

Parody
Affective Registers, Amateur Aesthetics
and Intellectual Property

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Chris Fowler: One of the amusing things about Twitter is that they have these pseudo accounts, these parody accounts, 'Pseudo Fed'. Very funny.

John McEnroe: You mean fake guys pretending to be these guys?

CF: Correct.

JM: Why is that funny? Shouldn't they be arrested? Being imposters?

CF: They make it plain it's not the real Rodger Federer saying the things that pseudo Fed says. I'm not trying to convince you of the comedy potential of Twitter, I'm just saying it's out there.

JM: So there's a guy out there, that doesn't ... you don't know who he is, some guy out there somewhere who pretends to be Roger Federer and you never know even who this person is?

CF: (laughs) they pretend to be Federer with the understanding it's not, it's a good-natured parody. Take it or leave it, I'm not trying to sell you.

JM: Oh I've left it!

Transcript of Wimbledon commentary, July 2012¹

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

UK Intellectual Property Office May 2011²

—INTRODUCTION

In April 2011, Canadian comedians Graydon Sheppard and Kyle Humphrey launched a Twitter account called 'Shit Girls Say' (@shitgirlssay). Carrying the tag line 'could you pass me that blanket?', the site posts humorous, pithy comments parodying the idiom supposedly used by young, middle-class women.³ The Twitter site proved to be highly popular, garnering many followers, and in December 2011 the pair produced a short video starring Sheppard as the eponymous girl. This clip circulated rapidly through social media and, at the time of writing, has attracted in excess of fifteen million views.⁴ In response, YouTube users have produced a number of similarly themed 'creative derivatives'⁵ including 'Shit Gay Guys Say' and 'Shit White Girls Say to Arabs'.

Not surprisingly, the video series has drawn complex patterns of critique across popular press and academic contexts. Chief among the concerns is the risk that such representations perpetuate sexism and racism. As Naima Ramos-Chapman puts it, many of the videos 'refer to adult women as "girls", and portray them as weak, stupid, silly, bad with technology, and helpless'.⁶ Along the same lines, Samhita Mukhopadhyay suggests that what is problematic about stereotypes is 'not about whether they are true or not, it's that they are used to disempower people or deny them certain privileges'; in other words, 'let's make fun of girls cuz we already know everyone thinks they are dumb and annoying'.⁷ However, other participants have

been more sanguine about the transgressive or progressive power of this series. Franchesca Ramsey, for example, produced her video 'Shit White Girls Say ... to Black Girls' in an effort to draw attention to the discrimination she experienced having been labelled, as she puts it, an 'oreo' for her 'proper speech' and 'valley girl accent'. As she explains:

Over the years I've found that dealing with white people faux pas can be tricky. If I get upset, I could quickly be labeled the 'angry black girl.' But if I don't say anything or react too passively, I risk giving friends and acquaintances permission to continue crossing the line. So I decided to create my own parody to make all people laugh while, hopefully, opening some eyes and encouraging some of my white friends and acquaintances to think twice before they treat their black friends and associates like petting zoo animals or expect us to be spokespeople for the entire race.⁸

Response to the series demonstrates the tension that operates between a parody and its 'target text', a tension, as this article explores, that is historically, legally and culturally situated. The series is also useful for raising questions about the definition of amateur cultural production and, in particular, the place of parody within these conceptual frameworks. As a number of studies have concluded, the absolute distinction between 'amateur' and 'professional' cultural producer is one difficult to sustain.⁹ And, as this article discusses, it is often through the socio-technological practice of parody that these distinctions become blurred. In relation to amateur economies, for example, parody and user generated content are key aspects of 'brandjacking' or what Susan Fournier and Jill Avery call 'the uninvited brand'.¹⁰ As Fournier and Avery explain, 'the concomitant adoption of desktop publishing software and social media has democratised brand parody production'.¹¹

Yet despite its utopian promise of free speech, the parodic form, demonstrated by the opening quotations, is tempered by cultural and legal exigencies. Moreover, these quotations illustrate the diverse registers through which parody operates to produce affects of incredulity, humour, distaste, admiration and economic desire. To understand emerging patterns of amateur parody, therefore, this article provides an exploration of how different fields of practice frame the parodic form. The first section locates parody as a particular literary genre and provides a historical context for the critical examination of its structures. Having identified how parody operates

as a linguistic device, the second section explores parody as a type of speech uttered by the voice of law. Indeed, the courts often turn to literary definitions of parody when deciding intellectual property cases.¹² In the final section these threads are drawn together through two case studies that analyse the use of parody across social media in which amateur creative work is framed by intellectual property regimes.

