

Just a matter of laugh? Why the CJEU decision in *Deckmyn* is broader than parody

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Judgment in *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, C-201/13, EU:C:2014:2132

PARODY UNDER EU LAW AND BEYOND

On 3 September 2014 the Grand Chamber of the Court of Justice of the European Union ('CJEU') issued its decision in Case C-201/13 *Johan Deckmyn and Another v Helena Vandersteen and Others* ('*Deckmyn*'). This was a reference for a preliminary ruling from the Brussels court of appeal, seeking clarification as to the notion of parody under Article 5(3)(k) of Directive 2001/29¹ (the 'InfoSoc Directive'). This provision allows Member States to introduce into their own copyright laws an exception or limitation to the rights of reproduction, communication and making available to the public, and/or distribution, for the purpose of caricature, parody or pastiche. It does so without providing a definition of these concepts.

Having clarified that 'parody' is an autonomous concept of EU law, in its ruling the Court held that this must be understood according to its usual meaning in everyday language. A parody has just two essential characteristics: first, to evoke an existing work while being noticeably different from it and, secondly, constitute an expression of humour or mockery. The CJEU also stated that the person who owns the copyright to a work has a legitimate interest in ensuring that this is not associated with the message conveyed by its parody if it is discriminatory/racist.

This decision is topical to EU debate on copyright exceptions and limitations in Article 5 of the InfoSoc Directive, as well discourse around activism – rather than mere activity – of the CJEU in this area of the law. Thus, the relevance of the *Deckmyn* decision is not confined to the sole topic of parody. Similarly to what has happened in relation to other aspects of copyright, e.g. the originality requirement² and the notion of work³ – also in this case the Court might have pursued some sort of *de facto* harmonization, notably with regard to moral rights.

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¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, O.J. 2001, L 167, pp. 10-19.

² See further E. Rosati, *Originality in EU Copyright. Full Harmonization through Case Law* (Edward Elgar, 2013).

³ See further E. Rosati, "Closed national systems of copyright-protectable works are no longer compatible with EU law" (forthcoming) GRURInt.

The present contribution is structured as follows. The first part explains the background to this reference, and summarizes the Opinion of Advocate General ('AG') Cruz Villalón on 22 May 2014⁴ and the subsequent findings of the CJEU. The second part discusses specific aspects of the Opinion and the ruling. First, the practical implications of the decision are reviewed. Secondly, the systematic impact of the *Deckmyn* case is addressed, including the actual harmonizing force of Article 5 of the InfoSoc Directive, as well as whether this ruling has introduced trade marks concepts into EU copyright (notably tarnishment), or even harmonized moral rights.

BACKGROUND

The national proceedings related to a calendar distributed during a public event in early 2011. The calendar cover reproduced a modified version of the cover to a 1991 comic book of the popular *Suske en Wiske* series by Willy Vandersteen. It did so to project the ideas of Flemish nationalist and political party Vlaams Belang, which has a history of xenophobic and racist behaviour. The drawing at issue resembled that appearing on the cover of the *Suske en Wiske* comic book entitled *The Compulsive Benefactor (De Wilde Weldoener)*, which Mr Vandersteen completed in 1961. The drawing by Mr Vandersteen represents one of the comic book's main characters wearing a white tunic and throwing coins to people who are trying to pick them up. In the drawing used by Vlaams Belang, that character was replaced by the Mayor of the City of Ghent and the people picking up the coins were replaced by people wearing veils and people of colour.

The Vandersteen estate and the holders of the rights to *De Wilde Weldoener* brought proceedings against the representatives of Vlaams Belang before the Brussels court of first instance, claiming that the drawing that the latter had used as the cover to its calendar amounted to an infringement of copyright in the original drawing by Willy Vandersteen. The court granted an interim injunction in favour of the estate and the holders of the rights to the book to prevent further distribution of the calendar, finding that the cover of the calendar infringed copyright in the comic book. The decision was appealed to the Brussels court of appeal on grounds that – among other things – the calendar cover fell within the scope of Belgian exception for parody, caricature and pastiche, pursuant to Article 22(1)(6) of the Belgian Copyright Act.⁵ The Court of Appeal decided to stay the proceedings and seek guidance from the CJEU as regards both the understanding of the concept of 'parody' and the characteristics that a work must possess to be considered a parody.

THE AG OPINION

AG Cruz Villalón clarified that this case was neither about moral rights (which remain unharmonized at the EU level)⁶ nor the three-step test in Article 5(5) of the InfoSoc Directive.⁷ The three-step test is

⁴ Opinion of Advocate Pedro Cruz Villalón in *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, C-201/13, EU:C:2014:458.

⁵ Law on Copyright and Neighbouring Rights of June 30, 1994, as amended by the Law of April 3, 1995.

⁶ Opinion of AG Cruz Villalón, *cit. supra* n. 5, para 28.

