

REVERING IRREVERENCE: A FAIR DEALING EXCEPTION FOR BOTH WEAPON AND TARGET PARODIES

ANNA SPIES*

I INTRODUCTION

In the seminal decision *Campbell v Acuff-Rose Music Inc*,¹ the United States ('US') Supreme Court found that 2 Live Crew's rap parody was a fair use of Roy Orbison's song, 'Pretty Woman'. Since that time, parody has been well recognised as a form of fair use in the US, provided that the parody 'targets' the original work, rather than use the work as a weapon to attack a third party or as part of wider social criticism.² The latter is often referred to in US cases as 'satire'.³ This distinction between 'weapon' or 'target' parodies has often been applied as a threshold test in the US. However, there may be a growing international trend towards an acceptance of weapon parodies as a form of fair dealing. In 2006, Australia enacted a fair dealing exception for both parody and satire.⁴ Canada proposed a similar exception in 2010⁵ and the United Kingdom ('UK') Government announced in August 2011 that it would introduce a parody exception.⁶ Whereas the target parody exception is generally justified on criticism and free speech grounds, the policy justifications behind the new

* Solicitor, Mallesons Stephen Jaques. Bachelor of Arts/Bachelor of Laws (Hons 1st Class), University of New South Wales.

1 *Campbell v Acuff-Rose Music Inc*, 510 US 569 (1994) ('*Acuff-Rose*').

2 The target parody exception may also arguably cover targeting the author of a work. These parodies are discussed in further detail below.

3 See the definition of 'satire' applied in *Acuff-Rose*, 510 US 569 (1994), and in *Dr Seuss Enterprises LP v Penguin Books USA Inc*, 109 F 3d 1394 (9th Cir, 1997) ('*Dr Seuss*'). The use of the words parody and satire in this sense is perhaps contrary to the literary definition of the terms, which will be discussed later. The terms 'weapon parody' and 'satire' have been used interchangeably in literature and in US case law. This article will not attempt to provide a literary analysis of the terms. Rather, for the sake of considering policy justifications behind the weapon/target debate, the term 'weapon parody' will be used.

4 *Copyright Act 1968* (Cth) ss 41A, 103AA ('*Copyright Act*'). These sections were introduced by the *Copyright Amendment Act 2006* (Cth).

5 Bill C-32, *An Act to Amend the Copyright Act*, 3rd Sess, 40th Parl, 2010 (second reading 5 November 2010), reintroduced in 2011 as Bill C-11, *An Act to Amend the Copyright Act*, 1st Sess, 41st Parl, 2011 (first reading 29 September 2011).

6 Government of the United Kingdom, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (Intellectual Property Office, August 2011) 8.

Australian, UK and Canadian exceptions have included recognition of the inherent value to society of weapon parodies through the dissemination of new works of social commentary and comic and creative value.

This article will consider whether there has been an international shift towards acceptance of weapon parodies as a form of fair dealing, and will argue that such a shift is justifiable on policy grounds. The imitation of an original work by a weapon parody can be considered 'fair' in certain circumstances. The article will first consider briefly the definition of parody and satire and its lack of clarity in both case law and literary theory. Secondly, the article will consider the current state of the parody exception in the US, Australia, Canada and the UK. The legislative context indicates that the Australian exception and proposed Canadian and UK exceptions were intended to permit both weapon and target parodies, leading these fair dealing jurisdictions down a different path to the body of US fair use authority. This article will then consider whether widening the parody exception can be justified on policy grounds. Judge Richard Posner and Michael Spence are proponents of the view that 'the [fair use] doctrine should provide a defense to infringement only if the parody uses the parodied work as a target rather than as a weapon'.⁷ Factors that are considered by these commentators and courts to justify the exception for target parodies include free speech, criticism, market substitution and market failure. Contrary to the arguments of proponents of the target and weapon distinction, these considerations do not logically lead to the conclusion that a weapon parody can never be a fair dealing and the arguments can instead be extended to justify an acceptance of weapon parodies. There are good social and economic reasons for excepting weapon parodies from copyright infringement, provided that their use of the original work is fair.

II A BASIC DEFINITION OF PARODY AND SATIRE

Contrary to the literary definition, weapon parodies are generally referred to in US case law as 'satire'. The oft quoted US legal definition from *Acuff-Rose* states that a parody uses 'some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works.'⁸ A satire, on the other hand, uses an original work as a weapon against a third party or society at large.⁹ However, the case law in the US has involved constant disputes about the definition of parody and it has been argued that '[n]o stable understanding of

7 Judge Richard A Posner, 'When is Parody Fair Use?' (1992) 21 *Journal of Legal Studies* 67, 71. See also Michael Spence, 'Intellectual Property and the Problem of Parody' (1998) 114 *Law Quarterly Review* 594, 617-8, who also argues that target parodies should be able to target the author of a work.

8 *Acuff-Rose*, 510 US 569, 580 (1994).

9 *Dr Seuss*, 109 F 3d 1394, 1400 (9th Cir, 1997), citing *Acuff-Rose*, 510 US 569, 580-1 (1994).

the term “parody” exists.¹⁰ The definitions of parody and satire have evolved over millennia and there is currently no precise literary definition of either.¹¹

The US definitions have been often criticised as being contrary to the literary definitions of parody and satire, which may be overlapping.¹² Indeed, “[b]asing a legal theory on the distinction between [parody and satire] ... may, however, lead the courts into the need to devise near impossible distinctions between satiric parodies and parodic satires.”¹³ The literary use of the term ‘parody’ is not necessarily confined to criticisms of the original work. Many theorists and legal commentators have cited a definition that means a parodist can use the parodied text to critique something other than the work itself.¹⁴

US case authority has become increasingly out of step with popular culture definitions of parody, which have blurred the line between parody and satire.¹⁵ Shows such as *Saturday Night Live* and *The Chaser’s War on Everything* have developed their own traditions in the genres. Popular interpretations of parody have evolved in the digital and technological era.¹⁶ A suggested popular definition of the term ‘parody’ might be that a parody imitates another original work in order to make a new work with some humorous criticism of the work or a third party.¹⁷ Amateur YouTube videos and songs that imitate and transform other works for the purpose of comedy are typically labelled ‘parodies’.

Given the diverse views and unceasing debate over the definitions of parody and satire, this article does not propose to enter into that foray and will adopt a

10 Spence, above n 7, 594. Spence quotes a recent monograph in the field that lists 37 types of understanding and uses of parody. See also Graham Reynolds, ‘Necessarily Critical? The Adoption of a Parody Defence to Copyright Infringement in Canada’ (2009) 33 *Manitoba Law Journal* 243, 246.

11 Parody and satire are ancient forms of literary expression which have been used since Classical Greece. For example, Aristophanes’ play, *The Frogs*, parodies Euripides.

12 Maree Sainsbury, ‘Parody, Satire and Copyright Infringement: The Latest Addition to Australian Fair Dealing Law’ (2007) 12 *Media and Arts Law Review* 292, 319; Jonathan M Fox, ‘The Fair Use Commercial Parody Defense and How to Improve It’ (2006) 46 *IDEA – The Intellectual Property Law Review* 619, 619. Fox argues that the legal definition is broader than the literary definition.

13 Spyros M Maniatis and Ellen Gredley, ‘Parody: A Fatal Attraction? Part 1: The Nature of Parody and Its Treatment in Copyright’ (1997) 19 *European Intellectual Property Review* 339, 343.

14 Spence, above n 7, 595, adopts a definition of parodies that involves the ‘imitation of a text for the purpose of commenting, usually humorously, upon either that text or something else’. See also Reynolds, above n 10, 247–8.

15 See Sainsbury, above n 12. Condren et al argue that parody and satire are overlapping concepts: Condren et al, ‘Defining Parody and Satire: Australian Copyright Law and Its New Exception’ (2008) 13 *Media and Arts Law Review* 273, 277.

16 Condren et al, above n 15, 277. They state that although the current practices of parody and satire contain much continuity with literary practices, the law must allow for the technical developments and differences in form in our digital age.

