FAIR USE AFTER BILL C-11: THE DEVELOPMENT OF THE PARODY AND SATIRE DEFENSE IN CANADIAN, US, AND INTERNATIONAL COPYRIGHT LAW

By: Michael Rosen

With the passage of Bill C-11 in June 2012, the Canadian Parliament substantially expanded the previously limited “fair dealing” exception to copyright laws by including parody, satire, and education as specifically delineated categories of protection. In the process, it may have surpassed, in these specific circumstances, the more liberal approach taken by US lawmakers and courts in the “fair use” doctrine. With the changes in the Copyright Act only going into effect as recently as November 2012, judicial interpretation has yet to take place. However, this paper will examine how the statutory inclusion of “satire,” (defined as “a thing, fact, or circumstance that has the effect of making some person or thing ridiculous” and in a legal context refers to the fact that the target of criticism is a third party), a protection that is generally not recognized in American law, may transform Canadian law to a newly permissible state. A similar provision from Australian law may also provide guidance, and is analyzed further. It also demonstrates how Canadian courts have led the way in recent years in expanding the interpretation of fair dealing, and how the addition of three new concepts carves out unique exceptions to the protection of copyright.

---

1 Bill C-11, An Act to amend the Copyright Act, 1st Sess, 41st Parl, 2011 (assented to 29 June 2012) [C-11].
2 RSC 1985, c-42 [CCA].
3 The Oxford English Dictionary, 2d ed, sub verbo, “satire”.
Historic Canadian Approach to Fair Dealing

A fair dealing exception has been a part of Canadian copyright law since the passing of the Copyright Act\(^4\) in 1921, but its application was interpreted narrowly by the courts for most of its existence. The language was largely imported untouched from the British Copyright Act, 1911 (along with many other Commonwealth countries).\(^5\) The exception declared that copyright is not infringed by “[a]ny fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary.” It was subsequently amended twice, once in 1988 and again in 1997, to distinguish research and private study with criticism, review and news reporting.\(^6\)

Michelin Man and the Restrictive Approach

The restrictive Canadian approach was typified by the decision of the Federal Court in Michelin & Cie v CAW-Canada\(^7\), the first, and possibly only, case that specifically considered whether the historical fair dealing defence includes parody.\(^8\) In that case the court denied a union’s claim that its parody of the Michelin’s logo and Tire Man (“Bibendum”) in pamphlets as part of a unionization drive was fair dealing, and awarded damages and an injunction. Writing for the court, Teitelbaum J held that “exceptions to copyright infringement should be strictly interpreted.”\(^9\) The court also wrote that for fair dealing to apply the defendant must explicitly define the source of the originating work, and concluded that the nature of parody did not imply

---

\(^4\) SC 1921, c 24, s 16(1)(i).
\(^5\) David Vaver, Copyright Law (Toronto: Irwin Law, 2000).
\(^9\) Ibid at 236.
the source. The court took the position that parody is not a form of criticism that is protected by law, noting a longstanding tradition in Canadian courts to that effect while specifically rejecting the more permissive American approach. Indeed, the court in Michelin asserted that freedom of expression as guaranteed in the Charter of Rights and Freedoms\textsuperscript{10} does not override copyright, stating “[t]he Charter does not confer the right to use private property – the plaintiff’s copyright – in the service of freedom of expression”.\textsuperscript{11} Teitelbaum J further stated that even if there were an infringement, it would be justifiable under a section 1 analysis.

Interestingly, a ruling by the Quebec Court of Appeal in its 1999 decision Productions Avanti Cine-Video v Favreau\textsuperscript{12} seemed to recognize that parody could potentially be fair dealing, but applied a similarly restrictive standard. In that case, the defendant had produced and sold a pornographic video that was a thinly veiled imitation of a hugely popular Quebec television comedy series called La Petite Vie. The filmmaker had made minor modifications to the plaintiff’s title in making his own, and had used the same characters and distinctive setting of the television series. The unanimous court rejected his claim that his use was fair dealing for criticism and review, with Rothman J writing in his concurrence that “simply adding pornographic activity as a storyline for characters that have been appropriated from another writer’s work does not, in my opinion, constitute parody or fair use of that material.”\textsuperscript{13}

