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Articles

Defining parody and satire: Australian copyright law and its new exception: Part 2 — Advancing ordinary definitions

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In Part 1 of 'Defining Parody and Satire' we sought to show that, for the purposes of the new exception to infringement of the Copyright Act in ss 41A and 103AA (the 'new exception'), it is unsafe to construe parody and satire according either to US law on the matter or to available dictionary definitions. In this part we propose working definitions for parody and satire which, we suggest, are more congruent with both the intention of the Act to protect the free speech of Australian humorists and with the ordinary meanings of the words. There are four categories of artistic practice that the new Australian exceptions would seem designed to protect. The largest two groups combine the two terms: (1) satirical parodies in which copyright material is reused and distorted for the satirical effect of ridiculing that material. These are the staple of many literary, theatrical, video and digital media. We propose a metaphor of the satirical fist of critical intent animating the parodic glove of formal reuse to help comprehend this group particularly. (2) A group of satirical parodies where the target is not the artistic form parodied, but where the parody, for example of a popular song, provides a vehicle for satirical comment of some other person, group, or event. (3) Pure parody — formal play without discernible satirical intent either towards the vehicle text or any other potential target. This is, perhaps, most common these days in the visual arts, where a layering of pre-existing images creates juxtapositions which defy rhetorical purpose; there is also an established tradition of affectionate literary and dramatic parody. (4) Straight or pure satire, which may be independent of parody, but which may also quote its object so that the audience can know what the target is, without distorting the form of that object (text or image) in parodic ways. This category would include the use of excerpts of television broadcasts which became the subject of Australian copyright litigation in the well known 'Panel' case, decided before the introduction of the new exception. We submit that unlicensed use of copyright material in all of these categories should enjoy the protection of the new Australian exception, subject to the issues of 'fairness' and possibly also moral rights in particular instances —

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*a consideration of which is beyond the scope of this article. The definitions of parody and satire we will propose are: **Parody: the borrowing from, imitation, or appropriation of a text, or other cultural product or practice, for the purpose of commenting, usually humorously, upon either it or something else; Satire: the critical impulse manifesting itself in some degree of denigration, almost invariably through attempted humour; the artistic results (usually humorous) of expression of such a critical impulse.***

1 Introduction

I'm not a lawyer, I'm a cartoonist. I poke fun at people for a living. — *Bill Leak*¹

In the previous part, we sought to demonstrate that Australian courts should not simply follow US law or commonly available dictionaries in construing parody and satire for the new exceptions to the Copyright Act. It is important that the critical work done in the first part be permitted to stand or fall in its own right. If, as we believe, the negative task of questioning the adequacy of existing dictionaries and US law to provide 'take away' definitions has been successful, then we now need to essay the task of proposing more adequate definitions for the ordinary meaning of the terms. Our formulations will necessarily be subject to debate and refinement, but we recognise the ultimate need for prescriptions in a legal context, where copyright holders and creative artists have clear rules as to what is permissible reuse for the purposes of the exception.

It is important to recognise that this legitimate legal need for prescriptive clarity creates a tension in our work. Theories of literary, cultural and aesthetic activities in the humanities and social sciences are, of their nature, descriptive and open-ended activities. Theorists may (and too often do) masquerade as legislators of form, meaning and value, but such claims are essentially rhetorical, however much they pretend to be statements of fact. There are no rules in the creative arts that cannot be questioned, varied and even broken by sufficiently inventive artists. Aesthetic theory, therefore, cannot contain what artists might do to existing genres, and theorists must respond to reconsider definitions when the need arises lest they be trapped in the arid activity of declaring, for example, that a work intended and received as an epic is not one because it fails to match the prescription. We have argued in Part 1 that the law should be responsive to change in the function and media of parody and satire, and not lock the terms into a primarily Augustan meaning. However, we recognise that the law cannot be endlessly responsive either, because legal consequences can impinge on the rights of others in ways that purely aesthetic consequences cannot.

Imagine, for example, that an artist chooses to call an entirely abstract canvas 'A Portrait of Queen Elizabeth'. The cultural critic does not need to decide whether this painting is 'really a portrait', but can legitimately write about how the intersecting planes of yellow and red relate intriguingly to established practices of portraiture in the European tradition. If a few artists do this sort of thing, then books about portraiture need to take account of the

¹ P Wilson, 'Leak in the clear over Tintin', *The Australian*, 4 June 2007.

trend and vary the idea that portraits are necessarily paintings of recognisable individuals. If, however, the original artist wants to enter her 'portrait' of Elizabeth in the Archibald Prize, a far more concrete group of legal considerations comes into play. As a matter of equity for the other entrants in the Prize, a clear and legally enforceable definition of a portrait, one that rationally permits inclusions and exclusions for judgment, becomes necessary. Indeed, on a number of occasions, disputes over what constitutes a portrait for the purposes of the Archibald have made it to court, so the example is more than moot.²

The situation is analogous for parody and satire under the new exception. While we strongly oppose the introduction of definitions that are so restrictive as to stifle creative activity, to rush to the opposite extreme of open-ended descriptiveness is impractical and clearly outside the intention of the Act. A limit case is relatively easy to imagine. An artist might wish to reproduce a feature film without alteration in the sincere belief that it is so bad as to be a satirical parody of itself. As theorists of parody and satire, we can at one level see the point of such a gesture, but the potential for abusive appropriation of others' intellectual property on this justification is also clear. To come up with a formulation that fits into this middle ground will require some intellectual compromise, but it is legally necessary. The law requires a prescriptive definition of parody and satire so that copyright holders and comic artists can know in advance what their rights and responsibilities will be. Moreover, we submit, the 'ordinary meaning' of parody and satire, as understood by practitioners, theorists and the general public, lies in this middle ground between narrow prescription and open slather; so that is where we will search.

We will start by placing parody and satire within the taboo-testing practices of humour, suggesting that, to receive legal protection, creative artists need to invoke a play frame as a context for their reuse. Then we separate the different functions of parody and satire, while explaining how many particular works involving reuse are both parodic and satirical. We propose working definitions of parody and satire and proceed to outline how these definitions would have functioned in some recent Australian cases if those had been pursued under the new Act.

2 Humour and the play-frame

When the Minister for Justice told the Senate that the new exception would ensure 'that Australia's fine tradition of poking fun at itself and others will not be unnecessarily restricted',³ he betrayed a common and reasonable assumption that parody and satire are particular activities within the wider field of humour. It is possible to give counter-examples to this general truth — a handful of major satirical works such as George Orwell's *1984*⁴ are too bleak to be considered humorous — but the ordinary understanding of parody and

² See P Ross, *Let's Face it: the History of the Archibald Prize*, Art Gallery of NSW, Sydney, 1999.

³ Commonwealth, *Parliamentary Debates*, Senate, 29 November 2006, p 112 (Chris Ellison, Minister for Justice and Customs).

