MAKING SENSE OF COPYRIGHT LAW RELATING TO PARODY: A MORAL RIGHTS PERSPECTIVE

MOANA WEIR*

INTRODUCTION

The traditional approach of English speaking countries to the unique problems presented by parody to copyright law has been the same as for other works of art — namely, to determine whether to afford protection or not on the basis of the original copyright owner's economic rights. This paper will argue that this economic approach to an essentially moral dilemma has not only engendered inconsistency and confusion; the approach is also wrong in principle and inimical to both democratic values and artistic creativity.

In this article the term 'parody' is used generically to mean not just parody strictly so called, but also burlesque. The two can be distinguished: 'parody' is defined in the *Oxford English Dictionary* as a composition in prose or verse in which an author's characteristic turns of thought and phrase are imitated and made to appear ridiculous, especially by applying them to ludicrously inappropriate subjects;[1] in contrast, a burlesque is a species of composition which aims at exciting laughter by caricature of the manner or spirit of serious works, or by ludicrous treatment of their subjects — a mockery.[2] Nevertheless both parody and burlesque are derivative and because of their reliance on other works in order to create independent literary, musical or artistic works they pose the same questions for copyright law. Moreover, both use humour as a medium for literary and social criticism. A further reason for treating parody and burlesque together in this article is that Courts do not distinguish between them, but regard them all as 'parody' cases.

The history of parody is long and distinguished. It dates back to ancient Greece where the epics of Homer were sent up by such works as the *Batrachomyomachia* (Battle of the Frogs and Mice), and the styles of Euripides and Sophocles were humorously treated by Aristophanes.[3] Many of history's most eminent writers have been either parodists themselves or the subject of such treatment. For instance, among parodists would be numbered Shakespeare, Pope, Austen, Joyce, Hemingway and Faulkner.[4] The tradition has also produced some of the most enduring novels: Voltaire's *Candide*, Cervantes' *Don Quixote* and Swift's *Gullivers Travels*, to name a few. Thus while detractors have described parody as 'the tribute that mediocrity pays to genius,[5] it is

* BA (Monash), Final year LLB (Hons) student at Monash University.

[1] J C Lahore, *Intellectual Property in Australia Copyright Law Service* (Sydney, Butterworths, 1988) para 4.11.200.

[2] Ibid.

[3] R Bernstein, 'Parody and Fair Use in Copyright Law, (1984) No 31 *ASCAP Copyright Law Symposium* 1, 12.

[4] R Kapelke, 'Piracy or Parody: Never the Twain', (1966) 38 U Colo L Rev 550, 551.

[5] Oscar Wilde, quoted in R Bernstein, op cit, loc cit.

submitted that Aldous Huxley was closer to the truth when he said that 'parodies and caricatures are the most penetrating of criticisms'.[6]

What transforms parodies from merely derivative humorous works into special works having 'social value beyond (their) entertainment function',[7] is the critical comment every 'true' parody makes on the original at the same time as it makes us laugh. The basic premise of this paper is that this critical and comic design endows parody with independent social and literary merit as a manifestation of both free speech and creativity. Parodies, it is argued, deserve a special place in copyright law, which the economic rights approach in copyright law wrongfully denies them.

PARODY — A MORAL DILEMMA

Economic rights in the context of copyright are essentially legal property rights in a work. A copyright owner is given exclusive rights to enable him or her to profit from the commercial exploitation of protected works. In Australia and other English speaking countries both copyright legislation and case law are predicated upon these economic rights and no exception is made for parodies. By contrast Continental European countries, most notably France, are not only concerned with the protection of the copyright owner's economic rights; they also protect moral rights in his or her creation. The moral rights theory regards an author's work as a manifestation of his or her personality, and ascribes an inalienable legal bond between authors and their works. Moral rights exist quite independently of the author's proprietary or economic rights which may be commercialised or exploited through licence, mortgage or assignment.

