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## Articles

### Defining parody and satire: Australian copyright law and its new exception

Conal Condren,<sup>\*</sup> Jessica Milner Davis,<sup>†</sup> Sally McCausland<sup>#</sup>  
and Robert Phiddian<sup>§</sup>

*The new exceptions to the Copyright Act in ss 41A and 103AA, providing protection of re-use for 'the purpose of parody or satire' seem clearly intended to provide protection for both parody and satire, not merely some confection of the two artistic practices. As these practices are not contiguous and separable genres, as pastoral and epic poetry, or situation comedies and current affairs programs are, it is important to have a model for understanding how these two practices can operate together and separately. The threshold issue of what will legally qualify as parody or satire under the new exception is critical in determining its scope. The answer to this question will determine how far new forms of Australian artistic practice can use existing copyright material before they become infringements, however creative they are.*

*In Part 1 of this article, we argue that it is not safe to rely solely on dictionary definitions of the terms, as the available definitions from the most commonly used dictionaries depend on lexicography too completely shaped by narrowly literary theories of the practice. Moreover, their definitions do not take into account the sort of multi-media re-use that is most likely to cause hard cases to come before Australian courts in the twenty-first century. In our view this caution would be consistent with a judicial approach which surveys a range of dictionaries as one element of the interpretive approach supporting the primary task of textual analysis. Neither is it safe to simply import the US jurisprudence on the terms, for two reasons: broadly, that it has developed in jurisdictions with very different laws, especially those concerning free speech, and narrowly, that the course of US case law has generated a very idiosyncratic distinction between parody and satire which may serve a convenient legal purpose in that jurisdiction, but which does not correspond to the normal meanings of either term in Australia, among practitioners, theorists, and (to the extent they think it through) audiences.*

*In Part 2 of this article (forthcoming) we develop a better theoretical framework for interpreting and applying the threshold definitional part of the new exception.*

<sup>\*</sup> Emeritus Scientia Professor, Faculty of Arts, University of New South Wales and Honorary Professor, Centre for the History of European Discourses, University of Queensland.

<sup>†</sup> Senior Visiting Research Fellow, School of English, Media and Performing Arts, University of New South Wales.

<sup>#</sup> Senior Lawyer, Special Broadcasting Service.

<sup>§</sup> Associate Professor in English, Director, Flinders Humanities Research Centre for Cultural Heritage and Cultural Exchange, Flinders University. The views expressed in this article are the personal views of the authors.

## Part 1: Why US law and dictionaries are unsound sources

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

### 1 Introduction

In December 2006 Australia got a new fair dealing exception for the purposes of 'parody or satire' (the new exception).<sup>2</sup> In his second reading speech to the House of Representatives, the Attorney-General said that the new exception would promote:

free speech and Australia's fine tradition of satire by allowing our comedians and cartoonists to use copyright material for the purposes of parody or satire.<sup>3</sup>

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'.<sup>4</sup>

The words 'parody or satire' are undefined and the issue of what definitions will apply is not yet settled. There was disagreement between copyright owners and users on this issue during the bill submission process.<sup>5</sup> It is likely, therefore, that any test case concerning the new exception will involve a 'battle of the definitions', or rather of the range allowed by adoption of this or that definition. The outcome of this 'battle' will be important. It will dictate which kinds of creative expressions using existing copyright material can claim threshold protection, and which will be knocked out of contention. The definitional stage will act as a bottle-neck determining which creative expressions go through to the substantive analysis of 'fairness'. In the meantime, neither parodic or satirical artists nor their publishers can know what sorts of activities will enjoy protection.

Part 1 of this article examines two key approaches to defining parody and satire apparent in the prior case law and around the introduction of the new exception. The first is the 'binary approach' in certain US fair use cases.<sup>6</sup> In a nutshell, this 'binary approach' requires the court to classify the allegedly infringing use of copyright material into one of two restrictively defined categories: either it is a 'parody', a work whose main aim is to comment critically on the original work or its author; or it is a 'satire', using the copyright material to critique some other target. During the lead up to introduction of the new exception, the US binary approach was promulgated

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

2 Copyright Amendment Act 2006 (Cth) ss 41A and 103AA.

3 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 19 October 2006, p 2 (Philip Ruddock, Attorney-General).

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

5 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.

6 See, eg, *Leibovitz v Paramount Pictures Corporation* 137 F 3d 109 (2d Cir, 1998); *Dr Seuss Enterprises v Penguin Books USA, Inc* 109 F 3d 1394 (9th Cir, 1997); *Columbia Pictures Industries v Miramax Films Co* 11 F Supp 2d 1179 (USDC, 1998); *Suntrust Bank v Houghton Mifflin Co* 268 F 3d 1257 (11th Cir, 2001), discussed further in text accompanying below n 45.

by interest groups seeking to limit the scope of any new exception to the exclusive rights of copyright owners under Australian law.<sup>7</sup> It is likely that, in any test case on the new exception, the plaintiff will argue that the court should adopt these restrictive US legal definitions of parody and satire.<sup>8</sup>

The second approach we examine is the favourite short cut to definitions in Australian fair dealing cases to date — that is to define common words using dictionaries.<sup>9</sup> The Australian *Macquarie Dictionary* is usually preferred, and is likely to be cited in any test case, so we will focus on that.

Using a range of examples, we examine the implications of each approach for cartoonists, comedians and other creators seeking the protection of the new exception. Concerning parody, we argue that the US definition is far narrower than any ‘ordinary’ meaning and, if used, could significantly narrow the scope of works protected. We also test the application of these approaches to ‘satire’. The *Macquarie Dictionary* definition is based on the classic Augustan, or ‘Pope and Dryden’, literary models, while under US case law, satire has come to encompass a range of socially critical expressions.

We show how legal definitions canvassed to date may exclude expressions which are both transformative<sup>10</sup> and harmless — that is, uses which do not substitute for the original work or otherwise affect the legitimate interests of the copyright owner — and ones which ordinary people would today consider to be parody and/or satire. Such a result would be unlikely to inspire confidence in copyright law and may unnecessarily restrict creative expression in Australia.

We argue that, while both the US fair use cases and the *Macquarie Dictionary* merit review, in this new territory for Australia neither source should control legal meaning. We suggest that a proper application of the rules of statutory construction will favour ‘ordinary meanings’ discovered by reference to a wider range of sources. This approach, which we explore in

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7 See, eg, 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 the Copyright Agency Limited; Copyright Council (supported by Media Entertainment and Arts Alliance; Viscopy and the National Association for the Visual Arts). See further in McCausland, above n 5. For an earlier proposal in favour of adopting the restrictive US approach in any Australian version of a parody exception, see D J Brennan, ‘Copyright and Parody in Australia: Some Thoughts on *Suntrust Bank v Houghton Mifflin Company*’ (2002) 13(3) *AIPJ* 161 at 165.

8 This approach appears evident in publications by copyright owner groups explaining the new exception to constituents. See, eg, Copyright Council, information sheet ‘Parody, Satire and Jokes’, December 2006, at <<http://www.copyright.org.au>>: ‘It seems that the purpose of a true parody is to make some comment on the imitated work or on its creator’; Australian Record Industry Association, ‘Key Changes — Copyright Amendment Act 2006’, at <<http://www.aria.com.au/pages/keychanges-CopyrightAmendmentAct2006.htm>>: ‘A parody transforms and comments on the copyright material itself, whereas a satire uses copyright material to draw attention to a more general comment on society.’