17 See also Maniatis and Gredley, above n 13, 341 who state that the ‘popular conception of parody and the standard dictionary definition’ conceives of parody as a ‘specific work of humorous or mocking intent, which imitates the work of an individual author or artist, genre or style, so as to make it appear ridiculous’. McCutcheon argues that ‘[m]any examples of what may ordinarily be considered parodies would probably fall outside a strict definition of parody’: Jani McCutcheon, ‘The New Defence of Parody or Satire under Australian Copyright Law’ [2008] *Intellectual Property Quarterly* 163, 176. Fox, above n 12, 642 also states that ‘[t]he legal use of the word parody in the fair use analysis bears little resemblance to the common meaning of the word.’

broad view of the term ‘parody’.¹⁸ Many satires use themes, techniques and other elements from a genre to comment on that genre or society in general. In most cases, this will not be considered a substantial part of the original work and would therefore not need to rely on an exception. The focus of this article is on assessing those derivative works that copy and transform a substantial part of the original work to criticise a third party or for comic effect. Although there may be literary or case law dispute as to whether this type of derivative work should be referred to as a parody or satire, for the purposes of its analysis, this article will refer to it as a ‘weapon parody’. Therefore, the term ‘weapon parody’ will be used to cover the perhaps misused term ‘satire’ in US cases and to discuss the debate between ‘weapon’ and ‘target’ derivative works.¹⁹

III INTERNATIONAL APPROACHES TO WEAPON PARODIES

A The US ‘Target’ Definition of Parody and *Acuff-Rose*

There are four fair use factors listed in *Copyright Act of 1976*, 17 USC § 107 (2011) to be taken into account to determine whether a particular use is a fair use of an original work. These are the purpose and character of the use, the nature of the copyrighted work, the amount of the original work used, and the effect upon the market for or value of the original work. The parody/satire or weapon/target distinction has been seen as the critical issue under the ‘purpose and character of the use’ fair use factor.²⁰

In *Acuff-Rose*, Souter J stated that a parody must copy an original work to make its point, and so must use the original creation. On the other hand, satire can ‘stand on its own two feet and so requires justification for the very act of borrowing.’²¹ Satire is therefore subjected to more exacting standards. Justice Souter stated that if a:

commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in using another’s work diminishes accordingly.²²

In a footnote, Souter J indicated that a weapon parody may in certain cases be fair use of an original work if it does not act as a market substitute for the original.²³ ‘[L]ooser forms of parody may be found to be fair use, as may satire

18 Similarly, for the purposes of the weapon/target debate, Spence states that ‘[g]iven ... the variety of activities potentially caught by the term “parody” and the debate that surrounds its use, it will be important to adopt a fairly broad understanding of the term’: Spence, above n 7, 595.

19 In addition, the term parody is generally used in the academic debate in this area rather than the term satire, or when satire is referred to, this perhaps may more accurately be described as a weapon parody.

20 *Dr Seuss*, 109 F 3d 1394, 1399–400 (9th Cir, 1997).

21 *Acuff-Rose*, 510 US 569, 581 (1994).

22 Ibid 580.

23 Ibid 581. See also Tyler T Ochoa, ‘Dr Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody’ (1998) 45 *Journal of the Copyright Society USA* 546.

with lesser justification for the borrowing than would otherwise be required.²⁴ Fair use should be decided on a case-by-case basis.²⁵ However, in a concurring judgment, Kennedy J applied the ‘targeting’ factor as a requirement, rather than a factor to be taken into account as part of the fair dealing balance.²⁶

Most courts since *Acuff-Rose* have applied the parody and satire distinction without the nuance of Justice Souter’s discussion.²⁷ The case most frequently cited to apply the ‘target only’ approach is *Dr Seuss*, which concerned a book that retold the OJ Simpson trial in the style of Dr Seuss. The Court found that this was not a fair use, as there was no comment or criticism on the Dr Seuss book and therefore there was no need to conjure up the original work.²⁸ Similarly, in *Salinger v Colting*²⁹ the author Fredrick Colting had inserted Salinger himself as a character in his own novel, *The Catcher in the Rye*. The District Court found that the work criticised only the author, not the work itself, and was not therefore a parody.³⁰

Other cases have taken a slightly broader interpretation, finding that a parody can both comment on the original and be a wider social commentary, or can comment on the author of the original. In *Suntrust Bank v Houghton Mifflin Co*,³¹ the Court of Appeals found that a retelling of *Gone with the Wind* from a slave’s perspective was ‘a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in *GWTW*.’³² In *Bourne Co v Twentieth Century Fox Film Corp*,³³ it was held that a song from the television show *Family Guy* used the Disney Song ‘When You Wish upon a Star’ to parody that song and also Walt Disney’s purported anti-Semitism. Similarly, the Central District Court of California in *Henley v DeVore*³⁴ found that criticism of the

24 *Acuff-Rose*, 510 US 569, 581 (1994).

25 *Ibid* 577.

26 *Ibid* 597. Justice Kennedy states that it ‘is not enough that the parody use the original in a humorous fashion, however creative that humor may be. The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well).’

27 The case law is often criticised for not having developed a consistent analytical approach. See Joseph Petersen, ‘When Parodists Wish upon the Fair Use Star: A Dream Come True Could Be a Nightmare’ (2010) 244(32) *New York Law Journal*; Bruce P Keller and Rebecca Tushnet, ‘Even More Parodic than the Real Thing: Parody Lawsuits Revisited’ (2004) 94 *Trademark Reports* 979, 980.

28 *Dr Seuss*, 109 F 3d 1394, 1400 (9th Cir, 1997). The 9th Circuit affirmed the decision of the District Court, which had stated ‘[o]nly when the satirist wishes to parody the copyrighted work itself does the taking of protected expression from that work become permissible, and even then, only in such amounts as is required to fulfil the parodic purpose’: *Dr Seuss Enterprises LP v Penguin Books USA Inc*, 924 F Supp 1559, 1568 (SD Cal, 1996).

29 *Salinger v Colting*, 607 F 3d 68, 72 (2nd Cir, 2010).

30 *Salinger v Colting*, 641 F Supp 2d 250, 261 (SD NY, 2009). On appeal, the Second Circuit Court of Appeals agreed that Salinger was likely to succeed in a claim for copyright infringement, but did not wade into the target/weapon parody discussion: *Salinger v Colting*, 607 F 3d 68, 72 (2nd Cir, 2010).

31 *Suntrust Bank v Houghton Mifflin*, 268 F 3d 1257 (11th Cir, 2001).

32 *Ibid* 1269.

33 *Bourne Co v Twentieth Century Fox Film Corp*, 602 F Supp 2d 499 (SD NY, 2009).

34 *Henley v DeVore*, 733 F Supp 2d 1144, (CD Cal, 2010). See also Petersen, above n 27.

author via the author's works may fit within the structure of protectable parody, expressly disagreeing with *Salinger v Colting*.³⁵

There have been numerous criticisms of the application of *Acuff-Rose* in *Dr Seuss*. Although *Acuff-Rose* considered that the arguments weighed against allowing weapon parodies, the possibility that they could be a fair use was not specifically excluded.³⁶ However, subsequent cases have elevated the parody/satire distinction to a threshold test in practice. Although courts may consider the other fair use factors besides the purpose of the dealing, unless a parody can be considered a 'target' parody in some sense, the fair use argument inevitably has failed.

B The Fair Dealing Jurisdictions Prior to Legislative Intervention

In contrast to the open-ended fair use exception that exists in the US, the fair dealing provisions in Australia, Canada and the UK contain a closed list of exceptions. For any parody to be a fair dealing, the parody has traditionally been required to fit within a particular listed exception, most often criticism.

Prior to 2006, Australia did not have an 'exemption, in terms, in the case of works of parody or burlesque', as stated in *AGL Sydney Ltd v Shortland County Council*.³⁷ The list of fair dealing provisions include the fair dealing with an original work for the purposes of research or study (*Copyright Act*, sections 40 and 103C), criticism or review (*Copyright Act*, sections 41 and 103A), or reporting of the news (*Copyright Act*, sections 41 and 103B).³⁸ In *The Panel Decision*, Conti J considered that a parodic purpose might be relevant to the question of substantiality, as the essence of parody involves imitation and thus copying. Justice Conti also found that criticism and review (sections 41 and 103A) do not necessarily exclude notions of satire or comedy.³⁹

Similarly, the Canadian *Copyright Act*⁴⁰ does not contain an explicit exception for parody or satire and no Canadian court has upheld a defence of parody when this argument has been brought before the courts.⁴¹ The Canadian Supreme Court in *Michelin* found that the court was powerless to expand the

35 *Henley v DeVore*, 733 F Supp 2d 1144, 1154 (CD Cal, 2010).