Apart from prohibiting false attribution of authorship (*Copyright Act* 1968 (Cth) ss 190–195), in Australian copyright law there is no recognition of artists' moral rights, even though as a signatory to the Berne Convention, Australia is bound by Article 6 bis of the *Paris Act* of 1971 to protect, in the present context, the author's right of paternity (ie the right to claim authorship in his work) and the right of integrity (the right 'to object to any distortion, mutilation or other modification of, or other derogatory action . . . which would be prejudicial to his honour or reputation'.)[8]

The author's right of paternity would arguably be infringed by an ostensible 'parody', which far from being an independent work which lampoons the original, adds nothing to the primary work and is simply passed off as the work of the original author. However, protection against this appropriation can be based on the author's rights in his or her name rather than the right of

[6] Id 11–2.
[7] *Metro-Goldwyn-Mayer* v *Showcase Atlanta* 479 F Supp 351, 357, per Evans J.
[8] B Morrow, 'The Moral Rights of Authors', (1983) 2 Cop Rep 2, 2.

authorship;[9] in any event, the secondary work is in this case not a true parody but an outright piracy which should not be protected.[10]

In cases of true parody, however, the rights relevant to the issue of infringement are the author's moral rights of integrity, honour and reputation.

Since parody is aimed at the author's modes of expression and characteristic turns of thought or phrase, it is principally an attack upon the author's personality manifested in his or her creation. It is not an attack on his or her ability (or that of any assignee of the author's economic rights) to profit from, or exploit commercially, the copyright.

Indeed, more often than not, a parody may actually enhance an author's economic rights through increased demand for the original work thus given additional exposure and treatment.

It has been said that to place parody in the context of the author's 'right to respect' is nonsensical since a parody by definition aims to distort the original author's work and to treat it irreverently and comically.[11] But whether such irreverence reaches the author's honour and reputation is a question of degree which a Court can determine on the facts of a particular case. The law can and should ensure that the secondary work does not so distort or 'disrespect' the original as to damage the author's honour and reputation. A moral rights approach, rather than stifling artistic endeavours, would only restrain parodies which harm the honour and reputation of the original author; otherwise parodists would be given free reign to make the best parodies possible — something hitherto denied them by the economic rights approach which does not discriminate between different kinds of parody.

THE ECONOMIC RIGHTS APPROACH

Courts in common law countries have not appreciated the essential character of questions raised by parody as moral questions. They have instead erroneously regarded parody as a wrongful threat to the original author's economic interests.

Because parodies are not a threat to economic rights, the economic rights approach is flawed in principle, productive of confusion, and a constant barrier to legitimate criticism and creativity. The cases discussed below will bear this out and point clearly to the need to substitute a moral rights perspective for the current economic rights approach to parody in copyright law.

Reduced Demand for the Original

Under the economic rights approach, one of the tests for determining whether a parody infringes the original work is whether the parody as a secondary work can be said to have reduced the demand for the original. *Hill* v *Whalen and*

[9] A Francon, 'The Copyright Aspects of Parodies and Similar Works', (1988) 24 Copy 283, 286.
[10] Ibid.
[11] Ibid.

Martell[12] was the first US case where parody was put forward as a defence to infringement of copyright. The plaintiff was an exclusive licensee of dramatic rights in the copyrighted cartoons *Mutt and Jeff*. The defendants put on a show called *In Cartoonland* which featured two characters called *Nutt and Giff* which they admitted were intended and understood to look like Mutt and Jeff. Indeed in their show the defendants used direct quotes from dialogue in the original work. The defendants' defence to the plaintiff's action for copyright infringement was principally that their work was a parody or burlesque of the original.

District Judge Rose found in favour of the plaintiff; however, he said that the test applicable to parody claims was 'whether or not so much has been reproduced as will materially reduce the demand for the original'.[13] He had no difficulty finding that the defendants had failed that test here. Those who saw the defendants' show would have less desire to see Mutt and Jeff — indeed, he noted, they would probably think they had already seen them.

