
Inspiration or infringement: parody and the law

Stuart Hannabuss

The author

Stuart Hannabuss is a Lecturer in the Faculty of Management, Robert Gordon University, Aberdeen, UK.

Keywords

Law, Copyright

Abstract

Parodies live off the things they imitate. They also exist as literary works in their own right. They raise important legal and ethical issues for people in literary, publishing, and information work. There may be infringement, use in a misleading context, the exercise of fair use, plagiarism, and free speech. At best there may be theft of the text, at worst theft of authorship itself. The postmodern interest in pastiche removes the oppositionality of parody but paradoxically reveals how perennial a form it is and its consequences are.

Electronic access

The research register for this journal is available at <http://www.emeraldinsight.com/researchregisters>

The current issue and full text archive of this journal is available at <http://www.emeraldinsight.com/0024-2535.htm>

Parody has had a bad press for many years. Yet we often get pleasure from reading and seeing it, especially if we get the joke, and see what is being parodied. It feels good to be included in the conspiracy, and we often willingly connive in the fun. At the same time, we know what parodies are. They feed off other works, like parasites, and make fun of them, often in spiteful and witty ways.

There is a long literary tradition of parodies, from the plays of Aristophanes to Max Beerbohm. Stern's *Tristram Shandy* has strong elements of parody and self-parody. Even Dostoyevski, in *The Possessed*, lampooned Tolstoi. Web sites providing the official line on political and company activities have spawned counter Web sites which debunk corporate messages. Fame brings its own imitators and parodists – Thackeray parodied Bulwer-Lytton and Disraeli in the nineteenth century, Amazon.com's customer reviews have a brain-dead parody at www.brains4zombies.com. Serious issues may be taken to almost tasteless limits in pursuit of parody, like the "top story" about "killer sheep" during the UK foot-and-mouth scare at www.thebrainstrust.co.uk. The well-known children's book, Dr Seuss' *The Cat in the Hat*, has been the subject of a parody suit in the USA. Laurie Taylor's column in the *Times Higher* takes the Lilliputian affairs of UK higher education into the domain of the absurd.

This article examines some of the literary and legal implications of parody, and attempts to open up – or remind readers about – the fine line between inspiration and infringement.

Defining parody

The term parody appears back in Aristotle where it indicates a literary work, like a poem, treating a subject in a light, satirical, or mock-heroic way. This mockery comes through in the plays of Aristophanes and, much later, in works like *The Dunciad* by Alexander Pope. Parodies often showed people in a bad light, making fun of them, pointing out their idiosyncrasies and flaws. We get this in works like *Gargantua and Pantagruel* and *Don Quixote*. The intention is usually comic or burlesque, however cruel the humour might



be (and it can be anything from bawdy to black, direct and insinuated).

The notion of incongruity is important for parody. It is after all, in many cases, a form of imitation, one which undermines, one which winks at the knowing reader as if to ask “do you spot what we’re actually doing here?”

Heroes become anti-heroes, famous personalities get mocked, well-known genres – like buddy movies, film noir, romantic musicals, official documents – crudely or subtly simulated. The incongruity is an essential part of the humour.

This leads to the attitudes and intentions of the parodist. If the effect is mocking imitation and exaggeration, then we can infer something about these – it may be an oblique form of homage, but it is more likely to be malicious, targeting the original person or text in order to undermine it and put it up for ridicule. There are many examples of sympathetic parody, where the content, structure, and tone of the original have helped to shape the new work – we think of Joyce’s *Ulysses* in particular. Giraudoux’s *Mad Woman of Chailot* uses a playful irony to comment on and distance herself from the effects of capitalism in the play. The work of Anthony Burgess, John Barth, Kurt Vonnegut, and others reveals how original – and socially important – parody, when set in the larger framework of social satire, can be. But for most people, most of the time, arguably, parody summons up the idea of unsympathetic treatment.

Lawyers speak of using works in a misleading way, a misleading context. They usually go further in emphasising how original works can be intentionally distorted, mutilated, or prejudicially modified. These things may happen to an original work for reasons other than parody, of course. Much of the legal concern lies more in the realm of copyright infringement, and in particular moral rights. Intentions are usually very important in parody, and they usually take the form of an intention not just to imitate but also to mock.

This presents us with two other important issues. The first is that of the originality of the parody itself. Many are works of no mean literary merit and interest, justly attracting not just copyrightability but also esteem. Some interesting legal implications arise here on just when a work is truly original. The second is whether parody takes more than a bit of the

original, more than a bit of the reputation of the original, away from it. To such an extent, in fact, that it is a theft of authorship, not merely a theft of text.