⁷ *Ibid.*, para 29.

a concept derived from international copyright instruments – notably the Berne Convention⁸ and the WIPO Copyright Treaty⁹ –, and mandates that exceptions and limitations are only applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter, and do not unreasonably prejudice the legitimate interests of the rightholder. The AG then stated that the notion of parody must be regarded as an autonomous concept of EU law.¹⁰ This conclusion (later confirmed by the Court¹¹) is not surprising. On a consistent number of occasions the CJEU has stated that the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law that makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the EU.¹² In addition, also one of the objectives of the InfoSoc Directive, i.e. to harmonize certain aspects of copyright and related rights, would support this interpretation.¹³

The AG addressed the second and third questions together. First, he (somehow oddly) found that it is not really necessary to distinguish between the concepts of caricature, parody and pastiche, since they are all aimed at setting an exception to copyright protection.¹⁴ Looking at the definitions of parody in a number of languages, the AG then stated that a parody – in its most schematic definition – is structurally an imitation and functionally humorous. It follows that a parody must possess a number of basic features, both structural and functional.¹⁵

With regard to the structural components, a parody is both a copy (in that a parody always draws upon an earlier work and some of its essential elements) and a creation. The latter is because a parody is an alteration of an earlier work that the author of the parody has made. In any case, it is left to Member States to determine whether a parody is sufficiently original and not just a reproduction with slight alterations of an earlier work.¹⁶

Turning to the considerations of the functional elements of a parody, the AG distinguished between the subject of a parody, its effect, and content. In relation to the latter, fundamental rights issues might arise.

As regards the subject of a parody, this can be either an earlier work (so to make a ‘parody of’) or something/someone else (so make a ‘parody with’, as was the case in *Deckmyn*). Accordingly, within Article 5(3)(k) of the InfoSoc Directive a parody can be indifferently a ‘parody of’ or ‘a parody with’.¹⁷

Considering the effect of a parody, the AG held that it is a common understanding that a parody must have somehow a humorous *effect*. A parody pursues a specific effect, which necessarily follows from

⁸ Article 9(2) of the Berne Convention for the protection of literary and artistic works, as revised at Paris, 24 July 1971.

⁹ Article 10(1) of the WIPO Copyright Treaty, adopted by the Diplomatic Conference, Geneva, 20 December 1996.

¹⁰ Opinion of AG Cruz Villalón, *cit. supra* n. 5, para 35.

¹¹ Case C-201/13 *Deckmyn*, paras 14 and 15.

¹² For recent decisions in the area of copyright, see judgments in *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, EU:C:2009:465, para 27; *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)*, C-467/08, EU:C:2010:620, para 32; *DR and TV2 Danmark A/S v NCB — Nordisk Copyright Bureau*, C-510/10, EU:C:2012:244, para 33.

¹³ Opinion of AG Cruz Villalón, *cit. supra* n. 5, para 36. By adopting the InfoSoc Directive, the EU intended to achieve two main objectives. Besides harmonization, the other objective (Recital 15) was to align EU copyright law with and implement into the EU legal order the 1996 WIPO Internet Treaties.

¹⁴ Opinion of AG Cruz Villalón, *cit. supra* n. 5, para 46.

¹⁵ *Ibid.*, para 48.

¹⁶ *Ibid.*, para 54.

¹⁷ *Ibid.*, para 65.

the re-elaboration of an earlier work. Lacking a humorous effect, a parody is a total failure.¹⁸ However (this part of the Opinion is particularly confusing) it is left to Member States to define what humorous *intent* means, also on account of different national sensitivities.¹⁹

Finally, the AG addressed the content of a parody and the relevance of fundamental rights. The *Suske en Wiske* book did not have any political aim. Moreover the copyright owners did not approve of the political message of the parody. So the question became how to balance copyright (which has been recognized as a fundamental right within Article 17(2) of the Charter of Fundamental Rights of the European Union)²⁰ and parodists' freedom of expression – including disturbing or upsetting expressions within Article 11(1) of the Charter.²¹ Freedom of expression is not unlimited, as also clarified by Article 10(2) of the European Convention on Human Rights ('ECHR')²², and other rights – including copyright protection – might interfere with its exercise.²³ Although a parody cannot be forbidden just because the author of the parodied work does not approve of it, parodies that transmit a message that is radically contrary to the deepest, fundamental, values of the society upon which the European public space is built should be prohibited.²⁴

THE CJEU RULING

The mere 36-paragraph judgment of the Court does follow the AG Opinion in the first question, but appears to depart from it in respect of the two other questions.

A parody must be understood according to "*its usual meaning in everyday language*"²⁵, and has just two essential characteristics: first, to evoke an existing work while being noticeably different from it and, secondly, to constitute an expression of humour or mockery.²⁶ There are no other requirements: a parody does not have to be reasonably attributed to a person other than the author of the original work, or relate to the original work or mention the source of the parodied work. In particular, unlike what the AG stated in his Opinion, a parody does not have to display an original character of its own.²⁷ This is because such additional requirements are found neither in the usual meaning of 'parody' in everyday language nor the wording of Article 5(3)(k) of the InfoSoc Directive. To state otherwise would mean unduly compressing the scope of the exception or limitation for parody. This would be both against Recital 3 in the preamble to this directive, which requires compliance with – amongst

¹⁸ *Ibid.*, para 67.

¹⁹ *Ibid.*, para 69.

²⁰ Charter of Fundamental Rights of the European Union, O.J. C 364, pp. 1-22. See judgment in *Martin Luksan v Petrus van der Let*, C-277/10, EU:C:2012:65, para 68. Note however that CJEU's reliance on Article 17(2) of the Charter has been criticized for being "*very thinly reasoned*" by J. Griffiths, "Constitutionalising or harmonising? The Court of Justice, the rights to property and European copyright law" (2013) 38(1) EL Rev 65, at 76.

²¹ Opinion of AG Cruz Villalón, *cit. supra* n. 5, para 80.

²² European Convention on Human Rights as amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13. For recent applications of Article 10 to copyright cases, see the decisions of the European Court of Human Rights in *Robert Ashby Donald and Others v France*, Appl No 36769/08, judgment of 10 January 2013, and *Fredrik Neij and Another v Sweden*, Appl No 40397/12, judgment of 19 February 2013.

