

Kluwer Copyright Blog

The Parody Exception: Revisiting the Case for a Distinct Pastiche Exception

Sabine Jacques (University of Liverpool) · Thursday, October 5th, 2023

As succinctly noted by Susan Bischoff in a [prior post](#), the ongoing legal saga surrounding the ‘Metall auf Metall’ case continues to yield legal insights. Presently, a [new reference](#) from the German Federal Court of Justice (BGH) asks the Court of Justice of the European Union (CJEU) for vital interpretive guidance concerning the parody exception within copyright law. While many anticipate the CJEU’s forthcoming decision in mid-2025, this contribution seeks to advocate that distinguishing between parody, pastiche, and caricature in copyright law may be ineffective.



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The parody, pastiche, and caricature exception, enshrined in Article 5(3)(k) of the Information Society Directive ([InfoSoc](#)), represents an optional provision for EU member states to incorporate into their domestic legislation. This provision, while optional, is rendered mandatory for online use on select major platforms under Article 17(7) of the copyright and related rights in the Digital Single Market Directive ([CDSM](#)). Lacking specific statutory criteria, it is unsurprising that this vague provision has given rise to disparate national interpretations, thereby imperilling the goal of EU harmonisation.

The initial CJEU decision, [Deckmyn](#), aimed at advancing harmonisation within the parody exception, primarily focused on the requirements attached to this exception for its application. Some [critics](#) argued that this decision failed to definitively establish whether there exists a singular parody exception encompassing related terms such as pastiche and caricature or if Article 5(3)(k) of the InfoSoc Directive prescribes three distinct exceptions. Articulating these three as distinct exceptions has its advantages, as evidenced in Emily Hudson’s 2017 [article](#), which posits that delineating pastiche as a separate exception could infuse greater flexibility into the EU copyright system, akin to the concept of transformative use in U.S. law. Additionally, proponents like the [European Copyright Society \(ECS\)](#) and, more recently, [Eleonora Rosati](#) contend that treating parody, pastiche, and caricature as distinct exceptions could better safeguard freedom of

expression, enabling uses grounded in fundamental rights while lacking a specific defence against copyright infringement. Several national courts have independently chosen to differentiate between these three genres, exemplified by the German case Landgericht Berlin, 2.11.2021 – 15 O 551/19.

Nevertheless, the question arises: is it truly advantageous to delineate these three as separate exceptions to strike an equitable balance between copyright protection and freedom of expression? Could the parody exception, conceived as encompassing pastiche, caricature, and related genres, sufficiently provide the required flexibility to safeguard users' rights within EU copyright law? After all, Article 5(3)(k) of the InfoSoc Directive, coupled with the guidance from *Deckmyn*, appears sufficiently broad to encompass these uses in theory. Furthermore, exhaustively defining these concepts within legal confines may exacerbate the disjunction between their legal interpretation and their evolving meanings within diverse artistic fields. This could potentially render the law opaquer to creators, despite them being the intended beneficiaries of this legislation. Furthermore, such a distinction might exacerbate practical disharmony among member states (France and Belgium being examples of countries that do not distinguish the three genres as separate exceptions) and ossify the law at a time when the meaning of these concepts evolves alongside society and its technological advancements, as posited by cultural theorists. Consequently, there is a risk that the law may lag behind contemporary creative processes, technological shifts, and societal expectations.

Identifying Commonalities among Parody, Pastiche, and Caricature

The nature of parody, pastiche, and caricature has spawned extensive discourse among various art fields over time. Cultural theorists endeavoured to comprehensively define these concepts, but such attempts have encountered limitations. For example, in considering parody, some have sought to tether the genre to a specific art form (Kiremidjian) or a specific context (Bakhtin traces the origin of parody to Carnival and its challenge to established power structures).

Others have approached parody through the lens of its functions. Scholars like Jameson emphasise parody's comedic aspect, whereas Hutcheon focuses on its critical function and the "ironic social critical distance" it establishes between the parody and its source material. Hutcheon's broad definition encompasses a wide array of hypertextual forms beyond traditional parody. Recognising the shortcomings of these definitions, Genette strives to balance the comic and critical functions of parody. While Genette's definition acknowledges the dual facets of parody, it results in another expansive definition that leaves room for interpretation regarding the uses covered. Dentith concludes that seeking an all-encompassing definition of parody is counterproductive and suggests focusing on a particular aspect. This approach, initially applied to cultural politics by Dentith, can be similarly adopted within copyright law. The objective is to distinguish legitimate uses from illegitimate ones, and this can be accomplished through a proper application of *Deckmyn* in conjunction with the framework of human rights and teachings from the European Court of Human Rights (ECtHR).

It's important to understand the commonalities that bind these concepts and what sets them apart. Fundamentally, all three genres rely on *imitation* of a source. While parody imitates (or mimics) an original work for comedic and/or critical purposes, caricature involves exaggerating idiosyncratic features of the original, and pastiche entails the imitation of another's style as a form of tribute or homage, often by replicating its characteristics, themes, or techniques. Pastiche primarily

emphasises the similarities between expressions rather than attempting to transform a creative expression. However, not all parodies are necessarily critical. As Jameson notes, some parodies lack a critical edge, blurring the boundaries between parody and pastiche. Similarly, modern interpretations suggest that pastiche can also incorporate elements of critique.

