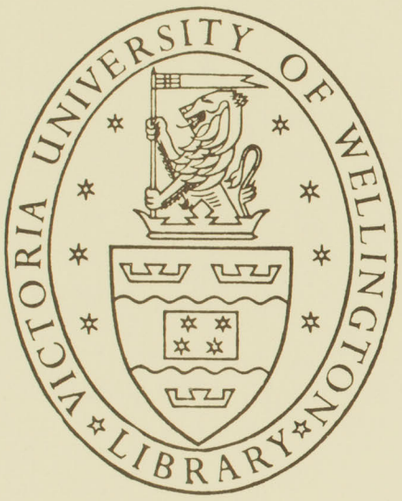
Joanna Robyn Sowerby

PARODY AND FAIR DEALING IN COPYRIGHT LAW

LLM Research Paper
Intellectual Property (LAWS 541)

Law Faculty
Victoria University of Wellington

1991


VICTORIA UNIVERSITY OF WELLINGTON
LIBRARY

Joanna Robyn Sowerby

PARODY AND FAIR DEALING IN COPYRIGHT LAW

LLM Research Paper
Intellectual Property (LAWS 541)

Law Faculty
Victoria University of Wellington

1991

CONTENTS

I INTRODUCTION

This paper discusses the conflict between the copyright owner's interest in controlling the use of his or her work and the parodist's interest in taking from the copyright work to create a new independent work. There is also the importance of advancing the public interest in the production of creative works.

Firstly, I will discuss for background, the general law of copyright infringement and the fair dealing defence. Parodies can either be subject to an infringement action or be protected from a successful action by the copyright owner because of this fair dealing defence.

The problem of the definition of parody is examined and it is suggested the more acceptable legal definition is one which requires critical comment to be made by the parodist. This definition would justify the protection of parody under fair dealing.

New Zealand has no case law on the treatment of parody. Other jurisdictions are therefore examined for guidance on the way New Zealand should approach the problem.

The English, Canadian and Australian courts take a restrictive approach to the art of parody. Parody is treated the same as any other form of copying, and will therefore usually be an infringement.

The United States courts recognise the value of parody, and will protect it under their fair use defence. However there are some problems with the United States approach. There is little definition of parody, and the most common definition is wider than suggested in this paper. As the courts are reluctant to define parody there is sometimes confusion between the issues of whether the work is a parody, and whether it should be protected by the fair use defence. The courts concentrate on the conjure up test as the test for deciding whether the fair use defence

applies in the circumstances. This is a limiting approach and it would be preferable to concentrate on the effect on the demand for the plaintiff's work.

New Zealand should follow the United States' approach of allowing parody as fair dealing, but should develop a suitable parody definition and consider more appropriate factors.

II COPYRIGHT INFRINGEMENT

The Copyright Act 1962 section 6(1) defines copyright as the exclusive right to do and to authorise other persons to do certain acts in relation to that work. Section 6(2) provides that copyright is infringed by a person, not being the copyright owner, and without the licence of the owner who does or authorises certain acts in relation to the copyright work. The unauthorised acts are listed in sections 7(3) and 7(4).[1]

To be an infringement the person must have made use of the form of expression. There is no infringement for the taking of ideas, as there is no copyright protection for ideas.

In all jurisdictions there are general essential ingredients of copyright infringement. These are:

1. Ownership of copyright by the plaintiff

This involves showing originality in the author, copyrightability of the subject matter, citizenship status of the author such as to permit a claim of copyright, compliance with applicable statutory formalities and if the plaintiff is not the author, a transfer of rights or other relationship

---

1 There are similar provisions in other jurisdictions. England: Copyright Act 1956 ss 1, 2, and 3; Canada: Copyright Act 1985 ss 5 and 27(1); Australia: Copyright Act 1968 ss 31, 36 and 101(1); United States: Copyright Act 1976 s 106.

between the author and plaintiff so as to constitute the plaintiff the valid copyright claimant.[2]

2. Copying

(a) Causal Connection

The copyright work must be the source from which the infringing work is derived.[3] If there is no proof of copying it is assumed the work was created independently. There is no infringement no matter how closely the defendant's work resembles the plaintiff's work.

Generally it is not thought possible to establish copying by direct evidence. It will be rare that the plaintiff has a witness to the act of copying. Also copying may occur without any physical manifestation, since copying from memory is no less actionable than copying from direct view.[4] In most cases there is only indirect evidence of copying which "lies in the establishment of similarities between the plaintiff's work and defendant's work, combined with proof of access by the author of the alleged infringing work to the plaintiff's work".[5] The more similarities there are, the greater the likelihood that the defendant has copied from the plaintiff.[6] Copying is therefore inferred from the circumstances of the case. The causal link may also be established where the defendant has copied from an intermediate work, which is itself an infringement of the plaintiff's copyright.

---

2 M B Nimmer and D Nimmer *Nimmer on Copyright* (Matthew, Bender & Co, New York, 1988) Vol 3 § 13:01[A].

3 *P S Johnson* v *Bucko Enterprises* [1975] 1 NZLR 311.

4 Above n 2, Vol 3 § 13.01[B].

5 *Klissers Farmhouse Bakeries Ltd* v *Harvest Bakeries Ltd* (No 2) [1985] 2 NZLR 143, 158.

6 *PDL Packaging Ltd* v *Labplas* (1987) 8 IPR 331,335.

(b) Substantial Similarity

It is not necessary for infringement that the restricted act be done in relation to the whole work. The Copyright Act 1962 section 3(1) provides that infringement can also occur when the restricted act is done in relation to a substantial part of the copyright work.[7] The issue for the court to decide is whether a substantial part of the plaintiff's work survives in the defendant's work as to appear a copy.[8]

Difficult questions arise as to the amount of copying and degree of resemblance necessary to consist of appropriation of a substantial part. Whether the defendant has copied a substantial part depends much more on the quality, rather than the quantity of what was taken.[9]

The reproduction of a small part of a work which has great originality will therefore be an infringement, whereas the reproduction of a part which by itself has no originality will not be a substantial part of the copyright work and will therefore not be protected.[10] The quality of the work relates to the things which give it, its specific individuality.[11] The test is designed to prevent a person reproducing the important and valuable part of the plaintiff's work, even though it is a small part of the work.

It is helpful to distinguish between two types of similarity.[12]

---

7 This provision is a rule of Common Law. It is specified in the English Copyright Act 1956 s 49; Canadian Copyright Act 1985 s 3(1); Australian Copyright Act 1968 s 14; but not in the United States Copyright Act 1976.

8 W R Cornish *Intellectual Property* (Sweet & Maxwell, London, 1989) 290.

9 *Ladbroke (Football Ltd)* v *William Hill (Football) Ltd* [1964] 1 WLR 273,276.

10 Above n 9, 293.

11 *L B (Plastics) Ltd* v *Swish Products Ltd* [1979] RPC 551,622.

12 Above n 2, Vol 3 § 13.03[A].

1. Fragmented Literal Similarity

This is where the defendant has copied all or part of the plaintiff's work, word for word. Proof of infringement is straight-forward. The only question is how much of the plaintiff's work can be copied literally. Applying the quality test, the proportion of the part copied to the whole of the plaintiff's work need not be large.

2. Comprehensive Non-Literal Similarity

The fundamental essence or structure of the plaintiff's work is duplicated in the defendant's work. The mere fact that the defendant has paraphrased rather than literally copied will not preclude a finding of substantial similarity. The court must be sure the copying is of the expression of the idea, which the defendant has attempted to disguise by alteration, rather than copying of abstract ideas which is not an infringement.

It is entirely immaterial that in many respects the plaintiff's and defendant's works are dissimilar if in other respects similarity as to a substantial element of the plaintiff's work can be shown.[13] The only question is the value of the similar material as it appears in the plaintiff's work, not the defendant's work.

Determining whether a substantial part of the plaintiff's work has been taken is decided by the judge's impression, that is the ordinary observer test. No expert witnesses are called.

---

13 Above n 2, Vol 3 § 13.03[B].

III FAIR DEALING

In New Zealand, as in other jurisdictions there is the statutory defence of fair dealing available.[14] The defence arises where a substantial part of the copyright work has been reproduced, that is, it would otherwise be an infringement.[15]

There has been some confusion in the courts between substantial similarity and fair dealing. In England, before the Copyright Act 1911, the fair dealing exceptions were foreshadowed in case law as forms of fair use, a concept not clearly distinguished from insubstantial taking.[16] Also some United States cases have stated that an insubstantial similarity was not actionable, as it was a fair use.[17] This is an incorrect approach.