²³ Opinion of AG Cruz Villalón, *cit. supra* n. 5, para 82.

²⁴ *Ibid.*, para 85.

²⁵ Judgment in *Deckmyn*, para 19.

²⁶ *Ibid.*, para 20.

²⁷ *Ibid.*, para 21.

others – the protection of intellectual property and freedom of expression (parody being a way to exert this freedom)²⁸, and subsequent Recital 31, which states that exceptions and limitations must strike a “*fair balance*” between the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other.²⁹

In any case, it follows from Recital 31 that freedom of parody as an expression of one's own opinion is not unlimited. A parody that conveys a message that is discriminatory/racist may not be eligible for protection under Article 5(3)(k). To state otherwise would contradict the requirement for a fair balance between the rights and interests of the author of the parodied work and the rights of the parodist. It follows that in these instances the person who holds the rights to a work has a “*legitimate interest in ensuring that the work protected by copyright is not associated*” with the message conveyed by its parody.³⁰

THE PRACTICAL AND SYSTEMATIC IMPLICATIONS OF THE *DECKMYN* DECISION

The CJEU decision in *Deckmyn* has implications that are both practical and systematic. The former relate to the way national courts will have to address parody cases from now on. The latter regard CJEU understanding of areas harmonized by EU directives – notably the InfoSoc Directive – and the possible *de facto* harmonization of areas untouched by EU directives, in particular moral rights, and the introduction of trade marks concepts into EU copyright.

A MATTER OF ACTUAL OR INTENDED LAUGH?

By stating that a parody must only meet two requirements, i.e. to evoke an existing work while being noticeably different from it and constitute an expression of humour or mockery, the CJEU both omitted the distinction that the AG had drawn between the concepts of ‘parody of’ and ‘parody with’, and discarded the various tests employed by Belgian and other national courts.³¹

With regard to the former (‘parody of’/‘parody with’), it is plausible to assume that that part of the Opinion survived the CJEU ruling. Because of the Court’s stress on the need to strike a fair balance between copyright protection and freedom of expression, it appears that the subject of a parody may be indifferently an earlier work or something/someone else. This conclusion is to welcome, especially considering the difficulties arisen in the US following the 1994 decision of the Supreme Court in *Campbell v Acuff-Rose*, and the distinction drawn there between parody and satire: “*Parody needs to mimic an original to make its point, and so has some claim to use the creation of*

²⁸ *Ibid.*, para 25.

²⁹ *Ibid.*, para 26.

³⁰ Judgment in *Deckmyn*, para 32.

³¹ For the different treatment of parodies in a number of EU (UK, France, Germany, The Netherlands) and non-EU (Canada, Australia, USA) jurisdictions, see D. Mendis – M. Kretschmer, *The treatment of parodies under copyright law in seven jurisdictions. A comparative review of the underlying principles* (2013), available at <http://www.ipso.gov.uk/ipresearch-parody-report2-150313.pdf>.

its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."³² According to William Patry it is unlikely that the *Campbell* Opinion intended such a sharp distinction³³, also because in that case the US Supreme Court rejected the "ill-advised bivalent distinction between commercial and non-commercial uses"³⁴ that had been previously employed in *Sony*.³⁵

With regard to the various tests developed at the national level, it appears for instance doubtful that after *Deckmyn* France would be still able to require that parodies comply with the rules of the genre, as per current Article L 122-5(4) of the French intellectual property code.³⁶ Although this requirement under French law has been criticized as unhelpful³⁷, courts in that Member State have articulated some "lois du genre". These include that a parody must not be confusing; must not intend to harm personally the author of the earlier work; and is intended to be funny.³⁸ In its 2001 decision in *SNC Prisma Presse v Charles V.*, the Tribunal de Grande Instance de Paris held that "La parodie suppose l'intention d'amuser sans nuire."³⁹

With particular regard to this last requirement, when the CJEU stated that a parody must "constitute an expression of humour or mockery", it did not clarify whether this means that a parody must possess a humorous *intent* or also produce – as the AG Opinion appears to suggest – a humorous *effect*.⁴⁰

If the test was 'intent' (as it appears to be the case under US law, where however the critical element of a parody is understood to be its message⁴¹), then the exception under Article 5(3)(k) of the InfoSoc Directive would be broader than if a humorous 'effect' was also required. Above all, requiring just intent would be more compliant with the need to safeguard parody as "the right to mock the high and mighty"⁴², as well as freedom of expression. With regard to the latter, in relation to Article 10 ECHR the European Court of Human Rights has consistently stated that the Convention guarantees freedom

³² *Campbell v Acuff-Rose Music, Inc*, 510 U.S. 569, 580, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994).

³³ W.F. Patry, *Patry on Fair Use*, 2013 ed. (Thomson Reuters, 2013), at 360, arguing that whether the *Campbell* opinion intended such a sharp distinction is unlikely. In the same sense, see B.P. Keller – R. Tushnet, "Even more parodic than the real thing: parody lawsuits revisited", (2004) 94 TMR 979, at 984 ff., who review *Campbell's* effects on – amongst others – copyright cases, highlighting how some later decisions have relied on the wholesale parody/satire distinction, and placed on it an importance far out of proportion to its origins and benefits.

³⁴ Patry, *Patry on Fair Use*, *cit. supra* n. 38, 360.

³⁵ *Sony Corporation of America et al v Universal City Studios Inc et al*, 464 US 417.

³⁶ "Lorsque l'oeuvre a été divulguée, l'auteur ne peut interdire ... [l]a parodie, le pastiche et la caricature, compte tenu des lois du genre" (Code de la propriété intellectuelle, consolidated version as to 18 August 2013, Art. L 122-5(4)).

