

**Q291 – The Netherlands**

**2024 – STUDY QUESTION PARODY**

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**I) Current law and practice**

***Please answer all questions in Part I on the basis of your Group's current law.***

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

Yes, Article 18b of the Dutch Copyright Act (*Auteurswet*, hereinafter “**DCA**”) provides for an exception to copyright protection for the purpose of a caricature, parody or pastiche.

The (translated) text of Article 18b DCA reads as follows:

*“Disclosure to the public or reproduction of a literary, scientific or artistic work in the context of a caricature, parody or pastiche is not regarded as an infringement of the copyright in that work, provided that this use is in accordance with what is generally regarded as reasonably acceptable.”*

2. Does your law or case law define parody or any of the other similar exceptions mentioned in the above question? Please explain.

The DCA does not provide a definition for caricature, parody or pastiche. Article 18b DCA is based on Article 5(3) of the InfoSoc Directive.<sup>1</sup> The interpretation by the courts will therefore need to be in conformity with the case law of the EU Court of Justice (“**ECJ**”). In *Deckmyn* (2014) the ECJ defined the parody as follows: *‘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.’*<sup>2</sup>

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

Yes, a parody will need to comply with the three-step test of the Berne Convention, if only by virtue of art. 5(5) of the InfoSoc Directive.

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<sup>1</sup> 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.

<sup>2</sup> ECJ 3 September 2014, C-201/13, ECLI:EU:C:2014:2132 (*Deckmyn*), par. 33.

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

a) Parody must constitute an expression of humour or mockery;

On the basis of standing caselaw (ECJ *Deckmyn*) the current requirement is that the parody constitutes an expression of humour or mockery.

b) Parody must be transformative or add some significant new creation to the original work;

No. The *Deckmyn* criterion of 'noticeable difference' suffices.

c) Parody must have a critical intent;

No. Parodies *may* have a critical intent.

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

No. Parodies may also target an external matter that is completely unrelated to the original work.

e) Parody must be non-commercial;

There is no requirement for a parody to be non-commercial, however, it will need to satisfy the requirements of the three-step test. Thus, to the extent that the parody is commercial, this should not conflict with a normal exploitation of the original work and should not unreasonably prejudice the legitimate interests of the author.

f) Parody must not disparage or discredit the original work;

No, within the boundaries of what is generally regarded as reasonably acceptable (article 18b DCA) a parody may disparage or discredit the original work. This follows from Dutch case law – such as Court of Appeals Amsterdam 13 September 2011, ECLI:NL:GHAMS:2011:BS7825 (*Mercis/Punt.nl*) – and has not been refuted by *Deckmyn*.

g) Other - please explain.

A parody should be in accordance with what is generally regarded as reasonably acceptable

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

Yes. See, for example, the Advocate General in his opinion for the *Deckmyn* case, in which he stated that “*parody is a form of artistic expression and a*

*manifestation of freedom of expression*".<sup>3</sup> We agree and are of the opinion that freedom of speech is the *raison d'être* of the parody exception. Freedom of speech principles should therefore play a pivotal role in assessing the lawfulness of a parody.

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

Yes.

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

No, there is no explicit exception to moral rights. However, both i) the scope of the moral right and ii) the scope of the parody exception are dependent on that what is in accordance with what is generally regarded as reasonably acceptable (art. 18b DCA). Therefore, once the adaptation qualifies as a lawful parody, then the author cannot oppose this parody on the basis of his/her moral rights.<sup>4</sup> And – the other way around – once an adaptation breaches moral rights, then the adaptation will not qualify as a lawful parody.

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

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

We see little room for improvement since Dutch Law already provides for open norms that give leeway to the Court to decide on a case-by-case basis whether an expression qualifies as a parody and is thus safeguarded against copyright claims.

However, one way the current practice could be improved is if there would be more guidance regarding the exact application of the open norms, since there is little case law on the subject in the Netherlands.

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

- (a) Definition of Parody or of other similar exceptions;

No, article 18b DCA covers "*caricature, parody or pastiche*". The meaning of the terms caricature, parody and pastiche is determined by considering their usual meaning in everyday language.<sup>5</sup> Thus, this definition is understandable for non-lawyers and can provide ample creative freedom. We do note, however, that the

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<sup>3</sup> ECJ 3 September 2014, C 201/13, ECLI:EU:C:2014:2132 (*Deckmyn*), Opinion of Advocate General Cruz Villalón 22 May 2014, ECLI:EU:C:2014:458, par. 70.

<sup>4</sup> Court of Appeals Amsterdam 13 September 2011, ECLI:NL:GHAMS:2011:BS7825 (*Mercis/Punt.nl*), 4.16.

<sup>5</sup> ECJ 3 September 2014, C-201/13, ECLI:EU:C:2014:2132 (*Deckmyn*), par. 19.

