BEST CASE SCENARIOS FOR COPYRIGHT

PARODY IN FRANCE

by Alexandra Giannopoulou

Best Case Scenarios for Copyright is an initiative by COMMUNIA, presenting best examples of copyright exceptions and limitations found in national laws of member states of the European Union. We believe that, by harmonizing copyright exceptions and limitations across Europe, using as a model these best examples that are permitted within the EU law, the EU would reinforce users' rights in access to culture and education.

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COMMUNIA

The **COMMUNIA International Association** on the public domain is a network of activists, researchers and practitioners from universities, NGOs and SME established in 10 Member States. COMMUNIA advocates for policies that expand the public domain and increase access to and reuse of culture and knowledge. We seek to limit the scope of exclusive copyright to sensible proportions that do not place unnecessary restrictions on access and use.

INTRODUCTION

by Alexandra Giannopoulou and Teresa Nobre

Parody is a term whose roots can be traced to ancient Greece. Etymologically, parody is derived from the Greek word "*παρωδία (parodia)*" whose meaning evolved over time to not only include works of mockery but also the simple quotation of an older work to a more modern one.

France treatment of parody, pastiche and caricature as an exception to copyright was used as a model in the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society ("InfoSoc Directive").

Only a few countries have implemented the parody exception provided for in the InfoSoc Directive. That does not mean, however, that parodies are not exempted in countries that have not transposed the EU parody exception. Parodic uses of copyrighted uses are normally justified by freedom of expression, and case law in different EU countries show that national courts might resort on freedom of expression and freedom of the arts in the absence of an explicit parody exception[1]. Some countries, such as Germany, permit parodies on the basis that adaptations are free, under certain conditions[2]. Others exempt parodies if they constitute a new original work – that was the case of the Netherlands prior to the transposition of the InfoSoc Directive[3].

The problem with the above-mentioned approaches is that, if the parody work does not meet the conditions to be considered, respectively, a free adaptation or a new work, it will infringe on the exclusive rights of the author, including the right of reproduction. In the member states of the European Union that have implemented into their national laws the EU parody exception in full, there is no such an issue, as the exception applies to all the rights harmonized under the InfoSoc Directive (reproduction, communication to the public, making available to the public, and distribution). Thus, parodies amounting to relevant reproductions can also be exempted.

Since the implementation of a parody exception into its national law, in 1957, France has always exempted parodies that involve an act of reproduction of a copyrighted work. Moreover, France has a long parody tradition, with plenty of

1 See Mendis and Kretschmer, 2013: 31, 33 and 42.
2 See Mendis and Kretschmer, 2013: 29-33.
3 See Hugenholtz and Senftleben, 2011: 27. The Netherlands incorporated the EU parody exception into its national law in 2004.

examples of commercial and non-commercial parodic uses of copyrighted works found in national case law. Finally, the key criteria developed by French courts for assessing whether a certain parody work is permitted or not seems to be aligned with the recent European Court of Justice decision on the EU parody exception[4]. That is the reason why this national model was selected as one of the best examples of a parody exception in the EU context.

4 See Case C-201/13, *Deckmyn et a. c/ Vandersteen*, 3 September 2014. As we will see in this study, although this case involves the Belgian parody exception, it is applicable in France as well, since the EUCJ considered the conditions to which the parody exception is subject to be an "autonomous concept" of EU law. Besides, the Belgian legal provision does not differ much from the French one.

PARODY IN FRANCE

1. Text of the copyright exception or limitation

All provisions mentioned herein are from the French Code of Intellectual Property (*Code de propriété intellectuelle*) created by the law of 1 July 1992 (as last amended on 25 April 2016), available at legifrance.gouv.fr[5]. No official translations into English are available.

1.1. Main legal provision

Article L 122-5[6] of the French Intellectual Property Code recognises an exception for uses of a work protected by authors' rights (*droit d'auteur*) in parody, pastiche or caricature:

Article L.122-5
Lorsque l'œuvre a été divulguée, l'auteur ne peut interdire:
(...)
(4°) La parodie, le pastiche et la caricature, compte tenu des lois du genre;
(...).

Article L.122-5
When the work has been disclosed, the author may not prohibit:
(...)
(4) parody, pastiche and caricature, taking into account the rules of the genre;
(...)

Article L.122-5 of the code of intellectual property belongs to chapter II of the first part of the first book related to intellectual property. The chapter is entitled "Patrimonial rights (*droits patrimoniaux*)". The parody exception first appeared in article 41[7] of the French intellectual property law of 11 March 1957 and it was later codified in the Code of Intellectual Property by the law of 1 July 1992. The parody exception has remained unchanged since; its validity has been encouraged by the inclusion of a quasi-identical text in article 5.3.k of InfoSoc Directive.

