

Court of Justice of the European Union: The Parody Exception (Copyright)

Deckmyn v. Vandersteen and Others (Case C-201/13)

With respect to EU copyright law, Article 5(3) of Directive 2001/29 (“the Directive”) states that “Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases... (k) use for the purpose of caricature, [More](#)

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With respect to EU copyright law, Article 5(3) of Directive 2001/29 (“the Directive”) states that “Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases... (k) use for the purpose of caricature, parody or pastiche.”

However, the provision does not define “parody” or “pastiche,” and further does not mandate that such uses are an EU-wide exception to copyright law. The provision merely allows Member States to provide for exceptions or limitations as they see fit.

In this case, the European Court of Justice (“ECJ”) was presented with a situation in which the copyright owner’s (Vandersteen and his heirs, hereinafter “Vandersteen and Others”) works were used in a cartoon on a calendar as part of political propaganda distributed at a reception by Vlaams Beland, a Flemish nationalist political group. A member of Vlaams Beland, Mr. Deckmyn, disseminated the infringing cartoons in the form of the calendar for which he credited himself as the editor. Vandersteen and Others sued Deckmyn, alleging that his use of the cartoon constituted copyright infringement. Deckmyn, widely known for his anti-immigration stance, used a depiction of a 1961 comic book of Vandersteen and Others’ *Suske en Wiske* series entitled “De Wilde Weldoener” (translation: “the Wild Benefactor”) that depicted a philanthropist flying above a city and dropping coins over people, replacing the philanthropist with the Mayor of Ghent, and replacing the non-descript people underneath in the original image with those distinctly donning turbans and burqas. The plaintiffs not only considered this

use copyright infringement, but asserted that it associated their protected material with a discriminatory message. Deckmyn defended on the ground that his use was a parody.

The Court of First Instance of Brussels first reviewed the case and ruled against Deckmyn's parody defense, holding that the calendars infringed Vandersteen and Other's copyright and no exception applied. Deckmyn appealed the ruling to the Court of Appeal in Brussels, arguing that the subject use was protected parody under Belgian law (Copyright law of 1994, Article 22.1.6). The Court of Appeal confirmed that Belgian law provides for a parody defense to copyright infringement, but referred the following questions to the ECJ in order to better assess what criteria to apply in considering the scope of Deckmyn's parody defense: "Is the concept of 'parody' an autonomous concept of EU law?"

- Is the concept of 'parody' an autonomous concept of EU law?
- If so, must a parody satisfy the following conditions or conform to the following characteristics:
 - a. 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?
- Must a work satisfy any other conditions or conform to other characteristics in order to be capable of being labelled as a parody?"

The ECJ answered the first question in the affirmative, indicating that "the concept of parody ... is an autonomous concept of EU law." Therefore, a parody exception is in existence under all national regimes. The court then discussed the next two questions by first pointing out that according to recital 31 in the preamble to the Directive, "exceptions to the rights set out in Articles 2 and 3 of that directive, which are provided for under Article 5 thereof, seek to achieve a 'fair balance' between, in particular, the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other." In this context, the ECJ recognized that the authors had an interest in ensuring that their work was not associated with what they contended was a "discriminatory message," and that the defendant had an interest in freedom of expression.

The ECJ noted that the essential characteristics of parody are to (1) evoke an existing work, while being noticeably different from it, and (2) constitute an expression of humor or mockery. Beyond that, specific criteria may differ among Member States. Accordingly, that Art. 5(3)(k) is optional does not mean that the Member States which have chosen to implement the parody exception are free to determine its scope in an un-harmonized manner. Under this reasoning, the ECJ essentially refused to allow a Member State to require criteria for a parody exception that would narrow the scope of the exception beyond what may be enforced in other Member States. The ECJ finally concluded that “[i]t is for the national court to determine, in the light of all the circumstances of the case in the main proceedings, whether the application of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, on the assumption that the drawing at issue fulfils the essential requirements of parody, preserves that fair balance.” The case will now be handed back down to the Belgian Court of Appeal in Brussels, which will decide whether such an exception would preserve “fair balance” between the rights of the authors and the parodists.

Primary Contacts

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