four reasons: i) a parody will almost invariably copy a substantial part (if not all) of the copyrighted material; ii) commerciality is almost always going to be a part of a parody's purpose, as opposed to being purely for the purposes of criticism; iii) a parody while sometimes will comment on the work it imitates, will also often comment something else; and iv) the defence does not account for all conceptions of parody.[58]

If a parody were to try shelter itself under our fair dealing provisions, it would need to portray itself as being strongly critical, and have to try and take as little as possible. The test further ignores the fact that not all parodies will be critical.

v) Parody and Moral Rights

Another area of our Copyright law that confuses its relationship with parody is that of moral rights. Under the 1994 Act, authors have certain moral rights in relation to their copyrighted material that may too be infringed. The enactment of moral rights in New Zealand law sought to redress the balance between the rights of creators and authors and publishers as disseminators.[59] The Act complies with the key moral rights provided for in the Berne Copyright Convention 1886 to which New Zealand is a contracting state.[60] Such moral rights are as follows: the right of attribution and the

[56] *Ashdown v Telegraph Group Ltd* [2001] 3 WLR 1368; 4 All ER 666, at [58].
[57] At [59].
[58] Frankel, *Intellectual Property in New Zealand*, above n 36, at 354.
[59] Frankel, *Intellectual Property in New Zealand*, above n 36, at 299.
[60] Frankel, *Intellectual Property in New Zealand*, above n 36**, at 299.**

right to object to derogatory treatment of the work.[61] The Act additionally provides rights against false attribution and for the privacy of certain photographs and films.[62]

Parodies pose a potential clash with the moral rights of the original creator, particularly the right against false attribution and the right to object to derogatory treatment of the original work. This will be further explored in Chapter 3.

Conclusion

While parody pervades in most forms of the creative arts, the meaning of the term has been subject of much debate. It is due to the varying cultural conceptions that differing legal conceptions have derived as jurisdictions struggle to pinpoint the conceptions to mandate as necessary. However, regardless of what conception is adopted, parodies have a social value that outweighs the harms of copyright infringement. What results is both a normative and legal tension. The legal tension is that a parodist cannot fit their claim within the framework of our fair dealing provisions. Broader, in normative terms, a tension exists as parodies are socially and culturally valuable, yet we cannot afford them the protection they deserve.

[61] Copyright Act 1994, ss 94-101.
[62] Copyright Act 1994, ss102-105.

Chapter Two: The legal shades of parody

Introduction

The preceding chapter introduced the varying cultural conceptions of parody. This chapter explores the legal disagreements as to what features of parody are necessary in order to justify its protection under copyright law. We will see that the legal debates regarding parody mirror the aforementioned cultural conceptions. The disputed characteristics are threefold: i) whether a parody ought to criticise or comment; ii) whether the parody must be a 'target' parody; and iii) whether parodies must be humorous. Each discussion will begin with illustrative examples that show how other jurisdictions have harnessed each feature. The discussion then explores the necessary or unnecessary placement of each feature in the legal conception of parody in New Zealand.

A. To criticise or comment

An often-perceived element of parodies is that they convey a form of criticism or commentary. Note that when I discuss parodies as having an element of criticism/commentary, I am talking about parodies that find fault in the subject of its comment.[63] The illustrative examples I will use are the law of United States and Canada.

i) United States

In the United States, bar criticism/commentary, a work fails to constitute a legal parody.[64] While not specifically mentioned, parody is recognised under the 'criticism limb' of the 'fair use' provision. The United States' fair use doctrine is largely similar to the New Zealand fair dealing doctrine, however primarily differs in that the categories of works protected are listed inclusively.[65] Such has allowed for the United

[63] As opposed to parodies which commend the subject of its comment.
[64] *Campbell v Acuff-Rose Music*, above n 24.
[65] Compared to the exhaustive list in New Zealand. See Copyright Act 1994, ss 42, 43. Copyright Act 17 USC § 107 provides that "fair use of a copyright work for purposes such as

States courts to expand the 'criticism' or 'comment' limb to accommodate for parody.

The following cases demonstrate the application of the criticism/commentary limb in the context of parodies.

a) Campbell v Acuff-Rose

The seminal case of *Campbell* is the first opinion by the Supreme Court on whether parody constitutes fair use.[66] It is therefore worth exploring the case in detail. The case involved a parody of Roy Orbison's song "Oh Pretty Woman" composed by rap group 2 Live Crew and was titled "Pretty Woman". The parody used the distinctive opening bass riff of the original song and lyrics of the first line. Beyond this, the parody was markedly different to the original. After nearly a quarter of a million copies of the parody had been sold, Acuff-Rose sued 2 Live Crew for copyright infringement.

At the district court level, it was held that the 2 Live Crew's work was a parody and constituted fair use for its commentary and lack of excessive taking.[67] However, the Sixth Circuit Court of Appeal reversed the District court finding, concluding that the commercial nature of 2 Live Crew's rap parody rendered it presumably unfair.

The Supreme Court held that the Sixth Circuit erred on the basis of commercial purpose. Souter J, writing for a unanimous court, confirmed that the fair use doctrine cannot be simplified by "bright-line" rules, and held a commercial purpose cannot be presumed unfair.[68] The court defined parody as "...the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's work."[69] The court further adopted the view of Evans J in *Metro-Goldwyn v Showcase Atlanta Cooperative Productions.*[70] Evans J insisted on a requirement of

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criticism, comment, news, reporting, teaching (including multiple copies for classroom use), scholarship, or research does not infringe copyright."

[66] *Campbell v Acuff-Rose Music*, above n 24.

[67] At 594: the Court specifically said that the parody plays on the words of the original in a way that shows how "bland and banal" the original song was. The court went on to find that the rap group did not appropriate the original any more than necessary.

[68] At 577.

[69] At 580.

[70] *Metro-Goldwyn, Inc. v Showcase Atlanta Cooperative Productions, Inc* 479 F. Supp. 351,

criticism and stated if there is no form of critical comment or statement about the original, then the parody lacks social value beyond its entertainment function. Further, it is favourable for works of parody to have this social value otherwise the law would be permitting the underlying purpose of copyright law to be negated.[71]

The Court added:[72]

> [I]f…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 diminishes accordingly…and other factors, like the extent of its commerciality, loom larger.

As to the degree of criticism/commentary, Souter J asserted that while a critical element of 2 Live Crew's song existed, it is not for the Court to go the step further of evaluating its quality.[73] The Court said it would be a dangerous task for persons trained only to the law to make a final judgment on the worth of a work.[74]

The Supreme Court asserted that 2 Live Crew's song can be taken to "comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies."[75] The Court acknowledged the criticism/commentary criterion was barely met when they said they could not "assign a high rank to the parodic element…" to the work.[76] Nonetheless, the Court held that the work was a parody."[77]

We see that the significant weight placed on criticise or comment criterion. However, the degree of criticism or commentary need only meet a low threshold.

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357 (ND Ga. 1979).

[71] *Campbell v Acuff-Rose Music*, above n 24, at 566. The underlying purpose being to protect from unfair exploitation by others.

[72] At 580 where the Court explained that the threshold question is merely "whether a parodic character may reasonably be perceived."

[73] *Campbell v Acuff-Rose Music*, above n 24, at 582 per Souter J.

[74] At 582 citing Holmes J in *Bleistein* v. *Donaldson Lithographing Co.,* 188 U. S. 239, 251 (1903).

[75] At 584.

[76] At 583.

[77] At 583, held that "reasonably could be perceived as commenting on the original or criticising it, to some degree.

b) Roger v Koons

An example of where a case failed for lack of criticism or commentary is that of *Roger v Koons*.[78] The original work, "Puppies", was a photograph of a couple seated on a bench with eight German Shephard puppies. The photograph was well known and was licensed for use on notecards. Koons imitated the photograph in the form of a painted sculpture for an exhibition called "The Banality Show". The imitation added exaggerated noses to the puppies, and flowers to the hair of the couple. The Court noted that parody and satire are valued and encouraged forms of criticism and held Koon's work was not a parody for it lacked this social and artistic comment.[79]

What can be deduced from the United States case law is that treatment of earlier work that is merely funny, bar any critical edge, will not constitute a legal parody. However, as from *Campbell,* the degree of criticism/commentary need not be high.

ii) Canada

Canada has a fair dealing doctrine that expressly permits works of parody and satire.[80] The defence is yet to be applied by Canadian courts, however in examining the case law that led to the introduction of the defence, we can infer that criticism/commentary is a required feature.

