



# THE SPACE NEEDED FOR PARODY WITHIN COPYRIGHT LAW: REFLECTIONS FOLLOWING DECKMYN

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Parody has both popularity and cultural importance of long-standing. People have been poking fun at tempting targets for the entertainment of audiences for many ages. The legal history of parody reveals a variety of approaches in jurisdictions throughout the world, and also changes of attitude towards it. Within the realm of copyright policy at present, there is particular concern for the rights of users of copyright works, notably freedom of expression. The various legal treatments of parody bring it into differing levels of contact with these considerations. The choices are worth reflecting on, therefore. The Court of Justice of the European Union was asked recently, in *Deckmyn v. Vandersteen*<sup>2</sup>, to consider the scope of the parody exception in EU law. Perhaps surprisingly, this is the first time that it has done so.

This article will first outline briefly the history of parody. It will then discuss *Deckmyn* and its context. It will conclude with a preliminary assessment of the likely impact of the ruling.

## I. THE HISTORY AND GEOGRAPHY OF PARODY – AN OUTLINE

The notion of parody has a long history. There are a number of examples from ancient Greece. Writers would imitate the characteristics of epic poetry, but apply them to light or humorous subjects. Similarly, tragic plays were imitated for humorous effect. From these roots comes an expectation that a parody will very often invoke an earlier work, imitating it but also turning its message in some way. This may well be to poke fun at the earlier work or some aspect of it, but it will not necessarily ridicule it. The Greek prefixes *par-* and *para-* to indicate

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<sup>2</sup> *Deckmyn v. Vandersteen*, (2014) All ER (D) 30 (Court of Justice of the European Union). (“*Deckmyn*”).

something which is beside, next to, related to another thing. Although these prefixes also indicate some opposition or counter-direction to the other thing (and this is often the case in parodies), that opposition may have many moods: sometimes hostile, antagonistic, sometimes sympathetic, playful, sometimes with elements of both. Many examples of parody in literature are successful and popular in their own right. They have been appreciated and often treasured by audiences for centuries. Some will come to eclipse their original model. Even a cursory examination of these works reveals great diversity. Parody is a concept of great fluidity, and therefore extremely difficult to delineate or define with any precision.

Modern parodies show no less diversity than their historical antecedents, and the concept is currently even more broadly understood. Parody may be expressed in almost any artistic medium, now frequently including music, visual art and film, as well as literature. Parody need not refer to or ridicule a specific work, but commonly will refer to something else (perhaps a body of work, an author, a style, a theme, a particular subject or type of behaviour, but potentially covering many other possibilities) that it wishes to highlight or critique, and will set it in a different context. This catalysing and innovative potential has proved attractive to parodists working in the modernist and post-modernist world. Parody is far more than mere ridicule, and offers a powerful opportunity for comment of all sorts.

Those whose work is parodied and those associated with something being parodied may well not welcome this. Although many will simply shrug their shoulders and try to develop a thick skin, others have sought legal remedies.<sup>3</sup> Injurious falsehood and defamation may be an option in a small subset of cases, but certainly not all. Intellectual property rights of various sorts may be used. Moral rights might allow an author to object to derogatory treatment of a work, or to a false attribution of the authorship of the parody to themselves. Again, this would only be pertinent in certain cases. In theory, passing off, trade mark law and design law might all be used against a parodist, but very particular factual circumstances would be required. Given that any successful parody must necessarily evoke some sort of connection to the object of parody, copyright offers another obviously possible route to legal redress. If the parodist has taken a substantial part of a copyright work, then copyright law may be engaged. This route has been followed more frequently, although certainly not always successfully, in a significant number and range of jurisdictions.

## II. EXPLAINING LEGAL CONTROL OF PARODIES

Legislatures and courts are thus faced with the challenge of determining the extent to which copyright law should allow the control of parodies. It is clear that the copyright holder has rights in their work. But it is also thought that the

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<sup>3</sup> Michael Spence, *Intellectual Property and the Problem of Parody*, 114 *Law Quarterly Review* 594, at 596-601 (1998).

parodist has interests which should be respected. For example, it is often argued that artistic freedom requires that an artist be allowed to refer to the artistic context in which he or she is working, and that this should encompass certain uses of other people's works. This is put forward as one reason for making room for parody within copyright law. Many jurisdictions have done this, whether by case law within a general category of 'fair use' or 'fair dealing' exceptions, or as a specific exception (perhaps within a 'fair dealing' or similar framework). There are further policy justifications put forward for enfolding parody within an exception to copyright. One of copyright's objectives is often stated to be stimulating the creation and dissemination of works. Yet the owner of rights in a work may well refuse to licence it if it is to be parodied, and thus may actively inhibit the creation of further works. Another common argument is that parodies may themselves be original, or 'transformative', and that this in itself justifies an exception to copyright law; whether to promote artistic freedom or to encourage the creation of further copyright works. Though it should be noted in response to this that other arguably original and transformative uses, such as many adaptations, remain squarely within the realm of prohibited acts.