\textbf{CCH Canadian Ruling}

The most significant reinterpretation of copyright law before Bill C-11 took place in 2004 with the Supreme Court of Canada’s unanimous decision in \textit{CCH Canadian Ltd v Law Society of}
The Law Society’s Osgoode library photocopied single reports for study by request, and provided a photocopy machine that allowed patrons to make copies. Among the many important comments made by the court in its decision, the court significantly expanded the fair dealing exception. Chief Justice McLachlin, writing for the court, said that in order to maintain the “proper balance between the rights of a copyright owner and users’ interests” exceptions “must not be interpreted restrictively”\(^\text{15}\), a direct departure from earlier decisions, including *Michelin*. The court held that that to make out the fair dealing exception under section 29 of the *Copyright Act*, the defendant had the onus to prove that the dealing was a) for the purpose of either research or private study and b) fair. The court endorsed the Federal Court of Appeals\(^\text{16}\) six factors: i) the purpose of the dealing, ii) the character of the dealing, iii) the amount of dealing, iv) possible alternative actions available, v) the nature of the work being copied, and vi) the effect of the dealing on the work. The factors are roughly analogous to the four statutory factors codified in American law (see below). The court went further still in elevating the concept of fair dealing beyond a defence to a “user right,”\(^\text{17}\) a significant shift in the understanding of fair dealing, and one that is likely beyond the status American courts have granted to fair use. The court also specifically rejected the availability of a license as a factor to consider in fair dealing cases.\(^\text{18}\) Carys J. Craig sees the decision as part of a growing movement in the courts, and elsewhere, that saw fair dealing playing a crucial role in the public interest.\(^\text{19}\)


\(^\text{15}\) *Ibid* at para 48.


\(^\text{17}\) *Supra* note 14 at 316.

\(^\text{18}\) *Supra* note 14 at para 70.

Arguably, the Canadian fair dealing provision had now become much closer to the U.S.’s fair use, with a far more expansive and flexible approach given to copyright exceptions.

Some have argued that after *CCH* (and before C-11), parody became a protected category. 20 D’Agostino argues that reading the court’s liberal approach, when coupled with its approval of the more flexible American attitude, suggests that “new purposes, including parody, could be included under the CCA’s enumerated grounds.”21 Taking a different approach, Mohammed concludes that by applying Charter values, namely the freedom of expression, to the Supreme Court’s decision in *CCH*, Canadian courts should interpret fair dealing to include parody.22 His approach may have been supported by a more recent Supreme Court decision in which the court stated that the “the law must accommodate commentators such as the satirist or the cartoonist who seizes on a point of view… and blows it into an outlandish caricature for public edification or merriment,”23 although that case involved a defamation action rather than copyright infringement. These arguments are not easily made out, however. As Fewer notes, courts have rarely allowed challenges to the property rights embedded in copyright law with Charter challenges of freedom of expression (an argument in American law would similarly be dismissed).24 Furthermore, Reynolds argues that both of these approaches implicitly assume the parodies are necessarily critical of their source material, a position that is simply untenable because of the many parodies that do not serve that purpose, and thus were not protected under

---

21 Supra note 7 at 324.
22 Mohammed, supra note 20.
24 David Fewer, “Constitutionalizing Copyright: Freedom of Expression and the Boundary of Copyright in Canada” 55 U of T Faculty of Law R (1997). 175, at 206-8
Canadian law at the time.\textsuperscript{25} Perhaps most decisively rejecting arguments in favour of a parody defense based on the old \textit{Copyright Act} was the recent decision of the British Columbia Supreme Court in \textit{Canwest v Horizon}.\textsuperscript{26} In that case the court tersely rejected a defense of parody to a copyright violation based on \textit{Michelin}, stating “parody is not a defence to a copyright claim.”\textsuperscript{27} The court did not refer to \textit{CCH} in its decision, however, and perhaps a court more willing to follow the non-restrictive spirit of that ruling would have found differently. The point became moot, however, when Parliament amended the fair dealing law and explicitly added the three new exceptions in 2012.