36 Vogel has argued that *Dr Seuss* is therefore a substantial misapplication of *Acuff-Rose*: Jason M Vogel, 'The Cat in the Hat's Latest Bad Trick: The Ninth Circuit's Narrowing of the Parody Defense to Copyright Infringement in *Dr Seuss Enterprises v Penguin Books USA Inc*' (1998) 20 *Cardozo Law Review* 287, 304. See also Ochoa, above n 23, 591–3.

37 *AGL Sydney Ltd v Shortland County Council* (1989) 17 IPR 99, 105, cited in *TCN Channel Nine Pty Ltd v Network Ten Ltd* (2001) 108 FCR 235, 249 (Conti J) ('*The Panel Decision*').

38 *The Panel Decision* (2001) 108 FCR 235, 16 (Conti J).

39 *Ibid* 286 and 298 respectively (Conti J). Conti J considered that Ten's use of Nine's footage was by way of satire, rather than by way of parody, defined as requiring imitation and copying. Justice Conti did not therefore specifically decide whether a parodic purpose was relevant to criticism and review: at 284 (Conti J).

40 *Copyright Act*, RSC 1985, c C-42.

41 For discussions of the current state of Canada's law of parody, see Reynolds, above n 10.

closed list of fair dealing purposes in section 29.⁴² Justice Tietelbaum refused to ‘give the word “criticism” such a large meaning that it includes parody’, arguing that this would create a new exception.⁴³ However, the Supreme Court in *CCH Canadian Limited v Law Society of Upper Canada* found that a restrictive interpretation of fair dealing could result in an undue restriction of user’s rights.⁴⁴ In response to the *CCH* decision, some commentators in Canada have argued that the fair dealing exception for the purpose of criticism is broad enough to encompass parody.⁴⁵ D’Agostino argues ‘new purposes, including parody, could be included under the [Canadian Copyright Act]’s enumerated grounds, especially in light of the “real purpose or motive in using the copyrighted work.”⁴⁶ Despite this argument, cases since *CCH* have not adopted this broad view of fair dealing.⁴⁷ As the law currently stands, any parody would be required to fit within the bounds of the existing criticism exception and meet the fair dealing factors listed in *CCH*.⁴⁸ It is by no means clear whether either a target or weapon parody could fit within these bounds.

Similarly, a closed list of fair dealing exceptions are contained in sections 29 and 30 of the *Copyright, Designs and Patents Act 1988* (UK) c 48. Early cases in the UK emphasised the transformative nature of parodies, and seemed to accept both target and weapon parodies. In *Glyn v Weston Feature Film Co* Younger J stated in obiter that there is no infringement ‘where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result.’⁴⁹ This was applied in *Joy Music*

42 *Cie Générale des Établissements Michelin-Michelin & Cie. v CAW* [1997] 2 FC 306, 353 [65], 357–8 [71] (Tietelbaum J) (*‘Michelin’*). He stated that since the restrictions are listed as a closed set, ‘[t]hey should be restrictively interpreted as exceptions. ... If Parliament had wanted to exempt parody as a new exception under the fair dealing provision, it would have done so’.

43 *Ibid* 353 [65].

44 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 (*‘CCH’*). It should be noted however that the Supreme Court did not overturn the statement of Linden JA in the Court of Appeal that ‘[i]f the purpose of the dealing is not one that is expressly mentioned in the Act, this Court is powerless to apply the fair dealing exemptions’: *CCH Canadian Ltd v Law Society of Upper Canada* [2002] 4 FC 213, 283 [127].

45 See, eg, Giuseppina D’Agostino, ‘Healing Fair Dealing? A Comparative Copyright Analysis of Canada’s Fair Dealing to UK Fair Dealing and US Fair Use’ (2008) 53 *McGill Law Journal* 309, 359.

46 *Ibid* 324, quoting *CCH* [2004] 1 SCR 339, 366 [54]. D’Agostino states that in light of *CCH*’s liberal interpretation of enumerated grounds, the *Michelin* case ‘no longer seems to be good law’: at 359.

47 In 2008, the British Columbian Supreme Court decision struck out a parody claim, finding that ‘parody is not a defence to a copyright claim’: *Canwest Mediaworks Publications Inc v Horizon Publications Ltd* [2008] BCSC 1609, [15] (Master Donaldson) (*‘Canwest’*). This decision was upheld by Meyers J in *Canwest Mediaworks Publications Inc v Horizon Publications Ltd* [2009] BCSC 391. See also Mark Fassen, ‘Amending Fair Dealing: A Response to “Why Should Canada Not Adopt Fair Use?”’ (2010) 1 *Windsor Review of Legal & Social Issues* 71, who argues that the prediction that criticism could encompass parody has not come to pass. However, it is notable that *Canwest* does not mention the *CCH* decision: at 75.

48 *CCH* [2004] 1 SCR 339, 365–6 [53]. The Supreme Court applied the factors listed by Linden J.A. in the Court of Appeal: the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing on the work.

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

Ltd v Sunday Pictorial Newspapers (1920) Ltd,⁵⁰ where McNair J emphasised the original and sufficiently independent nature of the parody. However, in more recent decisions, the English courts have rejected a parody defence entirely. In *Schweppes Ltd v Wellingtons Ltd*⁵¹ the sole test was ‘whether the defendant’s work has reproduced a substantial part of the plaintiff’s ex hypothesi copyright work.’⁵² This approach was cited with approval in *Williamson Music Ltd v Pearson Partnership Ltd*.⁵³ These decisions rejected the parody defence, but left the possibility open that parody could fall within the scope of fair dealing for the purposes of criticism or review.

C Is an Exception Necessary?

Despite the lack of a particular statutory exception for parody, parodies continue to flourish.⁵⁴ It has therefore been argued that there is no need for a fair dealing exception for parody at all.⁵⁵ However, the fact that many parodies have been created and there is a relative lack of litigation is conclusive. Many of these works would likely infringe copyright, but the author has elected not to take action for a variety of reasons. This may include the economic benefits that an original work reaps from a successful parody.⁵⁶ In addition the parody may be removed from publication, broadcast or communication without any litigation. For instance, a parody will be removed from YouTube following an infringement notice sent by the copyright holder to YouTube under the *Digital Millennium Copyright Act* notice-and-takedown provisions, or a songbook of parodied songs may be removed from publication following an infringement letter.⁵⁷

50 *Joy Music Ltd v Sunday Pictorial Newspapers (1920) Ltd* [1960] 2 QB 60, 70–1 (*‘Joy Music’*). Justice McNair found that even where the alleged infringer had used a substantial part of the original work, he or she does not infringe copyright if they have created an original and a sufficiently independent new work.

51 *Schweppes Ltd v Wellingtons Ltd* [1984] FSR 210.

52 Ibid 212 (Falconer J). He went on to state that ‘[t]he fact that the defendant in reproducing his work may have himself employed labour and produced something original, or some part of his work which is original, is beside the point if none the less the resulting defendant’s work reproduces without the licence of the plaintiff a substantial part of the plaintiff’s work.’ Justice Falconer distinguished *Joy Music* on the basis that in that case, there had not been a substantial reproduction of the original work: at 213.

53 *Williamson Music Ltd v Pearson Partnership Ltd* [1987] FSR 97, 103.

54 UK Intellectual Property Office (‘IPO’), *Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions* (2009) 43 [307] (*‘Taking Forward the Gowers Review’*): ‘Respondents from various areas, such as publishing and music, also made the point that there was no shortage of parodies, and that their creation was often catered for by licensing.’

55 Ibid 3 [16]–[19].

56 In 2011, contrary to the actions of many other copyright holders, Blink 182 thanked fans who posted unauthorised copyright infringing clips of themselves playing Blink 182’s songs online. Blink 182 used excerpts from these clips to launch their single, stating ‘AT&T helped us search YouTube for every instance of fans using our music without our permission and rewarded them for it ... Thanks for being a fan.’ The clip is available at ShareAAT, *AT&T and Blink-182’s Up All Night Fan Montage* (2 August 2011) YouTube <http://www.youtube.com/watch?v=eabtzkY_jNs&feature=player_embedded>.

57 *Digital Millennium Copyright Act*, Pub L No 105-304, 112 Stat 2860 (1998). For YouTube to receive the benefit of the safe harbour under the *Digital Millennium Copyright Act* §512(c)(1)(C), YouTube is required to remove or disable access to any hosted material if it has received a notice of infringement from the copyright holder in the appropriate form.

