# Journalistic Parody and Moral Rights under Australian Copyright Law

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*Parody achieves its effect through a borrowing of a text which is then satirised by placing it in an inappropriate context or by caricaturing its theme. This borrowing has been a tool of journalism from the beginnings of that profession. However, this borrowing has begun to be subject to the scrutiny of copyright law. This article examines the impact of copyright law upon journalistic parody. Selected for particular scrutiny are parodies involving the false attribution of authorship and passing off. The article examines the impact upon journalistic parody of the moral rights provisions of the Copyright Amendment Bill 1997.*

## 1. The nature of parody

Parody has been the well-used tool of the journalist and social commentator since at least the fifth century BC, when Aristophanes parodied the plays of Euripides and Aeschylus. The distinguishing feature of this literary form is its reworking or re-contextualisation of existing works.[1] It achieves its effect through the satirical incongruity between the original and the parodied work. For its satiric effect, parody relies upon the familiarity of readers with the style and context of the original work. The parodist will often borrow from the original work to establish the allusion and then, through ironic inversion of the text or in its utilisation in an inappropriate context or by the caricaturing of its theme the parodist will achieve a satirical effect. An example of parody through an allusion to style is the satiric effect achieved by Duchamp in placing a moustache on the Mona Lisa. This parody obviously depends upon the viewer's familiarity with da Vinci's original work, which Duchamp reproduces, virtually in its entirety. An example of incongruity of context is the use of biblical imagery in the style of the King James Bible, for example to describe events of contemporary politics. An example of parody through the caricaturing of themes is the use made by the *Star Wars* films of the *The Wizard of Oz*. Because parody relies upon the complicity of the audience in the borrowings from the original work, it particularly lends itself to effective journalism.

[1] Parody is described as "one of the major forms of self-reflexivity in twentieth-century art forms, marking the 'intersection of creation and re-creation, of invention and critique'": Gredley and Maniatis, "Parody: A Fatal Attraction? Part 1: The Nature of Parody and its Treatment in Copyright" [1997] 7 EIPR 339, quoting Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms* (1985), p 2.

However, like so much else of colourful and creative journalism, parody has to survive the close scrutiny of defamation laws and, more recently, the scrutiny of intellectual property laws.

Currently, there are probably three major intellectual property hurdles for parody: first, where the parody involves the pretence that a piece is written by someone else, this may constitute a false or unauthorised attribution of authorship and be actionable as a tort arising under copyright law. Secondly, where too much of the original has been borrowed for the purposes of a parody, the parodist is exposed to liability for unauthorised copying under copyright law. Thirdly, if the parody is too convincing, it may be alleged that the take-off has become a rip-off and expose the writing to liability under the law of passing off. A fourth problem, created by the Copyright Amendment Bill 1997, which has been released by the Federal Attorney-General for comment, is that parody, if it involves ridicule, mutilation or distortion of the original work, may constitute derogatory treatment and infringe the moral rights of creators of works.*

## 2. Moral rights in Australia

The protection of moral rights is provided for in Art 6bis of the Berne *Convention for the Protection of Literary and Artistic Works*, 1886, to which Australia acceded in 1928. Article 6bis of the Convention provides that:

> "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work, which would be prejudicial to his honour and reputation."

To date, the only provision of moral rights under Australian copyright law was the prohibition in s 190 against the false attribution of the authorship of a work. Section 194 conferred a right of action for damages and injunction, in respect of a false or unauthorised attribution.

Beyond these provisions, there was no enactment in Australia of the moral rights obligations arising under the Berne Convention. In 1983 the then Attorney-General, Gareth Evans, referred the issue of moral rights to the Copyright Law Review Committee. In October 1984 the Committee issued a discussion paper and after considering submissions, reported to the new Attorney-General, Lionel Bowen, in January 1988. The Committee recommended by a majority of 5:4 against the introduction of moral rights. The majority and minority views divided on the issue of the practicality of the implementation of moral rights protection. Notwithstanding this report, the debate continued with the 1993 Labor policy statement *Distinctly Australian*, which identified moral rights as an area of copyright to be reviewed. In June 1994, the then Ministers for Justice and for Communication and the Arts issued the discussion paper: *Proposed Moral Rights Legislation for Copyright Creators*. This discussion paper proposed a possible moral rights legislative regime for Australia, based on amendments to the *Copyright Act*.