A further policy argument for a parody exception is that free speech should be protected and promoted. This is perhaps the argument which resonates most strongly with contemporary society, where human rights are increasingly acknowledged and protected- in the legal sphere, at least. In the hands of the Tudors, early UK copyright law was certainly associated with censorship, and this spectre still haunts modern policy. The principle of freedom of speech is widely recognised, and it has for a long time been acknowledged in copyright laws throughout the world by exceptions such as those allowing quotation from a copyright work for the purposes of criticism or review. However, the modern forms of parody may well go beyond this quite limited exception for literal quotation, and an author may wish to use a work because it conveys something which is otherwise tremendously difficult to express. For example, a reference to 'Barbie' swiftly imports a range of cultural associations, signifiers and messages which would be difficult to express concisely (or at all) in any other way. The artist Tom Forsythe produced a series of photographs entitled 'Food Chain Barbie', which depicted Barbie dolls in various absurd and often sexualised positions, generally juxtaposed with vintage kitchen appliances. Mattel objected to this as a breach of its copyright in the dolls. Forsythe explained that he chose to parody Barbie in his photographs because he believes that "*Barbie is the most enduring of those products that feed on the insecurities of our beauty and perfection-obsessed consumer culture.*" As the Ninth Circuit of the United States Court of Appeals observed: "*It is not difficult to see the commentary that Forsythe intended or the harm that he perceived in Barbie's influence on gender roles and the position of women in society.*"<sup>4</sup> It upheld the District Court's finding that the photographs were a fair use of copyrighted material.

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<sup>4</sup> Mattel Inc. v. Walking Mountain Productions, 353 F 3d 792 at 796, 802 (9th Cir 2003).

It would be easy to offer many further examples of copyright works which have a rich and particular symbolism or significance which is most effectively conveyed by use of the work, rather than by a lengthy exposition of that message. If this is to be permitted within copyright law, it requires careful justification. As Spence has noted, it is during this assessment that it can be useful to distinguish between different types of parody (although it should be acknowledged that the commonly-used labels are far from perfect).<sup>5</sup> So-called ‘target’ parodies are those in which the parody is linked to the underlying work. They are aimed at some aspect of the work or its author, including its context and implications, even though the connection to the work may be somewhat remote and the field embraced somewhat general. In contrast, ‘weapon’ parodies are directed at things or thinking other than the work.

It is not difficult to make the case that a parodist should be permitted to use a work in order to comment on that work or its author. The parodist’s aim here is comment or criticism, and it is difficult to achieve this without making sufficient reference to the underlying work. Additionally, it may well be in the copyright holder’s interests that accurate quotation and reference is made. To prevent this would stifle comment and criticism to an extent inconsistent with the right of free expression – a fundamental right in many legal systems. It is also considered to be in society’s general interest that creators should be able to build on and comment on earlier works; just as the creators of those works were able to draw on and comment on earlier works and traditions. Furthermore, copyright is a property right, and protects against appropriation. It is no part of copyright law’s purpose to insulate the right holder from unwelcome criticism. There is, therefore, a strong argument that the rights of the copyright holder should in such cases give way so that target parody may occur without unwarranted hindrance.

With weapon parody, the case is less clear. The parodist does take the work, and in one sense takes it precisely because it provides a short cut. In some factual situations, such as the use of Barbie dolls discussed earlier, the taking seems on balance defensible. The purpose there was social critique, and the parodist would have been seriously restricted in conveying his message if he had not been permitted to use the dolls themselves. A long, written explanation of the parodist’s thoughts on gender roles in society would have had a very different impact from the visual message conveyed almost immediately by the photographs of Barbie dolls in absurd positions and situations. There was no harm done to the market for Barbie dolls, or derivative markets. Again it seems arguable that the copyright holder’s rights should give way, so that the parodist is not unduly restricted in the construction and communication of his message. But where there is no critical purpose, the taking is rather harder to defend. As the US Supreme Court has

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<sup>5</sup> Spence, *supra* note 2, at 612.

noted, a parodist might use the earlier work simply “to get attention or to avoid the drudgery in working up something fresh”.<sup>6</sup>

An example of this second situation was seen in the UK *Schweppes/Schlurppes* case.<sup>7</sup> A company copied the distinctive yellow label which appeared on every bottle of Schweppes’ Indian Tonic Water (a widely-sold soft drink) and used it on a bath product. The new label was extremely similar in almost every respect to the Schweppes label, simply replacing two letters so that it read ‘Schlurppes’, and describing the product as ‘tonic bubble bath’. Although the defendant company sought to excuse its taking by characterising it as a parody, Schweppes sued successfully for breach of the artistic copyright in its label. It is in this sort of factual situation that the copyright holder’s case seems stronger than the parodist’s. The company sought for its own product a free ride on the reputation of the Schweppes product, thus circumventing the need to build a reputation of its own with potential customers. Its purpose was commercial sales, not to poke fun or to comment. Even if one is prepared to bring the Schlurppes label within the ill-defined boundary of the field of parody, the justification here for preferring the parodist’s interests to those of the copyright holder seems much less convincing than in the case involving the use of Barbie dolls.