³⁷ R. Jacob, "Parody and IP claims: a defence?" in R. Cooper Dreyfuss – J.C. Ginsburg (Eds.), *Intellectual Property at the Edge. The Contested Contours of IP* (CUP, 2014), pp. 427-440, at 431, arguing that "when it comes to parody 'the genre' has no rules, making legislation immensely difficult. Parody ranges from the downright brutally offensive to the respectful homage."

³⁸ *Ibid.*

³⁹ Tribunal de Grande Instance de Paris 3ème chambre, 3ème section, Judgment on 13 February 2001, *SNC Prisma Presse et EURL Femme / Charles V. et association Apodeline* (emphasis added).

⁴⁰ Opinion of AG Cruz Villalón, *cit. supra* n. 5, para 67.

⁴¹ See Patry, *op. cit. supra* n. 38, at 370, observing that: "The critical element of a parody is its comment; that comment may and frequently does elicit laughter, the laughter evidencing the ridicule that the parodist has successfully brought out. Parody may also, though, make people wince, feel disgust, or perhaps even become angry."

⁴² House of Lords, Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, Motion to Approve moved by Baroness Neville-Rolfe, 29 July 2014, Colum 1556, available at <http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/140729-0001.htm#14072947000224>.

of expression to “*everyone*”, with the addition that not even the aim of the expression at hand, e.g. whether profit-making or not, has a bearing in determining eligibility for protection under Article 10.⁴³ It would be unduly restrictive if only actually funny people were able to enjoy the right to parody as part of their freedom of expression, with those unable to achieve a humorous effect being ineligible for protection under Article 10 ECHR.

If the test was ‘effect’ instead, it is unclear from what perspective this requirement would need to be considered: will the parody have to be an expression of humour or mockery in the opinion of the judge who has been requested to decide a certain case? Or would it rather have to be so according to the standards of that particular Member State? This could be in analogy with what happens in the case of national trade marks that are contrary to public policy and morality, and possibly in compliance with Recital 32 to the InfoSoc Directive that acknowledges – although from a different perspective – the existence of different legal traditions. However, should this be the case, then there might be parodies that are allowed under the laws of certain Member States but not others. This would clearly have an adverse effect on the free movement of goods and services and, ultimately, intended harmonization of Member States’ approaches to the parody exception/limitation.

Another option could be that the humorous effect is to be assessed against the standards of the “*society*” (possibly to be intended as the European/EU society) invoked by the AG in his Opinion. However, if this was the case, one might wonder how a parody that is closely bound to the specific reality of a certain Member State (as was the case in *Deckmyn*) could qualify for protection under the parody exception. This would be because the European/EU society could fail to recognize the humorous nature (intent or effect) of country- or sector- specific parodies. In this respect an option might be to import the trade mark law concept of ‘average consumer’ (possibly to be intended as the average European consumer of parodies) into copyright law. This might not be too distant a possibility, as recent AG Opinions in the area of copyright have somehow flirted with the idea of applying trade mark law concepts to copyright cases.⁴⁴ To this end, one might also rely on the ‘reasonable perception’ test adopted in *Campbell*.⁴⁵ Although the Supreme Court there did not elaborate this test at any particular length, it seems reasonable to assume that – albeit a question of fact⁴⁶ – to qualify for the parody exception under US law it could be sufficient that the individuals targeted by the parody are able to discern an *intent* to comment on the underlying work, with which they are familiar.⁴⁷ Ultimately adopting this test would require recognition that a humorous intent – not also the necessary achievement of a humorous effect – is sufficient to claim protection under the parody exception in the EU (fair use in the US).

Overall it appears that the difficulties that might arise should a humorous effect be required, lead to the conclusion the correct test under *Deckmyn* is that of a humorous ‘intent’. This conclusion is also one that best complies with Article 10 ECHR jurisprudence, in particular the universal nature of freedom of expression and the need to avoid unduly compressing the enjoyment and exercise of this human right.

⁴³ *Fredrik Neij and Another, cit. supra* n. 23, citing *Autronic AG v Switzerland*, judgment of 22 May 1990, Series A no. 178, p. 23, 47.

⁴⁴ See eg Opinion of Advocate General Verica Trstenjak in *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, EU:C:2009:465, para 58 (arguing that a reproduction in part must possess a distinctive character); Opinion of Advocate General Pedro Cruz Villalón in *Art & Allposters International BV v Stichting Pictoright*, C-419/13, EU:C:2014:2214, para 76 (speaking of likelihood of confusion with an earlier work).

⁴⁵ *Campbell, cit. supra* n. 37, para 582: “*The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.*”

⁴⁶ Patry, *op. cit. supra* n. 38, at 361-362.

⁴⁷ D.A. Simon, “Reasonable perception and parody in copyright law” (2010) 3 Utah L. Rev. 779, at 814.

In any case, the uncertainties raised by the *Deckmyn* decision might reflect on the application of national parody exceptions, an example being the UK. On 1 October 2014 new section 30A of the Copyright, Designs and Patents Act 1988 ('CDPA') entered into force. Paragraph 1 provides that "[f]air dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work." As explained in the *Guidance for those using copyright works to create new content*⁴⁸, parody imitates a work for humorous or satirical effect, commenting on the original work, its subject, author, style, or some other target. As the provision reads, it is not completely clear whether it is sufficient that a parody pursues a humorous or satirical effect, or also needs to achieve it.⁴⁹

"UNITED IN DIVERSITY"⁵⁰? NOT REALLY (YET DECKMYN MAY BE DIFFERENT)

Besides presenting practical difficulties for national courts, this CJEU decision also raises issues that relate to EU – or rather, CJEU – understanding of copyright architecture. The first issue concerns the system of copyright exception and limitations in Article 5 of the InfoSoc Directive.