The following three cases draw on the journey of reform for Canadian law and the recognition of critical parodies as worthy of protection.

a) Michelin

Michelin was the first case to expressly address whether the fair dealing defence protected parody.[81] The defendant had distributed leaflets depicting CGEM

[78] *Rogers v Koons* 960 F 2d 301 (2nd Cir 1992).
[79] At 310-312.
[80] Copyright Act RSC C 1985 C-42, s 29. In June 2012, the House of Commons passed the Copyright Modernization Act and received Royal Assent on 29 June 2012. Section 29 established that fair dealing for the purposes of parody or satire would not infringe copyright. Section 29.21 set out the requirements for permitting 'user-generated content' which may cover parodies that do not fail under the fair dealing exception under section 29.
[81] *Ce G nrale des Etablissements Michelin -Michelin & C" v. CAW Canada* (1996) 71 CPR (3d) 348 (FCTD).

Michelin's corporate logo called the "Michelin Tire Man". The leaflets were to assist a union in organizing a hostile campaign at CGEM Michelin plants. The leaflets illustrated two Michelin workers, one called Bob, ready to be unsuspectingly crushed by the other, a Michelin Tire Man. A caption from Bob's mouth said, "Naw, I'm going to wait and see what happens". Below was a plea by CAW Canada "Don't wait until it's too late! Because the job you save may be your own. Sign today for a better tomorrow." Subsequent to CGEM Michelin suing for copyright and trademark infringement, the defendant claimed parody was a defence under the Canadian fair dealing provisions.

Teitelbaun J refused to read the word 'criticism' so widely as to include parody.[82] The Justice stated, "… under the Copyright Act, 'criticism' is not synonymous with parody."[83] Teitelbaum J continued to say that reading parody into the fair dealing defence of criticism would create a new exception to copyright infringement and that this was a step only for Parliament to take.[84]

b) Productions Avanti Cine-Video Inc. v Favreau

Not long after *Michelin,* the case of *Productions Avanti Cine-Video Inc. v Favreau*[85] saw the judiciary become more receptive to the idea of a parody exception. The case involved the appropriation of 'La Petite Vie', a "highly original and very well-known situation comedy…probably the most popular series in the history of Quebec television".[86] The defendant had created a pornographic film entitled 'La Petite Vite' that substantially copied the most important and original elements of the 'La Petite Vie', thereby constituted prima facie copyright infringement.

Rothman J accepted the idea that parody could act as a defence to copyright infringement in certain circumstances. Said circumstances would normally involve the humorous imitation of another's work, often exaggerated, *for purposes of* criticism or comment. The Court nonetheless found infringement as the characters, their costumes and the décor were substantially copied from the original. Importantly,

[82] At 377.
[83] At 378.
[84] At 381.
[85] *Productions Avanti Ciné-Vidéo Inc. c/ Favreau* [1999] 177 DLR. (4th) 129.
[86] At 574.

there was no attempt to disguise the appropriation. It was held that the adaptation was far from a parody of an original dramatic work, and instead was a crass attempt to gain instant public recognition without having to expend any independent creative skill.[87]

Despite the judgment of Rothman J, *Michellin* was still the only case to address fair dealing interpretation and whether such may protect works of parody.[88] However, I expect the fair dealing doctrine would be applied in harmony with Rothman J's reasoning. Namely, the comments about substantiality and the improper purpose of the defendant have the same flavour as the considerations required by the test for 'fairness'.

c) CCH Canadian Ltd. v Law Society of Upper Canada

The case *CCH Canadian Ltd. v Law Society of Upper Canada* signalled an important shift in the Canadian interpretation of fair dealing.[89] The case is not significant for parodies specifically, but more for its emphasis on the amplitude and purpose of the fair dealing defence. The respondents alleged that the Law Society had breached copyright when the Great Library reproduced copies of eleven of its copyrighted works. The Law Society maintained The Great Library at Osgoode Hall, a research library with one of the largest collections of legal materials in Canada. Library staff worked in accordance with a request-based photocopy service that allowed copies on request to be made and delivered by mail or facsimile.

Instead of interpreting the fair dealing defences restrictively like its predecessors, the Supreme Court accepted that defences to copyright infringement should be seen as users' rights. The Court came to a unanimous decision and held that the Law Society's actions were research based, fair, and therefore protected under the fair dealing provisions. The court asserted that in the interests of maintaining a proper

[87] At 575. Rothman J also draws the important distinction between parodies and works that appropriate copyrighted material to commercially exploit the success of the original.
[88] Graham Reynolds "Necessarily critical? The Adoption of a Parody Defence to Copyright Infringement in Canada" (2009) 33 Man. LJ 243 at 254.
[89] *CCH Canadian Ltd. V Law Society of Upper Canada* [2004] 1 S.C.R. 339.

balance between the interests of copyright owners and users of copyrighted material, the fair dealing defence "must not be interpreted restrictively."[90]

Following *CCH,* commentators suggested that it was possible for legal protection of parody.[91] However, subsequent instances proved that relying on litigation to ensure parody works were afforded protection was risky and that the judgment in *Michelin* proved more persuasive than the user focused approach taken in *CCH* and *Productions Avanti.*[92]

From the Canadian case law, we can deduce that criticism is an element of parody. The rejection of parody being protected in *Michelin* was due to resistance of the idea of 'criticism' extending so far as to include parody. In *Productions Avanti,* the idea of a parody defence was entertained and parody was defined as an imitation for the purposes of criticism. *CHH* is important because it insisted on a user-oriented approach to fair dealing that saw works of parody as falling within the ambit of protection provided by fair dealing.

iii) Should New Zealand require parodies to criticise/comment?

There is an undeniable value in parodies serving as a means of critical expedition. However, I contend that critical parodies are only one acceptable conception of a legal parody. Returning to the assertion by Evans J in *Metro-Gold,* the Justice correctly touched on an important rationale for protection of parodies, that parodies ought to have social value. The reality of parodies having social value was one of my primary justifications for the defence. However, I acknowledged the source of this social value deriving from more than just the presence of criticism/commentary. Rose endorsed this view when she said, "if aspects of ridicule or mockery were present these were additional to its other functions".[93] Hence, parodies are valued for more

[90] At [48].
[91] Giuseppina D'Agostino "Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K Fair Dealing and U.S. Fair Use" (2008) 53 McGill LJ 309 at 338.
[92] See *Canwest Mediaworks Publications Inc v Horizon Publications Ltd* [2008] BCSC 1609 at [15] where Master Donaldson referred to the judgment of Teitlebaum J in *Michelin* and concluded that parody is not a defence to a claim of copyright claim.
[93] Margaret A. Rose, above n 8, at 25 on the function of parody.

than their ability to criticise or comment. Specifically, non-critical parodies (those parodies that praise or commend a subject) and purely humorous parodies are worthy of protection.

Consider political parodies. There is societal value in critical and non-critical parodies as both allow for a balanced exposure of political targets. Critical/satirical parodies pieces for instance may be used to ridicule politicians, policy positions and the like. The ability to expose the faults in these targets both further creative expression and providing the opportunity for others to re-evaluate their political stance. On the other hand, non-critical parodies also have value as they serve the opposite function of reverence, and may encourage people to adopt certain political movements as part of their ethos.[94]

Non-critical parodies can also be used to appreciate creators by emphasising the meritorious features of their work. The dissemination of these parodies serve the public interest in drawing the attention of society to those artists we ought to commend and appreciate.[95]

Sociolinguist Mary Louise Pratt drew on another specific purpose non-critical parodies can serve. Pratt viewed parodies as an art of the contact zone.[96] She asserted that parodies act as a tool of self-development, helping the oppressed groups achieve autonomy as against more empowered groups. These can be non-critical, and used to artistically demonstrate culture clashes spurring discussion on power imbalances such as those found in colonialism, slavery or their aftermaths.[97] This creative expression should not be stifled for lack of critical character. This observation also acknowledges the function of freedom of expression as nurturing self-development, thus builds on my justification discussion in Chapter one.