9 This approach is generally accepted in statutory interpretation in Australia, with the *Macquarie Dictionary* being the first choice of most Australian courts: see D C Pearce and R Geddes, *Statutory Interpretation in Australia*, 6th ed, LexisNexis, Australia, 2006, para 3.30.

10 By ‘transformative’ we mean the sense employed by Souter J, delivering the judgment of the US Supreme Court in *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994) (*Campbell*) at 579: ‘adding something new, with a further purpose or different character, altering the first with new expression, meaning, or message’.

Part 2, aims to ensure that, as far as possible, the legal definitions of parody and satire reflect the familiar connotations of these terms relied on in informed practices among those using the new exception in the spirit of Australia's 'fine tradition'.

## 2 An interpretive framework

The new exception is found in ss 41A and 103AA of the Act, as follows:

41A Fair dealing for purpose of parody or satire

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.

103AA Fair dealing for purpose of parody or satire

A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of parody or satire.

Parody and satire are ancient critical terms which have accrued many overlapping, and some contradictory, meanings over the centuries.<sup>11</sup> It will be neither possible nor, in the interests of expeditious resolution of litigation, desirable for a court construing the new exception to seek to embrace all the complexities of these usages. Of necessity, the court will adopt 'working definitions' which will, to some extent, be reductionist. It is, however, important that these definitions take in rather more than the 'I find it funny, so it's OK' test that most ordinary people very simply apply to parody and satire. What is important is the objective purposes of the use of copyright material for parody or satire. We argue that working definitions reflecting these objective purposes require contemporary understandings of the rules of the modes, as practitioners demonstrate them. This is not to propose that the empirical intentions of individual practitioners should hold much (or any) value in assessing whether a piece is parody or satire for the purposes of the Act. Rather, we argue that what practitioners might reasonably understand by parody and satire should inform the legal definition of each term and this in turn, as we shall show, requires some attention to a more elaborate analysis of the nature and purpose of these activities than the reasonable person can simply intuit.

Nor is recourse to dictionary definitions necessarily safe, as parody and satire are no longer confined to principally literary practices; indeed many

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11 See S Dentith, *Parody*, Routledge, London, 2000; M Rose, *Parody/Metafiction*, Croom Helm, London, 1979, revised as *Parody: Ancient, Modern, and Post-modern*, Cambridge University Press, Cambridge, 1993; L Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms*, Methuen, New York and London, 1985; R Phiddian, *Swift's Parody*, Cambridge University Press, Cambridge, 1995; and 'Are Parody and Deconstruction Secretly the Same Thing?' (1997) 28(4) *New Literary History* 673, for surveys of and approaches to parody. For more recent surveys of and approaches to satire see D Griffin, *Satire: A Critical Reintroduction*, University Press of Kentucky, Lexington, 1994; B C Connery and K Combe (Eds), *Theorizing Satire: Essays in Literary Criticism*, St Martin's Press, New York, 1995; F V Bogel, *The Difference Satire Makes: Rhetoric and Reading from Jonson to Byron*, Cornell University Press, Ithaca, 2001; and C A Knight, *The Literature of Satire*, Cambridge University Press, Cambridge and New York, 2004.

hard cases presented before courts these days are likely to deal with digital appropriation of sound and images. Standard definitions of the terms have not yet taken full account of these major changes in the media of parody and satire. If the provisions are not to be interpreted so as to freeze artistic practices in the print age, definitions are needed which accommodate and reflect how the forms are developing. Current practices of parody and satire are not radically discontinuous from older modes of satire and parody; indeed the continuities are very real and significant. However, if a 'fine tradition' of parody and satire is to be protected, rather than fossilised, the law must allow for technical and other developments within it.

In *Stevens v Sony*,<sup>12</sup> a recent High Court case interpreting new amendments to the Copyright Act, members of the court recited the following rules of statutory interpretation as found in the common law and as codified and extended in the Acts Interpretation Act 1901 (Cth). Stating first that the structure and text of a provision were the overriding considerations, the majority then affirmed that the dominant rule of construction was the 'purposive rule', now modified by s 15AA of the Acts Interpretation Act:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.<sup>13</sup>

The court also referred to s 15AB of the Act. This subsection allows the court to consider extrinsic material which is:

'capable of assisting in the ascertainment of the meaning of the provision' to confirm that the meaning is the 'ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act'.

Section 15AB also grants flexibility of judicial interpretation where the provision is 'ambiguous or obscure' or if the ordinary meaning would lead to a result that is 'manifestly absurd or is unreasonable'. Importantly, s 15AB requires Australian courts to keep in mind 'the desirability of persons being able to rely on the ordinary meaning' of the provision being interpreted.

In this article we proceed on the assumption that there is nothing warranting the displacement of the ordinary meanings of parody and satire by, for example, the binary approach to these terms under US law. A brief rehearsal of the textual and extrinsic materials supports this approach.

First, there are no definitions of the words 'parody or satire' inserted into the Act, and no limiting words within the text of the two provisions. The drafters could easily have narrowed the definition of parody to the restrictive US meaning by, for example, expressly limiting permitted fair dealings with a work or audiovisual item to the purpose of parody of 'that work or audiovisual item' only. But no such limiting words appear in the text, and so a parody substantially reproducing a copyright work or audiovisual item could be for

<sup>12</sup> *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448; 65 IPR 513; [2005] HCA 58; BC200507453.

<sup>13</sup> Acts Interpretation Act, cited in *Stevens* (2005) 221 ALR 448; 65 IPR 513; [2005] HCA 58; BC200507453 at [31]–[32] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

the purpose of parodying that work or audiovisual item and thus commenting critically on it, as per the current US legal meaning of parody, or, in theory, would still be within the legislative purpose if used to parody something else entirely.

Nor is any clear legislative intention to displace the ordinary meanings of the terms apparent in the extrinsic materials. While comments in the Amended Explanatory Memorandum, echoed by the Minister for Justice's second reading speech in the Senate, do suggest some reference to the binary US approach:

Parody by its nature is likely to involve holding up a creator or performance to scorn or ridicule. Satire does not involve such direct comment on the original material, but in using material for a general point it should also not be unfair.<sup>14</sup>

But they do not do so unequivocally: parody is described as *likely* to involve critique of the copyright material it uses, not that it *must* do so in order to fall within the exception.

Further, and much more significantly, the inclusion — above the objections of copyright owners — of 'satire' as a use now covered by fair dealing<sup>15</sup> further distances the Australian text from the US binary approach. As discussed below, under that approach, if the court determines the use a 'parody', it is presumptively fair and legal, but if it classifies the use a 'satire', the use is presumptively unfair and illegal. By expressly including 'satire' in the new Australian fair dealing exception, our drafters have rejected the US binary approach, following instead the government's injunction to protect satirical use of copyright material as part of Australia's 'fine tradition of poking fun'. Parody and satire (not to mention 'parodical satire') are on an equal footing in Australian law.

