

## EU AND US PERSPECTIVES ON FAIR DEALING FOR THE PURPOSE OF PARODY OR SATIRE

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### I INTRODUCTION

Despite being a statutory topic,<sup>1</sup> copyright has a strong common law flavour. Determining the ordinary and natural meanings<sup>2</sup> of the words of the *Copyright Act 1968* (Cth) is, as in so many contexts, only the beginning of the analysis.<sup>3</sup> Certainly, the meanings of many key statutory terms – ‘original’, ‘work’, ‘literary’, ‘idea’, ‘expression’, ‘publication’, ‘substantial part’, ‘authorise’, ‘in public’ and so on – are notoriously difficult to pin down. And sometimes, the specific terms used in the copyright legislation seem only lightly to influence judicial analysis. The important term ‘original’ is an example. When *Walter v Lane* was decided,<sup>4</sup> for instance, the governing legislation did not expressly require works to be ‘original’ to qualify for copyright protection.<sup>5</sup> The subsequent inclusion of that term in the *Copyright Act 1911*<sup>6</sup> in itself made little difference to

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1 *Copyright Act 1968* (Cth) s 8: ‘Copyright does not subsist otherwise than by virtue of this Act’. The common law right in unpublished works was abolished with the codification of copyright law by the *Copyright Act 1911*, 1 & 2 Geo 5, c 46, which became law in Australia under the *Copyright Act 1912* (Cth) s 8.

2 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 162 (Higgins J).

3 See D C Pierce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2011) 27, quoting *Reid v Reid* [1979] 1 NZLR 572, 594 (Cooke J): ‘[t]he natural and ordinary meaning of what is actually said ... [in legislation is] the *starting point*’ (emphasis added).

4 [1900] AC 539, the famous case about the subsistence of copyright in journalists’ edited transcriptions of a politician’s speeches.

5 The applicable legislation was the *Copyright Act 1842*, 5 & 6 Vict, c 45.

6 *Copyright Act 1911*, 1 & 2 Geo 5, c 46, s 1(1), adopted in Australia by the *Copyright Act 1912* (Cth) s 8.

courts' analysis of the subsistence of copyright.<sup>7</sup> In the construction of copyright statutes, courts often seem to be reaching 'through' the statutory text and engaging with deeper questions of copyright policy.<sup>8</sup>

This article concerns the interpretation of the defence of fair dealing 'for the purpose of parody or satire',<sup>9</sup> a defence that was added to the *Copyright Act 1968* (Cth) in 2006.<sup>10</sup> It is not yet known how the defence will be applied. The *Copyright Act 1968* (Cth) provides no definition of 'parody or satire'; no cases have considered the meaning of parody or satire in this statutory context; and official sources provide little interpretive guidance on the meaning of these

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7 See, eg, *Sawkins v Hyperion Records Ltd* [2005] 1 WLR 3281, 3289 [33] (Mummery LJ): 'The essential elements of originality were expounded by the House of Lords over a century ago in *Walter v Lane* [1900] AC 539, a decision on the *Copyright Act 1842* (5 & 6 Vict c 45). It remains good law'. See also *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 ('*IceTV*') in which Gummow, Hayne and Heydon JJ referred to an argument by the Digital Alliance as to the standard of creativity required for subsistence of copyright, and then observed: 'It is by no means apparent that the law even before the 1911 Act was to any different effect to that for which the Digital Alliance contends': at 516 [188].

8 See generally Jane C Ginsburg, "'*Une Chose Publique*'? The Author's Domain and the Public Domain in Early British, French, and US Copyright Law' (2006) 65 *Cambridge Law Journal* 636, discussing cases in which judges have appeared to go beyond the text of copyright legislation in order to provide authors with broad protections. Moreover, courts' understanding of key copyright concepts can shift over time, as their appreciation of the various interests at stake evolves, even if the statutory terms remain the same: see, eg, *Lucasfilm Ltd v Ainsworth* [2012] 1 AC 208, 227–8 (Lord Walker SCJ and Lord Collins) rejecting earlier interpretations of the meaning of 'sculpture' and noting that 'the court should not ... encourage the boundaries of full copyright protection to creep outwards': at 228 [48].

9 *Copyright Act 1968* (Cth) s 41A provides that '[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'. Section 103AA provides an equivalent fair dealing defence for an 'audio-visual item' or 'any work or other audio-visual item included in the item'. Section 100A defines an 'audio-visual item' to mean 'a sound recording, a cinematograph film, a sound broadcast or a television broadcast'. Though there are two sets of defences, the first for 'works', the second for 'audio-visual' items, in this article, the singular will be used. The analysis below applies to 'works' and, as relevant, subject matter other than works. In addition, for ease of understanding, fair dealing for the purposes of 'parody or satire' is treated in this article as a single defence. Cf P Cruz Villalón, 'Opinion of Advocate General Villalón', Submission in *Deckmyn v Vandersteen* (Court of Justice of the European Union, Grand Chamber, C-201/13, 3 September 2014) [42] ('*Deckmyn*'), stating that the Belgium accepted (in argument) that the distinction between 'parody', 'caricature' and 'pastiche' in the *Council and Parliament Directive 2001/29/EC of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* [2001] OJ L 167/10 ('*EU Copyright Directive*') 'must not play a role in the definition of parody, stating that the three concepts are too similar for it to be possible to distinguish between them'. This is further discussed in Part III, below.

10 *Copyright Amendment Act 2006* (Cth) sch 6 pt 3 items 9A–9B, inserting *Copyright Act 1968* (Cth) ss 41A, 103AA.

terms.<sup>11</sup> Section 15AA of the *Acts Interpretation Act 1901* (Cth) requires that '[i]n interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation'. But the long title of the *Copyright Act 1968* (Cth) – 'An Act relating to copyright and the protection of certain performances, and for other purposes' – offers no real guidance, and judicial statements as to the legislative purpose tend to paint with a broad brush.<sup>12</sup> Compounding the interpretive difficulties is the requirement that any dealing for the purpose of 'parody or satire' also be 'fair'. In the Anglo-Australian copyright tradition, fair dealing seems to exemplify what Gleeson CJ has described as a legislative standard directed at accommodating competing interests.<sup>13</sup> In *IceTV*, Gummow, Hayne and Heydon JJ appeared to confirm that much of copyright law is of this character, with their reference to 'the imprecision of criteria devised by legislatures' to achieve an accommodation between the various interests copyright legislation affects.<sup>14</sup> The interpretation of the scope of the defence is likely to be iterative and incremental. Consistent with copyright's common law character, the scope of the defence will be usefully informed by an appreciation of legislative history, analogous precedents and comparative analysis.<sup>15</sup>

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- 11 Official sources included: Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth); Attorney-General's Department (Cth), 'Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age' (Issues Paper, May 2005) ('Fair Use Issues Paper'); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Provisions of the Copyright Amendment Bill 2006* (2006). None provided any detailed guidance as to the scope of the parody/satire fair dealing defence. The 2013 report by the Australian Law Reform Commission ('ALRC'), which recommended the enactment of a US-style fair use defence with 'parody or satire' to be listed among a number of illustrative fair uses, is likely to generate further interest: Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013) 150. If the Commonwealth does not accept the fair use recommendation, the ALRC advocates the retention of the existing parody/satire fair dealing defence: at 168. Like the official sources accompanying the introduction of the 2006 reforms, the report provides little interpretive guidance as to the meaning of the key terms. On 29 April 2016, the Australian Productivity Commission issued a draft report also recommending adoption of a 'fair use' standard: Productivity Commission, *Intellectual Property Arrangements*, Draft Report (2016) 159–61.
  - 12 In *IceTV* (2009) 239 CLR 458, French CJ, Crennan and Kiefel JJ explained that '[c]opyright legislation strikes a balance of competing interests and competing policy considerations. Relevantly, it is concerned with rewarding authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public': at 471 [24]. In broadly similar terms, Gummow, Hayne and Heydon JJ stated that that 'the purpose of a copyright law respecting original works is to balance the public interest in promoting the encouragement of "literary", "dramatic", "musical" and "artistic works" ... by providing a just reward for the creator, with the public interest in maintaining a robust public domain': at 485 [71].
  - 13 *Carr v Western Australia* (2007) 232 CLR 138, 143 [5], discussing interpretive difficulties that arise 'where a statutory provision strikes a balance between competing interests'.
  - 14 (2009) 239 CLR 458, 484 [68].
  - 15 For a case that exemplifies this approach, see *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 40 FCR 59, concerning the meaning of the term 'public' in the context of the public performance right.

This article seeks to contribute to the third of these: the comparative analysis that might occur when courts are eventually required to interpret the meaning of ‘fair dealing for the purposes of parody and satire’. Its specific claim is that understanding of the scope of the parody/satire fair dealing defence could be enhanced by consideration of recent developments in the copyright law of the European Union (‘EU’) and the United States (‘US’). In broad outline, that case law engages with the issue of how to make room for parodies and satire while keeping copyright law’s system of rights and rewards largely intact. In other words, it construes the defence in the light of copyright’s fundamental systemic commitment to providing copyright owners with a market in which they can derive income from their creative outputs. For those tasked with interpreting the Australian statutory text, this jurisprudence offers some useful insights as to the meaning of ‘parody or satire’. Most importantly, it also sheds light on how courts should approach consideration of ‘the effect of the dealing upon the potential market for, or value of, the work’ (or adaptations of the work),<sup>16</sup> one of the statutory factors to which courts should have regard when considering a claim that a use of a copyright-protected work is a fair dealing.<sup>17</sup> To that end, the article first discusses the long-awaited decision of the Court of Justice of the European Union (‘CJEU’) in *Deckmyn*,<sup>18</sup> in which the CJEU analysed the scope of the parody exception in the *Directive 2001/29/EC of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* [2001] OJ L 167/10 (‘EU Copyright Directive’). It then turns to US case law,<sup>19</sup> focusing on a recent set of cases that presages a possible circuit

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16 *Copyright Act 1968* (Cth) s 40(2)(d).

17 In respect of fair dealing for the purposes of research and study, *Copyright Act 1968* (Cth) ss 40(2)(a)–(e) provide an inclusive list of five statutory factors to which courts are required to have regard to when deliberating on the fairness of any dealing:

- (a) the purpose and character of the dealing;
- (b) the nature of the work or adaptation;
- (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- (e) in a case where part only of the work or adaptation is reproduced – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

There is an equivalent list in s 103C(2). While the legislative text does not provide that these factors shall be considered in the context of other fair dealing defences, persuasive sources indicate that they should: see, eg, Copyright Law Review Committee, Parliament of Australia, *Simplification of the Copyright Act 1968: Exceptions to the Exclusive Rights of Copyright Owners* (1998) pt 1, 35 [4.09] (suggesting that it would be ‘reasonable to assume’ that the matters listed in the statute ‘are also relevant in determining the fairness of a dealing for purposes other than research or study’). See also Sam Ricketson and Christopher Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Thomson Reuters, 2014) [11.35], noting that the factors in s 40(1) ‘[b]y and large ... are similar to the types of factors taken into account in the case law dealing with fair dealing in general’. In the light of this authority, it is appropriate to assume that the inclusive list factors in s 40 are generally applicable to all fair dealing defences. This article adopts this approach.

18 Court of Justice of the European Union, Grand Chamber, C-201/13, 3 September 2014.

19 *Kienitz v Scornie Nation LLC*, 766 F 3d 756 (7<sup>th</sup> Cir, 2014) (‘Kienitz’); *Cariou v Prince*, 714 F 3d 694 (2<sup>nd</sup> Cir, 2013) (‘Cariou’).

split over the proper interpretation of the (sometimes misunderstood)<sup>20</sup> decision of the US Supreme Court in *Campbell v Acuff-Rose Music Inc*,<sup>21</sup> in which the Court considered the application of the fair use defence to a parody of a popular song.

