Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 22 May 2014[1]

Case C-201/13

Johan Deckmyn
and
Vrijheidsfonds VZW
v
Helena Vandersteen,
Christiane Vandersteen,
Liliana Vandersteen,
Isabelle Vandersteen,
Rita Dupont,
Amoras II CVOH
and
WPG Uitgevers België

(Request for a preliminary ruling from the Hof van beroep te Brussel, Belgium)

(Directive 2001/29/EC — Copyright — Article 5(3)(k) of Directive 2001/29/EC — Reproduction right — Exceptions — Parody — Autonomous concept of Union law — Fundamental rights — General principles)

1. By the present request for a preliminary ruling, the Hof van beroep (Court of Appeal), Brussels has submitted to the Court several questions concerning the nature and meaning of the concept of 'parody', as one of the exceptions to the exclusive rights of reproduction, distribution and communication to the public of works and the exclusive right to make available to the public protected subject-matter, provided for as an option for the Member States in Article 5(3)(k) of Directive 2001/29/EC[2] ('the Directive'). The appearance and composition of the graphic representation giving rise to the main proceedings have led the referring court to include the Charter of Fundamental Rights of the European Union ('the Charter') in the Union legislation that it considers relevant. Along the same lines, the Court invited the parties referred to in Article 23 of the Statute of the Court of Justice of the European Union to make submissions at the hearing as to the effect that certain rights under the Charter could have on the interpretation of the exception concerned.

2. The origin of this case lies in a calendar distributed at a public event, the cover of which reproduces that of an instalment of a well-known comic strip to which certain alterations have been made with the aim and result of conveying a message that is part of the ideology of the political party *Vlaams Belang*.

1 — Original language: Spanish.

2 — 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 (OJ 2001 L 167, p. 10).

3. On that basis, and following clarification of the abovementioned concept of 'parody', the present case gives the Court — albeit only to the extent required to provide a helpful reply — the opportunity of ruling on a matter of unquestionably broad scope, namely: the treatment to be afforded to the fundamental rights by a civil court when applying, in the main proceedings, a concept that is part of European Union secondary law.

I – **Legal framework**

A – *Union law*

4. Recitals 3, 19 and 31 in the preamble to the Directive are worded as follows:

'(3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

(19) The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.'

5. Article 2 of the Directive provides:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works; …'

6. The Directive provides in Articles 3 and 4 for the creation of other exclusive rights, namely the right of communication to the public of works, right of making available to the public other subject-matter and the right of distribution.

7. Article 5 of the Directive lays down exceptions and limitations. For the purposes of the present proceedings, attention should be drawn to the following exception:

'3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: …

(k) use for the purpose of caricature, parody or pastiche; …

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be 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.'

B – *National law*

8. The Law on copyright and related rights (Wet betreffende het auteursrecht en de naburige rechten) of 30 June 1994 provides in Article 1:

'1. The author of a literary or artistic work alone shall have the right to reproduce his work or to have it reproduced in any manner or form whatsoever (direct or indirect, provisional or permanent, in full or in part).

This right shall also comprise the exclusive right to authorise adaptation or translation of the work ...

The author of a literary or artistic work shall alone have the right to communicate it to the public by any process whatever, including by making it available to the public in such a way that members of the public may access it from a place and at a time individually chosen by them.

The author of a literary or artistic work alone shall have the right to authorise distribution of the original of the work or of copies thereof to the public, by purchase or otherwise. …

2. The author of a literary or artistic work shall enjoy an inalienable moral right in his work.

Overall renunciation of the future exercise of this right shall be null and void. This right shall comprise the right to publicise the work. …

He shall enjoy the right to respect for his work that shall permit him to oppose any alteration to that work.

Notwithstanding any renunciation, he shall retain the right to oppose any distortion, mutilation or other alteration to his work or any other act prejudicial to the same work that may damage his honour or reputation.'

9. Lastly, Article 22(1) reads as follows:

'Once a work has been lawfully published, its author may not prohibit …

6. caricature, parody and pastiche, observing fair practice'.

II – **The facts and the main proceedings**

10. The main proceedings are concerned with two joined appeals in which the applicants at first instance claimed infringement of their copyright in the comic strip *Suske en Wiske*.[3]

3 — *Suske en Wiske* is a comic strip created in 1945 and very well known, particularly in Dutch-speaking areas.

11. The applicants are the heirs of Mr Willebrord Vandersteen, creator of the *Suske en Wiske* comic strip, and also two companies that acquired rights in that comic strip.

12. The defendants at first instance were Mr Johan Deckmyn, a member of the *Vlaams Belang* political party, and the Vrijheidsfonds, an association whose object is to support that political party financially and materially and to provide multimedia printing and distribution of publications.

13. At a reception in the city of Ghent to celebrate the New Year of 2011, Mr Johan Deckmyn handed out calendars in which he was named as the publisher responsible and on the cover of which there was, inter alia, a depiction of the then mayor of that city wearing a white tunic with the Belgian tricolour flag tied around his waist. According to the applicants, the cover featured the colour characteristic of the covers of *Suske en Wiske* and on the lower part of the drawing were the handwritten words: 'Fré [the cartoonist], freely adapted from Vandersteen'.

14. The image on the cover was the following:



15. The same drawing ('the cover at issue') also appeared on the Vlaams Belang website and in that party's publication *De Strop*, which is distributed in the Ghent area.