On 18 June 1997, Attorney-General Daryl Williams introduced to Parliament the Copyright Amendment Bill 1997, which largely enacted the scheme proposed in the 1994 discussion paper. The Bill replaces Pt IX of the *Copyright Act* 1968, with a series of provisions which grants to the authors of literary, dramatic, musical or artistic works and directors and producers of cinematographic films rights of attribution and integrity.

## 3. Parody and the prohibition of the false attribution of authorship

A type of parody which has become something of a journalistic genre is the satirical simulation of the real or imagined writing style of public figures, or the spurious representation of the activities of public figures by their associates. In the journalistic context this style of parody is probably best exemplified by the feature columns published over the years by the English satirical magazine, *Private Eye*. It commenced in the 1960s with the

* Editor's Note: The moral rights provisions discussed in this article were not among the amendments to the *Copyright Act* 1968 (Cth) passed in July 1998. Adding moral rights protection to the *Copyright Act* is still proposed. As to the changes generally, see the article by Michael Hall in this issue, p 156.

publication of the alleged diary of the wife of the then Prime Minister, Harold Wilson, which satirised the self-consciously pipe-smoking, Gannex Mac and cloth cap style of the Wilson administration. The success of this parody was followed by the "Dear Bill" letters, purportedly written by Margaret Thatcher's husband, which was succeeded by "The Secret Diary of John Major at the age of 47¾". *Private Eye* currently publishes a diary representing Tony Blair as a priest in a provincial rectory.

No copyright objection can be taken to this particular style of journalistic parody because, appearing as they do in a well-known satirical magazine, no reader is likely to think that the content is actually provided by the persons being satirised. A copyright problem arises when this style of journalistic parody is carried by a regular newspaper and when it becomes too convincing. This issue was recently addressed by the Chancery Court in *Clark v Associated Newspapers Limited.*[2] The plaintiff was Mr Alan Clark, the well-known Conservative Party politician and former Cabinet Minister. In 1992, Alan Clark briefly retired from politics. In the year of his retirement Alan Clark published with Weidenfeld and Nicholson his *Diaries*. These sold very well, about 240,000 copies between 1992 and 1996, after which they were selling at 20,000 per year.

In January 1996 Alan Clark entered into an Agreement with the *News of the World,* a Sunday newspaper, to provide a weekly column of at least 1000 words at £2,840 per column, totalling some £130,000 per annum. In 1996, he decided to stand again for Parliament. On 23 January 1997 he was selected as the Conservative candidate for the seat of Kensington and Chelsea.

The case brought by Alan Clark against Associated Newspapers arose out of incidents occurring in the run-up to the 1997 general election. On 24 January, the day after Clark's preselection for the Tories had been announced, the London *Evening Standard*, a daily, had published a one-off article written by a journalist, Peter Bradshaw, parodying the *Diaries*. No complaint was made by Alan Clark about this. On 28 January Alan Clark was approached by the *Evening Standard* and offered £60,000 per annum to contribute a weekly column. Alan Clark responded by demanding £100,000. The gap could not be bridged and these negotiations came to an end.

The date of the general election was announced on 17 March 1997. On 27 March the *Evening Standard* commenced a series of articles entitled "Alan Clark's Secret Election Diary". The first contribution commenced with the following standfirst:

> "It will be a sad loss if the great diarist Alan Clark does not eventually publish a record of his campaign to retain Kensington and Chelsea for the Tories. Meanwhile PETER BRADSHAW, who recorded Mr Clark's capture of the nomination in January, again imagines what a new diary might contain."

Then followed the heading "Alan Clark's Secret Election Diary", with Alan Clark's photograph. Below this was the heading "Tricky night in the Fuhrerbunker" followed by the content of the article.

Further articles were published on 9, 11, 17, 23, 28 April and 2 May, all with the same format. The standfirst referred to Peter Bradshaw, imagining how the plaintiff might have recorded the events, followed in larger text by the title of the article and then in smaller print by the purported content of the diary. There were then three print sizes. Largest was the title, next largest was the standfirst, with Peter Bradshaw's name in block caps and then the content of the diary. The general election concluded on 1 May, but the *Evening Standard* decided to persist with the series in much the same format, but under the heading "Alan Clark's Secret Political Diaries". The first article in the new format was published on 8 May. The second article was published on 15 May and was followed on 19 May by a letter from the plaintiff enclosing a writ. The defendants continued publishing the series for the several months up to and including the trial of the action.

