Kluwer Copyright Blog

Copyright vs parody: the fair balance doctrine in front of the Italian Supreme Court

Roberto Caso (University of Trento) · Wednesday, March 29th, 2023

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On 30 December 2022, the Italian Supreme Court (*Corte di Cassazione*) issued an order that intervened again on the interpretation of the quotation exception under Article 70 of the Italian Copyright Act (l. 633/1941, l.aut.). The decision concerns an advertising campaign of a mineral water company. The commercial video promoting the mineral water features a humorous version of the Zorro character created by Johnston McCulley in 1919, but itself inspired by earlier literary figures such as Robin Hood and the Scarlet Pimpernel as well as, according to some speculation, Joaquin Murrieta, a California outlaw who lived in the 1800s. The company that owns the copyright on the Zorro character sued the mineral water company for copyright infringement.

The ruling of the order *is the following:*

"Parody must respect a fair balance between, on the one hand, the intellectual property right of the copyright holder on the work and, on the other hand, the freedom of expression of the author of the parody; in this sense, the reproduction of protected work may be justified within the limits inherent in the parodistic purpose and provided that the parody does not prejudice the interests of the owner of the original work, as is the case when it competes with the economic use of original work".

Italian copyright law and parody

Italy has chosen not to introduce an *ad hoc* exception on parody in its copyright law, even when it could have proceeded so on the basis of InfoSoc Directive. Today, Italian law, following the implementation of Art. 17 (7) Copyright Directive 2019/790 (CDSMD), explicitly names exceptions and limitations for the purpose of caricature, parody and pastiche in Art. 102-nonies (2) l.aut., but this provision is specifically aimed at protecting the freedom of expression of Internet users when they upload and make available content they generate through online content-sharing service providers. In other words, it is not a general exception on parody.

Towards the Italian fair balance doctrine?

The case decided by the *Corte di Cassazione* provides an opportunity to reformulate the legal principle of prevalence of freedom of parody over copyright in the terms used by the Court of ustice of the EU (CJEU). The (magic) formula is the "fair balance between fundamental rights". In the lexicon of the EU Charter of Fundamental Rights (CRF), this is the balance between intellectual property (Article 17(2)) and freedom of expression and information (Article 11).

In short, the EU-style fair balance doctrine officially becomes part of the interpretive and argumentative techniques of the Italian Supreme Court.

But there are some open issues.

a) What is the relationship between the CRF and the Italian Constitution in the field of copyright?

b) The CJEU coined and used the fair balance formula to give itself the power to conform with European copyright law. In the arguments of the *Corte di Cassazione*, is the formula destined to assume real weight in the outcomes of the next decisions?

c) In the CJEU's case law, the fair balance doctrine has served to give flexibility to the interpretation of exceptions and limitations, otherwise condemned to the narrow spaces of restrictive literal interpretation. In judging the permissibility of parody, the Court must respect a fair balance between fundamental rights. If the message contained in the parody has discriminatory content, the Court must consider the author's interest in not having his work associated with the discriminatory message (Deckmyn, C-201/13). Is the *Corte di Cassazione* willing to follow the CJEU on this path?

d) Is the fair balance doctrine destinated to become a kind of Euro-Italian fair use in disguise? The question is relevant because many are calling for the inclusion of an open-ended clause in the European regulatory framework, as for instance suggested by reCreating Europe's project policy recommendations.

The devil – as always – is in the details. The prevalence of the right to parody is only tendential, as

copyright wins again when the parodic work competes with the economic use of the original work. This ruling of the *Corte di Cassazione* is not fully convincing for two reasons.

(i) The criterion based on the competition with the economic use of the work is slippery. On the one hand, the sophisticated techniques of antitrust law aimed at defining the boundaries of the relevant market have no place in copyright law. On the other hand, imitation or reproduction for parodistic reason is not always a source of taking away the profits of the original work; on the contrary, it can produce the opposite effect, multiplying fame and revenues.

(ii) The fair balance test in this way weighs in favor of the intellectual property at the expense of the freedom of expression. This reasoning reflects a one-dimensional (economic) view of copyright, while the same is historically, philosophically, and positively multidimensional, because it is precisely closely related to freedom of expression and information.