### III. THE COMMON LAW WORLD

As has been mentioned, a variety of approaches to parody can be seen in jurisdictions around the world, which may be more or less friendly to it. Many common law countries (including Australia, Canada, Hong Kong, India, New Zealand, Singapore, and South Africa) inherited the general approach adopted in the UK’s Copyright Act, 1911.<sup>8</sup> Essentially, parodies were assessed just as other allegedly infringing works. If there was a substantial taking, the question was then whether one of the ‘fair dealing’ exceptions applied.<sup>9</sup> This basic structure was capable of some flexibility, as the various tests were interpreted and applied in particular cases. Thus, notably, the assessment of what was a ‘substantial part’ could be understood in ways that were sympathetic to parodies – or not. It is certainly possible to observe changes in approach within the case law in common law countries, as the tide of judicial sympathy for parodies has ebbed and flowed.<sup>10</sup>

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<sup>6</sup> *Campbell v. Acuff-Rose Music*, 510 US 569 at 580 (1994).

<sup>7</sup> *Schweppes Ltd. v. Wellingtons Ltd.*, 1984 FSR 210. There was at that time no specific statutory defence covering parody in UK law, though one was introduced in 2014.

<sup>8</sup> See *International Copyright Law and Practice* (Paul Edward Geller & Lionel Bently eds., LexisNexis, 2013).

<sup>9</sup> This approach differs from the American doctrine of ‘fair use’, which is broader and more general in what it includes, and specifies four factors to be considered when assessing whether a particular use is fair.

<sup>10</sup> Lionel Bently, *Parody and copyright in the common law world in Copyright and freedom of expression: proceedings of the ALAI study days 2006*, 360-369 (Hugyens ed., 2008).

Where a substantial part was taken, the focus moved to the question of whether or not the use satisfied the tests necessary for the parody to be regarded as ‘fair dealing’ within one of these exceptions. Normally, exceptions relating to criticism or review were argued. This immediately raises the question of whether parody can be regarded as criticism or review. Much depends on how these concepts are construed. If construed broadly, they will often cover target parody, and may (on particular facts) cover weapon parody. Many courts adopted an accommodating construction, though an unusually restrictive approach was adopted by the Canadian Federal court in the *Michelin case*.<sup>11</sup> Discussions in that case and others demonstrate how easy it is to become mired in definitional difficulties when applying cultural concepts such as parody, satire, pastiche, caricature and burlesque in a legal context.

Even when working within this comparatively standard common law framework, countries have demonstrated somewhat different attitudes to parody, and have sometimes reached somewhat dissimilar positions. The comparative rarity of litigation involving parodies has made it even harder to be certain whether any particular parody will offend. As has been discussed, the policy arguments are not straightforward, and the interests engaged are significant and not easy to balance. Additionally, although a parody will often use a substantial part of a copyright work, this is not necessarily the case. It will depend on the factual circumstances, including the aims of the parodist, the medium adopted, and so on. Nor does a finding of substantial taking affect whether or not a particular parody is, for instance, effective or valuable. Viewed from a cultural perspective, if parody is regarded as potentially a worthwhile activity in its own right, it would seem somewhat odd to restrict parodists in their choice of medium and style simply to avoid infringement of copyright. Such doubts and considerations have strengthened calls for specific parody exceptions within the common law world, for reasons of clarity as well as principle. Australia was the first common law country to introduce a legislative exception for parody, and others have followed.<sup>12</sup>

Writing for this particular journal, it seems appropriate to note the position in India in a little more detail.<sup>13</sup> Within copyright there is no specific statutory

<sup>11</sup> *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada*, (1997) 2 FC 306.

<sup>12</sup> Section 41A, Australian Copyright Act, 1968 (as amended by the Australian Copyright Amendment Act, 2006). It recognises works of parody or satire within its ‘fair dealing’ exception. For discussion of the factors influencing the Australian decision, including the desire to reduce the restrictive impact of the Free Trade Agreement with the United States, see Bently, *supra* note 9, at 387-388.

