

# The concept of parody

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## **Abstract**

*The scientific paper focuses on possible meanings of the concept of parody, by using as framework Law No.8/1996 on copyright and neighboring rights, but especially in the perspective of the European Union Law (Directive No. 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 and the Judgement of the Court (Grand Chamber) of Justice of the European Union of 3 September 2014-Case C-201/13.*

**Keywords:** Law No.8/1996, Directive 2001/29/CE, Judgement of the Court of Justice of the European Union - C-201/13.

**JEL Classification:** K39

## **1. Introduction**

Parody is being defined by the Explanatory Dictionary of the Romanian Language (DEX 2009) as being 1. A literary composition that takes over subjects, motives and artistic means from another literary work for the purpose of achieving a satirical or comical effect. 2. Unsuccessful copy of an original, of a prototype, that is inferior to the original. By extension mockery.

The French Dictionary Larousse defines parody in literature<sup>2</sup> as being an imitation with comical effect, edging caricature, pastiche and burlesque, that mocks a serious and famous literary work or any codified system (parody of ceremonies, of law texts, of religious texts); the parody aims to achieve a playful and liberating effect, but, by presenting values and norms as being false, it points out the tragic results of their end- this is the cause of the bitter character of the comical part.

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<sup>2</sup> Imitation à vocation comique, touchant à la fois à la caricature, au pastiche et au burlesque, qui ridiculise un texte littéraire sérieux et célèbre, ou tout système codifié (parodies de cérémonies, de textes de loi, de textes religieux...). La parodie peut avoir seulement une fonction ludique et de défoulement, mais, en présentant les valeurs et les normes des genres nobles comme fallacieuses, elle s'expose à énoncer le tragique résultant de leur liquidation – d'où il vient que son comique est souvent amer. En savoir plus sur <http://www.larousse.fr/encyclopedie/litterature/parodie/175898#lobcLkUef7itYsIs.99> - last access on May 1, 2015

## 2. The parody in the Romanian law

Law No.8/1996 *on copyright and neighboring rights*<sup>3</sup> does not define the concept of parody. Specific provisions are to be found in Art. 35 that states that the alteration of a work shall be permissible without the author's consent and without payment of remuneration in the following cases:

(a) if the alteration is made privately and is neither intended for, nor made available to the public;

(b) if the result of the alteration is a parody or caricature, provided that the said result does not cause confusion with the original work and the author thereof;

(c) if the alteration is made necessary by the purpose of the use permitted by the author;

(d) if the alteration is a short review of the works by didactic purpose, pointing out the author.

As such, the main elements of parody (and caricature, too), according to Romanian law, are:

- The presence of an alteration of a work
- Absence of the consent of the author for the purpose of altering the work
- Absence of payment of remuneration
- The result of the alteration shall not cause confusion with the original work and author thereof.

Although, it is arguable if the four points mentioned in the above paragraph are all conditions to be fulfilled for a work to be considered a parody. In our opinion, the absence of the consent of the author for the purpose of altering the work and the absence of payment of remuneration may be considered legal effects of creating a parody.

The most important element that distinguishes parody (and caricature) from other allowed alterations of a work is the clear separation between the original work and its author and the altered work and the author thereof.

Law No.8/1996 does not provide the difference between parody and caricature, which makes us revert to the definitions of DEX (2009)/ every-day language. The caricature is being defined as 1. A representation, especially by means of graphic art, of a person or a situation by exaggerating their features, especially the negative ones, aiming at creating a satirical or comical effect. ♦ Ridiculous appearance of a person or of an object; a person or an object having this appearance. 2. Unsuccessful imitation that distorts/misrepresents the original<sup>4</sup>.

By comparing the two definitions we can assume that the parody applies mostly to literary works and the caricature to graphic works, but both may be found in other types of works, too (point 2 of the two definitions). Parody may be also applicable to artistic or audiovisual works. In our opinion, is possible to have a

<sup>3</sup> Published in the Official Gazette of Romania, Part I no. 60 of 26 March 1996, as amended.

<sup>4</sup> <http://dexonline.ro/definitie/caricatura>, last access on May 1, 2015

parody of caricature, as well as a caricature of a parody. The difference related to the type of work cannot be accepted on legal grounds, because, according to the provisions of Art. 35, parody, as well as caricature, can have as object any type of work. Both definitions point out the comical effect of the alteration. We consider that the comical/satirical nature is a key element of an allowed alteration of a work (parody and caricature) and it should have been clearly stated in the law. The comical effect is very important in order to determine possible infringements of rights.

### 3. The parody in the European Union legislation and case law

The provisions of Law No.8/1996 are in line with the dispositions of Directive No. 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*<sup>5</sup>. The Directive is stating in Art.5 (3) (k) as exceptions or limitations to the reproduction right (art.2<sup>6</sup>) and right of communication to the public of works and right of making available to the public other subject-matter (art.3)<sup>7</sup> use (of works) for the purpose of caricature, parody or pastiche<sup>8</sup>. The concept of parody is not defined in the content of the Directive. Related to the

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<sup>5</sup> Published in the Official Journal of the European Union L 167, 22.6.2001.

<sup>6</sup> Reproduction right 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;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

<sup>7</sup> Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
  - (a) for performers, of fixations of their performances;
  - (b) for phonogram producers, of their phonograms;
  - (c) for the producers of the first fixations of films, of the original and copies of their films;
  - (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

<sup>8</sup> According to DEX (2009), the pastiche is a literary, musical or plastic work, usually without any originality or value, in which an author uses in a servile way the themes or means of expression of a great author; imitation; copy.

enforcement area of these exceptions in connection to the type of work, Art. 2 and Art. 3 do not limit the categories of works which can be subject of parody. As such, according to the provisions of the Directive, any type of work can be parodied. Moreover, the use of language in Art.5 (3) (Member States **may** provide for exceptions or limitations...) underlines the optional character of the exceptions and limitations. Member States can decide not to include parody as an exception/limitation of the reproduction right or of the right of communication to the public of works and right of making available to the public other subject-matter.