The defence originally developed in the Common Law. Historically fair dealing (or fair use as it is called in the United States) has always had to do with the use by the second author of the first author's work.[18] There is a problem with such uses as photocopying fitting within this, and it is better described as an exception. The defence therefore anticipates original thought by the defendant building on the use of the plaintiff's work.

The rationale behind the defence is that it is needed in some circumstances to fulfil the object of copyright which is the promotion of creativity. The primary object of giving a monopoly through copyright protection is the belief that providing economic benefits to authors and

---

14 New Zealand: Copyright Act ss 19, 20; England: Copyright Act ss 6, 9; Canada: Copyright Act 1985 s 27(2); Australia: Copyright Act 1968 ss 40-42; United States: Copyright Act 1976 s 107.

15 *Johnstone* v *Bernard Jones Publications Ltd* [1938] Ch 599,603.

16 Above n 8, 301.

17 Above n 2, § 13.05.

18 L E Seltzer *Exemptions and Fair Use in Copyright* (Harvard University Press, Cambridge, Massachusetts, London, 1978) 24.

other artists will encourage creativity, which is in the public interest.[19] The traditional uses protected under this defence are also concerned with promoting learning and increasing knowledge. Fair dealing is a defence to infringement where these objects are not served by protecting the copyright owner.[20]

It is rare for fair dealing to be defined. The Copyright Act 1962 does not define the term.[21] A suggested definition is "a privilege in others than the owner of copyright, to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright".[22] This is a very general definition. Whether a use is fair is determined by the court taking into consideration the circumstances of each case. The defence is very fact specific and different factors will be considered in different cases. This accounts for the view that it is impossible to give a definition that will fit every case.

The use of the copyright work for certain types of purposes, for example, research or criticism may be fair dealing. These developed in the Common Law and are now codified in the Act.

The New Zealand, English, Canadian and Australian Copyright Acts set out specific limited purposes for which a use may be fair dealing. Parody is not included in these lists. The limitation of purposes in regard to which the defence of fair dealing can be set up, probably did not alter

---

19 Statute of Anne c 19 An Act for the encouragement of learning by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned. United States Constitution Art I section 8, clause 8 gives Congress the power "To promote the progress of arts and sciences ... by securing for limited times to authors ... the exclusive rights to their writings".

20 L R Yankwich "Parody and Burlesque in the Law of Copyright" 33 Can Bar Rev 1130,1132 (1955).

21 Nor do the English, Canadian, Australian and United States Copyright Acts.

22 H Ball *The Law of Copyright and Literary Property* (1944) 260.

the law, but it has prevented any attempt to extend the defence to new purposes.[23]

The Copyright Act 1976 was the first American Copyright Act to codify fair use. The fair use provision, section 107 provides:

> Notwithstanding the provisions of sections 106 and 106A the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in those sections, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non profit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or the value of the copyrighted work.

This section instead of listing specific uses which can be fair use anticipates other uses than those specified may be fair use, by the language "for purposes such as". The Committee of the Judiciary listed examples to give some idea of the types of activities the courts might regard as fair use under the circumstances. Included is the use in a parody of some of the content of the work parodied.[24] The list set out purposes which the courts in the past have regarded as fair use,

---

23 W A Copinger and F E Skone James *Copinger and Skone James on Copyright* (12 ed, Sweet & Maxwell, London, 1980) 513.

24 Copyright Act 1976 s 107 *Notes of the Committee of the Judiciary House Report* No 94 1976.

depending on the facts of the case. The Act therefore, does not change the courts' position on fair use, nor did it intend to.

The English courts have set out various factors to be considered to decide whether the copying is fair in a particular case. These have been accepted in other Commonwealth jurisdictions. The cases discussed considered whether the use was fair where the purpose was criticism.

In *Hubbard* v *Vosper* Lord Denning set out three factors to be considered.[25]

1. The number and extent of quotations and extracts.
2. The use made of them.
3. The proportions of extracts to comments.

He also thought other considerations might come to mind.

In *Beloff* v *Pressdram* the court approved *Hubbard* v *Vosper* and considered similar factors, whether it was an approved purpose, the amount and value of what was taken and the proportion of what was taken to comments.[26]

In earlier English cases, another factor considered important was the likelihood of the works entering into competition with each other, the market of the copyright work being affected.[27] This may be an underlying, though not expressly spelt out factor in recent English cases.

In the United States the Copyright Act 1976 section 107 sets out four factors to be included in determining whether the use in a particular case is fair. The section gives no guidance as to the weight to be given each

---

25 [1972] 2 QB 84,94.

26 [1973] RPC 765,786-787.

27 *Weatherby* v *International Horse Agency* [1910] 2 Ch 297,305.

factor. Factors other than those set out in the section may be considered.

The United States courts emphasise that a commercial purpose militates against fair use. This was laid down in *Sony Corp* v *Universal City Studios Inc*[28] and *Harper & Row Publishers Inc* v *Nation Enterprises*.[29]

Sony Corp involved owners of copyright in television programmes suing manufactures of home video recorders alleging that individuals used them to record copyrighted works. The manufacturers were alleged to be liable for infringement because they sold the recorders. The Supreme Court emphasised that if the Betamax recorders were used to make copies for a commercial purpose, such use was presumed unfair. But in this case the contrary presumption applied as it was a non-commercial use.[30] The majority also found there was no harm to the potential market for or the value of the copyright work.

The Court laid down the commercial/non-commercial distinction to assist in a finding of fair use.

This decision does not fit within the traditional fair use idea of the second work using and building on the original. The case involved total copying. It would have been better to leave the legislature to solve the problem by charging a royalty on blank tapes, home video taping being impossible to regulate.

Nation was a case where the copyright owner of a former President's memoirs who had sold the exclusive rights to print pre-published excerpts to a national magazine, alleged infringement where another magazine

---

28 78 L Ed 2d 574 (1984).

29 85 L Ed 2d 588 (1985).

30 Above n 28, 597.

acquired a copy and rushed it into print, leading the first magazine to cancel the contract.

The Supreme Court rejected the argument of fair use and found an infringement. The fact that the publication was commercial rather than non-profit weighed against fair use.[31] The crux of the profit/non-profit distinction is not whether the sole motive is for monetary gain, but whether the user stands to profit from the exploitative use of copyright without paying the customary price.[32] The Court therefore rejected the defendant's argument that the primary motive was news reporting.

All jurisdictions emphasise the amount taken as a relevant factor in determining fair use. This appears to be a reapplication of the substantial similarity test. As fair dealing is a defence to infringement, which involves the taking of a substantial part of the plaintiff's work, the amount taken should only be relevant to the extent that the defendant's work becomes a substitute for the plaintiff's work. The defendant's work must have input from the defendant to be a fair use.

IV PARODY

The term parody refers to a humorous work where the humour is derived from the mocking imitation of other, usually serious works.[33] In this

---

31 Above n 29, 608.

32 Above n 31.

33 S N Light 'Parody, Burlesque and the Economic Rationale for Copyright' 11 Conn LR 615,616.

paper, the term parody will cover both parody and burlesque. The two terms do have different technical meanings.[34]

Their common feature is that they depend for their existence on the opportunity to copy other works.[35] They are of a parasitic nature. The success of a parody depends on its perceived relationship with a familiar work. Without recognition of the thing being ridiculed, the audience will not appreciate the parodist's point of view.

Not all parodies depend on copying which is substantial enough to raise a copyright cause of action.[36] Most parodies by their nature depend upon the use of a substantial part of a copyright work and it is this characteristic which brings the parodist into conflict with the copyright owner.

Copyright gives a copyright owner, property rights in his/her work, the most important of which is the right to make and distribute copies of the work, which may be exercised or transferred as thought fit. Anyone other than the copyright owner who exercises these rights is liable for copyright infringement. Conflict therefore exists between the copyright

---

34 From the Oxford English Dictionary (2nd ed, Clarendon Press, Oxford, 1989).

burlesque: That species of literary composition, or of dramatic representation which aims at exciting laughter by caricature of the manner or spirit of serious works, or by ludicrous treatment of their subjects; a literary or dramatic work of this kind.

parody: A composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous, especially by applying them to ludicrously inappropriate subjects; an imitation of a work more or less closely modelled on the original, but so turned as to produce a ridiculous effect. Also applied to a burlesque of a musical work.

Burlesque imitates the style of the work burlesqued for the purpose of poking fun by applying the style to some topical subject other than the original work. Parody focuses on both the style and subject matter of the work imitated, drawing humour and insight from subtle variations which expose weaknesses of the original.