<sup>13</sup> This article is largely concerned with copyright’s response to parody. But as has been noted, a parody may be considered defamatory. In a comparatively recent case in the Delhi High Court, Justice Bhat refused to grant an interim injunction to prevent the distribution of an online game alleged to be defamatory to a business (referring to ‘Tata Demons’), and an infringement of a registered trade mark. He held that the allegations of defamation could only be tested at trial. He also took the view that use of a trade mark deliberately to draw attention to some activity of

exception covering parody, but a parody may be considered under one of the fair dealing exceptions, such as criticism and review.<sup>14</sup> This was done by the Kerala High Court, in relation to Thoppil Bhasi's famous play *Ningalenne Communistakki* ('You Made Me a Communist'). First performed in 1952, Bhasi's play was banned for a time because of its political content, though it was very influential in Kerala's political history and remains a classic piece of writing. In 1995 Civic Chandran published a play *Aare Communistaaki* ('Whom did you make a Communist?'). Chandran's 'counter-drama' (as he described it) was intended to challenge the political thinking underlying Bhasi's play. Although Chandran had used many of the characters and some of the scenes from Bhasi's play, it was held that he had done so in the context of highlighting and commenting on political differences of opinion. His play was not simple imitation, but included additional material, and his own perspective. It therefore was 'fair dealing' for the purposes of the Copyright Act.<sup>15</sup> Although this instance offers an indication of the factors that might be considered when a parody is involved and fair dealing is claimed, further cases would be determined in the light of their particular facts. It would be unwise to draw any firm conclusions as whether a particular parody was permissible from this single instance. As elsewhere in the common law world, if it is not held to be a substantial part of the original copyright work that is taken, it will not infringe.<sup>16</sup>

#### IV. THE EUROPEAN SPHERE

Within Europe, historically, a range of approaches to parody can again be seen in national laws.<sup>17</sup> In terms of EU law, in 2001, an exception for "*use for the purpose of caricature, parody or pastiche*" was permitted (though not required) by the Information Society Directive.<sup>18</sup> A number of EU member states have enacted statutory exemptions which cover parody, although these do not all mention parody explicitly, and may differ in their detail. Other member states have approached things differently. Some consider that transformative uses result in a new work, so consent by any early right holder is not required. Others have a wider 'free use' clause. The common law systems have in the past tended to be the least permissive with respect to parody, although the UK has now adopted a

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the trade mark owner would not necessarily result in infringement. He regarded 'describing the Tatas as having demonic attributes [as] hyperbolic and parodic'. *Tata Sons Ltd. v. Greenpeace International*, IA No. 9089 of 2010 in CS (OS) 1407 of 2010 dated 28-1-2011 (Del). The case thus raises issues concerning freedom of expression which have some parallels in copyright law.

<sup>14</sup> S. 52(1)(a) Copyright Act 1957.

<sup>15</sup> *Civic Chandran v. Ammini Amma*, 1996 PTR 142 (Ker).

<sup>16</sup> S. 14 Copyright Act 1957.

<sup>17</sup> See Guido Westkamp, *The Implementation of Directive 2001/29/EC in the Member States* (Queen Mary Intellectual Property Research Institute, London, 2007), available at: [http://ec.europa.eu/internal\\_market/copyright/docs/studies/infosoc-study-annex\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf).

<sup>18</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Art. 5(3)(k). Many member states' laws already accommodated parody, so the implementation of the Directive has not resulted in many substantive changes in this regard. See Westkamp, *id.*



statutory exception and Ireland is considering so doing.<sup>19</sup> Even within these categories, each country will of course have built up its own body of case law, over differing periods of time.

The Information Society Directive (“the Directive”) was a wide-ranging and much-contested harmonisation measure, regarded by the Commission as essential for the proper functioning of EU intellectual property in the information society. The Directive harmonises the rights of reproduction, distribution, and communication to the public throughout the EU. It also harmonises the system of exceptions, though the less-than-ideal structure of this aspect of the Directive reflects the difficulties of reaching agreement on this matter, particularly given the diverse systems already established in member states. The Directive imposes one mandatory exception (for certain temporary, technical copies), and introduces an exhaustive but optional list of other exceptions.<sup>20</sup> It is within this list that the exception for parody is to be found.

In one sense the harmonisation of the parody exception was of only minor importance. Most member states already recognised parody within their schemes of copyright in one way or another, and the exception is in any case an optional one. The headline issues of the Information Society Directive were to be found elsewhere within it. But viewed from a wider perspective, the questions raised when considering the proper place of parody in EU copyright law are highly significant, and also characteristic of the more general debates regarding the relationship of copyright holders and copyright users. The discussion is therefore more sensitive than might be appreciated at first, and circumstances have until now led to its postponement rather than its resolution.