\textbf{The American Fair Use Doctrine}

\textbf{Development of the Parody Defense}

American jurisprudence has long recognized some limitations to copyright protection. In the 1841 case of \textit{Folsom v Marsh},\textsuperscript{28} the plaintiff won a judgement after the defendant copied 388 pages of material from the plaintiff’s work. The court noted that there could be “justifiable use of the original material such as the law recognizes as no infringement of the copyright of the plaintiff” and specified a number of factors to determine this, including the nature and quantity of the infringement, and the degree to which it may diminish profits. American courts relied on these principles for the next 135 years until Congress formally adopted the rules in USC section 107.\textsuperscript{29}

\begin{footnotes}
\item[26] 2008 BCSC 1609, 173 ACWS (3d) 431.
\item[27] \textit{Ibid} at para 15.
\item[28] 9 F Cas 342 (CCD Mass 1841).
\item[29] Roger E Schechter, John R Thomas, \textit{Principles of Copyright Law} (St. Paul: Thomson Reuters) 433 \{Schechter\}.
\end{footnotes}
Unlike Canadian law, which provides a narrowly worded, closed list of fair dealing and only after would the court engaged in its six-factor CCH test, American fair use doctrine is far more open-ended. The statute merely lists examples of specific activities that constitute fair use, which follow after it writes “such as”. Decisions instead rely chiefly with dealing with the four criteria specified in section 107: 1) the purpose and character of the use 2) the nature of the copyrighted work 3) the proportion of the work used 4) the effect the use will have on the potential market. One judge went so far as to complain that the “doctrine is entirely equitable and is so flexible as virtually to defy definition.”

Parody was finally ensconced in American law as a potential fair use with the landmark Supreme Court decision in Campbell v Acuff-Rose Music, Inc. Previously, courts displayed a persistent inconsistency in their application of the defence. In Walt Disney Productions v Air Pirates, the Ninth Circuit found that a comic book that depicted Mickey Mouse as a sexually promiscuous drug smuggler was not protected by the fair use defense. Other courts found otherwise. In Elsmere Music, Inc v National Broadcasting Co., the Second Circuit ruled that a Saturday Night Live parody of the New York advertising jingle “I Love New York”, instead using “I Love Sodom”, was fair use.

The Campbell Decision and Parody as a Transformative Work

In Campbell, the court did not find that parody was a per se defense, but finally ruled that parody was unequivocally available as a potential defence. In the case, the rap group 2 Live Crew had written a satirical version of Roy Orbison’s 1964 song “Oh, Pretty Woman.”

---

31 510 US 569, 114 S. Ct. 1164, 127 L.Ed.2d 500 (1994) [Campbell].
32 Supra Schechter note 29 at 477.
34 623 F.2d 252 (2d Cir. 1980).
parody version used the same drum beat and distinctive bass line, but substituted its own words in place of Orbison’s. Moving away from previous jurisprudence that stressed the commercial nature of the parody considered under the first factor, and thus invariably disallowed the usually commercial parodies, the court instead opted for a more balanced approach that primarily examined the “transformative” nature of the work. This provided a social benefit, akin to that provided by comment and criticism. The court found that it would be reasonable to perceive the song as commenting or criticizing the original song, and thus held it not to be an infringement.

The court did not, however, go so far as to include satire as a permitted form of fair dealing. If the new work “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 other factors, such as whether it would be used commercially, play a greater role.35 As Schechter and Thomas explain, the concern is that only in cases of parody would an original author be less likely to grant license, thus making a fair use defense more important than in a case of satire, where, at least in theory, a creator would be willing to grant license.36 This argument, which certainly has been made by others to justify the distinction, seems odd when pointing to examples such as “Weird Al” Yankovic, who has long been able to secure licenses for his musical parodies of popular music hits.37

Two cases following Campbell illustrate the distinction made by the court that required the parody to, at least in part, target the copyrighted work. In Dr Suess Enterprises v Penguin Books USA, Inc38, the defendant had retold the story of the O.J. Simpson murder trial in the