35 Above n 33.

36 S L Faaland 'Parody and Fair Use: The Critical Question' 57 Wash L Rev 163 (1981).

holder's exclusive right to control and therefore prevent copying of the work, and the parodist's need to use the work to create an independent work. It may be assumed that a copyright owner would not often wish to licence a parody, as it most likely involves ridicule of his/her work.

As it is based on copying, parody is subject to the copyright owner's right to control reproduction of his/her work, and is an infringement, unless it is allowed as an exception under the fair dealing defence.

There are different types of parody. These different kinds make different demands on copyright owners and serve literature and the public in different ways.[37]

1. A parodist takes a specific work and parodies its style, mannerisms and subject.

2. A work which parodies only a style concentrating on an exaggerating its eccentricities.

3. A work which uses a copyright work as a vehicle for social, political or literary criticism.

4. A work which mocks an entire genre. The author draws on many works to concoct his/her version of the genre.

5. A work where the parody lies not in the text alone, but in the text and context.

Each type differs from the other in the use it makes of the source text and in the target of its criticism.

---

37 J Bisceglia 'Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act' 34 Copyright L Symp (ASCAP) 1,7 (1984).

Parody has made many exceptional contributions to literature and art, and is traditionally recognised as an independent art form. Both parody and burlesque have a long history. Parody developed in ancient Greece and burlesque has been popular since the late sixteenth century.[38]

Some parodies have become more famous than the work they ridiculed. For example, Don Quixote a now famous novel in its own right began as a parody on the Spanish novel of chivalry. Many famous authors wrote parodies, for example Shakespeare parodied Marlowe. Burlesque was common in the theatre in the nineteenth century. Important plays often brought forth a corresponding burlesque.[39]

There is some debate as to the appropriate legal definition of parody. The definition becomes important where it is possible for a parody to be protected by the fair dealing defence.

Some authors believe that parody is used to encompass any form of critical or humorous expression that depends on an existing work of authorship for its creation and contains independent effort.[40] A parody may therefore be only humorous and have no critical comment.

The writer prefers the alternative view that the real value of parody to society lies not in its humour, but in its criticism. A parody is usually funny, but not all funny adaptions of a work are a parody.[41] By ridiculing other works or an aspect of life in a humorous way, the parodist draws attention to the faults in the style and content of a work or in society. The parodist leads the audience to see the original work from another perspective.

---

38 Above n 20, 1134.

39 Above n 20, 1134-1136.

40 M A Clemmons 'Author v Parodist: Striking a Compromise' 33 Copyright L Symp (ASCAP) 85 (1983).

41 Above n 36, 164; Above n 37, 22; Above n 20, 1131.

The writer submits that a parody ought to be defined as a work which takes for the purpose of literary or social criticism, and does this in a humorous way, making some alteration to the original for this end.

Although parody is traditionally viewed as an independent art form, its parasitic nature means there is the potential for conflict with the copyright owner. The way copyright law treats parody could have a major impact on its present and future development. Parody could be destroyed, by constantly being seen as a copyright infringement, or alternatively, protected by the fair dealing defence.

V TREATMENT OF PARODIES IN ENGLAND

The English courts treat parody the same as any other form of copying. The ordinary infringement test is applied, that is, it is an infringement if it takes a substantial part of the original work.

There are few cases alleging infringement by parody in English law.

In an early case, *Glyn* v *Weston Feature Film Co*[42] Mr Justice Younger suggested a more lenient approach towards parody. The plaintiff was the author of the novel *Three Weeks*. She alleged that the defendant's farcical film *Pimple's Three Weeks (without the Option)* was an infringement. It was held that the defendant had not taken a substantial part of the plaintiff's work so there was no infringement. The defendant argued the film was a burlesque of the plaintiff's novel and therefore was not an infringement, it was a new work.[43]

Mr Justice Younger noted that it was remarkable there were no cases where a burlesque had been found an infringement considering its age

---

42 [1916] 1 Ch 261.

43 Above n 42, 263.

and popularity.[44] Two burlesque or parody cases prior to *Glyn* sometimes cited by authors,[45] are *Hanfstaengl* v *Empire Palace*[46] and *Francis, Day and Hunter* v *Feldman*.[47] In these cases, burlesque or parody were not argued as defences to the infringement actions, nor were the cases decided on this basis.

In *Hanfstaengl* two newspapers sent artists to the Empire theatre to make rough sketches of an exhibition of tableaux vivants, that is, where modern paintings were reproduced by having a painted background, a gilt frame and actors in the positions of the people in the paintings. The plaintiff was the copyright owner of five of these paintings and alleged the defendants had infringed copyright through indirect copying.[48] The sketches were found not to infringe the plaintiff's copyright, because they were rough sketches which did not copy the artistic merits of the original.[49] The quality of the original works were not reproduced, Lord Justice Lindley noted that the amusing sketches in Punch of the pictures in the Royal Academy were not infringements.[50] This was because those sketches, as in this case, did not take a substantial part of the plaintiff's work. This reference to Punch sketches seems the only comment of relevance to parody.

In *Francis, Day and Hunter* v *Feldman* the copyright owners of the song *You Made Me Love You (I Didn't Want To Do It)* alleged infringement by the reply song *You Didn't Want To Do It, But You Did*. On appeal, it was

---

44 Above n 42, 268.

45 Above n 20, 1139-1143.

46 [1894] 3 Ch 109.

47 [1914] 2 Ch 728.

48 The plaintiff had failed in the earlier case of *Hanfstaengl* v *Empire Palace* [1894] 2 Ch 1 to prove infringement by the theatre.

49 Above n 46, 132; 134.

50 Above n 46, 130.

decided that on a comparison of the two songs there was no infringement.[51] Therefore, this case was decided on the basis of substantial similarity.

Mr Justice Younger suggested reasons for the non-infringement of parody. He suggested the principle "that no infringement of the plaintiff's rights takes place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result".[52] This statement has sometimes been taken for authority for the general proposition that parody can never constitute an infringement.[53] Arguably Mr Justice Younger is just setting out the basic requirement that infringement only occurs when a substantial part has been taken. He goes on to set out this test.[54] However, the statement take alone suggests an illegitimate idea of the infringement test. An infringement occurs where the defendant has taken a substantial part of the plaintiff's work and it is irrelevant that the defendant may have produced some original work.

In *Carlton* v *Mortimer*[55] the copyright owner of the novel *Tarzan of the Apes* sued the defendant for a production of a comic acrobatic performance under the title *Warzan and His Apes*. The judge noted that only two incidents of the performance were taken from the novel. He was satisfied that a burlesque of these trifling incidents was not an infringement. The case was decided applying the substantial similarity test. He felt Mr Justice Younger was going too far if he understood him to be saying a burlesque could never be an infringement.[56]

---

51 Above n 47, 734.

52 Above n 42, 268.

53 S Ricketson *The Law of Intellectual Property* (The Law Book Co, Sydney, 1984) 201.

54 Above n 42, 269.

55 [1917-1923] Macg Cop Cas 194.

56 Above n 55, 195.

In the later case of *Joy Music Ltd* v *Sunday Pictorial Newspapers (1920) Ltd*[57] Mr Justice McNair cited the *Glyn* dicta with approval. The plaintiff was the copyright owner of the popular song *Rock-a-Billy* and alleged the defendant had infringed copyright by the parody *Rock-a-Philip*, which was in support of Prince Philip who had been criticised for his participation in dangerous sports. The only similarities between the two works were the verse structure and rhythm, and in a small part of the chorus, the words Rock-a-Billy, rock were changed to Rock-a-Philip, rock. The plaintiff argued this was the essential part of the song. The defendant argued alternately, that it was not a substantial part and as a parody it was protected by the *Glyn* dicta.

After noting that there was no reported decision on the question whether a parody of a copyright work is an infringement, Mr Justice McNair stated that *Glyn* provided him with a clear indication as to the way this question should be decided.[58] In this case applying the *Glyn* test would lead to the conclusion that the defendant's parody was not an infringement. Though the defendant's work had its origin in *Rock-a-Billy* "it was produced by sufficient independent new work by Paul Boyle to be in itself, not a reproduction of the original 'Rock-a-Billy', but a new, original work derived from 'Rock-a-Billy'".[59]

In *Twentieth Century Fox Film* Corp v *Anglo Amalgamated Film Distributors Ltd*[60] Mr Justice Plowman reluctantly applied the *Glyn* test. The plaintiffs were producers of the film *Cleopatra* and for advertising purposes had posters of a scene of Cleopatra lying on a divan with Antony and Caesar in the background. The defendants were producers of the film *Carry on Cleo* and produced a poster similar to the plaintiffs, the only difference being different actors were used. The judge noted

---

57 [1960] 2 QB 60.

