

Parody, pastiche & caricature

Enabling social and commercial innovation in UK copyright law

UK copyright law currently does not provide for an exception for parody, pastiche or caricature. Therefore anybody creating or distributing such a work is potentially liable for copyright infringement. Copyright protects the fixation, or the expression of an idea, not the idea itself. As such not every parody, pastiche or caricature of a copyrighted work will be copyright infringement. But many of these works are clearly derivative works of the original and use a substantial part of the original work they reference.¹

Consumer Focus supports Prof Hargreaves' recommendation for the introduction of an exception for parody in UK copyright law in order to reduce the cost and 'chilling effect' associated with relying on case law.

A parody exception in UK copyright law would:

- reduce the cost of litigation resulting from reliance on case law
- reduce the 'chilling effect' resulting from legal threats, particularly in the online environment
- support social and commercial innovation by providing legal certainty to parodists, those distributing parodies, and copyright owners
- simplify UK copyright law and bring it in line with that of other industrialised countries



Banksy – Kate Moss 2005

Parodies are an integral part of our lives, and are found everyday on the BBC, the theatre stage and YouTube. We believe it is time to support this kind of social and commercial innovation, and provide parodists and copyright owners with legal certainty. An exception for parody would be a significant step towards establishing the legal framework for innovative commercial and non-commercial transformative use. It would reduce the cost associated with rights clearance, litigation and take down notices, and provide legal certainty to parodists, those distributing parodies and copyright owners.

UK courts have, over the past century, established case law on parodies as copyright owners in the original work have brought court cases for copyright infringement. But it is not possible to draw certainty from existing case law, other than that a parody can be defended against copyright infringement claims on the basis that the use of the copyrighted work was not substantial, or that copyright law may be trumped by a public interest defence and/or the right to freedom of expression.

The current situation is wholly unsatisfactory for parodists, be they consumers or professionals. The UK has a proud tradition of parody, pastiche and caricature, but the law as it stands forces parodists to effectively operate in a legal grey zone. This imposes an unnecessary cost on the economy and stifles social and commercial innovation. According to Hargreaves the introduction of a parody exception would result in a £1 million cost saving per annum, and could generate additional economic growth of between £130 and £650 million per annum.²

¹ See Williamson Music Ltd v. Pearson Partnership Ltd 1987 FSR 97

² **Hargreaves Review Supporting Document EE – Economic Impact of Recommendations**, Intellectual Property Office, May 2011, pg.29

Culture made in the UK – parody, pastiche and caricature

The UK has a significant tradition in parody, pastiche and caricature in a variety of forms and mediums, including literature, stage, film, fine art and music. Parody, pastiche, satire and homage have been an important vehicle for social and commercial innovation. These types of work are among the most commercially successful and well-known works in British history. Examples include T. S. Eliot's *The Waste Land*, which recontextualises elements of various previous literary works, including Dante's *Inferno*. Sir Tom Stoppard has borrowed liberally from Shakespeare characters and plots to create famous pastiches such as *Rosencrantz and Guildenstern Are Dead* and *Shakespeare in Love*, and from George Orwell's *1984* and Federico Fellini's *8½* to create *Brazil*. Parodies frequently eclipse the work they are based on in popularity, with the BBC television sitcom *'Allo 'Allo!* now being better known than the original BBC television drama *Secret Army* which it satirised.

Pantomime, which has a long tradition in the UK, is a mixture of parody, pastiche and caricature. While the folklore and fairytales from which pantomime draws inspiration are in the public domain, many of the references to contemporary culture and characters are not. Parody, pastiche and caricature have also found new relevance in contemporary British urban and fine art, with artists such as Banksy and Mau Mau 'mashing-up' existing works to reflect on contemporary culture.

Digital technologies and the internet have fuelled the emerging 'mash-up' culture, where consumers take parts of copyrighted work, rework them and post them online. Parody, pastiche, satire and homage have found a new home in an online culture which can be both irreverent and devoted; where samples of copyrighted works are used both to ridicule and to praise. User-generated content such as the *Bush and Blair's Endless Love* parody³ and *ACS:Law Downfall* caricature⁴ have become part of an online viral and meme culture which delivers a running commentary on contemporary culture. What has become known as user-generated content blurs the lines between consumers, users and entrepreneurs. The line between social and commercial innovation is becoming increasingly fluid. Now a professional DJ and producer, London based Erol Alkan became a British pioneer of music 'mash-ups' in the early 2000s. His *Can't Get Blue Monday Out of My Head* mash-up of Kylie Minogue's vocals in *Can't Get You out of My Head* and the instrumentals of New Order's *Blue Monday*⁵ becoming so popular on radio and in clubs that Minogue eventually performed it live at the 2002 Brit Awards. More recently the *Newport State of Mind* parody/homage⁶ of Jay-Z and Alicia Keys' *Empire State Of Mind* went viral and was viewed two million times in two weeks, but was eventually removed from YouTube due to a 'copyright claim' by EMI Publishing.⁷