Nevertheless, Judge Rose added that in order to ground infringement such reduction in demand must result from the partial satisfaction of that demand by the secondary work.[14] A criticism which reduced the original's market by showing that it was not worth seeing or hearing thus could not give rise to a right of action.[15]

Courts in England and America have noted that reduced demand resulting from the parody's successful criticism is not to be factored into the economic calculus enunciated above. This would seem to be some recognition of the social value of parody's critical function; but it does not go further to recognize the essentially ethical nature of the problems posed uniquely by parody to copyright law. The Courts instead say, as did the Ninth Circuit in the latest US case, *Fisher* v *Dees*,[16] that the test is not whether demand for the original has been reduced but whether it has been replaced by the secondary work. After noting that a parody's critical impact should be ignored because copyright law' is not designed to stifle critics',[17] the Court in *Fisher* v *Dees* went on to say that it must regard instead whether the parody fulfils the demand for the original: 'Biting criticism suppresses demand; copyright infringement usurps it'.[18]

It is this economic factor of usurpation which Courts, particularly in America, have consistently regarded as the most important test in determining whether parodies infringe copyright in the original.

In an early United Kingdom decision, *Glyn* v *Weston Feature Film Co*,[19] Younger J noted that no case could be cited to the Court where a burlesque had been found to infringe copyright. He suggested that this resulted from the insistence of older English cases upon the necessity of showing that the alleged

[12] 220 F 359.
[13] Id 360 (emphasis added).
[14] Ibid (emphasis added).
[15] Ibid.
[16] 794 F 2d 432.
[17] Id 437
[18] Id 438.
[19] [1916] 1 Ch 261.

infringement was calculated to reduce the profits or supersede the objects of the original work. In that case the plaintiff's claim that the defendant's film *Pimple's Three Weeks (Without the Option)* infringed her novel *Three Weeks* failed. Younger J held that the alleged infringement only remotely resembled the plaintiff's work (that is, showed insubstantial similarity), and that, in any event, both the original novel and the film were immoral and indecent works which the Court would refuse protection in the public interest.

In the United States, parody cases usually raise the fair use defence. American Courts have most recently indicated that 'the effect of the use upon the potential market for or value of the copyright work'[20] is to be construed as occurring where demand for the original is replaced by the parody.[21] Usurpation is also the most decisive factor for determining whether the secondary work, despite prima facie infringement, is nevertheless to be allowed as fair use.

It is submitted that in whatever form, this test of whether the parody usurps or damages the market of the original is really misconceived. As Younger J noted in *Glyn* at the beginning of this century, the reason why burlesque had never been found to be an infringement was that, far from reducing or replacing demand for the original, the secondary work will often increase demand for the primary work by its additional treatment and exposure. So he perceptively noted: 'It is well known that a burlesque is usually the best possible advertisement of the original and has often made famous a work which would otherwise have remained in obscurity'.[22]

The market usurpation test in both its present or prospective mode has another surprising result: not only would it deny the legitimate interests of true parodists on the ostensible ground of protecting authors of original works; it would also deny the original author's legitimate moral claims to integrity, honour and reputation where these are imperilled by reckless parodies that can be shown to enhance the market value of the original.

In any event, a parody will rarely compete in the same market as the original work. Parodies and burlesques usually use serious works to make their humorous criticism more effective and more biting. But since they perform a comical and critical design — of lampooning or sending up the original — they will necessarily distance themselves from the primary works and thus appeal to a different audience (although there may, of course, be those who enjoy both the original and the parody). Only exceptionally will a parody satisfy the same market as the original — unless it is a parody of a parody, in true postmodernist style!

In *Fisher* v *Dees* the plaintiffs alleged copyright infringement of their original work *When Sunny Gets Blue* (a love ballad of the 50's) by a send up entitled *When Sunny Sniffs Glue*. After adopting factor (4) of the 1976 Copyright Amendment indicia for fair use, the Court found no infringement on the

[20] No (4) in the four codified indicia introduced by the 1976 Amendment to the US *Copyright Act* 17 USC 107, cited in *Fisher* v *Dees*, 794 F 2d 432, 437.

[21] *Fisher* v *Dees*, ibid, 438 (see earlier — ie parody's critical impact *not* to be factored into the economic calculus).

