The concept of parody and the legitimate interests of parodists and copyright holders

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Belgian copyright law provides that “since a work has been published, its author may not prohibit conclusions of parody and pastiche, deeming ‘pastiche’ this provision, which rested before the adoption of the Directive”.

This provision, which had not been modified by the implementation of the latter, was clearly subject to interpretation, as its wording was not explicit enough.

Belgian Courts and Parliament have therefore progressively established various conditions to be met in order to establish parody in the exception, the parody test:

- it must be a criticism of the public figure that was further justified and interpreted by some authors and case-law as not drawing to parody a work in critical setting (the work using some basic characteristics to criticize a politician);
- to display an original character;
- its purpose must be to denigrate the original work, as well as justified by some authors;
- to use the original work’s elements that are strictly necessary for the parody (in order not to create confuse with the parallel work);
- not to damage the original work;
- to be carried out by a customer judging not to be used in commercial contexts only (e.g. in advertising for products).

Needless to say that the uncertainty of this criterion and the many considerations that it imposed made any parody almost impossible referring to its copyright-related issues (even for well accepted cases such as parody of political figures).

This explains the wording of the preliminary question referred to the CJEU in the Deckmyn case.

Facts of the case

Deckmyn was at the time of the facts member of the Flemish parliament, and belongs to the far right and nationalists political party “Vlaams Belang”.

“Suske en Wiske” was a well-known version of the comic of a comic book of the same name created by Willy Vandersteen and published by the comic publisher Casterman. Deckmyn accused of “playing the benefactor with the taxpayer’s money to the benefit of foreigners and to the detriment of the city’s百姓”.

The Court then notices that the Directive does not define the concept of parody and decides that it must be considered in its usual meaning in everyday language, in other words, taking into account the relevant legal concepts of the exception.

As regards the “usual meaning” on the basis of the Advocate General’s small grammatical study which consisted in comparing its definitions found in dictionaries in the languages, the CJEU decides that:

- to parody is a form of criticism enabling the expression of a critical message (to criticise a politician);
- not to harm the author;
- not to denigrate the original work;
- to be humorous
- to display an original character;
- to serve a criticism purpose (which was further restricted and interpreted by some authors and case-law as not to damage the original work or to relate to this original work or mention the source of the original work or the author);
- to be original (to be different from the author’s original work).

The exception for parody: a fair balance

Interestingly, the Court stresses that the exception has to be interpreted identically between the two, and not only according to its wording.

Moreover, it refers to the harmlessness of the exception through the fairness of the exception.

As regards this purpose, the Court considers as the nullity of the exception or the freedom of expression. “If not adjusted that parody is an appropriate way to express an opinion” it says. “To interpret an exception in such a way as to make it possible for an author to make use of this fundamental right must be weighed against the rights and interests of authors, taking into account all the circumstances of the case”.

Aside from the freedom of expression, the other conditions set out by the referring court in the questions (some of them referring to the Belgian case law as explained above). It is therefore not required for a work to specify or parody to display an original character of the original work, on any condition to be a person other than the author of the original work itself or to relate to this original work or mention the source of the parallel work.

The exception for parody: a fair balance

In substance, the questions asked to the CJEU can be summarized as follows: are the Belgian parody exceptions allowable under the InfoSoc Directive? The CJEU examines the question concerning the Belgian parody provisions, as well as the questions concerning the parity between the two freedoms.

In the present case, considering that parody is an appropriate way to express an opinion, it says. “To interpret an exception in such a way as to make it possible for an author to make use of this fundamental right must be weighed against the rights and interests of authors, taking into account all the circumstances of the case”.

If even if I could have changed its meaning there, the CJEU came with one of the case-law in which it utterly accurate as... it indeed access the referring court’s opinion in case of the referring court would allow the CJEU to stay the harmless message as alleged by Deckmyn (i.e. the freedom of expression and the parody becomes a free-gem) however, copy after “legitimate interests” could be defined and could other try to order to limit the parody, which might still rely on the freedom of speech limitations.

For instance, the authors could ensure that their own associations with the work are not associated with any political messages (which is precisely what the author of the Belgian state has done in the case... could find that as a model for “legitimate interests” could be a message that was not allowed by the Belgian state). A model for “legitimate interests” of the authors could not be harmonized by the Belgian state as resources to the Absolutist General Pia Pica Triaboll is its consequent lack of exception.

The scope of copyright exceptions

Firstly, regarding the copyright exception as provided in the InfoSoc Directive in general, it is worth remembering this statement of the Court of 19th November 1992 “the interpretation according to which Member States that adopt the Directive should interpret their own national laws in the same way as the exceptions, without any reference to the wording of the exception”.

The Court then notices that the Directive does not define the concept of parody and decides that it must be considered in its usual meaning in everyday language, in other words, taking into account the relevant legal concepts of the exception.

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