The discussion proceeds as follows. Part II briefly describes the prevailing approaches to the interpretation that were advanced in commentary on the Australian parody/satire fair dealing defence. Part III outlines the CJEU's decision in *Deckmyn*. While the CJEU interpreted the concept 'parody' quite broadly, it also insisted that any application of the exception must achieve a sensitive balance of the interests of right holders and users of copyright-protected works. Part IV analyses the US fair use doctrine for the insights it might offer as to how to achieve that balance. It first discusses the Supreme Court's decision in *Campbell*, and then the emerging disagreement among lower courts as to the salience of 'transformative' use in the context of the US fair use defence.<sup>22</sup>

Part V explores the implications of the EU and US jurisprudence for understanding the scope of the parody/satire fair dealing defence in the *Copyright Act 1968* (Cth), taking account of the broader systemic issues to which that jurisprudence draws attention, that is, the relationship between the defences and the copyright system as a whole. Part V also advances the view that consideration of the scope of the provisions might be more usefully directed at examining why, in the context of any particular dealing, the copyright system cannot be relied upon to coordinate access to the copyright-protected material in respect of which a fair dealing claim is advanced. While the article uses the parody/satire defence as its focus, it briefly explores the implications of the analysis it advances for the defence of fair dealing for the purpose of reporting news.

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20 A number of commentators have suggested that the Supreme Court held that the defendant's use was a 'fair use': see Conal Condren et al, 'Defining Parody and Satire: Australian Copyright Law and Its New Exception' (2008) 13 *Media and Arts Law Review* 273, 280: 'Controversially, the court determined that the rap version was fair use under s 107'; Anna Spies, 'Revering Irreverence: A Fair Dealing Exception for Both Weapon and Target Parodies' (2011) 34 *University of New South Wales Law Journal* 1122, 1122: 'In the seminal decision *Campbell v Acuff-Rose Music Inc*, the US Supreme Court found that 2 Live Crew's rap parody was a fair use of Roy Orbison's song, "Pretty Woman"'; Alexandra Sim, 'Strangling Their Creation: The Courts' Treatment of Fair Dealing in Copyright Law since 1911' (2010) 2 *Intellectual Property Quarterly* 192, 222 n 283: 'parody of Roy Orbison's rock ballad "Oh Pretty Woman" found to constitute fair use'. The decision of the US Supreme Court in *Campbell v Acuff-Rose Music Inc*, 510 US 569 (1994) has a 'Rorschach blot' quality about it: understandably, quite different things are found in it. On this point, however, the decision is clear. As is discussed in Part IV below, the Court did not hold that the defendant's use was a fair use.

21 510 US 569 (1994) ('*Campbell*').

22 A petition for certiorari in the most recent of these cases was denied on 23 March 2015: *Kienitz v Scottie Nation LLC*, 135 S Ct 1555 (2015), subsequent to *Kienitz*, 766 F 3d 756 (7<sup>th</sup> Cir, 2014).

## II THE SCOPE OF THE PARODY/SATIRE FAIR DEALING DEFENCE

To frame the following analysis, it is useful to consider three examples of uncompensated uses of copyright-protected material. First, in an animated movie that makes cheerful fun of 1960s girl bands and 1990s boy bands, singing chipmunks perform cover versions of popular songs from the relevant eras. Second, karaoke videos juxtapose incongruous photographs with the song lyrics as the lyrics appear on the karaoke monitors. Third, popular songs can be heard in the background of the latest YouTube sensation's comical reviews of consumer electronic products. It should be assumed that the songs, the lyrics, the soundtracks and the photographs are protected by copyright, and that no relevant licences have been secured. These dealings could be infringements of the relevant copyright owners' rights of reproduction, publication, public performance, communication and adaptation.<sup>23</sup> Are they copyright infringements? Under the current law, the only tenable defence would seem to be fair dealing 'for the purpose of parody or satire'.

Whether these uses would be excused by the parody/satire defence would depend on courts' views as to the scope of the defence. Certainly, most of the commentary that followed the enactment of this defence urged that the defence should be interpreted broadly.<sup>24</sup> If adopted, that approach would create quite a large category of dealings that would not require a licence. Some commentators argued that the legislation's use of *both* 'parody' and 'satire' was taken as a signal that the parody/satire fair dealing defence was meant to be capacious.<sup>25</sup> In support of these claims, commentators often referred to the US fair use doctrine.<sup>26</sup> That doctrine seems, at least on its surface, to be particularly accommodating of

23 *Copyright Act 1968* (Cth) relevantly grants to the owners of copyright in works protected by the Act exclusive rights of reproduction: at s 31(1)(a)(i); publishing: at s 31(1)(a)(ii); public performance: at s 31(1)(a)(iii); communication to the public: at s 31(1)(a)(iv); adaptation: at s 31(1)(a)(vi); and the right to do those acts in respect of adaptations: at s 31(1)(a)(vii). For subject matter other than works, s 101 grants equivalent rights.

24 Maree Sainsbury, 'Parody, Satire and Copyright Infringement: The Latest Addition to Australian Fair Dealing Law' (2007) 12 *Media and Arts Law Review* 292, 297, 318; 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, 292; Nicolas Suzor, 'Where the Bloody Hell Does Parody Fit in Australian Copyright Law?' (2008) 13 *Media and Arts Law Review* 218, 218, concluding that 'the new exceptions have the potential, if read broadly ... to allow for the use of copyright material to critique figures other than the copyright owner or author, extending to society generally'; Spies, above n 20; Condren et al, 'Defining Parody and Satire', above n 20. A different approach was, however, taken by David Brennan, in an analysis that predated the enactment of the parody/satire fair dealing defences. Brennan argued that a liability rule, rather than a property rule, will sometimes be preferable to a broad fair dealing exception: David J Brennan, 'Copyright and Parody in Australia: Some Thoughts on *Suntrust Bank v Houghton Mifflin Company*' (2002) 13 *Australian Intellectual Property Journal* 161.

25 Suzor, above n 24, 242–3; Sainsbury, 'Parody, Satire and Copyright Infringement', above n 24, 296.

26 See, eg, Dilan Thampapillai, 'The Novel as Social Satire: 60 Years Later, The Wind Done Gone and the Limitations of Fair Use' (2012) 17 *Deakin Law Review* 425, 426–9. This is discussed further in Part IV below.

parodies, but less forgiving of unlicensed uses for the purposes of satire.<sup>27</sup> Fair use needs to be permissive of parodies because a substantial taking from the underlying work is likely needed for the parody to be able to do its job of lampooning or ridiculing another copyright-protected work. A satirical use, however, involves a more general critique of shortcomings and frailties, societal and/or individual. Because a satirist could generate an entirely new work and still hit the critical target, unlicensed use of copyright-protected material for this purpose is less likely to be regarded as 'fair'. It was against this understanding of US law that commentators and stakeholders suggested that the Parliament's use of both 'parody' and 'satire' in the new provisions invited a broad approach.<sup>28</sup>

Other commentators drew on literary theory to demonstrate that parody and satire encompass a wide range of expressive practices, including dealings that ridicule the infringed material, or that ridicule other people, groups or events.<sup>29</sup> Commentators also advanced normative arguments that were focused on perceived allocative inefficiencies and distributional problems: broad parody and satire fair dealing defences would lower the legal and transactional barriers that impede the satisfaction of the seemingly insatiable appetite that exists for amusing, but otherwise infringing, downstream uses of copyright-protected material.<sup>30</sup> A broad approach would have the additional benefit of constraining

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27 For a leading exposition of this distinction, see Richard A Posner, 'When Is Parody Fair Use?' (1992) 21 *Journal of Legal Studies* 67. For a recent application of this principle, see *Galvin v Illinois Republican Party*, 116 USPQ 2d 1614 (ND Ill, 2015), noting the relevance to the fair use analysis in the satirical context of the availability of alternative material.

28 See, eg, Suzor, above n 24, 219, comparing the Australian provisions with US fair use doctrine, and reasoning that the inclusion of both parody and satire 'is important because it provides a larger scope than the equivalent exception under US law'; McCausland, above n 24, 288, noting that US fair use doctrine excludes satire, and suggesting that the Australian government 'found its own policy grounds to justify including satire in the exception'. But see Graeme W Austin, 'Four Questions about the Australian Approach to Fair Dealing Defenses to Copyright Infringement' (2010) 57 *Journal of the Copyright Society of the USA* 611, 627–8, noting the availability of this argument, but questioning whether the parody/satire defence will be interpreted so broadly that it excuses non-transformative uses of copyright-protected works.

29 Condren et al, 'Defining Parody and Satire: Australian Copyright Law and Its New Exception: Advancing Ordinary Definitions' (Pt 2) (2008) 13 *Media and Arts Law Review* 401.

30 McCausland, above n 24, 288, noting claims that 'humorous and other social and artistic expressions are being stifled'. See also Jani McCutcheon, 'The New Defence of Parody or Satire under Australian Copyright Law' (2008) 2 *Intellectual Property Quarterly* 163; Suzor, above n 24.

copyright owners' power to veto downstream uses.<sup>31</sup> Thus, a broad approach would enhance expressive freedoms.<sup>32</sup>

In many respects, it was to be expected that most commentators would favour a broad interpretation. Leading up to the 2006 amendments was a period of intense interest in copyright defences, accompanied by the expectation that they would be expanded.<sup>33</sup> The history of the reforms has been comprehensively described by others.<sup>34</sup> In outline, one impetus for expanding copyright defences was the proposal for, and eventual entry into, a free trade agreement between Australia and the US ('*AUSFTA*'),<sup>35</sup> requiring Australia to strengthen the rights of copyright owners in a number of respects. To temper some of the impacts of these changes, some stakeholder groups proposed enactment of a fair use exception.<sup>36</sup> An issues paper on the question was published,<sup>37</sup> but the proposal was not adopted.<sup>38</sup> The suite of new defences,<sup>39</sup> including the parody/satire fair dealing defence, was something of a compensation prize. Given this background, a capacious approach to this particular defence probably seemed appropriate. The approach probably also reflected a more general sense that copyright law was

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- 31 Of course, the power to veto uses depends on the availability of injunctions, rather than damages: that is, on treating copyright infringement as a 'property' rule, rather than a 'liability' rule. For the classic statement of this distinction in property law theory, see Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089. Some courts have considered whether damages might be a more appropriate remedy in intellectual property cases: see, eg, *Ashdown v Telegraph Group Ltd* [2002] Ch 149. In the parody context, see *Campbell*, 510 US 569, 579 n 10 (1994). See also *Salinger v Colting*, 607 F 3d 68 (2<sup>nd</sup> Cir, 2010), stating that irreparable harm does not inevitably occur following copyright infringement, and remitting the case to the lower court for reconsideration in the light of *eBay Inc v MercExchange LLC*, 547 US 388 (2006), which held that an injunction should not necessarily issue on a finding of patent infringement.
- 32 Thampapillai, above n 26, 431–3; Spies, above n 20, 1136; Melissa de Zwart, 'The Copyright Amendment Act 2006: The New Copyright Exceptions' (2007) 25 *Copyright Reporter* 4; Sainsbury, 'Parody, Satire and Copyright Infringement', above n 24, 302–3.
- 33 In an important study, Robert Burrell and Alison Coleman note that some courts had been unnecessarily restrained in their approach to defences and exceptions. Particularly relevant to the current study is the authors' discussion of judicial approaches to cases involving parody uses of copyright-protected works: see Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005) 264–5, discussing *Glyn v Weston Feature Film Co* [1916] 1 Ch 261; *Joy Music Ltd v Sunday Pictorial Newspapers (1920) Ltd* [1960] 2 QB 60; *Schweppes Ltd v Wellingtons Ltd* [1984] FSR 210.
- 34 See, eg, Kimberlee Weatherall, 'Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia's Recent Copyright Reforms' (2007) 31 *Melbourne University Law Review* 967.
- 35 *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005). Intellectual property measures are principally contained in ch 17.
- 36 See Melissa de Zwart, 'The Future of Fair Dealing in Australia: Protecting Freedom of Communication' (2007) 4 *SCRIPT-ed* 95 <<http://www2.law.ed.ac.uk/ahrc/script-ed/vol4-1/dezward.pdf>>.
- 37 Attorney-General's Department (Cth), 'Fair Use Issues Paper', above n 11.
- 38 The ALRC revived the idea in 2013: Australian Law Reform Commission, above n 11.
- 39 See generally Weatherall, 'Of Copyright Bureaucracies', above n 34. For a very useful discussion of the new exceptions for libraries, see Emily Hudson, 'The Copyright Amendment Act 2006: The Scope and Likely Impact of New Library Exceptions' (2006) 14(4) *Australian Law Librarian* 25.