16. On 13 January 2011, an action was brought against Mr Johan Deckmyn and the Vrijheidsfonds before the Rechtbank van Eerste Aanleg (Court of First Instance), Brussels. The applicants alleged infringement of their copyright in the cover of an instalment of *Suske en Wiske*, drawn in 1991 by Mr Vandersteen and entitled *De Wilde Weldoener* (something along the lines of 'the compulsive benefactor'), which is reproduced below

17. According to the applicants, the cover of the calendar handed out is broadly similar to that of the abovementioned instalment of the comic strip, apart from the fact that, on the cover at issue, the benefactor from *Suske en Wiske* has been transformed into a real political figure while the people picking up the money that the benefactor in the comic-strip image distributes now wear burkas or have become people of colour.

18. The Rechtbank van Eerste Aanleg, sitting in an urgent procedure, upheld the action by judgment of 17 February 2011, holding that the unauthorised distribution of the calendar was an infringement of copyright and ordering the defendants to cease using the calendars and the altered cover in any form whatsoever and to pay a fine of EUR 5 000 in respect of every infringement committed in breach of the injunction, up to a maximum of EUR 500 000 per day on which the injunction is not complied with.

19. On 15 April 2011, the parties subject to the injunction lodged an appeal against that judgment with the Hof van beroep, Brussels, claiming essentially that the court lacked jurisdiction, that the Vrijheidsfonds had no connection with the case and that none of the defendants at first instance had any connection with the website of Vlaams Belang, that the applicants at first instance did not hold or had not established that they held any rights and that the disputed cover was an artistic creation drawn by the cartoonist Fré and not by Mr Vandersteen, and, lastly, that that artistic creation constituted a parody, pastiche or caricature for the purposes of Article 22(1)(6) of the Law of 30 June 1994.

20. For their part, the respondents claimed that the appeal should be dismissed while at the same time lodging a cross-appeal seeking to prohibit the defendants from using drawings of the characters Suske and Wiske, in any manner whatsoever, in any medium in which the term 'Vlaams Belang' appears. The respondents argue that the overall appearance of the original work, the characters Suske and Wiske, the font, the title and the typical colour of the cover of the comic strips are clearly recognisable on the cover at issue. Moreover, on that cover, the characters picking up the money distributed by the benefactor are in some cases covered with burkas and in others are people of colour, thereby conveying a discriminatory message. The respondents maintain that some of the recipients of the calendar initially had the impression that it was a gift from the publisher of *Suske en Wiske*. It was only once the calendar was opened and examined more closely that it was found in fact to be a promotion on behalf of the Vlaams Belang political party. The public thus had the impression that the respondents endorsed the campaign of Vlaams Belang, a party of the far right, which is not the case at all. The use of the original work in this way infringes the respondents' moral rights and exploitation rights. The drawing is not intended to ridicule either Mr Vandersteen or the comic-strip characters but rather the Mayor of Ghent, and it does not satisfy the conditions for parody which are that it must fulfil a critical purpose, display originality, have a humorous objective and the aim of ridiculing the original work, cause no confusion with the original work, and not reproduce more formal elements of the original work than strictly necessary in order to create the parody.

III – **The questions referred for a preliminary ruling and the procedure before the Court of Justice**

21. By decision of 8 April 2013, the Hof van beroep dismissed the appellants' objections to the admissibility of the case, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling under Article 267 TFEU:

'1. Is the concept of "parody" an autonomous concept in EU law?

2. If so, must a parody satisfy the following conditions or conform to the following characteristics:

— display an original character of its own (originality);

— display that character in such a manner that the parody cannot reasonably be ascribed to the author of the original work;

— seek to be humorous or to mock, regardless of whether any criticism thereby expressed applies to the original work or to something or someone else;

— mention the source of the parodied work?

3. Must a work satisfy any other conditions or conform to other characteristics in order to be capable of being labelled as a parody?'

22. The Commission lodged written observations.

23. In accordance with Article 61 of its Rules of Procedure, the Court invited the parties referred to in Article 23 of the Statute to make submissions on the possible impact of the Charter of Fundamental Rights of the European Union, in particular Article 1 (human dignity), Article 11(1) (freedom of expression and information), Article 13 (freedom of the arts and sciences), Article 17 (right to property); Article 21(1) (non-discrimination) and Article 22 (cultural, religious and linguistic diversity) thereof, on the interpretation of Article 5(3)(k) of Directive 2001/29.

24. The Commission and the Kingdom of Belgium appeared at the hearing held on 7 January 2014.

IV – **Analysis**

25. By its first question, the Hof van beroep asks whether the concept of 'parody', included as an exception in Article 5(3)(k) of Directive 2001/29, is an autonomous concept of Union law. By the second and third questions, submitted in case there should be an affirmative reply to the first question and which it is appropriate to answer together, the Hof van beroep asks the Court to set out the relevant criteria for determining the cases in which a work constitutes a parody for the purposes of Article 5(3)(k).

26. It should be observed that, in accordance with the Directive, the Member States are to provide for the exclusive right to authorise or prohibit reproduction of a work (Article 2) and the exclusive right to authorise or prohibit any communication to the public of a work (Article 3(1)). Irrespective of that, under Article 5(3), Member States may provide for a number of exceptions or limitations to those rights, and one of those possible exceptions is referred to in subparagraph (k) ('use for the purpose of caricature, parody or pastiche'). The Belgian legislature made use of that option and included that exception in Article 22(1)(6) of the Law of 30 June 1994, cited above.

A – *Preliminary remarks*

27. Before proceeding to propose a reply to the questions asked by the referring court in connection with the concept of 'parody' for the purposes of Directive 2001/29, I believe that it is important to clarify all the matters about which the Court has *not* been asked.

28. In the first place, the Court has not been asked about the scope of the concept of 'moral right' in so far as it is an aspect of intellectual property expressly excluded from the scope of the Directive. Recital 19 in the preamble to Directive 2001/29 states unequivocally that '[t]he moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the

scope of this Directive.'[4] On that basis, the decision as to whether or not there has been an infringement of moral rights is left entirely to the assessment of the national court.