⁴ First published by Secker and Warburg, London, 1949.

satire categorises them as humorous techniques. Humour has traditionally provided a licence to say and do things which would otherwise not be allowed; while some cultures and cultural groups give wider permission than others, most have also recognised the inherent dangers of offence. Thus, wherever a licence for humour is found, signals or markers have evolved to allow it to be anticipated, as have specialised ‘containers’, or dedicated times and spaces devoted to humour and laughter. Common examples of the latter are: designated comedy theatres and clubs; holiday events such as school ‘muck-up’ days; and, in Spanish, Latin-American, Japanese and many other cultures, formal dedicated festivals such as Mardi Gras, Spring Festival⁵ and so on. These signals vary from frequent and liberal to infrequent and restrictive, but all serve to delineate a publicly privileged time and space.

Other markers of humour are interpersonal and conversational, such as the standard opening gambit to a joke-telling session, ‘Have you heard the one about . . .?’; or in Australia, the use of Strine,⁶ which automatically gives licence for colourful and alliterative abuse to make fun of friends and superiors alike.⁷ Semiotic markers such as the smiling face and sounds of laughter and chuckling also signal the onset of playfulness and humour and, like yawns, are known to predispose others to follow suit. Formal and structural markers include such things as the conventional black-box frame around a drawn cartoon,⁸ the use of a compère to introduce stand-up comedy acts and advertised titles of plays and films, pointing to both content and style (such as plays-on-words which typically indicate comedy, as in *That Was The Week That Was*, Michael Frayn’s hit comedy *Noises Off*, Mel Brooks’ comic film *Blazing Saddles*, or the long series of *Monty Python and . . .*). The appearance of stock characters, conventional plots or topics, even the announcement that a particular actor, well-known for comic roles, will appear, the sale-location of a book on a shelf labelled ‘humour’, or the title/home-page format of a magazine or a website, will all serve a framing and containing function. All such markers, whether extrinsic or intrinsic to the comic material at hand, effectively delineate a ‘play-frame’ within which humour, including parody and satire, is communicated.⁹

Like most humour, parody and satire depend upon the perceived resolution of incongruities, employing non-seriousness and irony to convey complex meanings. They both create humour by yoking together opposites (for example, in models, subjects, words, images, rhythms, sounds, acts or

5 In Japan such containers are known as ‘laughter places’, or *warai no ba*; see J M Davis (Ed), *Understanding Humor in Japan*, Wayne State University Press, Detroit, 2006, pp 3 and 18.

6 See C Davies, *The Mirth of Nations*, Transaction, Piscataway, New Brunswick, NJ, 2002, pp 89–102, for a useful account and examples of abusive Strine.

7 J M Davis, “‘Taking the Mickey’: a Brave Australian Tradition” (2007) 4 *The Fine Print* 25, at <<http://www.emendediting.com/html/ezine/index.html#>>.

8 In modern colour printing, a block of background colour to the cartoon can equally serve as a frame, set in a black and white page of print, and the convention is so well-established that even the occasional, deliberate absence of a frame is read as a reference to its existence.

9 The concept of a frame evolved by human society to delineate play, both in childhood and adult life, was put forward by Gregory Bateson in a chapter entitled ‘A Theory of Play and Fantasy’ in his *Steps to an Ecology of Mind*, Ballentine, New York, 1972, pp 177–93. For further elaboration on the concept, see D Handelman, ‘Passages to Play: Paradox and Process’ (1992) 5(1) *Play and Culture* 1.

whatever combination of materials is chosen by the humorist). Incongruity flows from such contrasts and pairings, but also from simplification and stylisation, caricature, exaggeration, repetition and inversion, and from the use of nonsense and illogic. Such patterning builds predictability about the next step in the entertainment or argument on offer and, combined with surprise twists defeating those expectations, creates humour when the incongruity is perceived as 'resolved' or 'explained'. In the case of parody, since the incongruities are structural, they may be more obvious, as when new material is cast into, or linked with, an established but contrasting original. In satire, incongruity is used more abstractly to point to contrasts between the ideal and the real, between the semblance (or the superficial) and the actual. The tonal effects of such juxtapositions will thus range widely, from gentle and quiet irony at one extreme, to overt ridicule and savage debasement at the other. And the resulting laughter may be more or less corrective in its intent. In general, pure parody is likely to be more light-hearted, although some gentle satire can also be more ironic than overtly critical; but when parody combines with satire, the force of the irony implied in its incongruities intensifies. The moral dimension to satire, which draws attention to hypocrisy and pretence, means that public figures such as politicians and media stars are frequent targets of cartoons, TV panel discussions, comic novels and so on. The social significance of the exposure turns what might otherwise be gently ironic into biting and intentional ridicule. Such open and direct scornfulness, without much subtlety or concealment, is particularly well-tolerated in the robust, Australian cultural context, where 'taking the mickey' and its broad permission for ridicule has almost come to be seen as a democratic right.¹⁰ Indeed, ridicule might seem sufficiently entrenched as a function of satire to be almost of definitional importance; but since its presence is not inevitable in satirical works, the common reduction of satire to ridicule alone is unsafe.

While humorous messages in general can be defined as non-serious communications and, when successful, are received as such by their auditors,¹¹ the non-seriousness can be — and especially is in the case of satire — linked with or layered upon a serious critical message, conveyed either explicitly or ironically. Like all human communication, humour is culturally mediated and many critics have pointed out that it may require specific cultural knowledge for its interpretation, which explains why misunderstandings over humorous intent regularly occur between otherwise intelligent human beings. Satire in particular possesses a vast scope for misinterpretation, and its humorous critique may well be taken at face value or, as Condren has pointed out, create ideas that can then be taken seriously.¹² What little can be discerned of contemporary reaction to Swift's shocking

¹⁰ P Ryan, 'Taking the Mickey' (2000) *Quadrant* 88–9. See also Davis, above n 7, pp 20–7.

¹¹ For a description of how humorous communications violate a number of the established Gricean principles of serious communication, see S Attardo, *Linguistic Theories of Humor*, Mouton de Gruyter, Berlin, 1994, pp 50, 271–92.

¹² C Condren, 'Between Social Constraint and the Public Sphere: On Misreading Early-Modern Political Satire' (2002) 1(1) *Contemporary Political Theory* 79–101; and C Condren, *Argument and Authority in Early Modern England: The Presupposition of Oaths and Offices*, Cambridge University Press, Cambridge, 2006, pp 226–8 on Arbuthnot's, *Art of Political Lying* (1712).