—SECTION ONE: HISTORICAL CONTEXTS FOR PARODY AND CULTURAL PRODUCTION

In her historical study of the linguistic and cultural context of parody, Margaret Rose argues the term has always been, to some extent, misunderstood and its influence underestimated. Moreover, the boundaries separating parody from the associated socio-linguistic terms of satire, burlesque, irony, pastiche and travesty have been inadequately distinguished. Part of the complexity, she suggests, arises from the failure to acknowledge the 'dispute and uncertainty' within the complex lineage of these terms.¹³ The derivation of the term parody comes from the ancient Greek *parôidia* which is a combination of 'para' meaning 'beside', 'near' or 'imitation' and 'ode' meaning song, hence: 'a song sung besides' or 'singing in imitation'.¹⁴ However, there remain contradictory lexical interpretations. As Linda Hutcheon observes, 'para' carries with it the meanings, simultaneously, of 'near' or 'beside' but also 'counter' or 'against' which results in an application of what she calls 'repetition with critical distance'.¹⁵ This means a parody may sit beside to complement the precursor text or may occupy an adversarial relation to the parodied work. Similarly, as Simon Dentith notes, the polemic aspect of modern-day interpretations of the term are not justified in its etymological connection within the ancient form of 'mock-heroic poem'.¹⁶ These may have imitated for comic effect rather than overtly mocked. For Rose, such lexical complexity is a demonstration of the power of this critical tool:

Parody, unlike forms of satire or burlesque which do not make their target a significant part of themselves, is ambivalently dependent upon the object of its criticism for its own reception ... Even explicitly critical parody can make the comic discrepancy between the parodist's style and that of the target text into a weapon against the latter and at the same time refunction the target's work for a new and positive purpose.¹⁷

Critical interpretations have significantly differed in their particular foci and purpose. Nevertheless, it is possible to identify dominant approaches during the last few decades to the study of parody and satire within literary and media research. Generally speaking, interpretations have mirrored the dominant theoretical or ideological frameworks of the period. That is, the structuralist approach within literary theory has focused almost entirely on the formal elements of the parodic work and the relations generated between it and the precursor text. Gerard Genette, for example, provides an exhaustive taxonomy of parody, distinguishing precisely between various related modes of pastiche, satire, quotation, allusion, plagiarism and caricature. Differentiating between parody and travesty, he argues the former transforms the *subject* of the precursor text while the latter modifies only the *style*.¹⁸ Although structuralist approaches such as Genette's provided a comprehensive model of parody, as is often the accusation made against structuralism they failed to take social and historical influences into account.¹⁹ Moreover, structuralist approaches to parody tend not to place much emphasis on the audience since their critical lens turns to the relations *between* texts. As might be expected, poststructuralist research on parody and satire, however, focuses explicitly on the audience's active involvement within the process of interpretation. Hutcheon, for example, argues that a parody depends on the recognition by the audience of both the 'foreground' (parody) and 'background' (target text) and the dynamics between these levels.²⁰ In other words, it is possible to miss the parodic intent of a work if one is unfamiliar with the cultural references. It should be noted that there are significant differences between these theories. Indeed, two of the key researchers in the field, Hutcheon and Rose, disagree on the fundamental place of humour within parody. For Hutcheon it is not always essential to the genre, while to Rose this argument risks adopting an elitist view of parody where the comedic aspect is denigrated.²¹ These arguments of definition and scope have socio-material consequences framed by the voice of law which are addressed in the following section.