29. Nor, in the second place, has the referring court asked the Court about the possible scope in the present case of the 'threefold condition' (also known as the 'three-stage test'), provided for in general terms in Article 5(5) of the Directive, according to which the parody exception is to be 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 determination of whether or not each of those conditions is satisfied in the present case is a matter which, again, will fall to the national court.

30. Nor, lastly, has the referring court asked about the possible scope, from the perspective of EU law, of the proviso laid down in Belgian law, which permits the parody exception, 'observing fair practice'.

31. Having said that, it only remains for me to point out that the considerations which I shall set out below in reply to the questions submitted by the referring court must be deemed to be — and it is important for me to emphasise this — without prejudice to the manner in which the national court may deal with the categories to which I have just referred when it disposes of the main proceedings.

B – *The first question*

32. By its first question, the Hof van beroep asks whether the concept of 'parody' is an autonomous concept of Union law.

33. The Hof van beroep appears to be inclined to assert that there is a need for an independent interpretation of the concept because of the requirement of the uniform application of Union law and the principle of equality, and also because of the lack of an express reference to the law of the Member States for the purposes of determining the meaning of 'parody'. The Commission and the Kingdom of Belgium share the view that the concept of parody must be interpreted independently and uniformly, although both contend that the Member States have some discretion.

34. I too share that view. The Directive does not define the term 'parody' but nor does it include an express reference to the law of the Member States for the purpose of defining the term.

35. According to settled case-law of the Court, when a provision of EU law does not refer to the law of the Member States for the purpose of determining its meaning and scope, the necessity of a uniform application of EU law and the principle of equality require the provision to be given an independent and uniform interpretation, having regard to the context of the provision and the objective of the relevant legislation.[5] That enables the conclusion that the concept of 'parody' in Article 5(3)(k) of the Directive is an autonomous concept of Union law.

4 — In accordance with Article 6*bis*(1) of the Berne Convention for the Protection of Literary and Artistic Works, an author has the right 'to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation'. On the subject of moral rights, see Grosheide, W., *Moral rights*, in Derclaye, E., *Research Handbook on the Future of EU Copyright*, Cheltenham: Edward Elgar 2009, pp. 242 to 266, and von Lewinski, S., *International Copyright Law and Policy*, Oxford, OUP 2008, pp. 133 to 137.

5 — *Padawan*, C-467/08, EU:C:2010:620, paragraph 32; *Ekro*, 327/82, EU:C:1984:11, paragraph 11; *SENA*, C-245/00, EU:C:2003:68, paragraph 23; *A*, C-523/07, EU:C:2009:225, paragraph 34.

36. That conclusion is confirmed by the aim of the Directive itself, which, in accordance with its title, seeks to harmonise certain aspects of copyright and related rights in the information society. It is also with that aim that, according to recital 32 in its preamble, the Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public, taking account of the different legal traditions in Member States, while ensuring a functioning internal market. Again according to recital 32, Member States 'should arrive at a coherent application of these exceptions and limitations …'.

37. That conclusion is not invalidated by the fact that the exception referred to in Article 5(3)(k) of the Directive is optional, so that the Member States may decide whether they wish to provide for an exception in favour of caricatures, parodies and pastiches. As the Court has previously held in relation to the exception formulated in Article 5(2)(b) of the Directive, which is also optional, '[a]n interpretation according to which Member States which have introduced an identical exception of that kind, provided for by EU law ... are free to determine the limits in an inconsistent and un-harmonised manner which may vary from one Member State to another, would be incompatible with the objective of that directive'. [6]

38. Finally, it must be pointed out that the nature of 'autonomous concept' of EU law does not mean that, when a directive — as is the case — does not provide sufficiently precise criteria for defining the obligations it lays down, Member States do not enjoy broad discretion for the purpose of determining those criteria. [7]

39. For the reasons set out, I propose that the Court's reply to the first question should be that the concept of 'parody' is an autonomous concept of Union law.

C – *The second and third questions*

40. The first question having been answered in the affirmative, it is now necessary to turn to the remaining questions. It should be recalled that the second question asks about various possible necessary characteristics and conditions which a particular work must satisfy in order to be treated as a parody, with the ensuing consequences for the rules governing copyright. By the third question, the referring court simply asks whether regard must be had to other characteristics and conditions in addition to the ones that it suggests. On that basis, it seems to me to be perfectly feasible to combine those two questions into a single question.

41. In that connection, it should be observed at the outset that the Commission proposes that the concept of parody should be interpreted as meaning an imitation of a work protected by the Directive, which is not a caricature or a pastiche and which denotes a humorous or mocking intention. More particularly, according to the Commission, none of the characteristics suggested by the Hof van beroep in its second question constitutes a necessary element of the definition of the concept, although it acknowledges the particular relevance of the humorous or mocking element.

42. For its part, in its oral argument, the Kingdom of Belgian submitted that the distinction between 'parody', 'caricature' and 'pastiche' must not play a role in the definition of parody, stating that the three concepts are too similar for it to be possible to distinguish between them. According to the Kingdom of Belgium, a parody is an imitation, created for the purposes of mockery, of a work protected by the Directive, without there being any possibility of that imitation causing confusion with the original work. Parody, as a concept of Union law, does not encompass the concept of 'fair practice';

6 — *Padawan*, EU:C:2010:620, paragraph 36.

7 — *Painer*, C-145/10, EU:C:2011:798, paragraphs 101 to 103; *SENA*, EU:C:2003:68, paragraph 38; *Commission* v *Belgium*, C-433/02, EU:C:2003:567, paragraph 19.

the latter concept may be included at national level — and is used in the Belgian legislation — at the discretion of the Member States, although the limits of the discretion available to them are to be found in Union law, and in particular in the fundamental rights and the three conditions imposed by Article 5(5) of the Directive.