Finally, brief reference may be made to the scant judicial comments on the possible legal meaning of parody and satire in Australian case law. All predating the exception are obiter and none had led to any specialised legal meanings which could be taken to have informed the drafters' choice of words.<sup>16</sup>

The statutory presumption of ordinary meaning is also supported by the context. Artists, social commentators, comedians and other creators will use the exception to create new works. It is particularly desirable these users are able to rely on ordinary meanings of parody and satire as they know these terms in their work. These ordinary meanings should be current, relevant to Australian legal and cultural conditions, and informed by a careful understanding of how these activities are developing in practice. That is why we argue in the next sections that it is unsafe to lock in other definitions developed by the idiosyncratic course of US case law on the terms, or by dictionary definitions which hark back to the Augustan age. If creators need to

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14 Commonwealth of Australia, *Parliamentary Debates*, Senate, 30 November 2006. See also Amended Explanatory Memorandum.

15 This express inclusion of 'satire' is apparently unique in the world. For a review of criticisms from copyright owners who opposed it, see McCausland, above n 5.

16 See eg, Conti J in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 184 ALR 1; 50 IPR 335; [2001] FCA 108; BC200100361 (*Panel Trial Judgment*); *AGL Sydney Ltd v Shortland County Council* (1989) 17 IPR 99 at 105.

get specialist legal advice on whether their works ‘qualify’ as parody or satire, they may be discouraged from using the new exception. Given that its purpose is to promote free speech, the new amendment will best serve the public interest by applying legal definitions of parody and satire which track ordinary meanings as understood by practitioners and their audiences as closely as possible, and which are neither unreasonably restrictive nor dangerously vague.

### 3 US fair use definition of ‘parody’

The US treatment of parody and satire has evolved in a particular legislative and constitutional context which should caution against easy conflation of the new Australian provisions with US definitions. On even a simple textual comparison, the open-ended, flexible structure of s 107 of the US Copyright Act<sup>17</sup> is clearly very different from the new exception. The US law on parody has developed by judicial increment under s 107 and has generated understandings of the central terms parody and satire which, to put it mildly, appear quite odd in an Australian context. Harsher critics might be inclined to suggest that US law in this area is an illustration of opportunistic judicial constriction of a relatively open statute, leading to definitions of parody and satire which have become very hard to reconcile with either the scholarly or the ordinary meaning of the words. There is no need to be persuaded of this larger allegation, however, before reaching the conclusion that US law cannot be relied upon to provide a neat ‘take-away’ set of definitions for the Australian exception.

The US Act relevantly provides that ‘the fair use of a copyrighted work . . . for purposes such as criticism and comment, is not an infringement’. Section 107 then proceeds to list four factors to be taken into account in assessing whether a use is fair. Because the list of fair uses set out in the text of s 107 is non-exhaustive, the issue of definitions is, in that context, simply not as crucial as it is for the new Australian exception. Under US law new ‘transformative uses’ can certainly be recognised as fair use, provided they meet the s 107 criteria. The two statutory texts are of a completely different structure.

Prior to the US Supreme Court decision in *Campbell v Acuff-Rose Music* in 1994<sup>18</sup> the US courts used the terms ‘parody’ and ‘satire’ interchangeably.<sup>19</sup> This is not a conflation that any professional practitioner or cultural or literary theorist would accept, either then or now. It confuses a fundamentally formal category — parody, or the manipulation of pre-existing works, usually for comic effect — with an essentially intentional one — satire, or the attack on some irritating aspect of the world. What the conflation or interchangeability of terms does seem to recognise, however, is an awareness that parodic form and satirical purpose have frequently enjoyed a symbiotic relationship:

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<sup>17</sup> 17 USC (1976) s 107.

<sup>18</sup> 510 US 569 (1994).

<sup>19</sup> Eg, *Elsemere Music Inc v National Broadcasting Co* 482 F Supp 741 (1980); aff 623 F Supp 252 (2d Cir, 1980); *Fisher v Dees* 794 F 2d 432 (9th Cir, 1986) at 436. See further B P Keller and R Tushnet, ‘Even More Parodic than the Real Thing: Parody Lawsuits Revisited’ (2004) 94 *TMR* 979 at 983.



Jonathan Swift's *Gulliver's Travels* parodies travel books while also satirising British politics and European civilisation; the contemporary television cartoon-series, *The Simpsons*, parodies TV situation comedy in general while also satirising middle America.

At the level of common usage, some lack of discrimination between terms does no harm to audiences or practitioners, even if it offends the sensibilities of some cultural theorists.

However, while legal definition clearly needs more precision, going to the opposite extreme and making a binary distinction between parody and satire as a matter of law is problematic.<sup>20</sup> It rests on the assumption that texts can be definitively sorted into one category or the other, and that is to court empirical confusion: *aliud distinctio, aliud separatio*. Indeed, that seems to be exactly what has happened, if not in *Campbell* itself then in its subsequent interpretation.

Prior to *Campbell*, the status of these artistic practices under US copyright law was unstable. In *Campbell*, the copyright owners of the Roy Orbison song, 'Pretty Woman' sued a rap group, 2 Live Crew, over its use of samples<sup>21</sup> from the song, in a version with parody lyrics set to a rap beat. Controversially, the court determined that the rap version was fair use under s 107. A key factor was the finding that the lyrics of the rap version contained an implicit criticism of the original song, and could therefore be categorised as 'criticism or comment' and thus within the text of s 107:

For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works.<sup>22</sup>

Despite the majority in *Campbell* admonishing against 'bright line rules' in the application of s 107, some subsequent lower court applications of *Campbell* proceeded to apply a narrow, binary distinction between the two terms which privileges certain forms of 'parody' as presumptively fair over other forms which are labelled 'satire'.<sup>23</sup> As noted above, it is this approach which was adopted by various copyright owner groups in submissions to the Australian Bill consultation process. Despite the fact that the Australian legislature determined to include 'satire' in the new exception in direct contradiction to the US approach, some copyright owners continue to assert that US judicial definitions are indeed applicable, particularly in relation to parody.<sup>24</sup> If such definitions were to be unquestioningly adopted in Australia, however, the

20 See further Keller and Tushnet, above n 19; E Gredley and S Maniatis, 'Parody: A Fatal Attraction? Part 1: the Nature of Parody and its Treatment in Copyright' [1997] 7 *EIPR* 339 at 342-3; Brennan, above n 7, at 166; M Sainsbury, 'Parody, Satire and Copyright Infringement: the Latest Addition to Australian Fair Dealing Law' (2007) 12 *MALR* 292 at 296.

21 Ie, actual extracts. For more precise definition of this term and discussion, see section 5 below.

22 510 US 569 (1994) at 580.

23 See cases above n 6.

24 Above n 8.

approach will have the effect of distorting and potentially curtailing the legal definitions of both parody and satire under the new exception in rather arbitrary and inconsistent ways.

The US approach would exclude many comic works easily and widely recognised as parodies because they appropriate, but do not comment in a directly critical way, upon some original work. This was a crucial point recognised by the British Law Lords in the early nineteenth century, accepting that William Hone's parody of *The Bible* to satirise his own society was not blasphemous.<sup>25</sup> A more recent example is the adoption during 2007, by Australian cartoonist Bill Leak, of the character Tintin (from the eponymous *band dessinée*)<sup>26</sup> to represent opposition leader Kevin Rudd. No-one viewing these cartoons would see them as commenting on the work of the Belgian artist, Hergé, although the origins of the images are immediately recognisable: rather, they are a clear, satirical comment on the ebb and flow of Australian politics. But to forbid the use of the word parody in description of these cartoons affronts common usage and invites the question — what else is one supposed to call them?