—SECTION TWO: PARODY WITHIN LEGAL FRAMEWORKS

Since parody, as a specific form of 'recombinatory labour'²² necessarily depends on the existence of a prior text, intellectual property law has taken a special interest in

its practices. As the judgment found in the leading US copyright and parody case, *Campbell v. Accuff-Rose Music*:

because parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically, the role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it.²³

Moreover, parody and satire are increasingly dominating the thematic output of the film, video and television industries. As Jonathan Gray notes, 'contemporary television' is 'heavily populated by parody and parodic texts'.²⁴ Similarly, Dan Harries observes that cinematic parody has become a 'major mode of Hollywood film-making'.²⁵ In addition, the borders distinguishing news and satire are becoming progressively more blurred. Such generic instability produces new forms of citizen engagement across the political process. Recent research about how late night political comedy influences the outcomes of election campaigns, for example, finds that parodic and satirical news programs such as *The Daily Show* and *The Colbert Report* have a major effect on shaping political candidate image and influencing voter intention.²⁶

This section surveys the legal and policy frameworks that constrain and enable parody discourse, with a particular focus on US and Australian jurisdictions. Understanding these socio-technical structures provides the background for an exploration of amateur parody and what Alexis Lothian calls the 'everyday digital thefts at the capital-saturated scene of online media production and consumption'.²⁷

US copyright regimes, fair use and parody defences

In contrast to those jurisdictions, such as Australia and the United Kingdom, which employ a specific, exclusive and defined set of fair dealing purposes, the US model of fair use provides copyright infringement defences which are 'flexible', 'open-ended' and 'not exhaustive'.²⁸ Section 107 of the *US Copyright Act* contains four statutory factors that may be consulted to determine whether a particular use of copyright material is 'fair use' and, therefore, does not constitute an infringement.²⁹

Although parody is not statutorily listed as a fair use exception, US case law has now recognised that such works are afforded protection under s107 and, as mentioned, the key authority is *Campbell v. Accuff-Rose*. In this 1994 case the rap

group 2 Live Crew proved their song, 'Pretty Woman' qualified as fair use in a copyright infringement action brought by the target of their parody, rights owners of the Roy Orbison rock ballad 'Oh, Pretty Woman'. Establishing the social function and public benefits of a parody exception to copyright infringement within fair use, the US Supreme Court ruled that:

parody has an obvious claim to transformative value ... it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one ... the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.³⁰

Campbell v. Acuff-Rose Music demonstrates that by its very nature—its complex 'transformative value'³¹—parody necessarily challenges the scope of some elemental principles framing copyright law, namely, authorship, originality, and ownership. Moreover, parody in copyright law is an important site for the struggle over cultural production and labour. As Michael Spence argues, parody troubles the foundations of the dichotomy often held to exist between copyright owners and users. Copyright lawyers regularly assume the two figures 'stand in locked opposition, the activity of "creators" does not depend upon existing work and that the activity of "users" is rarely creative'. Instead, Spence argues, we need to recognise that 'the parodist is both a "creator" and a "user"'.³² As discussed in section three, it is often amateur parody that brings this tension into focus.

In assessing the particular difficulties posed by parody to copyright law, the Supreme Court in *Campbell v. Acuff-Rose Music* held that parody presented 'a difficult case' since its 'humour' or 'comment' arises from the:

recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin ... Once enough has been taken to assure identification, how much more is reasonable will depend ... on the extent to which the ... overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original.³³

Although this case 'authoritatively confirmed the applicability of the fair use doctrine to parodies',³⁴ and represents a 'breakthrough for the parodist',³⁵ the parody defence within US case law has not always been successful. In 1996 Dr Seuss Enterprises successfully sued Penguin Books for copyright infringement because the

parody defence could not be raised. The defendants, Alan Katz and Chris Wrinn, had produced a book titled *The Cat NOT in the Hat!*, which was a 'poetic account' of the events pertaining to the OJ Simpson double murder trial.³⁶ Pleading fair use, Katz and Wrinn argued their work was a 'Dr Seuss parody that transposes the childish style and moral content of the classic works of Dr Seuss to the world of adult concerns'.³⁷

A central issue at stake in *Dr Seuss Enterprises v. Penguin Books* was the distinction between parody and satire. Part of the problem facing the defendants was that they could not prove their work had sufficiently 'transformed' or parodied the copyrightable material. Following *Campbell's* ruling on parody, the trial judge held the distinction to be as follows: 'Parody appropriates commonly known elements of a prior work to make humorous or critical comment on that same work' as opposed to the case of satirical work in which 'commonly known elements of a prior work ... make humorous or critical comment on another subject'.³⁸

Unfortunately for the defendants, their work was found to target the 'Simpson tale' rather than function as an explicit parody of the plaintiff's copyrightable work, *The Cat in the Hat*. As O'Scannlain J held, while '*The Cat NOT in the Hat!* does broadly mimic Dr Seuss' characteristic style, it does not hold *his style* up to ridicule'.³⁹ This judgement represents an important point of departure between US and Australian Copyright Law to which we now turn.