35 Supra Campbell note 31 at 580.
36 Supra Schechter note 29 at 478.
38 109 F.3d 1394 (9th Cir. 1997) [Dr Suess].
distinctive writing and graphic style of Dr. Seuss, the legendary children’s book author, entitled *The Cat NOT in the Hat*. The court refused to consider the more generous fair use clauses for the defendant after concluding that the book was a satire on the events of the Simpson trial, and not a parody of Dr. Seuss’s works. The alternative result was found in *Leibovitz v Paramount Pictures.* In that case, the defendants had created a promotional campaign for the movie *Naked Gun 33 1/3* featuring Leslie Neilsen, the star of the film, with his head superimposed over a pregnant woman. The image was very similar to a controversial picture that graced the cover of *Vanity Fair* by the celebrity photographer Annie Leibovitz took of an 8-month pregnant Demi Moore. The court held that the work was a true parody that took direct aim at the Moore photograph, and disregarded the commercial nature of the poster. A similar ruling was made by the Ninth Circuit in *Mattel, Inc v Walking Mountain Prods.*

The courts may also consider the second, third, and fourth factors, but their usefulness is marginal. The second factor was deemed largely irrelevant for the purpose of parodies by the court in *Campbell*, reflecting the need of parodists to borrow from fictional works (which usually are more likely to be protected than non-fictional ones). The third factor, the amount the parody may take from the original, has attracted some controversy. By necessity the parody must obviously borrow significantly to achieve its goal. The courts have generally held that the parody should contain no more than is necessary to recall the object of satire. For the fourth factor, the market effect, courts will nearly always find in favour of the defendant, short of straight copying. Notably, a 2003 lower court decision held that “once a work is determined to be a

---

40 353 F.3d 792 (9th Cir. 2003).
41 Supra note 31 at 579.
parody, the second, third, and fourth factors are unlikely to militate against a finding of fair use.”

Criticism and Interpretation of the Campbell Decision

However, the distinction of parody and satire made by the Supreme Court in Campbell is perhaps not as entirely precise as it may seem. Marshall and Siciliano argue that the court weakened the dichotomy by writing in a footnote that if there is “little or no risk of market substitution” based on greater transformation, “minimal distribution”, or the “small extent” it borrows from the original, looser forms of parody or even “satire.” Therefore, satirical work that does not target the original may be considered fair use if there is little chance consumers would find it a commercial substitute or only a little of the original is used. For many parodies, if not all, there seems to be little reason to be concerned a parody could ever serve as a commercial subsidy. It can safely be said that no parent would buy the profane parody written by the defendant in Dr Suess instead of the beloved children author’s works. Nevertheless, many courts seem to have eschewed the reasoned approach of Campbell for a bright line test dividing parody and satire. This has had the notable effect of encouraging creative arguments characterizing works as parodies of the original, as opposed to satire.

For example, in the case MasterCard Int’l Inc v Nader 2000 Primary Comm, the court held in summary judgement that an advertisement for Ralph Nader’s presidential campaign that used the unmistakeable “there’s some things money can’t buy” to comment on his rivals’

---

spending habits was in fact a parody of the MasterCard commercial.\(^{47}\) This was despite the ad’s ostensible purpose of criticizing his political opponents. The court held it could be reasonably conceived that the ad was commenting on the commercial, and quotes approvingly from the defendant’s factum that the defendant’s commercial “wittingly comments on the craft of the original, “‘which cloaks its materialistic message in warm, sugar-coated imagery that purports to elevate intangible values over the monetary values it in fact hawks.’”\(^{48}\) Thus the court concluded that the threshold inquiry was not whether the work was a parody or a satire, but whether it could be conceived that the work had any elements of parody to it at all. This flexible approach is tempered by the fact that a finding that the work is parody leads to immediate protection. Instead, a work that only weakly targets the original work means that other factors may become more relevant instead.

The distinction has led to much academic criticism. Ochoa notes that “drawing a distinction between ‘weapon’ and ‘target’ parody would… allow the copyright holder to censor satirical opinion with which he or she disagrees.”\(^{49}\) As Merges observes, the economic assumptions that a copyright holder would grant license in the case of satire is unlikely “where the target of the parody is a set of values or cultural assumptions deeply cherished by the copyright holder.”\(^{50}\) As the fair dealing exception works to balance the protections of copyright

---

\(^{47}\) Available online at: [http://www.youtube.com/watch?v=j4Qaf6yeymc.](http://www.youtube.com/watch?v=j4Qaf6yeymc)

\(^{48}\) Ibid at 43.