[22] *Glyn* v *Weston Feature Film*, [1916] 1 Ch 261, 268.

facts since demand for the original was not usurped by the send up; the Court found that persons wanting to hear a romantic ballad were not likely to be satisfied with the parody about a woman sniffing glue, and vice versa.[23] As this must be true of almost all true parodies, market unsurpation — a subtest of the economic rights approach — is ridiculous. It presupposes, erroneously, that parodies compete in the same market as the original.

The related 'functional test' proposed by Professor Nimmer and applied by Justice Evans in *Metro-Goldwyn-Mayer* v *Showcase Atlanta*[24] to determine effects on the potential, rather than present, market of the original simply compounds the error. In *Metro-Goldwyn-Mayer* the defendants were owners and creators of a musical production called *Scarlett Fever* based on the plaintiff's copyrighted novel (by Margaret Mitchell) *Gone with the Wind*. The defendants argued in relation to factor (4) here that their musical did not infringe and harm the plaintiff's potential market since no stage production was planned for the immediate future. The Court rejected this argument and found infringement. It applied Nimmer's 'functional test' as formulated for fair use cases and said that since the function of both the original novel and film was to entertain and since this was also the function of *Scarlett Fever*, the plaintiff's potential market was (implicitly) adversely affected.[25]

This approach is dangerously broad. In *Metro-Goldwyn-Mayer* the musical production was found to be not a true parody because, despite its comedic elements, it both lacked any critical comment on the original, and borrowed too substantially from it. However if the secondary work had been a true parody it is difficult to see how it could have escaped the factor (4) test so widely applied. Indeed, it is conceivable that such a functional interpretation of the potential markets test — depending on the characterization given at the discretion of individual judges — would mean that only in very exceptional cases would a parody not infringe the original by being said to operate in a different market.

Not only is such a principle unsound, it would logically deny the legitimate claims of original authors whose honour or reputation has been damaged by the secondary work but whose temporary profits have been enhanced.

Commercial Purposes

The Courts' excessive concern with the copyright owner's economic interests has also produced another weapon against parodies in the principle that a parody infringes the original if it can be shown to have been produced for commercial purposes. Confusion and inconsistency have arisen from the Courts' inadvertence to the importance of the primary purpose to which the secondary work is aimed, and from their focus not on whether any critical and socially valuable function has been performed (the test of 'true' parody) but rather on whether the 'parody' was of a commercial or non profit nature. The 'commercial nature' test has resulted in bad decisions because, like the market

[23] *Fisher* v *Dees*, 794 F 2d 432, 438.
[24] 479 F Supp 351.
[25] Id 359.

usurpation test, it starts from a wrong premise: that parodies have no economic worth, so that to be protected a parody must have only artistic and not economic value. Yet if they perform their critical or humorous design effectively, secondary works will, of course, attract commercial value because of, and in addition to, their artistic worth.

The clumsiness of the commercial nature test can be gleaned in Justice Carter's decisions in two District Court of Southern California cases: *Loew's* v *Columbia Broadcasting System Inc.*[26] and *Columbia Pictures Corp.* v *National Broadcasting Co.*[27]

Both cases involved television skits of well known films. In *Loew's*, the plaintiff was the copyright owner of the movie *Gaslight*, and was seeking injunctive relief against a television parody of the film by Television comedian Jack Benny, called *Autolight*. Judge Carter found that a parody was to be treated 'no differently from any other appropriation'.[28] He thus denied the genre any independent social value, and went on to say that infringement would be found where the secondary work has been issued, as in this case, solely for commercial gain and not the advancement of learning.

In *Loew's* the Court's attention was directed not at whether the parody made a critical point so as to endow it with independent social value worthy of protection, but rather whether it had any commercial value. Judge Carter held that there was infringement by characterizing Benny's skit as non educational and done purely for commercial gain. Yet in almost every case of course a parody will have some commercial value.