In regarding criticism/commentary as a sufficient but not necessary criterion, the defence will be capable of protecting more than one acceptable conception of parody.

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[94] Reynolds, above n 88, at 249.
[95] Reynolds, above n 88, at 249.
[96] Mary Louise Pratt, "Arts of the Contact Zone" (1991) 91 Profession 33 at 33.
[97] Pratt, above n 96, at 37.

B. Humour

Not only of value are non-critical parodies but also are those that are intended purely for comical effect. The value of humour as a stand-alone feature of parody must not be overlooked. I will use France and Australia as case illustrations to support this claim.

i) France

France considers the purpose of parodies to be to evoke laughter.[98] Criticism without humour is not a legal parody, while parodies produced for comic effect bar criticism are readily accepted. There are two further requirements: i) substantial modification to the original; and ii) no harm to occur to the copyright holder.[99] If harm does occur, then moral rights can be invoked. The courts typically reject reliance on the parody defences if the purpose of the imitation is for mere commentary.[100]

ii) Australia

In late 2006, Australia introduced a parody and satire exception to the Copyright Act 1968.[101] Australia's fair dealing test is largely similar to that of five-factor New Zealand.[102]

Worth mentioning is in May 2005, government published its *Fair Use Issues paper* that emphasised how copyright law should undergo reform to reflect public attitudes and practices. Also stressed was the need to strike a better balance in order to

[98] Rütz, above n 5.
[99] As for the second requirement, harm includes risk of confusion with the primary work and injury or degradation to the original work.
[100] Rütz, above n 5.
[101] Copyright Act 1968 (Aus), s 41A. The exception was introduced via the Australian Copyright Amendment Act 2006. Further, s 103AA. also now provides for fair dealing for the purpose of parody or satire of an audio-visual item.
[102] Copyright Act 1994, s 43(3).

accommodate for the changing digital environment. [103]

The Australian courts are yet to apply the defence, however there is one instance where humour was placed at the forefront of the legal attitude toward parody.

a) The Fanatics songbook

In 2006 Australian cricket supporters, titled 'The Fanatics', wrote a humorous songbook that took the lyrics of well-known songs and substituted them for humorous ones. Legal action was threatened by music publisher EMI, but was later retracted.

The Australian Attorney-General, in response to the creation of the parodic songbook, suggested that humour is more valued than critique when it comes to parody. The Attorney-General said that the new parody defence will allow the "making of a fair parody of musical works…and adding some clever lyrics." The Attorney-General also compared parody with 'taking the mickey' out of someone and said that Australians have always had an irreverent streak. It was further noted how the copyright law of Australia does little to protect the way that people use others' material for the purposes of parody "in the name of entertainment." [104]

These comments of the Attorney-General certainly contrast to the position of the United States, where it is not enough for the original to be adapted for humour, no matter how creative the humour may be (albeit 'fair' use). [105] Equating parody to works that 'take the micky' and conjoining parody with pure entertainment promotes the comical dimension of parodies.

[103] Australian Government Attorney-General's Department, Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age, Issues Paper (2005).

[104] Jessica Milner Davis "Taking the Mickey: a brave Australian tradition" (August 2007) The Fine Print <http://sydney.edu.au/humourstudies/docs/FinePrintVol4_2007_20-27.pdf>.
[105] *Campbell v Acuff-Rose Music*, above n 24, at 597 per Kennedy J.

iii) Should New Zealand require parodies to covey humour?

I contend that humour and entertainment is part of what lies at the core of parodies and our legal concept of parodies should reflect this. Since Aristotle, the element of humour has been reflected in the culture of parody.[106] Recall how Rose stresses that the humorous dimension of parody has been its primary identifier since its earliest introduction in ancient Greece.[107]

Take the parody of the 'The Fanatics'. It would be a tad absurd to require that the songbook provide a form of commentary or criticism on the original musical works in order to gain legal protection. The purpose of the songbook was to 'take the mickey' out of the cricket players, not to comment on the original songs or their author.[108]

We should recognise that sometimes a parodist seeks only to entertain and evoke laughter using their creative wit. Provided that treatment of work is fair, it is sufficient for the work to serve social value in this way. In legally accommodating for these parodies, New Zealand would be reflecting the reality that parodic humour is self-sufficient. I want to stress however that my acceptance of critical and non-critical parodies earlier in this discussion still holds. Humour is a sufficient feature of parody, not necessary. We also must not forget the additional safety net, that the work must too be 'fair'.[109]

C. Parodies as targeting the original

This debate asks whether those parodies that do criticise or comment must target this criticism/commentary at the original work that it imitates or its author. Recall, these parodies are called 'target' parodies. Those that do not target the original, but more

[106] Reynolds, above n 88, at 346.
[107] Rose, above n 8, at 52.
[108] Another example of a work I envisage as coming under a parody defence is the exhibition of *Roger v Koons.* Recall that the imitation took the original photograph and added exaggerated features to the subjects of the photograph. This imitation could reasonably be perceived as a comical take on the original photograph, and certainly departs from the original. In this departure, a new and aesthetically original work was created, albeit lack of criticism/commentary. Assuming the work is fair, this is an example of a humorous parody that merits legal protection.
[109] As under Copyright Act 1994, s 43(3).

pertain to wider social criticism are termed 'weapon' parodies, also referred to as satire.[110]

The key jurisdictions I will draw on to illustrate this debate are United States and Australia. The United States more readily recognises target parodies under the fair use doctrine as opposed to weapon parodies. By contrast, the law of Australia extended their fair dealing exception for both parody and satire. Additionally, I will introduce the United Kingdom defence. While there is yet to be any cases ruling on the defence, it is important to raise the newly introduced defence for it too recognises weapon parodies.

i) United States

The distinction between 'weapon' or 'target' parodies is often applied as a threshold test in the United States. It follows that parody is a well-recognised form of fair use, provided that the parody targets the original. The following three United State cases will demonstrate how the target/weapon parody distinction has been interpreted.

a) Campbell

The target/weapon parody distinction was a crucial issue under the 'purpose and character of the use' fair use factor. In the often-quoted legal definition of parody, the Court phrases the function of parodies as "taking aim at a particular original work…"[111] signifying the importance of parodies as targeting a work. The Supreme Court stipulated that bar targeting of the original, the source work is merely used to "get attention or maybe even to avoid the drudgery in working up something fresh".[112]

The Court made clear that satire must overcome a more strenuous battle than parody in order to come within the scope of fair use. The Court drew the distinction between parody and satire by saying imitation is essential for parody, while satire is less

[110] William M. Landes and Richard A. Posner *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003) at 152.
[111] *Campbell v Acuff-Rose Music*, above n 24, at 588.
[112] At 580.

dependent on the original. Parody therefore concentrates on aiming its critical point at the original, while the scope for satire is much wider, aiming to criticise or comment on contemporary customs or values. It is the latter where the necessity to use another's copyrighted material rarely exists.[113]

In a footnote, Souter J did indicate that weapon parodies might constitute as fair use in certain cases.[114] However the concurring judgment of Kennedy J stated that parody must target the original, "and not just its general style, the genre of art to which it belongs, or society as a whole."[115] Therefore applied the 'targeting' factor more as a requirement, as opposed to a factor for consideration.

b) Leibovitz v Paramount Pictures Corp

The matter of targeting was again canvassed in *Leibovitz*.[116] The case more broadly interpreted the 'targeting' requirement. Leibovitz sued Paramount Pictures for using her well-known 'Vanity Fair' cover photograph of nude and pregnant Demi Moore. Leibovitz had created a poster that superimposed the face of Leslie Nielson on a naked, pregnant model in the same pose as Moore. The poster was used to promote the film "Naked Fun 33 1/3: The Final Result" of which Nielson was the main actor. The Court followed the lenient approach in *Campbell* ruling that the transformative character of an advertising poster outweighed its commercial purpose. The case did however chide the guidance given by the Supreme Court in *Campbell* regarding satire.[117]