58 Above n 57, 70.

59 Above n 57, 71.

60 *The Times*, London, England, 22 January 1965.

that it was important to bear in mind that the test was suggested in relation to literary, not artistic copyright. But even applying the test it did not displace the view one would form on a visual comparison, that is, the defendants' poster did reproduce a material part of the plaintiffs' poster.

This case could have been dealt with by rejecting the defendants' argument of parody. Their poster appears to be nothing more than straight copying.

More recent cases have firmly rejected the *Glyn* test. It has been described as the high water mark of any liberty allowed towards parody.[61]

Schweppes Ltd v *Wellingtons Ltd*[62] involved the use of the distinctive Indian tonic water label on the defendant's tonic water bubble bath. The defendant's label was substantially similar to the plaintiff's, the only difference was the defendant's label bore the name Schlurppes instead of Schweppes. The plaintiff alleged artistic copyright had been infringed, while the defendant argued it was intended as a joke, the label being a parody and therefore not an infringement applying the *Glyn* test.

After finding substantial similarity, Mr Justice Falconer rejected the *Glyn* test as an incorrect statement of law. "The test every time in my judgment is, as the statute makes perfectly plain: Has there been a reproduction in the defendant's work of a substantial part of the plaintiff's work?".[63] He interpreted *Joy Music Ltd* as being decided on this basis. There was no substantial similarity because there was no

---

61 *Williamson Music Ltd* v *The Pearson Partnership Ltd* [1987] FSR 97,104.

62 [1984] FSR 210.

63 Above n 62, 212.

reproduction of the words or any part of the plaintiff's song.[64] If the case was to be explained on any other basis it was wrongly decided.

As there was no real defence to the infringement claim in this case, summary judgment was awarded to the plaintiff. As Jeremy Phillips noted, it is difficult to see how this was a case of parody. It is not an attempt to ridicule or poke fun at the plaintiff's product, but rather an attempt to cash in on consumer familiarity with the plaintiff's product as a means of enhancing the defendant's sales.[65]

In *Williamson Music Ltd* v *The Pearson Partnership Ltd*[66] the copyright owner of the song *There is Nothin' Like a Dame* alleged infringement by the defendant's television advertisement and moved for an interlocutory injunction. The defendant argued that the lyrics and music were deliberately created to parody the plaintiff's song and in the result there was no infringement.

The judge approved the test laid down by Mr Justice Falconer. A substantial part of the lyrics had not been taken, so the literary copyright was not infringed. Regarding the musical copyright, it was arguable that a substantial part of the original was in the advertisement, so there was a serious question to be tried.

The judge made some interesting comments on the nature of parody.[67]

1. A parodist may take an idea and from it a completely new and original work may be created.

---

64 Above n 62, 213. The judge referred to the words of McNair J in *Joy Music Ltd* v *Sunday Pictorial Newspapers (1920) Ltd* [1960] 2 QB 60,69.

65 J Phillips 'The Parody Defence to Copyright Infringement' 43 Cam L J 245,247 (1984).

66 [1987] FSR 97.

67 Above n 66, 103.

2. The parodist may be indulging in literary criticism or review of the original work. The point did not arise in this case, so there was no need to deal with any sort of defence under the fair dealing exception.

The first proposition misses the point about the problem of parody in copyright law. Parody usually involves the copying of the form of expression, and it is this feature which brings the parodist into conflict with the copyright owner.

The second proposition suggests that if the judge had been faced with a parody with a critical element it could be protected under the existing statutory fair dealing defence.

The judge was referred to the United States authority of *Berlin* v *EC Publications Inc.*[68] He emphasised that the case was decided on the basis of substantial similarity, but did not acknowledge that the dicta was suggesting a test for deciding whether a particular parody fitted within the fair use defence. It seems odd that counsel did not quote later United States authorities that clearly support that a parody may be a fair use.

English law therefore adopts a strict approach towards parody. A parody will be a copyright infringement if it takes a substantial part of the copyright work. *Williamson Music Ltd* offers a slim hope that a true parody may be exempted from copyright infringement under the existing fair dealing defence because it is for the purpose of criticism. It is unknown whether courts will apply this in the future.

---

68 219 F Supp 911 (1963); affirmed 329 F 2d 541 (1964).

VI TREATMENT OF PARODIES IN CANADA

The Canadian courts, like the English, give parodies no special treatment. They are infringements if they take a substantial part of the copyright work.

In *Ludlow Music Inc* v *Canint Music Corp Ltd*[69] there was an action for an order restraining the defendant from selling records using the tune of the composition *This Land is Your Land* with different lyrics. The Court held that the Copyright Act 1952 section 19 did not authorise a recording of the tune with new lyrics, since a song is both the tune and lyrics.[70]

The defendant had argued that there were separate copyrights in the lyrics and tune and as the firm were not using the plaintiff's lyrics there was no infringement.[71] In dicta, the judge assumed the plaintiff would argue the new lyrics involved a substantial taking and were therefore an infringement. The defendant asserted the lyrics were a parody because they chided the Canadian Government and people for alleged feelings of inferiority. The judge would have decided this issue in accordance with the type of reasoning in *Joy Music Ltd*, whether the new lyrics are a new composition or a mere adaptation of the plaintiff's work.[72]

In later cases the courts do not refer to the *Glyn/Joy Music Ltd* test and decide the issue on the usual substantial similarity test.

---

69 62 DLR (2d) 200 (1967).

70 In other jurisdictions, including New Zealand, there are separate copyrights in the lyrics as a literary work and the tune as a musical work. See Brown and Grant *The Law of Intellectual Property in New Zealand* (Butterworths, Wellington, 1989) 237.

71 Above n 69, 214. The defendant alleged the use of tune was authorised in effect by s 19. The defendant had agreed in earlier correspondence to pay royalties for the tune.

72 Above n 69, 215.

In *MCA Canada Ltd* v *Gillberry & Hawke Advertising*[73] the copyright owner of the musical work *Downtown* alleged infringement by the defendant's parody of the lyrics, set to the tune, in an advertisement for a car dealership. Normally advertisers could obtain a licence that permitted a parody of the work in an advertisement. There was a system where various types of licences were issued and monitored by the CAPAC (Composers, Authors and Publishers Association). The defendant agency had not obtained a licence and was held to have caused the parody to be prepared and performed as a blatant infringement, in disregard of the rights of the others and was liable for both damages and punitative damages.[74] Parody is therefore treated as any other form of copying.

In *Rotisseries St-Hubert* v *Le Syndicat des Travailleurs*[75] the plaintiff was the owner of copyright in the design of a stylized head of a chicken and signature. During a labour dispute the defendant used a parody of the plaintiff's work on pamphlets distributed. The Court held that the defendant's work was an infringement. While the parody was not an exact reproduction, it reproduced a substantial portion of the work. The plaintiff therefore obtained damages and a permanent injunction.

VII TREATMENT OF PARODIES IN AUSTRALIA

The Australian courts also follow the strict English approach towards parodies.

---

73 (1977) 28 CPR (2d) 52.

74 No penalty was imposed on the author of the parody. He was thought to have exhibited naivety in accepting the defendant's offer.

75 (1986) 17 CPR (3d) 461.

In *United Features Syndicate Inc* v *Star Newspaper Pty Ltd*[76] the plaintiff was the copyright owner of the cartoon strip *Peanuts* featuring the character Charlie Brown. The defendant, publisher of a magazine called Ribald produced a comic strip *Charlie Brum*. The plaintiff instituted proceedings for an interlocutory injunction. The defendant had substantially taken the plaintiff's cartoon character, but changed the theme and storyline, to that of a salacious nature.

The defendant argued the work was a parody, but the court referring to the *Glyn* test rejected this. The court was satisfied that the defendant's work was not an original result, it merely took the original copyright work and turned it to a salacious and unpleasant end.[77]

In the recent case of *AGL Sydney Ltd* v *Shortland County Council*,[78] although it was held the defendant's work was a reply not a parody, Mr Justice Foster discussed the parody cases. After noting that the *Glyn* test appears to have won general acceptance, he stated it is of the essence of parody that the work parodied must be evoked in the mind of the hearer or viewer to fulfil the purpose of the parodist. The question must necessarily remain whether an infringement of copyright has occurred as a result of a substantial taking from the plaintiff's work. The Copyright Act grants no exemption for parody or burlesque.[79]

VIII TREATMENT OF PARODIES IN THE USA

The United States courts have a different approach to parodies. They are recognised as deserving of special treatment. They may fit under the

---

76 NSWSC No 2637 of 1977.

77 J Lahore *Intellectual Property in Australia. Copyright* (Butterworths, Sydney 1977) Update Service, April 1980, 92.

78 (1989) 17 IPR 99.