Parodies are often attributed to the world of satire. There are many ways to be verbally aggressive about people around us and the events we see and read about. It can take many forms, from vituperative anger to arch irony, from sarcasm to caricature. Traditionally it has been regarded as both offensive and brilliant, often depending on your position and point of view: the perpetrator will respond differently from the object of the satire, and always there are onlookers, who often take sides, openly or not. In social history and anthropology there is a rich tradition of the trickster and the fool, mocking the great, often wisely commenting on great events, as in the mediaeval Feast of Fools.

There are, then, many types of satire – from invective to the literary hoax, lampoon to irony, political and sexual. The characteristic of the parody, however, is that it usually starts with a text, or illustration, or other work, and goes from there, changing the original in subtle or blatant ways, with the intention of mocking, undermining, even exposing the alleged hypocrisy of the original. The intention is usually laughter, light or savage. The effect on the reader or audience is often laughter, sometimes sardonic, but coupled with the lure of being drawn in by the parodist as a conspirator. We might say, then, that people who enjoy parody contribute in no small way to its success. The effect on the original creator, if they know or care, can be substantial – as we see from literary feuds and legal wrangles.

The legal angle on parody

Much of the commentary on parody concerns itself with literary traditions and phenomena. There are several important legal and ethical angles too. The close way in which creators protect their title in copyright proves this. Even a cursory look at entertainment law cases over the last decade reveals how vigilant rights holders are.

Their attention is drawn mainly to copyright infringement. This includes economic issues, like those economic losses which are arguably lost through infringement

and piracy, as well as moral issues, like those where the attribution to the creator (“paternity”) may be under threat. There are always going to be debates about what is copyrightable. Copyright law states that ideas, as such, are not protected. Only the expression of the ideas in some tangible form is protected. It is often very difficult to draw the line (and so assess the authenticity of a new work, and the intentionality of its creator). Superman comics, for instance, are widely known and copyrighted, yet this has not stopped many imitations, and some of them have been contested in court. Yet if someone drew an image which was regarded as too close to – or derivative from – the Superman character, and this might even pre-date the Superman comics, only tangible proof of having drawn the image could be used as a starting point for proving title.

The points here, then, are twofold: first, that ideas in tangible form are copyright, and copies, including parodies, usually lead to arguments about original ownership (and exploitation and distribution and dissemination rights as well). And second, that it is a complex matter of fact and law whether a work existed in its own right and not just as an imitation, let alone a parody. Paradoxically, too, parodies often want to make the connection with the original clear: that is part of the rationale of parody, that readers will identify what is being parodied and join in the laughter and scorn.

It is easy to identify the incentives for copyright in economic terms. There are many individual and collective interest groups active in the field, for example in the music and software industries. The Napster debate has hinged on legal and economic arguments. In literature, copyright has vigorously extended to the protection of fictional characters like *Lolita*. The Nabokov Estate brought a suit against Pia Pera for her book *Lo's Diary* which allegedly made extensive use of the “original”. Fictional characters can be protected if they appear in a copyrighted work. Difficulties come when fictional characters take on a life of their own outside such works, like the detective Sam Spade.

The argument is that such characters are “distinctively delineated”, so they can be misappropriated by anyone else, say another author using the same character, and by extension a parodist. Protecting such characters depends on whether they have

been fully described, and in this respect fictional characters are often shifting ground for authors and lawyers. To the distinctively delineated test there is added another – that of “substantial similarity”, between the original fictional character and the infringing one. Working out whether substantial similarity does actually exist is often subjective, and draws on characterisation, plot, mood, dialogue, and “the total concept” of the character. Such characters may also have trademark protection, good examples being The Lone Ranger, Dougal of *The Magic Roundabout*, and Postman Pat.

Graphic characters, too, can be protected. Walt Disney’s characters spring immediately to mind – such as Mickey Mouse and Donald Duck. This issue is so important because of global merchandising and commercialisation. It is again worth asking whether graphic characters can be owned as intellectual property, and if so how they can be protected from exploitation. Protecting characters inside their copyrighted works is just the start – there is also what happens to them outside them. Comics and cartoon producers are experienced in this legal field, and many interesting cases can be found.

Again, trademark protection can be applied, when graphic characters function in their own right and grow into devices or even logos for other forms of merchandise. Crucial here is whether confusion arises in the minds of reasonable members of the public as a result of trademarked graphic characters who resemble the original one. This confusion is critical in trademark law, even though evidence is not always reliable from market research, since it underpins any case by the plaintiff for economic loss and even loss of reputation. Again, too, there are interesting similarities and differences with parody, where there are similarities in the sense that similar images may be used but differences because parody usually wants and expects consumers to notice the link with the original, and in many cases (but not all) the economic rivalries are not a factor.

