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Does the Parasitic Nature of Parody Justify Special Protection Under New Zealand's Copyright Regime?

Aläina Nash*

Parody has been subject to a variety of different definitions throughout its lengthy history. The social context in which parody is used, and the medium of its expression both determine and contribute to the uncertainty regarding its definition.¹ In contemporary usage the term designates a form of literary or artistic satire distinguishable from other kinds of satire by its imitative mode and its internal dependence on the devices and conventions of its satiric target.² Parody is an effective means through which we are able to critically assess societal values. However, its imitative mode often exposes the parodist to liability under a range of different intellectual property regimes. This paper focuses specifically on the inherent conflict between parody and copyright law.

Section 14 of the Copyright Act 1994 (NZ) defines copyright as a property right that exists in original works. The Act further provides that this right is infringed if one copies either the whole or a substantial part of a protected work.³

The leading test for establishing infringement by copying in New Zealand was set out in *Wham-O MFG Co v Lincoln Industries*.⁴ To satisfy the test the plaintiff must establish that:

- i) The reproduction is either of the entire work or of a substantial part;
- ii) There is sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof;
- iii) A causal connection exists between the copyright work and the infringing work.⁵

In determining whether a substantial part of the prior work has been reproduced the Courts focus on the quality, rather than the quantity, of the reproduction. Even if the part reproduced by the defendant is quantitatively small, it may still amount to infringement if the part is qualitatively important to the work as a whole.⁶

Copyright may also be infringed where there has been excessive or unfair use of

* This essay is a revised version of a research paper written for Laws 444, Intellectual Property, Faculty of Law, University of Otago, 2006. The author is a recently admitted barrister and solicitor and graduate of the Faculty of Law, University of Otago. She has a strong interest in intellectual property and criminal law and is currently living in Ireland.

¹ Simon Dentith, *Parody, the New Critical Idiom* (Routledge, 2000) 193.

² Pavel Petr, David Roberts and Philip Thompson, *Comic Relations: Studies in the Comic, Satire and Parody* (Verlag Peter Lang GmbH, 1985) 195.

³ Copyright Act 1994, s 29(2)(a).

⁴ *Wham-O MFG Co v Lincoln Industries* [1984] 1 NZLR 641 (CA).

⁵ *Ibid*, 666.

⁶ *Bleiman v News Media (Auckland) Ltd* [1994] 2 NZLR 673, 678 (CA).

the work.⁷ In New Zealand, the courts tend to ask whether or not the defendant has appropriated the skill, judgement, effort and labour of the plaintiff in the making of what appears to be a reproduction of a substantial part.⁸ Usually this requires an analysis of the similarities between the works rather than the differences.⁹ However, the recent decision of the Supreme Court of New Zealand in *Henkel KGaA v Holdfast New Zealand Ltd*¹⁰ makes it clear that this proposition cannot be taken to its extremes. In that case the Court had to decide whether or not Holdfast New Zealand Ltd had infringed copyright in Henkel KGaA's packaging design. Tipping J, delivering the judgment of the Court, rejected Henkel KGaA's argument that the Court should ignore the distinguishing features of Holdfast's design, stating that Henkel was asking the Court to "take the proposition that the Court concentrates on the similarities rather than the differences too far".¹¹

In order to be effective, parody relies upon a close association with its satiric target. Often this will result in an objective and substantial similarity to the copyright work. Consequently, a parody could feasibly constitute a "copy" for the purposes of the Copyright Act 1994.

Unlike various European jurisdictions¹², New Zealand has not specifically recognised parody as a defence to copyright infringement. The aim of this paper is to determine whether or not parody requires special protection under our copyright regime, and if so, to what extent and in what form.

The body of this paper is divided into five parts. Part one summarises the arguments in favour of affording parody special protection from the limits imposed by intellectual property law. Part two outlines the criticism and reviews the fair dealing defence provided for in the 1994 Act and questions the ability of the parodist to come within this exception. Part three examines the diverse approaches taken by the United Kingdom and the United States of America to reconcile parody and copyright in terms of fair dealing. Part four contains recommendations as to which fair dealing approach New Zealand should adopt, if any. And finally, part five draws on the experience of the English Courts, and considers the extent to which the common law "public interest" defence may justify the publication of an infringing parodic work.

⁷ Susy Frankel and Geoff McLay *Intellectual Property in New Zealand* (LexisNexis Butterworths, 2002) 214.