providing copyright owners with rights that were too powerful,<sup>40</sup> a view that was likely to have been reinforced by the further expansion of copyright owners' rights required by the AUSFTA. Relatedly, the broad interpretation aligned with the sense that copyright's system of private rights<sup>41</sup> is in tension with the public interest; as a corollary, an expansive public domain serves the public interest.<sup>42</sup>

An expansive approach to the parody and satire defence also seemed to be supported by contemporaneous political commentary. For example, former Attorney-General, Philip Ruddock, explained that the new defence would ensure that 'Australia's fine tradition of satire is safe'. His paean to Australians' 'irreverent streak', and his observation that '[a]n integral part of [comedians'] armoury is parody and satire – or, if you prefer, “taking the mick[e]y” out of someone’,<sup>43</sup> seemed to support a broad interpretation.<sup>44</sup> These ideas gained support from the Attorney-General's references<sup>45</sup> to an instance of cricket fans' reworking of popular songs,<sup>46</sup> compositional efforts that could hardly be described as commentary on the originals.<sup>47</sup> If, as the Attorney-General suggested, these dealings would be excused by the new provisions, it seemed clear that the Australian defence was meant to be quite forgiving – and certainly not limited to critique of the material whose copyright had been infringed.<sup>48</sup>

A broad interpretation was also consistent with the idea that the defence was a corrective to the (perhaps parsimonious) approach to the then extant fair dealing defences adopted in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd*

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- 40 See Jane C Ginsburg, 'Essay – How Copyright Got a Bad Name for Itself' (2002) 26 *Columbia Journal of Law and the Arts* 61, suggesting that greed on the part of both copyright owners and consumers – manifested, for instance, in extended copyright terms – accounts for the disparagement of copyright.
- 41 See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*'). See the Preamble: 'Intellectual property rights are private rights'.
- 42 This has been an enduring debate in copyright law and policy since the beginnings of copyright. For a recent exploration of a modern iteration of the claim that defences, not rights, serve the public interest, and that creativity depends on 'copyright exceptions and limitations more than ... exclusive rights', see Jane C Ginsburg, 'Exceptional Authorship: The Role of Copyright Exceptions in Promoting Creativity' in Susy Frankel and Daniel Gervais (eds), *The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge University Press, 2014) 15, 15.
- 43 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>>.
- 44 Spies, above n 20, 1131.
- 45 Ruddock, above n 43.
- 46 Jane Holroyd, 'Fanatics Wait on Umpire's Decision', *The Age* (online), 22 November 2006 <<http://www.theage.com.au/news/news/fanatics-wait-on-umpires-decision/2006/11/22/1163871458766.html>>.
- 47 The alleged infringement involved a cricket fan group's publication of songbooks containing reworked lyrics of popular songs, to be sung a cappella at matches. The target appeared to be neither the original compositions nor their authors. Rather, it was the fans' English counterparts, known as 'The Barmy Army'.
- 48 Spies, above n 20, 1131.

(‘*The Panel Case*’).<sup>49</sup> That case involved irreverent television commentary on extracts from copyright-protected broadcasts. Some of the contested dealings did not pass muster as fair dealings under the provisions then in force. Characterising the 2006 amendments as a corrective to that decision both supported the prevailing interpretation and differentiated the new provisions from the existing fair dealing defences, most pertinently the defences for criticism and review.<sup>50</sup> On this analysis, unless the parody/satire defence was meant to be different from the extant provisions, it would have little work to do.<sup>51</sup>

The extrinsic sources on which commentators drew to support a broad approach to the defences<sup>52</sup> included a ‘fact sheet’ from the Attorney-General’s Department,<sup>53</sup> which stated that satire ‘often involves attacking an idea or attitude, an institution or social practice, through irony, derision or wit’, while parody ‘often involves the imitation of the characteristic style of an author or a work for comic effect or ridicule’. The fact sheet’s treatment of satire, so defined, suggested that the Australian provision was meant to be considerably broader than the US doctrine. The Australian provisions appeared to include exactly the

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- 49 (2001) 108 FCR 235; and on appeal to the Full Court of the Federal Court of Australia: *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417. See, eg, Suzor, above n 24, 223, 225; Kim Weatherall, ‘*Copyright Act 1968* (Cth), Secs 10, 87, 91 – “The Panel”’ (2006) 37 *International Review of Intellectual Property and Competition Law* 354, 357, noting criticisms of the application of the fair dealing provisions in the case, and suggesting that the approach had ‘given impetus to those arguing that Australia should expand its existing exceptions, to include a new fair-dealing defence to allow parody, satire and burlesque or even adopt US-style fair use’. See also McCausland, above n 24, 289; Michael Handler and David Rolph, “‘A Real Pea Souper’: *The Panel Case* and the Development of the Fair Dealing Defences to Copyright Infringement in Australia’ (2003) 27 *Melbourne University Law Review* 381; Melissa de Zwart, ‘Seriously Entertaining: *The Panel* and the Future of Fair Dealing’ (2003) 8 *Media and Arts Law Review* 1; Ben Mee, ‘Laughing Matters: Parody and Satire in Australian Copyright Law’ (2010) 20 *Journal of Law, Information and Science* 61; Spies, above n 20, 1132. Submissions on the ‘Fair Use Issues Paper’ also addressed these concerns: see McCausland, above n 24, 289 n 23.
- 50 The defence for fair dealing for criticism or review was recommended in the Copyright Law Review Committee, Parliament of Australia, *Report of the Committee Appointed by the Attorney-General of the Commonwealth To Consider What Alterations Are Desirable in the Copyright Law of the Commonwealth* (1959) 24 (‘*1959 Spicer Report*’). These recommendations were enacted as ss 41 and 103A of the *Copyright Act 1968* (Cth).
- 51 Spies, above n 20, 1130. See generally *Schweppes Ltd v Wellingtons Ltd* [1984] FSR 210, where the court refused to adapt existing defences to parody use. Courts in some cognate jurisdictions have been more accommodating. Israeli courts, eg, have considered that fair dealing for the purposes of criticism includes parody and satire: see Guy Pessach, ‘The New Israeli *Copyright Act* – A Case-Study in Reverse Comparative Law’ (2010) 41 *International Review of Intellectual Property and Competition Law* 187, 192, citing CA 2687/92 *Geva v Walt Disney Inc*, 48(1) PD 251 (1993). Before the enactment of the *Copyright Act 2007* (Israel), Israeli copyright legislation followed the Anglo tradition. The *Copyright Act 1911 (Extension to Palestine) Order 1924* (Imp) 114 OG 643, repealed by *Copyright Act 2007* (Israel), was a transposition of the *Copyright Act 1911*, 1 & 2 Geo 5, c 46.
- 52 *Acts Interpretations Act 1901* (Cth) s 15AB permits recourse to extrinsic materials in cases of ambiguity. As to the interpretation of the parody/satire defence, see Melissa de Zwart, ‘Australia’s Fair Dealing Exceptions: Do They Facilitate or Inhibit Creativity in the Production of Television Comedy?’ in Andrew T Kenyon (ed), *TV Futures: Digital Television Policy in Australia* (Melbourne University Press, 2007) 166, discussing extrinsic sources to which reference would likely be made in the interpretation of the defence.
- 53 Attorney-General’s Department (Cth), ‘New Australian Copyright Laws: Parody and Satire’ (Fact Sheet, 2006) cited in Mee, above n 49, 86 n 109.

kind of thing that the US doctrine excluded.<sup>54</sup> Given the importance of US law to the legal and political background against which the provisions were enacted, this contrast seemed deliberate.<sup>55</sup>

A broad interpretation would make it easier to claim that the dealings described at the beginning of this Part would not require a licence. With the chipmunk movie, the use of the songs could certainly be claimed to be ‘for the purpose’ of satirising the entertainment genre of girl and boy bands. With the karaoke example, the incongruousness of the photographs helps make fun of karaoke performances themselves, perhaps even the whole karaoke genre.<sup>56</sup> And, depending on its specific content, the synchronisation of the music with the soundtrack of the YouTube video could be said to be for the purpose of sending up typical reviews of consumer products. While none targets the infringed works, under a broad interpretation of ‘parody or satire’, this would not appear to be necessary.<sup>57</sup> This is of course not to suggest that such dealings *would* be found to be ‘fair’; as Lord Denning MR famously said, the fairness of any dealing is a matter of impression.<sup>58</sup> Even so, the prevailing approach in the commentary on the parody/satire defences would, if adopted, certainly make it easier to advance such a claim.

### III ‘PARODY’ IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

EU and US jurisprudence on parody and satirical uses of copyright-protected works might assist in the analysis of the scope of the defence. This jurisprudence offers a different perspective to that suggested by those advancing a broad

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54 Spies, above n 20, 1131–2.

55 One commentator appeared to reinforce the claim that the inclusion of parody and satire reached dealings that were weapons to attack a third party or as part of a wider social criticism (described as ‘weapon parodies’) by referencing statements in the Senate by then Minister for Justice and Customs, Christopher Ellison: see Spies, above n 20, 1132. After describing ‘parody’ in the more restrictive sense of ‘holding up a creator or performance to scorn or ridicule’, Mr Ellison said: ‘Satire does not involve such direct comment on the original material, but in using material for a general point it should also not be unfair in its effects on the copyright owner’: Commonwealth, *Parliamentary Debates*, Senate, 30 November 2006, 148. The word ‘also’ and the final seven words are omitted in the article cited, perhaps affecting the statement’s meaning. Rather than suggesting that ‘weapon parodies’ should not be *considered* unfair, the full statement perhaps implies that a qualifying dealing must be a ‘satire’ *and* fair.

56 At least two US Courts of Appeals have rejected the defence of fair use in cases of unlicensed uses of copyright-protected material in karaoke products: see *Zomba Enterprises Inc v Panorama Records Inc*, 491 F 3d 574 (6<sup>th</sup> Cir, 2007) and the subsequent denial of a petition for certiorari in *Panorama Inc v Zomba Enterprises Inc*, 553 US 1032 (2008); *Leadsinger Inc v MBG Music Publishing*, 512 F 3d 522 (9<sup>th</sup> Cir, 2008). An unreported district court decision specifically engages with, and rejects, the claim that karaoke performances are protected as a fair use for the purposes of parody: *Lorimar Music A Corporation v Black Iron Grill Co* (WD Mo, No 09-6067-CV-SJ-FJG, 29 July 2010).

57 The fullest exposition of this point is in Spies, above n 22, arguing that the parody/satire defence does and should reach ‘weapon parodies’ – ie, parodies that do not necessarily make fun of the copyright-protected work that is used, but are targeted more broadly.

58 *Hubbard v Vosper* [1972] 2 QB 84, 94.

approach. The case law invites an analysis that keeps in view both the societal benefits of uncompensated uses on the one hand, and the implications for the copyright system as a whole on the other. This Part considers the case of *Deckmyn*, in which the CJEU for the first time considered the scope of the parody defence in the *EU Copyright Directive*. Part IV considers the scope for unlicensed uses for the purposes of parody in US copyright law.

*Deckmyn* was a reference to the CJEU from Belgium. The relevant Belgian law provides that once a work is published, its author ‘may not prohibit ... caricature, parody and pastiche, observing fair practice’.<sup>59</sup> Under article 5(3)(k) of the *EU Copyright Directive*, EU member states are permitted to include in their domestic copyright laws an exception to the rights of copyright owners ‘for the purpose of caricature, parody or pastiche’.<sup>60</sup> The parody exception is one item in a long list of permitted exceptions from the rights of reproduction and communication to the public that are set forth in articles 2 and 3 of the *EU Copyright Directive*.<sup>61</sup>

The case involved infringement proceedings brought by the heirs of the author of a well-known comic book, *Suske en Wiske*, known in the United Kingdom (‘UK’) as *Spike and Suzy*, and in France as *Bob et Bobette*. The principal defendant in *Deckmyn* was a nationalist political party. It distributed calendars at a public meeting on the cover of which was an illustration that closely resembled one of the covers of the original comic. In the defendant’s version, one of the dominant figures in the original illustration was replaced by the Mayor of Ghent. He was depicted dressed in a white robe with a Belgian flag around his waist, distributing coins to a group comprising people of colour and people wearing veils. The defendant’s version was not a critique of the original work, but instead targeted the Mayor’s policies. Sued for copyright infringement, the defendants invoked the parody exception.

