COPYRIGHT COMMENT

Parody in the EU: a view from across the Atlantic


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The issues raised by *Deckmyn* are still being digested among EU copyright lawyers, but how might such a case fare in the US? **Douglas W Kenyon** and **R Dennis Fairbanks** offer a Stateside perspective…

The Supreme Court's decision in *Campbell v Acuff-Rose Music, Inc,* 510 U 569(1994), remains the baseline for determining the applicability of the fair use parody defence in copyright infringement cases in the US. Recently, an Advocate General (AG) of the Court of Justice of the European Union (CJEU) issued a non-binding opinion in a Belgian parody case that the Belgian court had referred to the CJEU, *John Deckmyn, Vrijheidsfonds VZW v Helena Vandersteen* (C-201/13). If adopted by the CJEU, the AG's opinion will clarify important aspects of the parody defence within the EU. But it may also make the availability of the defence uncertain in actual cases because it will be determined, in part, in light of the potentially disparate values of the various member states. This article summarises *Campbell* and *Deckmyn* and then discusses the implications of *Deckmyn* for copyright owners and content users whose rights are determined by the laws of the EU and its member states.

The Campbell (2 Live Crew) Case

In *Campbell*, the United States Supreme Court was asked to decide whether 2 Live Crew's commercial rap parody of Roy Orbison's song '*Oh Pretty Woman*' might be a fair use within the meaning of Section 107 of the US Copyright Act. The Supreme Court held that it might be fair use, rejecting the Second Circuit Court of Appeals' conclusion that the commercial nature of the parody rendered it presumptively unfair. The Supreme Court remanded the case for reconsideration in light of its discussion of the non-exclusive fair use factors in Section 107. In doing so, the Supreme Court recognised that fair use analysis is not reducible to bright-line rules but, instead, requires case-by-case assessment. In discussing the first fair use factor, "the purpose and character of the use," the Supreme Court noted that copyright's goal of promoting science and the arts "is generally furthered by the creation of transformative works", that is, works that add "something new, with a further purpose or different character, altering the first with new expression, meaning, or message. . . ".[1] While transformative use is not "absolutely necessary," the court continued, transformative works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright…".[2] Thus, as the level of transformation rises, the importance of the other factors, including commercial versus non-commercial use, diminishes.[3]

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The AG's opinion in *Deckmyn*

Willy Vandersteen, a Belgian cartoonist, created the well-known comic strip characters Suske and Wiske, and authored comic books in which they appeared, including *The Wild Benefactor*. Johan Deckmyn. a member of the political party Vlaams Belang, edited and distributed a party calendar, the cover of which he based on the cover of *The Wild Benefactor*. Compared to the original, the derivative replaces the benefactor from the title with a caricature of the mayor of Ghent throwing money on people in the public square. It was intended to advance the political ideology of the party, an ideology with which the rightsholders to Vandersteen's work argued that they disagreed. The original and parodic

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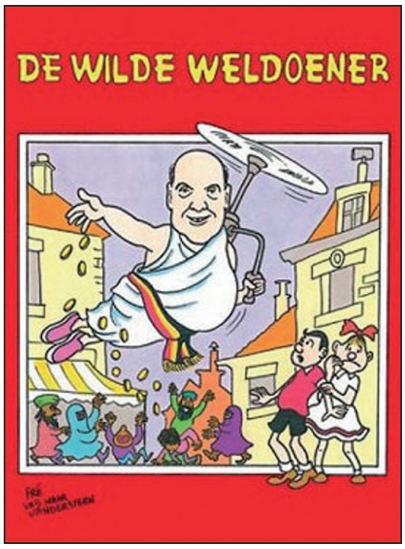

versions are depicted above.

The Belgian court enjoined distribution of the calendar and referred the case to the CJEU, seeking answers to several questions relating to the nature and scope of parody. The AG issued his opinion as part of the referral process. Although the CJEU has not yet ruled, an AG's opinion often is influential and provides important insights into how the EU court may instruct the court in Belgium.

The AG reached the following conclusions. First, parody is an autonomous concept under EU law. While member states may decide for themselves whether to recognise parody under their respective national laws, once recognised parody law should be applied in light of the EU's principle of equality and, within appropriate discretion of the member states, uniformity. Secondly, the work claimed as a parody must imitate the original in a non-confusing manner, and must be intended as a spoof or burlesque. But the target of the parody need not be the original work. It may instead be third parties, such as politicians. Finally, in assessing whether the parody defence applies, national courts are given broad discretion. They must, however, balance fundamental rights, including freedom of expression, with human dignity and the prohibition against discrimination. Thus, for example, a work may be protected as parody, even though it expresses opinions anathema to the majority, but may be denied protection if it expresses a view contrary to the deeply rooted convictions of society.

The implications of *Deckmyn*

The AG did not address, and the CJEU is not expected to reach, several questions that logically may arise in the context of future parody cases in the EU. Those questions include the scope of "moral rights," trademark rights, and concepts of "fairness". The AG's opinion does, however, posit a legal analysis that simultaneously requires recognition of EU-wide principles of equality and harmony while leaving to member states broad discretion to determine how those principles will be applied in light of disparate cultural imperatives. The implications are varied but include the following:

- Assessing the risk that a parody constitutes infringement can be expected to be difficult because inconsistent application and development of the law should be anticipated. Therefore, risk assessment often will require analysis under the laws of numerous member states.
- Free speech, while important in parody analysis, is not as fundamental in the EU as it is in the US. Determining whether a parodic work is protected within a member state may include an analysis of the message's content to a greater extent than in the US. Consequently, it is plausible that national courts may enforce content-based restrictions in the context of adjudicating copyright claims.
- Especially for companies and content creators used to expansive First Amendment protections, distributing parodic works in the EU, therefore, can add heightened business and legal risks. Suggestions for reducing those risks include (a) determine in advance where the works will be distributed, (b) conduct reasonable diligence into the infringement potential of the works before committing substantial resources to them, and, (c) to the extent applicable in the context of distribution and licensing relationship with others, obtain indemnification covering the liability and the costs of defence.

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Footnotes

1. 510 US 578-79.
2. 510 US at 579.
3. 510 US at 579.