⁸ *Supra* n 6, 679.

⁹ *Idem*. However, cf *Beckmann v Mayceys Confectionary Ltd* (1995) 33 IPR 543. In *Beckmann* the Court emphasised the differences between alleged infringing works and the copyright works. This may have been due to the nature of the works in question, both being industrial designs and representations of the same common object – a crocodile.

¹⁰ *Henkel KGaA v Holdfast New Zealand Ltd* [2007] 1 NZLR 577.

¹¹ *Ibid*, 594.

¹² Copyright Code (Consolidation), 01/07/1992, No 92-597, Art L122-5 (France), Real decreto legislativo, 12 Abril 1996, Num 1/1/1996, Propriedad Intelectual, Art 39 (Spain).

I. Does Parody Require Special Protection Under Our Intellectual Property Regime?

a. *Parody as a Distinctive Genre*

Many academics argue that parody requires special treatment because it can be characterised as a distinctive genre deserving of recognition and protection.¹³ This is the apparent justification for copyright laws in Spain which specifically exempt parody from copyright infringement as an adaptation.¹⁴

Parliament already recognises that certain genres are worthy of protection under our regime. Sections 42(1), (2) and (3) of the Copyright Act 1994 provide that fair dealing with a work for the purposes of criticism, review or news reporting will not infringe copyright. The allowance for works intended to criticise¹⁵ arguably gives some form of protection to parodic works, but unlike the Spanish provision, the Copyright Act does not afford parody protection as a specific genre per se.

It is my submission that the argument for affording parody protection due to its status as a distinctive genre is unpersuasive for a number of reasons. First, the argument assumes that genre status alone automatically entitles all qualifying forms of expression to shelter under an umbrella of indiscriminating protection. The shortcomings of the distinctive genre argument are immediately revealed when applied to other forms of expression. Defamatory statements, for example, while capable of attracting genre status, are also injurious to the subject's reputation and detrimental to the public good. Such statements are not, and should not, be permitted under our regime despite their ability to attract genre status.

Even if we accept that parody is entitled to protection as a distinctive genre, it is possible that the application of an express statutory definition would prove problematic. Unlike news reporting, the parody genre is incapable of precise definition. The Spanish legislature circumvented this problem by omitting a definition altogether. However, some assert that this overt ambiguity has resulted in a substantial increase in Spanish parody-related litigation.¹⁶

Finally, this argument also fails to consider why the parody genre should be entitled to protection over and above other uses that the original creator has legitimate control over.

b. *Parody as a Problem of Market Failure*

Other commentators categorise the problem of parody as one of "market failure". Theorists in this tradition assert that voluntary exchanges between individuals

¹³ Gredley and Maniatis "Parody: a Fatal Attraction? Part 2: Trade Mark Parodies" 8 [1997] EIPR 412, at p 420.

¹⁴ Real decreto legislativo, 12 Abril 1996, Num 1/1/1996, Propriedad Intelectual, Art 39, and Michael Spence "Intellectual Property and the Problem of Parody" (1998) 114 LQR 594, at p 611.

¹⁵ Copyright Act 1994, s 42(1).

¹⁶ Michael Spence, "Intellectual Property and the Problem of Parody" (1998) 114 LQR 594, at p 613.

the right to freedom of expression. Section 6 requires that wherever possible, other enactments be interpreted in a manner consistent with the Bill of Rights. However, this requirement is not absolute. Section 4 stipulates that the Courts must not decline to give effect to any law merely because it appears inconsistent with the provisions of the Act. Further, s 5 states that the rights enunciated in the Act may be limited as long as such limits are lawful and reasonable having regard to whether they can be demonstrably justified in a free and democratic society. Thus, while s 14 appears to protect parody as a form of free speech, ss 4 and 5 prevent such protection from being absolute.

There are no parody cases in New Zealand involving the consideration of arguments based on the Bill of Rights. However, the following cases, in other areas of law, indicate that society accords much significance to the right in s 14. Nonetheless, it is also clear that the Courts will only give effect to the right to freedom of expression if they consider that it supersedes any competing rights or concerns.