Moral rights and wrongs

It is in the area of moral rights that parody seems to hit home. The increasing emphasis in recent years on moral rights can be seen in the assertion of paternity made on the backs

of title-pages in books. Two moral rights are particularly important: paternity and integrity. Paternity is usually not under direct threat in parody, since it is in the nature of parody to identify the work and the author (if only then to make fun of them). It is not as if parody is seeking to take away the rights of authorship from the original creator, even though some parodies have alleged or implied that the original creator is a plagiarist! Indeed, this is a useful distinction between parody and plagiarism, that parody rarely sets out to take the authors' paternity away from them, while plagiarism goes beyond a theft of text into a theft of authorship itself.

Integrity is another key element of moral rights. This takes the form of a right to oppose any changes in the work that might distort it or alter it in detriment to the honour or reputation of the original creator. We can see evidence of this concern in legislation, such as the Visual Artists Rights Act (1990) in the USA. This protects original works by preventing any intentional distortion, mutilation, or other modification of the work that would prejudice an author's reputation.

The issues here are important for parody. Parody can, after all, not just draw on the content and structure and tone of the original, but it might also take parts of it, perhaps substantial parts, and do new things with them. It could be that original material is altered, and this is easy when information is in electronic form. It might also be placed in a new context, which may have misleading consequences (for example it may confuse and even offend) visitors to a Web site or readers of a book). In certain cases, parodies which are also spoofs might misrepresent information and advice and lead to consequential economic loss.

We can pick up on the alternations as they allegedly lead to detriment to the reputation of the original creator. Part of the case made by victims of Internet framing technology, where original news is repositioned in screen displays surrounded by the borrower's advertisements and hypertext links, is that their material has not just been downloaded without permission but also that its integrity is being abused. This damage to reputation is something which integrity moral rights and parody do have in common: such damage can result from both infringing integrity rights and from parody. Studies so far appear to have concentrated on the chagrin experienced by

parodied authors rather than on tangible and accurately analysed economic damage, and some research on this would be most welcome.

Many examples highlight the wider legal circumstances and just assume that, if harm is done, it should be put right. The son of film director Fred Zinnemann, for instance, filed a lawsuit against an Italian TV station in 1999 for broadcasting a colourised version of his father's classic World War Two drama *The Seventh Cross*. It re-broadcast it despite his complaints. In this case the plaintiff argued that colourisation was mutilation of the original, and argued on moral grounds that it was detrimental to his father's reputation. The economic implications of broadcasting and rebroadcasting were also very much part of the case.

What happens to original material has economic and moral rights consequences. For instance, in the information provided by Her Majesty's Stationery Office on photocopying their materials, we read that "reproduction is not allowed in connection with advertising or endorsement, nor in any circumstances which, in the view of HMSO's Licensing Division, are potentially libellous or slanderous of individuals, companies or organisations. In addition its use must not give rise to unfair or misleading selection or undignified association."

It is clear how easy it is to move from the economic dimension of copyright (which understandably rights holders wish to protect) to that dimension associated with reputation and perception by the marketplace. Hence the assertion of no links with advertising and endorsements which would undermine the objectivity of their material, and its reliability. The comments on defamation are important, albeit predictable. Even more interesting, in this context, are the remarks about unfair and misleading selection and undignified association. The concept of being represented in a false light (which derives from defamation law) is relevant here, since consequentially this entails damage to reputation. Arguably too it is offensive to reasonable people.

Where economic and moral rights come together is in the area of derivative works. Derivative works, and legal rights associated with them, forms a complex area of law. Overarching the debate is the moral issue of who is doing what to whom and what and why. Putting aside arrangements under

contract or licence by which someone may have the legal right to use another's copyright material, we are dealing here with material over which the original author or artist is the rights holder, and he/she is able to exploit that work over the duration of the copyright, depending on jurisdiction. It may well be, however, that other works are created from the original one, say new software from original, new screen graphics from original, new online learning materials from original.

There is a need here, as we saw in discussing graphic characters, to examine the "two texts" with the test of substantial similarity in mind. This is never easy, as current software law demonstrates. The Altai test and others push us in the direction of looking for underlying "*scènes à faire*" in such software, and certainly the protection of source codes. Yet copyright extends to the tangible expression of the ideas, and it is not easy to identify, or extract, the essential and underlying uniquely identifying content of any copyrighted work. We are also faced with another issue, that of the views of the stakeholders – suspicion probably on one side, innocent self-vindication or opportunism on the other.