Quotation or transformative use of unprotectable ideas?

A final remark. The formulation of a legal problem is never a neutral act since, in reflecting the political and ideological beliefs of the interpreter, it guides the solution. The case submitted to the *Corte di Cassazione* was formulated in terms of a quotation exception. But the problem could be formulated not with reference to the quotation exception, but to the principles of creativity and the dichotomy idea/expression.

Several arguments move in this direction. The protection of Zorro is invoked not in relation to a complex work, but a character inspired by other historical precedents. Assuming that the identifying and figurative elements of the character (the name Zorro, the blackness of the clothes, the mask, the hat and the sword) are creative contents, these elements are relocated in a humorous context that undoubtedly determines a new semantic meaning. They take in the autonomous parodic work a “transformative” meaning that they do not have in the original work. Such creative elements, if evaluated in the comparative analysis between parodied and parodistic work, lose their original character and end up becoming ideas, data, facts.

This way of reasoning has the advantage of looking not at the formal distinction between idea and expression (which is always difficult to govern), but at the purpose of a work that draws inspiration from one or more previous works while modifying their meanings. This advantage is evident, for example, in disputes over contemporary art, which is known to be more focused on ideas than expressions.

The purpose of copyright law is not only to create a market for intellectual works but also to ensure freedom of expression and information. This freedom fosters, in a democratic society, the dialogue between authors and the public, the development of a plural, diverse and inclusive culture as well as the fulfillment of the social function of the exclusive right and its limits. In this perspective, the analysis of the parody-copyright conflict cannot be trapped in a criterion based on formal parameters (the abstract distinction between idea and expression) or merely economic ones (competition with the economic use of the original work) that disregard the purpose of the parody.

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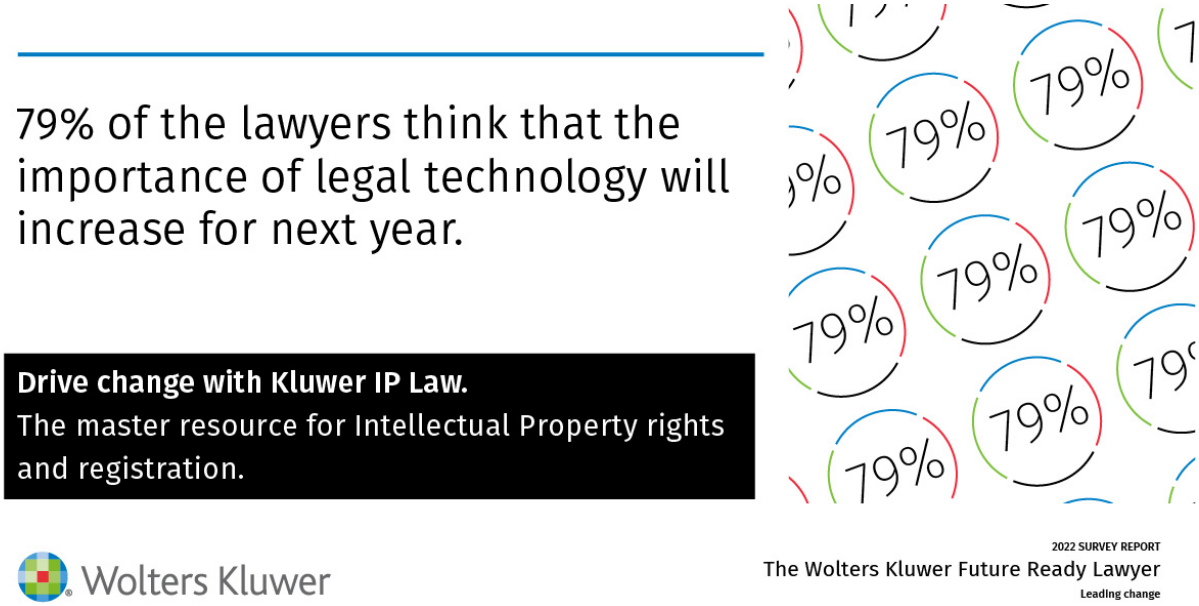

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