1.2. Other relevant legal provisions

5 https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069414
6 https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006069414&idArticle=LEGIARTI000006278917
7 https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000315384#LEGIARTI000006466389

Article L 211-3[8] of the French Code of Intellectual Property recognises an exception for uses of a work protected by neighbouring rights (including performers' rights) in parody, pastiche or caricature:

Article L.211-3
Les bénéficiaires des droits ouverts au présent titre ne peuvent interdire:
(...)
(4°) La parodie, le pastiche et la caricature, compte tenu des lois du genre;
(...)

Article L.211-3
The beneficiaries of the rights available in the present title may not prohibit:
(...)
(4°) parody, pastiche and caricature, taking into account rules of the genre;
(...)

2. Analysis of the scope of the exception or limitation

2.1. Acts

The law does not expressly specify which acts of use are exempted. The intention of the legislator was to facilitate the creation of parody works. The exception can thus cover all acts that are necessary in the context of parody, pastiche or caricature, including without limitation reproduction, public performance, adaptation and transformation of the protected work.

The level of adaptation and transformation of work is irrelevant to the legislator and the author cannot *a priori* object to the specific use as long as the parody work is created with the specific intention to make people laugh by turning the parodied works into derision and as long as the two works are distinguishable in the eyes of the public (see sections 2.3. and 2.6. below).

Although the terms parody, pastiche and caricature do not appear in the Bern Convention, they are used in the InfoSoc Directive. Inspired by the French text, the InfoSoc Directive describes the same three acts as exempted from the exclusive rights of the author.

Once a parody work is created, the legislator does not expressly limit the uses allowed for the parody work. So, all uses can be considered as exempted. Thus, a parody work can be published, performed make available online or otherwise used without infringing the rights to the parodied work.

8 https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006069414&idArticle=LEGIARTI000006279028

2.2. Object

All protected works are covered by the exception. The legislator does not limit the type of works that can be used under the parody exception. More specifically, the chosen wording of the relevant article (*oeuvres divulguées*) shows that the intention of the legislator was to include all types of works that have been disclosed (by publication or otherwise) to the public.

French case law has also included trademark parody in the realm of exempted uses. Parody has been thus recognised not only for uses of pre-existing works protected by the *droit d'auteur* but also for uses of trademarks with the goal of parody.

The law itself doesn't impose any limits on the portion of the work that can be used for the parody work. The extent to which a protected work can be used will vary according to the needs of the parodist considering the specific purpose of the parody, and always taking into account the rules of genre (see section 2.6 below). It is thus safe to assume that it is possible to make a parody of an entire work as long as there is no risk of confusion to the public between the parody work and the parodied work.

Courts have also clarified that the parody exception can be used to defend acts of parody where the parodied work is already humorous or where the parodied work is already a parody of another (*Tribunal de grande instance de Paris*, 3e ch., 18 March 2005).

2.3. Purposes

The legislator has not provided a definition for the terms parody, pastiche and caricature. According to some legal scholars, the three uses are differentiated because each one relates to a different corresponding genre. As such, musical works could be used to characterise parody, literary works for pastiche and graphic works for caricature (Desbois, 1978, n°254; Durrande, 1995, p.133). At the same time, courts have ruled on the deciding differences between parody and pastiche. According to the *Cour de cassation*, parody permits the immediate identification of the parodied work while the goal of pastiche is to make fun of a character through the caricatured work (1re Civ., 12 January 1988). The distinction has been recently qualified as unconvincing and irrelevant (Vivant et Bruguière, 2015). The generic term used for all the exempted uses is that of parody.

The characterisation of parody requires two conditions: first, an element regarding the intention of the use and second, a material element.

The parody exception may only be invoked if the humorous intention is established, which implies a subversion of the work parodied. Admittedly, the appreciation margin by the courts is narrow. According to the *Tribunal de Grande Instance de Paris*,

"parody implies the intention of having fun without hurting (the original work)"[9] (3e ch., 13 February 2001). Parodists may find themselves having trouble convincing the court of the satiric effect sought.

Uses with goals different than the humorous intent are not covered by the exception. For example, advertising parodies are not exempted uses and they are still dependent on the prior authorisation of the author of the parodied work because their goal is not to provoke laughter or to criticize but to promote a product or a service. The *Tribunal de grande instance de Paris* ruled that if the ad borrows from the original work with an intention not to provoke laughter but to divert it '"for commercial purposes, to promote the agency", (3rd Ch., 13 February 2001) the prior authorisation of the work's author is necessary and the use is not exempted by the parody exception.