The action by Alan Clark sought remedies for breach of the *Copyright, Patent and Designs Act* 1988 (UK) and for passing off. The copyright action was based on s 84 of the English Act prohibiting the false attribution of a literary work by an author. Infringement occurs when "a person ... issues to the public copies of a work ... in or on which there is a false attribution". The leading English case on false

[2] Unreported, 21 January 1998, Lightman J.

attribution was *Moore v News of the World Ltd*[3] which concerned an article entitled "The Girl who Lost the Saint. When Love Turns Sour by Dorothy Squires talking to Weston Taylor". The words attributed in this article to Dorothy Squires were actually provided by the journalist. The question for the court was whether the article pretended to be written by Dorothy Squires. The trial judge directed the jury to make up their minds what the impression was to the reader. The jury found that the article did pretend to be written by Dorothy Squires and found for the plaintiff. The Court of Appeal approved the trial judge's direction to the jury and affirmed the decision granting damages for the plaintiff. The Court of Appeal was particularly influenced by the style of the article. For example, the opening lines read:

> "When I saw those placards, screaming out, 'Roger Moore weds', I knew it was the worst day of my life. Everywhere I looked my ex-husband's name was on newspaper bills in the streets of London."

This was placing words in the mouth of Dorothy Squires. Damages of £100 were awarded to Ms Squires.

As a side issue, it should be noted that if someone is going to complain about false attribution of authorship, they may well also have a complaint about defamation. This was certainly the case in *Moore v News of the World*. The Court of Appeal agreed with the plaintiff that the words used in the article:

> "by reason of the context in which they were published bore the natural and ordinary inferential meaning that the plaintiff was an embittered and unprincipled woman who had deliberately prepared and sold for a substantial sum of money a series of articles for publication ... in a sensational form and manner revealing private and confidential details of her private life with Roger Moore."

Under this head of damage, she was awarded £4,300.

In determining whether there had been false attribution, the trial judge, Lightman J, in *Clark v Associated Newspapers Ltd* applied the defamation test of determining "the single meaning which the literary work conveys to the notional reasonable reader".[4] In deciding what this meaning was, the judge referred to the evidence led by the plaintiff identifying a number of categories of person who had been deceived. These were:

1. politicians
2. porters
3. lawyers
4. miscellaneous and
5. experts.

The conclusion reached by the judge was as follows:

> "I finally look at the articles as a whole and the totality of the messages and counter-messages. In my view the dominant message in the defendant's presentation of the articles is of the plaintiff's authorship; and the counter messages can be expected to be insufficient to disabuse a substantial number of unsuspecting readers of the *Evening Standard* who tend to skim-read; and accordingly, a substantial number of readers would be left (as were the plaintiff's witnesses) with the impression that the plaintiff was the author."

The Australian equivalent of s 84 of the English Act is s 190 in Pt IX of the *Copyright Act* 1968 which prohibits the false attribution of the authorship of a work. The section provides, in part:

> "(1) A person (in this subsection referred to as 'the offender') is by virtue of this section, under a duty to the author of a work not to:
>
> (a) insert or affix another person's name in or on the work, ... in such a way as to imply that the other person is the author of the work..."

Other paragraphs deal with the publishing, sale, hire, offer for sale, exhibition, distribution and reproduction of works carrying a false attribution. Under the *Copyright Act*, where a false attribution occurs, s 194 provides that this gives a plaintiff a right of action for damages and injunction.

The Copyright Amendment Bill 1997 enacts as part of an author's moral rights, the right to attribution of authorship. This is provided in Div 2

[3] [1972] 1 QB 441.

[4] See, eg, *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65.

of new Pt IX of the *Copyright Act* which confers upon authors the positive right to be named as author (s 192) in "a clear and reasonably prominent" way (s 195). Authors can prevent others from falsely claiming authorship (s 195AB).

## 4. Passing off and parody

The *Alan Clark* case also raised the issue of parody as passing off. As is mentioned above, effective parody relies upon the audience's familiarity with the work or style of the author who is being parodied. Actionable passing off occurs when a person appropriates the commercial reputation of another. This typically happens when the indicia or symbols of a commercial reputation are appropriated. Thus passing off will occur where a trader's name, trade marks, trading style or even the advertising imagery of a trader are appropriated.[5] The simplest category of passing off is the use by a defendant of the plaintiff's name. In the press media context, there have been a number of cases where a plaintiff has successfully complained about the copying of the name of a newspaper, for example, "Belgravia" *Maxwell v Hogg,*[6] "London Evening News" *George Outram & Co v London Evening Newspapers*[7] and "Punch" *Bradbury v Beeton.*[8] Additionally, passing off has been found where the nom de plume of a plaintiff has been wrongfully appropriated. The best example of this form of appropriation is the Australian case which concerned the appropriation of the nom de plume, "Pierpont".[9]

