

Q291

Defence of parody in copyright

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Respondent

3

Anonymous

17:04

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Contact details

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I. Current law and practice

Please answer the below questions with regard to your Group's current law and practice.

5. **1)** Does your law or case law provide for exceptions or limitations to copyright protection for the purpose of parody or any other similar exceptions (e.g. satire, caricature, pastiche)? Please explain.

Yes. Under § 34/A (1) of the Act on Copyright (Act 76 of 1999 as amended, hereafter: CA) works (and via the reference to subject matters of related rights in § 83 (2) CA all performances, sound recordings, radio and TV programs and films)

a) with an indication of the source and the author indicated therein for the purpose of criticism or review, and/or

(b) by evoking the work and expressing humour or mockery, for the purposes of caricature, parody or pastiche may be used by any person.

(2) In the case of use within the meaning of paragraph (1), the original work shall be subject to exceptions or limitations to the extent justified by the purpose. This amendment took effect on June, 1, 2021 in the framework of the transposition of Art 17 (7) of the EU CDSM Directive (Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC). The relevant part of Article 17 (7) reads as follows: "(...) Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services: (a) quotation, criticism, review; (b) use for the purpose of caricature, parody or pastiche."

The HU legislator decided to introduce the „parody“ exception with a broader scope. It is not only an exception that can be used for the purpose of uploading and making available protected content in the course of using (via uploading) and providing (via storing and making available) the services of the online content sharing providers, but it has been devised as a general case of free use. It is irrelevant whether the use results in the generation or enhancement of income. It means that any work and subject - matter protected by related rights can be freely reproduced and altered („arranged“) for the „parody“ purpose within the limits of the statute.

The use

- may not go beyond the extent justified by the purpose,
- must remain within the limits of the Deckmyn case (par 25 -27 of the Study Guidelines),
- may not violate the integrity right of the author and/or the performer.

For the purpose to delineate integrity right infringements and parody exception, the legislator „recast“ the provision of CA on the integrity right. Now it is crystal clear that only acts/ behaviours that are derogatory to the reputation and honour of the author /performing artist may qualify as integrity right violations. „§ 13 CA: Any distortion, mutilation, alteration or other abuse of a work which is prejudicial to its honour or reputation is an infringement of the author's moral rights.“

6. **2)** Does your law or case law provide for exceptions or limitations to copyright protection for the purpose of parody or any other similar exceptions (e.g. satire, caricature, pastiche)? Please explain.

Prior to the amendment, CA did not refer to parody expressis verbis, but parody was considered permissible in copyright jurisprudence and commentary literature. Hungarian law accepted quotation as a free use of the expression type, did not directly refer to criticism and review, and did not transpose parody, caricature and pastiche when implementing the INFOSOC Directive.

In line with the previous practice of the Council of the Copyright Experts, opinion No 16/2008 states that "[p]arody is not provided for in CA nor is it defined as an exception to the right of integrity or to the adaptation. However, this does not mean that 'genuine' parody is a use subject to authorisation. In Hungarian copyright law, a 'genuine' parody is not a use subject to authorisation because, although the new work inspired by the parodied work would in principle be a reworking of it, its specific character is manifested in the addition and juxtaposition of new - exaggerated - features of the original work, in its distance from the original work, and therefore in its being excluded from the exclusive right. The basic case of 'genuine' parody is 'pastiche' within the meaning of Article 3(k) of the Infosoc Directive, which does not use the parodied work at all, but merely reproduces its style, exaggerating certain formal features."

Parody-type uses used to be free prior to the amendment of CA, as long as they met the criteria established by the parody case-law practice, including that the parody itself exhibits individual, original features, i.e. that it is itself an independent work. Thus, in a recent judgement prior to the amendment of CA, the Court of Appeal rejected a plea of free use in the case of a parody that appeared to be a political caricature. The court reasoned that "[i]f the parody creates a new work from the original work by adding individual, original elements, which does not differ from the underlying work to such an extent that the independence of the new work can be established, it constitutes a work of adaptation subject to authorisation, also in view of the fact that Hungarian copyright law does not recognise use for the purpose of parody."

7. **3)** Must the parody comply with the three-step test provided for in article 9(2) of the Berne Convention?

Yes. Not only with the relevant provisions of the Berne Convention, but rather with the broader Article 13 of the TRIPs Agreement, and Article 5 (5) of the Infosoc Directive reiterating the three step test (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).