79 Above n 78, 105.

fair use defence provided they fulfil the criteria. The balancing function of fair use is clearly an appropriate approach to the competing artistic claims of the parodist and his or her victims.[80]

A. Development of Present Approach

The first case in which the conflict on parody was presented was *Loews Incorporated* v *Columbia Broadcasting System*.[81] Previously in some cases involving imitation there had been dicta supporting special treatment for parodies.[82]

In *Loews* the plaintiff had copyright in the motion picture *Gaslight* and alleged that the defendant's humorous sketch on television was an infringement. The defendant argued as the sketch was a parody, it escaped liability, by coming under the fair use defence.

The issue facing the court was whether a parody which takes a substantial part of a work is a fair use. The court decided the issue in the negative. A "parodized or burlesqued taking is to be treated no differently from any other appropriation".[83] The defendant's sketch was found to be an infringement of copyright.

This decision was affirmed by the Court of Appeals (Ninth Circuit). The Court of Appeal noted "The fact that a serious, dramatic work is copied practically verbatim and then presented with actors walking on their

---

80 Above n 36, 168.

81 131 F Supp 165 (1955); affirmed 239 F 2d 532 (1956); affirmed 356 US 43 (1958).

82 For example, in *Shapiro, Bernstein & Co* v *P F Collier & Son Co* 26 USPQ 40,43 (SDNY 1934) it was said "Mimicry, editorial comment, and parodies are other instances or varieties of fair use". See W F Patry *The Fair Use Privilege in Copyright Law* (Bureau of National Affairs, Washington DC 1985) 48-52 for further examples.

83 131 F Supp 165,183.

hands or with other grotesqueries, does not avoid infringement of the copyright".[84]

Soon after the District Court decision in *Loews*, the same court decided the case of *Columbia Pictures Corp* v *National Broadcasting Co*.[85] This involved the television burlesque *From Here to Obscurity* of the film *From Here to Eternity*. The plaintiff alleged infringement.

The Court sets out confusing reasoning but appears to decide the use made in the burlesque was permissible as it did not constitute the taking of a substantial part of the plaintiff's work.[86] Earlier in the reasoning, the Court suggested principles on which a burlesque or parody case should be decided.[87] In a burlesque of copyrighted material, there must be sufficient use of the original to recall or conjure it up, and the law permits more extensive use in the creation of a burlesque, than another serious work, by allowing it the fair use defence if appropriate on the facts.

Berlin v *EC Publications Inc*[88] involved the publication in Mad, a satirical humour magazine, a collection of parody lyrics of 57 old standard songs. They were divided into categories such as business and education, so were parodies on an aspect of life. The subject matter of the defendant's lyrics were completely different from the plaintiff's. After the title of each set of lyrics, a statement indicated the aspect of modern life the lyrics were intending to satirize. Then there were the words "sing to the tune of" and the title of an old standard song was inserted.

---

84 239 F 2d 532,536.

85 137 F Supp 348 (1955).

86 Above n 85, 352.

87 Above n 85, 350.

88 Above n 68.

The District Court applied the strict *Loews* test and found that a substantial taking had not occurred. This was affirmed in the Court of Appeals (Second Circuit), but the Court noted that the *Loews* decision, that a parody could not be justified as a fair use had been severely criticised. The Court stated:[89]

> "[W]e believe that parody and satire *are* deserving of substantial freedom - both as entertainment and as a form of social and literary criticism .... At the very least, where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire, a finding of infringement would be improper."

This dicta has subsequently been applied. Now in United States law a parody may have the defence of fair use.

The decision emphasised the two elements of parody, and suggested there is a parody, deserving of a defence where it is only a form of entertainment. The Court also set out the two tests that subsequent courts have used in deciding whether a parody in the particular circumstances is a fair use. These are the "conjure-up test" (third factor) and the "effect on demand test" (fourth factor). The Court did not address the question of how much was legitimately necessary to conjure up the copyright work and later decisions have struggled with this question.

B. Parody Definition

The courts do not often discuss the definition of parody. In *Berlin* the Court emphasised the entertainment aspect of parody as worth protecting. Also in *Elsmere Music Inc* v *National Broadcasting Co*[90] the Court of Appeals (Second Circuit) thought that a parody uses the

---

89 329 F 2d 541,545.

90 428 F Supp 741 (1980); affirmed 623 F 2d 252 (1980).

original as a known element of modern culture and contributes something new for humorous effect or commentary.[91] The humorous element of parody was emphasised as deserving of protection.

The Court in *Metro-Goldwyn-Mayer* v *Showcase Atlanta Co-op Productions, Inc* defined parody as a work in which the language or style of another work is closely imitated for comic effect or ridicule and in which some critical comment is made reflecting the original work of the parodist.[92] The Court believed that the underlying rationale of applying the fair use doctrine to parody is that this art form involves the type of original critical comment meant to be protected by section 107. Otherwise any comic use of an existing work could be protected, removing the fair aspect of the fair use doctrine. To be a parody and therefore have the possibility of fair use protection, the defendant's work must have social value beyond its entertainment function.

In this case, the Court decided that the defendant's musical *Scarlett Fever*, based on the novel and film *Gone With the Wind* was not the sort of original critical comment meant to be protected by the fair use defence. The work was not a parody, it was just a comical musical adaption.

The *Atlanta Showcase* decision has not been followed. The writer submits that this case gives the preferred definition of parody. The critical function of parody is it's merit, and it is this the law should protect. The wider definition of parody adopted by the United States' courts seems to have resulted in a very limited amount of taking under the "conjure up" test before a parody can be fair use.

It is vital to have a statutory or judicially consistent definition of parody, so that a true parody may be protected, while the parody argument cannot be used as a mere subterfuge for appropriation of another

---

91 623 F 2d 252,253.

92 479 F Supp 351,357 (1979).

person's creation. The definition the United States courts favour gives a parodist protection where his or her work is only humorous and has no critical comment. Allowing fair use for merely funny adaptions is too severe an encroachment on the copyright owner's rights.[93]

Parody can be a very powerful form of criticism. A critique of a work or aspect of society promotes thought and analysis by the public and other artists. This will lead to the creation of other original and interesting works.

Allowing only a true parody, that which has critical comment, as a fair use remains consistent with other purposes for which the defence is allowed. These other purposes are concerned with promoting learning and the expansion of knowledge. A humorous adaption may be entertaining, but it will not educate or inform the public, which is what traditional fair use defences require.

Other academics suggest there should be a distinction between protected and non-protected parodies on commercial grounds. There is a distinction between comic adaptions for monetary gain and true parody. Two different motivations are seen for a parodist. The first is the desire to utilise the copyright owner's work for financial gain, the second is where the parodist is motivated by artistic goals with financial gain as a secondary factor.[94]

This is an unworkable distinction. Whether an author sought to make a profit is irrelevant to the issue of whether the work is a parody.[95] A parodist should be entitled to work for financial gain, not just artistic fulfilment and most users have some commercial motive.

---

93 Above n 36, 164.

94 R T Nimmer 'Reflections on the Problem of Parody-Infringement' 17 Copyright L Symp (ASCAP) 133,152 (1969).

95 Above n 37, 19.

The general United States approach of partly deciding fair use by the commercial/non-commercial distinction is also considered incorrect.[96] The only relevance the commercial success of the second work should have is where it affects the demand for the original work.

Parody ought to be defined by the legal system, to emphasise the requirement of critical comment. The courts should be able to distinguish between criticism and humour to decide whether the defendant's work is a parody. This would be assisted by the defendant having the burden of showing what the parody was criticising. A defendant's inability to explain this, would alert the Court to an attempt to use the parody defence as a sham. It is suggested that the test for determining whether the work is a parody is whether the reasonably perceptive viewer can see its critique.[97] Although the critical point of a parody is in the eye of the beholder, that is, dependent on the individual, to be an effective parody, most of the audience must see its point.

Once the work has been determined to be a parody, it is a purpose for which the fair use defence exists. The other fair use factors must be considered to determine whether the parody is a fair use in the particular circumstances of the case.

There is no distinction in United States law between long and short works argued to be parodies. A long work, for example a play, can be a parody and therefore receive immunity from an infringement action.