## V. THE EU CONCEPT OF PARODY: DECKMYN

However, in *Deckmyn*, following a reference to the Court of Justice of the EU (“the CJEU”) from the Belgian Court of Appeal, the question of parody was raised head-on. The facts of the case illustrate a number of the difficult tensions and issues just discussed. It is important and helpful to see the Court’s ruling against the complex and somewhat contradictory background set out earlier in this article. Nevertheless, this was a request for a ruling on EU law, and the Court must of course respond within that framework.

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<sup>19</sup> Section 30A(1), UK Copyright, Designs and Patents Act, 1988: “Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work” (introduced October 2014). For Ireland, see *Modernising Copyright: the Report of the Copyright Review Committee* (Dublin 2013), at 62-63.

<sup>20</sup> Article 5 of the Directive.



## VI. THE BACKGROUND TO THE REFERENCE

At a New Year's party held in the Belgian city of Ghent, Johan Deckmyn, a member of the Flemish nationalist party, Vlaams Belang, handed out calendars. On the cover page was a drawing resembling the cover of a book in the Belgian comic series *Suske en Wiske* (known as *Spike and Suzy* in English). Created by the Belgian author Willy Vandersteen, *Suske en Wiske* was first published in 1945, and soon became popular. Its theme is the adventures of the two children, Suske and Wiske, and their friends and family. It was serialised in Hergé's comic magazine *Tintin* for over a decade, and (alongside *The Adventures of Tintin*) is one of the most famous comic strips in Belgium. It is still published today, and has been translated into many languages. The traits and foibles of the main characters are well known to the Belgian public.

The original drawing at issue in the case was made by Vandersteen in 1961. It appeared on the cover of one of the *Suske and Wiske* books, called 'De Wilde Weldoener' ('The Wild/Compulsive Benefactor'). It shows one of the comic's main characters, Lambik, raised into the air by an eye-catching personal propeller, scattering money to the crowd as Suske and Wiske look on open-mouthed with shock. Lambik is drawn as something of a figure of ridicule in the series. Bald and with a big nose, he likes to consider himself a hero, particularly in terms of his intellectual prowess, though he is often shown failing in this. He is also somewhat vain and stubborn, though he does have a noble side. The other characters tend to humour him, to keep him quiet. In the version of the drawing which appeared on the defendant's calendar, the Lambik character was redrawn as an obvious caricature of Daniël Termont (also bald, and visually not dissimilar), the popular mayor of Ghent, and member of the Socialist party. The people in the crowd were white in the original drawing, but were now depicted as people of colour, several wearing veils. Deckmyn's message was that residents of Ghent were paying taxes to support people who were not resident in Ghent and paying taxes, and that the quality of life in Ghent was impaired as a result. Vandersteen's heirs (he died in 1990) brought an action for breach of copyright.

A preliminary injunction was granted at first instance, the court holding that the calendars infringed copyright and that the parody exception provided for by Belgian law did not apply. The case was brought in appeal to the Court of Appeal in Brussels. The Court considered that the Belgian parody exception was permitted under the Information Society Directive.<sup>21</sup> However, the definition of parody had not been left to the member states, and the CJEU had not yet ruled on the concept. The Court therefore referred a number of questions on the interpretation of Article 5(3)(k) to the CJEU:

1. Is the concept of "parody" an autonomous concept of EU law?

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<sup>21</sup> Article 5(3)(k) of the Directive.

2. If so, must a parody satisfy the following conditions or conform to the following characteristics: display an original character of its own (originality); display that character in such a manner that the parody cannot reasonably be ascribed to the author of the original work; seek to be humorous or to mock, regardless of whether any criticism thereby expressed applies to the original work or to something or someone else; mention the source of the parodied work?
3. Must a work satisfy any other conditions or conform to other characteristics in order to be capable of being labelled as a parody?

These questions are shaped by the arguments of the parties. Deckmyn had argued that the drawing was a political cartoon and a permitted parody under Belgian law. Deckmyn also argued that it was obvious that the cartoon was not by Vandersteen. The Vandersteen case had a number of elements. It argued that both drawings were very similar in overall appearance and detail. In particular the Deckmyn drawing used the characteristic orange colour associated with the *Suske en Wiske* series. It was alleged that, as a result, some of those who received the calendars initially thought that they were a gift from the publishers of the cartoon. This perception was only corrected once the calendar was opened and examined. Recipients thus believed that the author of the cartoon approved of the extreme right-wing ideology of the Vlaams Belang, and that the characters were associated with this also. Furthermore, the alterations to the figures in the crowd conveyed a discriminatory message. The defence that the drawing was a parody was rebutted. It did not ridicule either the author or the characters in the cartoon, but was aimed at Termont. It was also argued that parodies had to have some originality, must be intended to be humorous, should not cause confusion with the original work, and should take no more of it than necessary to achieve the parody. Deckmyn denied that these were requirements of a parody, as they were not set out in the Belgian Act.