It is remarkable, that our CA repeats the three step test in § 33 (2) CA, moreover it also extends the scope of this test.

§ 33 (2) CA „Even under the provisions on free use, use shall be permitted or free of charge only in so far as it does not prejudice the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author, and provided that it complies with the requirements of fairness and is not directed to a purpose incompatible with the purpose of free use.

(3) The provisions on fair use shall not be interpreted in a broadening manner."

As a result the test finds application not only to the legislator (via the Berne Convention and the TRIPs Agreement and the Infosoc Directive), but also in court practice and the judiciary applies the provisions of various cases of free uses based on the three step test provisions repeated in the HU CA.

8. 4) Are there any other special conditions or requirements for a parodist to benefit from this exception?

- ☒ Parody must constitute an expression of humour or mockery;
- ☐ Parody must be transformative or add some significant new creation to the original work;
- ☐ Parody must have a critical intent;
- ☐ Parody must be directed at the original work (instead of targeting at society or other aspects unrelated to the original work)?
- ☐ Parody must be non-commercial;
- ☒ Parody must not disparage or discredit the original work;
- ☐ Other - please explain.

9. 4) (continued) Please explain

a) Parody must constitute an expression of humour or mockery:
YES.

b) Parody must be transformative or add some significant new creation to the original work:
No, unfortunately, due to the erroneous parody requirements, as defined by the European Court of Justice in the Deckmyn case (paragraphs 25-27 of the Study question).

c) Parody must have a critical intent:
No, unfortunately, due to the erroneous parody requirements, as defined by the European Court of Justice in the Deckmyn case, however the legislator introduced – in conjunction with the parody exception – an exception to use the work with an indication of the source and the author indicated therein for the purpose of criticism or review.

d) Parody must be directed at the original work (instead of targeting at society or other aspects unrelated to the original work)?
No, it may be directed either at the original work, or at the author of the original work, or may target other aspects. If it constitutes the expression or humour or mockery, and is suitable to evoke the source work, and the reproduction does not step over the extent required by the purpose of the parody, the parody meets all statutory requirements.

e) Parody must be non-commercial:
No, there is no such requirement.

f) Parody must not disparage or discredit the original work:
Yes, via the eventual violation of the integrity right of the author, if the parody is derogatory to the reputation or honour of the author.

g) Other - please explain:
There are no other requirements.

10. 5) Do freedom of speech principles play any role when assessing lawfulness of a Parody?

No, but due to the recent introduction of the parody exception there is no court practice whatsoever to support this view. On the one hand the Constitutional Courts' practice expects all courts to make ex office fundamental rights assessment within the framework of the mandatory interpretation and application of the statutes and regulations, even if the parties do not refer to any violation of fundamental rights. This obligation might offer an incentive to the courts to consider constitutional freedom of speech principles in addition to (or in contradiction with) the normal application of the parody exception. On the other hand the CA now includes not only a parody exception, but also a free speech exception „to use the work with an indication of the source and the author indicated therein for the purpose of criticism or review“ (CA, § 34/A (1)). If there is an internal free speech exception in the CA, why should a court turn to the constitutional free speech provisions? But at this stage no definite answer can be given to the question without guiding precedents.

11. 6) Are all types of copyright works subject to parody exceptions?

Yes (and all subject-matters of related rights).

12. **7)** Does your law or case law provide for any exceptions or limitations to moral rights associated with parodies? Please explain.

Yes, please see the answer given to Q 1 and 4.f.

II. Policy considerations and proposals for improvements of your Group's current law

13. **8)** Could your Group's current law or practice relating to parody defences to copyright claims be improved? If yes, please explain.

☒ Yes

☐ No

14. **8) (continued)** Please explain.

Yes, but the improvement is impossible. The parody requirement should include that a parody shall be a work in terms of copyright (individual creation), and it shall have a purpose of intellectual dispute with the author of the source work, or with the source work, or it shall have another social target to dispute with via the reproduction/alteration of the source work. The reason of the impossibility is the Deckmyn decision of the European Court of Justice (Paragraphs 25-27 of the Study Questions).