Art. 5 (3) (k) has received an interpretation from the Court of Justice of the European Union by the Judgement of the Grand Chamber of 3 September 2014<sup>9</sup>, following the request for a preliminary ruling under Article 267 of the Treaty of Functioning of the European Union (TFEU) from Hof van beroep te Brussel-Belgian Court) – Johan Deckmyn, Vrijheidsfonds VZW/Helena Vandersteen and others (*Cause C-201/13*).

The request had been made in the proceedings between Mr. Deckmyn and Vrijheidsfonds VZW, a non-lucrative association, on one hand, and several heirs of Mr. Vandersteen, the author of the *Suske en Wiske* comic books (The French version called *Bob et Bobette*), as well as holders of rights associated to these works, on the other hand, regarding the handing-out by Mr Deckmyn of a calendar that contained a reproduction of a drawing which resembled a drawing appearing on the cover of one of the books in the *Suske en Wiske* series.

Mr. Deckmyn, member of the Vlaams Belang political party (party supported by Vrijheidsfonds), handed over at the New Year's Reception (9 January 2011) given by the City of Ghent calendars for 2011 mentioning his quality as editor. On the cover page of the calendars there was a drawing showing the mayor of Ghent, dressed in a white tunic, throwing coins to people wearing veil and people of color. The drawing was similar to the one on the front page of *Suske and Wiske*, called „De Wilde Weldoener” (The Compulsive Benefactor, Hindu Tomb in the French version) from 1961, created by Mr. Vandersteen, in which one of the main characters of the book, dressed in a white tunic, was throwing coins to persons trying to collect them.

The first Belgian Court dealing with the case (Court of First Instance, Brussels) decided in favor of the author of the drawing from 1961, the defendants being forced to end the use of the calendar and of the drawing. During appeal, the defendants presented their view that the drawing is a parody, according to Belgian Law on copyright and related rights. The plaintiffs argued that a parody must fulfill several conditions in order to be considered as such and, moreover, the drawing is conveying a discriminatory message due to the fact that the characters from the original drawing collecting coins had been replaced with veiled persons and persons of color. The Court of Appeal has presented the Court of Justice of the European Union with the following questions:

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<sup>9</sup> <http://curia.europa.eu/juris/document/document.jsf?docid=157281&doclang=EN>, last access on May 1, 2015

1. If the concept of “parody” is an autonomous concept of EU law.
2. For the situation in which there is a positive answer to the above question, 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?

The Court of Justice of the European Union ruled out that Art.5 (3) (k) must be interpreted in the sense that the concept of “parody” is an autonomous concept of EU Law. The legal grounds for this decision lie within the fact that the Directive does not refer the concept to national legislation in terms of definition. This situation requires an autonomous and uniform interpretation of the concept at EU level. From the Court’s Perspective, the optional character of the exception does not allow Member States that introduced the exception in their legislation to interpret according to their own rules and, as such, in an unharmonized manner, the specific provisions.

For the other two main questions, the Court pointed out that the absence of a definition of the concept of parody creates the need to establish the meaning of the concept according to the every-day meaning of the word, by taking into account the context in which is being used and the objectives of the specific legislation where it is mentioned. The every-day meaning of the notion comprises the idea of evoking an existing work, while being noticeably different from it, and secondly, to constitute an expression of humor or mockery. Regarding the objective, the Directive, as is apparent from recital 3 in the preamble, intends a harmonisation which will help to implement the four freedoms of the internal market and which relates to observance of the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest. It is not disputed that parody is an appropriate way to express an opinion<sup>10</sup>.

According to the provisions of reference 31 of the Directive, a fair balance between the rights and interests of authors and the rights and interests of users of protected subject-matter must be achieved.

The Court of Justice ruled that it is up to the Belgian Court to determine, after it decides if the drawing is a parody or not, if the message of the parody might be considered discriminatory. The Belgian Court has to examine if there is a fair

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<sup>10</sup> <http://curia.europa.eu/juris/document/document.jsf?docid=157281&doclang=EN>, last access on May 1, 2015

balance between the rights over the original work and the freedom of speech of the user of a protected work that is regarded as a parody.

#### 4. Conclusions

In our opinion, the elements set by the Court of Justice for the concept of parody allow an extended definition of the notion and offer a substantive protection for the users of such works from the Member States that have included parody as an exception. Nonetheless, when it comes to discriminatory or offensive messages, it will be for the national courts to decide and, in an implicit manner, to shape the concept of fair balance between the rights of authors of original works and the rights of authors of parodies.

##### **Annex – Main points of the Judgement of the Court<sup>11</sup>:**

1) 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, must be interpreted as meaning that the concept of ‘parody’ appearing in that provision is an autonomous concept of EU law.

2) Article 5(3)(k) of Directive 2001/29 must be interpreted as meaning that the essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery. The concept of ‘parody’, within the meaning of that provision, is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should relate to the original work itself or mention the source of the parodied work.

However, the application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k).

It is for the national court to determine, in the light of all the circumstances of the case in the main proceedings, whether the application of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, on the assumption that the drawing at issue fulfils the essential requirements of parody, preserves that fair balance.

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<sup>11</sup> <http://curia.europa.eu/juris/document/document.jsf?docid=157281&doclang=EN>, last access on May 1, 2015.

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