Another example is provided by the 2007 Ashes tour songs of *The Fanatics* (Australian cricket supporters), to which the Attorney-General referred in his press comments at the time of introducing the amendment.<sup>27</sup> While not very sophisticated, they are recognisable parodies of well-known originals (they had to be to allow mass audiences to 'sing-along' with no rehearsal), and the Attorney-General recognised as much in using them to illustrate his reasons for bringing forward the new exception. Taking one case, the song 'Marcus Stresscothick'<sup>28</sup> is clearly an attack on the English opening batsman of the time and, by extension, on the mental toughness of the English cricket team, but it has nothing meaningful to say about the original vehicle, that old rock and roll standard, 'Twist and Shout'.

Perhaps it was in recognition of such dangerous waters that the US court warned in 1994 that 'bright line rules' should be avoided, adding the rider that 'taking parodic aim at an original is a less critical factor' where other fair use factors favour the parodist.<sup>29</sup> Unfortunately, this thoroughly justified caution and rider has been ignored in some subsequent cases, and *Campbell* has been cited as authority for the requirement that a protected parody *must* target the original copyright work by commenting or criticising its substance or style.<sup>30</sup>

25 For discussion, see Rose, above n 11, p 32, and B Wilson, *The Laughter of Triumph: William Hone and the Fight For the Free Press*, Faber, London, 2005.

26 Herg was the pen-name of Georges Prosper Remi. *Les aventures de Tintin* was originally published in French in 1930, with many series to follow. Some are available electronically at <<http://linux02.lib.cam.ac.uk/~cjs2/vw.cgi?s=WAD+1975.49>>. Many of the Leak cartoons are posted at <<http://www.theaustralian.news.com.au/gallery/0,25198,5027659-20581,00.html>>.

27 P Ruddock, 'Protecting Precious Parody', *Daily Telegraph* (Sydney), 30 November 2006.

28 Original lyrics to The Beatles' 'Twist & Shout' posted at <<http://www.delta.ro/beatles/lyrics/ptwistand.html>>. Parody: 'Marcus Tresscothick Tune: Twist & Shout' posted at <<http://www.news.com.au/couriermail/story/0,23739,20643374-10389,00.html>>.

29 *Campbell* 510 US 569 (1994) at 581 n 14.

30 For criticism of the failure of these subsequent cases (cited above n 6) to adopt the nuances of the Supreme Court's analysis in *Campbell*, see Keller and Tushnet, above n 19; J M

Casualties of this approach are those parodies that innocently seek only to entertain (consider Simon Barnes' cricketing parodies of Proust, Chaucer, Wild and Ian Fleming et al);<sup>31</sup> and those that are paying homage to the original, so locating themselves in a tradition (consider Tolkien's entertaining use of various song forms, or Umberto Eco's parodic use of the Holmesian detective story).<sup>32</sup> A third would be any parody developed for educational purposes, to help students identify the salient characteristics of an author's style.<sup>33</sup> Prior to *Campbell*, the US courts were prepared to recognise that a parody could be 'for humorous effect or commentary'<sup>34</sup> provided it otherwise satisfied the fair use factors. However in *Campbell* itself, the majority defined parody as 'critical wit', and it is the element of criticism which has since defined US fair use doctrine on permissible parodies.

US copyright law thus tends to reduce the legal concept of parody to a convenient shorthand for an activity which literary and cultural theorists would call 'lampoon', whereby the original work is critically 'targeted' by being parodied. As the term is commonly understood and practised, a lampoon is a subset of parody: it is a parody, the purpose and focus of which is satirical comment on and ridicule of its original model. As observed above, this is an uncomfortably narrow definition and would make even the archetypal parody, Cervantes' *Don Quixote*, an uncomfortable fit. The redactors of its original model, *Amadis of Gaul*, might, under this interpretation, have some hope of remedy against the estate of Cervantes for improper use, were it not that so much time has passed. Lampoons are certainly parodies, but they are only one of several kinds of parody; others include burlesque, pastiche, travesty and metafiction,<sup>35</sup> as will be discussed further in Part 2 of this article, in the context of proposing a more defensible ordinary meaning for the term. While theorists can disagree over the precise borders and subdivisions between these sometimes overlapping terms, it is clear both from the scholarly literature, and on any analysis of literary and artistic practice, that parody is the recognised umbrella term for a range of practices of transformative re-use.<sup>36</sup> If the US

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Vogel, 'The Cat in the Hat's Latest Bad Trick: The Ninth Circuit's Narrowing of the Parody Defense to Copyright Infringement in *Dr Seuss Enterprises v Penguin Books USA, Inc*' (1998) 20 *Cardozo LR* 287; E J Schwarz and M Williams, 'Joking Aside: Recent Copyright Infringement Cases Re-examine the Distinction between Satire and Parody in Determining Fair Use' (2007) 30 *Los Angeles Lawyer* 33.

31 S Barnes, *A La Recherche du Cricket Perdu*, Macmillan, London, 1989.

32 U Eco, *Il nome della rosa, The Name of the Rose*, trans W Weaver, Secker & Warburg, London, 1983; J R R Tolkien's parody of the nursery rhyme, 'The Cow Jumped Over the Moon' appears in his *The Fellowship of The Ring*, Allen & Unwin, London, 1966, Vol 1, pp 170-2.

33 Eg, A von Aardvark, 'Recipes and Extracts from the Greatest Chefs in the History of Political Thought' (1991) 3(1) *The Political Theory Newsletter* 97-100.

34 *Elsemere* 482 F Supp 741; aff 623 252 (2d Cir, 1980) at 252 n 1 (emphasis added).

35 This list is culled from Dentith, above n 11, 'Definitions', pp 9-21.

36 J D Jump, *Burlesque*, Methuen, London, 1972, was idiosyncratic in treating burlesque rather than parody as the umbrella term. The idea did not catch on, partly because of the cross-Atlantic differences in the ordinary meaning of burlesque, whereby in the United States it still tends to designate a saucy stage performance rather than a funny one. Despite the substantial body of scholarship concerning parody since then, there is a paucity of mention of burlesque. There is no sense in the parliamentary debates that the Australian parliament intended to protect only a sub-set of burlesque called parody.

courts had wanted to protect only lampoon, they really should have said so, and not employed a word with considerably wider meaning.

Consequently, for US legal commentators, the problem appears to be twofold: (1) that this test is difficult to apply in practice and is open to subjective interpretation by the courts; and (2) that the effect of the test is unnecessarily restrictive of creative expression and free speech.<sup>37</sup> For our purposes, the precedent problem is that this test does not match with meanings of parody as they are understood among those who produce, analyse and consume actual parodies in the world beyond the United States, including in Australia. Despite some US courts endeavouring to take account of both dictionary definitions and academic literature on the meaning of parody,<sup>38</sup> this legal definition of parody under US law has now evolved its own narrowly idiosyncratic meaning. Australian courts should not import the US definition uncritically, even if they seek a restrictive definition of parody for the purposes of the exception, because it cannot fairly be described as an ‘ordinary meaning’ of the word in this country, or indeed elsewhere.