A Modest Proposal seems to ignore the obvious fact that it attacks English rule of Ireland.¹³ And one obvious way of defending Machiavelli's *Prince* was to read it as a satire.¹⁴

The implications for issues of fair dealing in the use of parody and satire are clear. There can be little doubt that audiences culturally familiar with the forms of these markers and play-frames are forewarned about what to expect and, naturally, such expectations affect reception of the stimuli which follow, however diverse that might actually be.¹⁵ Given the power of this 'humorous framing effect', it is important in any discussion of parody and satire that the context within which instances of humour are communicated be admitted as part and parcel of the whole. Thus, an episode of news-parody appearing as part of a TV program which openly bills itself as 'satirical' or 'humorous' will be received differently from a 'cold call', where the artist or actor is presented without framing context or introduction and must work with an essentially blank slate of audience expectations. Where the play-frame is evident, the audience will not mistake seriousness for non-seriousness, nor reuse for plagiarism (the fundamental offence copyright law is designed to protect people from), intuiting instead some degree of critical and/or creative distance from the original. They may or may not like the resulting humour, but the fact that it is intended as humorous will have been made clear, and these markers will assist courts in their objective determination of the purpose of a dealing with copyright material

3 Satire and parody: independent but linked

Satire and parody so frequently work together that dictionary definitions and common usage often treat them as conjoined, even partly interchangeable. Nevertheless, conceptually, they are neither identical nor two equivalent but clearly different genres of humour. While epic and pastoral are both equivalent but distinct poetic genres, parody and satire are not very conveniently conceived as genres at all. Parody focuses on manipulations of literary or artistic form and thus has some entitlement to be called a genre, but satire is more properly an abstract noun we use when we detect a critical/humorous dimension to anything. This means it is defined primarily by purpose rather than structure or technique, and lacks the formal properties required for delineating a genre. In addition, genre itself as a concept becomes attenuated in usefulness when artistic creations cross media boundaries and alter their characteristics and, as already noted, parody and satire in the digital age thrive

13 Full title: *A Modest Proposal for preventing the children of poor people from becoming a burthen to their parents or country, and for making them beneficial to the publick*, S Harding, Dublin (printed); J Roberts, London (reprinted), 1729. See R Phiddian, 'Have you Eaten yet? The Reader in Swift's *A Modest Proposal*' (1996) 36 *Studies in English Literature* 603 at 603–21 for analysis of reader reaction.

14 As in its early English translation, by Henry Neville, in *The Works of the Famous Nicolas Machiavel*, printed for John Starkey at the Miter in Fleetstreet, near Temple-Bar, London, 1675. See the Prefatory Letter.

15 See, eg, P Derks, R E Staley and M G Haselton, "'Sense" of Humor: Perception, Intelligence, or Expertise?' in W Ruch (Ed), *The Sense of Humor*, Mouton de Gruyter, Berlin, 1998, pp 143–58. For the most recent summary of research, see R A Martin, *The Psychology of Humour: an Integrative Approach*, Elsevier Academic, Burlington Mass and London, 2007.

on such mixed media. Thus, we suggest employing metaphor to grasp the relationship and nature of the two types of humour, seeing parody as the glove (more or less ornamented and artificial in form), and satire as the directing hand of purpose within it.

4 'Pure satire', 'satirical parody' and 'pure parody'

A very common form of satirical humour is 'bare knuckle' or 'pure satire', without the use of parody. Here a humorous creation (text, cartoon, video, acted performance, art-work, musical creation etc — all often subsumed in literary discussion by the word 'text') has evident critical intent, but its comic forms and techniques do not invoke any recognisable original or 'shadow from the past'; they therefore cannot be said to be parodic, or to involve reuse of intellectual property in any persistent way. For example, many of the individual satirical pranks or 'stunts' which, like beads on a string,¹⁶ comprise a typical program in *The Chaser's War on Everything*, do not involve a parodied form or reference to a pre-existing original text. Their controversial APEC¹⁷ prank (or perhaps more strictly speaking 'hoax', since it was authorised by the team's producers)¹⁸ of a mock motorcade which penetrated the formidable security barriers established at the time in Sydney,¹⁹ was certainly intended to expose those imposing, but apparently ineffectual, public safety measures. In doing so, however, it did not set out to mock either the concept of motorcades or any particular one of them; nor did it invoke or refer to pre-existing models of testing security (such as Colonel de Groot slashing the ribbon at the opening of the Sydney Harbour Bridge). It was a satire without parody, or 'pure satire', for our purposes.

'Satirical parody' is also very common, as can be seen in other *Chaser* sketches, such as their mock-pop song *Stairway to Kevin*,²⁰ or the more risky *Eulogy to Dead People*,²¹ a song concerning the hypocrisy which gags the media from mentioning, after the deaths of public personalities, those negative traits exploited for comment during their lifetimes. Both these examples make

16 The structure basic to many comic plots, so defined first by K M Lea, *Italian Popular Comedy: a Study in the Commedia dell'arte 1560–1620*, Oxford University Press, Oxford, 1934, Vol 2, p 188. See also J M Davis, *Farce*, rev ed, Transaction, Brunswick NJ, 2003, p 16.

17 Asia-Pacific Economic Community. In September 2007, it was Sydney's turn to host an APEC Leaders' Forum, amid serious concerns about security and terrorism.

18 For the professional comedian and scholar of humour, there is an important distinction between a hoax, which is performed in response to an invitation, and a prank, which is an unauthorised leg-pull or practical joke. Comic artists such as the late Campbell McComas from Melbourne, or Rodney Marks in Sydney today, earn substantial incomes from hoaxes legitimated by their corporate hosts for quite serious reasons. See website of International Association of Hoaxers and Pranksters for more detail at <http://www.prankstersassociation.com/wst_page7.html>.

19 Shown on 12 September 2007, ABC TV.

20 Shown on 12 September 2007, ABC TV, when then opposition leader, Kevin Rudd, was rising in the polls. The original parodied was Led Zeppelin's sentimental hit 'Stairway to Heaven'. Text and lyrics of original at <<http://www.superseventies.com/stairway.html>>.

21 17 October 2007, ABC TV. Original song and music written by Andrew Hansen using a 'patter song' structure typified by the work of satirists such as Gilbert and Sullivan, Flanders and Swan or Tom Lehrer. Posted on *YouTube* at <<http://www.youtube.com/watch?v=hLVslpejFgM>>.

their point by deliberately choosing to imitate familiar and recognisable structures.²² Both are also clearly intended to deliver humorous but critical comment about social vices and follies and thus qualify as satire; they are good examples of parody appearing in harness with, and as a technique for achieving satirical purpose. They can usefully be termed ‘satirical parody’, for with them the glove of parody is animated by the satirical hand.

Parody bereft of critical intention is far less common. Stretches of Laurence Sterne’s eighteenth century comic masterpiece, *Tristram Shandy*, read as motivelessly playful parody of various contemporary written forms, and some musical parodies, such as C P Q Bach, delight simply in the mastery of a particular style or technique. The purpose or intent is pure fun, not mockery of an original model, nor any real critique of social folly.

In other cases (for example, Tolkien and Barnes as noted in Part 1), ‘pure’ parody can serve as deliberate *hommage*, when an artist invokes aspects of an original image or text for serious intellectual purposes, such as praise or acknowledgment of the achievement of the original. Such purposes may not even be combined with humour, as with T S Eliot, who juxtaposes snippets from the classics with verse-lines of his own in *The Waste Land* and *Ash Wednesday*.²³ This form of sampling is often referred to as ‘appropriation’ and even when it does shade into humour, the intent may be to use the original to comment on something else altogether; by combining the old and the new in this way, a pastiche is created. Given today’s ease of sampling from all media, pastiche is becoming more central as a form in its own right, as well as a technique combined with parody or satire (or both). Music and visual arts are the media where it is most freely practised.