## VII. ADVOCATE GENERAL CRUZ VILLALÓN'S OPINION

As expected, the Advocate General considered that parody had, following the implementation of the Information Society Directive, become an autonomous concept of EU law. The Directive had not defined the term 'parody', nor had it referred explicitly to the laws of member states in order to define it. As CJEU case law has consistently stated, in such cases the concept has to be interpreted in an autonomous and uniform manner, taking account of the context of the provision and the objectives of the legislation in which it is found. Here, since the broadly harmonising Directive had laid down an exhaustive list of exceptions, it is important for the good functioning of the internal market that member states should apply any exceptions in a coherent manner. This conclusion is not

undermined by the optional nature of the parody exception. Where member states have introduced the same exception, provided for in the Directive, they cannot be free to specify its parameters in an incoherent and unharmonised way.<sup>22</sup> Notwithstanding, where the criteria within the legislation are not sufficiently precise to delineate all the obligations flowing from it, the member states enjoy a considerable margin of appreciation in determining the necessary boundaries.<sup>23</sup>

Parody therefore had to be interpreted consistently with its meaning in everyday language, taking account of the legislative context in which it was used. The Advocate General did not see the necessity for precise definitional distinctions between parody, caricature and burlesque – particularly given the wide range of dictionary definitions to be found in member states. He simplified the basic elements of parody to two-one structural and one functional. Structurally, a parody had to be at the same time a copy and a creation. It was for member states to determine whether any particular copy was sufficiently creative to amount to a parody, or whether it was simply a copy with insignificant changes. It was also important that any parody should not be confused with the original. Beyond this, none of the criteria proposed by the Belgian Court was indispensable. Functionally, a parody had to be a burlesque of some sort.

This functional requirement caused the Advocate General to consider three matters. One was the subject of the parody; did the parody have to be directed at something related to the original work, or could it be something else? The Advocate General was a little hesitant but found nothing in the Directive to justify confining the exception to parodies with a direct link to the parodied work ('parody of', or what this article has described as 'target' parodies). Parody had for a long time used earlier works to criticise habits and manners, as well as social and political positions, because this was an effective way of conveying the particular critical message to the audience. Therefore, since this sort of parody (parodies in the style of something or someone, directed other than at that work; or 'weapon' parodies) was firmly anchored in our culture and habits, it could not be excluded from the definition within the Directive. As for the effect of parody, it was usually expected to be humorous or to produce a sense of ridicule in an audience, though the precise limits of this element should fall within the margin of appreciation of member states.

Finally, the content of a parody could, as in this case, raise issues of fundamental rights. These are recognised and guaranteed within the EU as general principles of its legal order. Specifically, as the Belgian court had noted, a number of Charter rights were engaged here; including human dignity, freedom of expression and information, freedom of the arts and sciences, freedom of

<sup>22</sup> Deckmyn, at para 37. Reliance was placed on Relying on Case C-467/08, Padawan SL v. Sociedad General de Autores y Editores de España (SGAE), 2011 ECDR 1, in Deckmyn, at para 36.

<sup>23</sup> Deckmyn, at paras 35-39.

property, non-discrimination, and religious and linguistic diversity. In a situation such as this one, in the Advocate General's opinion, freedom of expression had to take priority in a democratic society. As a matter of principle, the fact that the message conveyed by a particular image was not shared by the author of the original work – or by a large body of public opinion – could not be the *sole* reason for setting such an image outside the exception for parody. The difficult problem, though, was to define the limits of the content of the message when there were other important considerations. Freedom of expression was not the only value in the Charter, and other values in the Charter might on occasion come into conflict with it. In the Advocate General's view, this was the realm of the national court. It was for the national judge in a particular case to consider all the facts and to apply the EU definition of parody, drawing on the fundamental rights declared by the Charter, and to balance these as the situation demanded.

The Advocate General's advice to the Court was, therefore: for the purposes of the Information Society Directive, the notion of parody was an autonomous concept of EU law, that a parody had to include elements of copying and originality, with a humorous or mocking intention, combined in a way such that the parody could not reasonably be confused with the original, and that within the outlines of this concept the national judge must, drawing on the EU's fundamental rights, undertake the necessary balancing of these rights, given the particular demands and circumstances of the case.<sup>24</sup>

## VIII. CJEU'S RULING

The CJEU approached the referral in a similar way to the Advocate General, but there were slight differences in the framing of its response.