It has also been argued that there is no need to introduce an exception for parody or satire, as protection is adequately provided by the criticism exception.⁵⁸ Generally, parodies are most effective when they imitate a large proportion of a work. For instance, a book review may quote part of a work for the purposes of criticism. A parody may imitate a far larger proportion of the book for its criticism and this may be seen as more than necessary for the purposes of criticism.⁵⁹ Generally, a parody of a song will imitate the entire song, with transformative changes to the lyrics or other elements of the song. Equating ‘parody’ with the criticism exception is likely to result in the protection of a ‘restrictive, limited conception of parody.’⁶⁰ Similarly, it may be argued that a recent emphasis on substantiality⁶¹ will mean that a parody of a work will not be an infringement of the original work. However, a parody will generally imitate a high proportion of an original work, and thus it is likely that this would usually meet the substantiality threshold.

D Australia’s Parody or Satire Exception

On 11 December 2006, the Australian Government introduced new fair dealing exceptions to copyright infringement into sections 41A and 103AA of the *Copyright Act*. The exceptions state that a fair dealing with an original work does not constitute an infringement of copyright if it is ‘for the purpose of parody or satire’.⁶² The amendments were made to protect free speech and Australia’s ‘fine tradition of satire’.⁶³ However, the terms ‘parody’ and ‘satire’ were not defined, which has resulted in criticism from a number of commentators.⁶⁴ Detailed consideration and background explanations were not included in the Fair Use Issues Paper⁶⁵ and Report,⁶⁶ nor does the Explanatory Memorandum provide useful details.

58 IPO, *Taking Forward the Gowers Review*, above n 54, 46 [329].

59 Although Faaland correctly points out that parodies do not need to be a direct spoof of an original, it may closely track the original’s wording and structure: Susan Linehan Faaland, ‘Parody and Fair Use: The Critical Question’ (1981) 57 *Washington Law Review* 163, 186.

60 Reynolds, above n 10, 245.

61 See *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458.

62 *Copyright Act* s 41A provides, ‘[a] fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic, or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.’ *Copyright Act* s 103AA provides, ‘[a] fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of parody or satire.’

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

64 See, eg, Sainsbury, above n 12, 319. Sainsbury states that ‘[w]hile it is an area of law where many considerations need to be balanced and flexibility is warranted, further certainty could have been achieved by including definitions of “parody” and “satire”’. See also Sally McCausland, ‘Protecting “A Fine Tradition of Satire”: The New Fair Dealing Exception for Parody or Satire in the Australian Copyright Act’ (2007) 29 *European Intellectual Property Review* 287, 290.

65 Attorney-General’s Department, ‘Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age’ (Issues Paper, May 2005).

66 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Copyright Amendment Bill 2006 [Provisions]* (2006).

Extrinsic statements indicate that the Government's intention was to allow both target and weapon parodies to be considered as a fair dealing, provided that their use is fair. The policy justification centred on the comic and creative contribution of parodies and their role as a valuable form of social criticism. The Attorney-General stated, 'Australians have always had an irreverent streak. Our cartoonists ensure sacred cows don't stay sacred for very long and comedians are merciless on those in public life. An integral part of their armoury is parody and satire or, if you prefer, "taking the micky" out of someone.'⁶⁷ These comments were made in response to a high profile copyright infringement situation in which EMI had threatened the Australian cricket fan club, The Fanatics, with copyright infringement for a songbook that contained changed song lyrics, with the intention of ridiculing the 'Barmy Army'. The Attorney-General made it clear that The Fanatics songbook would be a fair dealing as a parody under the new exceptions, even though it targeted a third party, rather than commenting on the copyrighted work itself.⁶⁸

In defining the exception, the Australian courts will likely consider two options: to broadly adopt (perhaps with some variation) the US definitions or to apply *The Panel Decision* definitions. In *The Panel Decision* the Federal Court considered the definitions of parody and satire in the context of the comment and criticism exception. Justice Conti considered the Australian *Macquarie Dictionary* and defined the essence of parody to be imitation, whereas satire was a form of 'ironic, sarcastic, scornful, derisive or ridiculing criticism of vice, folly or abuses, but not by way of an imitation or take-off.'⁶⁹ This definition of the terms is supported by the Australian Government Fact Sheet on the new exception, which states the terms are

similar and can overlap. Satire often involves attacking an idea or attitude, an institution or social practice, through irony, derision or wit. Parody often involves the imitation of the characteristic style of an author or a work for comic effect or ridicule.⁷⁰

This definition of satire is markedly different to the US definition. Parody is not restricted to imitation for the purposes of criticism of the original and satire does not involve any imitation.⁷¹

67 Philip Ruddock, 'Protecting Precious Parody', *The Daily Telegraph* (online), 30 November 2006 <<http://www.dailytelegraph.com.au/news/opinion/protecting-precious-parody/story-e6frezz0-1111112605033>>.

68 Ibid.

69 *The Panel Decision* (2001) 108 FCR 235, 249 [17]. Justice Conti also considered previous Australian cases, including *AGL Sydney Ltd v Shortland County Council* (1989) 17 IPR 99 and *United Features Syndicate Inc v Star Newspapers Pty Ltd* (Unreported, Supreme Court of New South Wales, No 2637 of 1977).

70 Attorney-General's Department, New Australian Copyright Laws: Parody and Satire (Fact Sheet, 2006) <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~Copyright+Fact+Sheet+-+Parody+and+Satire.pdf/\\$file/Copyright+Fact+Sheet+-+Parody+and+Satire.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~Copyright+Fact+Sheet+-+Parody+and+Satire.pdf/$file/Copyright+Fact+Sheet+-+Parody+and+Satire.pdf)>.

71 *The Panel Decision* has therefore been criticised by Matthew Rimmer as displaying 'anglo-centric bias' in failing to consider the US jurisprudence that has developed to allow parody as an exception to infringement: Matthew Rimmer, 'Valley of the Dolls: Brand Protection and Artistic Parody' (2004) 16 *Intellectual Property Law Bulletin* 160, 162.

The parody or satire exception was enacted against the background of US law. This strongly supports the conclusion that the inclusion of weapon parodies in the new Australian exception is the inclusion of *both* satire and parody.⁷² A number of sources have assumed that the US definitions will be applied. For instance, submissions to the *Fair Use Issues Paper* argued that the concepts of parody and satire should be distinguished on the same basis as they have been distinguished in the US.⁷³ In addition, since the Bill has been enacted, certain commentators and copyright groups have explained the Bill on the basis of the US definition and interpretation of parody and satire, for example, the Australian Copyright Council,⁷⁴ and the Australian Recording Industry Association.⁷⁵ The US definitions were adopted in the Senate debates, where the Minister for Justice and Customs said, '[p]arody by its nature is likely to involve holding up a creator or performance to scorn or ridicule. Satire does not involve such direct comment on the original material, but in using material for a general point it should not be unfair'.⁷⁶

In light of seemingly contradictory government statements, it is uncertain which definition was intended. However, in both scenarios, the Australian exception will likely allow both target and weapon parodies, provided that the use is fair. If the US definition is adopted, a weapon parody will be considered a 'satire' and may be excepted if the use is fair. If *The Panel Decision* definitions are adopted, both weapon and target parodies require imitation and therefore fall under the 'parody' definition. The 'weapon' or 'target' distinction could then be considered in weighing the fair dealing factors for parody. This would implement the legislative intention to allow Australians to use parodies as weapons against 'sacred cows' and to continue their 'irreverent streak'.

72 Graeme W Austin, 'Four Questions about the Australian Approach to Fair Dealing Defenses to Copyright Infringement' (2010) 57 *Journal of the Copyright Society* 611, 626–7.

73 See, eg, Arts Law Centre of Australia, Submission to Attorney-General's Department, *An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age: Issues Paper*, 8 July 2005, 8; Australian Copyright Council, Submission to Attorney-General's Department, *An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age: Issues Paper*, June 2005, 8; Copyright Agency Ltd, Submission to Attorney-General's Department, *An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age: Issues Paper*, July 2005, 15–6. The Copyright Agency Ltd argued that 'there would need to be use of the form to comment on the earlier work to justify the use as a fair dealing. If the creator of the new work simply wants to create a comic new work, this would not be a parody': at 15.