5 Parody

Appropriation and ‘parodic re-functioning’

Appropriation and sampling have widened the scope of traditional parody and thus of the common usage of the word itself. Creative artists in many spheres (art and cartooning as well as musical composition, theatre, mime, stand-up comedy and even in advertising) make use of such appropriations, and with greater degrees of ambiguity and comic distance from the original than is present in, or was intended by, Eliot’s work. Greatly facilitated by electronic media and their readily-available techniques of ‘cut and paste’, such layered borrowing produces what Hutcheon has labelled ‘postmodern parody’, namely, ‘the ironic playing with multiple conventions, [an] extended repetition with critical difference’.²⁴ As a result, contemporary literary

22 A specific hit-song in the first case, and a collection of trite platitudes commonly in use to refer to the dead and departed, in the second. Significantly, the second met with more negative public comment than the first, reflecting its more serious social critique. On-air, the comedians themselves reacted to the risqué nature of their satire, interrupting their colleague with throat-clearing and ‘That’s enough!’, in order to persuade him to desist from listing the dark sides to any more ‘Aussie paragons’, celebrated in death as flawless, but in life well-known not to be so.

23 T S Eliot, *Collected Poems 1909–1935*, Faber and Faber, London, 1936.

24 L Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms*, Methuen, New York, 1985, p 7.

criticism has tended to expand the range of the single word ‘parody’ to accommodate such post-modern creations. One influential book, which has already been cited in an Australian decision,²⁵ prefers the term ‘parodic refunctioning’.

Contemporary humour and comedy tend to appropriate not only cultural objects and conventions, but also specific techniques that in the past have been reliably associated with other, distinct genres or forms. Thus the traditional farce-techniques of using stock-characters, mechanical plot-devices and whirlwinds of sound and action have been pressed into service by other, very different styles of comedy, such as the Theatre of the Absurd, or are found more specifically in the works of Alan Ayckbourn, Michael Frayn and Ben Elton, in the ambiguous films of Quentin Tarantino, and other complex works like Mel Brooks’ *The Producers* (1968, subsequently a 2001 Broadway musical hit). A contemporary study of the genre has observed how:

Deliberately playing with established genre-patterns and signals, tilting and shifting mood and feeling, undercutting expectations with reversals, incongruities, dead-ends, pauses, using self-referential comments and parodic haloes drawn from well-known genre-classics, comic artists in recent years have pushed ‘pure’ farce in many different directions, exploiting the riches of its structures and devices and producing plays which use farce for many different purposes.²⁶

In similar vein, it is probably ‘parodic re-functioning’ rather than ‘pure parody’ which characterises much of the work of today’s comic artists when invoking famous originals. In May 2007, Bill Leak began a cartoon series for *The Australian* which appropriated the image and character-type of Hergé’s Tintin, but without parody or lampoon of Hergé’s creation. The holders of the rights, Moulinsart, claimed that Leak’s cartoons ‘t[ook] unfair advantage of the reputation of the work of Hergé’.²⁷ Here is an example from the protracted federal election campaign, showing an imminently victorious Rudd/Tintin in the final round with a bedraggled John Howard:

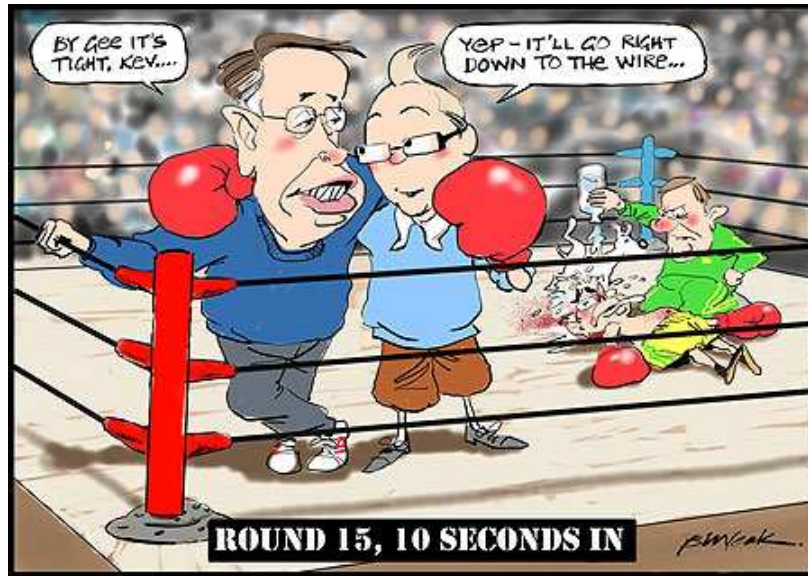
The cartoons neither critique the original nor suggest that the 2007 Rudd/Tintin character is more foolish or less competent than the original. Rather, the well-known image and character-traits of ‘old’ Tintin are parodically re-functioned to convey insight into the behaviour of an emerging political figure. The conjunction of Rudd and Tintin certainly produces a message which is critical of Rudd and of his overly-credulous supporters, and perhaps also of the Australian polity as a whole. Further, it conveys comment about John Howard’s electoral predicament, as Tintin always wins in the end. So Hergé’s work has been used as a means of comment well beyond the compass of its creator. Nevertheless, this reuse is and should be protected under the new exceptions, and Moulinsart withdrew their request to Leak to stop using the image.

²⁵ M Rose, *Parody: Ancient, Modern and Postmodern*, Cambridge University Press, Cambridge, 1995, cited in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235; 184 ALR 1; 50 IPR 335; [2001] FCA 108; BC200100361 at [17] per Conti J (*Panel Trial Judgment*).

²⁶ Davis, above n 16, p 16. Other commentators on the conflation of comic genres in the last few decades include A Bermel, *Comic Agony*, Northwestern University Press, Evanston, Ill, 1993.

²⁷ Wilson, above n 1.

Example: a Bill Leak cartoon



Originally published in *The Australian*, 24 October 2007; reproduced with permission.

The ordinary meaning of parody

It is sensible to take a step back at this point to recognise that the complex literary theory which seeks to track such fine-grained distinctions in parody is unlikely to satisfy the practical purpose of arriving at contemporary ordinary meanings for legal purposes. Literary theory revels in complexity such that, for example, Rose's book manages to define differences between 37 'types of understandings and uses of parody',²⁸ and arrives at a general definition of parody as 'refunctioning of preformed linguistic or artistic material'.²⁹ This is so broad as to capture much that is clearly not parodic in any sense; for example, a performance by an actor of any role, tragic or comic, previously interpreted differently by another actor, or by the same actor in a different performance. Such an approach, as Michael Spence points out, makes 'a more precise understanding of the term parody . . . difficult to find'³⁰ and he prefers 'a definition that tracks the ordinary usage of the term in a sufficiently broad range of contexts to render it useful for the purposes of legal analysis'.³¹ In pursuing this aim, it will, however, be important that definition captures

²⁸ Rose, above n 25, pp 280–3.

²⁹ Ibid, p 52.

³⁰ M Spence, 'Intellectual Property and the Problem of Parody' (1998) 114 *Law Review Quarterly* 594 at 594.

³¹ Ibid, at 595.

parody (and satire) in a number of modes and media, not just as literary texts, but also as performed and audio/visual material.