Australian copyright law reform, fair dealing and parody

In May 2006, following a twelve-month period of consultation with media industry bodies, arts institutions and the public, the Australian Government announced its intention to draft legislation which would effect major reforms to the *Copyright Act 1968* (Cth) in relation to fair dealing and other copyright exception provisions such as time and format 'shifting'.⁴⁰

As noted above, Australian Copyright exemptions operate under the regime of 'Fair Dealing' rather than the US model of 'Fair Use'. Under Fair Dealing, legal copying applies only to specific, exhaustive, purposes. Before the 2006 amendments these were: research or study, criticism or review, and reporting of news.⁴¹ When the amendments came into effect on 1 January 2007, the Act contained a new fair dealing exception for parody and satire.⁴²

During the five years since the legislation was enacted these new copyright exceptions remain untested by the courts. This could indicate, as Kate Gilchrist and Katherine Giles argue, that Australia is ‘truly the home of parody and satire’ and that ‘copyright owners are prepared to accept that’.⁴³ Certainly these defences allow more scope for protection than other jurisdictions, such as the United States, in providing for both parody *and* satire.

The Panel

As a number of commentators have suggested, a possible driver for these Australian copyright reforms was an intensely protracted, high-profile Australian copyright case in 2000, *TCN Channel Nine Pty Ltd v Network Ten Ltd* (*The Panel*) to which we now briefly turn.⁴⁴ For its complex procedural journey and the breadth of copyright issues it addresses, *The Panel* has been comprehensively analysed.⁴⁵ The present survey will focus on only those areas of relevance to parody and satire defences.

Between August 1999 and June 2000, Channel Ten taped twenty short clips of program episodes from Channel Nine consisting of between eight and forty-two seconds in duration. These extracts were then re-broadcast on Channel Ten’s news and comedy based weekly television program, *The Panel*.⁴⁶ Channel Nine brought a copyright infringement action against Channel Ten in the Federal Court alleging breaches under s87(a) and (c) of the Act relating to, respectively, the subsistence of copyright in making and rebroadcasting a television broadcast. In its defence Channel Ten pleaded fair dealing under ss103(a) and (b) providing for copyright exemptions for the purposes of, respectively, ‘criticism or review’ and ‘reporting news’.

In the Federal Court at first instance, Conti J held that Channel Nine failed to establish infringement through the application of ‘substantiality’, the ‘linchpin’ for Nine’s case, and therefore found Ten had not infringed copyright for any extracts because the taking did not constitute a substantial part as statutorily explained under s14 of the Act.⁴⁷ Channel Nine appealed the decision to the Full Court of the Federal Court in relation to copyright subsistence within a television broadcast. The appeal was upheld by Sundberg, Finkelstein and Hely JJ who, in overturning the ruling of Conti J, found that a substantial part of Channel Nine’s copyright had been used by Channel Ten.⁴⁸ This led to consideration of the fair dealing defences claimed

by Channel Ten. In this matter, too, the Full Court disagreed with the decision at first instance finding a fair dealing defence failed on eleven of the twenty extracts. Channel Ten appealed to the High Court solely on the definition of a television broadcast.⁴⁹ In other words ‘was it each single image shown on a television set, or was it the program constituted by an aggregation of those images’?⁵⁰ McHugh ACJ, Gummow and Hayne JJ (Kirby and Callinan JJ dissenting) found the Full Court had erred in their construing of the term ‘television broadcast’ finding in favour of Channel Ten.⁵¹ When the case was sent back to the Full Federal Court for consideration of the remaining issues of substantiality, the decision was, again, reversed and it was held that Channel Ten had infringed the copyright of Channel Nine in relation to six of the twenty program segments.⁵²