43. That said, it should be observed that the interpretation of Article 5(3)(k) of the Directive comes within the context of case-law of the Court of Justice, which is already fairly well-developed concerning Article 5 of the Directive. It follows from that case-law that the conditions set out in Article 5 must generally be interpreted strictly, for they provide for exceptions to the general rule established by the Directive to the effect that the copyright holder must authorise any reproduction of a protected work. [8] That requirement of strict interpretation also reflects the history of the provision, which, together with other exceptions, was introduced by the Council during the legislative procedure with a view to addressing the claim by some Member States that a number of additional strictly-defined exceptions should be included. [9]

44. Irrespective of the foregoing, it is to be borne in mind that the case-law of the Court is highly nuanced and leaves considerable latitude with regard to satisfaction of the specific features of each exception. Thus, the Court has expressed its support for broad discretion on the part of the Member States for the purposes of providing for the exception in Article 5(3)(e) of the Directive. [10] Moreover, the Court has also observed that the interpretation of those exceptions must safeguard their effectiveness. [11]

45. That being so, and in accordance with the case-law of the Court, the concept of parody, like all concepts of Union law, must be interpreted by considering the usual meaning of the terms of the provision in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part. [12]

46. Starting with the fact that the parody exception does not appear in isolation but rather, on the contrary, as part of a series of three categories in the form of a continuous list ('caricature, [13] parody or pastiche'), [14] I do not believe that a comparison with each of the concepts with which it coexists is of particular relevance for the present purposes. It may be difficult in a specific case to assign a particular work to one concept or another when those concepts are not in competition with one another. That being so, it does not seem to me to be necessary to proceed any further with that distinction, since, in short, all those concepts have the same effect of derogating from the copyright of the author of the original work which, in one way or another, is present in the — so to speak — derived work.

8 — Order in *Infopaq International*, C-302/10, EU:C:2012:16, paragraph 27; *Painer*, C-145/10, EU:C:2011:798, paragraph 109; *Infopaq International*, C-5/08, EU:C:2009:465, paragraphs 56 and 57; *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 162; *Luksan*, C-277/10, EU:C:2012:65, paragraph 101.

9 — Council of the European Union, Position commune arrêtée par le Conseil en vue de l'adoption de la directive du Parlement européen et du Conseil sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information, Exposé des motifs du Conseil 9512/1/00 REV 1 ADD 1, Rn. 35.

10 — *Painer*, EU:C:2011:798, paragraphs 100 and 101.

11 — *Football Association Premier League and Others*, EU:C:2011:631, paragraph 163.

12 — *Probst*, C-119/12, EU:C:2012:748, paragraph 20, and *Content Services*, C-49/11, EU:C:2012:419, paragraph 32.

13 — 'Dibujo satírico en que se deforman las facciones y el aspecto de alguien. 2. Obra de arte que ridiculiza o toma en broma el modelo que tiene por objeto.' [Satirical drawing in which a person's features and appearance are distorted. 2. Work of art which ridicules or mocks its subject]. Real Academia Española, *Diccionario de la Lengua Española*, Pozuelo de Alarcón: Espasa Calpe, 22nd ed. 2001. Here and below, I do not refer to definitions in the sphere of music.

14 — 'Imitación o plagio que consiste en tomar determinados elementos característicos de la obra de un artista y combinarlos, de forma que den la impresión de ser una creación independiente.' [Imitation or plagiarism consisting of taking certain characteristic elements of an artist's work and combining them so that they give the impression of being an independent creation]. Real Academia Española, *Diccionario de la Lengua Española*, Pozuelo de Alarcón: Espasa Calpe, 22nd ed. 2001.

47. Having clarified that and turning now to the question of the meaning of the word 'parody', I think it common sense to begin with the dictionary definitions of the term. Thus, in Spanish, a parody is, quite simply, an '[*i*]*mitación burlesca*',[15] a definition which is almost identical to that in French: '*imitation burlesque (d'une œuvre sérieuse)*'.[16] In German, parody is defined as '*komische Umbildung ernster Dichtung; scherzh[afte] Nachahmung …*',[17] in Dutch as '*grappige nabootsing om iets bespottelijk te maken*'[18] and, finally, in English as: 'A prose, verse or (occas[ionally]) other artistic composition in which the characteristic themes and the style of a particular work, author, etc. are exaggerated or applied to an inappropriate subject, esp[ecially] for the purposes of ridicule …'.[19]

48. In addition to a common etymological origin[20] (the Greek word παρωδία),[21] a comparison of those definitions reveals that their essential features are substantially similar. Those common features are of two types. On the one hand, there are the — so to speak — structural features and, on the other hand, there are the functional features: in its most simplified formulation, a parody is, structurally, an 'imitation' and, functionally, 'mocking'. Let us consider these separately.

1. The 'structural' features of parody

49. From what I am calling the 'structural' perspective, a parody is a *copy* and a *creation* at the same time.

50. To a greater or lesser extent, a parody is always a *copy*, for it is a work that is never completely original. On the contrary, a parody borrows elements from a previous work (regardless of whether or not that work is, in turn, entirely original), and, as a matter of principle, these borrowed elements are not secondary or dispensable but are, rather, essential to the meaning of the work, as there will be occasion to see. The earlier work, some of whose characteristics are copied, must at the same time be 'recognisable' to the public at which the parody is directed. That is also a premiss of a parody as an author's work. In that connection, a parody always entails an element of tribute to, or acknowledgement of, the original work.