Parody, pastiche and caricature in copyright law

EU law provides that member states are free to introduce an exception for parody, pastiche or caricature in national law,⁸ but the UK is among the few industrial countries which does not provide for such an exception. Australia most recently introduced a fair dealing provision for parody and satire into copyright law in 2006. Belgium, Spain, Switzerland, and France provide for a similar exception in their laws. Countries which, like the UK, do not provide for an exception in law, commonly see litigation on the issue. In Germany courts take a lenient view on parodies in the absence of a statutory exception, while in the US courts generally consider parodies to fall under the fair use defence as a form of criticism. US courts have considered parodies in a number of landmark cases, but the theoretical and practical difficulties in applying the fair use defence to parodies means that courts have not arrived at a consistent approach to parody. Varying case law, which leaves gaps of interpretation, has led to substantial uncertainty for parodists and copyright owners based in the US. The disadvantages of relying on costly court cases for the ongoing interpretation have fuelled calls for the recognition of parodies as an art form in US copyright law.

³ **George Bush Tony Blair – My Endless Love**, YouTube, January 2007

⁴ **ACS:Law's Anti-Piracy Downfall Sends Hitler Crazy**, Torrentfreak, 4 October 2010

⁵ **Can't get Blue Monday Out of My Head**, YouTube, March 2006

⁶ **Newport parody of Empire State of Mind becomes online hit**, Telegraph.co.uk, 23 July 2010

⁷ Greg Cochrane, **Jay-Z spoof Newport State of Mind removed from YouTube**, BBC Radio 1, 10 August 2010

⁸ See Article 5(3)(k) of the **InfoSoc Directive (Directive 2001/29/EC)** which allows for such an exception to the right of reproduction and making available.

The economics of parody

Parody, pastiche and caricature are effectively illegal in the UK, despite there being no evidence to suggest that they harm the economic interest of copyright owners. Parodies are transformative works; they are new works, which are not market substitutes for the original work. As such the potential economic harm from parody, pastiche and caricature is bound to be limited. There is no evidence in economic literature to suggest that such works, or user-generated content more generally, cause any economic harm to copyright owners.⁹ Anecdotal evidence would suggest that instead parody, pastiche and caricature can lead to increasing demand for the works they borrow from. According to the BBC a parody exception would 'facilitate the broadcast and sale of programmes' and the economic arguments are particularly compelling for parodies produced and distributed in a commercial context. In order for the UK to maintain its competitive and vibrant creative culture UK creators should have the same legal certainty and protection creators in other industrialised countries enjoy.

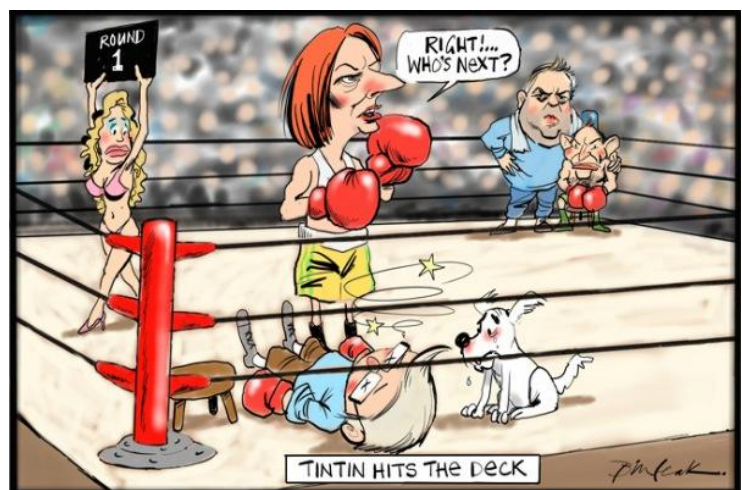
The 'comedy right' in Australia

A parody exception in UK copyright law would remove the structural barriers to continuous commercial and social innovation. It would allow the UK to nurture a form of creativity that is inherent in our culture. Aside from considering an exception purely in terms of its ability to monetise culture, the Government should recognise, and celebrate, parody, pastiche and caricature as inherently British and worthy of protection. When Australia introduced a fair dealing defence for parody and satire in 2006 the Australian attorney-general Philip Ruddock explicitly recognised the cultural significance of the change in the law he was proposing:

*'Australians have always had an irreverent streak. Our cartoonists ensure sacred cows don't stay sacred for very long and comedians are merciless on those in public life. An integral part of their armoury is parody and satire... However, our copyright laws have until now done very little to protect the way people use others' works or images to parody and satirise others in the name of entertainment. I have a Bill currently before the Senate which will ensure Australia's fine tradition of satire is safe.'*¹⁰

The introduction of the so called 'comedy right' into Australian copyright law was widely welcomed, especially by cartoonists, who found themselves at the receiving end of legal threats. Like the UK, Australia at the time suffered from uncertain case law on the matter, leaving cartoonists open to considerable legal uncertainty.