In *Atlanta Showcase* there was no suggestion that the court rejected the parody argument, because of the length of the alleged parody. Rather it was because there was such extensive copying by following the plot, and copying specific incidents and dialogue of the original work. The parodist cannot copy the general story line and development, while parodying a

---

96 See n 28 and n 29 and accompanying text.

97 Above n 36, 190.

few incidents of the work. The work must overall be a parody, to have the possibility of the fair use defence.[98] This type of reasoning would also apply to shorter parodies.

It is not the length of the alleged parody that matters, but rather that the defendant's work overall parodies the plaintiff's work.

The United States courts disallow a work as a parody, where there is complete copying.

In *Walt Disney* v *Mature Pictures Corp* the Court rejected the possibility that where there was complete copying of the plaintiff's work, such a work was a parody.[99] In this case, the plaintiff's *Mickey Mouse March* was played over and over again as background music.

This result has been criticised as a work may be parodied by context alone. For example, in an anti-war review where *The Ballad of the Green Berets* (a military song) is performed by people dressed as gorillas in uniform. This could be an effective critical commentary on the values underlying the song.[100]

The *Mature Pictures* approach makes critical commentary by context impossible. Cases in which a whole work needs to be taken will be rare, but should be considered a parody, because of the biting criticism possible.

Another aspect of the parody definition which is disputed is what a parodist may parody.

---

98 Above n 92, 360. This was also the view expressed in *Columbia Pictures Corp* v *National Broadcasting Co* 137 F Supp 348,350.

99 389 F Supp 1397,1398 (1975).

100 Above n 36, 187.

In *MCA* v *Wilson*[101] the copyright owner of the song the *Boogie Woogie Bugle Boy of Company B* alleged infringement by the defendant's song the *Cunnilingus Champion of Company C*. The defendant argued the song took an innocent style of music and combined it with words on a taboo subject to make a funny point. By making fun of 1940s music the work parodied the sexual taboos of today. The District Court rejected the argument on the ground the defendant may have sought to parody life, but the work did not attempt to comment on the copyright work itself.[102] The plaintiff therefore won the case.

This approach was rejected in *Elsmere Music*. The plaintiff was the owner of the *I Love New York* advertising jingle which was the slogan of an advertising campaign to rescue the ailing city's tourism trade. The defendant television network allowed a comedy sketch to be performed. This sketch involved citizens of Sodom discussing the city's image problems and the effect on the tourist trade. The remedy was the advertising campaign using the song *I Love Sodom*.

The defendant's work was substantially similar to the plaintiff's so the decision hinged on the parody defence. The plaintiff argued that as the defendant did not attempt to parody the song *I Love New York* itself, it was not the type of parody that could get legal protection. The Court considered that the defendant's song was as much a parody on the plaintiff's song, as it was of the overall campaign. Even if *I Love Sodom* did not parody the plaintiff's song itself, that would not preclude a finding of fair use.[103]

In the *MCA* v *Wilson* Court of Appeal (Second Circuit) decision the majority rejected the dictum of going too far. "[A] permissible parody

---

101 425 F Supp 443 (1976); affirmed 677 F 2d 180 (1981).

102 425 F Supp 443,445. This was also the view in *Walt Disney* v *Mature Pictures Corp* 389 F Supp 1397.

103 428 F Supp 741,746.

need not be directed solely to the copyrighted song, but may also reflect life in general. However if the copyrighted work is not at least in part an object of the parody there is no need to conjure it up."[104]

The writer prefers the *Elsmere Music* dictum. The law should recognise that different types of parodies exist and that they are all deserving of the same freedom. The defendant might have a logical reason for conjuring up a work, without intending to parody the work itself, for example, with a song, recalling a mood by the type of music used.[105] Where the parody criticises society in general, the defendant must show that the work chosen was a particularly appropriate vehicle to make this criticism. The defendant has a broad range of work from which to choose his or her vehicle, some perhaps not copyrighted, and he or she should be required to prove the necessity of his/her particular choice.[106]

C. Conjure Up Test

This test involves a special application of the third factor in section 107. Applying this factor for other uses, the courts will consider the amount taken in proportion to the original work done by the defendant. This type of consideration is only appropriate to determine that the defendant's work is not a substitute for the plaintiff's work. The conjure up test appears to be more limiting. It only allows the parodist to take the minimum necessary to enable the audience to recall the original.

This test is commonly applied in parody cases but the courts have been reluctant to establish its boundaries. This tendency to concentrate on the third factor has meant there have been few cases where the parodist has succeeded. Also when the content of the parody is less than socially acceptable (in the judge's eyes) the test has shown its weakness.[107]

---

104 677 F 2d 180,185.

105 Above n 36, 185-186.

106 Above n 36, 191.

107 Above n 36, 175.

In *MCA* v *Wilson*, if the work had been a parody the District Court would have applied the conjure up test. The Court would have decided against fair use as the defendant's work not only conjured up the original memory of the plaintiff's work, it shared some of the same lyrics and music.[108] The Court therefore allowed the minimum taking for which the audience could recognise the original work.[109]

The majority of the Court of Appeal agreed the amount copied was excessive, so as to be beyond the conjure up test. The judges seemed influenced by the content of the defendant's work, that is the dirty lyrics.[110] The conjure up test can therefore be used to deny fair use, as a means of censorship.

The judgment of Mr Justice Mansfield (dissenting) is preferable. He considered that the defendant's work was a parody and the defendant had made a fair and limited use of the plaintiff's work in a reasonable manner.[111] He thought the District Court's conception of the conjure up test was too narrow and that although the defendant's use of dirty lyrics or language may be personally offensive to the judge, this is irrelevant in deciding whether the defendant's work is a fair use.[112]

Walt Disney v *Air Pirates*[113] was another case which applied the conjure up test. The plaintiff owned cartoon characters which were innocently delightful. The defendant copied the characters' graphic images and used them in an adult cartoon behaving in a way, quite unlike the

---

108 425 F Supp 443,454.

109 In *Walt Disney* v *Mature Picture Corp* 389 F Supp 1397 the Court was also of the view that the work was used for more time than was necessary to conjure up the original.

110 Above n 104.

111 Above n 104, 188.

112 Above n 104, 191.

113 581 F 2d 751 (1978).

plaintiff's characters would behave. The defendant argued that the work was a parody and a fair use.

The Court firstly upheld its previous decision in *Loews* and interpreted it as providing a threshold test which eliminated near verbatim copying.[114] In the absence of near verbatim copying the conjure up test is applied. On the facts, it was held that the defendant had taken more than necessary. As the essence of the defendant's work was to parody the character's personalities rather than appearances, it was unnecessary to copy the images so closely.

The defendant asserted that the humorous effect of a parody is best achieved when at first glance the defendant's work appears to be the original, but on closer examination it is something else. The Court rejected this. The parodist is not permitted to take as much of the plaintiff's work to make the best parody. The desire to make the best parody must be balanced against the rights of the copyright owner in his or her work. This balance is struck by allowing the parodist what is necessary to conjure up the original.[115]

In *Atlanta Showcase* if the defendant's work had been a parody it would have failed the conjure up test. It extensively copied from the plaintiff's work. The Court noted that it failed to parody even a significant portion of the elements of *Gone With the Wind* which it parallelled.[116]

In *Elsmere Music* the Court of Appeals (Second Circuit) favoured an expansion of the conjure up test and the recognition that a parody can be a fair use when the parodist takes more than allowed under the conjure up test.[117]

---

114 Above n 113, 757.

115 Above n 113, 758.

116 Above n 92, 360.

117 Above n 91.

> "[T]he concept of "conjuring up" an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to makes its humorous point. A parody is entitled at least to conjure up the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary."

Subsequent cases have rejected extending the fair use defence to the wider test suggested in *Elsmere Music*.

In *Warner Bros* v *American Broadcasting Co*[118] the Court of Appeals (Second Circuit) criticised the District Court's approval of the *Elsmere Music* test, fearing that under this test the defence could be used to shield an entire work substantially similar to the copyright work.[119]

The recent case of *Fisher* v *Dees*[120] also disapproves of the suggestion that more extensive use beyond the conjure up test is fair use. The Court applied the conjure up test, but agreed with the *Elsmere Music* view that the test is not limited to the amount necessary to invoke initial recognition.[121] Instead the test is whether the parody could have been made by using less of the plaintiff's work. Relevant to deciding this is the degree of public recognition, the ease of conjuring up the original and the focus of the parody. In this case, in view of the parodist's medium, no more was taken than was necessary to accomplish its purpose.

The United States courts therefore maintain the position that to be a fair use a parody must do no more than conjure up the original. This test

---

118 523 F Supp 611 (1981); affirmed 654 F 2d 204 (1981); 350 F Supp 1187 (1982); affirmed 720 F 2d 231 (1983).