51. In addition, a parody is, naturally, always a *creation*. The alteration to some degree of the original work is part of the genius of the author of the parody. In short, it is the latter who, ultimately, has the most interest in that no confusion should arise between 'his' parody and the original, even if he is the author of both.

15 — Real Academia Española, *Diccionario de la Lengua Española*, Pozuelo de Alarcón: Espasa Calpe, 22nd ed. 2001. I have left out the meanings associated with music.

16 — Rey-Debove, J. and Rey, A. (eds), *Le Nouveau Petit Robert*, Paris, Dictionnaires le Robert, 1993.

17 — Dudenredaktion, *Duden*, Mannheim, Dudenverlag, 25th ed. 2010.

18 — *Van Dale online*, www.vandale.nl.

19 — Brown, L. (ed.), *Shorter Oxford English Dictionary*, Oxford: OUP 6th ed. 2007.

20 — An origin shared by all the language versions of the Directive. In Bulgarian: 'пародията', in Czech: 'parodie', in Danish: 'parodi', in German: 'Parodien', in Estonian: 'paroodias', in Greek: 'παρωδία', in English: 'parody', in French: 'parodie', in Croat: 'parodije', in Italian: 'parodia', in Latvian: 'parodijās', in Lithuanian: 'parodijai', in Hungarian: 'paródia', in Maltese: 'parodija', in Dutch: 'parodieën', in Polish: 'parodii', in Portuguese: 'paródia', in Romanian: 'parodierii', in Slovak: 'paródie', in Slovenian: 'parodije', in Finnish: 'parodiassa', and in Swedish: 'parodi'.

21 — The word appeared in Aristotle's poetry: *Aristóteles, Poética* (translated and edited by García Bacca, J.), México: UNAM 1946, 1448 a.

52. However, the difficulty clearly lies in the situation which, by definition, is now before the Court; in other words, the situation in which the author of the parody and the author of the work parodied are not one and the same. This brings us into a decidedly troubled field. I am not referring to the field of art theory, into which it is clearly not for me to enter, but rather the field of copyright. A cursory glance at intellectual property law, either at international level or at Member-State level, suffices to reveal the variety and intensity of the issues involved. [22]

53. From the perspective of EU law, in which the Directive has harmonised certain aspects of copyright in the information society, the specific issue arising is that of the degree to which the concept of parody must be determined by the provision of an optional exception of the kind in question.

54. In that connection, it seems clear to me that, in addition to drawing attention to the structural features I have identified as essential, EU law leaves certain matters to be determined by the national legal systems of the Member States — in short, their courts — in which that exception has been adopted.

55. Thus, more specifically, it is for the Member States to determine whether a parody entails sufficient creative elements in relation to the parodied work or whether it is little more than a copy with insignificant alterations. To that end, the national courts have developed various criteria, [23] such as, for example, whether the alleged parody could be confused with the original work, [24] whether there is sufficient 'distance' between it and the original work, so that the latter's characteristics are blurred, [25] or whether more elements of the original work were used than necessary for the purposes of parody. [26]

56. I believe that those and other specific criteria, aimed at identifying whether the case concerns a parody for the purposes of Directive 2001/29, must be included within the discretion left to the Member States by the Directive, in view of the statement in recital 32 in the preamble to the Directive that the list of exceptions takes account of the different legal traditions in Member States.

57. In its second question, the referring court has singled out a series of possible criteria apt for the identification of a particular work as a parody. On the basis of the foregoing considerations and as far as the structural aspect which I am analysing is concerned, it must be sufficient to reply as follows. Certainly, a parody must '… display ... an original character of its own', to use the words of the referring court, which means that, reasonably, it will not be confused with the original. In addition to this, and in line with the Commission's submissions, I believe that none of the structural criteria proposed by the referring court satisfies the condition that they should be elements necessary or essential to the definition of the concept from the perspective of Union law.

22 — For comparative studies of the exception, see Mauch, K., *Die rechtliche Beurteilung von Parodien im nationalen Urheberrecht der Mitgliedstaaten der EU*, Frankfurt am Main, Peter Lang, 2003; Mendis, D., and Kretschmer, M., *The Treatment of Parodies under Copyright Law in Seven Jurisdictions*, Newport, Intellectual Property Office, 2013/23; Ruijsenaars, H., *Comic-Figuren und Parodien: Ein Urheberrechtlicher Streifzug — Teil II: Beurteilungskriterien für die zulässige Parodie*, GRUR Int 1993, 918.

23 — In some Member States, criteria in this regard have been developed in case-law even though the legislation itself does not provide for a parody exception, as is the case in Germany where the question was discussed in the context of Paragraph 24 of the Urheberrechtsgesetz.

24 — In Spain: Article 39 of Real Decreto Legislativo (Royal Legislative Decree) 1/1996 of 12 April (RCL 1996, 1382), AP (Audiencia Provincial: Provincial Court), Barcelona (Section 15), 10 October 2003, 654/2001; AP, Madrid (Section 13), 2 February 2000, 280/1998; In France: Cour de Cassation (1re Ch. Civ.) 12 January 1988, RIDA 1988, 137, 98, Cour de Cassation (1re Ch. Civ.) 27 March 1990, Bull civ I N° 75, p. 54, Cour d'Appel de Paris (1re Ch.) 11 May 1993, RIDA 1993, 157, 340, Cour d'Appel de Versailles (1re Ch.) 17 March 1994, RIDA 1995, avr., 350, Cour d'Appel de Paris (1re Ch.) 25 January 2012, *S.A. Editrice du Monde / Société Messagerie Lyonnaise de Presse, Société Sonora Media*, TGI Paris (3ème Ch.), 13 February 2001, *SNC Prisma Presse et EURL Femme / Charles V. y Association Apodeline*.