In the same way as the Advocate General, the Court found that parody was an autonomous concept of EU law. Allowing the member states to determine the limits of the exception in an unharmonised manner would be inconsistent with the harmonising objective of the Information Society Directive.<sup>25</sup> In terms of its meaning, this had to be determined by considering the usual meaning of the word parody in everyday language, taking into account the legislative context (again as the Advocate General had advised). In consequence, the Court adopted two basic characteristics as essential: the parody must evoke an existing work whilst being noticeably different from it, and it must constitute an expression of humour or mockery. The Court would not go beyond these two elements, and did not endorse the list of particular conditions set out by the referring court. Those particular (and quite detailed) conditions are not untypical of conditions applied in various national laws, but, as has been explained, there has been little firm consensus on a general list of such conditions.

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<sup>24</sup> Deckmyn, at para 89.

<sup>25</sup> Deckmyn, at paras 14-17.

Although the Court does acknowledge that a parody should be noticeably different from the original work, the requirement is focused on the audience's ability to distinguish the parody from the original, rather than attempting engagement with the tricky question of original character. The Court steered away from the Advocate General's references to the 'creative' aspect of a parody. Exceptions must be interpreted strictly and in a way which safeguards their effectiveness—another standard consideration which does not lead the Court to allow further restrictive conditions. As had the Advocate General, the CJEU also emphasised that member states cannot be free to determine the limits of a particular exception which they have chosen to introduce, as its scope might then vary between member states, an outcome incompatible with the harmonising purpose of the Information Society Directive.<sup>26</sup>

In terms of purpose, the CJEU looked to the objectives of the Information Society Directive: namely, a harmonisation which relates to observance of the fundamental principles of law, especially, property including intellectual property, freedom of expression and the public interest. The Court clearly regarded all of these as being unquestionably in play, though it underlined that engagement of the principle of freedom of expression was self-evidently defensible, because “[i]t is not disputed that parody is an appropriate way to express an opinion.”<sup>27</sup> Thus all that remains is to balance these interests, the aim here being to achieve a ‘fair balance’ between the rights and interests of authors, and the rights of users of protected subject-matter; an approach established in cases such as *Padawan* and *Painer*.<sup>28</sup> In any particular case, the application of the exception for parody must preserve that fair balance. The CJEU emphasised, however, that all the circumstances of the case must be taken into account. This is of particular significance in the case at issue, because the allegation is that the parody made changes to the original drawing in such a way as to associate it with a discriminatory message. Since the principle of non-discrimination based on race, colour and ethnic origin is specifically defined in the Equal Treatment Directive, and confirmed in the Charter of Fundamental Rights of the EU, holders of intellectual property rights have “*in principle, a legitimate interest*” in ensuring that a copyright work is not associated with a discriminatory message.<sup>29</sup>

It is for the national court to make the factual assessments. If the drawing complained of does fulfil the essential requirements of parody, the national court

<sup>26</sup> Deckmyn, at para 16. Relying on Case C-467/08, *Padawan SL v. Sociedad General de Autores y Editores de España (SGAE)*, 2011 ECDR 1 at para 36 (“*Padawan*”) and Case 435/12, *ACI Adam BV v. Stichting de Thuis kopie* (April 10, 2014), at para 49. How strict this requirement is remains a matter of debate.

<sup>27</sup> Deckmyn, at para 25.

<sup>28</sup> *Padawan*, at [43]; Case 145/10, *Painer v. Standard Verlags*, 2012 ECDR 6 at para 132 (“*Painer*”).

<sup>29</sup> Deckmyn, at para 31. This language echoes that of Article 5(5) of the Information Society Directive, which provides that exceptions shall only be applied “in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”.

must then determine, in the light of all the circumstances of the case, whether the application of the parody exception fulfils the essential requirements set out by the CJEU, and preserves a fair balance between the rights of the holder of the rights in a work, and the rights of a user of that protected work.

## IX. EARLY THOUGHTS ON THE RULING

The CJEU has its own concerns and preoccupations when considering parody. The goals of harmonisation within the EU and upholding fundamental freedoms have a greater priority than that of establishing an entirely satisfying definition of parody. It should be emphasised again that the CJEU's task is to interpret EU law, and that it has therefore, necessarily, a restricted field of vision. The Court's strategy of looking to 'everyday language' will inevitably produce a somewhat rough and ready definition- one acknowledging the most obvious and prominent features of the form, but lacking the fine subtleties which would grace a literary definition. This is understandable in terms of practicality. The CJEU has thereby avoided all the quagmires in national jurisdictions all over the world regarding justification and definition. But can the decision be defended as setting a firm and culturally neutral framework for the concept of parody, which will both enclose and accommodate the potentially wide range of cases likely to be presented for determination?