74 See Australian Copyright Council, *Information Sheet: Parodies, Satire & Jokes* (January 2008), 3 <http://www.copyright.org.au/admin/cms-acc1/_images/2842923184d0015597ec78.pdf>. This is despite stating that the *Macquarie Dictionary* definition would be considered. The Australian Copyright Council's Information Sheet states that 'the purpose of a true parody is to make some comment on the imitated work or on its creator. ... The purpose of satire ... is to draw attention to characteristics or actions ... by using certain forms of expression': at 3.

75 Australian Recording Industry Association, *The Copyright Amendment Act 2006 – Key Changes to Legislation* <<http://www.aria.com.au/pages/keychanges-CopyrightAmendmentAct2006.htm>>.

76 Commonwealth, *Parliamentary Debates*, Senate, 30 November 2006, 148 (Christopher Ellison, Minister for Justice and Customs).

E Canadian and UK Proposals

In June 2010, the Canadian Government introduced the *Copyright Modernization Act* ('Bill C-32'),⁷⁷ which among other amendments, proposed the expansion of the fair dealing exception to include parody and satire. Although the Bill was sidelined following a vote of no-confidence in the Government on 25 March 2011, the Canadian Government was re-elected with a majority in May, and re-introduced the *Copyright Modernization Act* with identical parody and satire provisions on 29 September 2011 ('Bill C-11').⁷⁸ Bill C-11 proposes that section 29 of the *Copyright Act*⁷⁹ be amended as follows (amendments underlined):

Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.⁸⁰

The Canadian proposal provides no definition of the terms 'parody or satire'. The government statements provide limited assistance in interpreting the provisions. Typical statements include that '[t]he Bill enables the use of copyrighted materials to create a parody or satire, provided the use is considered "fair."⁸¹ If enacted, it is likely that the provision will be interpreted broadly. The Canadian Supreme Court has characterised the fair dealing provisions as a 'user's right', and will generally interpret the exception in a way that benefits the user.⁸² It would appear likely that the same principle would apply to 'parody or satire'. With an emphasis on 'user's rights' the courts may place less emphasis on the rights of the copyright holder, which consequently gives less weight to the licensing arguments put forward by advocates for the 'target only' view of parody and satire.

Similarly to Australia, the Canadian Government proposed the exception against the backdrop of a substantial body of US case law.⁸³ References to the new defence have tended to assume that the terms 'parody' and 'satire' will be defined similarly to the US case law interpretation of the terms.⁸⁴ The Canadian

77 Bill C-32, *An Act to Amend the Copyright Act*, 3rd Sess, 40th Parl, 2010 (second reading 5 November 2010).

78 Bill C-11, *An Act to Amend the Copyright Act*, 1st Sess, 41st Parl, 2011 (first reading 29 September 2011).

79 *Copyright Act*, RSC 1985, c C-42.

80 Bill C-11, *An Act to Amend the Copyright Act*, 1st Sess, 41st Parl, 2011, cl 21.

81 Balanced Copyright, *What the New Copyright Modernization Act Means for Consumers* (3 October 2011) <<http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01186.html>>.

82 *CCH* [2004] 1 SCR 339, 364 [48], 365 [51]. In the context of interpreting the term 'research' as used in s 29, the Supreme Court advocated a broad view of the fair dealing exception, in order to ensure that 'users' rights are not unduly constrained.' The Court also recognised the importance of recognising the limited nature of creator's rights.

83 See, eg, Industry Canada, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (October 2002) Balanced Copyright, 36-7 <<http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp00863.html>>. The report referred to the US fair use parody exception when discussing whether the fair dealing exception in s 29 should be expanded.

84 See, eg, FMC Law, *The Copyright Modernization Act – Proposed Amendments to the Copyright Act*, 3 <www.fmc-law.com/upload/en/publications/2010/1110_The_CMA_Proposed_Amendments_to

Bar Association states that the exception would be consistent with both Australian and US law, without acknowledging that there are likely critical differences between these two jurisdictions.⁸⁵ The inclusion of both ‘parody’ and ‘satire’ explicitly, combined with the Supreme Court’s tendency to view fair dealing as a ‘user’s right’ may mean that both weapon and target parodies may be excepted from copyright infringement, provided that they are ‘fair’.

On 3 August 2011, the UK Government stated that in Autumn 2011 it would expand the current copyright exceptions to include an exception for parody.⁸⁶ In 2006, the *Gowers Review of Intellectual Property* recommended a legislative change: the creation of ‘an exception to copyright for the purpose of caricature, parody or pastiche by 2008.’⁸⁷ This exception followed the terminology of article 5(3)(k) of the European Union’s 2001 Information Society Directive,⁸⁸ under which Member States may provide for exceptions or limitations to copyright for ‘use for the purpose of caricature, parody or pastiche’. A number of European Countries have expressly included a parody exception in their copyright law, such as Belgium, France, Lithuania, Luxembourg, Malta, the Netherlands, Poland and Spain.⁸⁹ The Gowers Review discussed the US cases, for example *Acuff-Rose*, in the context of a ‘transformative use’ exception to copyright infringement, recommending that this should also be introduced.⁹⁰ At the time, the IPO rejected the introduction of an exception for parody, finding there were not sufficient justifications to introduce the new exception.⁹¹

However, in 2011 the Hargreaves Review on Intellectual Property⁹² recommended the introduction of a parody exception, which would be consistent with EU law and which would be of benefit to the British economy.⁹³ The Hargreaves recommendation was considerably broad, focusing on the economic benefits of parodies, as was the scope of the review. Noting also that there were significant freedom of expression arguments, the Review stated,

_the_CA.pdf>. Carys Craig has also stated that the inclusion of both exceptions avoids the difficulty faced by the US courts in defining a work as either a parody or satire: Carys Craig, ‘Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32’ in Michael Geist (ed), *From ‘Radical Extremism’ to ‘Balanced Copyright’: Canadian Copyright and the Digital Agenda* (Irwin Law, 2010) 177, 186.

85 Canadian Bar Association, *Submission on Bill C-32, Copyright Modernization Act* (February 2011), 17 <<http://www.cba.org/CBA/submissions/pdf/11-06-eng.pdf>>.

86 Government of the United Kingdom, above n 6, 8.

87 Andrew Gowers, *Gowers Review of Intellectual Property* (Stationery Office, 2006) 6 (‘Gowers Review’). See especially Recommendation 12.

88 *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* [2001] OJ L 167/10.

89 IPO, *Taking Forward the Gowers Review*, above n 54, 32.

90 Gowers, above n 87, 66–8. The *Gowers Review* also noted the value of works of parody, including the work of Weird Al Yankovic, who has received 25 gold and platinum albums and two GRAMMY awards by parodying other songs, and Tom Stoppard’s *Rosencrantz and Guildenstern Are Dead*: at 68.

91 IPO, *Taking Forward the Gowers Review*, above n 54, 3.

92 Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011) <www.ipo.gov.uk/ipreview-finalreport.pdf> (‘Hargreaves Review’).

93 *Ibid* 49–50.

parody is today becoming part and parcel of the interactions of private citizens, often via social networking sites, and encourages literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy. Comedy is big business.⁹⁴

References to parodies that should be protected were both weapon and target parodies. In August 2011, the UK Government announced that in response to the Review it would introduce a parody exception in 2011. 'Copyright exceptions to allow parody should also be introduced to benefit UK production companies and make it legal for performing artists, such as comedians, to parody someone else's work without seeking permission from the copyright holder.'⁹⁵ Since the exception will be introduced in response to the Hargreaves Review, it appears likely that a broad exception will be introduced that will cover both weapon and target parodies.

IV POLICY CONSIDERATIONS FOR THE INCLUSION OR EXCLUSION OF WEAPON PARODIES

If there is an international shift towards permitting weapon parodies to be considered as an exception to the exclusive rights of the copyright holder, can this shift be justified on a consideration of the policy grounds behind the fair dealing or fair use exceptions? The body of US jurisprudence has found that a weapon parody cannot be considered 'fair' based on number of important policy considerations, including freedom of expression and the importance of criticism, the prevention of market substitution and the market failure argument. However, these arguments can also be used to justify the protection of weapon parodies. In addition, the shift towards protecting weapon parodies added new policy factors, being the inherent value of these works as a form of social criticism and the value of disseminating new comic and creative works.