As mentioned above, the first question in *Deckmyn* was not really problematic to address. However, it is particularly relevant to note what the Court stated at paragraph 16, following the clarification that the conclusion that parody is an autonomous concept of EU law is not invalidated by the optional nature of the exception in Article 5(3)(k). This is because: "*An interpretation according to which Member States that have introduced that exception are free to determine the limits in an unharmonised manner, which may vary from one Member State to another, would be incompatible with the objective of that directive*".

The InfoSoc Directive harmonized copyright exceptions and limitations, on the premise that – similarly to the case of exclusive rights – differences among the laws of Member States would have direct negative effects on the functioning of the internal market, and that such differences would have become more pronounced in view of the further development of cross-border exploitation of works.⁵¹ While the rationale of Article 5 is to require a coherent application of the various exceptions and limitations, it leaves Member States the option (the sole mandatory exception being temporary acts of reproduction under paragraph 1) to provide for certain exceptions or limitations. Influential commentators have held the view that in most cases Article 5 'shopping list' would be composed of categorically-worded prototypes rather than precisely circumscribed exceptions, thus leaving Member States broad margins of discretion at the stage of national implementation.⁵² It may be however questioned whether this conclusion is still correct.

⁴⁸ UK Intellectual Property Office, *Exceptions to copyright: guidance for creators and copyright owners* (March 2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/315025/copyright-guidance-creatorsowners.pdf.

⁴⁹ L. Bently – B. Sherman, *Intellectual Property Law*, 4th ed. (OUP, 2014), at 242.

⁵⁰ This is the motto of the European Union.

⁵¹ See Recitals 6 and 7 to Directive 2001/29, *cit. supra* n. 1.

⁵² P.B. Hugenholtz – M.R.F. Senftleben, *Fair Use in Europe. In Search of Flexibilities* (2011), available at <http://www.ivir.nl/publications/hugenholtz/Fair%20Use%20Report%20PUB.pdf>, 29. But *cf.* S. Von Lewinski – M.M. Walter, "Information Society Directive", in M.M. Walter – S. von Lewinski (Eds.), *European Copyright Law. A Commentary* (OUP, 2010), at §11.5.09: "*Member States are only free not to introduce one or several of the listed exceptions and limitations, or to provide for the listed exceptions and limitations only in respect of certain selected aspects or under stronger conditions*".

In her Opinion in *Padawan*⁵³, AG Trstenjak suggested that Article 5 “allows the Member States considerable flexibility in the transposition of the directive”. The AG further elaborated upon this in her subsequent Opinion in *Painer*, in which she stated that, subject to a number of requirements (including the three-step test in Article 5(5)), “[i]f the Member States are able to decide whether to provide for one of the constraints ..., they are also able, according to the principle of *qui potest majus, potest et minus*, to decide in principle how to organise such a constraint.”⁵⁴ This conclusion was also shared by AG Sharpston in her Opinion in *VG Wort*, in which she stated that “[t]he optional nature of the exceptions or limitations gives Member States a certain freedom of action in this area, which is reflected in the preamble to the Directive, particularly in recitals 34, 36 to 40, 51 and 52.”⁵⁵

However in its decisions in *Padawan*⁵⁶ and *TV2 Danmark*⁵⁷ the CJEU seemed to suggest that, unless where the InfoSoc Directive leaves it to Member States to fine-tune the scope of resulting exceptions and limitations, it is not possible for them to alter the scope of the exceptions and limitations that they have decided to transpose into their national regimes. Overall, it appears that Member States’ freedom to fine-tune the breadth of resulting national exceptions and limitations may be much narrower than what has been understood so far.⁵⁸ In most cases Article 5 exceptions and limitations would not be just categorically-worded prototypes.⁵⁹

This conclusion was confirmed in *ACI Adam*⁶⁰, yet in terms that appear even stricter than in earlier decisions. At paragraphs 33 and 34 of that ruling, the CJEU stated that it follows from Recital 32 in the preamble to the InfoSoc Directive that Member States have the option of introducing the different exceptions provided for in Article 5 in accordance with their legal traditions. However, once they have made the choice of introducing a certain exception or limitation, this must be applied coherently across the EU. This is necessary to avoid undermining the objectives of this directive, including to ensure the proper functioning of the internal market.⁶¹ Above all, as the CJEU appeared to suggest at paragraph 27 of this decision, in compliance with Recital 44 to the InfoSoc Directive Member States’ freedom (where it exists) would be only in the sense of limiting the scope of the resulting national exceptions or limitations, not also in the sense of extending it beyond what is provided in Article 5 (yet in compliance with Article 5(5)).

⁵³ Opinion of Advocate General Verica Trstenjak in *Sociedad General de Autores y Editores (SGAE) v Padawan SL*, EU:C:2010:264, para 43.

⁵⁴ Opinion of Advocate General Verica Trstenjak in *Eva-Maria Painer v Standard VerlagsGmbH and Others*, EU:C:2011:239, para 148, adding that (para 150) “[a] Member State is free in principle to determine, at its own discretion, the cases in which it considers an exception or limitation to copyright to be justified.”

⁵⁵ Opinion of Advocate General Eleanor Sharpston in *Verwertungsgesellschaft Wort (VG Wort) v KYOCERA Document Solutions Deutschland GmbH and Others and Hewlett-Packard GmbH v Verwertungsgesellschaft Wort (VG Wort)*, EU:C:2013:34, para 35.