119 654 F 2d 204,211.

120 794 F 2d 432 (1986).

121 Above n 120, 439.

poses the difficult question as to what quantum is necessary to conjure up the original.

Courts therefore allow the minimum taking for which an audience can recognise the original work. This will prevent a parodist from drawing attention to a particular scene or a character's behaviour and making a comment about this particular aspect of a work.

Decisions which suggest an application of *Loews* as a threshold test are even more restrictive. The Court in *Loews* was clearly treating parody like any other form of copying. The decision should have been rejected, rather than interpreted in a way which attempted to soften it's impact.

This restrictive approach has the result of favouring mediocre over better parodies. The appeal of the best parodies lies in their close paralleling of the original work. This is clearly a drawback of the application of this test. It is in the interests of the public to promote the best, rather than the worst or mediocre parodies. A test which does not allow the public to appreciate the finest parodies defeats the purpose of allowing parody under the fair use defence.

Fisher v *Dees* has expanded the conjure up test, to allow in appropriate cases, a high degree of similarity.[122] However the emphasis is still on allowing taking of the least amount necessary to conjure up the original.

In the writer's opinion if the third factor must be applied, it would be better to apply the *Elsmere Music* test because this recognises the important aspect of fair use, that is, that the parodist must apply some original thought to create a new work. Some authors see *Elsmere Music* as going too far and as suggesting an open-ended standard whereby wholesale appropriation of another's work becomes possible under the

---

122 Above n 2, § 13.05 [C].

banner of fair use.[123] This was also the fear of the Court of Appeal in *Warner Bros*. The writer does not think this test goes too far.

If the courts are to concentrate on the amount taken, then the more extensive taking allowed by *Elsmere Music* is preferable to the conjure up test. Generally, the basis of allowing the fair use defence is that the original work is used to produce a new work. The *Elsmere Music* test applies this rationale and the courts should use it, as it is consistent with the approach for other uses.

Another disadvantage of the conjure up test is the potential for judicial censorship of works. As the conjure up test is so vague it allows judges to reject the fair use defence because of the content of the work. This may be explicit as in *MCA* v *Wilson*, or a silent factor underlying the decision.[124] Judges should not be able to make decisions on the hidden basis that they were offended by the defendant's work. Copyright law should not operate as a silent means of censorship.

The courts favour the conjure up test because of their wide definition of parody, that is, that the humorous element of parody is deserving of protection. They feel the need to limit the protection of parodies at some point. The better approach is to limit the parody definition to cover only critical works.

Consideration should only be given to the amount taken to the extent that the defendant's work becomes a substitute for the copyright work. More importance should be placed on the effect on the demand for the plaintiff's work.

---

123 Above n 2, § 13.05 [C].

124 Above n 37, 30. It is suggested *Walt Disney* v *Air Pirates* 581 F 2d 751 was also influenced by the judge's distaste for obscenity.

D. Effect on Demand Test

Anglo-American law provides an economic justification for copyright protection. It is assumed that if authors are not given a copyright monopoly they would reap insufficient reward to encourage the production of creative works, which is in the public interest. The fair use defence means the public interest prevails over the copyright owner's right to control reproductions. The public interest is in the development of new works, not just substitutes, so it is these the defence aims to protect.

Most United States courts when confronted with a parody have focused on the degree of similarity between the parody and copyright work. Many courts have disallowed extensive taking even when the copyright holder has not shown a likely threat to the economic value of his or her work.[125]

Often the plaintiffs in parody cases sought to protect their works not because of economic interests, but because of personal interests. They wished to prevent their works being parodied in a way they disliked. By concentrating on applying the conjure up test these types of interest may be protected. However, as present law stands the protection of personal interests cannot be justified.

The courts should concentrate on the potential effect of the parody, on the work parodied. Economic harm must result from competition, not from the effectiveness of the parody's criticism.[126]

Nimmer calls this type of approach the functional test. The proper measure of the effect of the unauthorised use is whether the use supplants a valid use of the original. If the use fulfils an actual or potential function of the original, that effect is assumed to be a

---

125 'The Parody Defence to Copyright Infringement: Productive Fair Use After *Betamax*' 97 Harv L Rev 1395,1400 (1985).

126 Above n 33, 634.

disincentive to the author and therefore undesirable. However if the use merely supplements the functions of the original work it should be allowed. This test does not require evidence of actual economic harm suffered by the copyright owner, but an examination of the copyright work and the purpose and character of the second.[127]

Under this test the courts should not look towards the similarity of the medium, for example, both works are films, but rather the purpose of the works and whether they are directed to the same type of audience. This makes allowance for the fact that a novel has the potential of being developed into a film.

A true parody will not usually be a threat to the economic value of copyright by competing with the copyright work. Therefore when parody victims allege infringement it is more likely that their pride rather than their copyright has been hurt.[128]

Some decisions have considered the effect on the demand test along with the conjure up test. This factor was laid down by the Court of Appeal in *Berlin* as appropriate to consider, as well as the conjure up test.

In *Elsmere Music* the District Court decided that the defendant's use had not tended to interfere with the marketability of the copyright work.[129] In *MCA* v *Wilson* the Court of Appeal noted that the defendant's use was not fair use because the songs were competitors in the entertainment field.[130] The District Court in *Warner Bros* noted that the plaintiff had not proved that the defendant's work would reduce demand for the

---

127 Above n 2, § 13.05 [B].

128 Above n 36, 191.

129 Above n 103, 747.

130 Above n 104, 183.

plaintiff's work.[131] The test was also applied in *Atlanta Showcase*. The Court found *Scarlett Fever* was likely to harm the potential market for the derivative use of *Gone With the Wind* in the form of a theatrical adaption. It was irrelevant that a previous stage version of the copyright work was a failure. The Court applied the functional test and found the overall function of both works was to entertain. As the defendant's work was not a parody, its function was not criticism.[132] Arguably a parody's function is also entertainment but as it is aimed at a different type of audience, it is not a substitute for the original.

The decision which best expresses the approach is *Fisher* v *Dees*. It will not be a fair use where the defendant's work supplants the original in the market which the original is aimed at or in which the original is or has reasonable potential to become commercially valuable. The parody's critical impact must be excluded from this test, as copyright law is not designed to stifle critics. A destructive parody has an important role to play in social and literary criticism.[133] In this case, the defendant's work did not fulfil the demand for the original, as people wishing to hear the plaintiff's work, a romantic ballad, would not be satisfied with hearing the parody.

The courts should concentrate on applying this factor. As copyright law emphasises the protection of economic interests, the fair use defence should only be rejected where the defendant's work becomes a substitute for the original, and is in competition with it. The defendant is entitled to profit from a parody, which would have a different market, but is not entitled to compete with the plaintiff's work. As a true parody involves a critique through humour and original thought by the parodist, it would never effect the demand for the original.

---

131 523 F Supp 611,617.

132 Above n 92, 360-361.

133 Above n 120, 438.

E. Advertisements

There are no cases where the courts have accepted the parody defence when the defendant's work was an advertisement.

In *DC Comics* v *Crazy Eddie* the defendant's television commercial for electronic equipment involved detailed copying of the plaintiff's televised trailers for a *Superman* film. The defendant argued the advertisement was a parody. This was not a case of fair use, but one of unjust appropriation of copyrighted material for personal profit.[134]

The judge emphasised that the advertisement was only made for a commercial motive so this weighed against fair use. There was also detailed copying, so the defendant's work would probably not have fulfilled the third factor requirement.

The case was discussed in *Warner Bros*. The Court felt there was a valid distinction between a commercial purpose to sell the defendant's products, which the plaintiff could prevent, and a parody for entertainment in the hopes of commercial success.[135]

Later cases have emphasised that an advertisement will not be a parody because of the lack of intention of making a humorous comment.

In *Original Appalachian Artwork Inc* v *Topps Chewing Gum Inc*[136] the manufacturer of Cabbage Patch Kids alleged copyright had been infringed by the defendant's Garbage Pail Kids stickers. The stickers depicted dolls with features similar to Cabbage Patch Kids in rude, violent situations. The Court found the stickers copied a substantial amount of the Cabbage Patch Kids' features. The defendant argued the work was a parody and protected under the fair use defence.

---

134 205 USPQ 1177,1178 (1979).

135 720 F 2d 231,242.

136 642 F Supp 1031 (1986).

The Court stated "the primary purpose behind the defendant's parody is not an effort to make social comment but an attempt to make money".[137] The basic concept behind the defendant's stickers aimed at capitalising on the Cabbage Patch craze. The defendant's use was an infringement.