In relation to fair dealing for criticism or review, parody was judicially considered at first instance only. In particular, Conti J refers to the finding in *AGL Sydney Ltd v. Shortland County Council* (1989) in which a ‘reply’ advertisement produced by the defendant, Shortland Council, adapting an original advertisement made by AGL, was found to infringe copyright.⁵³ Foster J ruled that Shortland Council were unable to raise a defence of parody under fair dealing since the taking had been substantial yet a mitigating factor, namely the transformative value of the subsequent production, had not been met. In reaching his decision, Foster J relied upon the decision in *Glyn v. Weston Feature Film* stipulating that infringement is avoided when there is demonstrated ‘mental labour’ and ‘revision’ of the copied work as to ‘produce an original result’.⁵⁴ Further, the ‘adapted’ advertisement was not found to be a parody but instead merely a ‘reply advertisement’.⁵⁵

As noted above, *The Panel* played a significant role in the introduction of parody and satire defences to the *Copyright Act 1968* (Cth). The inclusion of both these terms for fair dealing provides a greater protection than other jurisdictions for social commentators to use ironically or humorously the content of rights holders. It is unlikely, for example, that were *The Panel* to run today, a parody defence in itself could be raised in relation to all the clips that Channel Ten used from Channel Nine because the test of transformative use would be difficult to meet. However, since satire is a broader rhetorical gesture in which ‘the copyrighted work is merely a vehicle to poke fun at another target’, it could provide a more robust defence in relation to how those clips were used.⁵⁶ Since parody, satire, appropriation and

irony are significant forms of social commentary such legislative developments are to be welcomed. But as this next section demonstrates, amateur parody is not always supported by intellectual property regimes.

—SECTION THREE: SOCIAL MEDIA, FAKE ACCOUNTS AND AMATEUR PARODY

In their article entitled ‘The Entrepreneurial Vlogger’, Jean Burgess and Joshua Green argue cogently that distinctions used by mainstream media to describe the interactions on YouTube are often unproductive. In particular, as they explain:

amateur and entrepreneurial uses of YouTube are not separate, but coexistent and coevolving, so that the distinction between market and non-market culture is unhelpful to a meaningful or detailed analysis of YouTube as a site of participatory culture.⁵⁷

I draw upon this observation to explore the uses of parody across social media performed at the interstices of public and corporate interests. The two case studies which follow help illustrate some of the issues facing amateur parodists.

‘You’re not from Newport’

Questions about the distinction between professional and amateur cultural production were raised in the ‘Newport’ series of music? videos which appeared on Youtube during 2010. The first of these, titled ‘Newport (Ymerodraeth State of Mind)’, was directed by British film maker M-J Delaney who also wrote the lyrics together with Tom Williams and Leo Sloely. The Newport video is based on ‘Empire State of Mind’, a hit song recorded and performed by US musicians Jay-Z and Alicia Keys in 2009.⁵⁸ Delaney’s work parodies the target text by using similar shot sequences, musical style and appearances of the performers but re-imagines these in ways at odds with the original. In particular, it makes banal the portentous ode to New York by replacing the titular city with the name of the Welsh town of Newport; a strategy reinforced by deadpan lyrics ‘celebrating’ everyday practices of fast food, supermarkets and unattractive landscapes. For example, Keys sings in ‘Empire State of Mind’:

In New York, concrete jungle where dreams are made/
There’s nothing you can’t do/
Now you’re in New York/
These streets will make you feel brand

new, big lights will inspire you/ Let's hear it for New York, New York, New York.⁵⁹

The accompanying video shoots Keys at night in dramatic black and white, her grand piano reflecting the Statue of Liberty while iconic images of New York flash behind her. In contrast, Terema Wainwright in the Newport video sings:

In Newport, concrete jumble nothing in order/Not far from the border/When you're in Newport. Chips, cheese, curry makes you feel brand new/Washed down with a Special Brew/Repeat the word Newport, Newport, Newport.⁶⁰

Rather than a spectacular chiaroscuro style achieved through images of the neon skyline of New York, the Newport video is shot in the flat light of cloudy daytime with Wainwright playing an old Yamaha keyboard propped up on a park bench, traffic moving desultorily in the background.