A Dissemination of New Comic and Creative Works

The dissemination and creation of new works is one of the major policy objectives of copyright and the fair dealing provisions. In *Acuff-Rose*, Souter J said 'the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.'⁹⁶ The central importance of transformation was similarly emphasised by the UK courts in *Glyn v Watson*,⁹⁷ though the UK courts have since departed from this decision. The creation of new works and benefit to the economy in creation of parodies was behind the

94 Ibid 50.

95 IPO, 'Sweeping Intellectual Property Reforms to Boost Growth and Add Billions to the UK Economy' (Press release, 3 August 2011).

96 *Acuff-Rose*, 510 US 569, 579 (Souter J) (1994).

97 [1916] 1 Ch 261.

recommendation of the Hargreaves Review to introduce a parody exception.⁹⁸ The IPO recognised that a parody exception would benefit UK production companies and comedians, rather than emphasising the critical nature of parodies.⁹⁹ The argument that a weapon parody exception will be exploited by users in order to avoid the drudgery in working up something fresh¹⁰⁰ is avoided when a parody is sufficiently transformative and original. Piele states that '[i]f the purpose of copyright law is to encourage creativity and increase dissemination of creative works, it is illogical to stifle one parodist while encouraging another.'¹⁰¹ The Australian government emphasised that the fair use exception was introduced for the protection of Australian comedians and their 'irreverent streak'¹⁰² and Australia's 'fine tradition of satire.'¹⁰³ However, more so than the Hargreaves Review, perhaps due to the Hargreaves Review's focus on the economic impacts of commentary, the Australian government also emphasised the second element, the social criticism and commentary that weapon parodies provide.

The fundamental justification for an exception for target parodies is freedom of expression and the social benefit that criticism of an original work provides. As a genre, target parodies imitate the original in order to present an effective criticism.¹⁰⁴ As an important form of free speech, the use of that original is protected. The Australian and UK governments have also justified weapon parodies based on their contribution to free speech through social commentary and criticism.¹⁰⁵ The Australian Attorney-General's Department considered satire to be a particular form of transformative use that may be justified, as 'satire may have a more useful social benefit in adding to political social discussion.'¹⁰⁶ It is difficult to justify a conclusion that a comment or criticism of a particular work is

98 Hargreaves, above n 92, 50. Professor Hargreaves stated, a 'healthy creative economy should embrace creativity in all its aspects,' and discusses the resilience of parodies to takedown from the internet, commenting 'the offending video has remained both visible and popular, giving rise to further parodies in response.'

99 IPO, 'Sweeping Intellectual Property Reforms', above n 95.

100 *Acuff-Rose*, 510 US 569, 580 (1994): 'If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.'

101 Kathryn D Piele, 'Three Years After *Campbell v Acuff-Rose Music, Inc*: What is Fair Game for Parodists?' (1997) 18 *Loyola of Los Angeles Entertainment Law Journal* 75, 99.

102 Philip Ruddock, above n 67.

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

104 Spence, above n 7, 610.

105 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 2006 (Philip Ruddock); IPO, *Taking Forward the Gowers Review*, above n 54, 35: The IPO stated '[i]t is an important part of the tradition of freedom of speech which contributes to the cultural diversity of the UK.'

106 Attorney-General's Department, Submission No 69A to the Senate Standing Committees on Legal and Constitutional Affairs, *Inquiry into the Provisions of the Copyright Amendment Bill 2006*, 8 November 2006, 3. See also Melissa de Zwart, 'The Copyright Amendment Act 2006: The New Copyright Exceptions' (2007) 25 *Copyright Reporter* 186. De Zwart argues that a parody of social norms and practices may have more public benefit than a parody of a specific work.

of greater social value than a comment or criticism of another work or on society generally.¹⁰⁷ As Craig states, ‘excluding satire from the realm of fair use silences a powerful and socially valuable form of critical expression’.¹⁰⁸

B Criticism and the Market Failure Approach

The target and weapon parody distinction has also been justified on a market failure analysis.¹⁰⁹ The market failure approach considers that a use of an original is fair when the ‘costs of transacting with the copyright owner over permission to use the copyrighted work would exceed the benefits of transacting’, such as creating new works.¹¹⁰ In the case of target parodies, if it were necessary to obtain the permission of the original author, they would likely refuse to grant the parodist a licence to use their work order to suppress criticism. Since criticism is an important element of free speech, the market in this scenario should not be allowed to make the trade-off.¹¹¹ Justice Kennedy in *Acuff-Rose* found it was important to protect ‘works we have reason to fear will not be licensed by copyright holders who wish to shield their works from criticism.’¹¹²

It has been argued that the same reasoning cannot be applied to weapon parodies. In this circumstance, there is no reason not to let the market make the trade-off for weapon parodies. It is assumed that a licence for a weapon parody would often be forthcoming.¹¹³ Posner poses the question that for weapon parodies, ‘why should the owner of the original be reluctant to license the parody?’¹¹⁴ Yet, a similar free speech licensing consideration can be applied to weapon parodies. Although the copyright owner may not suppress criticism of their own work, a copyright owner can refuse a licence to a parodist because of objection to the particular viewpoint of the parodist, cherishing of a particular set of values or a holding a cultural assumption.¹¹⁵ Through refusing to grant a license, the copyright owner can censor opinions and inhibit free speech. If the subject matter is ‘unsavoury’, such as the OJ Simpson trial in *Dr Seuss*, the parodist is unlikely to find a copyright holder willing to authorise the parody. Similarly, in *Acuff-Rose*, 2 Live Crew had offered to pay for a licence to use the Roy Orbison song, yet this was refused. Yet there is benefit to society in

107 McCutcheon runs a similar argument. She asks, ‘[w]hy is a comment about the banality of Roy Orbison’s song, “Pretty Woman” of greater value than a comment on US President Bush’s stance on the war on terror, or climate change?’. McCutcheon, above n 17, 179.

108 Craig, above n 84, 186.

109 Posner, above n 7, 72.

110 Ibid 69.

111 Ibid 73–4.

112 *Acuff-Rose*, 510 US 569, 597 (1994).

113 Julie Bisceglia, ‘Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act’ (1987) 34 *Copyright Law Symposium* 1, 25.

114 Posner, above n 7, 71.

115 Robert P Merges, ‘Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright’ (1993) 21 *AIPLA Quarterly Journal* 305, 311. When weapon parodies are viewed as offensive to an author’s sensibilities, the author is as unlikely to licence that parody as if the parody had criticised the original work directly: Vogel, above n 36, 313. See also Keller and Tushnet, above n 27, 999.

promoting the creation of such works. If weapon parodies are seen as a valuable public good in themselves, the benefit of their creation may mean that the market failure argument extends also to weapon parodies. Although famous weapon parodists, such as Weird Al Yankovic, have a practice of asking for, and receiving, permission for their parodies,¹¹⁶ amateur parodists are less likely to receive permission from copyright owners.

However, there is a strong argument that a parodist should have offered to pay the copyright owner a license fee in order for the market failure argument to apply. If the parodist has not been, or would not be, refused a licence to use the copyrighted work, the licensing argument is highly persuasive. The situation can be compared to the rights of authors to other derivative works, such as movie rights. However, to incorporate this as a requirement for an exception poses difficult questions. What is the appropriate level of royalties a parodist must offer? Should this argument apply to both target and weapon parodies? If so, what is the justification for differentiating between them? Nonetheless, some advocates of the weapon parody exception have required that there be a licensing offer, arguing that '[a]s long as the parodist offers a royalty to the copyright holder that will adequately compensate her, we should not sanction refusals to license.'¹¹⁷

It has also been argued that since target parodies criticise the original, they are justified in copying that original. In contrast, weapon parodies could have imitated any number of other works. Classically quoted is Justice Souter's statement in *Acuff-Rose*: 'Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's ... imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.'¹¹⁸ Similarly, Jones J in *Dr Seuss* at first instance stated that the satirist wishing to criticise something apart from the copyrighted work has alternatives available. Otherwise, the satirist's work is an 'unreasonable attempt to cash in on another's creativity.'¹¹⁹ Posner states that there is no compelling reason to subsidise social criticism by allowing writers to use copyrighted material without compensating the copyright holder. Posner compares this to a writer stealing a pencil to reduce the cost of satire.¹²⁰

The argument that a parodist can simply use another work is weak when the original work has become a unique shorthand for a particular range of meanings or a social ideology that is being criticised by the parody. In these circumstances, the force of the parodic message may be diminished by the use of another

116 Keller and Tushnet, above n 27, 996–7.

117 Merges, above n 115, 310.

118 *Acuff-Rose*, 510 US 569, 580–1 (1994).

