Kluwer Copyright Blog

The not-so-optional parody exception

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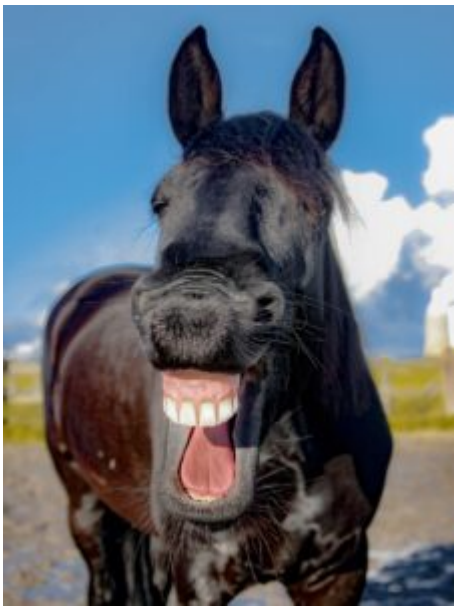

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Like most exceptions in the EU copyright *acquis*, the general parody exception in Article 5(3)(k) of the InfoSoc Directive was originally designed as optional, meaning that Member States could choose to implement it or not into their domestic legal orders. This exception was made mandatory by Article 17(7) of the CDSM Directive, as a safeguard against the over-blocking of user-uploaded content. However, Article 17(7), coupled with Recital 70, suggests that the obligation to transpose the parody exception is limited to the need to ensure that users are allowed to make their content available on online content-sharing platforms. If this interpretation is correct, the CDSM Directive makes the parody exception mandatory indeed, but only for acts falling within the coverage of Article 17. Apart from this type of online uses, parody remains an optional privilege. Or does it?

The once straightforward idea that parody is not of mandatory implementation was called into doubt by the well-known trio of CJEU rulings delivered in the summer of 2019. In *Pelham*, *Funke Medien* and *Spiegel Online*, the judges made the same (somewhat enigmatic) statement: the exceptions in Article 5 of the InfoSoc Directive, they said, "may, or even must, be transposed by the Member States". The notion that these exceptions *may* be transposed by Member States into their national laws seemed self-evident, as the twenty exceptions provided in Article 5(2)-(3) are worded as optional. What is not so clear is what the Court meant with the segment "or even must".

It could well be argued that the expression refers to the exception for acts of temporary reproduction – the only non-optional privilege on the list. But there is an alternative and arguably more plausible interpretation, which involves reading that segment of the decisions in light of a ground-breaking (and clearer) statement made by AG Szpunar in his Opinion in *Pelham*. What the

AG then said was that, since some of the exceptions in Article 5 reflect the balance that the EU legislature sought to strike between copyright and various fundamental rights, "[f]ailing to provide for certain exceptions in domestic law could therefore be incompatible with the Charter [of Fundamental Rights of the EU]" (para. 77). In saying that some exceptions "must" be transposed and, simultaneously, in not rebutting AG Szpunar's revolutionary statement in *Pelham*, the judges were more likely than not adhering to his view on the mandatory nature of those exceptions that bear a special connection with fundamental rights, as other scholars have argued.

Although AG Szpunar did not name the exceptions that merited this status, parody is an obvious candidate, as it finds its rationale in the queen of fundamental freedoms – freedom of expression (Article 11 of the Charter). As AG Cruz Villalón put it in his Opinion in *Deckmyn*, "parody is a *form of artistic expression* and a manifestation of *freedom of expression*. It can be one thing as much as the other and it can be both things at once" (para. 70). Similarly, the CJEU judges recognized that the application of the parody exception must strike a fair balance between the interests and rights of copyright holders, on the one hand, and the freedom of expression of users, on the other (para. 27).

The very definition of "parody" adopted by the CJEU in *Deckmyn* renders this link with freedom of expression manifest. According to the Court, for the parody exception to apply the work must (i) "evoke an existing work, while being noticeably different from it", and (ii) "constitute an expression of humour or mockery". Thus, in order to qualify as a parody, the use must, at a single blow, create a new work and criticize or at least comment on something else, namely the earlier work that it borrows from. And, if it is effective, it may also make people laugh.

This connection between parody and freedom of expression is also mentioned in Recital 70 of the CDSM Directive: the mandatory nature of the parody and quotation exceptions in the context of Article 17 is said to be "particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union (…), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property".

Taken together, what all these elements suggest is that reading the InfoSoc parody exception as optional and failing to include it in national catalogues is not compatible with EU copyright law when interpreted in light of the Charter. The restrictive approach of providing for a parody defense only for Article 17-related activities, which was followed by Italy (*see* Article 102-*nonies* of the Italian Copyright Act), should therefore be avoided.

Instead, countries like Cyprus, Greece and Portugal, that presently lack a general parody exception and that, at the time of writing, have not yet fully transposed the CDSM Directive, would be well-advised to follow the example of Hungary, which used the 2021 reform to finally codify a general parody defense covering not only user uploads, but also other acts, online and offline alike, that are not related to Article 17 (*see* Article 34/A(1)(b) of the Hungarian Copyright Act).

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