#### 4 US fair use definition of ‘satire’

The US legal definition of ‘satire’ for copyright purposes compounds these difficulties, because it is constrained by its internal logic to find a space for satire beside and wholly distinct from parody. In reality, satire is very often the element of intent within a formal glove of parody, and we shall explore this useful, definitional metaphor at greater length in section 6. To understand fully the oddness of the US definition, one needs to recognise that while it is possible either to have pure fist (eg, Juvenal’s *Satires*)<sup>39</sup> or to elaborate an empty glove (arguably the case of Laurence Sterne’s *Tristram Shandy*),<sup>40</sup> to separate all parodies and satires into logically distinct piles is impossible without torturing the meanings of the words. None of this is new or dependent on transformations available to digital media: Aristophanes’ plays from classical Athens mix parodic form and satirical purpose; Cervantes’ paradigmatic parody *Don Quixote* also has clear satirical elements; the Scriblerian satirists of the eighteenth century, Arbuthnot, Swift<sup>41</sup> and Pope, on whom much of the traditional theory of satire is built, employed sophisticated

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37 See, eg, Keller and Tushnet, above n 19; Vogel, above n 30.

38 One might wonder how this somewhat idiosyncratic array of texts was chosen: see, eg, *Campbell* 510 US 569 (1994) in which the court referred to the *Encyclopedia Britannica*, 1975 ed, the *American Heritage Dictionary*, 1992 ed, and the *Oxford English Dictionary*, 1989 ed; *Suntrust* 268 F 3d 1257 (11th Cir, 2001) whose sources include Rose, above n 11, V Nabokov, *Pale Fire*, 1962; and *Seuss* 109 F 3d 1394 (9th Cir, 1997) which relied on G Highet, *The Anatomy of Satire*, 1962.

39 Sixteen verse satires written in the late first and early second centuries CE, translated by, among others, John Dryden as *The Satires of Decimus Junius Juvenalis. Translated into English Verse by Mr Dryden . . . To which is prefix’d a discourse concerning the original and progress of satire*, Printed for Jacob Tonson at the Judge’s-Head in Chancery-Lane etc, London, 1693.

40 The Rabelaisian comic novel, originally published in parts between 1759 and 1767; see also section 6 below.

41 For an extended analysis of how parody and satire co-exist in the works of Jonathan Swift, see R Phiddian, *Swift’s Parody*, Cambridge University Press, Cambridge and New York, 1995.

parodic techniques. The US legal attempt to distinguish as categorically between parody and satire as one might between apples and oranges, or between different genera of insects, appears to be little other than a perverse back-formation from a legal problem and, in consequence, the US legal definition of 'satire' is no closer to being an 'ordinary definition' of the term than that which has emerged for 'parody'.

The current treatment of satire in US fair use law springs from *Campbell*, and it attempts to underpin a somewhat hierarchical separation of the two terms:

Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victim's) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.<sup>42</sup>

The court qualified the statement that satire 'requires justification for the very act of borrowing' with the same rider given on 'looser forms of parody': that is, that where other fair use factors favour the satirist, satire may be found to be fair use 'with lesser justification for the borrowing than would otherwise be required'.<sup>43</sup>

Post-*Campbell* courts, however, have used the term 'satire' to refer to works that are determined not to be 'parodies' because the target of their criticism is not the original work. This is despite the fact that it is far from clear that the court in *Campbell* intended that all 'non-qualifying' parodies be lumped together as 'satire'. Souter J refers to satire as 'a work in which prevalent follies or vices are assailed with ridicule' or are 'attacked through irony, derision or wit'.<sup>44</sup> This does not preclude many works which attack through parodic means, from Aristophanes to *The Simpsons*. It is even more difficult to make a tight distinction between parody and satire where the court goes on to refer to satire as 'when society is lampooned through its creative artefacts'.

As noted above, post-*Campbell* cases have managed to evolve the so-called binary distinction between the two based on the target of their apparent criticism or comment. In *Suntrust v Houghlin-Mifflin Bank*<sup>45</sup> the distinction is expressed as follows:

Parody, which is directed towards a particular literary or artistic work, is distinguishable from satire, which more broadly addresses the institutions and mores of a slice of society.<sup>46</sup>

This seems intuitively plausible until one attempts to apply the distinction in practice. In that case, the court heard lengthy evidence about whether the novel *The Wind Done Gone* was critical of the depiction of slavery in the original work *Gone With the Wind*, or merely a general commentary on the American South in the Civil War era. In another post-*Campbell* decision, the

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42 510 US 569 (1994) at 580–1.

43 Ibid, at 581 n 14.

44 Ibid, at 581 n 15, citing the *Oxford English Dictionary*, 1992, and *American Heritage Dictionary*, 1989, respectively.

45 268 F 3d 1257 (11th Cir, 2001).

46 Ibid, at 1268.

distinction was expressed as: ‘parody (in which the copyrighted work is the target) and satire, (in which the copyrighted work is merely a vehicle to poke fun at another target).’<sup>47</sup>

It can be seen that the definitions of satire in these cases range from narrow to broad descriptions of both targets and modes. The narrow formulation is redolent of a rather forced understanding of Augustan satire: this was in fact highly parodic, because literary and intellectual follies were held to be central to ‘social follies’ more generally.<sup>48</sup> In the broader formulation, the copyrighted work is a vehicle to ‘poke fun at another target’. To some extent the formula has not mattered much — in these cases as ‘satire’ has functioned as a catch-all, negative category which is presumptively disqualified from fair use because it has unfairly borrowed some of its materials. As one academic paper has noted,<sup>49</sup> however, the result of *Campbell* has been for comedians and others to stop calling their work ‘satire’ and start to call them ‘parodies’. A US musician has cynically commented that he can only avoid infringement for changing the lyrics to a popular song if he includes a verse targeting the song’s copyright owner — by complaining about her refusal to licence a parody.<sup>50</sup>

While there may be legal convenience in having a neat binary distinction between fair (parody) and unfair (satire) use, the artistic practices and odd development of US law in this area both demonstrate that this is not really tenable.<sup>51</sup> Indeed, there are signs that this is being recognised in the United States. In a recent case, the US Court of Appeals found that a ‘satire’ was fair, applying the s 107 fair use factors to a Jeff Koons collage entitled ‘Easyfun Ethereal’.<sup>52</sup> The Koons work, like many in the digital age now upon us, incorporated a scanned partial reproduction of a photograph of glamorous female legs. The photograph, which Koons said he used because it was a ‘typical’ image of women’s legs ‘in our consumer culture’, was a *Gucci* magazine advertisement by Andrea Blanch, a commercial photographer. In the Koons collage, the partial reproduction of the photograph is surrounded by painted images of a landscape with giant pastries and sweets. In court, Koons gave evidence that he intended to:

comment on the ways in which some of our most basic appetites — for food, play, and sex — are mediated by popular images . . . By reconceptualizing these fragments as I do, I try to compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media.<sup>53</sup>

The court held that Koons had a ‘genuine creative rationale’ for using the Blanch image in order to ‘satirize’. Applying the fair use analysis required under s 107, the court found that Koons had sufficiently justified sampling Blanch’s photograph. While the decision is of little consolation to commercial photographers, importantly it opens the door for various strands of

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47 *Seuss* 109 F 3d 1394 (9th Cir, 1997) at 1400.