For example, in *Moonen v Film and Literature Board of Review*³⁴, (*Moonen 1*), the appellant possessed material classified as "objectionable" by the Film and Literature Review Board under s 3 of the Films, Videos, and Publications Act 1993. Mr Moonen appealed to the High Court and then to the Court of Appeal on the ground that the Board had failed to consider his right to freedom of expression pursuant to the Bill of Rights Act. The Court of Appeal held that the Board had not adequately considered the Bill of Rights when determining whether Moonen's publication "promotes or supports, or tends to promote or support the exploitation of children or young persons, or both, for sexual purposes".³⁵ It was also held that a meaning was to be placed on "promotes and supports" that encroached as little as possible on freedom of speech. The Board was ordered to reconsider the classification, and once again classified nearly all of the material as objectionable. Moonen appealed and the Court of Appeal in *Moonen 2*³⁶ upheld the decision of the Board while approving of the approach taken in *Moonen 1*. It is arguable that the final outcome in *Moonen* implies that an interpretation consistent with the Bill of Rights is one involving the least possible *reasonable* limitation on a right or freedom, rather than the least possible limitation.

Section 14 of the Bill of Rights was also considered in *Hopkinson v Police*.³⁷ This case involved a prosecution under the Flags, Emblems and Names Protection Act 1981. Hopkinson was protesting against Australian support of United States military action in Iraq. As part of his protest, Hopkinson doused a New Zealand flag in kerosene and set fire to it. No member of the public was harmed. France J held that that on its ordinary and natural meaning, s 11(1)(b) of the governing Act was an unjustifiable limit on the freedom of expression.³⁸ Thus, Her Honour concluded that the word "dishonour" was to be read narrowly so as to require "vilification" of the flag.³⁹ The Court held that the defendant's conduct did not

³⁴ *Moonen v Film and Literature Review Board* [2000] 2 NZLR 9 (CA).

³⁵ The Films, Videos, and Publications Classification Act 1993, s 3(2)(a).

³⁶ *Moonen v Film and Literature Review Board* [2002] 2 NZLR 754 (CA).

³⁷ *Hopkinson v Police* [2004] 3 NZLR 704.

³⁸ *Ibid*, 717.

³⁹ *Idem*.

amount to vilifying the flag and allowed his appeal.⁴⁰

The cases outlined above reveal the importance that society places on the right to freedom of expression and further, the extent to which the judiciary will go in order to give effect to this right. The argument stemming from the right to free speech is therefore the most substantive and workable justification for affording parody special protection. It recognises that justified limits preclude the right from being absolute and also that the weight accorded to free expression varies depending on the strength of competing rights.

II. Fair Dealing

New Zealand's ability to provide exceptions to copyright is governed by both the Berne Convention, and the 1994 TRIPS Agreement.⁴¹ Section 42(1) of the Copyright Act 1994 provides that fair dealing with a work for the purposes of criticism or review does not infringe copyright in the work provided that it is accompanied by a sufficient acknowledgement. Fair dealing is not defined in relation to s 42(1). It is arguable therefore, that parody constitutes fair dealing for the purposes of criticism or review and is thus afforded sufficient protection under our current copyright regime.

However, the doctrine of fair dealing does not transpose easily to the parody setting for a number of reasons. One instance where parodies might fall short of the protection offered by our fair dealing provisions is where part of the motivation behind such parodies is commercial success as opposed to merely providing a critique of an original work.⁴² For example it is unlikely that a company that parodies a rival's advertising would be able to take advantage of the defence.

Further, while it may be possible in a book review to limit the use of quotations,⁴³ the strength of a parody usually involves the appropriation of a substantial part of the parodied work.

And lastly, it is arguable that in order for a parody to be effective the parodist needs to employ subtle mechanisms to invoke or conjure up the image of an original work. The "sufficient acknowledgement" requirement necessitated by s 42 quickly destroys any opportunity the audience may have had to make the connection for themselves and therefore detracts from the comedic element and overall effectiveness of the parodic message.

⁴⁰ See more recently *Brooker v Police* [2007] 3 NZLR 91. The catalyst behind the original dispute was a protest by Brooker in front of the home of an off-duty policewoman. At issue on appeal was the meaning of "disorderly behaviour" under s 4(1) of the Summary Offences Act 1981. The majority of the Supreme Court at [24] held that the right to freedom of expression guaranteed by s 14 of the New Zealand Bill of Rights Act 1990 superseded privacy concerns in situations where there was clearly no harassment or annoyance to the public.