The Court in *Leibovitz* opined that often a particular source work would be the most appropriate avenue for conveying a parodist's message. The Court noted it doubtful to exclude parodies using a specific work to criticise contemporary values from the advantage of fair use. While some argue that copyright holders would normally

[113] At 581.
[114] At 581, per Souter J at footnote 14. Souter J said that if factors like market substitution, or amount of borrowing are small, then "taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required."
[115] At 597.
[116] *Leibovitz v Paramount Pictures Corp.* 137 F 3d 109 (2nd Cir NY 1998) .
[117] *Campbell v Acuff-Rose Music*, above n 24, at 581 where The Supreme Court in did not claim to exclude satire completely from the fair use provision, but noted that satire required more justified than parody.

license their work for satirical works, or "weapon parodies", this will not always be the case. One can imagine an author or their audience holding values that are the very target of the satirical work. In this instance it is unlikely that the author would willingly license their material for satirical purposes.

The judgment signalled that the targeting criterion is rather malleable and left room for the possibility that 'weapon' parodies be just as deserving of protection as 'target' parodies.

c) Mattel Inc. v Walking Mt. Prods

In this case the prospective judgment in *Leibovitz* being realised. The defendant had produced and sold photographs depicting Mattel's copyrighted 'Barbie' doll under the title 'Food Chain Barbie'. The majority of the photographs showed a nude Barbie in abnormal and often sexualized positions in danger of being attacked by kitchen appliances. Despite the imminent danger, Barbie continued to smile in oblivion to her predicament. The defendant had explained the aim of his photographs being to critique the "objectification of women associated with [Barbie], and…[to] lambast…the conventional beauty myth and the societal acceptance of women as objects because this is what Barbie embodies".[118] On why 'Barbie' was made the object of the photographs, the defendant said he believed that Barbie was "the most enduring of those products that feed on the insecurities of our beauty and perfection-obsessed consumer culture."[119]

The Court said that parody does not require the original need to be the sole subject of the parody. Loose targeting will suffice as long as the parody can be reasonably perceived as commenting on the original to some degree.[120] Court rejected Mattel's argument that the artist could have made his point about gender and consumerism without using Barbie, for this would unacceptably limit the definition of parody. It follows that parody does the copyright owner's work need not be the irreplaceable source of the intended social commentary.[121] The Court concluded that the

[118] *Mattel Inc. v Walking Mt. Prods*, above n 28, at [3].
[119] At [3].
[120] At [30]
[121] At footnote 7. Additionally, the Court said it would not be in the public interest to allow Mattel complete monopolistic control over the kinds of critical artistic works that Barbie could be the subject of.

photographs constitute fair use.

This case demonstrates how the often overlapping of parody and satire results in an arbitrary distinction. [122] Further, we see the Court trying to strike an adequate balance by disallowing monopolistic control over artistic works.

The United State case law shows that the Courts arbitrarily distinguishes between parody and satire. The often-cited pronouncement in *Campbell* indicates that target parodies are far more acceptable as fair use. However, as in *Leibovitz,* often a work will both target and be used as a weapon.

ii) Australia

By extending their parody defence to satire, the arbitrary distinction noted above is avoided. Moreover, the inclusion of satire signals Parliamentary recognition that those 'weapon' parodies also provides social value.

The terms 'parody' and 'satire' are not defined. The only useful guidance given when the defence was introduced was that in the Attorney-General's factsheet which provided that: [123]

> The amendments do not define the terms which are similar and can overlap. Satire often involves attacking an idea or attitude, an institution or a social practice, through irony, derision, or wit. Parody often involves the imitation of the characteristic style of an author or a work for comic effect or ridicule.

When comes the time for the Australian courts to apply the exception, the definition applied by the Federal Court in *The Panel Case* likely will be used.[124] It is therefore worth having a look at the case.

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[122] At [34] the Court noted that all the associations surrounding 'Barbie' made her "ripe for social comment". Clear reference was made to the satirical component of the work in that it made commentary about matters beyond the scope of the original; namely gender and consumerism.

[123] Australian Government Attorney-General's Department, Factsheet, "'New Australian Copyright Laws: Parody or Satire" <http://www.ag.gov.au>.

[124] McCutcheon, above n 33.

a) The Panel Case

In this case, Channel Nine brought a case against Network Ten for copyright infringement of Channel Nine's television broadcasts. Network Ten's popular satirical show, *The Panel,* played short clips from twenty of Channel Nine's broadcast programs. The guests and hosts of The Panel discussed the excerpts, which ranged between 8 to 42 seconds. It was a light-hearted program. As to shedding light on how to identify parody and satire, Conti J stated: [125]

> [T]he essence of parody is imitation, ...whereas satire is described as being a form of ironic, sarcastic, scornful, derisive or ridiculing criticism of vice, folly or abuses, but not by way of an imitation or take-off.

On trial it was acknowledged that parody would not avoid copyright infringement, since imitation is in the nature of copying. On the contrary, the court also noted that what was taken could be characterised as trivial, and was used by Network Ten for different objects or purposes than those targeted by Channel Nine. Another matter that arose is that there is a largely unstructured and restrictive framework of the fair dealing provisions means there is little room for unlicensed users to take copyright material and appropriate it for the purpose of commenting on society, or unrelated works.[126] As such the problematic application of fair dealing in the context of parody was alluded to.[127]

The Panel Decision therefore is both useful guidance as to how the Australian courts will likely interpret parody and satire under the new defence, and also for further demonstrating the tension that lies between fair dealing and parody.

iii) United Kingdom

Last year the United Kingdom introduced a parody defence to the Copyright, Designs,

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[125] At [17].
[126] Nicolas Suzor "Where the bloody hell does parody fit in Australian copyright law?" (2008) 13 MALR 218 at 224.
[127] Another matter that rose is that there is a largely unstructured and restrictive framework of the fair dealing provisions means there is little room for unlicensed users to take copyright material and appropriate it for the purpose of commenting on society, or unrelated works.

and Patents Act 1988.[128] The UK government announced this introduction in 2011 in response to the Hargreaves Review on Intellectual Property.[129]

In an attempt to help clarify the category of work envisaged within the defence, the UK Intellectual Property Office introduced a guidance paper when the parody exception was enforced.[130] The guidance makes clear that works under the exception need not target the work it imitates as it comments that whilst parody does involve an element of humour or mockery, it does not have to comment on the author or the original work. Instead, the parody can be used to comment on any theme or target. More specifically, the guidance envisages satirical works being protected when it states: "parody imitates a work for humorous or satirical effect…it evokes an existing work while being noticeably different from it."[131]

iv) Should New Zealand require parodies to target the work?

It is suggested that New Zealand reject the targeting requirement should the defence be introduced. In doing so, our law would reflect the realistic understanding that a parodist will often imitate for a purpose that goes beyond targeting the original work or its author. This rationale results in the inclusion satirical/weapon parodies under the proposed defence. My suggestion is based on the arbitrary and difficult identification involved in distinguishing between parody and satire, and that often works will contain both.

The targeting requirement poses an unduly difficult task of identification. The United State case law, particularly *Leibovitz* and *Mattel*, demonstrated how it often can be impossible to discern whether a purported parody takes aim at the original work or its author, or whether it stands to make a point about matter beyond the original. Often a

[128]Copyright, Designs, and Patents Act 1988 (UK), s 30A. Specifically, s 30A which expressly provides that fair dealing for the purposes of caricature, parody or pastiche does not constitute copyright infringement.
[129] Ian Hargreaves "Digital Opportunity: A Review of Intellectual Property and Growth" (May 2011) <www.ipo.gov.uk/ipreview-finalreport.pdf> The review recommended the introduction of a parody exception consistent with the EU law and which would benefit the British economy.
[130] "Exception to copyright: Guidance for creators and copyright owners" (October 2014) United Kingdom Intellectual Property Office <https://www.gov.uk/guidance/exceptions-to-copyright>
[131]Hargreaves, above n 129, at 7.

parody will even do both. *Mattel* particularly indicated that it is not sensible or logical to excise satire from the parody defence, as works may that contain both parodic and non-parodic components.