In summary, parody, pastiche, and caricature all rely on imitation and copying as a means of generating new expressions. While pastiche may involve more extensive copying than parody, and parody may exhibit more pronounced critical elements, these three genres are interconnected. What further aligns them is their *transparent* nature—they do not seek to mislead and unmistakably signal their reference to the original work. Despite their unmistakable connection to the source material, they are considered creative endeavours that lead to new expressions. Drawing inspiration from Proust, pastiche represents an ideal form of creative critical activity, or *Auseinandersetzung*, serving as a vehicle for challenging the notion that classical art and culture alone possess validity or authority.

Throughout history, these three concepts have experienced fluctuations in reputation, at times viewed negatively before undergoing a resurgence. The rise of the ‘creative genius’ during the Enlightenment era cast these genres as impediments to creativity, and in some countries, parody even carried the potential for criminal liability. Similarly, pastiche was regarded disdainfully as inferior variants of the works they mimicked or as fraudulent endeavours. However, the 20th century witnessed a revival of these genres, which became more multifaceted, serving purposes ranging from entertainment and criticism to paying homage, acknowledging the past, and advancing artistic movements. This complexity rendered these concepts open-textured and context-dependent.

In contemporary art, pastiche, such as composite paintings, serves as a means of commenting on culture, systems, ideologies, and more. To engage with such artworks, viewers must *actively decipher* cultural references and layers of meaning, often requiring a degree of cultural and artistic literacy. The same holds true for parody and caricature.

Differentiating Parody from Quotation

Given the crucial role of imitation in linking these concepts, it is pertinent to distinguish between parody (understood here as encompassing pastiche, caricature, satire, and related genres) and quotation. The Italian Supreme Court recently posited that parody, pastiche, and caricature could be regarded as forms of quotation, as both parody and dialogue can arguably engage in a discourse with the original work (a summary can be found [here](#)). While this perspective offers a resourceful approach to addressing the absence of a specific parody exception in Italian legislation, it is a perspective that should be dismissed.

Although both quotation and parody can be perceived as literary or artistic techniques, they diverge in terms of their functions, necessitating different requirements for their realisation. Quotation involves using the original work for reference or accuracy, whereas parody entails imitating and exaggerating elements of a work or subject for comedic or critical effect. Additionally, quotation represents a straightforward acknowledgment of another source, while parody involves creative reinterpretation and some form of transformation of the original. While both concepts are rooted in human rights, they demand distinct legal treatment because they serve distinct functions. Accuracy

is paramount in quotation, warranting prohibitions on alteration and requirements for source acknowledgment, which do not translate effectively to parody.

The CJEU's Perspective on Parody, Pastiche, and Caricature

In the *Deckmyn* case, the European Commission suggested the necessity of treating parody, pastiche, and caricature as separate exceptions. However, the [CJEU Advocate General](#) concurred with the Belgian submission, positing that these three genres are so interlinked that distinguishing them for copyright law and EU harmonisation purposes may be superfluous. To quote the Advocate General:

[I]t does not seem to me to be necessary to proceed any further with that distinction, since, in short, all those concepts have the same effect of derogating from the copyright of the author of the original work which, in one way or another, is present in the — so to speak — derived work (paragraph 46).

This perspective appears well-founded. Opting for a different approach would not only conflict with the evolution of these concepts in various art fields but could also generate situations where a use incorporating both pastiche and parody is permissible under the pastiche exception but not under the parody exception. Given the close relationship among these genres, such an outcome might lead to challenging scenarios where the interpretation of the 'three' exceptions undermines the overall effectiveness and objectives of copyright law, potentially running counter to the principles established in the *Football Association Premier League* case (C-403/08 and C-429/08 at 163).

While the CJEU did not explicitly delineate its stance on the matter, it can be argued that the CJEU endorsed a comprehensive understanding of parody. Firstly, the Belgian Court of Appeal's submission and the CJEU's case summary refer to the use in question as a caricature. Had the CJEU intended to differentiate between the three concepts within the realm of copyright law, it might have offered clarification, especially considering the Advocate General's explicit stance. In this context, the CJEU's omission to do so suggests agreement with the Advocate General's reasoning.

Conclusion: The Parody Exception Is More Inclusive Than Perceived

Many proponents of a separate pastiche exception do so in response to the perception that the parody exception is overly restrictive due to the requirement of humour or mockery. However, as [argued](#) previously, the parody exception is inherently flexible if correctly applied. Judges, in applying this exception, are neither tasked with making aesthetic judgments nor deciding the type of humour permissible. A more human rights-compliant approach is to interpret this requirement as necessitating the user's intent to remain within the bounds of freedom of expression. This approach aligns with fundamental rights and principles while preserving a wide spectrum of humorous expressions, including dark humour and other incongruities, all while upholding the exclusive rights of rights holders by ensuring that they and their protected works are not unduly denigrated.

The human rights framework offers further insights to realise the objectives of the parody

exception. However, it is acknowledged that the parody exception cannot be extended to encompass all types of mashups and other remixes. Should such a broad exception be desired, it should be introduced by the EU legislator, complete with its own set of conditions for application.

Finally, if a radical shift in EU copyright law is contemplated, this endeavour lies within the purview of the legislator and would necessitate meticulous scrutiny in light of the three-step test and requires public consultation, especially considering the potential breath of its scope and potential commercial impact, which might call into question its compatibility with the first and second steps.

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