While the participants of 'Newport' are, clearly, experienced and skilled performers, the parody relies, in part, on what one might call an amateur aesthetic to deliver its parodic force. This aesthetic operates in nearly all of the 'response' videos which were produced and uploaded following the original clip. In particular, the generic conventions demand a location with inauspicious or prosaic characteristics and performers who, while rapping fairly convincingly, also manage to convey the poignant banality of the urban lived experience. In the US video 'Newark State of Mind', for example, the keyboard is stolen mid song and lyrics complain 'Crack pipes, needles shards of Baccardi/garbage so high it's like a scene out of *Wall-E*'.⁶¹

The Newport parody became, as the cliché will insist, 'an internet sensation' attracting over two million views.⁶² Indeed, it was itself made the object of a parody produced by the satirical rap group 'Goldie Lookin' Chain' (GLC). Subtitled 'You're Not From Newport', the video attacks Delaney's piece for its disingenuous claims of origin and heritage, singing 'You're not from Newport/probably never been either/I'll bet you a fiver'.⁶³ GLC's response demonstrates the strength of the generic conventions which inform amateur aesthetics. Its target seems entirely to be the Newport parody rather than the original 'Empire State of Mind' video and, specifically, it is Delaney's articulation of cultural authenticity that is satirised.

Claims of originality are, of course, a central tenet of intellectual property law and in August 2010 Youtube, which had hosted 'Newport State of Mind', removed the video after complaints of copyright infringement issued by EMI Publishing.⁶⁴ This action provoked much speculation since conflicting stories emerged regarding possible economic and cultural bases for the music company's decision. Some commentators suggested it was less about a rights holder protecting revenue streams than an artist maintaining the cultural integrity of their work. A piece published in the *Guardian* shortly after the video was removed, for example, announces 'We've identified the culprit behind the Newport State of Mind takedown—and it wasn't EMI Music Publishing'. Instead, argues the news item, Alicia Keys and Jay-Z complained personally because they took direct offence at the unflattering tone of the parody.⁶⁵ To add further evidence for this argument, the infringement claim was limited to this specific work despite the many similar videos having been posted to Youtube (although this could be explained by matters of jurisdiction since most of the other videos originated in the United States where, as explained, parody is a protected form of speech unlike in the United Kingdom).⁶⁶ While it would be ill advised to search for 'real' reasons in complex, media-saturated contexts such as these, the case study does highlight how amateur parody tests intellectual property regimes in ways that escape explanations restricted solely to economic forces.

For Ian Hargreaves, it is precisely the amateur or, as he puts it, the 'homemade' nature of 'Newport State of Mind' that demonstrates the need for major copyright reform. Hargreaves is the author of the UK Government-commissioned 2011 report, *Digital Opportunity A Review of Intellectual Property and Growth*, a quotation from which opens this article. In August 2011, the UK Government announced plans to enact most of the major intellectual property (IP) reforms recommended in the report including the introduction of a defence to copyright infringement for parody.⁶⁷ Of the Newport videos, Hargreaves wryly observes:

given the IPO [Intellectual Property Office] has its headquarters in Newport ... future PhD students may well find deeper layers of meaning in this sequence of creations, which together amount to a persuasive satire upon the confusion of UK copyright law.⁶⁸

'Newport State of Mind' reappeared shortly after the initial complaint was issued and, at the time of writing, is readily accessible across many online platforms. The UK Government 2011 copyright consultation paper argues the video's ubiquity, despite the threat of legal action, provides further evidence for IP reform since 'incidents like this can have a negative impact on the public's trust of the copyright system'.⁶⁹

This case study has explored a fundamental tension (or balance) that operates between rights owners and users where, as explained above, parodists trouble this distinction. Through the lens of copyright the question posed of the Newport series turns on whether the extensive use made by the parody of the original video (particularly the almost verbatim use of the melody) amounts to infringement.⁷⁰ Although the Newport parody might be assessed as infringing it is unlikely anyone would *confuse* one for the other; viewers of these videos are almost certainly able to identify the real Jay-Z. But what happens when an amateur parody so closely resembles its target as to be accused of misleading or deceptive practice? The following section explores an amateur parody twitter site that raises questions of political activism, brand jacking and the public domain.

'Who tweets for Qantas PR?'