\(^{49}\) Tyler T Ochoa, *Dr. Suess, the Juice and Fair Use: How the Grinch Silenced a Parody* 45 J Copyright Society 546 (1998).

with the need for allowing new works that are in the public interest, such a distinction seems to be largely indefensible.\footnote{See also Roger L. Zissu, “Funny is Fair: The Case for According Increased Value to Humor in Copyright Fair Use Analysis”, (2008) 55 J Copyright Society USA 393, 393-94; Geri J Yonover, “The Precarious Balance: Moral Rights, Parody, and Fair Use (1996) 14 Cardozo Arts & Ent LJ 79.}

**Bill C-11 and the Updated Canadian Approach**

In 2011, the Conservative government introduce Bill C-11, “An Act to amend the Copyright Act,” and received its first reading on September 29, 2011. Unlike Bill C-32, the earlier precursor to Bill C-11 which died on the Order Paper following the dissolution of Parliament for elections in March 2011, Bill C-11 received royal assent on June 29, 2012. Among the many important changes made to copyright law, the bill repealed section 29 of the Copyright Act, the fair dealing section, and reintroduced it with the addition of “satire,” “parody,” and “education”, thereby removing any academic debate about the status of parody in fair dealing law:

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

It also protected satire, which was certainly not included in the statute. Parliament stopped short of adding a “such as” clause, followed by the six factors identified in CCH, that would bring Canada firmly in line with the more open-ended approach of the American fair use provisions. However, Canadian courts will not need to engage in the strained analysis identifying which side of parody and satire a work lies on. They will still need to undergo the six factors of CCH, which are roughly similar to the four factors from USC section 107.

With Bill C-11 so newly introduced, only coming into force on November 7,\footnote{See also Roger L. Zissu, “Funny is Fair: The Case for According Increased Value to Humor in Copyright Fair Use Analysis”, (2008) 55 J Copyright Society USA 393, 393-94; Geri J Yonover, “The Precarious Balance: Moral Rights, Parody, and Fair Use (1996) 14 Cardozo Arts & Ent LJ 79.} an examination of the background of the bill may be helpful as background. In 2005, the Liberals
under Paul Martin introduced Bill C-60 to amend the Copyright Act, but the bill failed after the dissolution of Parliament later that year. Notably it did not contain amendments for the fair dealing section. Bill C-61 was introduced to Parliament by the now governing Conservative party in June 2008, and also lacked additional parts for the fair dealing section. The bill was met by mixed reviews. After the dissolution of Parliament, the act once again failed to pass. In 2009, the government held consultations with the public on the Copyright Act. There was broad support from public interveners and submissions supporting the inclusion of a specific fair dealing right of parody and satire. Geist notes numerous consumer protection provisions that were eventually added, including parody and satire, after an increasingly vocal public advocated for expanded rights. The Conservatives then introduced Bill C-32, and on November 5 it passed a second reading and was referred to committee for further consultations. Provisions such as the technological protection measures (“TPMs”), the addition of “education” to fair dealing exceptions, and the “notice and notice” rules for ISPs received the most attention as the more controversial part of the bill. With Bill C-11 passing with the same provisions, the consultations surrounding both are relevant to a discussion of the new terms.

After the second reading, the addition of parody and satire seemed to be generally uncontroversial in Hansard, and did not attract considerable comment in the Senate. The Hon. Christian Paradis, speaking for the majority Conservatives, said the Bill would “balances the interests of the various stakeholders.” Some NDP members expressed a concern that the lack of