As to the meaning of ‘parody’, the Court said that a parody must ‘evoke an existing work while being noticeably different from it’, and must ‘constitute an expression of humour or mockery’.<sup>62</sup> The reference to ‘mockery’ will presumably make up for any humour deficit in putative parodies: often cruel mockery can be decidedly unfunny. More significantly, the CJEU’s understanding of ‘parody’

59 *Loi relative au droit d’auteur et aux droits voisins* [Law on Copyright and Neighbouring Rights] (Belgium), 30 June 1994, art 22(1)(6) [trans *Deckmyn* (Court of Justice of the European Union, Grand Chamber, C-201/13, 3 September 2014) [6]]. See generally, Marie-Christine Janssens, ‘Implementation of the 2001 *Copyright Directive* in Belgium’ (2006) 37 *International Review of Intellectual Property and Competition Law* 50.

60 The three rights in respect of which the exception is permitted are the ‘reproduction right’, the ‘[r]ight of communication to the public of works’ and the ‘right of making available to the public other subject-matter’: *EU Copyright Directive* arts 2–3.

61 The exceptions and limitations must only be ‘applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder’: *ibid* art 5(5). Known as the ‘three-step test’, this formulation is now the standard against which domestic exceptions and defences are tested for compliance with public international law copyright norms: *Agreement on Trade-Related Aspects of Intellectual Property Rights* art 13.

62 *Deckmyn* (Court of Justice of the European Union, Grand Chamber, C-201/13, 3 September 2014) [20].

does not exclude uses that could be characterised as ‘satires’, at least according to US fair use doctrine. A parody needs to invoke another work, and be humorous or mocking, but the CJEU’s ruling did not require that the defendant’s work also critique the infringed work.<sup>63</sup>

In addition, however, the Court tested the scope of the exception against copyright law’s fundamental commitment to the rights of copyright owners. Quoting recital 31 of the *EU Copyright Directive*, which provides that ‘[a] fair balance of rights and interests between the different categories of rightholders and users of protected subject-matter must be safeguarded’,<sup>64</sup> the CJEU explained that any application of the parody exception ‘must strike a fair balance between, on the one hand, the interests and rights of persons referred to in articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody’.<sup>65</sup> In other words, for all that a purported parody invokes another work and is humorous or mocking, it will not necessarily fall within the parody exception if this would be inconsistent with the ‘fair balance’ that must be struck between users and rights holders.

The CJEU did not elaborate on how the balance is to be struck in any particular case, leaving that question to the national court. As will be discussed below, US fair use jurisprudence offers a rich vein of analysis of this question. The CJEU did provide two guidelines. First, like other exceptions set forth in the *EU Copyright Directive*, the parody exception must be interpreted strictly; the parody exception is, after all, an exception.<sup>66</sup> Hence the importance to the Court’s analysis of balancing the interests of the users with the rights of the copyright owner (protected under articles 2 and 3 of the *EU Copyright Directive*).

Secondly, the copyright owner’s rights should, in the particular case, be weighed against the ‘freedom of expression of the user of a protected work who is relying on the exception for parody’.<sup>67</sup> This reference to freedom of expression is unlikely to mandate an especially broad approach to the EU parody exception. The true position is likely to prove more complex. When the CJEU has previously considered the relationship between freedom of expression and the rights of copyright owners, it has not countenanced any significant dismantling of the latter.<sup>68</sup>

Both intellectual property and the right to freedom of expression are now recognised as fundamental rights in the *Charter of Fundamental Rights of the*

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63 This argument had been advanced in P Cruz Villalón, ‘Opinion of the Advocate General Villalón’, Submission in *Deckmyn* (Court of Justice of the European Union, Grand Chamber, C-201/13, 3 September 2014) [20].

64 *Deckmyn* (Court of Justice of the European Union, Grand Chamber, C-201/13, 3 September 2014) [4].

65 *Ibid* [27].

66 In support of the principle that the exceptions should be interpreted strictly, the Court in *Deckmyn* cited *ACI Adam BV v Stichting de Thuiskopie* (Court of Justice of the European Union, Fourth Chamber, C-435/12, 10 April 2014) [23]; *ibid* [22]. See also *Infopaq International v Danske Dagblades Forening* (Court of Justice of the European Union, Third Chamber, C-302/10, 17 January 2012) [27].

67 *Deckmyn* (Court of Justice of the European Union, Grand Chamber, C-201/13, 3 September 2014) [27].

68 See *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (Court of Justice of the European Union, Fourth Chamber, C-314/12, 27 March 2014).

*European Union*.<sup>69</sup> In recent cases, the CJEU has recognised that the ‘right’ to intellectual property, including copyright, is not absolute, but it has not accepted that recognition of the principle of freedom of expression necessitates a radical change to European copyright law.<sup>70</sup> The CJEU’s analysis is broadly consistent with that of the European Court of Human Rights (‘ECtHR’),<sup>71</sup> which recently confirmed that copyrights are ‘rights of others’ for the purposes of the limitations clause in the guarantee of the right to freedom of expression contained in article 10(2) of the *European Convention on Human Rights*.<sup>72</sup> According to the ECtHR, nations are to be given a large margin of appreciation in accommodating both copyright and freedom of expression in their domestic law.<sup>73</sup> Certainly, in appropriate cases, the right to freedom of expression might constrain the exercise of intellectual property rights, as a number of domestic courts in European nations have held.<sup>74</sup> However, as the ECtHR has confirmed, article 10 does not in itself require copyright-protected material to be consigned to the public domain.

The CJEU hinted in *Deckmyn* at a further limit to a parodist’s expressive freedom: authors’ moral rights.<sup>75</sup> In the particular factual context, the Court reasoned that the possible association of the original work with a discriminatory message might cause the use to fall outside the article 5(3)(k) parody exception.<sup>76</sup> In sum, the approach of the CJEU to the parody exception is consistent with the basic point that the application of specific provisions in domestic copyright statutes invariably involves a complex balancing of different interests.

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69 [2000] OJ C 364/1, arts 11, 17(2).

70 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (Court of Justice of the European Union, Fourth Chamber, C-314/12, 27 March 2014). Recognising the importance of other rights within the EU legal system, the CJEU nevertheless upheld a blocking order against an ISP in respect of third party websites at which infringing content was available.

71 *Donald v France* (European Court of Human Rights, Fifth Section, Application No 36769/08, 10 April 2013). English translation available in D W, ‘*Ashby Donald and Others v France*’ (2014) 45 *International Review of Intellectual Property and Competition Law* 354, 358 [36], 359 [40].

72 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 2 October 2013, CETS No 214 (entered into force 17 February 2014) art 10(2).

73 *Donald v France* (European Court of Human Rights, Fifth Section, Application No 36769/08, 10 April 2013).

74 See, eg, *Lila-Postkarte*, Bundesgerichtshof [German Federal Court of Justice], I ZR 159/02, 3 February 2005, discussed by Martin Senftleben, ‘Adapting EU Trademark Law to New Technologies: Back to Basics?’ in Christophe Geiger (ed), *Constructing European Intellectual Property: Achievements and New Perspectives* (Edward Elgar, 2013) 137, 148. See also the recent decision of the Cour de cassation [French Court of Cassation], 13-27391, 15 May 2015 reported in (2015) Bull civ n° 519, in which the Court recognised that in some instances freedom of expression principles required the rights of authors to be tempered.

75 For analysis on the interplay between the parody/satire fair dealing defences and moral rights, see, eg, Maree Sainsbury, ‘Parody, Satire, Honour and Reputation: The Interplay between Economic and Moral Rights’ (2007) 18 *Australian Intellectual Property Journal* 149. That topic is beyond the scope of this article.

76 The Advocate General also directed attention to the right to human dignity as a possible limit on freedom of expression: P Cruz Villalón, ‘Opinion of the Advocate General Villalón’, Submission in *Deckmyn* (Court of Justice of the European Union, Grand Chamber, C-201/13, 3 September 2014) [82]–[86].

Another issue referred to the CJEU in *Deckmyn* was whether ‘parody’ was an ‘autonomous’ concept in EU law, requiring it to be interpreted consistently in the copyright laws of all EU member states. Answering affirmatively, the CJEU reasoned that an interpretation that would allow individual member states to interpret the term ‘parody’ in different ways would be contrary to the *EU Copyright Directive*’s aim of harmonising copyright law within the EU.<sup>77</sup> Even if each EU member state may ‘do its own thing’ in the drafting of its parody exception (to quote Sir Robin Jacob),<sup>78</sup> following *Deckmyn*, the different domestic exceptions are likely to be substantively harmonised. While this point might appear to be a technical matter of EU copyright law,<sup>79</sup> it is also relevant to the present discussion. If parody is an autonomous concept in EU law, this is likely to reduce even further the significance of some of the textual variation that exists in domestic iterations of the article 5(3)(k) exception. This part of the CJEU’s holding gives support to the claim that, in the copyright context, legislative terminology might sometimes be less important than the fundamental principles that the statutory language is attempting to capture.<sup>80</sup> The CJEU is of

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77 See, eg, *ACI Adam BV v Stichting de ThuisKopie* (Court of Justice of the European Union, Fourth Chamber, C-435/12, 10 April 2014) [49].

78 Sir Robin Jacob, ‘Parody and IP Claims: A Defence? – A Right to Parody?’ in Rochelle Cooper Dreyfuss and Jane C Ginsburg (eds), *Intellectual Property at the Edge: The Contested Contours of IP* (Cambridge University Press, 2014) 427, 431.

79 In the EU context, its implications may be significant. In EU law, copyright defences and exceptions are not harmonised, unlike the substantive rights comprising the copyright. With *Deckmyn* (Court of Justice of the European Union, Grand Chamber, C-201/13, 3 September 2014) treating ‘parody’ as an autonomous concept, the CJEU appears to be furthering a more general harmonisation agenda. On the harmonisation agenda in EU copyright law, see the recent report, Committee on Legal Affairs, European Parliament, *Report on the Implementation of 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* (2015).

80 For example, the UK Parliament recently approved the adoption of a defence for fair dealing for the purposes of ‘caricature, parody or pastiche’. The UK amendment tracked the language of the *EU Copyright Directive* (‘caricature, parody, pastiche’), but, consistent with the typical Anglo approach, added a threshold requirement of ‘fair dealing’, a concept that is not mentioned in the *EU Copyright Directive: Copyright and Rights in Performances (Quotation and Parody) Regulations 2014* (UK) No 2356, reg 5. The amendment, which came into force on 1 October 2014, followed recommendation by the 2011 independent review of UK copyright law: Ian Hargreaves, ‘Digital Opportunity: A Review of Intellectual Property and Growth’ (Independent Report, May 2011) (‘Hargreaves Review’). The Hargreaves Review recommended adoption of a parody exception, noting that parodies did not interfere with the traditional copyright incentives: at 49 [5.32]. The Hargreaves Review gave little attention to the relevant textual parameters imposed by the *EU Copyright Directive*. ‘Pastiche’ is mentioned only once in the final report: at 49 [5.32]; ‘caricature’ is not discussed. The Belgian statute’s reference to ‘fair practice’ similarly incorporates concepts to which the *EU Copyright Directive* makes no express reference. French copyright law requires an intention to amuse, while observing ‘the rules of the genre’: *Code de la propriété intellectuelle* [Intellectual Property Code] (France) art L122-5(4). See also Legalis, *Jurisprudence: Droit d’auteur – Tribunal de Grande Instance de Paris 3ème chambre, 3ème section Jugement du 13 février 2001* [Jurisprudence: Copyright – Tribunal de Grande Instance of Paris 3<sup>rd</sup> Chamber, 3<sup>rd</sup> Section Judgment of 13 February 2001] (13 February 2001) <[http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=77](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=77)>. The Irish Copyright Review Committee recommended adoption of yet another variation – a fair dealing defence for parody and satire ‘or related purposes’: Copyright Review Committee, Parliament of Ireland, *Modernising Copyright* (2013) 63.

course not a common law court; however, in this respect its analysis of the scope of the parody defence has a decidedly common law character. By characterising ‘parody’ as an autonomous EU concept, the CJEU seems to be reaching beyond whatever textual variations might appear in domestic law iterations of the defence and insisting that the scope of the defence be construed in the light of copyright’s deeper systemic commitments.