25 — BGH GRUR 1994, 206 — *Alcolix*, BGH GRUR 1994, 191, 193 — *Asterix-Persiflagen*, BGH NJW 2003, 3633, 3635 — *Gies-Adler*; BGH GRUR 2000, 703, 704 — *Mattscheibe*.

26 — BGH GRUR 1971, 588, 589-590 — *Disney Parodie*. In its subsequent case-law, the BGH explicitly rejected that criterion. BGH GRUR 2000, 703, 704 — *Mattscheibe*.

58. In short, as regards its structural aspect, a parody must strike a certain balance between elements of imitation and elements of originality, on the basis that the inclusion of unoriginal elements in fact corresponds to the intended effect of the parody. However, this now brings us to the functional aspect of parody.

2. The 'functional' aspect of parody

59. Three matters have to be addressed in this regard. In the first place, there is the matter of two possible purposes of parody, and, therefore, in practice two types of parody; in the second, there is the matter of the intentional aspect, and, in short, the 'effect' which a parody is intended to create; finally, there is the matter of the 'subject-matter' of the parody, which is where the question of the impact of fundamental rights arises.

a) The purpose of parody

60. First, I believe that this may be the appropriate place to deal with the issue of what should be called 'the purpose' of parody, which is implicit in the wording of the second question, in which the referring court asks whether a parody must be designed to provoke humour or to mock, 'regardless of whether any criticism thereby expressed applies to the original work or to something or someone else'.

61. In formulating this alternative, the Hof van beroep draws our attention to two different types of parody, according to whether the purpose or intention, which I shall not define yet, is directed at or concerned with the original work ('parody of'), or the original work parodied is merely the instrument of an intention aimed at a third-party individual or object ('parody with').

62. Those two possible types of parody were considered at the hearing. The question is whether both types are a parody for the purposes of the Directive or, on the contrary, only the type which is directed at the original work, in so far as it is a 'parodied' work in the strict sense of the term.

63. The question thus framed is important, for the case at issue in the main proceedings does not concern the latter type of parody. It is, without doubt, a case of parody 'with'. The cover of the comic-strip album has been manipulated to convey a message that has nothing to do with the original work, about which the image in question does not appear outwardly to express any opinion.

64. I am inclined to believe that the concept of parody in the Directive ought not to be confined to the case of a parody having no meaning beyond the original, work parodied. It could perhaps be argued that, from the point of view of literary theory, the most deeply-rooted type of parody is that which, whatever the intention, is essentially designed to refer to the original work. Irrespective of that, it cannot be denied that criticism of customs, social criticism and political criticism have also, from time immemorial and clearly for the purpose of conveying a message effectively, made use of the privileged medium entailing the alteration of a pre-existing work, which is sufficiently recognisable to the public at which that criticism is directed.

65. In short, I believe that the type of parody which, for ease of reference, we are calling 'parody with' is now sufficiently established in our 'communication culture' for it to be impossible to disregard it when defining the concept of 'parody' for the purposes of the Directive. That being said, it is now necessary to turn to the question of the effect sought by the author of the parody.

b) The effect of parody

66. We have already had an opportunity of seeing how the usual dictionary definitions contain a common intentional element related to the effect sought by means of the parody, so that the imitation is described alternatively as '*burlesca*', '*burlesque*', '*komisch*', '*scherzh[aft]*', '*grappige … om iets bespottelijk te maken*', and lastly as '*for the purposes of ridicule*'.

67. In short, parody pursues a particular effect, almost as a necessary consequence of the reworking of an earlier work. It is that — so to speak — selective reception that must of itself have a particular effect on the addressees, at the risk of being a complete failure.

68. The issue which, to my mind, is more difficult is that of the restriction of this intentional or functional element to, or at least its definition as, mockery, humour, or comedy. Taking account, in particular, of the extreme seriousness which may underlie a humorous expression, and the significance, difficult to exaggerate, which tragicomedy has had in some of our cultures: what degree of humour can there be in a certain parody of the medieval chivalresque novels, to give a well-known example?

69. At all events, in accepting the reference to 'mockery' as the usual way of describing the intentional aspect of parody, I believe that the Member States have broad discretion when it comes to determining whether the work in question has the status of a parody. [27]

70. Finally, from the perspective I am calling functional, parody is a *form of artistic expression* and a manifestation of *freedom of expression*. It can be one thing as much as the other and it can be both things at once. The important point for the present purposes is that the case before the referring court predominantly falls within the context of freedom of expression, so that that the image in question is designed to convey a particular political message with supposedly greater effectiveness.

c) The subject-matter of the parody: the impact of the fundamental rights

71. At this juncture, we must return to the question of the form and subject-matter of the political message that the cover of the calendar handed out by Mr Deckmyn at the New Year reception held by the City of Ghent seeks to convey.

72. In the main proceedings, the parties debated before the civil court the concept of parody as an exception to copyright provided for in the national legislation. The current holders of copyright in the work drew attention to, inter alia, the subject-matter and, in short, the unequivocal message of the cover at issue. The original work has been distorted by two changes: first, the 'benefactor' has been replaced by a political figure; second, the beneficiaries of the benefactor's generosity, who were originally non-specific, have, in an equally unequivocal way, become immigrants, or, at all events, 'foreign' residents, in order to convey Vlaams Belang's message. In so far as the original work, through such manipulation, has become a means of conveying a political message with which the holders of copyright in the work are fully entitled not to agree and in fact do not agree, the question arises whether the court seised of the proceedings must include the *subject-matter* of that political message in its assessment of the parody exception.