The critical question in passing off in the journalistic context, as well as in false attribution cases, is whether the reader would be deceived into thinking that the defendant's newspaper, cartoon, or article emanates from the plaintiff. The legal test which was applied by Lightman J in the *Alan Clark* case (applying *Cadbury-Schweppes Pty Ltd v The Pub Squash Co*)[10] was "whether a substantial (or large) number of readers of the *Evening Standard* have been misled or are likely to be misled". As was noted in a deceptive advertising case,[11] with publication in a daily newspaper "the bread is cast upon very wide waters".[12] Thus "readers will include both the shrewd and the ingenuous, the educated and the uneducated and the experienced and the inexperienced".[13] In assessing whether deception has occurred, the court looks to the article as a whole and considers, for example, the prominence of any disclaimer which may be employed. In making this assessment of deception, the difficulties of the journalistic parodist become immediately apparent. The keystone of parody is imitation. The best parodies are those which take in the reader for a while. In other words there must be a momentary deception or take off. If this persists, it becomes an impermissible rip-off.

In assessing the likelihood of deception we must consider the particular characteristics of the defendant's readership. The judge accepted the plaintiff's submission that:

> "the readers of the *Evening Standard* read it with varying degrees of attention. A substantial number of such readers do so after the day's work, often on a journey home; they do not see the *Evening Standard* as, or want, what may be termed a heavy or serious newspaper calling for attentive reading, or attentive reading throughout; rather it is something generally to skim read..."

Thus the trial judge stated that when he looked at the articles as a whole and the totality of the messages and counter-messages:

> "the dominant message in the defendant's presentation of the articles is of the plaintiff's authorship; and the countermessages can be expected to be insufficient to disabuse a substantial number of unsuspecting readers of the *Evening Standard.*"

In finding actionable passing off to have been established, Lightman J concluded that as the plaintiff had a substantial reputation as a diarist, his identity as an author of the articles was of importance to readers of the *Evening Standard* in

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5 See *Cadbury Schweppes Pty Ltd v The Pub Squash Co* [1981] 1 WLR 183.

6 [1967] 2 Ch App 307.

7 (1911) 27 TLR 231.

8 (1869) 21 LT 323.

9 *Sykes v John Fairfax & Sons* [1977] 1 NSWLR 414.

10 [1981] 1 WLR 183.

11 *CRW Pty Ltd v Sneddon* [1972] AR (NSW) 17.

12 Ibid at 28.

13 Ibid.

deciding whether to read the articles.

> "This, as it seems to me, is reflected in the choice of the format adopted, and most particularly in the design of the heading, which is calculated to exploit the public recognition enjoyed by the plaintiff as author of the *Diaries* and the public interest which any diary written by the plaintiff may be expected to generate."

A factor which Lightman J did not emphasise in his finding of actionable passing off, was the fact that Alan Clark had been unsuccessfully approached by the defendant to provide a column and that he was already writing a political column for a newspaper on a commercial basis. This factor could have been used to indicate that Alan Clark had a commercial reputation which was real, rather than potential and that, consequently, he would have been expected to suffer damage, by the purloining of his identity by the *Evening Standard*. Similarly, the trial judge could have used the fact that Alan Clark was already writing a political column as evidence of the likelihood of confusion arising from the defendant's activities.

It is not every case of false attribution which will result in passing off, since a precondition will be the existence of a protectable commercial reputation on the part of the plaintiff. In the Alan Clark case, this element was easily established, because of his existing journalistic activities. A distinction could be drawn between this case and, say, the "Secret Diary of John Major", satirised by *Private Eye* in a situation where the former English Prime Minister had not been involved in political journalism. Because of the penchant of politicians to become diarists upon retirement, an even greater distinction could be drawn between the *Alan Clark* case and the hypothetical "Secret Diary of Michael Jackson". This greater distinction would lie because of a complete absence of any reputation of that pop star's involvement in journalism.

## 5. Parody and the right of integrity of authorship

Particularly convincing journalistic parodies sometimes involve the reworking of the actual words of an author. This raises two particular copyright problems. The first is whether the reworking involves such an excessive amount of borrowing that it may simply constitute impermissible copying.[14] A second issue which is raised by the moral rights amendments to the *Copyright Act* 1968 is whether this style of parody involves "derogatory treatment".