15. **9)** Could any of the following aspects of your Group's current law relating to parody defences be improved? Please explain:

- ☒ a) Definition of Parody or of other similar exceptions
- ☒ b) Requirements for benefiting from such exceptions
- ☐ c) The interplay between parody exceptions and moral rights
- ☐ d) The types of work that may benefit from such exceptions

16. **9) (continued)** Please explain

(a) Definition of Parody or of other similar exceptions:
Yes, to the extent that such exceptions exhaust the free speech right of the parodist to be exercised with regards to copyright works. The purpose of such a provision would be to diminish the danger of legal uncertainty that may arise in the course of fundamental rights assessment in relation to the direct application of the copyright exceptions.

(b) Requirements for benefiting from such exceptions:
Yes. The parody requirement should include that a parody shall be a work in terms of copyright (individual creation), and it shall have a purpose of intellectual dispute with the author of the source work, or with the source work, or it shall have another social target to dispute with via the reproduction/alteration of the source work.

(c) The interplay between parody exceptions and moral rights:
No.

(d) The types of work that may benefit from such exceptions:
No. Although there are functional works, that per se may not be used as source works for parody (e.g. source code of a computer program, or a database protected by copyright), but the lack of such clarification does not disturb the smooth application of the parody exception.

17. **10)** In your Group's view, what policy objective (such as free speech, or another objective) would a defence of parody promote and help accomplish? Does the policy objective drive the types of expression that should be allowed under a parody defence?

The defence of parody under the EU law – if one considers the Deckmyn decision – is duly promoted and is broader due to the lack of some essential requirements (creative parodies, intellectual dispute) than it would be justified. If the parody exception is supplemented with a broad free speech – criticism – exception – as it is the case in the Hungarian CA – there is nothing to improve.

18. **11)** Are there any police considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

☐ Yes

☒ No

19. **11) (continued)** Please explain

III. Proposals for harmonisation

Please consult with relevant in-house / industry members of your Group in responding to Part III.

20. **12)** Do you believe that there should be harmonisation in relation to exceptions and defences based on parody?

If YES, please respond to the following questions without regard to your Group's current law or practice.

Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.

☒ Yes

☐ No

21. **12) (continued)** Please explain

Yes, it seems to be necessary due to the fact that parodies are very frequently used in the context of the internet on various content sharing platforms. Still we think that harmonisation seems to be a mission impossible, due to the insurmountable differences between the fair use system and the case by case limitations and exceptions (L&E-s) system.

22. **13)** Should there exist exceptions or limitations to copyright protection for the purpose of parody or any other similar exceptions (e.g. satire, caricature, pastiche)?

If YES, please explain.

☒ Yes

☐ No

23. **13) (continued)** Please explain.

Yes, it is necessary. Such exceptions give incentives to new intellectual creations without a license and at the same time contribute to the exercise of the free speech right.

24. **14)** Should parodies comply with the three-step test provided for in article 9(2) of the Berne Convention in order to benefit from the exception?

☒ Yes

☐ No

25. **14) (continued)** Please explain

Yes, since the parody exception constitutes an integral part of the system of E&L-s (exceptions and limitations).

26. **15)** Should there be any other special conditions or requirements for a parodist to benefit from this exception?

☐ Parody should constitute an expression of humour or mockery

☐ Parody should be transformative or add some significant new creation to the original work;

☐ Parody should have a critical intent;

☐ Parody should be directed at the original work (instead of targeting at society or other aspects unrelated to the original work)?

☐ Parody should be non-commercial;

☐ Parody should not disparage or discredit the original work;

☐ Other - please explain.

27. **15) (continued)** Please add comments below

Yes, as we explained above. The parody should

- express humour or mockery, and
- evoke the source work to the extent that the source work be recognizable, and
- be a work (alteration/arrangement) in terms of copyright, and
- use the source work to the extent, which is sufficient to make the source work recognizable, but shall not exceed this extent, and
- express an intellectual dispute with the source work, or with the author of the source work, or critically target a social phenomenon via the parody.

28. **16)** Should freedom of speech principles (or any other policy objective) play any roles when assessing lawfulness of a Parody?

☐ Yes

☐ No

29. **16) (continued)** Please explain

30. **17)** Should all types of works be subject to parody exceptions?

☐ Yes

☐ No

31. **17) (continued)** Please explain

32. **18)** Should there be any exceptions or limitations to moral rights associated with parodies? If YES, please explain.

☐ Yes

☐ No

33. **18) (continued)** Please explain.

34. **19)** Please comment on any additional issues concerning exceptions and limitations to copyright protection related to parody you consider relevant to this Study Question.

35. **20)** Please indicate which industry sector views provided by in-house counsels are included in your Group's answers to Part III.