Less than a year after the review of copyright law the 'comedy right' was put to the test when the Belgium based Moulinsart SA, which owns the worldwide copyright for *Tintin*, threatened court action against the Australian cartoonist Bill Leak. Leak had satirised Prime Minister Kevin Rudd's boyish appearance by portraying him as Tintin, but was told to stop producing 'parodied adaptations' and pay royalties for drawing on the likeness. Leak refused, pointing to the fair dealing defence for parody and satire in Australian copyright law, and Moulinsart SA backed down.



Five years after the introduction of the fair dealing defence for parody and satire into Australian copyright law, the 'comedy right' has created an effective balance between the commercial interest of copyright owners and of those who want to reference copyrighted work to comment on contemporary culture.

⁹ Mark Rogers, Joshua Tomalin & Ray Corrigan, **The economic impact of consumer copyright exceptions – a literature review**, Consumer Focus, November 2010, pg.7

¹⁰ Matthew Rimmer, **Digital copyright and the consumer revolution: hands off my iPod**, Edward Elgar Publishing, 2007, pg.142

The need to clarify UK law

The fact that the UK has a long tradition in parody, pastiche and caricature without these art forms being protected in copyright law has given rise to the argument that no such exception is needed to ensure continuous commercial and social innovation. In response to Gowers recommending for a parody exception in 2006 the music industry argued that a copyright exception is not necessary and that relying on litigation provides sufficient legal certainty to parodists and fosters user-generated content.

But the reality is that parodists and those who make their works available to the public face considerable risk of being sued for copyright infringement and hence having their works removed by internet hosts. Older case law on parody and copyright infringement suggests that, even where the use is substantial, a parody is not copyright infringement if it is in itself original.¹¹ However, more recent case law has held that a parody which reproduces a substantial part of an earlier work does infringe copyright.¹² More generally UK courts have interpreted increasingly minute parts of a copyrighted works to constitute a 'substantial part' and that their use is therefore copyright infringement. This means that the Government cannot continue to defer the parody problem to the courts. And courts cannot be relied on for the continuous protection of an important part of our culture by finding the appropriate balance between the interest of parodists and copyright owners. Parody is a notoriously difficult defence and when *Newport State of Mind* was taken offline, the IPO published this commentary from Steve Kunczewicz of HBJ Gateley Wareing LLP:

*'The general rule is that the more of the original copyright work which the parody uses, the harder it is to argue that it doesn't infringe. "Newport State Of Mind" uses a virtually identical melody to Jay-Z's original even though the lyrics are very different, and it's probably this line of attack which EMI have used to get the video removed... This is the essential legal problem with parodies – they need to be close enough to the original to be recognised by their audience as a parody in the first place, which means that they will almost inevitably infringe copyright. Even though some cases have argued that parodies contain enough original thought and creativity to be recognised as "works" in their own right, the position is nowhere near clear enough for this particular parody to be worth the risk... the only way for platforms and websites to be sure that they aren't drawn into such a claim is to remove any potentially infringing content as quickly as possible.'*¹³

The parody problem is one of market failure, as most copyright owners are unlikely to grant licences to permit the creation of parody, pastiche or caricature. Rights clearance is overly complex and associated with high licensing transaction costs. Relying on the courts, to resolve instances where copyright owners choose to sue, aggravates the market failure because the UK is one of the most expensive countries in the world to resolve copyright disputes through the courts. As a consequence only creators and publishers with the necessary financial resources, and taste for lengthy court cases, will risk producing and distributing such works on a commercial basis. SMEs and those organisations lacking an in-house legal team will shy away from the substantial legal risk associated with any parody, pastiche or caricature. Museums and galleries frequently refuse to display or commission works which incorporate elements of other works for fear of being sued for copyright infringement. The argument that this merely reflects 'bad legal advice' ignores the fact that most museums and galleries won't be able to afford legal advice in the first place, let alone defending a parody, pastiche or caricature in the High Court.

The legal uncertainty surrounding such works has a chilling effect on commercial and social innovation, and further brings copyright law into disrepute. In the absence of an exception for parody in copyright law, which clarifies what parodists can and can't do with copyrighted content, consumers will continue to knowingly or unknowingly engage in copyright infringement when they express themselves through 'mash-ups' and user-generated content. Internet hosts who allow consumers and entrepreneurs to make their creative works available to the public will continue to oblige when copyright owners send take down requests, rather than face the cost of defending their users' content in the High Court.

¹¹ See for example *Joy Music Ltd v Sunday Pictorial Newspapers Ltd* [1960]

¹² See for example *Schweppes Ltd and Others v Wellingtons Ltd* [1984] and *Williamson Music Ltd v Pearson Partnership Ltd* [1987]

¹³ Steve Kunczewicz, "**Newport State of Mind**", **old Parody issues**, Intellectual Property Office, September 2010