The material element refers to the idea that creating a parody work implies borrowing elements from the parodied work or adapting it in a way that still reveals the link between the two works. However, the parody work should be distinctive enough in order to avoid competition with the parodied work. Also, when a parody is found, authors of the parody works are not limited to non-commercial uses only. Case law has clarified that a commercial use of a work is not incompatible with the qualification of that work as parody (*Cour d'appel de Paris*, 4e ch., 13 October 2006). As long as the exempted use is found to be a parody, the authors of the parody work are free to benefit from the work commercially.

The *Cour de cassation* has ruled multiple times in favour of parody uses of trademarks as long as the disputed use is not motivated by the intention to harm the trademark. For example, in a case involving the critical use of the brand Esso by Greenpeace France the judges have ruled that the disputed use of the trademark with the purpose of criticism is not incriminating (*Cour d'appel de Paris*, 14e ch., 26 February 2003). The ruling was confirmed by the *Cour de cassation*, which found a "proportional expression of the critique" to the brand (Com., 8 April 2008). However, in a similar case involving the company specialising in nuclear waste treatment called Areva, the court found the modification of its logo denigrating to the "activities and services" of the company (*Cour de cassation*, 1e ch., 8 April 2008). Is worth mentioning that in the second case the court rejected the defamation claims of Areva and did not find an abusive exercise of freedom of expression by Greenpeace.

At a European level, the CJEU (C-201/13, *Deckmyn et a. c/ Vandersteen*, 3 September 2014) recently defined the conditions of application of the exception of parody. The court considers the latter "an autonomous concept". According to the decision, there are two conditions to qualify the parody exception. Firstly, the parody must

9 *"La parodie suppose l'intention d'amuser sans nuire."*

"evoke an existing work, while being noticeably different from it" and second, the work must "constitute an expression of humour or mockery".

2.4. Beneficiaries

Due to the nature of the exception, anyone can benefit from it as long as the conditions of the exception are respected. This means that the exception is not only applicable for uses made by individual artists, but also for those made by organisations or companies.

2.5. Remuneration

The exempted use does not require any form of remuneration to the rights holders of the parodied work.

2.6. Other conditions

The French exception has a limitation that restricts its applicability in cases where the debated use collides with other rights related to the author of the original work. The condition is described in abstract terms at the second half of the article L. 122-5, (4°) (see section 2.1. above).

In practice, case law has showed two types of limits to the parody exception. First, the use is not exempted if it violates the author's moral right of respect of the original work. For example, a French court recently ruled against the application of the parody exception because it qualified the use as "hate parody (...) violating the author's moral rights" (*Tribunal de Grande Instance de Paris*, 3e ch., 15 January 2015). Another case pointed out that the goal of parody is not to "degrade" the interpretation of an artist (*Cour de cassation*, 1e ch., 10 September 2014). Similarly, a French court found that the moral rights of a musician were infringed when a comedian published on TV some excerpts of one of his sound recordings with an audio commentary that was ruled as denigrating (*Cour d'appel de Paris*, 4e ch., 18 September 2002). Second, the exempted use is balanced to the personality rights of the author. The goal is to develop a balance between the right to laugh and personality rights of the author chosen as the target, taking into account the French tradition of satire.

The *Cour de cassation* emphasizes that the parody exception constitutes a valid legal defence only when the author of the parody has made it clear to the audience that the presented work is not the parodied work or an extract thereof (*Cour de cassation*, 1re civ., 27 March 1990). Similarly, it has been decided that the parody use of the trademark Citröen by a satirical show is an exempted use and cannot be punished as long as no "confusion between reality and satirical work" is created (*Assemblée Plenière* of the *Cour de cassation*, 12 July 2000). The exempted acts are not restricted to the genre of the parodied work (*Cour d'appel de Paris*, 2e ch., 18 February 2011).

The parody work can be a result of transformative acts resulting in a work of different genre. For example, a song can be a parody of a play or an image can be a parody of song lyrics.

The key factor is that any confusion between the parody work and the work parodied be avoided. In practice, the appreciation of that confusion is subject to a subjective interpretation by courts (*Cour de cassation*, 1e ch., 10 September 2014). This condition is considered necessary because even if the parody work implies borrowing from the original work, the first must also stand independently enough to avoid competition with the work parodied. It should also be clarified that the appreciation of that condition does not require that the parody work will need to fulfil the originality threshold in order to be qualified as such.

As above-mentioned, in the *Deckmyn* ruling, the CJEU described the limits of the parody exception as an autonomous concept of EU law. Although the InfoSoc Directive does not provide for any further conditions to the application of the parody exception, the court stated that the application of the parody exception is conditional to striking "a fair balance" between the authors' rights and users' freedom of expression rights on which the parody exception is founded. The European judges note that when a parody sends a discriminatory message, the application of the exception for parody must strike a fair balance between the competing interests of those concerned, including the legitimate interest of the rights' holder of the parodied work that their work is not associated with such a message. Finally, it was clarified that it is not necessary for the parody work to fulfil the originality condition and that the parodist is not obligated to credit the parodied work.