There is room to argue that even 2 Live Crew's song in *Campbell* contained both parodic and satirical messages. Souter J commented that the parodied song "reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences…"[132] The Court thus hints that the parody comments on a matter beyond the content of the original song. Nonetheless, the Court persisted on labelling the work a parody, failing to acknowledge song embodying both a parodic and satirical character. Such complicates the judgment and results in an artificial, arbitrary distinction between parody and satire. It is submitted that New Zealand should avoid the distinction and in doing so will avoid this convoluted debate.

Through permitting parodies to comment on something beyond the scope of the original, this paves the path nicely for the inclusion of satirical pieces under the legal ambit of parody. It is important to stress that in removing the targeting requirement, this does not equate parodies to satire. The primary legal distinction I propose echoes the Supreme Court judgment in *Campbell.* The Court postulated:[133]

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

Thus, the aim of a parody is to create an original expression through imitation. Whereas satire does not purpose itself on making an original imitation, rather it seeks to attack an idea, attitude, or social practice through use of an original work.

There are three key arguments against permitting weapon parodies. Each will be discussed below.[134]

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[132] *Campbell v Acuff-Rose Music*, above n 24, at 582.
[133] At 580.
[134] A fourth objection is that discussed in *Leibovitz.* The Court noted that some argue it is unnecessary to make a legal exception for satirical works as owners of this copyrighted material are able to license their work for satirical purposes. However, the Court in *Leibovitz* rightly pointed out that one can envisage an author or their audience holding values that are

The first objection was one raised by the Australian Copyright Council when the proposed inclusion of satire caused disquiet. The objection is that a satirist can deliver their message without the use of another's work. Therefore this encroachment on the rights of copyright holders is not justified.[135] To this objection, I agree with the judgment in *Mattel* and contend that often the appropriation of a particular work is the perfect way of delivering the satirist message. A neat illustration of this point is the manipulated video of the United States President George W. Bush and British Prime Minister Tony Blair. In this video, various news clips featuring Blair and Bush were mixed so as to make it appear that the two were singing the duet 'Endless Love' by Lionel Ritchie to one another. The original song was used as a means of satirising the Anglo-US response to the Iraq war. While there may have been alternative routes of expressing this political criticism, the use of 'Endless love' allowed for the message to be delivered with the desired zing and vehemence.[136]

The second objection builds on the first objection and was raised in *Campbell,* where it was stated that satirical works require justification for the act of borrowing, therefore are less likely to be considered as 'fair'. However, this view is unsubstantiated. It rests on the assumption that targeting a specific work caries greater value than the targeting of a general vice or folly. It is true that satire does not involve direct comment on original material, "but in using material for a general point it should not be unfair."[137] McCutcheon ran a similar argument when she asks why a comment about the banality of Roy Orbison's song in *Campbell* is of greater value than a comment on President Bush's stance on the war on terror.[138]

The third objection is that if such an exception for these works is provided, then it will be exploited to avoid investing effort in working up something fresh. We saw this line of argument also being postulated by the Supreme Court in *Campbell*. However, this concern is circumvented in requiring that the parody convey an original expression. It

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the very target of the satirical work. In this instance it is unlikely that the author would willingly license their material.

[135] Australian Copyright Council, Submission to the Senate Legal and Constitutional Affairs Committee on Copyright Amendment Bill 2006, October 2006, at 45.

[136] Jani McCutcheon "The new defence of parody or satire under Australian copyright law" (2008) 2 I.P.Q. 163 at 174.

[137] Christopher Ellison, Minister for Justice and Customs "Commonwealth, Parliamentary Debates" Senate 148 (30 November 2006).

[138] McCutcheon, above n 33, at 179.

follows that if the purpose of copyright law is to encourage the dissemination and creation of original creative works, it is illogical to favour one form of parody over another.[139]

Conclusion

Through case analysis, we have learned how the different legal conceptions of parodies have been utilised. We saw that the United States view parody as necessarily critical and must target the original to some extent. However, the courts have acknowledged that such targeting may be coupled with targeting that goes beyond the original. We know that Canadian law also see it necessary for a parody to critique or comment.

By contrast, Australia appears to see humour as an important feature of parodies that need not be armed with critique. Australia also chose to statutorily recognise the ability for parodies to pass critique or comment on broader matters through their inclusion of 'satire' under the defence. The United Kingdom also does not require parodies to target the original work, but do require some form of commentary or criticism.

In my analysis, I have acknowledged the value in each concept discussed. Therefore, the most plausible structure of the defence is to allow parodies provided they embody at least one of the concepts. It follows that each conception is sufficient, but not necessary. I do not think it wise to construct a legal definition of parody that places more weight on the value of one feature over another. Such weight would be arbitrary and I cannot conceive of a worthy justification for doing so. This may be the situation that the United Kingdom and Australia has primed. However each have failed to provide explicit guidance to this issue.

[139] Kathryn D. Piele "Three Years After *Campbell v Acuff-Rose Music, Inc*: What is Fair Game for Parodists?" (1997) 18 Loyola of Los Angeles Entertainment Law Journal 75 at 99.

Chapter 3: Applying the defence in New Zealand

Introduction

Based on my analysis in the preceding chapter, I have fashioned a test that encompasses the properties of parody worth protecting. A common law test is recommended, however this dissertation leaves open the possibility of a statutory enactment. I have also accompanied my test with guidance as how to interpret parody and apply the defence in the context of fair dealing.

A. Structure of the defence

My proposed defence can be summarised as follows: fair dealing with a work for the purposes of parody does not infringe copyright in the work. In order to come within this fair dealing exception, two limbs must be satisfied. These limbs are in the form of a threshold test, and a fair dealing test. It must be proved that the work is a 'parody', and that the dealing of the copyrighted material is 'fair'. A step-by-step representation of the defence is below:

<u>The threshold test</u>

1. A work qualifies as a parody if it imitates another's copyrighted material by conjuring up its constituent parts in order to convey an original expression, meaning or message.

2. For the purposes of (1), an original expression, meaning, or message is achieved through one (or a combination) of the following:

    a) imitating for the purpose of humour;

    b) imitating in order to criticise, comment or commend the original or its author; or

    c) imitating in order to criticise, comment or commend s subject matter that does not pertain to the original work or its author.

Fair dealing test

1. In order to determine whether copying constitutes fair dealing for the purpose of parody, regard must be made to the following:

a) the purpose of the copying; and

b) the nature of the work copied; and

c) the effect of the copying on the potential market for, or value of, the work; and

d) the amount and substantiality of the part copied taken in relation to the whole work.

B. Further guidance

i) The threshold test

The threshold test reflects two important dimensions of parody. The first, that a parody creates a new and original expression. The second, that such original expression can take three forms, each important to the idea of parody. It follows that each form is sufficient, but not necessary. This threshold test reflects what should be Parliamentary intent in protecting parodic works that society values.

In terms of imitation, a parody must first convey two simultaneous messages, one that it is the original, and one that it is not the original, in order to achieve its parodic purpose.[140] In regard to 'conjuring up', I want to note here that complete copying may be justified in light of the parodic purpose provided that an original expression, message or meaning is produced.[141] The fairness of the amount and substantiality of the material taken is analysed in the test for fair dealing.