Section 195AH which is inserted by the Copyright Amendment Bill 1997, confers a right of an author to "integrity of authorship" in "not having a work subjected to derogatory treatment". "Derogatory treatment" is defined in s 195AI as

> "the doing of anything, in relation to the work, that results in a material distortion of, the mutilation of, or a material alteration to the work itself that is prejudicial to the author's honour or reputation",

or the

> "doing of anything else in relation to the work that is prejudicial to the author's honour or reputation".

The 1994 discussion paper distinguishes between honour and reputation in the following way:

> "The term 'honour' is generally associated with personal integrity and how a person considers he or she is perceived, 'reputation' on the other hand, is associated more in the defamation context, as relating to a person's professional, business or personal standing in the community."[15]

The discussion paper gives the following examples of the treatment of a literary work which may not be derogatory: translations; the re-editing by an employer of a draft document; and where a work is used for parody or burlesque.[16] Examples where the treatment of a literary work may be derogatory include: where a substantial part of an article is deleted to alter its context and where the remaining part is reproduced in a publication without consent; where a person edits or substantially alters a poem with an intention to make a mockery of the poet or to change the intended meaning of the poet; and where a script for a film or play is substantially altered for another

[14] See text below under the heading "Fair dealing".

[15] *Proposed Moral Rights Legislation for Copyright Creators*, June 1994, para 3.49.

[16] Ibid, para 3.51.

purpose which the author would find offensive.[17]

A problematical area, illustrated by the *Alan Clark* case, is the limits of permissible parody. The discussion paper specifically exonerates burlesque and parody as "valued practices in society because they are part of free speech".[18] However, as with defamation, the boundaries of the tort are difficult to delineate.

The United States cases in the area of trade mark parody provide some case examples of derogatory use. Most of these cases concern the suggestion of an unwholesome or unsavoury association. For example "Miami Mice" was a reasonable parody of "Miami Vice", when used on a T-shirt *Universal City Studios v T-Shirt Gallery.*[19] Whereas, in *Coca Cola v Gemini Rising,*[20] Coca Cola was able to satisfy the court that a poster with the words "enjoy cocaine" produced in the style of Coca Cola's trade mark went beyond parody and was injurious to its reputation. In *American Express v Vibra Approved Laboratories*[21] the defendant's novelty *America Express* condom card, with its slogan "Never Leave home without it" was held to be a clear infringement of the plaintiff's trade marks. Similarly *Dallas Cowboys Cheerleaders v Pussycat Cinema,*[22] which concerned the movie "Debbie Does Dallas", involved the star of the film occasionally clad in the uniform of the Dallas Cowboys. In response to a defence of parody raised in relation to an action for trade mark infringement the court referred to the movie as "a gross and revolting sex film" which "hardly qualified as a parody".

This case brings us back to the consideration of parody as a literary form. If a literary evaluation is to be made about whether a parody is derogatory, this is similar to the consideration under s 55(2) of the *Copyright Act* 1968 which permits the manufacturer of a phonogram record to make a recording of an adaptation of a musical work upon payment of a statutory royalty, provided that the adaptation does not debase the work.

A recent consideration of what constituted debasement was considered in *Schott Musik International GMBH v Colossal Records of Australia*[23] which concerned the use of Carl Orff's work "Carmina Burana" by a techno rock group. The group took the "O Fortuna Chorus" from the work and remixed it in the techno style "particularly favoured at all night dance sessions (raves) where loud pulsating music is played". Expert evidence in the case by the composer Richard Meale and by the Chair of the Musicology Department at the Sydney Conservatorium was of the view that the techno adaptation was debasing. Wilcox J was not persuaded by this musicological analysis. He observed that:

> "'debase' is a strong term. It requires much more than an opinion, even an expert opinion, that the adaptation is musically inferior. For the term to be applicable, the adaptation must be so lacking in integrity or quality that it can properly be said to have degraded the original work."[24]

Lindgren J also followed this approach. Hill J sought to apply an objective test for debasement and examined "whether it is a consequence of the adaptation ... that a reasonable person will be led to think less of the original work". He indicated that it would probably be rare for an adaptation to be debasing, but mentioned the circumstance where the rearrangement of a work and its use by a racist or terrorist organisation might be considered debasing. His Honour considered that this relieved the court from being an arbiter of taste. The techno version was considered to be a new work, but one which would not detract from the original. Wilcox and Lindgren JJ did not shrink from the task of evaluating the cultural worth of the parody. Thus, applying the words of the trial judge they reached the conclusion that the parody "preserves substantial and essential elements of the original" communicating "a powerful exuberance and rhythmic character quite consistent with the character of the work".[25]

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[17] Ibid. para 3.52.
[18] Ibid. para 3.66.
[19] 634 F Supp 1648 (SDNY 1986).
[20] 346 F Supp 1183 (EDNY 1972).
[21] 10 USPQ 2d 2006 (SDNY 1989).
[22] 604 F 2d 200 (2d Cir 1979).