All of this of course begs the question of what these systemic commitments might be, and how the various interests at stake should be accommodated. As is typical, the CJEU was largely silent on this question, leaving it to the courts of member states to apply the broad principles articulated in the *Deckmyn* decision. That is, the CJEU identified the scope of the relevant inquiry, but then left it to the domestic courts to undertake the relevant analysis. For Australian courts, *Deckmyn* provides a signpost to the relevant area of inquiry. To determine how the balancing of interests should occur, however, courts may need to look elsewhere. The following Part examines US fair use doctrine in the parody context for the insights it offers on this question.

#### IV PARODY AND SATIRE IN US FAIR USE DOCTRINE

The 2007 US federal district court case *Burnett v Twentieth-Century Fox Corporation*<sup>81</sup> captures much of the flavour of US fair use doctrine in the parody context. It concerned a segment of the enormously popular cartoon television programme, *Family Guy*. The segment included a parody of ‘the Charwoman’, a much-loved character created by entertainment icon, Carol Burnett. Explaining its conclusion that the parody was a fair use, the Court observed:

it takes far more creative talent to create a character such as the ‘Charwoman’ than to use such characters in a crude parody. ...

However, the law, *as it must in an open society*, provides broad protection for the defendant’s segment. Therefore, the Court grants defendant’s motion to dismiss plaintiff’s complaint ...<sup>82</sup>

In other words, even if the parasitic character of parodies renders the original authors’ claims superior, some uses of the original creative work ‘must’ be placed beyond the copyright owner’s control. Accordingly, ‘broad’ protection for the defendant’s use might be needed. The fair use analysis helps to identify when this is so.

Fair use was codified for the first time in section 107 of the *Copyright Act 1976* (US).<sup>83</sup> While the section lists a number of illustrative categories of use that might be fair,<sup>84</sup> it imposes no limits on the kinds of use to which it applies. The

81 491 F Supp 2d 962 (CD Cal, 2007) (*‘Burnett’*).

82 Ibid 974–5 (Pregerson J) (emphasis added). The court assumed *arguendo* that the ‘Charwoman’ character was protected by copyright.

83 17 USC §§ 101–7 (2012) (*‘Copyright Act 1976* (US)).

84 17 USC § 107. The illustrative categories are: criticism, comment, news reporting, teaching scholarship, and research.



list includes neither parody nor satire. Four mandatory ‘fair use factors’ must be considered by any court applying the section:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The ‘fair use’ factors are broadly in line with the statutory factors that Australian judges apply in the fair dealing analysis.<sup>85</sup>

### A Parody and Satire as Fair Use

In *Campbell*, the Supreme Court held for the first time<sup>86</sup> that an otherwise-infringing use of copyright-protected material for the purposes of a parody might be a fair use. While *Campbell* has been extensively discussed in the commentary on the parody/satire fair dealing defence, misunderstanding about the case endures.<sup>87</sup> Given the importance of *Campbell* to analysis of the parody/satire fair dealing defences, and the recent case law that has called into question the scope of *Campbell*’s holding,<sup>88</sup> a closer look at the US doctrine might be useful.

*Campbell* concerned a parody version of the Roy Orbison classic pop song, ‘Oh, Pretty Woman’ by the rap group, 2 Live Crew. The defendant’s version begins with the famous guitar riff that opens the original song, and quotes the first line of melody and lyrics. It then ‘quickly degenerates into a play on words, substituting predictable lyrics with shocking ones’, with the effect of showing the Roy Orbison song to be ‘bland and banal’.<sup>89</sup> The defendant had attempted unsuccessfully to secure a licence. When nearly 250 000 copies of the 2 Live Crew album had been sold, the copyright owner commenced proceedings. It was

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85 *Copyright Act 1968* (Cth) ss 40(2), 103C(2). English case law, in which the concept of fair use first emerged, forms part of the background for both ‘fair dealing’ and ‘fair use’: see *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605, 612, tracing the common law and statutory precursors to the fair dealing provisions in the *Copyright, Designs and Patents Act 1988* (UK) c 48. The concept of ‘fair use’ emerged in US case law long before it was codified in *Copyright Act 1976* (US) § 107: see, eg, *Dellar v Samuel Goldwyn Inc*, 104 F 2d 661, 662 (The Court) (2<sup>nd</sup> Cir, 1939). The fair use ‘factors’ set forth in § 107 derive from *Folsom v Marsh*, 9 F Cas 342, 348 (Story J) (D Mass, 1841).

86 Cf *Columbia Broadcasting System Inc v Loew’s Inc*, 356 US 43 (1958), where an equally divided Court confirmed the holding in *Benny v Loew’s Inc*, 239 F 2d 532 (9<sup>th</sup> Cir, 1956) that a burlesque version of the plaintiff’s play, *Gas Light*, was not a fair use. The Supreme Court in *Campbell*, 510 US 569 (1994) aligned itself with later decisions in which parodies were held to be fair use. See, eg, *Fisher v Dees*, 794 F 2d 432 (9<sup>th</sup> Cir, 1986).

87 See, eg, Condren et al, ‘Defining Parody and Satire’, above n 20; Spies, above n 20; Sim, above n 20.

88 *Kienitz*, 766 F 3d 756 (7<sup>th</sup> Cir, 2014); *Cariou*, 714 F 3d 694, 706 (2<sup>nd</sup> Cir, 2013).

89 *Campbell*, 510 US 569, 573 (1994), quoting the district court in *Acuff-Rose Music Inc v Campbell*, 754 F Supp 1150 (MD Tenn, 1991).

uncontested that, unless the fair use defence applied, the 2 Live Crew version infringed the copyright in the Orbison song.

While the Supreme Court found the defendant's song to be a parody,<sup>90</sup> it did not hold that the defendant's version was a fair use. Instead, it remanded (remitted) the case to develop a fuller record on the issue of potential damage to the copyright owner's market for non-parody rap derivative versions of the original song.<sup>91</sup> The Court's actual holding confirms copyright owners' entitlement to derive income from derivative works<sup>92</sup> – assuming there is an audience for them – either by creating such works themselves, or licensing others to create them. The Court thus left open the possibility that the potential harm to this derivative market might warrant a finding against fair use, notwithstanding the characterisation of the defendant's work as a parody.

In the parody context, the Court recognised that a claim to fair use can be grounded, in part, on the need to quote from the original work to achieve the critical purpose. The Court explained, however, that use for the purpose of critique is not necessarily dispositive. If the use of the plaintiff's work is merely 'to get attention or to avoid the drudgery in working up something fresh', the claim as to the fairness of the appropriation will weaken.<sup>93</sup> Other factors, such as the extent of the commercial nature of the defendant's use, would then 'loom larger'.<sup>94</sup> As the Court's holding underscores, the effect on the derivative market is likely to be critical.

## B Transformative Uses and Market Failure

According to *Campbell*, to be a fair use, the use will usually be of a kind that the copyright owner is unlikely to license.<sup>95</sup> The Court explained:

This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectible derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical

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90 In a concurring opinion, Kennedy J said that he was 'not so assured that 2 Live Crew's song is a legitimate parody', but was prepared to join the Opinion, noting that the Supreme Court had left room for the district court to determine that the defendant's use was not a fair use: *Campbell*, 510 US 569, 599–600 (1994).

91 The case was in turn remanded the case to the district court: *Acuff-Rose Music Inc v Campbell*, 25 F 3d 297 (6<sup>th</sup> Cir, 1994).

92 In Anglo copyright systems, these are typically described as adaptations, rather than derivative works: *Copyright Act 1968* (Cth) ss 31(1)(a)(vi)–(vii). The *Copyright Act 1968* (Cth) does not specifically grant authors of artistic works a right of adaptation (ss 31(1)(a)(vi)–(vii)). Even so, the reproduction right may reach dealings that would be characterised as adaptations, especially when applied in the context of s 14. For the purposes of the infringement analysis, s 14 equates 'works' with a 'substantial part' of a work.

93 *Campbell*, 510 US 569, 580 (1994).

94 *Ibid.*

95 Robert A Gorman and Jane C Ginsburg, *Copyright: Cases and Materials* (Foundation Press, 6<sup>th</sup> ed, 2001) 730.

reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.<sup>96</sup>

This analysis is consistent with the idea, developed in more detail below, that copyright law does not so much suppress speech as organise access to it. The organisation typically occurs through market mechanisms created by copyright law's system of exclusive rights.<sup>97</sup> These include the price paid for consumption of copyright-protected works. In derivative markets (or, in the Australian context, markets for adaptations), licensing is another key vehicle for organising access. But with some kinds of uses, it is not appropriate to rely on conventional licensing mechanisms.<sup>98</sup> It does not necessarily follow, however, that any kind of market failure will suffice.<sup>99</sup> The analytical challenge is to work out when the market failure problem becomes intolerable, and therefore requires the intervention of the exception.

These points were recently discussed in considerable detail by the US Circuit Court of Appeals for the Eleventh Circuit in *Cambridge University Press v Patton*,<sup>100</sup> a high-profile dispute over whether universities made 'fair use' of copyright-protected works when they made available electronically to students unlicensed portions of copyright-protected works. Characterising the issue as 'boil[ing] down to an evidentiary question', the court reasoned:

As a conceptual matter, in making fair use determinations, we must conjure up a hypothetical, perfect market for the work in question, consisting of the whole universe of those who might buy it, in which everyone involved has perfect knowledge of the value of the work to its author and to potential buyers, and excluding for the moment any potential fair uses of the work. Then, keeping in mind the purposes animating copyright law – the fostering of learning and the creation of new works – we must determine how much of that value the implied licensee-fair users can capture before the value of the remaining market is so diminished that it no longer makes economic sense for the author – or a subsequent holder of the copyright – to propagate the work in the first place.<sup>101</sup>

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96 *Campbell*, 510 US 569, 592 (1994). The point was reiterated by Kennedy J in his concurring Opinion. See also *Brownmark Films LLC v Comedy Partners*, 682 F 3d 687, 693 (Judge Cudahy) (7<sup>th</sup> Cir, 2012).

97 Daniel Gervais, 'Collective Management of Copyright: Theory and Practice in the Digital Age' in Daniel Gervais (ed), *Collective Management of Copyright and Related Rights* (Kluwer Law International, 2<sup>nd</sup> ed, 2010) 1, 12–14.

98 For a seminal exploration of these issues, see Robert P Merges, 'Are You Making Fun of Me? Notes on Market Failure and the Parody Defense in Copyright' (1993) 21 *American Intellectual Property Law Association Quarterly Journal* 305.

99 In academic commentary, there is a voluminous literature on the topic of market failure, in addition to the important work by Merges: *ibid*. Wendy Gordon's analysis, in particular, has become canonical: see Wendy J Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the "Betamax" Case and Its Predecessors' (1982) 82 *Columbia Law Review* 1600. See also Wendy J Gordon, 'Market Failure and Intellectual Property: A Response to Professor Lunney' (2002) 82 *Boston University Law Review* 1031.

100 769 F 3d 1232 (11th Cir, 2014), reversing and remanding (remitting) the decision to the lower court.

101 *Ibid* 1258.

In the Court's analysis, fair use is a kind of 'implied licence'.<sup>102</sup> Judicial intervention is required when the parties cannot agree as to how the market for downstream uses should operate.<sup>103</sup>

In the parody context, however, the Supreme Court has emphasised that this is not only a matter of empirics. As an empirical fact, there may or may not be a market for a parody of a particular work<sup>104</sup> (although it might be anticipated that relatively few copyright owners would license their works in order for them to be lampooned). According to *Campbell*, however, there should not, as a normative matter, be a legally *protectable* market for parodies.<sup>105</sup> As a corollary, in this context, whether the copyright owner would in fact have granted a licence cannot be dispositive.<sup>106</sup> For the law to recognise a market for some critical uses of copyright-protected works would put too much control in the hands of copyright owners. In this instance, upholding the copyright owner's veto power would not be a tolerable way to organise access to copyright-protected expression.

