Case Law Luxembourg: Deckmyn v. Vandersteen. Court broadens concept of parody and returns hot potatoes to national court

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EU Court of Justice delivers preliminary ruling in Belgian Parody Case (*Spike and Suzy*)
CJEU broadens the concept of parody, and returns the hot potatoes to the national court

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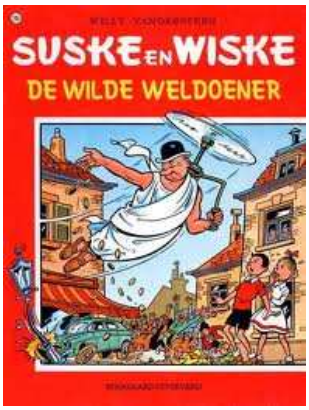

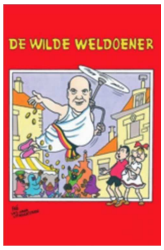

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A pending case in Belgium on parody evokes a set of questions related to the right to freedom of expression conflicting with copyright, and the impact of the Information Society (Infosoc) Directive 2001/29, such as e.g. the question whether the parody exception must be given an autonomous and uniform interpretation throughout the European Union, despite the optional nature of the parody exception mentioned in Article 5(3)(k) of the Directive 2001/29. The most interesting aspects of the case deal with the criteria of the parody and the remaining possibilities of the right holders in case they don't want the original work to be associated with a parody, when that parody contains an (alleged) message of discrimination or "hate speech". In this blog we briefly focus on the definition by the CJEU of the parody concept and on the aspect of the conflicting rights at issue: copyright vs. freedom of expression.

The parody at issue is a transformative use of one of the most famous comics strips in Belgium, Spike and Suzy (Suske en Wiske, Bob et Bobette) by Willy Vandersteen. The parodist is the Vlaams Belang (*Flemish Interest*), a Flemish nationalistic party, rejecting multiculturalism, advocating the independence of the Flemish region and limiting immigration. The Vlaams Belang originated from Vlaams Blok, after a criminal conviction in 2004 finding that the party's publications had manifestly and systematically incited to racism and xenophobia. The right holders on the work of Vandersteen request for an interim injunction, while Vlaams Belang (in the case represented by Deckmyn and

Vrijheidsfonds) relies on the parody exception in the Belgian Copyright Act (Art. 22(1), 6°) and its freedom of political speech.

Copyright and free speech as conflicting rights

The case concerns more particularly a small calendar, less than 6 by 9 centimeters, distributed in January 2011 by the Vlaams Belang, representing one of the Spike and Suzy comic book's main characters, Ambrose (Lambik), wearing a white tunic and throwing coins to people who are trying to pick them up. The calendar resembles the cover of an original Spike and Suzy album, "De Wilde Weldoener", roughly to be translated as "The Compulsive Benefactor". On the cover of the calendar the character of Ambrose is replaced by the Mayor of the City of Ghent. The people picking up the coins are replaced by people wearing veils and people of colour. The President of the Court of First Instance in Brussels had rejected the parody defense by the Vlaams Belang, in essence because of lack of originality and because the parody did not criticize the work of Willy Vandersteen, but targeted the policy by the Mayor of the city of Ghent. It granted an interim injunction to prevent further distribution of the calendar because of copyright infringement. The decision was appealed. The Court of Appeal in Brussels showed reluctance how to decide the case and asked for a preliminary ruling by the CJEU in order to give some guidance how to apply the parody exception in the framework of EU copyright law.

It is interesting to notice that the CJEU draws the attention on the conflicting rights at issue, considering that "the application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive *(reproduction right and right of communication to the public, DV and IHR*), and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k)". This approach of balancing copyright with the right to freedom of expression can also be found in the recent case law of the European Court of Human Rights (see our blogs on the Ashby Donald and "The Pirate Bay" case: D. Voorhoof and I. Høedt-Rasmussen, "Copyright vs. Freedom of Expression", and "Copyright vs. Freedom of Expression II (The Pirate Bay)" *(links).*

Broad concept of parody can limit copyright claims in cases of "transformative use" of copyright protected works

The judgment of the CJEU of 3 September 2014 opts unambiguously for a broad, even a very broad definition of what can consist a parody and hence extends the range and application of the parody exception. Indeed in some EU member states, and especially in Belgium, the parody concept was given a much narrower interpretation as compared to the new established European standard. The CJEU decides that "the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery". These are actually the only two relevant and pertinent characteristics, as all other criteria or conditions formulated by the Brussels Court of Appeal in its request for a preliminary ruling are irrelevant, according to the CJEU. The CJEU is very decisive and clear : "The concept of 'parody' (..) , is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should

relate to the original work itself or mention the source of the parodied work". This also implies that both the parody 'on' and the parody 'with' are covered by the EU parody exception: a parody does not need to criticize or be directly in contrast or in a dialogue with the original work, as it does not need "to relate to the original work itself".