The function of parodies as creating an original expression is of upmost importance. The legal conception needs to require that parodies produce a new, original expression by casting a fresh light upon other works. It is this casting that provides social benefit and it is this social benefit that strengthens the justification of the

[141] *Mattel Inc. v Walking Mt. Prods*, above n 28, at 805.

defence.[142] In creating this original expression, parody is productive, not reproductive. I want to emphasise that the idea being expressed in a parody is different from the idea expressed in the source material. The similarity between the source material and the parody is superficial as what goes to the core of a parody will inevitably be different from that of the original.[143]

As to the three forms that parody can take, each pertains to the three concepts of parody I have accepted as valuable. Let me re-emphasise as to why each are valuable and worthy of legal protection. I have shown that humour has historically been attributed to societies understanding of parody. Margaret Rose supported this view, and saw humour as a "primary identifier" of parodies.[144] Critical expression is also important, both when aimed at the imitated work or a subject matter that lies beyond the source work. These parodies, also referred to as target and weapon parodies respectively, promote freedom of expression and allows for flaws of the original work and in contemporary societal subjects to be exposed. As for parodies that commend source work or subjects beyond the source work, they further promote freedom of expression and allows for merit in in subjects to be accentuated.

Jurist Judge Kaufmann said, parody is "deserving of substantial freedom – both as entertainment and as a form of social and literary criticism".[145] Kaufmann implicitly accepts the value in parody as being a source of entertainment and criticism. I agree, and additionally find value in parodies as being a form of praise. The legal test I have constructed properly encompasses these concepts.

ii) The Fair Dealing test

The second question to address is whether the use of copyrighted material is fair. In the context of parody, the 'fairness' dialogue will be crucial in further identifying

[142] *Campbell v Acuff-Rose Music*, above n 24, at 579.
[143] The requirement of originality can then be used to expedite the distinction between those parodies that use copyrighted material as the basis of an original expression, or used purely for free-riding purposes. It is the former that copyright law should give latitude to. If the contested work can be directly substituted for the original or can be confused to be the original, then the work is undeserving of protection.
[144] Rose, above n 8, at 52.
[145] *Irving Berlin et al v E.C. Publications, Inc.* 329 F2d 541 (2d Cir. 1964) at 545 per Kaufmann J.

commercial rip-offs that closely resemble the content of passing off actions, and identifying clearly distinguishable parodies that do not substitute the original.[146]

Covered in Chapter one were the five factors typically taken into account when determining whether dealing is fair.[147] I have only included four of these factors in my test as it is these four factors that are relevant to the parody analysis. The considered factors under the fair use doctrine of the United States are largely similar to our fair dealing factors. As such, United States case law is relevant to discuss,[148] particularly *Campbell* as a useful analysis of the fair use factors was engaged.[149] In doing so, we must keep in mind that our fair dealing provisions are not as liberal as the fair use doctrine. However, Commonwealth case law on fair dealing provisions is scarce, and therefore the United States cases are a useful starting point so long as the essential differences between both provisions and general philosophy are kept in mind.[150]

a) Purpose of the use

In terms of parody, fair dealing must be for the purpose of parody. This factor will have been covered at the threshold test to a degree. Scholars and authorities have questioned whether, at this stage, such purpose has to be achieved in fact, or whether it suffices for the subjective intention of the parodist is to achieve this purpose.[151] In response to this query, *Pro Sieben* said that the defendant's subjective "mental element" is not determinative.[152] I agree, and instead assert that the question to resolve is whether, objectively, the threshold test is met. However, I caution that it is not the degree of success of the parody that matters. Whether parody is in good or bad taste is irrelevant.[153]

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[146] *Productions Avanti Ciné-Vidéo Inc. c/ Favreau,* above n 85*,* at 575, per Rothman J in drawing a crucial distinction between legitimate and illegitimate parodies.
[147] Copyright Act 1994, s 43(3).
[148] Frankel, *Intellectual Property in New Zealand*, above n 36, at 361.
[149] *Campbell v Acuff-Rose Music*, above n 24.
[150] Frankel, *Intellectual Property in New Zealand*, above n 36, at 338.
[151] Frankel, *Intellectual Property in New Zealand*, above n 36, **at 348.**
[152] *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605 (CA) per Robert Walker LJ.
[153] McGeveran, above n 32, at 718.

An example of this factor being applied improperly is seen in the context of obscene or pornographic parodies. A shibboleth in parody cases sees parodies of this category as presumptively unfair for their erotic content.[154] However, this line of reasoning considers content as determinative. This should not be how the factor is applied in New Zealand. *Mattel* echoed this thought when it commented that it is not the task of a court to judge what objects an artist chooses to make focus of their work.[155]

Another important consideration is the commercial purpose of the parody (if any). In the guidance issued by our Copyright council, it is advised that if the purpose of use was for commercial gain, then this deems use of the work as would be less fair.[156] This insinuates that New Zealand takes a presumptively unfair stance to appropriation of copyrighted material for a commercial purpose. Unsurprisingly, this line of reasoning does not sit well in a parody context. For instance, consider the work of a musical parodist. A presumption against fair use in this scenario is problematic, for the parodist seeks to entertain by lampooning well known songs in order to entertain. To entertain, it is routine to seek and reach a wide audience. In order to do so, commercialising their work is an obvious route.[157]

A useful assertion made by the Supreme Court in *Campbell* was that commercial purpose is merely one of many factors to be weighed in the overall assessment of fairness.[158] It is suggested New Zealand take an approach like that of the United States. However, while it is suggested that commercial motivation is not determinative, the court is to take into account whether the alleged infringing use was primarily for public benefit or for private commercial gain, and whether the parodying was done in good or bad faith.

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154 For instance, in *MCA, Inc. v. Wilson* 677 F2.d 180, 181 (2d Cir.1981) at [24], the parody musical "Let My People Come – A sexual Musical" was described as an "erotic nude show." The Court was not prepared to hold that a commercial composer can plagiarise a … copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody.

155 *Mattel Inc. v Walking Mt. Prods,* above n 28.

156 "Information Sheet: Fair Dealing" (January 2009) Copyright Council of New Zealand <http://www.copyright.org.nz/viewInfosheet.php?sheet=338>

157 *Campbell v Acuff-Rose Music*, above n 24.

158 *Campbell v Acuff-Rose Music*, above n 24, at 584.

For instance, assume Company A in Industry X copyrights a jingle used as part of their promotional campaign. If Company B, also part of Industry X, then parodies the jingle with the intent of poking fun at Company A and ultimately poaching Company A's customers, the resulted use falls beyond the intended application of the defence (assuming the Company B's jingle was in fact a 'parody').[159]

Equally, if the commercial purpose of the parody were to plot and distribute a substitute to the original, fashioned to disguise the taking of copyrighted efforts as a parody, then this too would fail the test. A work would also fail the threshold test for these reasons.[160]

We see that the primary matter for discussion under this first factor will be the commercial purpose of the parody. If an improper commercial purpose can be ascertained, for instance the parodist seeks to commercialise the parody in the interests of harming the market for the original, then the parody fails under this head. My guidance further clarifies that the courts should not be concerned with the quality of the parody, and should not be influenced by subjective assessments as to taste.

b) Nature of the work copied

This factor in its orthodox form imputes that if copyrighted material involved extensive skill and effort, then it would be less fair to copy and appropriate the work.[161] The underlying idea is that, in the interests of the public, we require some works to be more accessible than others. Typically, the more creative and artistic works are, the more likely appropriation of the work will be considered unfair. In other words, the highly expressive works will rank above the commonplace creation. An example of a commonplace creation might be a common melodic or harmonic sequence often used in pop songs.[162]

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159 Lionel Bently and Brad Sherman *Intellectual Property Law* (3rd ed, Oxford University Press, New York, 2001) at 205.

160 An instance of this was seen in *Rowling v Uitgeverij Byblos BV* [2004] E.C.D.R. 7 at [7] where the popular book *Tanja Grotter and the Magic Double Bass,* based on the popular work of J.K Rowling *Harry Potter and the Philospoher's Stone* was deemed an 'unauthorised adaptation' of copyrighted material. The infringer's book was not a parody, for the Court accepted that the Netherland law permits parody, except when used to compete unfairly.

161 Frankel, *Intellectual Property in New Zealand*, above n 36**, at 355**

162 Monika Bimbaite "When is Parody a Violation of Copyright?" (2004) 1 International

Campbell commented that this factor is not of much assistance "… in separating the fair use sheep from the infringing goats in a parody case, since most parodies almost invariably copy publicly known, expressive works."[163] As such, this factor does not sit neatly in the parody context, and to afford much weight to this factor would, for all practical purposes, "destroy parody as a genre".[164] Therefore I advise little weight to be placed on this factor.