Clearly any useful contemporary definition of parody must go beyond the dictionary definitions which restrict parody to a comic critique of its models and are shaped too much by narrowly literary concerns. Spence provides a 'working definition' that takes care to avoid this trap. He usefully defines parody as 'the imitation of a text for the purpose of commenting, usually humorously, upon either that text or something else'.³² Formally, this would seem unduly restrictive, but Spence in fact takes 'text' in an appropriately accommodating sense. If his understanding of text is extended to cover a wide range of artefacts in various media, the definition is closer to the common understanding of the term by artists, their audiences and the public at large. It captures the fundamentals of parody as we have discussed them and it is formulated as a working definition. It also accepts that the humour of parody may be at the expense of targets other than the originals parodied and, importantly, it establishes the independence of 'pure parody', with its merely humorous nature, from satire, with its intentionally polemical purpose.

Thus the 'ordinary meaning' of the term can be formulated, which may then co-exist with, but remain distinct from, satire: *parody is the borrowing from, imitation, or appropriation of a text, or other cultural product or practice, for the purpose of commenting, usually humorously, upon either it or something else*. This is proposed as a working definition for the ordinary meaning of parody in the context of the new Australian exception.

6 Satire

Historical approaches to satire

As a preliminary to a contemporary definition, a little more needs to be said about the past meaning and scope of satire in classical and later times. When the Romans claimed to have invented satire they were, as noted in Part 1, referring to it as a distinctive poetic genre, which assisted in asserting cultural independence from the Hellenic world. Such a narrow and interested use has not been helpful for a longer time than dictionary definitions might suggest, given their reliance on classical references. From late antiquity, the range of the satiric has stretched well beyond the constraints of poetic genre to include prose, mixed prose and poetry, dramatic presentation, philosophical dialogue and pictorial imagery. Although specific *poetic* satires, often in imitation of the Romans Horace and Juvenal, continued to be written well into the eighteenth century, it is quite misleading to see satire, then or now, as fixed in any specific type of writing.

Satire has come to refer to a dimension of writing or communicating critical of some aspect of society or intellectual life. While dictionary definitions effectively capture the element of critique, they have unhistorically constrained the satiric to literature rather than to the broadly discursive. Satire has been intrinsic to social and political discourse for a long time. And in this extended sense, satire can be direct or indirect, subtle, gentle or harsh, vitriolic and slanderous, sustained or more sporadic, all within a single piece of work.

³² Ibid, at 595.

In short, to find satire does not mean finding *a* satire with a given tone or following any specific set of artistic or literary conventions. Hence, again, the fundamental challenge of definition.

Further, as has already been noted, the relationship with humour has been ambiguous and complex throughout satire's history. Because the attempt to be humorous is now almost invariably taken as a defining characteristic of satire, the connection between the two requires a little more examination. From antiquity, it had been accepted that the provocation of laughter was itself a form of social critique, that laughing was largely laughing at — a form of ridicule designed to shame, humiliate and isolate. Concomitantly, the effective provocation of laughter was a sign of rhetorical success in combating what was posited to be wrong.³³ Hence, predominantly, satire became almost co-extensive with the *serio ludere* tradition of discourse beyond poetry; through the ludicrous, say what is serious. The authority figure of this approach to life was the philosopher Democritus, who held that the only truly philosophical response to the world was to laugh at it. Historically, the most important exponent was Lucian (120-c.180).

From Renaissance times, the functions of satiric humour were further theorised and practised. Both Sir Thomas More and Erasmus, for example, held that the provocation of laughter could be used to stimulate self-criticism; this they tried to show through making the satirist the partial butt of the humour. They believed this could be morally more effective than dogmatic assertion or the shaming of a victim through ridicule.³⁴ It was in the sixteenth and seventeenth centuries that the notion of comic satire was developed from these humanistic theories of rhetoric. Possibly, this was in part a protective device: satire was vulnerable to accusations of slander, if not worse, but what was said in jest, if not malicious, could be a defence at law.³⁵ Once established, this notion has largely prevailed and thus guides us in the task of defining the contemporary ordinary meaning of satire and the satiric.

Satire and the satiric: towards an ordinary meaning definition

The word 'genre' can be used very broadly to mark an identifiable discursive phenomenon, but its use in the context of satire can be highly misleading. It can lead us to expect satire to be subject to a simple, strict definition of the sort that might apply to the sonnet or to *haiku* poems, but the contested history and range of the word 'satire' is resistant to such a reduction.³⁶ A useful working definition may have to stop short of prescribing a defining essence and rely more on a family resemblance. Thus, satire may be identified in terms of a

33 Q Skinner, *Reason and Rhetoric in the Philosophy of Hobbes*, Cambridge University Press, Cambridge, 1996, pp 198–211.

34 D Grace, 'Utopia: A Dialectical Interpretation' in C Murphy, H Gibaud and M Di Cesari (Eds), *Miscellanea Moreana, Moreana 100*, Medieval and Renaissance Texts and Studies, Binghampton, 1989, pp 273–302.

35 C Curtis, 'From Sir Thomas More to Richard Burton: the Laughing Philosopher in the Early Modern Period' in C Condren, S Gaukroger and I Hunter (Eds), *The Philosopher in Early Modern Europe: The Nature of a Contested Identity*, Cambridge University Press, Cambridge, 2006, pp 90–112.

36 Condren (2002), above n 12, at 79–80.

constellation of relatively stable, but ultimately contingent, features that are understood within a culture, and by virtue of which we assign the general term 'satire'.³⁷ This caveat aside, all satirists, irrespective of specific content or form in what they produce, will claim a moral, intellectual or critical seriousness in what they are doing. In short, what is vital for an effective working definition is not isolating a single continuous feature *of*, but identifying an informing intention *in* and rationale *for* this creative activity. It is this type of claim that putatively justifies the work of a satirist, as a determination to shock an audience and/or to ridicule a target presupposes desert. Thus the defences of satire by writers like Swift and Pope were essentially casuistic: they were, they claimed, obliged to be harsh because there were serious evils to combat, the ridicule was of the deserving, and so on. Conversely, those accusing others of satire saw them as unfairly and cruelly harming others, as being more problem than solution.

The forms in which the satiric impulse is manifested are almost as various as cultural activity itself. The means to its critical ends are also various, but are most likely to involve the provocation of humour.³⁸ In order to provoke laughter, a satirist must distort, and satire's encouragement of distortion has always left it vulnerable to accusations of unfairness (a point More and Erasmus addressed by making the satirist the butt of humour). In the present context of proposing a definition, this makes it important to distinguish between fair usage *of* (as protected by the Act) and being fair *to* whoever is being satirised.