27 — For example, see BGH NJW 1958 — *Sherlock Holmes*; BGH NJW 1971, 2169, 2171 — *Disney-Parodie*; Cour d'Appel de Paris (2ème Ch.), 18 February 2011, 09/19272; AP de Barcelona (Sección 15a), 10 October 2003, 654/2001. Hess, G., *Urheberrechtsprobleme der Parodie*, Baden-Baden, Nomos, 1993, p. 134.

73. It was the referring court that mentioned in the request for a preliminary ruling certain of the rights laid down in the Charter, certainly with the intention of focusing the Court's attention on the subject-matter of the picture at issue. It was that same concern that led the Court to ask the parties referred to in Article 23 of the Statute of the Court of Justice to make submissions on the possible impact on the interpretation of the concept of parody of certain fundamental rights referred to in the Charter (Article 1 (human dignity), Article 11(1) (freedom of expression and information), Article 13 (freedom of the arts and sciences), Article 17 (right to property); Article 21(1) (non-discrimination) and Article 22 (cultural, religious and linguistic diversity)).

74. In reply to that question, the Kingdom of Belgium expressed the view that the fundamental rights laid down in the Charter are undoubtedly relevant for the purposes of the interpretation of the concept of 'parody'. It pointed out that, from a different perspective, copyright could be regarded as a limitation of the freedom of expression within the meaning of Article 52 of the Charter, meaning that the rights at issue must be examined by the national court. According to Belgium, the rights to be taken into consideration include not only intellectual property rights (including moral rights) and freedom of expression but also the other rights laid down in the Charter, including the rights referred to by the national court in its order.

75. For its part, the Commission observed that, in accordance with recital 3 in the preamble to the Directive, the legislature was seeking to respect fundamental rights, in particular, intellectual property and freedom of expression. It is therefore a question of reconciling those rights and striking a fair balance between them. The Directive must be interpreted in conformity with those two rights in particular. In the context of the application of the Directive, the national court must also respect other fundamental rights.

76. To what extent may the interpretation of the scope of the parody exception carried out by the national court be affected by the fundamental rights? That is, in short, the difficult question that must be answered as the final point of this Opinion.

77. Since the case-law of the Court on fundamental rights began, particularly in a context in which there is no declaration of rights in the traditional sense of the word, the Court has held that fundamental rights are recognised and guaranteed in the Union as 'general principles' of EU law. This is still affirmed today in Article 6(3) TEU, *in fine*. The reminder in paragraph 4 of *Internationale Handelsgesellschaft* is obligatory in that respect, while at the same time hardly necessary. [28]

78. At all events, that is how the original interpretation of fundamental rights in the context of the Union, as a category included in the general principles of EU law, has enabled those rights to be relied on as a general criterion for the interpretation of EU law. [29]

28 — '… In fact, *respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community …'; Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, paragraph 4; see *Stauder*, 29/69, EU:C:1969:57, paragraph 7; *Nold*, 4/73, EU:C:1974:51, paragraph 13; Cf. Bryde, B.-O., *The ECJ's fundamental rights jurisprudence — a milestone in transnational constitutionalism*, in: Poiares Maduro, M., and Azoulai, L. (eds), *The Past and Future of EU Law*, Oxford, Hart, 2010, p. 119; Kumm, M., *Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm*, in: ibid., p. 106.

29 — That connection between the fundamental rights and the category of general principles of a particular legal order, which is so characteristic of the doctrine of the fundamental rights in the Union, creates a spontaneous link with a particular vision of the fundamental rights which may be regarded as part of 'the constitutional traditions common to the Member States', also referred to in Article 6(3) TEU. In accordance with that interpretation, which is widespread in the Member States, abeit with a very different scope, the fundamental rights transcend their essentially 'subjective' dimension and contribute to the effect on the interpretation of the legal system as a whole. Cf. Wahl, R., *Lüth und die Folgen*, in: Henne, T., and Riedlinger, A. (eds), *Das Lüth-Urteil aus (rechts-)historischer Sicht*, Berlin, BWV, 2005, p. 371; Wahl, R., *Die objektiv-rechtliche Dimension der Grundrechte im internationalen Vergleich*, in: Merten, D., and Papier, H.-J. (eds), *Handbuch der Grundrechte. Band I*, Heidelberg, C.F. Müller, 2004, p. 745.

79. It should thus be no surprise either that the settled case-law pursuant to which European Union secondary law must be interpreted in conformity with primary law, including the Charter, [30] also has a bearing when a provision of secondary law applies as between individuals. [31] In particular, the Court has stressed the importance of striking a fair balance between the various fundamental rights applicable in cases in which they may be in competition. [32] In the concise but expressive words of the Court, 'situations cannot exist which are covered in that way by EU law without those fundamental rights being applicable'. [33]

80. Against that background, it cannot be disputed that, in a situation such as that giving rise to the main proceedings, the first of the rights derived from the Charter which the court seised of the main proceedings must take into account is freedom of expression, laid down in Article 11(1) thereof. The Court, relying in turn on the case-law of the ECHR, has drawn attention to the prominent role of freedom of expression in a democratic society, [34] such as European civil society, particularly when freedom of expression appears as an instrument of and in the service of the European public space, either at Union level or at the level of each Member State. Pursuant to Article 10(2) of the European Convention on Human Rights, freedom of expression must also be respected where information or ideas offend, shock or disturb. [35]

81. In short, provided that the parody does in fact satisfy the conditions referred to above, an interpretation of the concept of parody by the civil court in the circumstances of the case must, as a matter of principle, lead to favouring the exercise of freedom of expression by those specific means. However, the difficulty lies in the limits of the subject-matter of the message and this is addressed in the considerations below.