⁴¹ Agreement on Trade-Related Aspects of Intellectual Property Rights (1994).

⁴² Susy Frankel and Geoff McLay *Intellectual Property in New Zealand* (LexisNexis Butterworths, 2002) 214, 281.

⁴³ *Idem*.

on the grounds that it confined itself to the first element of the analysis and inflated its significance. The Court rejected the argument that the commercial release of the parody precluded the defendants from having recourse to the fair use defence. Since Congress had not specifically prohibited commercial use, such a use alone could not constitute unfair use.⁵⁵

The Supreme Court placed little emphasis on the second factor. It was clear on the facts that Orbison's original creative expression for public dissemination fell within the core of copyright's protective purposes.⁵⁶

The third factor concerns the substantiality of the amount taken from the prior work viewed in its entirety. Souter J declared that copying should not be regarded as "excessive" merely because the parodist reproduced the heart of the original work.⁵⁷ The Court placed substantial weight on the fact that for the most part, 2Live Crew had departed considerably from the original lyrics.

Addressing the final factor, Souter J discussed whether the market for the original, or any potentially derivative work, would be harmed by the actions of the infringer. The extent to which a work transforms the original by criticism or commentary is crucial to this analysis.⁵⁸ The Court held that the defendants' song was unlikely to damage the market for the prior work. This was probably due to the fact that the two works were completely different genres, sought to achieve different ends and therefore served different market functions. While the risk that the defendants' song would affect the derivative market for hip-hop versions of Orbison's song was somewhat more substantial, neither party adduced evidence on this point. Thus, the Court held that the 2Live Crew's song was a transformative and therefore, fair use of the prior work.

Fair use was reconsidered in 2001 by the Court of Appeals for the 11th Circuit Court in *SunTrust Bank v Houghton Mifflin*.⁵⁹ The case concerned an action by the estate of Margaret Mitchell, author of the novel *Gone with the Wind*, against an unauthorised sequel to her novel written by Alice Randall entitled *The Wind Done Gone*. The Court reversed the decision of the District Court and lifted the preliminary injunction prohibiting publication of the parody.

The *SunTrust* decision appears to expand considerably the fair use approach heralded by the Supreme Court in *Campbell*.⁶⁰ For example, *SunTrust* removed one of the main definitional impediments that often prevented the parodists from claiming fair use. In order to qualify as parody, the *Campbell* Court seemed to require that works contain a certain element of humour.⁶¹ *SunTrust* rejected this proviso and held that when determining fair use, the Courts must treat the work as a parody if its object is to comment on or criticise a prior work.⁶² The removal of this definitional prerequisite is fundamentally important to the

⁵⁵ Supra n 53, 524.

⁵⁶ Ibid, 520.

⁵⁷ Ibid, 522.

⁵⁸ Ibid, 523.

⁵⁹ Supra n 52.

⁶⁰ Jeffery D Grossett "The Wind Gone Done: Transforming Tara into a Plantation Parody" (2002) 52 Case Western Res 1113, at p 1127.

⁶¹ Supra n 53, 517.

⁶² Supra n 42, 1268.

development of the law in this area. Accessibility to the fair use defence is now increased, affording additional protection to parodies that lack hilarity but still provide meaningful critiques or commentaries.

The expansion of fair use is also manifest in the Court's emphatic reliance on First Amendment principles. For example, Birch J asserted throughout his opinion that the public interest is best served by promoting First Amendment values and in preserving the public domain from encroachment.⁶³ In reversing the decision of the District Court, His Honour maintained that injunctive relief was inappropriate in this case and further, that it was an unlawful and unconstitutional constraint on the freedom of expression.⁶⁴ He considered that any harm suffered by the plaintiff would be better rectified through an award of monetary damages.

The Court's consideration of remedial matters converges significantly on current discourse relating to the common law public interest defence. This common law doctrine will be discussed in depth in part five of this paper.

IV. What Approach Should New Zealand Adopt?

The approaches of the United States and the United Kingdom differ markedly from each other, each having its advantages and disadvantages.