The scope of the fair use defence in the context of downstream derivative creativity has been the subject of a recent dispute between two US Circuit Courts of Appeals. Second Circuit case law has treated 'transformative uses' and 'fair uses' as near synonyms.<sup>107</sup> Criticising this approach, the Seventh Circuit demands a more rigorous evaluation of the need to treat a particular transformative use as one that falls outside the copyright owner's derivative work right.<sup>108</sup> The Second Circuit would treat (sufficiently)<sup>109</sup> transformative uses as such,<sup>110</sup> whereas the Seventh Circuit requires a more testing analysis, one that takes account of the impact on the copyright owner's right to create and/or licence adaptations.

The defendant in *Cariou*, a 2013 decision of the US Court of Appeals for the Second Circuit, was a renowned practitioner of 'appropriation art'.<sup>111</sup> His works sold for significant sums in upmarket galleries. The defendant incorporated others' photographs, including the plaintiff's, into new paintings and collages. The plaintiff was a professional photographer who had lived for some six years

102 Ibid 1257.

103 '[T]he parties essentially turn to a court to make a determination for them as to the appropriate boundaries of the secondary user's implied licence': *ibid* 1258.

104 In this context, it is almost de rigueur to cite the example of Weird Al Yankovic, who does secure permissions for his use of copyright-protected songs in his satirical reworkings. See, eg, Kim J Landsman, 'Does *Cariou v Prince* Represent the Apogee or Burn-Out of Transformativeness in Fair Use Jurisprudence? A Plea for a Neo-traditional Approach' (2014) 24 *Fordham Intellectual Property, Media and Entertainment Law Journal* 321, 375.

105 See also *Brownmark Films LLC v Comedy Partners*, 682 F 3d 687, 693 (Judge Cudahy) (7<sup>th</sup> Cir, 2012), stating that '[a]ny effect on the derivative market for criticism is not protectable'.

106 Cf Sainsbury, 'Parody, Satire and Copyright Infringement', above n 24, 314.

107 The Second Circuit has characterised as public domain 'transformative markets', ie, markets that the copyright owner would not 'generally' develop: *Castle Rock Entertainment Inc v Carol Publishing Group Inc*, 150 F 3d 132, 145 n 11 (Judge Walker) (2<sup>nd</sup> Cir, 1998).

108 *Kienitz*, 766 F 3d 756, 758 (Judge Easterbrook) (7<sup>th</sup> Cir, 2014).

109 See, eg, *North Jersey Media Group Inc v Pirro*, 74 F Supp 3d 605, 609 (Raymos DJ) (SD NY, 2015), for the purposes of a summary judgment motion, the defendant's work held not to have sufficiently transformed the infringed work.

110 *Bill Graham Archives v Dorling Kindersley Ltd*, 488 F 3d 605 (2<sup>nd</sup> Cir, 2006).

111 714 F 3d 694, 706 (Judge Parker) (2<sup>nd</sup> Cir, 2013).

among Jamaican Rastafarians, taking photographs that were eventually published as a book, titled *Yes Rasta!* The defendant had taken parts and sometimes the whole of the plaintiff's Rastafarian images and painted over parts of them or juxtaposed them with other images in new compositions. The aesthetic effect of the defendant's work was, in most instances, quite different from that of the original photographs. Criticising the lower court for requiring a work to 'comment on, relate to the historical context of, or critically refer back to the original works' in order to qualify as a fair use,<sup>112</sup> the Second Circuit reasoned that '[t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative'.<sup>113</sup> Quoting *Campbell*, the court opined that, to be a fair use, a new work must generally alter the original with 'new expression, meaning, or message'.<sup>114</sup> In the Court's analysis, the defendant had, in most instances, satisfied this standard.

The 2014 decision of the Seventh Circuit Court of Appeals in *Kienitz* advanced a different analysis.<sup>115</sup> The defendant sold T-shirts on which were printed an altered version of a copyright-protected photograph of the Mayor of Wisconsin, along with the words 'Sorry for Partying'. As a student, the Mayor of Wisconsin had attended the same street party which, many years later, he sought to shut down. The defendant's T-shirt drew attention to this apparent hypocrisy. The court held that there was no copyright infringement, as the defendant had not taken a substantial part of the original photograph. Even so, the Seventh Circuit took the opportunity to criticise the Second Circuit's approach to the fair use, disputing the latter's claim that a sufficiently transformative use is necessarily 'fair'. The Court suggested that to treat 'transformative' as a synonym for 'fair' would override the copyright owner's exclusive right to make derivative works.<sup>116</sup> According to the Seventh Circuit, fair use 'is not designed to protect lazy appropriators',<sup>117</sup> echoing the Supreme Court's admonition in *Campbell* against applying the fair use defence to uses that take the plaintiff's work merely to get attention or to avoid the 'drudgery' of working up something fresh. Instead, the Seventh Circuit explained, fair use is meant to provide the legal space for 'a class of uses that would not be possible if users always had to negotiate with copyright proprietors'.<sup>118</sup> In other words, the fair use analysis must engage with the realities of the market for copyright-protected materials – markets created by the system of exclusive rights granted by copyright law, including the right to make derivative works. The Court gave two examples of market failures where fair use might appropriately be invoked: 'copyright owners would block all parodies, for

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112 Ibid 704 citing *Cariou v Prince*, 784 F Supp 2d 337, 348 (Judge Batts) (SD NY, 2011).

113 Ibid 706. The case was subsequently settled in the Stipulation of Voluntary Dismissal: *Cariou v Prince*, 08-CIV11327 (filed 19 March 2014).

114 *Cariou*, 714 F 3d 694, 706 (2<sup>nd</sup> Cir, 2013), quoting *Campbell*, 510 US 569, 579 (1994).

115 *Kienitz*, 766 F 3d 756 (7<sup>th</sup> Cir, 2014).

116 '*Cariou* and its predecessors in the Second Circuit do no[t] explain how every "transformative use" can be "fair use" without extinguishing the author's [derivative work rights]': ibid 758, citing *Cariou*, 714 F 3d 694, 706 (2<sup>nd</sup> Cir, 2013).

117 *Kienitz*, 766 F 3d 756, 759 (7<sup>th</sup> Cir, 2014).

118 Ibid.

example, and the administrative costs of finding and obtaining consent from copyright holders would frustrate many academic uses'.<sup>119</sup>

This is not the place to evaluate in detail the relative merits of the two courts' understandings of the significance for the fair use doctrine of the 'transformative' character of downstream users' creativity. When a genuine circuit split arises,<sup>120</sup> the Supreme Court may decide to intervene. Here, the significance of this case law is in the way the courts considered the different interests that are engaged by copyright's defences and exceptions. Viewed in that light, it is certainly arguable that *Cariou* distorts *Campbell*'s prescriptions. While *Campbell* suggested that fair uses will typically be transformative, it neither said nor implied that a transformative use was necessarily fair. Such a holding would have significantly curtailed the copyright owner's derivative work right, and there would have been little purpose in remanding the case so as to develop a fuller record on the potential harm to the market for non-parody rap versions of the original song.

Assuming it prevails, the analysis in *Kienitz* might encourage adoption of a more testing attitude toward claims made in the Australian context that the 'transformative' character of parodies and satires 'itself will weigh in favour of a finding of fair dealing'.<sup>121</sup> The Seventh Circuit's approach not only demonstrates greater consistency with *Campbell*; for present purposes, by analysing the scope of the defence in the light of the rights accorded to the copyright owner, it also offers a more analytically sound basis for mapping the boundary between copyright protections and unlicensed uses.

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119 Ibid.

120 Predictably, certiorari on appeal from *Kienitz*, 766 F 3d 756 (7<sup>th</sup> Cir, 2014) was denied on 23 March 2015: *Kienitz v Scornie Nation LLC*, 135 S Ct 1555 (2015). As the defendant had not copied a substantial part of the photograph, the court's observations on fair use were obiter, and a genuine circuit split did not arise. Subsequently, in *The Authors Guild v Google Inc*, 804 F 3d 202 (2<sup>nd</sup> Cir 2015), the Second Circuit offered yet another perspective, describing the term 'transformative' as 'a suggestive symbol for a complex thought' and noting that it does not suggest that 'any and all changes made to an author's original text will necessarily support a finding of fair use': at 214 [5]–[8]. The Second Circuit did, however, characterise the 'derivative work right' in quite a narrow way, suggesting that derivative works are those, such as cinematographic adaptations, that change the form of the original work: at 216, n 18.

121 Cf Sainsbury, 'Parody, Satire and Copyright Infringement', above n 24, 311: 'Parody and satire are transformative uses of the work as opposed to mere reproductions. This fact of itself will weigh in favour of a finding of fair dealing, the rationale being that transformative use makes some contribution of new intellectual value'. In the light of the requirement that courts consider 'the purpose and character of the dealing', it is surely correct that the transformative character of the dealing will be a thumb on the scale in favour of fair dealing: see, eg, *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 189 FCR 109, 143 [142] (Bennett J). The reminder of the possible implications for the adaptation right in *Kienitz*, 766 F 3d 756 (7<sup>th</sup> Cir, 2014) might provoke a more testing analysis of the relevance of any such new intellectual value to the issue of fairness. Within the Seventh Circuit, *Kienitz* appears to be standing for the proposition that, in the fair use analysis, the effect of the use on the value of the protected work is generally considered the most important factor: see *Miller UK Ltd v Caterpillar Inc* (ND Ill, No 10-CV-03770, 20 November 2015) slip op 7–8.

## V LESSONS FOR THE PARODY/SATIRE FAIR DEALING DEFENCE

How might this discussion inform analysis of the scope of the Australian fair dealing defences? In fair dealing cases, what is described above as copyright's common law character seems more muted than in other contexts. Courts have devoted considerable attention to defining the terms that describe the purposes of the dealings.<sup>122</sup> Within the Anglo-Australian fair dealing tradition, this is to be expected: for a dealing to be fair, it must fit within the statutory categories of uses.<sup>123</sup> This definitional emphasis seems, however, to have inhibited courts from engaging with the more important task of identifying and accommodating the different interests at stake as fully as they might.<sup>124</sup> In *The Panel Case*,<sup>125</sup> there is even a suggestion in one of the Full Court's judgments that 'all that is required' to establish that a dealing is 'fair' is to show that it manifests the requisite characteristics of the relevant fair dealing purpose.<sup>126</sup>

In their insightful analysis of *The Panel Case*,<sup>127</sup> Michael Handler and David Rolph identify a number of problems with the prevailing approach, including the Court's frequent recourse to dictionary definitions to determine the meaning of the statutory terms used to describe the fair dealing purposes that were implicated in the case.<sup>128</sup> As Handler and Rolph note, this approach risks ossification of judicial understanding of the activities that might comprise fair dealing – news reporting, criticism, review, etc – and they advocate a more expansive reading of the relevant provisions in the light of changes in social and stakeholder practices. Handler and Rolph's principal attack is directed at the ad hoc character of the Court's fair dealing analysis, and, most prominently, its inappropriately narrow understanding of the fair dealing purposes.<sup>129</sup> Along the way, however, they carefully identify the Court's failure to consider the concept of 'fairness' and

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122 This analysis has not been without critics: see Burrell and Coleman, above n 33, 266–7.

123 See, eg, *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99, 105–7, in which Beaumont J discussed in detail various definitions of 'research', 'study', 'criticism' and 'review', quoting the current *Macquarie Dictionary* and citing earlier courts' definitions of the various statutory terms.

124 For a detailed exposition of this point, see Handler and Rolph, above n 49.

125 (2001) 108 FCR 235; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417. Incidentally, Justice Conti's judgment in *The Panel Case* included a lengthy discussion of the differences between parody and satire, in which his Honour drew on dictionary definitions and academic commentary that carefully distinguished between the two concepts: *The Panel Case* (2001) 108 FCR 235, 248–50 [16]–[17].

126 See Handler and Rolph, above n 49, 402, citing *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417, 424 [20] (Finkelstein J): 'all that is required' to show that a particular dealing for the purposes of news was a fair dealing was that it exhibited requisite characteristics of news reporting.

127 (2001) 108 FCR 235; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417.