In the *Columbia Pictures* case, Judge Carter, as a result of much criticism, retreated somewhat from his position in *Loew's*, but only to the extent that he acknowledged parody to be a special category of fair use cases, allowing for sufficient use of the original work by the parodist to 'recall' or 'conjure' it up.[29] *Columbia Pictures* was an action against Sid Caesar's Television skit *From Here to Eternity*. Judge Carter was able to find no infringement here, unlike in *Loew's*, on the ground of insubstantiality. But on the 'commercial nature' test he was conspicuously silent, besides noting that the case before him was, like *Loew's*, another collision between 'the economic interests of the motion picture industry and TV industry'.[30] An examination of the two cases reveals however that the decisions were not consistent. It is submitted that a consideration of the purpose of the secondary work is, indeed, legitimate and appropriate in parody cases. However it should only go to the issue of whether the secondary work is indeed a 'true' parody — that is, whether it makes a critical (and thus socially valuable) statement. It it does, whether it has economic value or not, the wider purpose it serves in promoting creative

[26] 131 F Supp 165, affirmed by the Ninth Circuit in *Benny* v *Loew's Inc*, 239 F 2d 532, and ultimately affirmed *per curiam* by an equally divided Supreme Court in *Columbia Broadcasting System Inc.* v *Loew's*, 356 US 43. (Mr Justice Douglas disqualified himself, for no explained reason.)

[27] 137 F Supp 348.

[28] *Loew's* v *Columbia Broadcasting System Inc*, 131 F Supp 165, 183.

[29] *Columbia Pictures Corp* v *National Broadcasting Co*, 137 F Supp 348, 354.

[30] Id 349.

endeavour and protecting democratic values should be presumed to outweigh the copyright owner's proprietary concerns.

On the other hand, where the secondary work performs no critical function but is used, for instance, to promote a product or solely for commercial gain, it deserves no special treatment and infringement should be determined on the usual principles' of copyright law such as reproduction and substantiality. Such instances fall outside true parody cases and squarely within the category which may rightly be characterised as essentially economic.

An illustration can be found in *Hogan* v *Pacific Dunlop*[31], a character merchandising case where the appellant owners of copyright in the film *Crocodile Dundee* sought to restrain an advertisement for products using the New York 'knife scene' from the film. Gummow J noted that 'rather too much'[32] was made by the respondents of their argument that their advertisment was a parody of the original worth protecting. His Honour held that the use of the popular images here was purely to promote the sale of shoes, however much employees of the respondents 'believed they were embarked upon a pursuit of the visual and dramatic arts'.[33]

Unjustified claim of parody by secondary users was even more clearly the case in the most recent Australian decision of *AGL Sydney* v *Shortland County Council*.[34] In that case the appellants were the makers of an advertisement promoting the benefits of gas over electricity. They brought an action to stop use of the respondent's advertisment for electricity, which had been deliberately shot as a response to the appellants' advertisement. The respondent's advertisement drew on the same setting, style of dialogue and type of characters as the appellants' advertisement, and even used one of the actors who had appeared in the original.

Although Foster J decided that there was no true parody before him but merely a 'reply' to the primary work, this was due to the lack of a comic rather than a critical element.[35] His Honour's view was that parody was unexceptional in cases of copyright infringement, and had no claim to special protection;[36] but in the event His Honour implicitly treated parody as exceptional — for he applied the American 'evoke' or 'conjure up' substantiality test. On this test he found the appellants' copyright to have been infringed.[37] However, the 'evoke' or 'conjure up' test was formulated by Judge Carter in *Columbia Pictures* as a retreat from *Loew's*, and in recognition that parodists have some special licence with respect to borrowing from original works.[38]

Nevertheless Fosters J's statement that parody warrants no special treatment may prove inimical to 'legitimate' parody claims. It is to be hoped that it will not find favour with subsequent Australian Courts.

After all in *AGL Sydney* — as in *Hogan* — the secondary work contained no

[31] (1988) AIPC 90-530.
[32] Id 38,570.
[33] Ibid.
[34] (1990) AIPC 90-661.
[35] Id 36,198.
[36] Ibid.
[37] Ibid.
[38] *Columbia Pictures Corp* v *National Broadcasting Co.* 137 F Supp 348, 354.

critical content but was designed purely to promote the product to the public. It was therefore not a true parody and was rightly found to be infringing. However, it is submitted that instead of looking immediately to commercial consequences the Court should in each case look first to whether any critical function has been served in order to determine whether or not there has been any infringement.