55 Michael Geist, “The Battle over C-11 Concludes: How Thousands of Canadians Changed The Copyright Debate” online: http://www.michaelgeist.ca/content/view/6544/125/.
detail in the fair dealing section would lead to litigation. When it went before the Legislative Committee on Bill C-11 and the Legislative Committee on Bill C-32, the parody and satire exceptions enjoyed support, but invited criticism from a few artist and creator groups. In opposition was Canadian Artists Representation Copyright Collective, who argued that the provision would weaken artists’ moral rights, while doing nothing to help satirists who “have flourished without an exception to copyright” and “parody and satire exceptions have invited protracted, expensive, and inconclusive litigation.” The President of the Canadian Independent Music Association expressed concern that the lack of definition for satire and parody would mean limitless protections for infringement of the moral rights of performers. Such a concern does not seem to be well-founded, however. As one speaker noted, there have been many parodic and satirical materials produced in Canada prior to the change. This demonstrated the exceptions were not needed. But it may be pointed out that a lack of litigation does not prove they were unneeded. As Professor De Beer submitted at the hearing, the possibility of litigation is not a sound reason to reject their inclusion in protection as a fair dealing in Canadian copyright law. As with many new statutes of this kind, the likelihood of the courts having to clarify the law is a perfectly reasonable expectation.

What the precise limits and extent Canadian law will extend to satire and parody remains to be seen. Of course, there have been many productions and works in Canada that are parodies and satires long before their enactment into fair dealing. Popular television series such as SCTV, Wayne & Shuster and This Hour Has Twenty Minutes all skewered and mocked productions that were obviously protected under copyright law. Courts will not need to undertake the sometimes

---

57 House of Commons, Legislative Committee on Bill C-11, “Committee Meetings Evidence” (February 2012) (Chair: Glenn Thibeault).
artificial undertaking of dividing parody from satire that is the case in America. One suspects that the CCH decision predicts a shift toward recognizing broad parody and satire rights.

**Parody Internationally**

**Worldwide**

Some direction for Canadian law may be taken from other jurisdictions that have enacted legislation, or have left the door open for courts to allow, parodies of copyrighted material. The Berne Convention\(^ {58} \) contains no specific provision that protects parodies. However, Article 2(4) states that adaptations should be protected as original works, without prejudice to the copyright in the original work, and thus parody is widely accepted as a permitted use.\(^ {59} \) Some civil law countries, such as France, Belgium and Spain, provide exemptions in certain circumstances for parodies.\(^ {60} \) The E.C. Copyright in the Information Society Directive specifically allows for exemptions in cases of “use for the purpose of caricature, parody or pastiche”\(^ {61} \) which is quite similar to the language in France’s Intellectual Property Code allowing “parody, pastiche and caricature, observing the rules of the genre.”\(^ {62} \)

Spain’s Copyright Act allows that a “parody of disclosed work shall not be considered such a transformation as requires the consent of the author, provided that it embodies no risk of confusion with that work and does no harm to the original work or its author.”\(^ {63} \) The requirement that there be no confusion has some parallels in American law, as the very fundamental aspect of the parody was its “transformative” nature, as well as the need for it not to be substitute of the

---

\(^{58}\) Berne Convention for the Protection of Literary and Artistic Works. (1886, amended 1971) [Berne Convention].


\(^{61}\) EC Copyright in the Information Society Directive article 5(3)(k).


\(^{63}\) Spain, *Copyright Act*, Article 39.
original work. The second requirement of the Spanish law, “does no harm”, is not considered in American jurisprudence. Indeed if the very purpose of a parody is to criticize the original work, then perhaps some harm is necessitated. In common law countries, parody may be subsumed under the general fair use provision. There have been cases that suggest English courts will apply a more generous standard of fair use than to other works, although such an approach need no longer be persuasive for Canadian defendants after the latest amendments. In any event, two 1980s cases firmly rejected the use of parody as a fair dealing – Schweppes v Wellingtons and Williamson Music v The Pearson Partnership. As Burrell and Coleman note, “it now seems reasonable that nascent exception for parodies has been killed off by [these] two judgements…”

Australia

The only comparable common law country that specifically names satire and parody as specific statutory exceptions to copyright laws is Australia. As of 2006, the Australian Copyright Act states a fair dealing with a literary, dramatic, musical or artistic work, or with an adaption of a literary, dramatic or musical work, does not constitute an infringement of copyright in the work if it is “for the purpose” of “parody” or “satire,” as is the case with Canada’s Copyright Act. The terms are not defined in the Act.