⁵⁶ Judgment in *Padawan*, *cit. supra* n. 13, para 36.

⁵⁷ Judgment in *DR and TV2 Danmark A/S*, *cit. supra* n. 13, para 36.

⁵⁸ Limited freedom for Member States would not only concern the system of exceptions and limitations, but also exclusive rights, as discussed in E. Rosati, “Copyright in the EU: In search of (in)flexibilities” (2014) 9(7) *JIPLP* 585, at 589-590.

⁵⁹ *Ibid.*, at 592-594.

⁶⁰ Judgment in *ACI Adam BV and Others v Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoeding*, C-435/12, EU:C:2014:254.

⁶¹ Compliance with this objective has become central to the achievement of unexpected outcomes in a number of recent CJEU cases in the area of copyright, e.g. judgments in *Football Association Premier League Ltd and Others v QC Leisure and Others* and *Karen Murphy v Media Protection Services Ltd*, C-403/08 and C-429/08, EU:C:2011:631 (foreign pay-TV decoders), and *UsedSoft GmbH v Oracle International Corp*, C-128/11, EU:C:2012:407 (software licences).

Deckmyn is another addition to this new course of CJEU jurisprudence, which has resulted in overall a diminished tolerance towards diverging approaches at the national level in the area of exceptions and limitations. Overall, the main justification for such recent judicial outcomes lies in internal market-building concerns, in particular the idea that certain divergences at the national level might raise barriers to the free movement of goods and services based on or incorporating copyright-protected works. However, the *Deckmyn* decision might have also signalled the start of somehow a different, more liberal, approach towards exceptions and limitations on the side of the CJEU. While the Court appeared still committed to favour uniformity of exceptions and limitations across the EU, it also emphasized the rationale for exceptions and limitations, and the protection of underlying rights (freedom of expression in the case of parody). In other words, in *Deckmyn* the CJEU appeared to scale down the far-reaching, pro-rightholders implications of decisions like *ACI Adam*. Indeed, it did so till the point of referring to exceptions and limitations as ‘rights’ in the recent *Ulmer* decision.⁶² This new approach – albeit still favouring uniformity rather than flexibility – appears to mark a departure from earlier, narrower, interpretations of Article 5 exceptions and limitations. It will be interesting to see whether and how the Court further elaborates upon it.

WHAT IS THE “LEGITIMATE INTEREST” TO OBJECT A DISPARAGING PARODY ABOUT?

In his Opinion AG Cruz Villalón noted that the *Deckmyn* case was not about moral rights, because this is an aspect expressly excluded from the scope of the InfoSoc Directive. Recital 19 states indeed that “[t]he moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of [Article 6bis of] the Berne Convention for the Protection of Literary and Artistic Works, of [Article 1 of] the WIPO Copyright Treaty and of [Article 5 of] the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.”⁶³ Accordingly, any decision as to whether moral rights have been infringed should fall within the competence of national courts.

Following the adoption of the InfoSoc Directive, debate has ensued as to whether moral rights should be harmonized at the EU level. The Commission responded in the negative in its 2004 Working Paper, in which it held the view that national differences would not hamper the functioning of the internal market: “Although disparities in moral rights protection do exist ... there is no apparent need to harmonise moral rights protection in the Community at this stage.”⁶⁴ Lionel Bently has recently indicated moral rights as one of those “thorny issues that have long divided the approaches of countries such as the UK from those of France and Germany”, and for which an EU intervention would be possibly required in the medium term.⁶⁵ *Deckmyn* might have accelerated the need for a discussion in this respect, especially in relation to the part of the judgment in which the Court stated that the relevant *rightholder* has a “legitimate interest” not to be associated with a discriminatory/racist parody.

⁶² Judgment in *Technische Universität Darmstadt v Eugen Ulmer KG*, C-117/13, EU:C:2014:2196, in particular para 44.

⁶³ See also Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, O.J. L 372, pp. 12-18, Rec. 20 and Art. 9; and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, O.J. L 77, pp. 20-28, Rec. 28.

⁶⁴ Commission of the European Communities, Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, Brussels 19 July 2004, SEC(2004) 995, at 16.

⁶⁵ Directorate-General for Internal Policies – Policy Department C, Citizens’ rights and constitutional affairs, *Workshop on upcoming issues of EU law* (2014), available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/509987/IPOL_IDA\(2014\)509987_EN.pdf?utm_content=buffer3f39b&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer](http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/509987/IPOL_IDA(2014)509987_EN.pdf?utm_content=buffer3f39b&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer), at 116.

“Legitimate interest” as a trade mark concept or even a moral right?

At paragraph 31 of the *Deckmyn* decision it is stated that “holders of the rights provided for in Article 2 and 3 of Directive 2001/29 ... have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with [a discriminatory] message.” Although the CJEU never mentioned the phrase ‘moral rights’ in its ruling, paragraph 31 *might* be read as referring to them.

Another reading of this part of the judgment is also possible, i.e. one that relies on a fundamental rights/public law perspective. Paragraph 30 appears to justify the “legitimate interest” of the rightholder in light of the fundamental principle of non-discrimination based on race, colour and ethnic origin as per Council Directive 2000/43⁶⁶, and Article 21(1) of the Charter of Fundamental Rights.

However, if one embraces strictly a private law/copyright reading of this part of the judgment, then the “legitimate interest” to object a disparaging parody might be intended as either the interest of the rightholder(s) to object ‘tarnishment’ of the work, or the interest that stems from moral rights protection, in particular integrity and – to a certain extent – attribution, intended also as the right to object false attribution.