The context-driven approach taken by *Campbell* and *SunTrust* is more flexible and makes more of an attempt to balance the rights of the parodist with those conferred on an author by the Copyright Act. However, the flexibility of the American approach may come at the cost of certainty.⁶⁵ A further concern is the manner in which the Americans assess substantiality under the third fair use factor. Souter J in *Campbell* declared that reproducing the heart or the essence of a prior work will not necessarily result in the Courts finding the defendant to have substantially duplicated the plaintiff's work. His Honour also emphasised that the Courts are to have regard to the differences between the works rather than the similarities. In this respect, the *Campbell* approach can be contrasted with the approach taken by the New Zealand Court of Appeal in *Bleiman v News Media (Auckland) Ltd*.⁶⁶ There Gault J specifically stated the substantiality test as being "whether the essence of the copyright work has been taken".⁶⁷ His Honour also contended that the assessment must be made by reference to the similarities rather than the differences.⁶⁸ However, it is my submission that Gault J's approach to substantiality relates specifically to the initial assessment of whether or not there has been prima facie infringement of copyright and should not be adopted when determining whether a particular use or dealing is fair.

Conversely, the United Kingdom approach has the advantage of certainty, but limits the Court's inquiry to whether or not a work has been substantially

⁶³ Ibid, 1276.

⁶⁴ Ibid, 1277.

⁶⁵ Supra n 7, 264.

⁶⁶ *Bleiman v News Media (Auckland) Ltd* [1994] 2 NZLR 673.

⁶⁷ Ibid, 678.

⁶⁸ Idem. However, cf *Beckmann v Mayceys Confectionary Ltd* (1995) 33 IPR 543 in which the court focused on the differences between the works as opposed to the similarities.

reproduced. In my submission the approach in *Schweppes* is too restrictive and does not go far enough to accommodate the parodist's right to freedom of expression.

In my view the American tradition emphasises the implicit balancing required between the rights of the copyright holder and those of the parodist. The American approach also seems easier to reconcile with Bill of Rights Act jurisprudence and better promotes the production and dissemination of texts.

Section 43(3) of our Copyright Act sets out a number of factors (very similar to those provided for in the American legislation) which the courts must consider when assessing fair dealing in relation to research or private study. However s 42 provides no such statutory guidance. It is my submission that Parliament should amend s 42 so that it more easily enables an interpretation similar to that employed in the United States. This could be achieved by merely importing the s 43(3) factors into s 42.

V. Public Interest Defence

There are many instances where parodies might fall short of the protection offered by our fair dealing provisions. In such situations, it may be possible to invoke the common law public interest defence. In essence, public interest may justify an infringement of copyright similar to the way that public interest can justify the release of confidential information, even if the infringement would not otherwise fall within the terms of the statutory exceptions.⁶⁹

Section 225(3) of the Copyright Act 1994 preserves the court's common law power to refuse to enforce copyright, providing that nothing in the Act affects any rule of law restricting the enforcement of copyright on grounds of public interest or otherwise.

The United Kingdom equivalent of s 225(3) of the Copyright Act 1994⁷⁰ has been the subject of discussion of the English Court of Appeal on two occasions. The first influential case was that of *Hyde Park Residence Ltd v Yelland*.⁷¹ The case involved the publication of security camera stills featuring Diana, Princess of Wales and Dodi Al Fayed. At first instance, Jacob J considered that the public interest defence constituted an additional defence to copyright infringement, rather than merely a means to defeat an interlocutory injunction application.⁷² His Honour rejected the argument that copyright legislation embodies the appropriate balance between the rights of the intellectual property owner and the right to freedom of expression.

However, on appeal the Court of Appeal reversed Jacob J's ruling and tight rules were prescribed to limit the defence's application. Aldous LJ proposed that copyright should not be enforced only if the work is:⁷³

- i) immoral, scandalous or contrary to family life;

⁶⁹ *Fraser v Evans* [1969] 1 QB 349.

⁷⁰ Copyright, Patents and Designs Act 1988, s 171(3).

⁷¹ *Hyde Park Residence Ltd v Yelland* [2001] 2 Ch 143.

⁷² Susy Frankel and Geoff McLay *Intellectual Property in New Zealand* (LexisNexis Butterworths, 2002) 268.

⁷³ *Supra* n 71, 66.

- ii) injurious to public life, public health and safety or the administration of justice;
- iii) incites or encourages others to act in a way referred to in (ii).

The public interest defence was reconsidered in *Ashdown v Telegraph Group Ltd*.⁷⁴ In that case a newspaper published extracts from the confidential diary of a prominent politician.