The moral rights area, then, is of particular interest to anyone exploring parody and wanting to bolt on a legal angle to the traditional approach through social history and literary criticism. Indeed, parody is a subject which never seems to lie down. Recent years have seen much action, above all where literary and musical materials are concerned.

Parody and fair use

Parodies make use of other works. This leads to an inevitable conflict between the original work and author on the one side, and the "new" work and author on the other. Many parodies simply "appear" and most do not appear with the sanction or knowledge of the original author. So we need to look at how the original is treated, how it is used, and whether this use is fair or not.

Fair use is a widely known concept. There are exemptions under copyright for fair use, so that, for example, researchers and students can use copyrighted material for research and private study. There are also many arrangements by which licences to use

copyrighted material allow use, although usually these prohibit commercial use, above all that which arguably would jeopardise the economic investment of the original creator or producer.

For parody, then, fair use is a central issue. It is not easy to establish, because parody draws on other works and may imitate them, use excerpts from them, rely on recognisable graphics and expressions for its effect. In this way, it is often difficult to argue that they are "legitimate" derivative works (for example developed and disseminated under licence or with permission). Usually, too, permission is rarely given, if at all, and parodies may, at their extreme, lead to court cases not merely on copyright or trademark infringement, but also on damage to reputation and infringement of moral rights.

There are also wider social issues, above all in the USA, derived from free speech, which encourages freedom of expression and the freedom to publish. This argument has been used by defendants in parody issues, arguing, say, that their parody of company mission statements, government information, military activity, and the rest, should be openly critiqued in a free society as part of the democratic process.

In many parts of the world, the concept of fair use includes the right to parody or satirise original works. The argument is that this has the public benefit of comment and criticism. Often another factor is added: that the parody does not compete with the original, as it appeals to a different audience, and may appear at a later time and often in a different place.

These issues all come together when particular cases arise. An important US case concerns Acuff-Rose Music. This company sued a rap group called 2 Live Crew for recording a parody of the hit song *Oh Pretty Woman* by Roy Orbison. Acuff-Rose alleged that 2 Live Crew had infringed its copyright. The case went through several courts: the first court decided that the parody was fair use, but at appeal the second decided that a parody could not be fair use where its production sought only to make a profit. These outcomes indicate how matters can swing from side to side in complex cases like this. In this one, the US Supreme Court reviewed it and decided that the existence of a commercial purpose did not destroy the fair use exception to copyright infringement.

The four-factor test

In cases like these a four-factor test is often and usually applied. The first is the purpose and character of the use of the original copyrighted work. We should ask whether the new work has been created for commercial or non-commercial purposes (many parodies are not). Commercial use in itself may not make the parody unfair, but could do so. Another aspect of this is whether the parody conforms to the fair use criteria of research and private study, research, news reporting or teaching. We should look too at how the original work has been transformed or changed (mutilated?), and take account of the purpose and intention of the original as well as of the parody. This transformative principle reflects the concept of derivative work mentioned earlier. Verbatim copying, for instance, would be infringement, and might also be plagiarism, as well as parody!

The second is the nature of the copyrighted work. The original may be, for instance, an educational or information text where copyright is essential, and the original intention is to inform and educate. Works of fact in consequence may be differentiated from works of fiction or musical works, creative works where the nature of the original may be harder to define. We might also wish to take account of whether the original work has actually been published: sometimes parodies appear of unpublished works, leading to associated issues of evidential proof.

The third is the amount and substantiality of what is used from the original work. This is the substantiality test. It is important to examine this quantitatively and qualitatively, and to ask whether the amount of “copying” or “reliance on the original” is reasonable or not. With a poem it might be a parody of all of it. With a singer it might be a parody of her style of singing. It might be a parody (or indeed a plagiarism, and something could be both!) of just part of a novel, say an episode, a character, or the style (like Hemingway’s style, or Damon Runyon’s style). Often lawyers involved in this issue have to weigh up just what has been taken or used, and whether more was taken than was necessary to create the parody. This is a fine line issue, because the rationale of parody is to demonstrate an explicit link with the original in order to make fun of it, or represent it or its creator in some

particular way. At the same time, from the legal viewpoint, substantiality is an important factor in deciding whether the parody has indeed been created independently and is a work in its own right. The paradox is striking.