The Court appeared to derive the phrase “legitimate interest” from paragraphs 26 and 27 of the judgment which, in turn, are linked to the language of the three-step test in Article 5(5) of the InfoSoc Directive. In the context of paragraph 31 this “legitimate interest” is the interest not to be associated with a disparaging parody. This interpretation is possible also because the three-step test, although referred to in the context of exceptions and limitations to economic rights, is not necessarily limited to them. As a WTO Panel explained, “the notion of “interests” [in the three-step test] is not necessarily limited to actual or potential economic advantage or detriment.”⁶⁷ Not only does the term ‘interest’ relate “to lawfulness from a legal positivist perspective, but it has also the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights.”⁶⁸

From a rightholder’s perspective, the “legitimate interest” mentioned by the CJEU might relate to the trade mark concept of tarnishment⁶⁹, also because a disparaging parody might establish a negative association with an earlier well-known work (as might be the case of the books in the *Suske en Wiske* series). Can it be that in *Deckmyn* the CJEU, while rejecting national tests for treating a parody, introduced a new test that borrows from trade mark law, and requires that a parody satisfies a ‘no confusion (that causes moral harm)’ requirement, as also AG Cruz Villalón appeared to suggest in his recent Opinion in *Art&Allposters*⁷⁰? If this interpretation was correct, then EU trade mark and copyright laws would be much more intertwined than what has been assumed so far. Above all, it would open the gates to the use of trade mark concepts in copyright cases, thus turning the flirtatious

⁶⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. L 180, pp. 22-26.

⁶⁷ WTO Copyright Panel decision (2000), Case WT/DS160, United States - Section 110 (5) of the US Copyright Act, at §VI(6)(2)(d)(i).

⁶⁸ *Ibid.*

⁶⁹ Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (codified version) O.J. L 299, pp. 25-33, Art. 5(2); Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version), O.J. L 78, pp. 1-42, Art. 9(1)(c).

⁷⁰ Opinion of AG Cruz Villalón in *Art & Allposters*, *cit. supra* n. 49, para 76.

relationship that AG Opinions in the area of copyright have entertained with trade mark concepts into an actual, committed, relationship sealed by the CJEU.

From a different perspective, it could be also possible to argue that this part of the *Deckmyn* judgment is about moral rights. In particular, the CJEU might have undertaken their *de facto* harmonization.

Moral rights across the EU

As Gerald Dworkin recalled⁷¹, moral rights may be seen as fundamentally rooted within Article 27(2) of the Universal Declaration of Human Rights.⁷² However, it is the Berne Convention that articulates – perhaps unsatisfactorily⁷³ – the minimum legal content of the moral rights of attribution and integrity, as developed by continental European case law and doctrine.⁷⁴ Article 6*bis* Berne states that, independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work, and object to any distortion, mutilation or other modification of, or other derogatory action in relation to, his/her own work, that would be prejudicial to his/her honour or reputation.

Since the Convention merely provides minimum standards, the way in which Berne countries have intended and applied moral rights varies greatly.⁷⁵ These differences are pronounced even within Europe. In some, so-called 'monistic' copyright regimes, *eg* Austria and Germany, the moral rights last as long as the economic rights.⁷⁶ In the UK and Ireland, moral rights likewise last as long as economic rights⁷⁷, but in these Member State moral rights may be waived.⁷⁸ In the 'dualist' conception of copyright in *droit d'auteur* jurisdictions, such as France and Italy⁷⁹, moral rights are separate from patrimonial and economic rights and are instead "*perpétuel, inaliénable et imprescriptible*"⁸⁰, and may not be waived.

With regard to the right of attribution, unlike *droit d'auteur* regimes where protection is automatic, under UK law this right may be only enjoyed (and enforced) if it has been asserted.⁸¹

⁷¹ G. Dworkin, "Moral rights in English law – the shape of rights to come" (1986) 8 EIPR 329, at 329.

⁷² "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." (emphasis added)

⁷³ Dworkin, *op. cit. supra* n. 76, at 332.

⁷⁴ A. Dietz, "The artist's right of integrity under copyright law – a comparative approach" (1994) 25 IIC 177, at 179.

⁷⁵ P. Goldstein – B. Hugenholtz, *International copyright. Principles, law, and practice*, 3rd ed. (OUP, 2013), pp. 363-365. For an overview of the different regimes in force across the EU, see M. Salokannel – A. Strowel, *Study contract concerning moral rights in the context of the exploitation of works through digital technology – Final report* (2000), available at http://ec.europa.eu/internal_market/copyright/docs/studies/etd1999b53000e28_en.pdf.

⁷⁶ Art. 60 of the Austrian Copyright Act (*Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte* (Urheberrechtsgesetz)); Art. 64 of the German Copyright Act (*Gesetz über Urheberrecht und verwandte Schutzrechte* (Urheberrechtsgesetz)).

⁷⁷ S. 86 CDPA; s. 115 of the Irish Copyright and Related Rights Act, 2000.

⁷⁸ S. 87(2) CDPA; s. 116 of the Irish Copyright and Related Rights Act, 2000.

⁷⁹ Art. 23(1) of the Italian Copyright Act (Legge 633/1941).

⁸⁰ Art. L121-1 of the French intellectual property code, *cit.*.

⁸¹ S. 78 CDPA.