Following the CJEU ruling, French judges must comply with the interpretation given by the European courts to the autonomous notion of parody. However, existing case law has already shown that French judges adopt a position that aligns with the arguments expressed by the European judges. Consequently, the European interpretation of the parody exception does not alter the application of the parody exception in France.

3. Analysis of the impact of the exception or limitation

France is amongst the few countries in the European Union that have implemented a parody exception to copyright law. Modern empirical studies concerning the social and economic impact of the parody exception are mostly found in other countries considering implementing a parody exception into their laws. In 2013, the UK Intellectual Property Office commissioned an empirical study on the treatment of parodies in seven jurisdictions, including in France[10]. The study has shown an overall

10 See Mendis and Kretschmer, 2013.

positive impact of parodies economically as well as socially. For example, the study did not find any empirical evidence implying that parody causes economic harm from substitution to the parodied work. It is also shown that parody works improve the creative incentives especially online. For example, the amount of creative elements added by the parodists varies from adding new lyrics, new video recording or even remixing. As a consequence of the highly creative work of parody, the study observed a small but significant number (6.5%) that displayed commercial production values.

4. Examples of use

The famous character of *Tintin* is very often involved in copyright infringement cases. An interesting decision emerged from these cases when the parody exception was used as a defence and prevailed. The defendant is an author that described the adventures of the famous reporter *Tintin* but in the context of ironic jokes on current geopolitical events. The rights holders of the copyright to Tintin series, the Moulinsard Foundation sued the publishers of the defendant's stories for copyright infringement. Both the *Tribunal de grande instance d'Evry* (8e ch., 9 July 2009) and the *Cour d'appel de Paris* (2e ch., 18 February 2011) accepted the defence of the parody exception regarding the disputed works. The lower court's decision accepted the parasitism claim that the parody work tried to benefit economically from the notoriety of the *Tintin* heroes. The decision was overturned at the *Cour d'appel* that reaffirmed the application of the parody exception. As the court pointed out, the parody exception is applied when there is no risk of confusion between the parody and the original work. The notoriety of the main character is such that excludes the possibility of such confusion. Also, the clear differentiation in the stories created by the parody and the original work supported the claim of no possible confusion as to the distinction between the two works.

The journal Charlie Hebdo has also on multiple occasions benefited from the parody exception in their publications. The satiric covers have included adaptations of the comic series Asterix and Obelix as well as Batman and famous movies.

When it comes to related rights, the *droits voisins* of the French intellectual property, a recent case recognised unequivocally that the appreciation of the parody criteria varies when it comes to parodies relating to copyrights and to related rights. The *Cour de cassation* (1e civ., 10 September 2014) accepted the parody exception in a case involving the reuse in a comic book series of a famous TV character called "Commissaire Maigret". The court ruled that the creation of the fictional parody character called "Comissaire Cremer" (from the name of the actor interpreting the role of Maigret in the original series and the plaintiff in the case) meets the conditions of humorous purpose and absence of risk of confusion and can be thus qualified as a parody interpretation of the character. The qualification of the parody

exception in this case showed the latitude of appreciation that the set criteria give to the courts with regards to the parody exception.

In conclusion, the French experience has shown that courts have proven to make learnt decisions when it comes to "balancing the rights of the authors of the parodied work and the freedom of expression" while also respecting the limits set by the "rules of the genre" as described by the European courts and affirmed by the copyright evaluation report (paragraph 48) by the rapporteur Julia Reda and adopted by the European Parliament in June 2015.

5. Notes

Case Law

France

Cour de cassation, 1e civ., 12 January 1988
Cour de cassation, 1e civ., 27 March 1990
Cour de cassation, Assemblée Plenière, 12 July 2000
Cour de cassation, Com., 8 April 2008
Cour de cassation, 1e civ., 8 April 2008
Cour de cassation, 1e civ., 10 September 2014
Cour d'appel de Paris, 4e ch., 18 September 2002
Cour d'appel de Paris, 14e ch., 26 February 2003
Cour d'appel de Paris, 4e ch., 13 October 2006
Cour d'appel de Paris, 2e ch., 18 February 2011
Tribunal de grande instance de Paris, 3e ch., 13 February 2001
Tribunal de grande instance de Paris, 3e ch., 18 March 2005
Tribunal de grande instance d'Evry, 8e ch. 9 July 2009
Tribunal de grande instance de Paris, 3e ch., 15 January 2015

CJEU

Case C-201/13, *Deckmyn et a. c/ Vandersteen*, 3 September 2014

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