82. It must be pointed out straightaway that freedom of expression is never quite 'unlimited' in a democratic society, [36] and this for many different reasons of form and substance that need not be considered. In that regard, suffice it to recall the wording of Article 10(2) of the European Convention on Human Rights. This is also why the Charter encompasses not only freedom of expression but also other rights that may occasionally compete with it: human dignity (Article 1), first, together with another series of rights and freedoms, in particular the prohibition of discrimination on grounds of race or religion (Article 21).

83. At the very core of those limits it is possible to identify the presence of the most deeply rooted beliefs in European society, which is far from being a society without history or, in short, without culture. [37] In secondary law, those beliefs found particular expression in the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law. [38]

30 — *Commission* v *Strack*, C-579/12 RX II, EU:C:2013:570, paragraph 40; *McDonagh*, C-12/11, EU:C:2013:43, paragraph 44; *Ordre des barreaux francophones et germanophone and Others*, C-305/05, EU:C:2007:383, paragraphs 28 and 29; *Klensch and Others*, 201/85 and 202/85, EU:C:1986:439, paragraph 21; and *Commission* v *Council*, 218/82, EU:C:1983:369, paragraph 15.

31 — *Alemo-Herron and Others*, C-426/11, EU:C:2013:521, paragraph 30, and *Werhof*, C-499/04, EU:C:2006:168, paragraphs 31 to 33. See also the Opinion of Advocate General Trstenjak in *Dominguez*, C-282/10, EU:C:2011:559, point 83, and the Opinion of Advocate General Poiares Maduro in *The International Transport Workers' Federation and The Finnish Seamen's Union*, C-438/05, EU:C:2007:292, points 29 to 44.

32 — See *Promusicae*, C-275/06, EU:C:2008:54, paragraph 68; *Lindqvist*, C-101/01, EU:C:2003:596, paragraphs 84 to 87; and recitals 31 and 3 in the preamble to the Directive.

33 — *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 21.

34 — *Connolly* v *Commission*, C-274/99 P, EU:C:2001:127, paragraph 39; *Commission* v *Cwik*, C-340/00 P, EU:C:2001:701, paragraph 18; ECHR *Handyside* v *United Kingdom*, 7 December 1976, Series A no. 24, paragraph 49; and ECHR *Vogt* v *Germany*, 26 September 1995, Series A no. 323, paragraph 52.

35 — See *Handyside* v *United Kingdom*, 7 December 1976, Series A no. 24, paragraph 49; *Soulas and Others* v *France*, 10 July 2008, 15948/03, paragraph 35; *Le Pen* v *France*, 20 April 2010, 18788/09; and Grabenwarter, C., *European Convention on Human Rights*, Munich, C.H. Beck, 2014, Art. 10 paragraph 28.

36 — *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 79; *Familiapress*, C-368/95, EU:C:1997:325, paragraph 26; see also Article 10 of the European Convention on Human Rights.

37 — Häberle, P., *Europäische Rechtskultur*, Baden-Baden, Nomos, 1994.

38 — Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ 2008 L 328, p. 55).

84. It is clear that a civil court seised of a case concerning intellectual property rights is not required primarily to give effect to such limits, which are part of criminal law, in a dispute between individuals. Civil courts are in no circumstances required to replace criminal courts in the suppression of such conduct. However, at the same time, it should be observed that civil courts in giving their interpretation cannot be unaware that 'the Charter exists'; that is to say, that it has a certain virtual existence, even in the context of civil proceedings.

85. Taking into account the 'presence' that fundamental rights must be acknowledged to have in the legal system as a whole, I believe that, in principle and strictly from the perspective of the concept of parody, a particular image cannot be excluded from that concept solely because the author of the original work does not agree with the message or because the latter may deserve to be rejected by a large section of public opinion. However, distortions of the original work which, in form or substance, convey a message radically opposed to society's most deeply held beliefs,[39] on which the European public space is constructed and exists,[40] should not be accepted as a parody and the authors of the work with whose assistance the parody is created are authorised to assert as much.

86. Finally, it is clear too that the European public space is constructed, even if only in part, on the sum of national public spaces that are not completely interchangeable. The Court has had occasion to assess that difference of identity, notably in *Omega*,[41] as far as human dignity is concerned.

87. The question whether, in the specific case, the alterations to the original work were made with respect for what I have described as the most deeply rooted beliefs in European society is a matter which it falls to the national court to decide.

88. In conclusion, I believe that when a civil court interprets a concept such as 'parody', it must, to the extent called for by the case, rely on the fundamental rights affirmed in the Charter, while being bound to weigh up those rights properly one against the other when the circumstances of the case so require.

V – **Conclusion**

89. For the reasons set out, I propose that the Court reply to the questions referred by the Hof van beroep as follows:

(1) The concept of 'parody' in Article 5(3)(k) of 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 is an autonomous concept of Union law.

(2) For the purposes of Article 5(3)(k) of Directive 2001/29, a 'parody' is a work which, for the purposes of mockery, combines elements of a clearly recognisable earlier work with elements sufficiently original to ensure that the work is not easily confused with the original work.

(3) When a civil court interprets a concept such as 'parody', it must, to the extent called for by the case, rely on the fundamental rights affirmed in the Charter of Fundamental Rights of the European Union, while being bound to weigh up those rights properly one against the other when the circumstances of the case so require.

39 — In that connection, see, for example, judgments of the Spanish Tribunal Constitucional (Constitutional Court) STC 214/1991 of 11 November 1991 (*Violeta Friedman*) and STC 176/1995 of 11 December 1995 (*Hitler=SS*).

40 — See Curtin, D.M., '*Civil Society' and the European Union: Opening Spaces for Deliberative Democracy*?, in: European University Institute (ed.), *Collected Courses of the Academy of European Law 1996 Volume VII Book 1*, The Hague, Kluwer, 1999, p. 185.

41 — *Omega*, C-36/02, EU:C:2004:614, paragraph 34.