48 As for example in Swift’s *Battle of the Books*, 1697, Pope’s *Dunciad*, 1728–43, Pope and Arbuthnot’s *Peri Bathous*, 1727; and ubiquitously the ‘ancients and moderns’ disputes.

49 Keller and Tushnet, above n 19, at 992.

50 Mike Agranoff, posted at <<http://www.mikeagranoff.com/lyrics/PlayTheGuitar.htm>>.

51 Keller and Tushnet, above n 19, at 994–5; Vogel, above n 30; cf Brennan, above n 7, at 167.

52 *Blanch v Koons* 467 F 3d 244 (2d Cir, 2006).

53 *Ibid*, at 247.

post-modernist artistic practice to qualify as fair use. With the explosion in the capacity of digital media in recent decades, this sort of visual or sonic appropriation is most likely to generate the difficult cases for judicial attention, in Australia as much as the United States.

Since, as stated above, the inclusion of 'satire' in the new Australian exception seems expressly designed to avoid this post-*Campbell* distinction and to protect uses of copyright material for wider aims than simply lampooning the original work, it would be unfortunate if the outdated US approach were imported via the back door. It seems clear that the Australian legislature intended that both parody and satire in their ordinary meanings should be presumptively capable of protection in relation to use of copyright material, provided that use is 'fair'. The question of fairness should be judged separately from the question of what constitutes parody or satire.

## 5 Limitations of dictionary definitions

It is worth noting, initially, that the purposes of dictionaries have changed significantly over the last hundred years or so, and with them the types of definition attempted. Before the development of the *New English Dictionary on Historical Principles* (commonly known as the *Oxford English Dictionary* or *OED*) in the nineteenth century, dictionaries were highly selective and their definitions frequently stipulative and prospective. Concentrating on new, foreign and difficult words, they sought to control present and future use. The *OED*, in keeping with the development of philology, broke with a long tradition in attempting to be complete and historical. It was agnostic as to future and preferred uses, its definitions ideally being purely lexical, abridgments from patterns of de facto use and including previous patterns of change where possible (hence the inclusion of the obsolete). The necessary correlative of this comprehensive ambition was a degree of time-lag in cataloguing the semantic development of language. The *Macquarie Dictionary* is in the same idiom as the *OED* and, as we shall see, significantly dependent on it.

In Australian jurisprudence, the *Macquarie Dictionary* has been the preferred dictionary reference assisting courts in the task of construing ordinary words. In *De Garis v Neville Jeffress Pidler*,<sup>54</sup> Beaumont J relied upon it as the sole dictionary source in determining the meaning of the common words such as 'criticism', 'review' and 'news', used in the various fair dealing defences relevant to the case, as did the trial judge and appeal court in the 'Panel' case, discussed below.<sup>55</sup> In the rare instances of obiter dicta in which the terms 'parody' or 'satire' have been considered in Australian copyright law to date, the *Macquarie* is featured once again.<sup>56</sup>

54 (1990) 37 FCR 99; 18 IPR 292; 95 ALR 625.

55 *Panel trial judgment* (2001) 184 ALR 1; 50 IPR 335; [2001] FCA 108; BC200100361; (appeal) (2002) 190 ALR 468; 55 IPR 112; [2002] FCAFC 146; BC200202565. The selective use of the *Macquarie Dictionary* in these cases is criticised by M Handler and D Rolph, 'A Real Pea Souper: *The Panel Case* and the Development of the Fair Dealing Defences to Copyright Infringement in Australia' (2003) 27(2) *MULR* 381, text accompanying nn 105–113.

56 Cases cited above n 16.

We turn now to consider how closely, in our view, the *Macquarie Dictionary* definitions of parody and satire approximate ordinary, contemporary meanings. The compilation history of the *Macquarie*, and behind that, of the *OED*, suggests that these definitions may not be the most appropriate for current legal purposes, given the purpose and objects of the legislation. They are relatively old definitions, based almost entirely on literary conceptions of parody and satire.<sup>57</sup> Moreover, the taxonomic practice of alphabetical listing can reinforce the impression that satire and parody are indeed as neatly separable as they might be formally distinguishable. While they are competent in their own terms, it is questionable whether these definitions provide a sufficient basis for twenty-first century delineation of what are restlessly evolving critical and artistic forms, especially in the light of developments in digital technology. This limits their value as ‘ordinary meaning’ definitions for the purposes of the new exception.

The definitions of both terms in the current online version of the *Macquarie* are:

parody *noun* (plural parodies)

1. a humorous or satirical imitation of a serious piece of literature or writing.
2. the kind of literary composition represented by such imitations.
3. a burlesque imitation of a musical composition.
4. a poor imitation; a travesty.

*verb* (t) (parodied, parodying)

5. to imitate (a composition, author, etc) in such a way as to ridicule.
6. to imitate poorly. [Latin *parodia*, from Greek *paroidia* burlesque poem]

— parodist, *noun*<sup>58</sup>

satire *noun*

1. the use of irony, sarcasm, ridicule, etc, in exposing, denouncing, or deriding vice, folly, etc.
2. a literary composition, in verse or prose, in which vices, abuses, follies, etc, are held up to scorn, derision, or ridicule.
3. the species of literature constituted by such composition. [Latin *satira*, variant of *satira* medley, properly feminine of *satir* full, sated]<sup>59</sup>

<sup>57</sup> These conceptions should be understood against a broader literary bias in the *OED*. When it was compiled, earliest use was typically sought in what are now literary texts, because these were available; hence there is a sometimes misleading literary authority that pervades construction and the perceived development of the English language. See R W McConchi, ‘Wise and Learned Cunctation: Medical Terminology 1547-1612 and the *OED*’, *Dictionaries*, Vol 5, 1983, pp 22–35.

<sup>58</sup> Macquarie Dictionary Publishers Pty Ltd, Bibliography: *The Macquarie Dictionary Online*, 2007, at <[http://www.macquariedictionary.com.au/129.96.0.0.16@FF839406088/-/p/dict/article\\_display.html?type=title&first=1&mid=2&last=2&current=1&result=1&DatabaseList=dictbigmac&query=parody&searchType=findrank](http://www.macquariedictionary.com.au/129.96.0.0.16@FF839406088/-/p/dict/article_display.html?type=title&first=1&mid=2&last=2&current=1&result=1&DatabaseList=dictbigmac&query=parody&searchType=findrank)>.

<sup>59</sup> Macquarie Dictionary Publishers Pty Ltd, ‘Bibliography’, *The Macquarie Dictionary Online*, 2007, at <[http://www.macquariedictionary.com.au/129.96.0.0.16@FF839406088/-/p/dict/article\\_display.html?type=title&first=1&mid=2&last=2&current=1&result=1&DatabaseList=dictbigmac&query=satire&searchType=findrank](http://www.macquariedictionary.com.au/129.96.0.0.16@FF839406088/-/p/dict/article_display.html?type=title&first=1&mid=2&last=2&current=1&result=1&DatabaseList=dictbigmac&query=satire&searchType=findrank)>.