Adaptations provide an interesting slant on this substantiality issue. In copyright law it is a restricted act to make an adaptation of a literary, dramatic or musical work. Adaptation includes translation. Computer programs can undergo adaptation, too, when an arrangement or altered version of the program is made of it, or when it is translated (such as into another computer language). Where programs like this are concerned, it is not an infringement for a lawful user of a copy of a program to copy or adapt it, providing that the copying or adapting is essential for the legal use of the program (like customising it to their needs and making it compatible with current hardware). The terms and conditions of use, and the contractual stipulations of the licence, may allow or prohibit such steps.

A question then would be whether parody is an adaptation. In a sense it is: parodies take the original material and “adapt” it, turning it (or some, or most, of it) into something else (which just happens to do allegedly mischievous things to it). Adaptations may cause offence to the original creator, as many dramatisations and musical arrangements of books have shown, but intrinsically adaptations, as such, need not be parodies. Think of radio versions of famous films, novelisations of films, adaptations of vocal music for orchestra, let alone all the many variations which arise when copyrighted works are performed.

So there needs to be a further ingredient in parody which is missing from adaptation. That further element is the intention to make fun, or treat creation and creator in particular ways. This pushes parody on from the strict domain of copyright infringement into the area of moral rights. In fact it pushes parody on from the area of moral rights as well, beyond paternity and integrity issues, into an area where satire, scorn, malice, polemic, pricking pomposity, getting revenge, debunking, and humour operate. All these issues may be at work in parody, which encourages us to consider what effect they have on the people who read the original, read the parody, and compare the two.

The fourth factor is the effect on the potential market and value of the original. Often parodies aim at different markets, but the extent of the harm is usually more complex than that implies. Where the musical parody was concerned, for instance, the markets could well have overlapped, and did, not just demographically but in time as well. There might be the possibility of confusion among consumers. New works might even supplant original works if people believe they are getting the product they desire, and parodies, being more recent, might avail themselves of new technology and improved publicity and marketing to achieve a wider audience. If not the intention, that might be the effect. It is a complex legal and moral argument to suggest that the parody has, or has had, a negative impact on the original. But this may occur. The parody could interfere with the sales of the original, causing economic damage. It could harm the reputation of the work, the creator, and others associated with the original work.

The four-factor test is important in any legal analysis of parody. It opens up crucial perspectives on the issue of what is yours and what is mine. It addresses the moral and socio-cultural issue of how to behave as an author in a community, what to do and how, where limits lie to original creative work and legitimate fair use and comment, and where ethical limits can be set to free speech.

Relevant cases

There are times when the issues seem straightforward enough. For instance, a Canadian parody case in 1997 concerned a pornographic parody of a television sitcom. The case was *Productions Avanti Ciné-Vidéo Inc. v. Favreau*. The television series was *La Petite Vie*, and Favreau made and marketed an erotic film called *La Petite Vite*. He admitted that he had borrowed ideas from the sitcom, and that he had relied upon the audience identifying his production with the plaintiff's original work. This last point is characteristic of parody, of course. Characters in both works were similar in terms of what they wore, and how they looked and spoke.

The Acuff-Rose Music decision from the Supreme Court has turned out to be precedential for such cases, even outside the USA, and influenced the decision in Canada.

Up until then, parody had been a valid defence to copyright infringement under “fair use” or “fair dealing”. Key to this, it appeared, was whether the defendant had reproduced the plaintiff's work, or had reproduced a substantial part of it.

The Canadian case turned out to be very interesting. It turned back to the issue of protecting fictional and graphic characters, above all to the difficulty of protecting fictional characters who belong to literary works and who then take on life outside them. The original sitcom was regarded, in its own right, as a caricature of daily life, and, rather like the characters in *Neighbours* and *Emmerdale* here in the UK, did not “show characteristics original enough to be protected by copyright”, even though the sitcom itself retained its copyright as an original dramatic production. In consequence, Favreau's parody was not a “reprehensible copy” of the original, and so the parody defence did not need to be considered.

The principles underlying this are important – how the original material was distinctively delineated, exactly what the property was over which the original creators claimed intellectual property rights, what the alleged parody did or appeared to do, whether substantial parts of the original were reproduced. Implicit in this discussion, too, must be the moral issues of the parody – that it was erotic, where the original was not; that it assumed knowledge of the original on the part of its audience and played on that knowingly; and that it is hard to establish, above all in economic terms, whether the original was harmed by the parody.

It is likely, moreover, that the audience for the parody was different from the audience for the original. In fact, the audience for the original may even have been enhanced by the parody. Evidence for this in general terms may be drawn from the raft of parodies, many affectionate, some morally more adventurous, of the *Star Trek* series (such as gay versions) and the *ER* series (like Dr Kerry Weaver's “real” life in Africa before she joined the hospital).