[23] [1997] 531 FCA (19 June 1997). (Internet) URL:http//: austlii.edu.au/do/disp.pl/au.
[24] Ibid.
[25] Ibid.

## 6. Parody, fair dealing and free speech

An enduring copyright problem for parody journalism is the permissible borrowing of material for the purposes of parody. A recent United States example of this style of parody, albeit occurring in a defamation context, was explored in *Liebovitz v Paramount Pictures,*[26] which concerned the poster used to advertise the film, *Naked Gun 33⅓: the Final Result*. The poster was a parody of Liebovitz's notorious photograph of the actress Demi Moore, "naked and pregnant with an expression of severity and pride". This photograph had appeared on the cover of *Vanity Fair* and had created considerable interest and controversy. The *Naked Gun* poster superimposed the face of Leslie Nielson, the star of *Naked Gun* over the face of Demi Moore with the caption "due in March". In response to the plaintiff's defamation action the court ruled that the parody transformed the plaintiff's photograph, creating a new work and that the borrowing which had occurred was a fair dealing with the plaintiff's work.

United States decisions must be used with caution, because of the existence in that country of a broad constitutional free speech doctrine. Although the explicit connection has not been made when applying the fair use defence, it is likely that United States courts may be subliminally influenced by such considerations. However, as a matter of general principle, one of the purposes of copyright law is to encourage and foster cultural activity. It has been acknowledged that "from the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been necessary to fulfil copyright's very purpose".[27] Thus the court in *Warner Bros v American Broadcasting Co*[28] observed that:

> "Whatever aesthetic appeal [a parody] may have, results from the creativity that the copyright law is designed to promote. It is decidedly in the interests of creativity, not piracy, to permit authors to take well known works and add their own contributions of commentary or humour. After all, any work of sufficient notoriety to be an object of parody has already secured for its proprietor considerable financial benefit. According that proprietor further protection against parody does little to promote creativity, but it places a substantial inhibition upon the creativity of authors adept at parody to entertain, inform, or stir public consciousness."[29]

A useful analytical approach for the application of copyright principles to works of parody is provided in the Supreme Court's 1994 decision in *Campbell v Acuff-Rose Music,*[30] the current leading United States case on parody. This case concerned the song "Pretty Woman" written by Roy Orbison and William Dees in which the copyright was assigned to Acuff-Rose Music. In 1989 the rap singer Luther Campbell of the group 2 Live Crew released a record containing the song "As Clean as they Wanna Be" which was a self-confessed parody of "Pretty Woman". The song began with the opening guitar riff from the Orbison song and the opening line from that song. The court looked at three key factors:

(a) the purpose and use of the original work;
(b) the degree of transformation of the original work, both in its purpose and use;
(c) the substantiality of the copying which had occurred and the impact of the parody upon the market for the original work.

Consideration of the purpose and use of the original work is particularly important where an informational work, such as a work of scholarship or news reporting is utilised by a copyist. In such a case the court is prepared to accept a greater deal of copying than in relation to a more "creative" work.[31] However, in the *Campbell* case the work being parodied was "a creative expression ... [falling] within the core of copyright's creative purposes".[32]

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[26] 41 USPQ 2d 1598 (SDNY 1996).

[27] Buckland, "Rap, Parody and Fair Use" (1995) 17 *Sydney Law Rev* 599 at 601, quoting from *Stewart v Abend* 495 US 207 at 236 (1990).

[28] 720 F 2d 231 (1983).

[29] Ibid at 242.

[30] 114 S Ct 1164 (1994).

[31] See Cohen, "Copyright, Fair Use, Parody" (1994) 79 *Massachusetts Law Review* 127.