Due to the highly expressive works often sought by parodists, this factor will not contribute much to the fair dealing determination. This factor could potentially be of use in conjunction with the third factor, amount and substantiality – for example if a copyright holder claims excessive taking has occurred, if the material is particularly 'commonplace', then this may weigh against this claim as being persuasive.

c) Effect on the original

This factor stresses that if dealing harms the owner's economic interests, then this will likely disqualify the work from being distributed, or at the very least weigh heavily against a finding of fair dealing.[165] Also, if the material is available for sale or license, then the unauthorised use of the material weighs against fairness. This factor resonates Article 13 of TRIPS Agreement, (to which New Zealand is a party), which stresses the need to avoid unreasonable prejudice to the legitimate interests of the right holder.[166] This factor can therefore be seen as promoting the rights of the author in order to ensure their interests are not overlooked.

Journal of Baltic Law 16 at 26: See *Selle v Gibb* 741 F.2d 896, 223 U.S.P.Q. 195 (United States Court of Appeals, 7th Cir. 1984). The case involved a claim of copyright violation against The Bee Gees who allegedly copied a song of the plaintiffs. While acknowledging the strong resemblance between the two musical works, the Court held that the material was so common to pop songs and did not involve much expression or creativity.

[163] *Campbell v Acuff-Rose Music*, above n 24, at 586.

[164] Geri Yonover "Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use" (1996) 14 Cardozo Arts & Ent LJ 79 at 117.

[165] Bently and Sherman, above n 159, at 205.

[166] Trade-Related Aspects of Intellectual Property Rights (TRIPS), Article 13 <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>

The key matter for discussion under this head is typically substitution. If the use results in pure substitution, such that the market for the original is displaced, the use fails to be fair. A work is substitutable for another when it provides the same satisfaction as the first work and is made available through comparable means (for instance, in terms of access, price and the like).[167] If the work is a true parody, it rarely will be substitutable for the source material and so is unlikely to penetrate the market of the copyrighted works. The parody in *Campbell* neatly illustrates this point. 2 Live Crew's parody of 'Pretty Woman' cannot be taken to be competing with the market of Roy Orbison's original song. A consumer seeking to purchase the original song is highly unlikely to instead purchase the parody version.[168] Therefore this factor will assist in ensuring that parodies stay true to their legal purpose and will catch those hard cases of parodies that may have scraped through the threshold stage.

A consideration in *Campbell* that will be relevant in some circumstances is the effect a parody has on the ability of the original author to make derivative works. Of contention in *Campbell* was whether, in adapting the original to produce a derivative 'rap' song, the original artist was prevented from producing a derivative rap version of their song.[169] Generally, courts should not allow a copyright owner to argue that parodies of their work prevent their ability to parody their own work.[170] However, Souter J was prepared to accept that the original artist may have been prevented from producing a derivative rap version of their work due to 2 Live Crew's parody. The case was remitted to the Trial Court on this point. Unfortunately, the case was settled before a final judgment was made. If a similar fact scenario arose in New Zealand, this effect may weigh against a finding of fair dealing.[171]

I think it important to make a comment here regarding negative effects on the market of the original caused by legitimate commentary. Some often confuse this for being directly attributable to the matter of 'fairness'. However, it is the taking of the copyright material that must be fair, not the original message that the parody conveys.

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[167] Landes and Posner, above n 110, at 153.
[168] Suzor, above n 126, at 244.
[169] *Campbell v Acuff-Rose Music,* above n 24, at 593.
[170] Frankel, *Intellectual Property in New Zealand*, above n 36, at 357.
[171] Frankel, *Intellectual Property in New Zealand*, above n 36, at 357.

The operation of this factor in the context of parody will ensure that the copyright holders interests are not overlooked and are tempered against the value that the parody contributes to society. In assessing the ability of the parody to substitute the original, and the potential loss of appropriation for the original author, those parodies that unfairly deal with the original work can be filtered out.

d) Amount and substantiality

Parodies require substantial, if not complete copying, of the source material in order to achieve its purpose.[172] Therefore, to apply this factor in its orthodox form would result in the new defence having little practical effect. However, there is room for its application in the parody defence if our focus is shifted. Rather than concentrating on what the parodist took, we focus instead on what the parodist did besides the substantial taking.

It is important that the parodying itself is not insubstantial compared to the copying. This point was reflected in *Campbell* where, while the bass riff and opening lyrics of the original were directly copied, the rest of the tune "departed markedly" from the original.[173] Souter J emphasised, "…the question of fairness asks what else the parodist did besides going to the heart of the original."[174] It follows that extensive copying is permitted, but parodying of those copied elements must also be great in order to be fair.

Another consideration may be that the more popular or recognisable a work, the less that needs to be taken. In other words, "the more eccentric the parodied work, the easier it is to evoke without much, perhaps any, actual quotation."[175] Such can be termed as 'the goldilocks calculation', as the aim is to find the level of copying that is 'just right' in light of the degree of popularity of the copied work.[176] However, the court in *Campbell* cautioned that the very point of parody is to take the heart of a

[172] *Mattel Inc. v Walking Mt. Prods,* above n 28.
[173] *Campbell v Acuff-Rose Music*, above n 24, at 589.
[174] At 589.
[175] Landes and Posner, above n 110, at 154.
[176] McGeveran, above n 32, at 723.

particular work, and "copying does not become excessive in relation to parodic purpose merely because the portion taken is the original's heart."[177]

A case that failed under this limb was *Metro-Goldwyn Mayer.*[178] The play 'Scarlet Fever' was held to infringe the copyrighted novel and film on which it was based – 'Gone With The Wind'. The defence of parody was rejected as fair use as the play had incorporated more of the film than necessary. Specifically, the play closely followed the general plot of the film, reproducing significant portions of the dialogue in an almost identical manner. Any disparities in the theme, content and style were not very significant, and given the popularity of the original, such extensive copying was not necessary to conjure up or recall them.[179]

However, most parodies will base themselves on well-known works in order to be successful.[180] *Campbell* did shed light on the degree of imitation. The Court opined that a parody must be able to conjure up at least enough of the original to make "... the object of its critical wit recognisable …" Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original.[181] This is also a good illustration of the fair dealing considerations being balanced and used in conjunction with each other.

Thus, this fair dealing factor, while typically would be in direct conflict with the defence of parody, is useful if our focus is shifted. This factor should involve an assessment as to the degree of parodying in relation to the amount copied. Further, the popularity of the work may give an indication as to how much is copying is reasonable. However, due to most parodies basing themselves on extremely popular works, the latter consideration may not be of much use. It is likely that the amount of parodying will prevail as the primary consideration under this factor. The assessment

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[177] At 588 per Souter J.
[178] *Metro-Goldwyn, Inc. v Showcase Atlanta Cooperative Productions, Inc* 479 F. Supp. 351, 357 (ND Ga. 1979).
[179] At 357. The Court further reasoned that the parody was likely to harm the potential market for or value of the derivative use of the original novel in the form of theatrical adaptation (thus considering the 'effect on the original' factor also weighed in favour of infringement).
[180] *Campbell v Acuff-Rose Music,* above n 24, at 586.
[181] At 588.

will ensure that the parody does produce an original expression through the degree of parodying.

To conclude, in the context of parody, the fair dealing provisions need to be applied with a particular air. The fair dealing test above reflects the aim of fair dealing which is to ensure that socially valued works are exempted from copyright infringement. Those parodies that aim to or do poach the market of the original or act as a substitute for the original will be filtered out and denied protection. Further, the balancing of copyright holders rights and users' rights is also elevated. For instance, the third seeks to strike this balance where works that encroach on the right of the original author to make derivative versions of their work may be denied protection. The fourth factor will ensure that the parody does convey an original message distinct from that of the original. In denying parodies that excessively copy the original sans sufficient parodying, the defence of parody is further prevented unfairly exploiting copyrighted material.