In *Tin Pan Apple* v *Miller Brewing Co Inc*[138] the plaintiff rap group brought an infringement action against a beer manufacturer who used look-alikes and part of the plaintiff's songs in a beer commercial. The defendant argued the commercial was an obvious parody and fair use.

The Court found there was ample authority for the proposition that appropriation solely for personal profit, unrelieved by any creative purpose, cannot be considered a parody as a matter of law.[139] The Court found the advertisement was not a parody relying on the *Elsmere Music* definition.

The writer considers that this approach has difficulties. Advertisers arguably do put some creative effort into the work, although commercial profit is more important. Parodists in the entertainment field may also have the commercial return as uppermost in their minds when creating a work.

Instead the courts should rely on the suggested definition of parody, that it must involve critical comment on a work or society. An advertiser is not usually concerned with making a valuable critical comment, but rather with associating his or her product with a well-known and popular work, often by making some humorous adaption to the original.

---

137 Above n 136, 1034.

138 737 F Supp 826 (1990).

139 Above n 138, 831.

Some advertisements could be considered parodies, for example those which are advocating a cause. For example Greenpeace advertisements which criticise human treatment of the world, for example, pollution, involve criticism of an aspect of society.

Usually when applying the more limited definition of parody an advertisement would not be a parody. There would be no need to emphasise the commercial purpose of advertisements.

IX CONCLUSION: THE NEW ZEALAND APPROACH

New Zealand copyright law is faced with the choice between two different ways of treating parodies.

English, Canadian and Australian copyright law adopt a restrictive approach to the art of parody. Parody is treated the same as any other form of copying. A parody will infringe copyright if it takes a substantial part of the original work.

As an art form, parody depends on the copying of other works. The success of a parody depends on the audience recognising the work being parodied. Although some parodies will not copy a substantial part of the original work, so as to be a copyright infringement, most will face a possible copyright action. The best parodies are those which closely parallel the original work and therefore keep the details of the work being ridiculed in the minds of the audience at all times.

By giving the opportunity for copyright owners to bring an action against parodists, copyright law could destroy the art of parody. This will mean a loss to the world of literature and art, and be contrary to the rationale of copyright law which is to promote artistic creativity.

The New Zealand Copyright Act 1962, is similar to those of Australia and Canada, all of them being based on the English legislation.

In the Common Law, the English courts treated certain purposes, according to the circumstances as a fair dealing, and therefore not an infringement. Parody was not one of these. When fair dealing as a defence to an infringement action was codified by copyright legislation, parody was therefore not included in the list of the only purposes for which the defence could apply. This prevented the development of the law to include parody as a fair dealing purpose, for the legislation is now relied on by courts in these jurisdictions, as establishing that parody is to be judged according to the infringement test.[140]

As the New Zealand Copyright Act is similar to the English legislation, it is submitted that the New Zealand courts would follow the strict English, Australian and Canadian approach. The writer considers that the United States approach of treating parody as a fair use, depending on the facts, is to be preferred. Parody should be treated as a valued and respected independent art form in copyright law. The fact that by definition it is premised on copying, should not detract from this.

The United States originally had the same restrictive approach as the other jurisdictions discussed but this was changed in *Berlin* v *EC Publications Inc.*[141] This is reflected in the United States Copyright Act 1976. The codification of the fair use defence has not involved a specific list of purposes for which a use is fair. Instead the purposes listed are just some of the examples of purposes which may have the fair use defence. The legislature anticipated that parody would continue to be treated as a fair use in the appropriate circumstances.

Although the United States approach of treating parody as a fair use should be followed, their definition of parody and the factors considered should be treated with caution.

---

140 See n 62, n 66 and n 78 and accompanying text.

141 Above n 89.

The critical element of parody is that which copyright law should aim to protect. The wide definition of parody adopted in the United States where the humorous element is found deserving of protection should not be followed. There is little social merit in protecting a merely humorous adaption of a copyright work from an infringement action. It may be entertaining, but other purposes protected by the fair use defence are those which involve expanding knowledge.

The United States approach of emphasising the amount taken, using the conjure up test as determinative of fair use should not be adopted. This is a restrictive test. It means that the better parodies, which involve close paralleling of the original will not be considered a fair use. This is contrary to the public interest. The promotion of creative works should involve, the promotion of the better as well as the mediocre works.

The type of test relying on the amount taken, should not be so heavily relied on to determine whether a parody is a fair use. As for other purposes, the amount taken should only be relevant to determine whether the parody is a substitute for the original.

More importance should be placed on the effect of the parody on the demand for the original work. Where the parody is in competition with the original work, that is, it can be purchased as a substitute, it will not be a fair use. As a parody involves a critique of the original work or some aspect of society, it cannot act as a substitute for the copyright work. This test means that only the economic interests of copyright holders, those protected by Anglo-American and New Zealand copyright law are considered by the courts.

As the writer considers a parody definition should emphasise the critical effect it is possible for parody to be considered a fair use under the existing New Zealand legislation, as a form of criticism. This was suggested as possible, though not on the facts of the case before the

Court in the English case of *Williamson Music Ltd* v *The Pearson Partnership Ltd*.[142]

It would be unwise to rely on this dicta to have such an influence over the New Zealand courts, in the face of the strong view in other parody cases, that it is correct to apply the substantial similarity test to parody.

In order to escape this conservative English, Canadian and Australian influence, the Copyright Act 1962 should be amended to specifically include parody as a purpose for which the fair dealing defence can apply. This amendment should also include a statutory definition of parody, limiting it to cover only those works which have a critical element. This would eliminate the possibility of the problems caused by the wider United States definition. The New Zealand courts will not face a situation of having to develop other restrictive tests, to prevent a defendant succeeding on the parody defence argument, where his or her work is just a humorous adaption. Such an amendment will mean New Zealand copyright law will help rather than hinder the art form of parody.

---

142 Above, n 61.

BIBLIOGRAPHY

Books

A Brown and A Grant *The Law of Intellectual Property in New Zealand* (Butterworths, Wellington, 1989)

W A Copinger and F E Skone James *Copinger and Skone James on Copyright* (12 ed, Sweet & Maxwell, London, 1980)

W R Cornish *Intellectual Property* (Sweet & Maxwell, London, 1989)

H G Fox *The Canadian Law of Copyright and Industrial Designs* (2 ed, Carswell Co Ltd, Toronto, 1967)

H Laddie, P Prescott and M Vitoria *The Modern Law of Copyright* (Butterworths, London, 1980)

J Lahore *Intellectual Property Law in Australia. Copyright* (Butterworths, Sydney, 1977)

M B Nimmer and D Nimmer *Nimmer on Copyright* (Matthew, Bender & Co, New York, 1988) Vol 3

W F Patry *The Fair Use Privilege in Copyright Law* (Bureau of National Affairs Inc, Washington DC, 1985)

S Ricketson *The Law of Intellectual Property* (The Law Book Co, Sydney, 1984)

L E Seltzer *Exemptions and Fair Use in Copyright* (Harvard University Press, Cambridge, Massachusetts, London, 1978)

Articles

J Bisceglia 'Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act' 34 Copyright L Symp (ASCAP) 1 (1984)

M A Clemmons 'Author v Parodist: Striking a Compromise' 33 Copyright L Symp (ASCAP) 85 (1983)

S L Faaland 'Parody and Fair Use: The Critical Question' 57 Wash L Rev 163 (1981)

R J Kapelke 'Piracy or Parody: Never the Twain' 38 Uni Colo LR 550 (1966)

T R Leavens 'In Defence of the Unauthorised Use: Recent Developments in Defending Copyright Infringement' 44 Law and Contemporary Problems 3 (1981)

S N Light 'Parody, Burlesque and the Economic Rationale for Copyright' 11 Conn LR 615 (1979)

R T Nimmer 'Reflections on the Problem of Parody - Infringement' 17 Copyright L Symp (ASCAP) 133 (1969)

J Phillips 'The Parody Defence to Copyright Infringement' 43 Cam LJ 245 (1984)

L R Yankwich 'Parody and Burlesque in the Law of Copyright' 33 Can Bar Rev 1130 (1955)

L R Yankwich 'What is Fair Use?' 22 U of Chi L Rev 203 (1954)

'Parody and Copyright Infringement' 56 Columbia L Rev 585 (1956)

'Parody and Burlesque: Fair Use or Copyright Infringement' 12 Vand L Rev 459 (1959)

'The Parody Defence to Copyright Infringement: Productive Fair Use after *Betamax*' 97 Harv L Rev 1395 (1985)