[32] It has been noted that this factor is rarely going to assist parodists who invariably copy publicly known creative works. See Fox, "2 Live Crew leads us back toward greater clarity and

On the question of the extent to which the parody transformed the original work, the trial judge, Souter J, observed that:

> "Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that weigh against a finding of fair use."[33]

In deciding whether a substantial copying had occurred, the Supreme Court held that too much of the original material remained, for example, the opening riff and line from the Orbison song. The court stated that "taking the heart of the original and making it the heart of the new work was to purloin a substantial portion of the essence of the original work".[34] It should always be remembered in copyright cases that it is not purely a question of the gross amount of copying, but the quality and function of that which is lifted. This is illustrated by the fair use case *Harper & Row Publishers, Inc v Nation Enterprises*[35] which concerned the review in *Nation* magazine of Gerald Ford's memoirs. *Nation* reproduced 300 words from Ford's 200,000-word memoirs, but the Supreme Court noted that these were the critical 300 words about President Ford's pardon of Richard Nixon in the Watergate scandal.

In assessing the impact of the parody on the market for the original Orbison song, the Supreme Court found that different audiences were targeted by the two works. This analysis was similar to that of the Federal Court in the *Carmina Burana* case.[36] After weighing up these four factors, the Supreme Court ruled that the copyright in the original work had been infringed. On balance, the borrowing of the essence of the Orbison song was probably determinative.

The dilemma of courts in deciding whether copyright infringement has occurred involves a balancing of private proprietary rights with the public interest in free speech.[37] In the United States this balancing tends to be self-conscious, because of the evolution of a theory of the freedom of commercial speech.[38] In Australia, ss 40-44B of the *Copyright Act* 1968 specifically allow a limited number of categories of fair dealing; of which the two most relevant for journalistic parody are fair dealing for the purpose of criticism or review and fair dealing for the purpose of reporting news. The extent to which these exemptions were framed with free-speech considerations in mind is unclear.[39] Subsection 40(2) provides that in determining whether a dealing with a literary, dramatic or musical work is a fair dealing, regard shall be had, among other things to "the amount or substantiality of the part copied in relation to the whole work or adaptation". As in the *Campbell* case, a problem will arise for the parodist who borrows too much.

This issue arose in an advertising case *AGL Sydney Ltd v Shortland County Council*.[40] The plaintiffs adopted an advertising campaign which highlighted the benefits of gas over electricity. The defendants parodied this advertisement to claim that electricity was better than gas. The Federal Court noted first of all that "the statute grants no exemption, in terms, in the case of works of parody or burlesque".[41] A fair dealing defence was not available as this was not criticism or reporting the news, so the only issue was whether copying had occurred and there the test was whether there had been a substantial borrowing. The trial judge, Forster J held that "more than a mere evoking or conjuring up of recollection had occurred" and that

predictability in the doctrine of copyright fair use" (1995) 40 *Loyola Law Review* 923.

[33] 114 S Ct 1164 at 1171.

[34] Ibid at 1176, cited in Cohen, op cit n 31, at 128.

[35] 471 US 539 (1985).

[36] *Schott Musik International GMBH v Colossal Records of Australia* [1997] 531 FCA (19 June 1997), (Internet) URL:http//: austlii.edu.au/do/disp.pl/au.

[37] See Smith, "The Limits of Copyright: Property, Parody and the Public Domain" (1993) 42 *Duke Law Journal* 1233.

[38] The current leading Supreme Court authority on commercial speech is *Central Hudson Gas and Electric Corp v Public Service Commission of New York* 447 US 557 (1980).

[39] See Macmillan Patfield, "Towards a Reconciliation of Free Speech and Copyright" in Barendt, *The Yearbook of Media and Entertainment Law, 1996* (Clarendon, Oxford, 1996), p 223.

[40] (1989) 17 IPR 99.

[41] Ibid at 105.

a substantial part of the plaintiff's work had been taken.[42]

The court's principal concern in cases in which the fair dealing exemption for criticism and review is raised, focuses on whether the borrower is having a free ride on the efforts of the originator. An English case which has interesting implications for reliance upon this category of fair dealing by a parodist is *Time Warner Entertainments Company LP v Channel 4 Television Corporation plc.*[43] This case concerned the defence by a television station that its use of 12 extracts totalling 12½ minutes from Kubrick's film, *Clockwork Orange,* in a documentary program, which screened for 30 minutes, was a fair dealing for the purpose of criticism and review. The court disregarded the quantum of the borrowing, in upholding "the interests of non-commercial, broadly political speech in this case".[44] On the other hand, the case may be distinguishable from commercial parody journalism on the basis that the defendant was a public broadcaster and not in competition with the plaintiff.

