Court of Justice of the European Union: CJEU introduces concept of parody in EU Law: Deckmyn v. Vandersteen

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A judgment of the Court of Justice of the European Union (CJEU), by way of a preliminary ruling delivered on 3 September 2014, once more deals with the conflicting interests of copyright protection and the right to freedom of expression and information (see Case-C-70/10 Scarlet Extended v. SABAM (see IRIS 2012-1/2), Case C-360/10 SABAM v. Netlog NV (see IRIS 2012-3/3) and Case C-314-12 UPC Telekabel v. Constantin Film Verleih (see IRIS 2014-5/2). In a case concerning the concept and application of the parody-exception in copyright law, the CJEU held that a "fair balance" must be obtained between the rights of the copyright holders and the right to freedom of expression, in this case of the parodist. The case concerns a political cartoon on a calendar with a message that was alleged discriminatory towards foreigners. The cartoon is a parody of the cover of one of the most famous comics strips in Belgium, Spike and Suzy (Suske en Wiske, Bob et Bobette) by Willy Vandersteen. The parodist is a member of the *Vlaams Belang* (Flemish Interest), a Flemish nationalistic party.

The judgment of the CJEU contains three elements. First the Court held that the (optional) parody exception under Article 5(3)(k) of the Information Society Directive 2001/29/EC must be interpreted as meaning that the concept of "parody" appearing in that provision is an autonomous concept of EU law. Second, the Court decided that the essential characteristics of parody are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery. It is up to the national courts to determine whether a parody is sufficiently different from the original work and whether it is funny or mocking. These are the only essential characteristics, as, according to the CJEU's judgment, the concept of "parody" is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; or that it should relate to the original work itself or mention the source of the parodied work.

Finally, the Court emphasised that in applying the parody-exception, national courts must strike a fair balance between the interests and rights of copyright holders and the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k). It is

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indeed for the national courts to determine, on the facts, whether the application of the exception for parody on the assumption that the drawing at issue fulfils the essential requirements of parody, preserves that fair balance. In this regard the Court drew attention to the principle of non-discrimination based on race, colour, and ethnic origin, as defined in Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and confirmed by Article 21(1) of the Charter of Fundamental Rights of the European Union. In those circumstances, copyright holders, such as Vandersteen, have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message.

It is now up to the Brussels Court of Appeal to apply the criteria put forward by the CJEU to determine whether the cartoon calendar at issue falls under the parody-exception as provided for in Article 22(1)(6) of the Belgian Copyright Act, also taking into consideration the right of freedom of (political) expression of the parodist and its limits from the perspective of “hate speech”.

Judgment of the Court (Grand Chamber) in Case C-201/13 Deckmyn and VZW Vrijheidsfonds v. Vandersteen a.o., 3 September 2014

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