THE MORAL RIGHTS APPROACH

From the above discussion of the market usurpation and commercial value tests it is clear that the economic approach to parody is flawed in principle and inimical to democratic values. It is submitted that its application was misconceived in the *Loew's*, *Columbia Pictures* and *AGL Sydney* cases, and it has further misled Courts into believing that the essential conflict in parody cases is economic, rather than ethical.

A moral rights approach explicitly appreciates the value of parody to democracy and artistic progress by weighting the balance in favour of the secondary users. It casts the onus on the original author to prove infringement only where he or she can show that the secondary work so distorts the original creation as to harm his honour or reputation. This would afford greater protection to the parodist since the Courts have tended to find economic harm on apparently slight evidence — as indicated by the very broad Nimmer test used in *Metro-Goldwyn-Mayer* — and since every parody will have some degree of commercial value. On the other hand prejudice to the author's 'right to integrity' would require closer analysis of the type and extent of the alleged harm to the original.

A moral rights approach to parody would still, however, be predicated upon originality and public policy but not substantiality. Let me elaborate.

Substantiality

Substantiality has been relied on heavily in deciding parody cases: the Courts have found infringement where the secondary work has drawn too significantly upon the original. It is submitted that, apart from ensuring that the secondary work is a true parody and, as such, an independent and sufficiently original work (see originality later), this consideration is wholly inappropriate for derivative works which by definition must borrow closely from the original. As one literary critic put it 'The truest parodies are those that tamper least with the material they are spoofing. Just enough to blow them sky high. That's all.'[39]

Unfortunately the substantiality test still persists in both the United Kingdom and United States. In England Justice McNair in *Joy Music* v *Sunday Pictorial Newspapers*[40] held that the defendant publishers who had printed a

[39] R. Kapelke, op cit, 565, citing Poore, 'Ardent Plea for the Art of Parody', *New York Times*, March 9 1958, 33.

[40] 1960 1 All ER 703.

parody of the lyrics of the plaintiff's song *Rock-a-Billy*, called *Rock a Philip Rock! Rock!*, did not infringe because they did not borrow too substantially from the original. The defendant's parody was a humorous defence of the sporting activities of Prince Philip for which he had been criticised in the British Press.

In America the substantiality element has arisen within the context of the fair use defence. Thus the Courts have engaged in artificial and arbitrary attempts to distinguish the test from that of threshold infringement (since if the test was the same for both then fair use as a defence would be useless).[41] Indeed in the 1976 Amendment the (3) nonexclusive factor to be considered in relation to fair use was stated to be 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole'.[42]

Judge Carter in *Columbia Pictures* held that in that case, unlike *Loew's*, there was no infringement because Caesar's television skit did no more than was necessary to 'recall or conjure up the subject matter being burlesqued'.[43]

Subsequent cases used Judge Carter's judgments to define substantiality in the parody fair use context. In *Air Pirates*[44] the Ninth Circuit, citing *Benny* v *Loew's*, held that while verbatim copying would not be fair use, the parodist was permitted to borrow only what was necessary to 'recall or conjure' up the original, citing *Columbia Pictures.*[45] In the *Air Pirates* case the plaintiff Walt Disney sued the defendants for using his cartoon characters in the defendants' adult counter culture comic books in which Disney's characters such as Mickey Mouse and Donald Duck were involved in illicit sexual and drug taking activities.

Applying the substantiality requirement on these facts the Ninth Circuit held that the defendants had done more than recall or conjure up the original because although they borrowed only the physical representations of the characters, public recognition was so widespread that this was all that was necessary to place the image of the Disney characters in the minds of readers.[46] The Court rejected the defendants' claims that they were permitted to borrow from the original as much as necessary to make 'the best parody possible',[47] saying that only what was necessary to conjure up the original would not infringe the rights of the original owner.