The CJEU clearly chooses for a wide and flexible parody concept, emphasizing that the concept of parody must be broad enough to "enable the effectiveness" of that exception and to safeguard its purpose. The CJEU considers that it "is not disputed that parody is an appropriate way to express an opinion", and that the envisaged EU-harmonisation of copyright right and related rights in the information society, can only be reached in "observance of the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest."

Therefore it is necessary and also sufficient that a parody "evokes" an existing work being "noticeably different" from it and that it constitutes an expression of "humour or mockery". It means that the national judges in the EU-Member states can only apply these criteria in determining whether or not the parody-exception as mentioned in Article 5(3)(k) of the Infosoc Directive 2001/29, and implemented in their national law, can be invoked. Whether the parody is "noticeably different" and contains "humour or mockery" is to be decided within the discretionary power of the national courts. The interpretation whether a parody expresses "humour or mockery" should be approached with due care, the courts or judges in this context becoming the jury of what humour or mockery is (and is not). For sure, there is no autonomous concept of EU law what humour or mockery is, while the "humour or mockery"-criteria are ultimately and decisively the criteria to determine whether a parody fits in the autonomous concept of parody in EU law. The appreciation whether something is considered as humour or mockery is very contextually determined and will be differently perceived according to age, gender, religion, nationality, ideology, social or cultural background etc. Apart from that, there are at least fifty shades of humour and mockery, which further complicates the application of these criteria in a legal setting.

Copyright holders can still oppose against a parody, if the parody contains a discriminatory message they do not want to be associated with

Even if the Vlaams Blok calendar is to be considered as a parody, according to the CJEU the right holders still have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with a discriminatory message. The result of this approach however risks to compromise the "fair balance" between the rights of the copyright holders and the right to freedom of artistic or political expression by the users of the copyright protected work. The CJEU explicitly refers to the EU instruments that can eventually justify an interference with the right to freedom of expression on the basis of combatting discrimination (the Council Directive 2000/43/EC of 29 June 2000 and Article 21(1) of the Charter of Fundamental Rights of the European Union), but it does not refer to Article 11 of the EU Charter of Fundamental Rights or Article 10 ECHR in this context.

By leaving wide open the possibility for right holders to oppose against a parody they dislike to be associated with, because of its alleged discriminatory message, the approach of the CJEU risks to compromise the aim and ratio of the parody exception. The essence of the parody exception is precisely to legitimise a transformative use of an original work without permission of the right holder, as copyright holders are not expected to authorise spontaneously the transformative use of

their original work. If copyright holders can oppose the making of transformative works they do not want to be associated with, not much will be left of the parody exception. The circumstance that right holders have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with a discriminatory message, does not mean that this is a sufficiently pertinent argument to put aside the parody exception and to interfere with the freedom of political expression of the parodist.

It is now up to the national courts, and if need be the European Court of Human Rights in a later stage, to determine whether the application of the copyright claim in this case, clearly interfering with the right to freedom of expression an information, can be sufficiently justified as necessary in a democratic society. Although the ECtHR has over the years established a very high level of freedom of political speech, the circumstance that this case concerns the balancing of conflicting human rights and because the parody allegedly contains a discriminatory message or a form of "hate speech", makes that the final outcome is hard to predict.

Most important is that the CJEU has clarified that the parody exception is to be applied as a very broad concept in European law. This obliges the judicial authorities of the EU member states to interpret the parody exception accordingly, that is in as far as it is provided in their national copyright legislation. EU member states who have not integrated a parody exception yet in their copyright law will now be inclined to do so. This aspect also reveals that many of the restrictions and limitations provided for in Article 5 of the Infosoc Directive 2001/29 should not be facultative, but mandatory, in order to guarantee a fair balance between copyright enforcement and the right to freedom of expression and information. And still a "fair balance" might be a balance that can be found outside the court room in a broader setting than the one provided by a legal framework.