On 31 October 2011, a parody Twitter account called 'Qantas PR' (@QantasPR) was established, describing itself as the 'non official, official broadcast channel for Australia's national airline' and using a 'cut and paste' of the official Qantas logo as its own.⁷¹ The account appears to have been a response to the industrial action involving Qantas Australia which resulted in the airline grounding all flights world-wide for forty-eight hours. The first tweets centred on passengers left stranded in airports, humorously suggesting these travellers were participating in the 'Occupy' activist movement: '#qantas is proud to have single-handedly brought the #ows @occupy movement to Australia's airports'.⁷² Following widespread customer dissatisfaction in reaction to flight service disruption, the (official) Qantas Twitter account launched a competition during November, inviting passengers to tweet praise for the brand using the hashtag '#qantasluxury'.⁷³ This social media marketing initiative proved to be something of a 'PR disaster' with comments of derision circulating such as: 'Getting from A to B without the plane being grounded

or an engine catching fire. #qantasluxury'.⁷⁴ Tweeting with obvious relish the parody site participated through contributions including 'OK, seriously ... is there some way to turn Twitter off for a day or two? #qantasluxury'.⁷⁵

Although it seems most people understood the Qantas parody site to be an impersonation of a public relations account, bearing no association with the airline, some twitter users were not so savvy. In late January 2012, for example, sports personality Shane Warne complained via Twitter about Qantas by posting the observation that 'My luck is seriously running out—Qantas just cancelled the flight & no info about how or when we will get back to Melbourne'.⁷⁶ The Qantas parody site responded with a comment that included a reference to Warne's recent well publicised traffic altercation with a cyclist, quipping 'We've left @warne888 stranded in Perth. Melbourne cyclists, it's now safe to ride your streets'.⁷⁷ Warne retorted: 'I thought you guys were meant to look after Australians, not be sarcastic? You to [sic] often are late, cancel flights & lose luggage', adding 'Lots of people were very frustrated at you guys, AGAIN !!!! who tweets for QantasPR—Think your [sic] going to be in trouble tomorrow'.⁷⁸ The site was, indeed, in trouble a few weeks later when Twitter suspended the parody account.

Under its rules and terms of service, Twitter sets out guidelines for managing 'Parody, Commentary, and Fan Accounts'; 'impersonation'; and 'trademark policy violation'. These would seem to be the relevant provisions in relation to the action it took suspending the parody QantasPR site. While Twitter users are 'allowed to create parody, commentary, or fan accounts (including role-playing)' those 'accounts with clear intent to deceive or confuse are prohibited as impersonation accounts and subject to suspension'.⁷⁹ Qantas lodged complaints that the account was 'misleading and deceiving' and the parody site was suspended on Saturday 11 February 2012. In particular, Qantas stated 'the account used our logo and we had legal advice about shutting it down because they didn't specify clearly enough that it was a parody account'.⁸⁰ Following the suspension, QantasPR uploaded to the web their rejoinder addressed to Twitter. It mounted a measured argument that their site should be reinstated:

Please take another look at the bio (it says Non-official) and ... the account was widely recognised as a parody account by its 2600 followers and the media, with articles written about it being fake [includes web links to the

international media coverage] ... We're sorry if we have accidentally impersonated Qantas or used their freely-available logo, but it was clearly our intention to comply to the Twitter Parody Terms of Service ... Twitter parody accounts with the PR story-line are an established meme (just look at @BPGlobalPR), and we are certain that not only Qantas customers, but the general volume of Twitterers have the intelligence level required to understand that @QantasPR is merely a fake parody.⁸¹

Interestingly, on 14 February 2012 Twitter updated its trademark policy further strengthening and clarifying the bases on which trademark violation might apply.⁸² Arguably, it was these terms, rather than an evaluation of parody, that enabled Qantas to persuade Twitter to suspend the account. In other words, QantasPR had fairly forcefully argued its case for an effective parody site but could not dispute it was using the Qantas logo without permission. When the account was reinstated on 22 February 2012, the name was changed to Fake Qantas PR (@FakeQantasPR); the description now read, 'The non-official broadcast channel for faked news and PR stuff'; and the image used was a red triangle with the fake twitter account appearing in white font. The previous image had been a direct copy of the Qantas airline logo including the 'flying kangaroo' mark.⁸³

A number of issues are raised by the Qantas twitter account in particular and uses of parody across the public domain more generally. Unlike the situation pertaining to copyright law, as discussed above, there are no specific provisions under the Australian *Trade Marks Act 1995* (Cth) permitting a parody defence to infringement.⁸⁴ This, then, provides Qantas with a strong footing to argue the parody account be suspended, reprimanded or at least reconfigured, all of which occurred.