There are sometimes issues of consumer or market confusion, say, where trademarks get confused, or could be confused, to the detriment of a trademark rights holder. Cases of trademark confusion or dilution (more and more of these now in the domain name field) are of direct intellectual property and

economic concern to the stakeholders. The *Baywatch* and *Babewatch* case is a UK example. A television programme called *Babewatch* was broadcast on the Adult Channel, a subscription-only channel, and contained sexually explicit material. Connoisseurs of the purported original, *Baywatch*, know that there is more than a little soft-porn amid the sun and sand, but know too that it is not pornographic. In fact the makers of *Baywatch* describe their series as a light entertainment family programme.

This was a trademark case so the focus was the names of the original and the alleged infringer, and the judge in the case found that there was not likely to be confusion because the two products were so different. No likelihood of confusion, then, is a relevant criterion. This does not detract from the fact that this was a parody, nor that the original creators appeared to resent the fact that their original material had been treated in a pejorative way.

An alternative viewpoint, of course, is that, whatever the commercial implications of trademark law (and these are considerable in commercial terms), this parody shares with many others the characteristic of being based on an original but, arguably, doing no direct harm to it. If there is no market confusion, then arguably there is little or no economic damage. A reasonable interpretation of the market position and potential of *Baywatch*, moreover, is that it will go on being popular, in an entirely unconfused way, for many years to come. Furthermore, since the parody was erotic, and the original was not, such differences were substantial and so the substantiality issue does not apply.

Another important parody case was that of *The Cat in the Hat*. This famous children's book, by Dr Seuss, was first published in 1957. The Cat is a character depicted with a large tall black hat, in which other cats live (cats in hats *ad infinitum!*). Theodore Seuss Geisel owns the trademark rights over "Dr Seuss" and "The Cat in the Hat" (as a graphic character), as well as the copyrights for the series. He also holds licences for characters used in merchandising, for example on clothing, software, and theme-parks. In 1995 Alan Katz and Chris Winn wrote and illustrated a work called *The Cat NOT in the Hat!* This satirised the O.J. Simpson trial in the USA. The publishers of the work, Penguin and Dove, were not

authorised to use any of the Dr Seuss copyrights or trademarks. Nor were the authors.

Seuss sued for copyright and trademark infringement and sought to place an injunction on the parody/imitation, having, in advance of publication, seen advertisements for it. He alleged that Katz and Winn had made an unauthorised and derivative work from his own copyrighted works. This interesting case demonstrated the application of the four-factor test. Even though parody may be regarded as fair social comment and criticism under free speech and fair use, there is something intrinsic in parody which "conjures up" the content, structure and tone of the original.

Arguably, if a parodist can prove that, for a reasonable reader or consumer, this process of "conjuring up" took place, or was likely to take place, then one might conclude that the rationale of parody – that of existing explicitly in relation to its original – did exist in fact. It is one step from there to argue that, if a reasonable consumer conjured up, or was likely to conjure up, the original work, when exposed to a parody, then there was or would be no confusion. Indeed, such confusion as there was, or might be, might arise solely because such a reasonable consumer would delight, knowingly, in the juxtaposition of the two texts or creations, and wittingly conspire with the parodist in the process of parody.

An interesting distinction was made in the case between parody (which targeted a copyrighted work) and satire (where a copyrighted work was merely an instrument used to poke fun at another target, albeit another copyrighted work). In order to be a parody, this targeting process has to take place. It may incidentally (and from a literary point of view, significantly) be a satire of a larger set of issues (for example issues represented in the original and the parody and of interest to the wider community, say, if the parody was one like *Babewatch*). The parody of *The Cat in the Hat* did, in many important ways, differ from a children's book, since it was full of sardonic, worldly, and at times macabre imagery to do with the O.J. Simpson murder trial. In fact, although the parody used the general "Cat" style, it did not hold the actual Dr Seuss style up to ridicule.

That said, it did draw heavily on the creativity of the Cat books and came close to the nature of the copyrighted work (the

second factor). Like the originals, the Cat character was central to the parody, so substantiality (the third factor) came into play. The image of the Cat had been used by the publishers as images in and on the book. Katz and Winn argued that the murderer in the trial was like the Cat in being on the scene suddenly, creating mayhem. Both original and parody took their ideas forward to a denouement in which the reader was faced with a decision of what to believe and accept. The court regarded this so-called *post-hoc* characterisation argument as no proof at all of being substantially different. The effect of the use (the fourth factor) contained a mixed analysis, since the parody was so different that it would appeal to different audiences, but on the other hand the parody allegedly undermined the good reputation of the Dr Seuss product range. In conclusion the judge said that the defendants had merely used the famous stove-pipe hat, the narrator figure, and the Cat himself, merely to get attention for their product, and “maybe even avoid the drudgery in working up something fresh”.