It should be noted that each of these definitions is identical with those in the first edition of 1981.<sup>60</sup> For a dictionary, this is not scandalous. Defining words is a precise art, so revision is something to be undertaken carefully and rarely; routine revision will cause more trouble than it avoids. Nor is it lexicographically unreasonable that the 1981 *Macquarie* definitions are demonstrably (in both structure and content of definitions) based on the definitions in the original *OED* (published in fascicles starting at A from 1884 and available in a complete edition in 1933). Dictionaries winnow interpretations over time, and a new dictionary (as the *Macquarie* was in 1981) will legitimately use the major authority in the field as a resource. The definitions in the 1933 *OED* are:

Parody *sb.*1

1. 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.
2. *transf* and *fig.* A poor or feeble imitation, a travesty.

Parody *v.*

1. a. *trans.* To compose a parody on (a work or author); to turn into a parody; to ridicule (a composition) by imitating it.  
b. *intr.* To write or compose a parody
2. *trans.* In a general sense: To imitate in a way that is no better than a parody.<sup>61</sup>

Satire

1. a. A poem, or in modern use sometimes a prose composition, in which prevailing vices or follies are held up to ridicule. Sometimes, less correctly, applied to a composition in verse or prose intended to ridicule a particular person or class of persons, a lampoon.  
b. *transf.* A satirical utterance; a speech or saying in ridicule of some person or thing. *Obs.*  
c. *fig.* A thing, fact, or circumstance that has the effect of making some person or thing ridiculous.
2. a. The species of literature constituted by satires; satirical composition.  
b. The employment, in speaking or writing, of sarcasm, irony, ridicule, etc in exposing, denouncing, deriding, or ridiculing vice, folly, indecorum, abuses, or evils of any kind.
3. Satirical temper, disposition to use 'satire'.<sup>62</sup>

Clearly, the *Macquarie* definitions derive directly from the *OED*'s. They are sometimes in a different order of exposition and they vary the precise order of words, but they do not differ from them in substance. They are adequate definitions for a general dictionary, but our point is that they cannot have taken

<sup>60</sup> *The Macquarie Dictionary*, St Leonards, NSW: Macquarie Library, 1981, pp 1260, 1531.

<sup>61</sup> *The Oxford English Dictionary, Being a Corrected Re-Issue with an Introduction, Supplement, and Bibliography of A New English Dictionary on Historical Principles*, Clarendon Press, Oxford, 1933, Vol VII, p 489 (illustrative quotations omitted).

<sup>62</sup> *OED*, Vol IX, pp 119–20. We have omitted the illustrative quotations and definitions 2c and 2d which add nothing material to the discussion.

into account any developments in the theory or practice of parody and satire since P and S were published in fascicles during the 1920s. Interestingly, the online edition of the *OED* recognises that there may be a need for modernisation, at least with ‘parody’, for which it provides a draft revision of the definition from 2005 onwards. This draft definition reduces the emphasis on ridicule, notes a particular but not compulsory link with satire, and extends the range of artistic fields potentially included:

A literary composition modelled on and imitating another work, esp a composition in which the characteristic style and themes of a particular author or genre are satirized by being applied to inappropriate or unlikely subjects, or are otherwise exaggerated for comic effect. In later use extended to similar imitations in other artistic fields, as music, painting, film, etc.<sup>63</sup>

It follows that if Australian courts depend on the *Macquarie* for an understanding of these words, they are relying on lexicographic work completed shortly after World War I, and decades before the advent even of *The Goon Show*. At least on the face of it, this presents a problem, for very substantial changes have occurred in the media of parody and satire through the development of film, radio and television during the twentieth century, as well as a further level of transformation derived from the more recent arrival of the digital age. Television in particular, from *That Was The Week That Was (TW3)*<sup>64</sup> in the 1960s to *The Panel*<sup>65</sup> and *The Chaser’s War on Everything*<sup>66</sup> in the last few years, has created a mass media satiric/parodic/news genre (yet to find an elegant name) that is developing its own traditions and blurring once distinct practices.<sup>67</sup> Such developments reflect post-modern tendencies for communication to play with multiple levels of ambiguity and receding perspectives; to borrow or adapt material or forms (including via technical means such as slowing down/speeding up film, familiar from silent movies, *Funniest Home Videos* etc); to present and replay ‘live’ (ie, rehearsed but also semi-unstaged) performances in hoax or stunt form such as *Candid Camera* or *The Chaser*. In the United States, *The Daily Show* insists that it be satirical in its news coverage, as only satire can give full coverage of the news

63 *Oxford English Dictionary Online*, ‘Parody, n.2’ (draft revision June 2005), at <<http://dictionary.oed.com/>>.

64 Pioneering BBC Television satirical commentary on politics and world events, broadcast in 1962 and 1963, with David Frost as comp re.

65 Network Ten and affiliates talk show, 1998–2000 and occasional specials, produced by Working Dog Productions, included several members of the former *D-Generation* and *The Late Show* casts.

66 The ABC’s recent *Chaser* program. The Chaser team describe themselves as ‘a satirical media empire which rivals Rupert Murdoch’s News Corp in all fields except power, influence, popularity and profitability’: MySpace at <<http://www.myspace.com/chaserteam>>.

67 Consider also *Not the Nine O’Clock News* (BBC), *Drop The Dead Donkey* (SBS), and *The Daily Show* (US); and cf *Yes Minister* (all episodes based on real cases and including accurate statistics), *Frontline*, and during the Sydney Olympics preparations, *The Games*. For print examples, see *The Onion*, Three Rivers Press, New York; columns by Edward Pearce in the UK *Daily Telegraph* during the Maggie Thatcher period, which were satirical reports of parliamentary proceedings, enlivened with playful comments on the Prime Minister’s dress-style; and the now defunct *The Chaser Magazine*, replaced by the current Chaser website, with redaction of the latter’s headlines in the main news-section of *The Weekend Australian*.

(a post-modern twist on the old newspaper claim of constituting ‘all the news that’s fit to print’). Such claims are taken seriously by a new-generation audience that is media-literate and logs onto the internet for news and information.

None of these examples fit comfortably in the old literary taxonomies of the dictionary definitions quoted above, which assume that parody and satire are primarily literary activities. Even the *OED*’s draft revision retains ‘literary composition’ as primary. Indeed, the ghost in the machine (the DNA) of the ‘satire’ definitions is the narrow generic definition which confines it to discursive poems like those of Horace, Juvenal and Pope. This is the sort of formal verse-satire that Quintilian had in mind in the first century CE, when he wrote proudly of the one verse genre not inherited by the Romans from the Greeks, ‘*satura quidem tota nostra est*’.<sup>68</sup> Cognisant of the limitations of this very old source, both the *Macquarie* and the *OED* feel a need to include the possibility of ‘and prose’ as also a valid medium so as to ensure that, for example, Swift’s famous work is not excluded. It is revealing that the *OED*’s first definition, however, is this narrower one, and only the second definition is more expansive; the *Macquarie* at least puts the broader definition first and the narrower second.