The precursor to the change in Australian law was TCN Channel Nine v Network Ten. In that case, known as “The Panel”, a TV show displayed short clips recorded from broadcasts of

---

68 Australia, *Copyright Amendment Act*, 2006, s 41A.
69 *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004), 218 CLR 273, 205 ALR 1 [The Panel].
other networks and used them for discussion by guests and hosts of the program. The result of the case led to much confusion for parodists who, like in Canada, had enjoyed a long and prominent place in Australian humour culture.\textsuperscript{70} The court narrowly restricted the use of “criticism”, “review” and “news” from the fair dealing section, leading to great uncertainty on how parody can be used.\textsuperscript{71} Much criticism centered on the fact that the use clearly could not be a substitute to the original Channel Nine’s new broadcast, both because of its delayed airing and the comedic treatment it would receive.\textsuperscript{72} There were further concerns after the signing of the Australia–United States Free Trade Agreement (AUSFTA) in 2004, which imported the more restrictive components of US intellectual property law while neglecting to counterbalance with the more inclusive ones.\textsuperscript{73}

Following public consultations, a draft of the Copyright Amendment Bill, 2006 was introduced with only limited exceptions for parody and satire. The proposed limitations would allow the use of copyrighted materials for parody and satire only if the use was a special case, it did not conflict with a “normal exploitation of the subject matter,” and the use did not “unreasonably prejudice the legitimate interests of the copyright owner.”\textsuperscript{74} A new section was instead enacted that does not require the proving of the three elements, taking effect on December 11, 2006. It exempted works that were made “for the purpose of parody or satire.”\textsuperscript{75} Suzor identifies three factors that must now be proven if they are held to be fair use.\textsuperscript{76} They are:

\begin{itemize}
\item \textsuperscript{70} Nicolas Suzor, “Where the Bloody Hell Does Parody Fit in Australian Copyright Law?” 13 Media & Arts L Rev (2008) at 218 [Suzor].
\item \textsuperscript{71} Michael Handler & David Rolph, “‘A Real Pea Souper’: The Panel Case And The Development Of The Fair Dealing Defences To Copyright Infringement In Australia” (2003) 27(2) Melbourne University LR 381 at 390.
\item \textsuperscript{72} Supra note 70 at 224.
\item \textsuperscript{73} Australia–United States Free Trade Agreement, opened for signature 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).
\item \textsuperscript{74} As cited in Suzor, supra note 70 at 229.
\item \textsuperscript{75} Copyright Act 1968 (Cth) ss 41A, 103AA.
\item \textsuperscript{76} Supra note 70 at 229
\end{itemize}
a) the copyright owner must show that the parody or satire reproduces a substantial part of the original b) the offending user must show that the use for the purpose of either parody or satire c) finally the user must show that the use of the material was “fair.”

Each can be compared to Canadian law. According to Suzor, Australian courts consider the question of substantiality as a question of fact and degree, with the determination primarily considering the quality, and not the quantity of the portion taken.\textsuperscript{77} Factors to be considered include both intrinsic elements of the work and a contextual inquiry, such as the economic significance and use of the work. This requirement, which predates the amendments, was not widely used by courts to protect parodies, and thus may be an easy threshold to pass, particularly because parodies require reproductions of the nature of the work to make sense.\textsuperscript{78} In the Canadian Supreme Court’s decision in \textit{CCH}, the court identified “the amount of the dealing” to be a factor in determining whether the work infringed on the original. While the court clearly states that a “trivial” amount will not be an infringement, it cites approvingly from \textit{Hubbard} that quantity is not determinative. Instead reference must be made to the purpose of the work, as indeed it may be impossible to criticize or review without use of the “whole work”.\textsuperscript{79} Thus it appears that outside trivial copying, a work must be subjected to a fair dealing examination. However, the difference between Canadian and Australian law is likely irrelevant, since any work that wishes to invoke a defense of parody or satire must by nature make identifiable use of its subject matter. While the amount of copying is similarly unclear in American law (likely it

\textsuperscript{77} \textit{Ladbroke (Football) Ltd v William Hill (Football) Ltd} [1964] 1 WLR 273 at 293; [1964] 1All ER 465.

\textsuperscript{78} \textit{Nationwide News v CAL} (1996) 65 FCR 399 at 418; 136 ALR 273.

\textsuperscript{79} Supra note 16 at para 56.
requires beyond *de minimis* infringement), it was dismissed as a significant factor for the parody analysis used in *Campbell*.