Conclusions from this important case include the points that parody has to parody a copyrightable original, and that this must apply for a fair use defence to apply; that copyright and trademark intellectual property issues are likely to apply; that the four-factor test is workable and comprehensive enough in legal terms. We must then move on to ask whether the moral and literary implications of parody are fully satisfied by such decisions.

A moral dimension and postmodern consequences

Humour is always complex. One way, it is said, to insult someone is to say they have no sense of humour. Parody turns on such a range of subjectivities and intentionalities, many situational in character. What seems a witty parody for one person will be insulting for another. The same parody might enhance the enjoyment of the original, or degrade and mutilate it. The hypothetical impact of parody on the literary and commercial destiny of the original has been discussed and needs further examination.

Many moral issues exist to surround the four-factor test and any other set of criteria for parody, its justification or defence, and any attempt to curtail it or punish parodists for

their work. It is not just a dialectic between “*liberté d’expression*” and “*droit d’auteur*”, or between authorised reproduction and a counterfeit. The purpose and character of use of the original work is bound up with the paternity and integrity moral rights of the creator, and the original work exists in its own moral readership context (for example people attribute particular values, derive particular benefits, from it, as Dr Seuss’ children’s books, Walt Disney cartoons). The nature of the work is more fluid with fictional works, as creative works, but it is worth asking how creative any parody is, above all when, allegedly, the parodist draws heavily on original material, in order to make fun of it. Substantiality is complex, because it is subjective and, more often than not, qualitative. The effect on the market, too, is an area where the extent of harm is difficult to determine, and where, as in the harms caused “proof” of obscenity, too many factors operate simultaneously for an easy solution to be found.

Over-arching these concerns are postmodern issues of authenticity. A demolition of differences between high and low art, interpreting simulation as authenticity and vice versa (such as with television news, in the style of Baudrillard), has encouraged us to look again at simplistic distinctions between the real and the apparent, the genuine and the fake. Eco’s discussion of fakes and forgeries in *The Limits of Interpretation* typifies this debate. Postmodernism highlights the knowingness of stakeholders in the creative process – novels which keep reminding us that they are novelistic, television characters who both play themselves and roles and accept that both realities coexist in the viewer’s mind.

In such a world, distinctions between original texts and parodies begin to fade. Parodies are generally knowing and knowingly conspiratorial, and reading and enjoying them entails this knowing negotiation of meanings on the reader’s part. The assumptions and criteria of copyright are based on ownership and seek to clarify, in Buber’s terminology, the I-Thou difference. This is this and that is that. Postmodernism seeks to de-differentiate this difference, that is redefine it so that it becomes a problematic: things can exist both as different and as non-different. This links with an increasing trend towards collaboratively authored texts

and content management systems where there are multiple versions of texts (however well-managed the rights are). Interactivity in information retrieval and text use, say by students at universities, has provided a pragmatic base for this problematic to live easily enough – users can live with the paradox of copyright being protective and use being permissive, of texts being themselves and yet also starting points for other things, jointly owned.

Jameson once said of the postmodern era (he called it the era of late capitalism) that there had been a temperamental shift “when pastiche appears, parody disappears”. Pastiche refers to the way in which postmodern works imitate the style of other historical periods. This borrowing or bricolage means that artefacts – from artwork to architecture – demonstrate a montage of different styles or stylistic masks. Such pastiche is a form of mimicry. It does not necessarily have the intention of parody, which is satirical and to provoke laughter. Baudrillard has said much about simulacra, such as television news programmes or sitcoms which supplant the realities to which they refer (they become hyper-reality). Many postmodern “texts” refer to other texts, knowingly, knowing that their audience will spot the intertextualities. The lives of celebrities move along parallel lines, as themselves and as the roles they play in films, music, and television.

Such developments indicate that the definition of parody is evolving in interesting ways. It is still there, distinctively oppositional in the sense that parody feeds off other texts, other experiences, other responses, and needs to declare its intention to parody and involve the reader conspiratorially. Pastiche, in its eclectic postmodern sense, imitates previous genres and styles, but it is not ironic, and therefore not subversive. That said, it is not easy, or even plausible at times, to differentiate between parody and pastiche. Often pastiche is parody. A lot of modern parody uses, like pastiche, irony in order to draw attention to the way it both satirises something else and would like to give the impression of not doing so. This is what turns things into something of a moral dilemma. For some the morality lies in clearly differentiating high from low art, or original works of art from imitations. For writers like Wyschogrod, there are moral consequences –

say for the study of history and literature – in so ironizing culture, information, and images. Perhaps the ultimate irony of such ironizing is epistemological, as we see in developments like virtual faith.