The effect of *Air Pirates*, with its formulation of substantiality heavily in favour of the interest of the copyright owner as against parodists, has been lessened somewhat by the later decisions of *Elsmere Music*[48] and *Fisher* v *Dees*. In *Elsmere Music* the Second Circuit affirmed the decision of the District Court that there was no infringement in the *Saturday Night Live* television skit which sent up New York's public relations campaign and theme

41 See *Walt Disney* v *Air Pirates*, 581 F 2d 751, 756.
42 17 USC 107: Cited in *Fisher* v *Dees*, 794 F 2d 432, 435.
43 *Columbia Pictures Corp* v *National Broadcasting Co* 137 F Supp 348, 354.
44 *Walt Disney* v *Air Pirates* 581 F 2d 751.
45 Id 757.
46 Id 758.
47 Ibid.
48 *Elsmere Music* v *National Broadcasting*, 623 F 2d 252.

song *I love New York* with a skit which ended with a parodied version *I love Sodom*. It added in a note that the 'conjure up' test was not to be construed as a limitation on how much of the original could be used but that a parody could 'at least' conjure up the original.[49] The Court added that it recognised that 'parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point'.[50]

The *Elsmere* view was endorsed by the Ninth Circuit in *Fisher* v *Dees*. The Court disagreed with the 'recall or conjure up' test as applied in *Air Pirates* and reverted to the *Elsmere* wider view.[51] But while the Court said that substantiality would not necessarily preclude fair use, almost verbatim copying would not be protected.

It is submitted that in using the substantiality test in whatever guise the courts have sought to impose arbitrary limitations on parodists. In contrast a moral rights approach would allow parodists free reign to blow the original 'sky high' — as long as they did not prejudice the author's honour or reputation.

Thus in *Air Pirates* the defendants' borrowing although not extensive may be seen as rightly infringing — not because of the strained interpretation of the substantiality test there applied, but because in that case the salacious context in which Disney's characters were used impinged upon the plaintiff's honour and reputation for wholesome and 'innocent delightfulness'.[52]

Originality and Public Policy

The other significant factors for deciding parody cases — originality and public policy — are both sound in principle and as relevant to the economic rights approach as to the moral rights conception of parody.

Originality features prominently in English and Australian decisions where it goes toward threshold infringement.

Thus in *Glyn*[53] and *Joy Music*[54] both Younger J and McNair J considered that threshold infringement would not lie where the defendant has bestowed such mental labour that the scondary work is an original result. Further, an unreported case of the NSW Supreme Court[55] found for the plaintiff by applying the dicta of Younger J in *Glyn* to the effect that where the defendant 'bestowed such mental labour . . . as to produce an original'[56] the secondary work would not infringe. In *United Feature Syndicate* v *Star Newspapers* the plaintiffs, copyright owners of *Peanuts*, brought an action against the defendant publisher for publishing a comic strip in its magazine featuring *Peanuts* characters under the name of *Charlie Brum*. But, as in *Air Pirates*, the defend-

[49] Id 253.
[50] Ibid.
[51] *Fisher* v *Dees*, 794 F 2d 432, 439.
[52] 581 F 2d 751, 753.
[53] [1916] 1 Ch 261.
[54] [1960] 1 All ER 703.
[55] J C Lahore, op cit para 4.11.230.
[56] Ibid.

ants contributed no originality; they merely borrowed the plaintiff's characters and put them in a salacious context. The Court found infringement.

As a sound test for determining whether a secondary work is a true parody (in the sense of a critical and mocking independent literary creation) rather than a mere copy, originality would also apply to the moral rights approach. A mere piracy is one of the clearest examples of wrongful prejudice to the original author's honour or reputation. Where the parodist applies insufficient labour and originality the integrity of the original work will be compromised. Where in addition the so-called parodist has made no critical comment but produced the secondary work for 'purely' commercial purposes then infringement of the copyright owner's economic interests will rightly lie.