119 *Dr Seuss Enterprises LP v Penguin Books USA Inc*, 924 F Supp 1559, 1567–8 (SD Cal, 1996).

120 Posner, above n 7, 73.

work.¹²¹ Posner's pencil analogy is therefore inapplicable. A parodist could use any pen or pencil to create a parody with the same effectiveness. However, the effectiveness of the social criticism of a weapon parody may vary drastically depending on the original work that has been parodied.¹²² If weapon parodies are seen as a valuable creative work in themselves, then the artistic license of their creator to transform a work that will best suit their artistic goals should also be recognised.¹²³

If the justification for a parody exception is based on the benefit to society of criticism, then an element of criticism is clearly a key factor.¹²⁴ On the other hand, if the justification of the parody exception is based on the inherent value in the creation of new comic and transformative works, a critical element is not an essential feature, but is rather an added bonus. The popular conception of parody sees parody as comic and transformative imitation, rather than critical and transformative imitation. Humorous imitation is highly unlikely to provide a substitute for the original.¹²⁵ However, the justifications for permitting weapon parodies as a form of fair use or fair dealing are lessened if the requirement for criticism is removed.¹²⁶ It is unclear whether the Australian, Canadian or UK legislative intention is to include parodies of purely comic intent, with no element of criticism. However, most parodies, even if created for the purpose of comedy, will contain a critical element. Usually, a weapon parody will involve some social comment. If courts take an expansive view of any critical

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- 121 Suzor argues that 'while it may be possible to make a satirical statement about society without reusing copyright material, it will often be significantly more difficult, or the force of the message may be diminished': Nicolas Suzor, 'Where the Bloody Hell Does Parody Fit in Australian Copyright Law?' (2008) 13 *Media and Arts Law Review* 218, 240. Similarly, Keller and Tushnet state that a 'satire may provide a uniquely effective social commentary whose effect could not have been achieved in a completely new work or a satire of a public domain work': Keller and Tushnet, above n 27, 998.
- 122 Winslow also disputes Posner's pens and pencils argument – 'Pens and pencils are not public goods ... Also, while authors do not license their works to parodists, there is no reason to believe that pencil and pen owners would not sell their goods to parodists': Anastasia P Winslow, 'Rapping on a Revolving Door: An Economic Analysis of Parody and *Campbell v Acuff-Rose Music, Inc*' (1996) 69 *Southern California Law Review* 767, 808.
- 123 See also Vogel, above n 36, 315. Vogel argues that the 'assumption that a parody author can shop around for other copyrighted works ignores the nature of the creative process. Artistic ideas of the satirist are likely to be inextricably tied to the underlying, borrowed material.'
- 124 Van Hecke states that a parody 'must in some oblique way comment on the original or its special societal value is lost': Beth Warnken Van Hecke, 'But Seriously, Folks: Towards a Coherent Standard of Parody and Fair Use' (1992) 77 *Minnesota Law Review* 465, 492.
- 125 Suzor, above n 121, 237. The 'Back Dorm Boys' are an internet sensation where two boys record lip synching music videos to Backstreet Boys songs. It may be found that their highly exaggerated dancing and facial expressions are a criticism of the Backstreet Boys. However, Suzor argues that it might be excepted as making a humorous comment on the original. The video may be viewed at Back Dorm Boys, *I Want it That Way* (5 May 2006) YouTube <<http://www.youtube.com/watch?v=YBICtqsat-w>>.
- 126 Advocates of both weapon and target views of parody quite clearly require a critical element. Faaland argues that the amount which the parody should be able to borrow should be measured in terms of the critical effect: above n 59, 182–3.

requirement in ‘parodies’, most comic parodies may be permissible.¹²⁷ However, without a critical comment, the balance of fair dealing factors may weigh against a parody created primarily for comic purposes, with a weak social comment.

C Market Substitution and Disincentives to the Original Author

To be a fair dealing or fair use of an original work, the derivative parody cannot be a market-substitute for the original work. However, a true parody is rarely a market substitution for the original work, even if both the parody and original work were created for entertainment.¹²⁸ Proponents of the distinction, such as Posner, have argued weapon parodies fulfil the same market as the original work, citing *Abbott and Costello Meet Frankenstein* as fulfilling part of the market demand for *Frankenstein* and *Dracula*.¹²⁹ However, this is an unpersuasive argument, as the market for a comic parody of the horror movie genre is quite different than the market for the horror movie.¹³⁰

The parody must also not act as a disincentive to the creation of new works. If the original author loses incentives to produce new works, due to a fear of weapon parodies and possible loss of revenue, then a weapon parody will not be considered ‘fair’.¹³¹ However, this argument cannot realistically be applied to either weapon or target parodies. Generally, a parody will be most effective if it uses a successful and well-known work. An author would not lose an incentive to create a highly successful work merely because it may be parodied.¹³² Fair use or fair dealing exceptions will by their very nature result in a loss of potential royalties from licensing. However, only a parody that interferes excessively with the incentive to create and disseminate new works merits rejecting a fair use or fair dealing defence if the inherent value of the derivative work has been

127 See McCutcheon, above n 17, 177. McCutcheon argues that the Australian courts should adopt this expansive definition of the critical element and that ‘the satirical threshold should be set low. In short, courts should not be reticent in construing a comic treatment as a “comment” on some vice.’ She points out that ‘[t]he reality is that the average person on the street probably values parody more for its humorous effect than its critical function’: at 175. She notes that under French copyright law, a parody is permitted when it imitates a work with humorous intent and effect, without creating any risk of confusion with the original work, and without injuring or degrading the original author.

128 Suzor, above n 121, 221. Weir suggests that a ‘no confusion’ test should be adopted, whereby a work is not a parody or satire if it could be confused with the original: Moana Weir, ‘The Parodist’s Nirvana: Droit Moral and Comparative Copyright Law: Part Two’ [1994] *Arts and Entertainment Law Review* 81, 82–3, 85.

129 Posner, above n 7, 70–1.

130 This also applies to Posner’s argument that erotic versions can affect the market of the original. Winslow considers Posner’s argument in some detail. She states that ‘an X-rated movie depicting Mickey Mouse in obscene postures could not reasonably affect the market for G-rated Walt Disney movies’: Winslow, above n 122, 807. See also McCutcheon, above n 17, 183.

131 Adriana Collado, ‘Unfair Use: The Lack of Fair Use Protection for Satire under § 107 of the Copyright Act’ (2004) 9 *Journal of Technology Law and Policy* 65, 74; IPO, *Taking Forward the Gowers Review*, above n 54, 44. See also Posner, above n 7, 73.

132 See Merges, above n 115, 308. Merges argues that even conceding that ‘at some margin off in the receding distance a hyper-risk averse creative person (!) might possibly be deterred from creating something by the risk that a court might some day force her to part with a license involuntarily, we ought to be willing to pay that small (perhaps nonexistent) price in service of the dissemination principle.’

recognised.¹³³ Indeed, contrary to this argument, a successful parody can often result in additional royalties for the original work. In *Glyn v Watson*, the Court stated that 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.'¹³⁴

If the author does suffer a loss of revenue as a result of parody, the most likely source is a target parody that criticises the original, rather than the parody replacing the market for the original.¹³⁵ As discussed below, loss of revenue due to criticism is justifiable on fair dealing or fair use grounds. *Acuff-Rose* acknowledged that 'it is legitimate for parody to suppress demand for the original by its critical effect.'¹³⁶ Since weapon parodies do not criticise the original, they should not reduce the royalties of an original, provided that there is no substitution. That weapon parodies may be even further justifiable than target parodies on this ground has been recognised by the Australian Attorney-General's Department: 'satire may be far less damaging to the creator. In some circumstances parody of a creator may destroy his or her market in a way satire will not.'¹³⁷

If a parody causes damage to the copyright holder or disincentives to creation through an offensive or unfairly critical use of the work, copyright holders are still able to use other areas of the law, such as defamation, to prevent these works from being made available or receive damages.¹³⁸ In addition, copyright holders' moral rights, such as the right to integrity of authorship, are protected under copyright law.¹³⁹ However, it can be argued that the author's right to not have their work subjected to derogatory treatment is at odds with an offensive parody. In the discussion paper on the introduction of moral rights, it was stated that '[t]he moral right of integrity is not intended to stifle satire, spoof or the lampooning of a work or film', but '[i]t is acknowledged that there may be borderline cases'.¹⁴⁰ It is likely that generally a parody or satire will not usually be an infringement of the moral rights of the author. However, the scope of these 'borderline cases' and the precise interplay between moral rights and the parody or satire exception is unclear.¹⁴¹ In addition, there is an argument that a parody or satire exception is only fair when there is sufficient acknowledgement of the original work in the parody. However, parody by its very nature requires an

133 Van Hecke, above n 124, 485–8.

134 *Glyn v Watson* [1916] 1 Ch 261, 268 (Younger J).