Reading the definitions narrowly also excludes from purview both satirical drama (a considerable tradition from Aristophanes to Ayckbourn, Williamson and beyond), and satiric opera (eg, *The Marriage of Figaro*, even Gilbert and Sullivan); even political cartoons in newspapers would miss the cut. Neither definition is useful in addressing that most common of satirical features today — and one to which the Attorney-General drew the attention of parliament — satire in visual media. Both definitions assume that the essential form of satire is written or spoken words. Even the definitions of parody, while allowing for the notion of musical parody as an example, are otherwise overwhelmingly verbal in focus. As we have demonstrated, this is an incomplete version of the world in which artists and their audiences work and live today.

Naturally, literary parody and satire still occur and deserve the protection of the new fair use provisions in copyright. But these areas are unlikely to present a major problem for courts in practice because they are long-established cultural activities, the ground-rules of which are well understood (in general) by writers, audiences and targets. The most volatile area in parody and satire — as exemplified by the US cases discussed above and particularly *Blanch v Koons* and other Australian cases such as *The Panel* — is presently in visual and digital media. It is here that the need will be greatest for legally sound definitions of the terms that take such cultural practices and new ordinary meanings into account.

The clearest way of illustrating the problem in using definitions stemming directly from 1981 and indirectly from the 1920s is to look at how the meaning of the word ‘sampling’ has changed in editions of the *Macquarie*. Sampling is, of course, the word in common usage for the most common digital practice of audiovisual re-use and recombination. It is now defined:

Sampling

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<sup>68</sup> Quintilian, *Institutio Oratoria*, 10.1.93: ‘Satire indeed is entirely our own’.

*noun* 1. a technique of digitally encoding external sounds and reproducing them at different pitches.

2. the process of creating a new piece of music by combining various extracts from other artists' songs, musical pieces, etc.

— *adjective* 3. (of synthesisers) having the facility to digitally encode external sounds and reproduce them at different pitches.

4. of or relating to someone who records music which consists of a composite of other artists' recordings.<sup>69</sup>

In 1981, the point of origin for the dictionary definitions of parody and satire being used by courts at present, there was no separate definition of 'sampling', for the obvious reason that it was not then technologically possible, except in a handful of laboratories. Instead, the word was subsumed within a definition of 'sample', grounded principally in statistics:

Sample, *n*, *adj*, *v*, -pled, -pling,

-*n*. 1. a small part of anything or one of a number, intended to show the quality, style, etc, of the whole; a specimen.

— *adj*. 2. serving as a specimen: *a sample copy*,

-*vt*. 3. to take a sample or samples of; test or judge by a sample.<sup>70</sup>

It is possible to see how a word thus understood could be extended to include digital sampling, but clearly this definition did not see such an extension coming. Even if the intellectual work in the *Macquarie* definitions of parody and satire is dated to the first edition of the dictionary (rather than the progenitor definitions in the *OED*), it is clear that they were arrived at in a world which had no premonition of what has now become one of the dominant cultural practices of early twenty-first century satirical and parodic re-use. Thus courts would be unwise to rely on lexicography that could not anticipate the advent of such practices of digital re-use. For the sorts of hard cases that are most likely to end up in court it is important that the *Macquarie* definitions should not be used in a manner that assumes they anticipate future uses of the terms.

This is, of course, a fundamental issue with using modern dictionaries for definitions. As we have indicated, they do not prescribe the semantic range of a word prospectively: rather they map usage, and they do so retrospectively. This can provide good, well-researched evidence for what ordinary usage has been at a point in the past (not always, or even often, the date of publication of the dictionary), but it is only a map. There are varying degrees of time-lag between definition (semantic content) and the pragmatics of use. Rarely can dictionaries take into account the evanescence of the forms of slang which differentiate social groups and which can be a vital factor in current use. Sensibly, in order to maintain their formal relevance, they opt for definitions of open-ended generality with apposite and clarifying illustration; but neither the general mapping of meaning, nor the illustration is legislative; nor can they be if they are to withstand the vagaries of time. Dictionary definitions are useful but not the end of the argument, especially where culturally and formally dynamic activities like parody and satire are concerned.

<sup>69</sup> Macquarie Dictionary Publishers Pty Ltd, *The Macquarie Dictionary Online*, 2007.

<sup>70</sup> *Macquarie Dictionary*, 1981, p 1525.

Supplementary definition for these terms in particular needs to be carefully considered.

These observations suggest that courts reviewing the new exception may need to go beyond the heavy favouring of the *Macquarie Dictionary* demonstrated in fair dealing cases to date. At a minimum, it would be preferable that a range of dictionaries be consulted, and then supplemented with other sources against the context of use.<sup>71</sup> As parody and satire are terms whose usage reflects changing stylistic practice by artists, it may be more useful to be guided by the approach taken in other areas of copyright law concerning artistic matters, where the difficulty of judging aesthetic issues is more readily acknowledged. Here courts are often more receptive to the opinions of practitioners, industry experts and even of the creators themselves in coming to an objective view of the legal issue at hand. A pertinent example is the decision of Tamberlin J in *Schott Musik International GMBH v Colossal Records of Australia*,<sup>72</sup> a copyright case which considered whether a 'techno' version of Carl Orff's *Carmina Burana* was a 'debasement' of the original. In determining this question, the judge considered a range of dictionary definitions of the term 'debasement' stating:

The dictionary definitions are not conclusive but they are of some assistance . . . In my view, the appropriate approach is to consider the various lines of definition, and balance them with the evidence, legislative history and other relevant matters.<sup>73</sup>

Accordingly, Tamberlin J took judicial notice of the then contemporary 'rave' culture in which techno music was played, and heard from industry practitioners and musicologists as expert witnesses. His approach mirrors that of some US courts considering the meaning of parody who have accepted testimony from experts, and even artists themselves.<sup>74</sup> It is also common for experts to be used to assist Australian courts in other areas of intellectual property litigation.<sup>75</sup> There is no reason why a consideration of the meaning of the terms 'parody' and 'satire' concerning, as they do, matters of aesthetics, could not encompass this broader and more flexible approach to statutory interpretation of these words as they apply in particular industries and artistic contexts.

In Part 2 of this article, we will hazard some suggestions as to how that supplementation should proceed in order to reflect the points of view of those who create, study and appreciate today's humour in parody and satire.

71 See Pearce and Geddes, above n 9, citing *Falconer v Pedersen* [1974] VR 185 at 187: 'One must interpret the phrase as used in its context, assisted as it may be, but not necessarily bound, by one of a variety of dictionary definitions.'

72 (1996) 71 FCR 37; 141 ALR 433; 36 IPR 267; BC9605718; affirmed on appeal: (1997) 75 FCR 321; 145 ALR 483; 38 IPR 1; BC9702546.

73 Ibid, trial judgment, at IPR 9.

74 See eg, *Suntrust* 268 F 3d 1257 (11th Cir, 2001); *Blanch v Koons* 467 F 3d 244 (2d Cir, 2006).

75 See eg, *Sheldon v Metrokane* (2004) 61 IPR 1; [2004] FCA 19; BC200400149, and also see Sainsbury, above n 20, at 317–18, suggesting that experts and academic writings could be used to assist the court in considering the new exception.