B. Moral rights

Having passed both the threshold and fair dealing test, there remains a hurdle the parodist may have to overcome. The author of a work may argue that their moral rights have been infringed. Chapter 1 of this dissertation introduced the moral rights framework and identified the right to object to derogatory treatment as being the most relevant under the parody discussion. Therefore, when I talk about moral rights I am referring to the moral rights recognised under the Copyright Act 1994. To refresh, the 1994 Act recognises the personal rights of the author of work, such are described as moral rights. Moral rights centres on the author's expression of personality and individualism in their work. It is instructive to discuss how the moral rights argument may play out in parody cases.

The two rights worth discussing is the right against false attribution (s 102) and the right to object to derogatory treatment of a work (ss98-101).[182]

[182] The right of attribution will not be present a problem for the parodist as the right is not infringed by an act that would not infringe copyright in the work. Examples of such works are those protected by the fair dealing exceptions. Therefore, should the defence be introduced under the fair dealing provisions, this moral right will not be able to apply in the parody

i) The right against false attribution

A person has a right not to have works falsely attributed to him or her as an author or director.[183] Attribution is defined as an express or implied statement as to the identity of the author or director.[184] Mere evidence of confusion as to the authorship of the work will not suffice. A parody may collide with this moral right if the real author cannot be readily identified. The *Alan Clark* case dealt with the matter of false attribution.[185] Tory M.P Alan Clark had been offered the opportunity by the newspaper *Evening Standard* to write a column based on his famous diaries. However, when Clark asked for a higher payment than the one offered, the newspaper decided to produce the column itself in the form of a parody version of the original work. The parody version was called 'Alan Clark's Secret Election Diary'. While correctly classified as a parody, the Court held that the right against false attribution had been infringed even though the first paragraph of the parody expressly stated that it was not actually written by Alan Clark. The court concluded that it was possible that readers would see the main title of the parody and then continue read the article, under the impression that Alan Clark was the author. The Court held that false attribution can only be neutralised by an express contradiction that has to be as precise and bold as the false statement.[186]

ii) The right to object to derogatory treatment

In terms of derogatory treatment, the author must prove that there is treatment of the work, and secondly that the treatment is derogatory.[187] A parody would constitute as treatment of the work for it adapts the copyrighted material.[188] This treatment is derogatory if it is prejudicial to the honour or reputation of the author.[189] The test is an objective one and the onus is on the author to prove that through treatment that is

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context. See Ian Finch *James & Wells: Intellectual Property Law in New Zealand* (Brookers Ltd, Wellington, 2007) at 191.
[183] Copyright Act 1994, s 102.
[184] Copyright Act 1994, s 102(1).
[185] *Clark v Associated Newspapers* [1998] *RPC* 261.
[186] Bently Sherman, above n 159, at 766.
[187] Copyright Act 1994, s 98.
[188] Finch, above n 182, at 191.
[189] Finch, above n 182, at 191.

either distortion or mutilation, such derogatory effect has occurred.[190] Further, it is not sufficient that the author is merely aggrieved by the treatment of their work.

Whether parodies will often amount to derogatory treatment is an unsettled question.[191] Parodies, by their nature, are not designed to accommodate for any sensitivities held by the author, and often the appropriation made is robust. It is worth noting here that copyright law does not traditionally care for preventing harm to the author by way of exposure to the lack of value, or weakness in their work.[192] Commentators further believe that parody will not usually be prejudicial to the reputation of the author, as laughing at ones expense would not hurt an authors reputation.[193]

In Australia the right to object to derogatory treatment is termed the moral right of integrity. When1968 Act was amended to include this right, the Commonwealth Attorney-General noted that the introduction is not intended to "impede or adversely affect the time-honoured practices of parody and burlesque."[194] It is advised for New Zealand to adopt the same attitude. Those authors who have a certain degree of personality interest in their work may have stronger grounds for arguing that the parodying of their work is derogatory if the test was subjective. However, in adhering to the required objective test, it is unlikely that true parodies will be seen as prejudicial to the author's honour or reputation as the opinions of the original author of the work is irrelevant.

It may also be counter-intuitive for Parliament to expand copyright law so as to allow a defence of parody if such parodies are likely to be restrained by this moral right. Instead, I view this moral right more as a right that can be invoked when the parody is offensive to the spirit of the original work.[195]

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[190] *Pasterfield v Denham* [1999] FSR 168, at p182 Overend J.
[191] Rütz, above n 5, at 292.
[192] Landes and Posner, above n 110, at 158.
[193] Rütz, above n 5, at 292.
[194] Commonwealth, Parliamentary Debates, House of Representatives, 18 June 1997, pp 5547–8 (Hon Daryl Williams QC).
[195] Previous commentaros have taken this view. See Rütz, above n 5.

Conclusion

In building on my conclusion of Chapter two, I have fashioned a defence that will provide adequate protection for works of parodies in New Zealand. My test defines parody so as to appropriately encompass those forms of parody that have societal value. In doing so the goal of our fair dealing provisions, to ensure societally valued uses of copyrighted material are permitted, is met. Through statutory recognition of these concepts, the justifications for the defence I discussed are met; the defence is capable of promoting freedom of expression in the interests of society and culture. My defence is further successful for it solves the tension between parody and copyright law also identified in Chapter one. Moreover, in order to arm the defence with more clarity, I have advised how the defence may play out should moral rights of the copyright holder be invoked.

Conclusion

As the law in New Zealand stands today, equity is not afforded to works of parody. In denying this cultural phenomenon legal protection, New Zealand law is stifling creativity by giving undue monopolistic control to holders of copyright. Parodists are innovative users of copyright material, and their rights need to be given latitude.

I illustrated why parody constitutes prima facie infringement, and why our defences to copyright infringement do not offer much comfort for parodists. Particularly, New Zealand has an unusually protective statutory fair dealing regime where a rigorous line is taken in respect of commercial use and substantiality.

Carving out a defence of parody is justified for it promotes the fundamental democratic right to freedom of expression. Particularly, parody as a form of creative expression is deeply valued by society and advances culture. The lack of legal recognition for parody is therefore a disservice to the public and stymies culture.

I have suggested for New Zealand to follow the lead of its counterparts in the United Kingdom, Australia, and Canada and legally recognise parodies under our fair dealing provisions. However, the introduction of a new defence is useless if it fails to provide an adequate scope of protection and is not armed with sufficient guidance as to its meaning and application. Other jurisdictions have given undue weight to some properties of parody over others. Furthermore, these jurisdictions with little case law pertaining to parody are left in bewildered as to how the defence will practically be put to effect.

My response to these flaws observed in other jurisdictions is to apply a threshold test that encompasses those valued forms of parody in order to best serve the artistic and cultural needs of society. My test allows for humorous, target, weapon and non-critical parodies, as all deserve protection in a free and democratic society. I have carefully fashioned my defence to ensure that the rights of copyright holders are not overlooked. Particularly, considering the defence as part of fair dealing, and the guidance as application will ensure that the production of parodies does not unjustly violate the property rights afforded under the 1994 Act. This fair dealing guidance is

particularly important for the fair dealing test requires an altered approach in the context of parody.

I have further considered how the defence would be construed against a claim of moral rights infringement. It is important to acknowledge the moral rights argument as a possible recourse, acting another layer that will ensure rights held by copyright holders are appropriately catered for.

In placing undue weight on the rights of copyholders, parodists are de-incentivised to create. My recommendations therefore do not threaten the goals of copyright law, rather they promote them, for the goal of copyright law is furthered by the creation and re-creation of material.

Of all the subjects that creative works have an impact on, it is other creative expressions that are nurtured and encouraged. Creativity permeates and enables other forms of creativity to take place, and it is this crucial element of society and culture that parodies play an integral role in. In a country where creativity, culture, and the freedom to express oneself is deeply valued, dismissing parody as an expression worth protecting is a disservice to the law, culture, and society generally. Through providing for works of parody under our fair dealing provisions, New Zealand copyright law will no longer act to stifle creativity and parodists can be given the legal paradise they deserve.

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