With regard to the right of integrity, French law apodictically⁸² states that the author has the perpetual right “*au respect ... de son oeuvre*”.⁸³ By requiring a “*treatment*” of the work, UK right of integrity⁸⁴ appears even narrower than what is provided under Article 6*bis* Berne, that encompasses not just any distortion, mutilation or other modification of a work, but also any other derogatory *action*.⁸⁵ Overall, it would seem that UK right of integrity does not protect against non-transformative uses of one’s work.⁸⁶ While UK understanding of the right of integrity appears narrower than other jurisdictions, UK law currently lacks a statutory defence rooted within freedom of expression. This means that alleged infringers of the right of integrity (but the same also applies to other moral rights) may not be able to rely on defences like fair dealing for parody, or fair dealing for criticism, review and news reporting.⁸⁷

Moral rights harmonization?

In *Deckmyn* the CJEU might have undertaken the *de facto* harmonization of both the scope of the rights of integrity and attribution, and the subject(s) who can enforce them.

Starting with the right of integrity, according to the CJEU one has a legitimate interest in ensuring that the work protected by copyright is not associated with the message of any parody of it, at least if this is discriminatory/racist. The question is whether this is the only instance in which such legitimate interest may arise. If the answer was in the affirmative, then this could be considered the only case when one’s own right of integrity might be infringed. This could have an impact on those Member States which, unlike the UK, have traditionally interpreted the right of integrity broadly, so that this right may be infringed also by mere use of a work out of context, without the need for any addition to, deletion or alteration of the original work.⁸⁸

Secondly, the CJEU rejected the suggestion that to be legitimate a parody had to comply with the condition that it could be reasonably attributed to a person other than the author of the original work itself. Yet in Member States like France parodies must be transformative and not harm the legitimate author, whether economically or morally.⁸⁹ The latter may be the case if the public may be deceived as to the origin of the work.⁹⁰ The right of attribution also encompasses the right to object to false attribution. It may be difficult for courts in France (but also in the UK, especially in those instances in which a parody includes an implied statement as to the identity of the author) to accommodate this part of the judgment.

Finally the CJEU held that the subject who has such “*legitimate interest*” is the copyright holder. While reference to the latter is justifiable in light of the language employed by Recital 31 which speaks of

⁸² In this sense, Dietz, *op. cit. supra* n. 79, at 182.

⁸³ Art. L121-1 of the French intellectual property code, *cit.*

⁸⁴ S. 80 CDPA.

⁸⁵ K. Garnett – G. Davies – G. Harbottle, *Copinger and Skone James on copyright*, 16th ed. (Sweet&Maxwell, 2011), Vol. I, at 732; W. Cornish, “Moral rights under the 1988 Act” (1989) 11 EIPR 449, at 450.

⁸⁶ E. Adeney, *The moral rights of authors and performers. An international and comparative analysis* (OUP, 2006), at 406.

⁸⁷ S. 30 CDPA.

⁸⁸ I. Stamatoudi, “Moral rights of authors in England: the missing emphasis on the role of creators” (1997) IPQ 478, at 481.

⁸⁹ Mendis – Kretschmer, *op. cit. supra* n. 36, at 9.

⁹⁰ In *SNC Prisma Presse*, *cit. supra* n. 44, the Tribunal de Grande Instance de Paris held that “*il ne peut y avoir parodie s’il existe un risque de confusion avec l’œuvre originale*”.

the need for “[a] fair balance of rights and interests between the different categories of rightholders”⁹¹ (as well as the three-step test), this part of the judgment may prove problematic to accommodate in *droit d’auteur* traditions. As mentioned, in those countries moral rights are personal rights of authors, and cannot be waived. This means that, even when copyright has been transferred, moral rights remain with the author and can only be enforced by him/her during his/her lifetime and by his/her estate after his/her death. One may wonder about the actual legitimacy of such “*legitimate interest*” when the copyright holder is different from the author, in particular with regard to the legal grounds that would justify the subsistence of such interest. It is also questionable whether the rightholder’s interest subsists alongside the author’s moral rights or not, and what the relationship between the rightholder’s “*legitimate interest*” and the author’s moral rights is.

If nothing else, this part of the *Deckmyn* judgment also shows the potential difficulties for national judges called upon applying it within their own legal systems, including how to qualify the nature of the “*legitimate interest*” invoked by the Court: is it a rightholder’s right to object tarnishment of a work? Is it linked to moral rights protection? Is it a legitimate interest framed within a public law/fundamental rights perspective? It is perhaps too early to draw a firm conclusion. However it is anticipated that much will depend on how national courts will interpret this part of the decision.

INPUT FOR THE NEW COMMISSION?

By rejecting diverging national criteria for assessing a parody, the CJEU in *Deckmyn* favoured uniformity at the expenses of the different legal approaches of EU Member States. From a policy perspective, it will be interesting to see whether and how this latest addition to CJEU case law on exceptions and limitations – in particular what looks like a diminished tolerance on the side of the Court for diverging national approaches, yet with a more liberal approach than in the (recent) past – will influence the reform agenda of the Juncker Commission.

It is likely that debate at the Commission level will continue focusing on further harmonization of the copyright laws of EU Member States (possibly including moral rights) or even their unification at the EU level. Full harmonization has been discussed as an option with increasing frequency over the past few years (the most recent instance being the Public Consultation on the Review of EU Copyright Rules that was conducted between late 2013 and early 2014⁹²), and will likely be discussed even more frequently during the term of office of the new Commission. It is apparent that any such debate would require an assessment of both the evolution and legacy of recent CJEU activity in the area of copyright and its exceptions and limitations, including the interests and (fundamental) rights that these protect.

⁹¹ Emphasis added.

⁹² European Commission, *Public Consultation on the Review of EU Copyright Rules* (December 2013), available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf, §VII. See also European Commission, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules (July 2014), available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf, §VIII.