Because parody and satire are not defined in either the Australian or Canadian Act, the court must determine on their own how to interpret the terms. Suzor predicts courts will resort to their dictionary definitions. Australian courts have accepted this as a statutory interpretation method, and have favoured the Australian *Macquarie Dictionary*. Canadian courts have similarly referred to dictionaries for ambiguous or contested words, often the *Oxford English Dictionary*, at least as a starting point and often these definitions can be quite persuasive.

Others have warned that while the dictionary method has merit, it is a reductionist approach since dictionary definitions may be archaically confined to mostly literary practises and ignores newer media types, such as digital works. Instead, they argue the court should supplement its reference of a range of dictionaries with other sources, like expert testimony from practitioners and creators themselves because of the difficulty courts have in judging aesthetic issues.

Whichever way the court decides on its definition, it will then make a factual determination based on this as to whether the work falls within this definition, and is not merely an illegitimate reproduction. Both countries’ amendments state the court need make reference only to the “purpose” of the dealing, instead of its actual effect. This broad wording does not require the court to make artistic judgements, and can include works that are not even targeted at any works in question, but instead are merely for the purpose of satire and parody. A recent

---

80 Schechter, supra note 29 at 378.
82 Ruth Sullivan, *Statutory Interpretation*, 2 ed, (Toronto: Irwin Law, 2007) at 53 – 57. See for example *R v McCraw*, [1991] 3 SCR 72 where the court confirmed its intuition with reference to the *Shorter Oxford English Dictionary* or *R v Hasselwander*, [1993] 2 SCR 398 where the court used the *OED* to establish that an interpretation preferred by court was plausible because it could be grounded in a meaning of a standard dictionary.
event in Australia demonstrates how both the Canadian and Australian amendments are more progressive than American. The cartoonist Bill Leak drew cartoons depicting Kevin Rudd, the then Prime Minister, as the character Tintin. He claimed the works were targeted at Rudd, and not at the Tintin character. The Belgian firm withdrew its complaint after admitting that the new provisions in Australian law protected such creations. In American law, a different outcome presumably would have occurred, but likely not so in Canada anymore.

The final consideration, according to Suzor, is the question of whether it is “fair.” Thus according to Suzor, the court will consider a number of factors depending on the circumstances of the case, including the purpose and character of the use and the nature of the work that is copyrighted. This criteria can be said to be somewhat comparable to the Canadian factors of the character of the dealing, alternatives to the dealing, the nature of the work, and the effect on the dealing. All of these factors are highly contextual, but it does underline the fact that merely claiming parody or satire is not the end of the analysis. The courts should be careful not to unduly restrict the interpretation of the exception to trivial or incomplete parts of the work, as this would essentially negate the use of these provisions.

**Other Issues in Parody and Satire**

There are additional potential protections for the original work which parodists and satirists must carefully consider, including the torts of defamation and passing off, but will not be considered here. One significant caveat that will be considered very briefly is the possible infringement of the moral rights of the original author. Moral rights are non-economic rights that vary by jurisdiction, but generally call for three basic rights: integrity, attribution, and

---

disclosure. The second and third are generally already considered in a fair dealing or fair use claim, so it is integrity rights that are of the most concern here. The United States has traditionally not granted moral rights much protection, if at all. The Visual Artists Rights Act of 1990, passed to ensure American compliance with the Berne Convention’s obligations, is the sole attempt to encode moral rights in the law. The rights are only extended to undisputed works of visual art. Therefore, despite the longtime recognition of the parody defense, American jurisprudence provides little guidance for Canadian law, which has much more significant protections.

Australian law may provide more direction. When it introduced moral rights into its Copyright Act in 1968, its Attorney General was careful to note that these rights were not intended to affect satire and parody rights. Australian academics have argued that even derogatory treatments of works should be protected under parody and satire, since their very purpose is the critique and criticism of the work in question. This approach would seem likely in the Canadian context, because it would make little sense to amend the fair dealing section and then heavily regulate them with an expansive interpretation of moral rights. Thus, it seems unlikely that moral rights will greatly impede the rights to parody and satire.

85 Supra note 29 at 266.
86 Supra note 29 at 270.