In recognition of all these points, a working definition for the ordinary meaning of satire in current use will be most easily arrived at if we first focus, not on 'satire', but on 'the satiric'; that is, upon the informing intention *in* and rationale *for* this creative activity in all its forms of expression. From this, we may pass to satire as the outcome or product of that moving spirit. The satiric may be defined as: ***the critical impulse manifesting itself in some degree of denigration, almost invariably through attempted humour.***

The emphasis on the adjectival 'satiric' rather upon the misleading abstract noun, 'satire', has the advantage that it pre-empts nothing as to form or target, artistic merit, intellectual content or moral integrity. The satiric can be controversial or reassuring; it can be intended to demonise or to stimulate self-reflection; it has been both honourable and slanderous. It will always, however, be animated by critique and provocation and identifiable as such. Thus, recognising that satire is not a genre but rather an idiom, a mode of writing and/or artistic creation, satire may be defined, by extension from the above definition of the satiric, as: ***those artistic expressions created in the satiric mode or idiom; the artistic results (usually humorous) of expression of such a critical impulse.***

37 On the notion of family resemblance, see L Wittgenstein, *Philosophical Investigations*, trans. G E M Anscombe, Blackwell, Oxford, 1953, 1968, paras 66–78.

38 See the comment in Section 2 above regarding Orwell's *1984* consistently classified as satire which certainly shocks, but is nevertheless devoid of humour.

The challenges of visual satire

As noted above, adjectival emphasis helps recognise the diversity of media and discursive forms that can be and are now used for satiric effect. It embraces satire as a mass media phenomenon as well as a literary practice. It applies equally to the ridiculing of an opponent in public or parliamentary debate; to paradigmatic satires such as those by Swift and Pope (themselves given to the scornful, slanderous and offensive); to the delicately ironic sub-texts of Jane Austen's novels; to the savage cartoons of *Krokodil* and the Third Reich; and to the relatively safe mockery of Middle American culture in *The Simpsons*.

In contrast to parody, however, the extension of the satiric to embrace purely non-linguistic forms of communication in practice presents more problems for artist and audience. Because satire and the satiric entail a claim to some critical intention, they are implicitly and often overtly argumentative. They rely on the truth functions of language, that is, upon the capacity of language to be used to assert or deny truth and/or moral worth. As previously noted, it is the role of humour to play with and suspend some of these conventions in order to create its jokes. Non-linguistic sign-systems, however, do not easily or unambiguously lend themselves to such forms of assertion about truth, although they can, of course, be used to express moods, to convey information and to issue imperatives.³⁹ In order for artists only to use *images* for satiric effect, they must rely on a very small stock of symbolic associations that are socially univocal, or which have been made so through language (badges of political affiliation, multinational logos, images in popular culture and so forth — many of which are copyright). Under such circumstances the satiric point is more easily lost, or the capacity for satiric expression is impoverished;⁴⁰ although ridiculous juxtaposition certainly makes it possible to create images of distaste, a good example being John Heartfield's superimposition of a fluorescent pink toothbrush into Hitler's gesticulating hand in a film-shot of the Führer speaking at a rally.⁴¹

Accordingly, it is more common for satirists in visual media to supplement

39 While highly conventionalised sign-systems (international traffic signs for example) can clearly communicate information and instructions, their value lies precisely in being limited to operating like simple words.

40 Only recently has it been concluded that the famous Cerne Abbas giant, carved into a Dorset hillside, is not an ancient fertility symbol but a satiric image of Oliver Cromwell as Hercules, commissioned by Denzil Holles when he fled England for the exiled court of Charles II. See T Dorvill et al, *The Cerne Giant: An Antiquity on Trial*, Oxbow Books, Oxford, 1999.

41 See Rose, above n 25, for some discussion of Heartfield's work; she makes a similar point with respect to the photographic montage, 'Millions are behind him', pp 116–17; whether the films show that the camera can lie is not discussed. N Roukes, *Artful Jesters: Innovators of Visual Wit and Humor*, Ten Speed Press, Berkeley, Calif, 2003, pp 8–27, provides a general commentary on visual humour (including illustrations of such artists' work, including Dadaist Meret Oppenheim's famous, fur-lined tea-cup, saucer and spoon of 1936, discussed pp 10–11). As his title indicates, Roukes identifies the intentionality behind such creations as absurdity, disquiet, and wry reflection on the human condition, rather than satire, but he gives one or two exceptions, such as the self-parodies of Charles Parness (eg, *Buck Fever*, 1996–98 figures of the artist's middle-aged self, chasing flying dollar bills), or Carroll Dunham's art, which 'tilts towards trenchant satire' (p 62) by combining painting with cartoon-technique in a critique of human urges to anger and war.

image with word (as is typical of cartoons), or to decode image with some sort of commentary. Another Heartfield piece of visual satire imposes a flurry of feathers onto a film of Hitler declaiming and gesticulating from behind a lectern; as it stands, this is minimally satiric, as is the toothbrush at the rally. A *distaste* is what is principally expressed through the incongruity of objects so conspicuously out of place in the context of an unambiguous image of authority. The caption accompanying the second image, however, turns such visual *tapinosis* (or diminishing images of scorn), into a more thorough-going satiric statement: 'Never trust a vegetarian'. As in cartoon captions, language thus helps underline and enhance the point of the collage, insuring that satiric intent is neither lost nor misunderstood. A satirical argument needs a certain level of semiotic clarity for the audience to get the point. While it is possible for this clarity to be provided by well-recognised symbols, purely visual satire is particularly subject to banality, and it is not surprising that most visual satirical media supplement their images with words, either written, spoken or sung.

In terms of today's ordinary meanings of satire and the satiric, visual satire is very important, and more often than not, combines with parody to produce satirical parody. As we have noted above, contemporary audiences are confronted by the combined modes/genres of both fictive, satirical parody and factual news-reportage in today's multimedia culture, such as *YouTube* pastiches of well-known news and advertising clips. The fact that these new traditions of digital manipulation and distortion, usually in the audiovisual medium, are blurring and extending strict academic distinctions and traditions, is evident in the overwhelming range of material identified by entering the search terms 'parody' or 'satire' into an internet search engine. An excellent example is the video 'Rudd Chinese Propaganda', commissioned in October 2007 in a 'satire competition' run by *The Chaser* and now posted on *YouTube*. This uses variously: fake subtitles over a range of actual television footage, including from Chinese news services, the ABC and Channel Seven; a Tintin cartoon by Bill Leak; and a TV advertisement for 'Mr Sheen' polish, to achieve a satirical parody of a Chinese propaganda video supposedly designed to promote Kevin Rudd, then aspirant Prime Minister of Australia.⁴² The key element here, easily recognisable by audiences as implicit in the context and purpose of the video's creation, is provocative ridicule of a public figure, both widely admired *and* disdained for his self-proclaimed expertise in Chinese. The play with Rudd's expertise in Mandarin means that this piece would popularly be termed 'satire', or 'satirical', yet its critique is wider than personal. The informing device is *reductio ad absurdum*: the satire reifies and then pursues to its logical conclusion the notion that a political leader competent in Chinese language would automatically adopt Chinese conventions of political leadership. Whether an individual considers this a fair or funny judgment is beside the point; it is clearly fair use for satirical purposes in that it frames itself as a humorous provocation to thought.

⁴² Posted on *YouTube* at <<http://www.youtube.com/watch?v=ptccZze7VxQ>> and at <<http://zooweekly.com.au>> with the header, 'Comedy Week — Chinese Kevin Rudd Propaganda — "The Great Rudd is a man of principle and vengeance"'.