Finally, in *Glyn*, *Air Pirates* and *United Feature*, the Courts were concerned to find infringement in the interests of public policy, and refused to extend protection to secondary works which were offensive and indecent. Such considerations would also offend the moral rights of original authors, since indecent uses of the original works would surely be held to offend their essential integrity, and to harm the author's honour and reputation (unless as in *Glyn* the original work itself was offensive and immoral and outside the Court's protection).

Who Can Sue and When?

Two additional considerations are particularly relevant to the moral rights approach to parody, namely who can sue and when. Only original authors should be able to bring claims for infringement against parodists since moral rights attach only to the author and are, unlike economic rights, inalienable. This flows from the premise that parody, when it performs a critical and humorous function, is an independent, socially valuable literary form, essential to the democratic ideal. Thus the economic claims of copyright owners should be subordinate to those of the true parodist except in the exceptional circumstances already mentioned (for instance, where the parody is to promote products, or is purely for commercial gain and makes no critical comment).

Protection will be granted to an original author against whom a parody is specifically aimed as a mockery of the author's style and mannerisms only when the parody compromises the author's honour and reputation. In this way original authors are afforded only that protection to which they are rightfully entitled and parodists are given free reign to irreverently poke fun at the artistic endeavours of others.

Copyright owners — that is, owners of proprietary rights in works — would not be left entirely unprotected because so-called 'parodies' which perform no critical function would not be treated as 'true' parodies, and ordinary infringement principles would apply. Copyright owners also protect their economic rights through the action for passing off or s 52 of the *Trade Practices Act* 1974 (Cth) (as in *Hogan* v *Pacific Dunlop*).[57]

[57] (1988) AIPC 90-530.

Finally, moral rights in France are perpetual. In the United Kingdom and Canada[58] however, moral rights have only been afforded the same duration as economic rights.[59] Australia would probably follow the United Kingdom/Canada approach. However even if the European model was adopted, allowing actions to be brought after the original author's death by his personal representatives in perpetuity, this would cause no harm. The need for original works to retain their essential integrity is timeless. Nor would the European model stifle secondary users since the moral rights approach advocated here encourages and protects creative freedom.

CONCLUSION

The economic rights approach to copyright law in Australia and other English speaking countries is wholly inappropriate to the protection of parody. It wrongly perceives parody as an attack on the copyright owner's economic interests whereas what this genre potentially undermines if anything, is the original author's moral right to the integrity of his work, and to honour and reputation.

By contrast the moral rights approach is uniquely suited to parody because the peculiar problems posed to copyright law by parodies and burlesques are fundamentally ethical and not economic. There is inevitable tension between a law which professes to further humankind's creative endeavours by protecting the extent to which works may be copied, and the need to encourage derivative literary forms whose intrinsic value lies in their unique critical and humorous purpose but which rely on other works for inspiration. The dilemma is not an economic one; it is a moral one which necessitates adjudication between conflicting public interests — the freedom of expression, creativity and humour represented by parodies and burlesques on the one hand, as opposed to the protection of the personality or integrity of authors' original works.

Mark Twain once wrote that 'Only one thing is impossible to God, to find any sense in any copyright law on this planet'.[60] If 'any sense' is to be made of the copyright law relating to parody, it will be through the belated adoption of Australia's Berne Convention obligations relating to moral rights;[61] and to see the protection of the original work's integrity and its author's honour and reputation as the only legitimate trammelling of the creation of the best (true) parodies.

[58] See Vaver D, 'Authors' Moral Rights — Reform Proposals in Canada: Charter or Barter of Rights for Creators? (1987) 25 Osgoode Hall LJ 749.

[59] P Banki, S Bridge, C Hughes, 'Moral Rights', Australian Copyright Council Bulletin No 50, (1984), 10.

[60] M Twain, Notebook 381, (1935 ed), quoted in R Kapelke, op cit 550.

[61] This view is against the majority view in the Australian Law Review Committee's *Report on Moral Rights* 1988; but see Vaver D, 'Authors' Moral Rights and Copyright Law Review Committee's Report: W(h)ither Such Rights Now?' (1988) 14 Mon LR 284.