135 Faaland, above n 59, 191: 'When a parody victim sues, one may wonder then what was really hurt: copyright or pride.'

136 *Acuff-Rose*, 510 US 569, 598 (1994).

137 Attorney-General's Department, Submission No 69A, above n 106, 3.

138 Gowers, above n 87, 68.

139 *Copyright Act* pt IX div 4.

140 Australian Government, *Proposed Moral Rights Legislation for Copyright Creators* (Discussion Paper, June 1994) 49.

141 A lengthy analysis of the interplay between parody and satire and moral rights is beyond the scope of this article. For a more detailed academic analysis, see Maree Sainsbury, 'Parody, Satire, Honour and Reputation: The Interplay between Economic and Moral Rights' 18 *Australian Intellectual Property Journal* 149.

obvious link to be drawn to the original work. To require a parodist to explicitly reference the original work may be counterproductive to the purposes of the parodist.¹⁴²

D An Arbitrary Distinction

The US courts have applied a binary target or weapon distinction to their consideration of parodies under fair use. When applied to a particular parody, requiring that the parody target the original work can result in arbitrary and artificial distinctions.¹⁴³ Often a work will be both a parody and satire, and will comment both on the original work and a criticism of an external thing.¹⁴⁴ For instance, in *Acuff-Rose*, 2 Live Crew's song 'Pretty Woman' could be seen both as a comment on society, popular notions of romantic love, and on the naivety of the Roy Orbison version.¹⁴⁵ As the Court in *Acuff-Rose* noted, 'parody often shades into satire when society is lampooned through its creative artifacts'.¹⁴⁶ In another famous example, *The Wind Done Gone*, the famous novel *Gone with the Wind* was written from a slave's perspective. It was found to be both a critique of *Gone with the Wind* and the popular understanding of the South.¹⁴⁷ In both these cases, the US courts found the second work to be a parody. On the other hand, 'The Cat Not in the Hat' in *Dr Seuss* was found to be a satire, as it was not closely targeted to criticise the Dr Seuss original. Yet this satire could be equally seen to be commenting on the naivety of the Dr Seuss style. The distinction is difficult for even literary theorists to apply.¹⁴⁸ Courts are ill equipped to make this decision and their decisions have led to allegations of led to arbitrary judicial line drawing¹⁴⁹ or even could lead to post hoc rationalisations to save favoured

142 Alina Walsh, 'Parody of Intellectual Property: Prospects for a Fair Use/Dealing Defence in the United Kingdom' (2010) 21 *International Company and Commercial Law Review* 386, 388. Walsh argues that the criticism defence is highly inappropriate for parody:

'Given the nature of parody, [sufficient acknowledgement] is not practical. The point of "dislocating" the material lies in the ability of the public to identify the original work and observe exaggerated discrepancies. The inference of the criticism and the element of surprise make parody amusing. Once this is taken, the parody is significantly weakened, if not destroyed.'

However, as Spence argues 'it is an open question whether many parodies would contain "sufficient acknowledgement" to qualify for protection': above n 7, 596–7. See also D'Agostino, above n 45, 360.

143 Suzor, above n 121, 239.

144 Brennan states that 'all parody must pass some implied comment on its primary material by the mere selection of that material': David J Brennan, 'Copyright and Parody in Australia: Some Thoughts on *Suntrust Bank v Houghton Mifflin Company*' (2002) 13 *Australian Intellectual Property Journal* 161, 166.

145 Merges, above n 115, 311. See also Sainsbury, above n 12, 296.

146 *Acuff-Rose*, 510 US 569, 581 (1994).

147 *Suntrust Bank v Houghton Mifflin*, 268 F 3d 1257 (11th Cir, 2001).

148 Craig, above n 84, 186.

149 Vogel, above n 36, 312–3. Vogel states that 'distinguishing between parodies and satires involves arbitrary judicial line-drawing ... [B]y defining parody broadly or narrowly, courts can subjectively accord or deny fair use to any alleged parodic work.' See also Piele, above n 101, 98. Keller and Tushnet argue that the distinction between parody and satire is in the eye of the presiding judge and that lawyers can manipulate the distinction between parody and satire to argue their case, thereby making the subtle literary distinction even more obscure: Keller and Tushnet, above n 27, 987–8, 990, 992, 994.

parodists from liability.¹⁵⁰ The difficulties with the distinction have been acknowledged by proponents of the weapon/target distinction, including Posner.¹⁵¹

V CONCLUSION: THE 'FAIRNESS' FACTORS

There are therefore strong fair dealing and policy arguments behind the inclusion of *both* weapon and target parodies as a form of fair dealing. The most substantial difference in the application of the policy arguments to weapon and target parodies is the justification behind the criticism element. Target criticism policy recognises the importance of not allowing an author to suppress criticism of their work. Weapon criticism policy recognises the value of parody as a medium for social commentary and criticism generally. Due to the different justifications, there may well be merit to the suggestion that there should be a difference in the remedies available to copyright holders for weapon and target parodies. Michael Spence and David Brennan both argue that weapon parodies should not receive a full exception, but that in certain circumstances there should be no 'control'-type remedies, such as an injunction or an account of profits.¹⁵² However, this distinction has not been specifically drawn by the Australian, UK or Canadian governments. Rather, the new or proposed parody or satire exceptions provide that once a parody is classed as a fair dealing, it is not an infringement of copyright to use an original work for the purpose of parody.

However, the conclusion that parodies may validly be a form of fair dealing does not lead to the implication that every weapon parody will be excepted from infringement. The use of the original work must also be *fair*. It may well be that in practice, weapon parodies, particularly if they are created for commercial purposes, purely for the purposes of entertainment, or do not transform the original in any meaningful sense, will rarely be fair dealing. These factors may lead to market substitution, disincentives to the author or a failure to be sufficiently critical. Rather than excluding weapon parodies entirely from fair dealing as some form of threshold test, the court will consider the particular circumstances of each parody. A weapon parody would not be considered a fair dealing without a favourable balance of the fairness factors.¹⁵³ Ironically, this appears to have been the original intention of Souter J in *Acuff-Rose*. Justice Souter stated that 'parody may or may not be fair use, and ... [the] suggestion that any parodic use is presumptively fair has no [merit] ... Accordingly, parody,

150 Brennan, above n 144, 167. Brennan cites Kennedy J in *Acuff-Rose*, 510 US 569, 600 (1994), who states that '[a]s future courts apply our fair use analysis, they must take care to ensure that not just any commercial takeoff is rationalized *post hoc* as a parody.'

151 Posner, above n 7, 71 states that there 'may of course be problems in distinguishing these uses and of overlaps between them.'

152 Spence, above n 7, 618; Brennan, above n 144, 167.

153 See Vogel, above n 36, 317-8; Piele above n 101, 99.

like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.¹⁵⁴

This article has argued that Australia, Canada and the UK have chosen on policy grounds not to implement the weapon or target distinction in their introduction or proposal for an exception for parody or satire. These developments have shifted away from a key requirement in the US jurisprudence that a parody must target the original work. Allowing both weapon and target parodies to be considered as a fair dealing will hopefully prevent arbitrary distinctions and categorisations of parodies. This development has been based on sound policy considerations and is consistent with fair dealing and fair use principles. Beyond factors such as market substitution and market failure, the UK, Canadian and Australian developments have emphasised the value to society of weapon parodies, both as a creative and comedic form of social criticism. When the courts eventually consider the new fair dealing exceptions, hopefully their analysis will recognise a broader parody exception than has existed under the US fair use doctrine. In doing so, the courts would implement the legislative intention to recognise the inherent value of these weapon parodies, both through their creative and comic contribution to society and their importance as a form of valid social criticism and commentary.

154 *Acuff-Rose*, 510 US 569, 581 (1994).