7 Parody, satire and copyright infringement

Whether satire is subtle, indirect and general or, as is more common, a direct and immediate attempt to ridicule, it need not involve any extended quotation of the target's intellectual property (or that of others), such that any fair dealing exception might be needed. Pure satirical attack may verge on defamation,⁴³ but that has little connection with copyright law beyond the issue of moral rights.⁴⁴ Clearly, the new copyright exception has been written particularly with a view to protecting that other, large category of reuse, satirical parody, where, as we have seen, satirical work is done (at least in part) through a parodic distortion of its object. However, as the examples we have already discussed make clear, recent developments in television and other media suggest that the inclusion of parody *and* satire in the new fair dealing provision is a deliberate and valuable thing. While in traditional literary practice it is very unusual to find quotation for satirical purposes that cannot also be described as parody — the fist of satire in the glove of parody — the sampling techniques of film and digital media throw up many, very clear examples of satiric reuse that are not themselves parodies and make no use of parody among other modes of humour. The particular purpose of this section is to argue that not just satirical parody but also some instances of satire alone will merit protection under the new exception.

43 Although it rarely crosses the line in practice, see E Handsley and R Phiddian, 'Political Cartoonists and the Law' in H Manning and R Phiddian (Eds), *Comic Commentators — Contemporary Political Cartooning in Australia*, Network Books, Perth, 2008, pp 63–90.

44 A discussion of the interaction between the new exception and moral rights is beyond the scope of this article. See further S McCausland, 'Protecting "A Fine Tradition of Satire": The New Fair Dealing Exception for Parody or Satire in the Australian Copyright Act' [2007] *EIPR* 287 at 292 and sources cited therein; M Sainsbury, 'Parody, Satire and Copyright Infringement: the Latest Addition to Australian Fair Dealing Law' (2007) 12 *MALR* 292 at 314–17; Copyright Council, information sheet 'Parody, Satire and Jokes', December 2006, at <<http://www.copyright.org.au>>.

Example A: a Leunig cartoon



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The one and only exhibit before parliament at the time it decided to pass the new satire exception provides a neat example for our purposes. Michael Leunig's cartoon comment on the 2005 celebrations at Gallipoli appeared in *The Age* just after the 90th anniversary of the Gallipoli landing by the ANZAC forces. Media reports (in *The Age* and elsewhere) had outlined a context of inappropriate partying to dance music by youthful Australian visitors. One of the songs they danced to was the Bee Gees' *Staying Alive*, a verse of which is quoted in the body of the cartoon itself, without alteration to the words and with acknowledgement. General public and press reaction at the time was to the effect that playing this song at Gallipoli, where men died in their thousands, was not so much ironic as in bad taste, especially when combined with the backpackers' other rowdy and littering behaviour. The reason the cartoon became a decisive argument for law reform was that the publishers of the Bee Gees' music sent a letter of demand to *The Age* asking for a copyright licence fee, creating support from the publishers of *The Age* for a satire exception to allow such free uses in the service of humour.⁴⁵

The song itself is not parodied or held up to ridicule by this cartoon, although possibly there is some vestige of parody to be found in posting the words within a cheap, wobbly frame. However, the sale label is merely factual, describing the plaque as 'Framed "Stayin" Alive' Lyrics'. One would only try to call this use of the lyrics parody if one had an ulterior (for example,

⁴⁵ Submissions to Commonwealth of Australia, Attorney-General's Department, Issues Paper, *Fair Use and other Copyright Exceptions in the Digital Age*, May 2005 ('Fair Use Inquiry') by Combined Newspapers & Magazines Copyright Committee.

a legal) motive, whereas to call it satire is uncontroversial.

A very similar problem arises for the parallel reuse of a photographic image of the then Prime Minister, John Howard, clad in country gear, placed in a similarly dubious frame and re-labelled as 'Framed Dinkum Aussie Digger Posters, Cheap!' If parody were an essential ingredient for licit reuse then Leunig would have equally needed permission at least from the photographer who took the original photo, if not from its subject. The cartoon is far better defended as satire, for its satirical critique is complex, applying to many targets, among them: superficial patriotism on the part of Australians (including their leader/s); the commercialisation of tourism and its fake trinkets; (mis)appropriation of pop-music at a memorial to grand, historical events; and the ironies of economic relations between host and visitor in both war and peace. Effectively it suggests that the annual intrusion of Gallipoli rowdies forms a second wave of invasion, casting the — presumably Turkish — stall-keeper in the familiar, pragmatic and exploitative role of a camp-follower. Evidently, the satire appropriates both images and words for its provocative purposes and possesses a strong degree of moral seriousness, perhaps even the full, classical desire of the satirist to provoke self-reflection, to correct and instruct society.⁴⁶ It constitutes valuable and public artistic comment upon current social dysfunction, and is a wholly justifiable instance on which to base new legislative protection, as involving reuse of both verbal and visual material. The reuse is integral to the satire of the cartoon, cannot plausibly be reduced to pure parody, and is certainly not the kind of lampoon required by US law.

Example B: episodes of *The Panel*

One of the last Australian cases to be decided before the introduction of the new exception illustrates its application in more detail.⁴⁷ *The Panel*, a television program broadcast on Channel 10, involved the use of clips of television footage which were presented in the context of a panel discussion. These clips were then clearly marked by the 'play frame' of appearing within a show marketed and accepted as 'non-serious' (in the Gricean sense)⁴⁸ news-comment and review, both by its viewing audience and by a live audience who came to be entertained, while occasionally having their critical capacities engaged. It would seem odd to describe the whole program as exclusively satire, but *The Panel* was in fact habitually known as a 'satirical talk-show' and followed a well-established format in Australian and overseas television noted in earlier discussion of news-programs. The members of *The Panel* itself had, for the most part, made their reputations as comedians (especially the core group from the Working Dog production house); they performed to a live audience and elicited frequent laughter from that audience. It would be fanciful to suggest that the program consistently made an analytic, satirical argument about the ills of the world in the manner of Swift's

46 This is the kind of seriousness for which, as a cartoonist, Michael Leunig has become a by-word. See for illustration, his personal website with list of 'Philosophies' on such things as 'Leunig on Nature', 'Leunig on Eternal Living', 'Leunig on Inner-self' etc, at <<http://www.leunig.com.au/>>.

47 (2001) 108 FCR 235; 184 ALR 1; 50 IPR 335; [2001] FCA 108; BC200100361.

48 See above n 11.

Gulliver's Travels (1726), or Barry Levinson's more recent film *Wag the Dog* (1997); but, as we have seen, such critical focus is a matter of degree. Instead, *The Panel* operated by holding elements of current affairs in Australian political and popular culture up to ridicule, with the evident intention of 'taking down' various public figures and beliefs a peg or two, and occasionally of provoking more searching analysis. Thus it was satirical in purpose and in audience reception, not merely comic. However shallowly on occasion, it sought to engage the audience's critical capacities as well as make it laugh.