In relation to amateur economies, parody twitter accounts pose questions about 'brandjacking' and the public domain. As Ramsey argues, when social media sites resolve possible trademark infringement issues privately rather than legally, free speech could be curtailed:

To avoid lawsuits or liability under trademark law, some social network sites may err on the side of deleting all allegedly infringing content that incorporates another's marks. This approach could stifle the free flow of information and ideas.⁸⁵

Moreover, with respect to those sites such as Twitter that *do* permit parody accounts, 'their decision-making process for allowing or banning certain content may not be transparent or predictable'.⁸⁶ Similarly, as noted, recent legislation introduced in the US state of California that prevents online impersonation for 'the purposes of harming, intimidating, threatening, or defrauding another person' could have significant implications for social justice aims.⁸⁷ As the Electronic Frontier Foundation warned before the bill was passed, 'temporarily "impersonating" corporations and public officials has become an important and powerful form of political activism, especially online'.⁸⁸

Yet one must recognise that commercial speech and free speech are relationally agonistic and, for some, it is precisely the amateur parodist who dramatically reconfigures the market. For example, in the journal *Business Horizons* Fournier and Avery posit a stark distinction between consumer-generated parody and professional production:

While brand parodies have existed almost as long as brands themselves, historically these have been authored and distributed by organized experts such as the creative minds of *Mad Magazine*, *Saturday Night Live*, or the magazine *AdBusters*.⁸⁹

Now, the authors warn, 'brand parodies have become a blood sport ... hyper-critical consumers can leverage social media to turn the playful Age of Parody into an Age of humiliation for targeted brands'.⁹⁰ As argued earlier, amateur parody may give rise to quite remarkable passion and fear. Notice the affective language employed by Fournier and Avery: 'experts' are 'organised', 'creative' and 'playful' while consumer parody practice is a 'hypercritical' 'blood sport' resulting in 'humiliation' for brands. Demonstrating this agonistic relationality, the authors urge traditional brand managers to develop new strategies in response to 'a space owned by the social collective, where exposure, criticism and ridicule often rule', concluding somewhat elegiacally that 'our brand assets are mecurial; they are slipping from our grasp'.⁹¹ Fournier and Avery posit a straightforward distinction between amateur and professional parodists, but this article has explored the ways in which parody is deployed in a complex range of affective, economic and legal contexts which blur these borders. Indeed, the Australian Law Reform Commission is, at the time of writing, considering implementing broader exceptions to copyright infringement in

recognition that amateurs or 'real world' user-generated content represent both commercial and cultural contributions to innovation.⁹²

—CONCLUSIONS

Drawing on the 'Shit Girls Say' refrain, in June 2012 a Twitter account was established in the name of 'William Gummow' (@shitjudgessay).⁹³ It is unlikely the account is run by the real Gummow, who sat on the High Court from 1995 to 2012, but perhaps it provokes a certain degree of confusion. Posing a question on the identity and tenor of the account, for example, 'Private Law Tutor' (@Priv8LawTutor) asks 'is this account serious or parody? ... Am assuming parody'.⁹⁴ The response provides a useful coda to the argument of this article that parody operates in complex ways across diverse fields of practice. In reply, 'Gummow' writes 'deadly serious we take every word of our material directly from #austlii and always provide a source'.⁹⁵ 'Austlii' is an abbreviation of the Australasian Legal Information Institute which hosts a substantial online free access database including case law and legislation. The response deftly avoids the question of authentic identity but leaves open the possibility that even directly attributed quotation may constitute parody; a point made by another participant in the Twitter exchange who argues that 'selective quoting is a very fine form of parody'.⁹⁶ In this way @shitjudgessay highlights that amateur or 'homemade' parody must be understood within its literary and legal historical frames, a perspective this article has sought to provide.

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