The simplicity of the Court's approach, confining itself to two basic definitional elements, does offer a firm structure. The judgment has also brought clarity regarding weapon parody, so that national insistence on target parody will not be permitted. This is an acknowledgment of the importance and value to society of the cultural form. Parody is a mode of comment which audiences enjoy, and not just parodists themselves. It remains to be seen whether the restrictions will prove problematic for the national courts. The Court has seemed willing to acknowledge that the national courts have some margin of discretion, and that the task of achieving 'fair balance' within particular facts is theirs alone.

It will be interesting to see how the Belgian Court responds in this case. Although it is clear that it is no longer possible to require such detailed pre-conditions as previously seen in some Belgian case law when defining an acceptable parody, there remains room for manoeuvre when balancing the various interests, and some of the issues previously considered at the definitional stage may still retain some relevance at the next stage. It is not straightforward to balance all the relevant rights. As the Belgian Court was careful to note in its reference, several fundamental rights are engaged. The Curia press release following the release of the judgment in *Deckmyn* was entitled (in bold type): "***If a parody conveys a discriminatory message, a person holding rights in the parodied work may demand that that work should not be associated with that message***".<sup>30</sup> This eye-catching

<sup>30</sup> Press Release 113/14 of Court of Justice of the European Union (September 3, 2014).

headline was hardly a fair summary of the Court's judgment, with its calm and methodical approach. But it does offer an indication of the heat generated by any suggestion of racial discrimination, particularly in a political context. The issue of immigration triggers strongly felt opinions and opposing condemnatory reactions. Though if political parody is to be permitted (or even encouraged) then the right of speech should be given considerable weight.

Yet, there are other considerations to be set against that here. Vandersteen's personal history had led to accusations of anti-Semitism and collaboration with the Nazis during World War II, because he had published certain pro-occupation drawings during that time. The situation was difficult and painful for Vandersteen and his family. In his will, Vandersteen had specified that his drawings should not be used for political purposes.<sup>31</sup> So the association with *Vlaams Belang* – a political party which in an earlier incarnation was found to have violated national laws on racism and xenophobia – would be particularly distressing to the Vandersteen family. It is hard to see how (precisely) to weigh such intensely personal considerations against broader social and cultural goals. Again looking more broadly, it is also not entirely clear to what extent national courts may take into account national traditions of culture and humour. It is to be hoped that national courts prove willing and able to resolve these difficult issues of implementation. It would be unfortunate to see such cases referred to the European Court of Human Rights for determination.

## X. THE SHAPE OF PARODY EXCEPTIONS YET TO COME

Formulating any parody exception within copyright law presents two potentially significant challenges: defining parody, and regulating the balance between copyright holders and parodists. As has been discussed, jurisdictions around the world have reacted to the parody of copyright works in a variety of ways in the past; some in principle supportive, some more hostile. Currently though, in the general field of copyright exceptions, there is increased concern to embed some rights for users of copyright works, to offset the rights given to holders of copyrights, and to do so in the light of the wider needs of society and the justification for copyright works. A number of countries have been revising their portfolio of exceptions with these considerations in mind. Parody is one exception which has generated recent activity, both legislatively and in case law. The UK considered and, at first, rejected the idea of a legislative exception for parody, in spite of the recommendations of the Gowers Review. It was argued that one was not needed, given the flexibility of the existing case law regime, and the strength of the market for parodies even without a statutory exception. However, following a further

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<sup>31</sup> Suske en Wiske dagvaarden *Vlaams Belang*, *Het Nieuwsblad* (January 14, 2011). [Accessed on December 30, 2014].



recommendation in the Hargreaves Report, and notable academic consensus in favour of a specific exception, this position was reversed.<sup>32</sup>

There are powerful arguments that society should allow or even positively encourage parody of copyright works - at least in principle. Parodies are often funny. They are themselves new works. Parody does not usually harm the copyright holder in an economic sense, and it is not the job of the copyright regime to insulate copyright holders against criticism or teasing. It is good for society's general wellbeing to allow parodists to take a poke at things or people they consider conspicuous targets. It would not be good for society if copyright holders were allowed to prevent parodies, because that would allow a form of private censorship which is not considered acceptable or defensible in an age where freedom of expression carries considerably more weight than it once used to. Furthermore, there is less deference to the author's sense of 'ownership' of texts in the post-modern era. These considerations have led to a more positive attitude towards parody being expressed, in legal and other contexts. However, parodies cannot be left entirely uninhibited, as this would leave their targets vulnerable to abuse, and other important rights would be left unacknowledged.

It is not yet entirely clear whether the CJEU's ruling in *Deckmyn* has produced a welcome simplification of the template for parody within EU law, whilst still recognising the rights of all those affected. Or whether it has simply pushed the recurrent problems of definition and justification back down to the national courts. Jurisdictions currently without a parody defence, though considering one, will be watching closely.

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<sup>32</sup> See Ronan Deazley, submission on behalf of the Intellectual Property Foresight Forum (2010).