Channel 9 took offence at the extent of reuse of its copyright material in several episodes of *The Panel*, claiming that it was not justified as fair dealing under the exceptions then available — use for the purposes of 'criticism and review' or of 'reporting the news'.⁴⁹ At first instance, Conti J described the uses as 'mainly satiric' and found that the presence of humour or the format of the program did not necessarily disqualify the segments from being criticism, or review, or reporting the news. However, it was clear that his attempts, and those of the Court of Appeal,⁵⁰ to fit these instances of 'satire' into these defences were akin to fitting square pegs into round holes.

For these purposes, we discuss three of those uses by Channel 10 which ultimately failed to establish a defence of fair dealing of either 'criticism and review' or 'reporting the news', and were consequently deemed to constitute copyright infringement. In our view, all of these three would arguably now fall within a defence of satire, but none of them would constitute parody. Two of these involved the then-Prime Minister John Howard, on one occasion being ignored by Australian cricketer Glenn McGrath at a formal dinner held to present the 2006 Alan Border Medal, and on another being enjoined by TV personality Kerri-Anne Kennerley, hosting her program on Channel 9, to sing 'Happy Birthday' to Don Bradman. The majority on appeal upheld the trial judge's decision that *The Panel's* purpose was to 'satirise aspects of Ms Kennerley's performance' but that the commentary on the footage did not constitute 'criticism and review' of her program. In relation to the Border Medal, distortion of the footage was employed to magnify what was originally an almost unnoticeable but 'embarrassing' event, which did not fit as quotation or sample for 'reporting the news'. Thus these segments failed to win protection.

Nevertheless, the Prime Minister of the time self-evidently was, and remains, a major public figure, and making fun of his well-known status as a cricket 'tragic' in a gathering of the 'real' cricket-greats clearly constitutes satirical commentary on his public persona. That it is not particularly brilliant or perceptive satire is beside the legal point. In the case of the Kennerley segment, the thrust of the 'comment' made was the exaggerated lengths to which the PM was prepared to go in order to demonstrate devotion to his hero, and not to seem discourteous to his winsome hostess in front of the voting public. The manipulation or distortion meted out to the other segment of footage (a slow motion replay of an almost certainly unconscious slight by McGrath to Howard) only marks that re-presentation or re-functioning as

⁴⁹ Copyright Act ss 103A, 103B.

⁵⁰ *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* (2002) 118 FCR 417; 190 ALR 468; 55 IPR 112; [2002] FCAFC 146; BC200202565.

more clearly satirical. Such incongruous distortions and simplification of focus are, as discussed earlier, typical elements of satire, akin to the caricatures used to represent similarly well-known public figures in political cartoons.

In the light of the new satire exception, the third defenceless segment may be morally, but apparently not legally, more troubling than the Howard segments. In it, an interview on the Channel 9's *Morning Program* was edited into a 'compile' by *The Panel* to increase its humorous effect and then replayed. It presented Mr Prasad, a formerly homeless man now employed to run a refuge for the homeless, being harassed by some of his clients. As with the news-reporting defence in relation to the Border Medal Dinner, distortion of the footage increased its comic effect, but also destroyed the defence of criticism and review. Now, however, it might fall within the satire defence. The segment could be construed as satirical in three ways:

- (1) as holding the homeless men up to ridicule;
- (2) as holding Mr Prasad up to ridicule in his recently restored, middle-class respectability; and
- (3) as holding up to ridicule *The Morning Program* and its exploitative, tabloid-news values.

While we may find only the third of these perspectives ethically palatable, each is undoubtedly provocative critique and thus satirical; and it is not apparent that the new exception requires that satires be in good taste to enjoy copyright protection.

Satire alone as a defence

In defining satire it would appear necessary to put aside the issue of moral propriety, as such matters are more appropriately the concern of defamation and (in extreme instances) vilification or obscenity laws, rather than copyright law. While some may prefer to see satire confined to being a defence against complaint by public rather than private figures or organisations, Australian law has largely resisted making such a distinction, inevitably vexed as it must be. Other avenues of protest and comment do exist, such as tribunals, submission of website comment, and letters to the editor, all of which have certainly been used to varying degrees (and in varying directions of support and protest).

The more important point here is that use of copyright materials for satirical but not necessarily parodic purposes is becoming relatively common in this era of digital sampling, and that the new exception would seem intended, in our view properly, to protect this practice. *The Panel* is by no means isolated in its methods, and its function is as central to satirical public commentary as was Working Dog's other major television series, the clearly parodic (as well as satirical) attack on current affairs journalism, *Frontline* (1994–97), or *The Daily Show* with Jon Stewart, perhaps the most famous 'news satire' of today. In the twenty-first century digital reuse is technologically easy, and the huge mass of media makes it difficult for even the most ardent follower of public affairs and popular culture to be abreast of all the works and events that might be referenced satirically and/or parodically. Quotation such as outlined in the examples discussed will often be necessary, and the appropriateness of having both parody and satire as fair dealing defences is clear. This is not because parodists and satirists provide a fount of unerring wisdom in a world gone mad

(though some of them may like to view themselves that way). Rather, it is because they work within the widely understood and publicly accepted play-frame of parodic and satirical public commentary to increase artistic and critical expression. This traditional space in Australian society, rightly identified by the Attorney-General in his media remarks at the time of proposing the new Australian parody or satire exception,⁵¹ is larger in scope and perhaps more democratic in spirit than in other more formal cultures. It occurs, nevertheless, in a public sphere where vested interests might otherwise have too great a capacity to 'control the messages' about them to which the public has unfettered access. The new defence widens the legally recognised Australian space for 'playing with' footage and other copyright material, in order to communicate otherwise *unauthorised* messages about issues, people and ideas. Thus the established Australian tradition of 'mickey-taking' continues to be protected, in both public and private discourse, and its transition and survival into the digital future is ensured, in accord with both parliamentary and media remarks of the Attorney-General at the time.

8 Conclusion

Parody and satire are not equivalent artistic practices, so they do not always appear together. To call something a parody is to say something about its form: that it imitates and distorts some pre-existing work or genre. To call something a satire is to identify some critical purpose in the treatment of some person, practice or institution. The ordinary meaning definitions here advanced are justifiable from a literary and technical point of view but also capture the reality of what practitioners and reflective consumers understand by these terms. What parody and satire both share is a play-frame of humour: they are not intended to be received as straightforwardly serious representations of reality nor of the object/s they quote from. The play-frame for satire (with or without parody being involved) will also include a clear signal of purposive critique.

Both satire and parody need to mark a critical distance from the objects they reuse in order to earn protection from the new exceptions to the copyright laws. This critical distance minimises the risk of market substitution in the satirical or parodic reuse for the original, and supports the basis of the new exception. The distance will normally be marked or greeted by laughter (though that laughter may have very different qualities), and will be signalled either in the framing of the parodic/satirical work (for example, a panel show with comedians and a laugh track), or clearly within the work itself (for example, a caricature of a public figure's appearance in a cartoon). A subjective expression of parodic or satirical intention after the fact clearly cannot be enough for legal purposes. However, Australian law can make strong and clear provision for parodic and satirical reuse, with the cultural and civic benefits that accrue, without opening flood-gates to a situation where 'But I meant it as a joke' becomes an effective defence for acts of plagiarism.

51 P Ruddock, 'Protecting precious parody', *The Daily Telegraph*, 30 November 2006.