The postmodern scenario is something in itself and ultimately it takes us away from the direct concerns of this article, which were the legal dimensions of parody. The literary history and implications are well recorded (see bibliography). The legal dimensions tend to exist in legal work but there are all too few crossovers. There need to be more. The legal issues present us with a number of important intellectual and cultural challenges – who owns what, how should we treat the work of other people, what is fair use, what is free speech, what can and should the law achieve in this domain? Moral rights opens up more dimensions for us, and the application of the four-factor test, hitherto restricted to the law courts, deserves wider use and interpretation. It would be worthwhile, for instance, working up a wider, literary and ethical, counterpart for the four-factor test.

Ultimately, too, we are talking about what happens to people’s work and people’s reputations. We may speak of adaptation and fair use, infringement and privacy, but what we are really talking about is a possible theft of the text, and beyond that a possible theft of authorship. After all, if parody turns to plagiarism, and there are times when it does, then it is just that. Information specialists, publishers, and many others are important intermediaries in this process, as well as creators, users and advisers.

Once the laughter has faded, just a little, and thoughtfulness has entered in, just a little, then parody presents some challenging issues. It is all too easy to find yourself on either end – as the butt of parody or the creator of it. In a recent reference work from a reputable UK publisher, the author of this article found what seemed to be a spoof article. It is in fact a parody of an entry in such a reference work. It was a skilful pastiche, it was knowing, it seemed fun. Once the knowing smile had faded, the moral implications, for publishers and information intermediaries, for knowledge, indeed for truth itself, do really seem to matter a very great deal indeed. We do not always know where or what the parody is. Whatever the limitations of legal perspectives on parody, we still appear to need them.

Further reading

- Alderman, J. (2001), *Sonic Boom: Napster, MP3, and the New Pioneers of Music*, Fourth Estate, London.
- Baudrillard, J. (1988), *Simulations*, Semiotext(e), New York, NY.
- Beaudoin, T. (1998), *Virtual Faith*, Jossey-Bass, San Francisco, CA.
- Bird and Bird [legal practitioners] at <http://www.twobirds.com>
- Channell, J. (1994), *Vague Language*, Oxford University Press, Oxford.
- Connery, B.A. and Combe, K. (Eds) (1995), *Theorizing Satire: Essays in Literary Criticism*, St Martin's Press, New York, NY.
- Dane, J.A. (1988), *Parody: Critical Concepts Versus Literary Practices, Aristophanes to Sterne*, University of Oklahoma Press, Norman, OK and London.
- Eco, U. (1994), *The Limits of Interpretation*, Indiana University Press, Bloomington and Indianapolis, IN.
- Gianetti, E. (1999), *Lies We Live by: The Art of Self-deception*, Bloomsbury, London. Available at: <http://hollywood.net.com> [for entertainment law].
- Howard, R.M. (1999), *Standing in the Shadow of Giants: Plagiarists, Authors, Collaborators*, Ablex, Stamford, CT.
- Hutcheon, L. (1994), *Irony's Edge: The Theory and Politics of Irony*, Routledge, London and New York, NY.
- Jameson, F. (1992), *Signatures of the Visible*, Routledge, New York, NY.
- Land, M. (1962), *The Fine Art of Literary Mayhem*, Holt, Rinehart and Winston, New York, NY.
- Langford, D. (Ed.) (2000), *Internet Ethics*, Macmillan, Basingstoke and London.
- Mawdsley, T. (1994), *Academic Misconduct: Cheating and Plagiarism*, monograph 51, National Organization on Legal Problems of Education, Topeka, KA.
- Nichols, J.W. (1971), *Insinuation: The Tactics of English Satire*, Mouton, The Hague and Paris.
- Reed, C. and Angel, J. (Eds) (2000), *Computer Law*, 4th ed., Blackstone Press, London.
- Robic [legal practitioners] at <http://www.robic.ca>
- Rose, M.A. (1993), *Parody: Ancient, Modern, and Post-modern*, Cambridge University Press, Cambridge.
- Smith, G.J.H. (Ed.) (1997), *Internet Law and Regulation*, 2nd ed., FT Law & Tax, London.
- Test, G.A. (1991), *Satire: Spirit and Art*, University of South Florida Press, Tampa, FL.