128 Handler and Rolph, above n 49.

129 *Ibid* 409–17.

conclude their analysis by advancing an inclusive list of factors that they suggest could structure the analysis of the fairness of the dealing.<sup>130</sup>

The premise underlying Handler and Rolph's analysis is that the courts' cabined approach risks thwarting whatever socially desirable activity is furthered by the fair dealing defences. What might receive further attention, however, is the relationship between the claimed fairness of the defence and the rights and incentives that structure the copyright system as a whole. The analysis advanced here is a matter of emphasis, not sharp distinction. As other commentators have noted, within the Anglo-Australian fair dealing tradition, decision-makers are required to consider a broad range of issues.<sup>131</sup> The *Copyright Act 1968* (Cth) requires courts to consider, for example, 'the purpose and character of the dealing' and 'the effect of the dealing upon the potential market for, or value of, the work or adaptation'.<sup>132</sup> Even so, relatively little attention has been given to the task of delineating the scope of the fair dealing defences in the light of copyright's systemic commitments.<sup>133</sup> The EU and US doctrine suggests that it is not sufficient to claim that a socially desirable end will be advanced by concluding that a particular dealing does not require a licence. Consideration should also be given to the implications of this proposition for the rights and rewards that are created by the copyright system.

Here, it is useful to recall Daniel Gervais' insight that copyright law helps to organise access to certain kinds of expression,<sup>134</sup> and that it does so principally

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130 These are:

the amount of the copyright material used in comparison with the length of the copyright material; the extent of the use made of the copyright material by the defendant; the motives of the defendant; whether the copyright material is confidential or has not been disclosed to the public; whether the parties are in commercial competition with each other in respect of the use of the copyright material in question and the way in which it has been used; whether the use of the material is reasonably appropriate, rather than necessary, for the permitted purpose; and the relevance of, and weight to be given to, any industry practices or agreements between commercial rivals as to what constitutes a 'fair' dealing ...

Ibid 418.

131 See generally Handler and Rolph, above n 49.

132 Under *Copyright Act 1968* (Cth) ss 40(2), 103C(2), the factors that must be considered are:

- (a) the purpose and character of the dealing;
- (b) the nature of the work or adaptation;
- (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- (e) in a case where part only of the work or adaptation is reproduced – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

133 A New Zealand High Court decision perhaps comes closest to the kind of approach that is advocated in this article. A news monitoring firm that recorded television programs and provided transcripts of the programs when requested by clients claimed that its activities were fair dealing. Rejecting that claim, Blanchard J reasoned that '[i]n some cases it will ... be necessary to pay regard to any depreciating effect which the dealing has on the worth to the plaintiff of the work', and that the value of the work might include the television channel's 'opportunity to exploit a market for transcripts, if not by supplying them itself for a fee, then by receiving royalties from those who do': *Television New Zealand Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91, 107.

134 Gervais, above n 97, 12.



through market mechanisms. By generating artificial scarcity through the creation of rights, copyright gives rise to markets for creative expression that would otherwise be in the commons.<sup>135</sup> Gervais was addressing what is sometimes described as copyright's free speech 'paradox':<sup>136</sup> copyright both encourages the production of speech while also suppressing it, to the extent that exclusive rights to creative expression can limit access to, and sometimes even prevent the use of, certain kinds of speech. For the most part, however, access to creative expression – for straightforward consumption and dissemination of copyright-protected material and for use of that material in downstream creativity – is coordinated through market mechanisms. *Campbell* can itself be assessed through this lens. The outcome of *Campbell* achieved, albeit perhaps serendipitously, a fair amount of coordination of access to the contested material. Before the lower courts reconsidered the case, the parties settled, with 2 Live Crew paying a licence fee to the copyright owner.<sup>137</sup> The original licensing impasse became a transaction. The parties' private arrangement resulted in the public being enriched by access (albeit for the price of the album or, now, a digital file containing the individual song) to 2 Live Crew's new composition. At the same time, the copyright owner was not required to sacrifice all of the income to be derived from this adaptation.

Accordingly, when determining the scope of the parody/satire defence, the inquiry should be directed at working out why, in any particular instance, the copyright system of incentives and rewards cannot be relied upon to coordinate access to the protected expression in an appropriate or tolerable way. This issue might usefully inform the application of the fair dealing factors, including 'the purpose and character of the dealing', and 'the effect of the dealing upon the potential market for, or value of, the work or adaptation'.<sup>138</sup> A copyright owner's refusal to license a particular use of a work should not, in itself, render any use non-infringing.<sup>139</sup> This would be tantamount to creating a compulsory licence for zero compensation. Because the licensing of adaptations is the typical way that the copyright system organises access to downstream uses, a copyright owner is usually given a veto power over such uses.<sup>140</sup> This is not to enable authors to engage in capricious acts of censorship. As Robert Merges has suggested, the exclusive right to create derivative works makes sense on allocative efficiency

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135 Paul A Samuelson, 'The Pure Theory of Public Expenditure' (1954) 36 *Review of Economics and Statistics* 387, 387; Edwin C Hettinger, 'Justifying Intellectual Property' (1989) 18 *Philosophy and Public Affairs* 31, 34.

136 See generally Neil Weinstock Netanel, *Copyright's Paradox* (Oxford University Press, 2008).

137 Jennifer E Rothman, 'Copyright's Private Ordering and the "Next Great Copyright Act"' (2014) 29 *Berkeley Technology Law Journal* 1595, 1604.

138 *Copyright Act 1968* (Cth) s 40(2). See also at: s 103C(2).

139 See Sainsbury, 'Parody, Satire and Copyright Infringement', above n 24, 310, discussing submissions that advanced this argument. See also Suzor, above n 24, 222. In some jurisdictions, a refusal to license might implicate antitrust issues: see, eg, *Microsoft Corporation v Commission of the European Communities* (T-201/04) [2007] ECR II-03619, where refusal to give access to software interface was held to be abuse of monopoly position.

140 See Calabresi and Melamed, above n 31; *Ashdown v Telegraph Group Ltd* [2002] Ch 149; *Campbell*, 510 US 569, 579 n 10 (1994); *Salinger v Colting*, 607 F 3d 68 (2<sup>nd</sup> Cir, 2010).

grounds.<sup>141</sup> Copyright owners are likely to be in the best position to accord an appropriate value to the downstream uses they choose to license (or not).<sup>142</sup> At some point in the life of the relevant copyright, perhaps during the downward arc of the commercial success of such songs, music publishers might well be interested in negotiating licences for the uses described above – the chipmunk movie, the karaoke product, and the videos. For the most part, copyright's system of rights and rewards is premised on the idea that copyright owners are in the best position to assess whether to enter such markets – or, at least, in a better position than enthusiastic downstream users.<sup>143</sup>

The US doctrine generates a cluster of more relevant questions that might inform the analysis, once it is established that there is a tenable claim that the dealing comes within the terms of the defence. These might include: is it a market that a copyright owner of this kind of work is reasonably likely to enter? Has the defendant added genuine creative content, or is she or he avoiding the drudgery of working up something fresh? How close is the nexus between the extent of and the purpose for the taking? In *Deckmyn*, for example, did the comparison with the character depicted on the cover of the original comic make an additional point about the targeted politician? Is this the kind of use that would be likely to be licensed? In some instances, the copyright owners might be too dispersed, and the transaction costs may impose barriers to efficient licensing; hence the Seventh Circuit's academic quotation example. One might add that some academic uses also serve freedom of expression interests, facilitating free and open critical inquiry. While the Seventh Circuit did not develop the point, it is probably the combination of these factors – market failure and societal benefit – that establishes the fair use ground, and, as with news reporting, may offer compelling reasons why we would not want copyright owners to have an especially strong veto power over such uses. Moreover, when a dealing ridicules or lampoons a work, there may be sound normative arguments for not relying on licensing as a mechanism for controlling access to the derivative market. In sum, the justification for treating a dealing as fair is not, or not merely, that the dealing can be described in a particular way, or that such a dealing, so described, is socially desirable. Assuming that a tenable claim might be made that a particular use is within one of the fair dealing purposes, the question should be whether, in respect of this otherwise-infringing use, it is inappropriate to rely on copyright's usual method for coordinating access.

The decision of the Eleventh Circuit Court of Appeals in *SunTrust Bank v Houghton Mifflin Co* illustrates many of these points.<sup>144</sup> It concerned a novel that

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141 Robert P Merges, 'Of Property Rules, Coase, and Intellectual Property' (1994) 94 *Columbia Law Review* 2655, 2664–7.

142 See, eg, *Castle Rock Entertainment Inc v Carol Publishing Group Inc*, 150 F 3d 132, 136 (Judge Walker) (2<sup>nd</sup> Cir, 1998), noting copyright owner's careful licensing practices.

143 For this reason, the claim that the parody or satire (or other secondary use) does not compete with the original, while likely to be true, misses the point. Cf Sainsbury, 'Parody, Satire and Copyright Infringement', above n 24, 314.

144 268 F 3d 1257 (11th Cir, 2001) ('*SunTrust Bank*').

retold the story of Margaret Mitchell's *Gone with the Wind* in the voice of an African-American slave. In itself, there is nothing in the idea of a retelling of the story from the perspective of another character that would cause the market for adaptations to fail.<sup>145</sup> The Mitchell estate has licensed at least two such adaptations.<sup>146</sup> The fair dealing analysis thus requires greater subtlety, in this instance asking whether the copyright system of rights and rewards is likely to be a suitable vehicle for licensing adaptations that target and critique the casual racism of the original book (and its subsequent cinematic adaptation).<sup>147</sup> Holding that the novel was a fair use, the Eleventh Circuit suggested that here the answer was 'no'.<sup>148</sup>

Similar concerns might inform analysis of other fair dealing categories, such as fair dealing that is 'for the purpose of, or is associated with, the reporting of news'.<sup>149</sup> It should not be sufficient merely to ask whether the dealing was genuinely for the purpose of reporting news, and then whether no more was taken than was necessary to achieve that purpose.<sup>150</sup> It is also useful to know whether the copyright system can be relied on to organise access to the protected material. In many news reporting contexts, the copyright system could be found wanting. With news reporting, timing is likely to be an especially relevant issue: news cycles are typically fast, and there may not be time to secure a licence. Some types of news reporting would not occur if licences needed to be negotiated. Many 'scoops' would be impossible, for instance, if the person or entity breaking

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145 Similarly, an unauthorised sequel is not necessarily a fair use. See, eg, *Salinger v Colting*, 641 F Supp 2d 250 (SD NY, 2009) (order vacated on the issue of remedy by *Salinger v Colting*, 607 F 3d 68 (2<sup>nd</sup> Cir, 2010)).

146 See Donald McCaig, *Ruth's Journey: A Novel of Mammy from Margaret Mitchell's Gone with the Wind* (Atria Paperback, 2014); Donald McCaig, *Rhett Butler's People* (St Martin's Press, 2007).

147 The discussion of the Court of Appeals in *SunTrust Bank*, 268 F 3d 1257, 1270 n 26, 1282 n 6 (11th Cir, 2001) offered another possible reason for justifying the intervention of the fair use defence: the Mitchell estate had apparently required licensees to avoid references to homosexuality or miscegenation.

148 In this aspect, the outcome in *SunTrust Bank*, 268 F 3d 1257 (11th Cir, 2001) raises a different set of issues from those briefly discussed by the CJEU in *Deckmyn* (Court of Justice of the European Union, Grand Chamber, C-201/13, 3 September 2014) as to the association of the author's work with a racist message. In the latter case, the Court was concerned with association of the copyright owner with that kind of message. In *SunTrust Bank*, the defendant highlighted the racism of the original. While a very robust approach to freedom of expression might provoke some questioning of this distinction – ie, if a copyright owner wants to be associated with a racist message, she or he should be able to object to a subsequent use that dilutes or questions that message – the prospect of that argument being run, and taken seriously, seems quite remote, to say the least. With its emphasis on the right to freedom from discrimination, *Deckmyn* itself suggests that this argument would have little traction in EU law; in the US, it would almost certainly be inconsistent with US Supreme Court dicta suggesting that fair use is a free speech safeguard: see *Eldred v Ashcroft*, 537 US 186, 218–19 (Ginsburg J) (2003).

149 *Copyright Act 1968* (Cth) ss 42(1)(a), 103B.