On appeal, a differently constituted Court of Appeal disagreed with the restrictive approach taken by the majority in *Hyde Park*, preferring not to circumscribe the defence according to a prescriptive formula. The Court noted that it would occasionally be in the public interest for information to be disseminated in the exact words of another.⁷⁵ In situations such as this, the Courts are bound, in so far as they are able, to apply the Copyright, Patents and Designs Act 1988 in a manner that accommodates freedom of expression. Such an approach necessitates an assessment of each case on its own merits.⁷⁶

The Court also suggested that in situations where public interest in the freedom of expression supersedes the rights conferred by copyright legislation, the refusal of injunctive relief would usually be sufficient to protect freedom of expression.⁷⁷ While the defendant would be free to copy the work, monetary remedies would be available, including damages for any depreciation in value of the copyright, or an account of the profits derived by the defendant from the infringement.⁷⁸ This remedial solution is similar to that advocated in *SunTrust*. It acknowledges the importance accorded to freedom of expression, but also that the existence of that right does not entitle one to make free use of another's work.

Burrows contends that the *Ashdown* approach may not necessarily transfer seamlessly to the New Zealand setting.⁷⁹ He maintains that by virtue of s 4 of the Bill of Rights, the right to freedom of expression cannot supersede conflicting enactments. However, in my submission if the Courts maintain the rights-centred approach espoused in *Moonen*, *Hopkinson* and *Brooker* they could, in appropriate situations, exercise the common law power reserved to them by s 225(3) to decline injunctive relief and give effect to the freedom of expression. It is submitted that the *Ashdown* decision is applicable to cases involving parody. However, because we are talking here of parodies which are not protected by s 42 it will be a rare occasion when the freedom to express something in parodic form will be held to supersede the competing rights conferred by the Copyright Act.

VI. Conclusion

Parody is frequently employed by commentators to critique and comment on works in the public domain. The effectiveness of parody is governed by the audience's ability to recognise the work being parodied. This usually requires a substantial reproduction of the original work, often exposing the parodist

⁷⁴ *Ashdown v Telegraph Group Ltd* [2002] Ch 149.

⁷⁵ *Ibid*, 46.

⁷⁶ *Ibid*, 45.

⁷⁷ *Idem*.

⁷⁸ *Idem*.

⁷⁹ John Burrows "Media Law" [2002] NZ Law Review 217, 251.

to liability under a number of intellectual property regimes. With regard to copyright it is clear that in most circumstances freedom of expression will be adequately protected, provided that Parliament reserves a right to others; the right to use information and ideas articulated in another's literary work, without reproducing a substantial part of the original author's work. However, due to its imitative nature, parody is more likely to constitute infringement of copyright than other uses and is therefore not subject to the same level of protection.

The fair dealing doctrine has not yet been considered in relation to parody in this country. It is my submission that we need to adopt a flexible, context-driven approach similar to that taken by the United States in both *Acuff-Rose* and *SunTrust*. Such an approach sufficiently protects the rights of the copyright owner and also gives effect to freedom of expression guaranteed by the Bill of Rights Act. There are a number of ways in which we could achieve this.

Firstly, the Courts could interpret the concept of fair dealing in s 42 of the Copyright Act liberally by reference to the factors in s 43. The judicial importation of these factors would provide a framework by which the Courts could determine, in the context of criticism or review, whether or not a particular dealing is fair. However, such an approach is open to criticism in that its flexibility and consequent ability to adapt quickly to changing social conditions comes at the cost of certainty.

Another option could be for Parliament to introduce a distinct statutory fair dealing exception for parody or satire. This approach was recommended in the United Kingdom⁸⁰ and was adopted by Australia in the Copyright Amendment Act 2006 (schedule 6, Part 3). The Australian provision does not define parody, its creators intending the courts to have recourse to standard dictionary definitions when determining whether or not a use is a parodic use protected by the Act. However this approach may be too rigid for a jurisdiction such as New Zealand which has not yet had the opportunity to interpret our current fair dealing provisions with reference to parody.

Section 225(3) of the Copyright Act may provide the parodist with some form of reprieve in situations where he or she is unable to come within the fair dealing provisions. If the courts embrace the approach taken by the Court of Appeal in *Ashdown* they will be able to strike a more appropriate balance between the competing rights of the parodist and the copyright holder.

⁸⁰ Andrew Gowers *Gowers Review of Intellectual Property*, HMSO 2006, 68.