## 7. Infringement of moral rights under the Copyright Amendment Bill 1997

Proposed Div 6 of new Pt IX, inserted by the Copyright Amendment Bill, 1997 provides that the right of attribution of authorship and the right of integrity of authorship is infringed where an unattributed, falsely attributed or derogatorily treated work is reproduced in material form, published, performed, transmitted or adapted.

Section 195AQ exonerates a failure to attribute authorship where this is reasonable. Similarly, s 195AR permits derogatory treatment which, in all the circumstances, is reasonable. Matters to be taken into account in determining reasonableness are

(a) the nature of the work;
(b) the purpose for which the work is used;
(c) the manner in which the work is used;
(d) the context in which the work is used;
(e) any practice in the industry in which the work is used, that is relevant to the work or the use of the work;
(f) whether the work was made in the course of an author's employment.

Additionally, in relation to a failure to attribute a work, it is relevant whether any difficulty or expense would be incurred as a result of identifying an author.

Section 195AZ provides the following remedies for the infringement of moral rights: injunction, damages and a declaration that an author's moral rights have been infringed and orders that the defendant make a public apology and that the false attribution of authorship, or the derogatory treatment be removed or reversed.

In exercising its discretion as to the appropriate relief to be granted, the court is enjoined by s 195AZ(2) to take into account:

(a) whether the defendant was aware, or ought reasonably to have been aware, of the author's moral rights;
(b) the extent of any damage to the work;
(c) the number and categories of people who have seen or heard the work;
(d) anything done by the defendant to mitigate the effects of the infringement;
(e) if the moral right that was infringed was a right of attribution of authorship – any cost or difficulty associated with identifying the author;
(f) any cost or difficulty in removing or reversing any false attribution of authorship, or derogatory treatment of the work.

## 8. Subsistence, duration and exercise of moral rights and contracting out

Section 195AL provides that moral rights are co-terminous with copyright. Section 195AZH provides that moral rights apply in respect of the whole or a substantial part of a work. In relation to works of joint authorship, s 195AJI provides that each author will be able to assert moral rights in respect of the work. Apart from the exercise of moral rights by the legal personal representative of an author, s 195AM(2) provides that a moral right in respect of a work "is not transmissible by assignment, by will or by devolution by operation of law".

[42] Ibid.
[43] [1994] EMLR 1.
[44] Macmillan Patfield, op cit n39, p 239.

Section 195AZG(1) permits a person to waive, by writing, "all or any of his or her moral rights". Subsection (3) permits the waiver to relate to "future works that are made in the course of employment". Subsection (6) provides that an assignment of copyright does not, by that act alone, constitute a waiver of moral right in respect of the work and subsection (5) permits a waiver to be unconditional or subject to conditions. Section 195AZI provides that in the case of joint authorship, the waiver of moral rights by one author does not affect the moral rights of the other author(s).

Section 195AZD provides for the presumption of the subsistence of moral rights, where copyright is proved or presumed to subsist in a work. The presumption of subsistence of moral rights is rebuttable on proof of waiver.

In the context of journalistic parody the contracting out provisions are likely to be of great practical importance. The practicalities of, for example, subediting are going to require necessary mutilation and re-formatting, which without the contracting out provisions, could otherwise create a liability for moral rights infringement. To some extent this problem is accommodated by s 35 of the *Copyright Act* 1968, which confers copyright in the works of employed journalists upon their employer. Certainly, in light of the moral rights amendments proposed to be inserted by the Copyright Amendment Bill 1997, it would be expected that employers of journalists would make express provision for the contracting out of any moral rights obligations. However, a problem would arise in relation to the parodies of non-employed syndicated journalists which may be carried by a publication. Again a practical solution would be to secure the contracting out of that journalist's moral rights.

Some slight reformation of the rights of employed journalists is effected by new s 35(4) which is inserted by the Copyright Amendment Bill. This provision allows employed journalists to retain their copyright in works for the purpose of inclusion in a book or reproduction in the form of a hard-copy facsimile. A new s 35A allows print media proprietors to restrain the reproduction of the whole or at least 15 per cent of the non-advertising part of a newspaper, magazine or similar publication, in a book. This provision was enacted to deal with the problems arising from *De Garis v Neville Jeffress Pidler Pty Ltd*[45] in which the court enjoined the use of newspaper extracts in a press clipping service. However, this sort of provision would also present a problem for parodies in book form, where excessive borrowing occurs.

[45] (1990) 18 IPR 292.