150 This was essentially the analysis in one of the leading English cases on fair dealing for the purposes of news reporting: *British Broadcasting Corporation v British Satellite Broadcasting Ltd* [1992] Ch 141, 150 (Scott J).

the story had to negotiate a copyright licence.<sup>151</sup> Stories are sometimes based on leaks, and some forms of reporting involve an iterative process; material can be gathered from a variety of sources, and the story might not be clear until immediately before publication. Again, issues of time sensitivity could preclude reliance on market mechanisms. With investigative reporting, seeking a licence could require disclosing the investigation, with the risk of closing off relevant lines of inquiry.<sup>152</sup> There will doubtless be other context-sensitive reasons that will sometimes make it impossible to rely on the mechanisms for organising access to speech created and sustained by the copyright system. More empirical data about how licensing actually works in any relevant context would certainly advance the analysis.<sup>153</sup>

Relatedly, simplistic invocation of the principle of freedom of expression does little to delineate the appropriate scope of fair dealing. News reporting perhaps offers the strongest freedom of expression claims in support of uncompensated dealings with copyright protected material (although it should be remembered that the dealings will not necessarily be passed on to consumers without charge).<sup>154</sup> News is crucial to political speech, and, by helping citizens to be informed, it enhances democratic participation. But an equally compelling line of analysis eschews such implicit line drawing. The issue is not merely to identify what can and cannot be described as news; rather it is whether an informed citizenry requires access *only* to news. As Alexander Meiklejohn puts the point, it is because people will be called upon to vote that they ‘need novels and dramas and paintings and poems’.<sup>155</sup> Even this may not exhaust all relevant issues. Why, in the freedom of speech context, does the ability to vote mark out the boundary beyond which any concern with the full development of our humanity stops? Powerful freedom of expression claims are available in support of almost all uncompensated uses of copyright-protected works. While we have a

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151 Mike Ananny and Daniel Kreiss, ‘A New Contract for the Press: Copyright, Public Domain Journalism, and Self-governance in a Digital Age’ (2011) 28 *Critical Studies in Media Communication* 314, 321; Sarah Laskow, ‘Bending Copyright Rules’, *Columbia Journalism Review* (online), 26 November 2013 <[http://www.cjr.org/cloud\\_control/getty\\_twitter\\_etc\\_etc.php](http://www.cjr.org/cloud_control/getty_twitter_etc_etc.php)>. Of course, not all scoops are fair: cf *Harper & Row Publishers Inc v Nation Enterprises*, 471 US 539 (1985).

152 Nick Economou and Stephen Tanner, *Media, Power and Politics in Australia* (Pearson Education, 2008) 94, 103.

153 See, eg, Emily Hudson and Andrew T Kenyon, ‘Without Walls: Copyright Law and Digital Collections in Australian Cultural Institutions’ (2007) 4 *SCRIPT-ed* 197 <<http://www2.law.ed.ac.uk/ahrc/script-ed/vol4-2/kenyon.pdf>>.

154 As Orbach notes, the ‘price’ might include consumers’ time and attention. Advertising supported dissemination of content is an obvious example: Barak Y Orbach, ‘Indirect Free Riding on the Wheels of Commerce: Dual-Use Technologies and Copyright Liability’ (2008) 57 *Emory Law Journal* 409, 429.

155 Alexander Meiklejohn, ‘The First Amendment is an Absolute’ [1961] *Supreme Court Review* 245, 263.

copyright system, to invoke freedom of expression does little in itself to advance the analysis of the scope of copyright defences.<sup>156</sup>

The strength and salience of particular justifications for the intervention of a defence or exception might change over time, and be examined differently in different social contexts. For example, the CJEU's concern for a copyright owner's interest in not having a work associated with a discriminatory message might not be so pressing elsewhere. In some domestic contexts, other kinds of concerns, such as the rights of indigenous peoples,<sup>157</sup> might inform the analysis and give rise to other kinds of limitations on the scope of an exception. More generally, conceptions of the dignity of the author might shape the analysis, informed by the idea that moral rights do not sufficiently capture all relevant concerns. Technological development, and changes in business models,<sup>158</sup> might also affect the analysis of the need for legal intervention. Even the claims in support of unlicensed academic uses might one day weaken. Imagine a dystopia in which academic freedom is significantly debased, and university-based scholars must act as 'researchers-for-hire' by public- and private-sector entities.

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156 For broadly similar reasons, the analysis is not advanced very far by noting the inevitable circularity of the fair dealing analysis. When applying the fair dealing provisions, courts shall have regard to 'the effect of the dealing upon the potential market for, or value of, the work or adaptation': See, eg, *Copyright Act 1968* (Cth) s 40(2)(d). If the dealing is covered by a fair dealing defence, the dealing need not be licensed. Accordingly, the fair dealing analysis appears to beg the very question at issue: whether there is a market that would be harmed by the defendant's dealing. Like arguments that simply posit freedom of expression in opposition to the rights of copyright owners, this circularity argument proves too much: without assuming that the copyright owner is entitled to the market – the potential harm to which being the focus of the analysis required by s 40(2)(d) – the fair dealing could entirely demolish the copyright interest. This point has been made by at least two US Circuit Courts of Appeals in the fair use context: *American Geophysical Union v Texaco Inc*, 60 F 3d 913 (2<sup>nd</sup> Cir, 1994); *Princeton University Press v Michigan Document Services Inc*, 99 F 3d 1381 (6<sup>th</sup> Cir, 1996), certiorari subsequently denied in *Michigan Document Services Inc v Princeton University Press*, 520 US 1156 (1997). In *Princeton University Press v Michigan Document Services Inc*, 99 F 3d 1381, 1387 (Judge Nelson) (6<sup>th</sup> Cir, 1996), which concerned the photocopying of articles from scientific journals, the Court of Appeals for the Sixth Circuit addressed the defendant's circularity argument as follows:

The defendants contend that it is circular to assume that a copyright holder is entitled to permission fees and then to measure market loss by reference to the lost fees. They argue that market harm can only be measured by lost sales of books, not permission fees. But the circularity argument proves too much.

Imagine that the defendants set up a printing press and made exact reproductions – asserting that such reproductions constituted 'fair use' – of a book to which they did not hold the copyright. Under the defendants' logic it would be circular for the copyright holder to argue market harm because of lost copyright revenues, since this would assume that the copyright holder had a right to such revenues.

In the fair use analysis, it is assumed that copyright owners are entitled only to markets that are 'traditional, reasonable, or likely to be developed': *American Geophysical Union v Texaco Inc*, 60 F 3d 913, 930–1 (Chief Judge Newman) (2<sup>nd</sup> Cir, 1994).

157 See generally Kathy Bowrey, 'Economic Rights, Culture Claims and a Culture of Piracy in the Indigenous Art Market: What Should We Expect from the Western Legal System?' (2009) 13(2) *Australian Indigenous Law Review* 35, advocating for a realignment of the discourse surrounding copyright law and cultural policies generally, so as to better accommodate the rights of indigenous peoples in Australia.

158 See Merges, 'Of Property Rules', above n 141; Tom W Bell, 'Fair Use vs Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine' (1998) 76 *North Carolina Law Review* 557.

Whatever description is given to these ‘outputs’, normative claims in support of characterising as fair these uncompensated uses of copyright-protected material in the course of such endeavours might atrophy.<sup>159</sup>

At some level, the benefits of uncompensated uses can be taken as a given. Even singing chipmunks find an audience;<sup>160</sup> and these audiences would doubtless ‘benefit’ if they did not have to pay to experience such a spectacle. Furthermore, derivative creators would be wealthier if they did not have to factor licensing costs into their bottom lines. More useful, it is suggested, is an analysis that evaluates the reason for the dealing in the light of the prerogatives of the copyright owner – that is, a contextualised analysis that engages with both the needs of users and the rights of the copyright owner and the reasons why we sometimes cannot rely on the copyright system to navigate between these interests. While copyright endures, arguments about the scope of defences should engage with, and not sidestep, the implications of those arguments for copyright’s systemic commitments.

## VI CONCLUSION

Those contesting the analysis advanced here might extract the following syllogism from the *Burnett* case,<sup>161</sup> discussed above: if a free society ‘must’ in its copyright laws make an accommodation for parodies, must it not also follow that the addition of a fair dealing defence for the purposes of parody *and* satire renders Australia even more ‘free’? And, if the terms of those defences were interpreted broadly, would this not offer even greater freedom?

Before concluding that broad defences and exceptions are an indisputable good, it should be recalled that fair dealings are, by definition, uncompensated dealings. A vast amount of uncompensated derivative creativity is tolerated, and probably always has been.<sup>162</sup> Today, an enormous volume of parody and satirical uses of copyright-protected works can be accessed at the click of the mouse, or a tap on a screen. Much of this is too trivial to warrant legal intervention, and, for

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159 Cf *Cambridge University Press v Patton*, 769 F 3d 1232 (11th Cir, 2014), where digitised posting and making available to students portions of copyright-protected books was found to not necessarily be a fair use.

160 The total gross US box office receipts for the movies, *Alvin and the Chipmunks* (Directed by Tim Hill, Fox 2000 Pictures, 2007); *Alvin and the Chipmunks: The Squeakquel* (Directed by Betty Thomas, Fox 2000 Pictures, 2009); *Alvin and the Chipmunks: Chipwrecked* (Directed by Mike Mitchell, Fox 2000 Pictures, 2011); *Alvin and the Chipmunks: The Road Chip* (Directed by Walt Becker, Fox 2000 Pictures, 2015) are estimated to be over USD655 753 719: see IMDb, *Alvin and the Chipmunks* <<http://www.imdb.com/title/tt0952640/>>; IMDb, *Alvin and the Chipmunks: The Squeakquel* <[http://www.imdb.com/title/tt1231580/?ref\\_=tt\\_rec\\_tt](http://www.imdb.com/title/tt1231580/?ref_=tt_rec_tt)>; IMDb, *Alvin and the Chipmunks: Chipwrecked* <[http://www.imdb.com/title/tt1615918/?ref\\_=tt\\_rec\\_tt](http://www.imdb.com/title/tt1615918/?ref_=tt_rec_tt)>; IMDb, *Alvin and the Chipmunks: The Road Chip* <[http://www.imdb.com/title/tt2974918/?ref\\_=nm\\_filmg\\_act\\_1](http://www.imdb.com/title/tt2974918/?ref_=nm_filmg_act_1)>.

161 491 F Supp 2d 962 (CD Cal. 2007).

162 David A Brewer, *The Afterlife of Character: 1726–1825* (University of Pennsylvania Press, 2005), discussing early versions of what might be described today as ‘fan fiction’.

the most part, copyright owners tolerate its existence.<sup>163</sup> In some contexts, however, the mickey is not only taken, it is commercialised, and its uncompensated taking might deny authors an income stream.<sup>164</sup>

As the EU and US doctrine underscores, it will not always be appropriate for otherwise-infringing dealings to be vetoed. Even so, it may be salutary to remember that, for many authors, being ‘free’ to ‘speak’ means having sufficient time and sufficient income to create the works that they hope will find a paying audience. In a vibrant marketplace of ideas, freedom of expression interests are surely furthered by the existence of such works. Broad interpretations of copyright defences that would expand the pool of uses for which authors will not be paid thus offer only one vision of freedom. Put another way, if exceptions for parody or satire give us more freedom to ‘take the mickey’, again to quote the Commonwealth Attorney-General, it does not necessarily follow that the more ‘mickey’ that is taken, the greater the freedom we enjoy.

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163 Ginsburg, ‘Exceptional Authorship’, above n 42, 15; Tim Wu, ‘Tolerated Use’ (2008) 31 *Columbia Journal of Law and the Arts* 617. The US Court of Appeals for the Eleventh Circuit recently discussed this point, noting that copyright owners ‘routinely tolerate secondary uses which do not adversely impact [the copyright owners’] market’: *Cambridge University Press v Patton*, 769 F 3d 1232, 1258 (Judge Tjoflat) (11th Cir, 2014).

164 See generally Brennan, above n 24, 167, noting the importance of devising rules, according to which ‘those who create literary and artistic expressions of economic value are better sustained by that value, thereby promoting freedom of expression in a vibrant democracy’.