ECJ has suggested that a parody should constitute an expression of humour or mockery, which we believe to be an interpretation that is too restrictive.<sup>6</sup>

(b) Requirements for benefiting from such exceptions;

The current open standard is flexible enough to decide on a case-by-case basis. The main downside of this is the lack of clarity, since the application of the law in a specific case is unpredictable.

There is a risk that creatives will “*err on the safe-side*” and thus will not make optimal use of the exception because of the unclarity. It is likely that this occurs in practice to at least some extent.

Apart from the two *Deckmyn* criteria – of noticeable difference and humorous/mockery intent – the CJEU in *Deckmyn* also states that if the parody conveys a discriminatory message, then the original author would in principle have a legitimate interest in ensuring that his work is not associated with such a message. We agree with this decision.

Two further remarks:

i) In addition to conveying a discriminatory message, there can also be other factors that can contribute to the conclusion that a parody unreasonably prejudices the legitimate interests of the original author or conflicts with a normal exploitation of the work.

ii) If a parody indeed conveys discriminatory messages or constitutes any other criminal offence, then the Public Prosecution Service in the Netherlands can also act against such a parody based on criminal law. This is also possible in other countries of the EU, and this is precisely what occurred in the *Alain Soral* case. In that case, a racist parody was prohibited by the French criminal court (see ECtHR 25 January 2022, 35364/19).

In addition, it is already required that there is a noticeable difference between the two works, so that the public is not confused, thus mitigating the possible reputational damage for the original author. Once the public is not likely to be confused - due to significant alteration - and the parody has a humorous or mocking intent, the exemption should apply (provided the three-step test is complied with).

(c) The interplay between parody exceptions and moral rights;

With regard to the moral rights of objection to alteration, distortion, or mutilation of the work that is “*prejudicial to the author’s honor or reputation*” we do not see

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<sup>6</sup> ECJ 3 September 2014, C-201/13, ECLI:EU:C:2014:2132 (*Deckmyn*), par. 33. See also our answer to question 15.

room for improvement; that test is already covered in the test that all circumstances need to be taken into account.

Whilst attribution is not required to qualify as a lawful parody we feel that it would be appropriate that attribution is in principle required (for subsequent making available/reproductions) if it is reasonably possible, and if the author wishes to be mentioned; and that the author should also have the authority to request not to be mentioned.

(d) The types of work that may benefit from such exceptions;

There is no reason to exclude certain types of work from benefiting from the parody exception, although – of course – certain types of works (computer programs, structure of a database, etc) are less likely to qualify as a parody as they will probably never meet the criteria of being ‘noticeably different’/’ constitute an expression of humour or mockery’.

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

Freedom of expression is an important fundamental right and an important reason for exemptions to copyright to exist. A parody defence enables authors to express their opinion about existing works, but it also allows them to discuss or criticize societal issues in an engaging manner.

11. Are there any policy considerations and/or proposals for improvement to your Group’s current law falling within the scope of this Study Question?

No.

### III) Proposals for harmonisation

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

Yes, but it will in practice be very difficult to reach full harmonisation. The test on whether a parody is permissible depends in large degree on national circumstances, i.e. perception of the public involved. These circumstances will vary from country to country. Whereas it would serve clarity to have a harmonised framework, the application in concrete cases would need open norms and much freedom for national courts.

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

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

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

If YES, please explain.

Yes, such exceptions should exist. As mentioned above, a parody (or similar) defence enables authors to express their opinion about existing works, but it also allows them to discuss or criticise societal issues in an engaging manner. Not only does this enrich the societal debate, but it also enables the creation of interesting works.

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

Yes, parody should comply with the three-step test.

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

a) Parody should constitute an expression of humour or mockery;

No, not necessarily. A parody can also be used for expressing criticism or conveying an argument. It is not certain whether 'expressing criticism' always qualifies as 'mockery', but our group is of the opinion that the ECJ was too restrictive in the *Deckmyn* case when it held that a parody should constitute an expression of humour or mockery.<sup>7</sup> The exception should also apply to critique, and should be allowed as long as the criteria are met of i) noticeable difference; and ii) in accordance with what is generally regarded as reasonably acceptable (including the three-step test).

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

No. This would raise the bar too high. The *Deckmyn* principle of noticeable difference or alteration suffices. The question whether one is allowed to use and adapt someone's work should be distinguished from the question whether this adaptation is rewarded with its own copyright. For the last question creativity should be required, for the first not.

c) Parody should have a critical intent;

No, not necessarily. There should be no limit to the way parody is used. See also the answer under a) above. Parodies *may* have a critical intent but can also be just humorous and/or mocking.

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<sup>7</sup> ECJ 3 September 2014, C-201/13, ECLI:EU:C:2014:2132 (*Deckmyn*), par. 33 and operative part under 2.

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

No, this should not be required. A broad interpretation of parody is desirable since parodies can be used in different ways.

e) Parody should be non-commercial;

No, a parody can be commercial as long as it complies with the three-step test.

f) Parody should not disparage or discredit the original work;

No. As long as there is enough noticeable difference or distance between the two works, to prevent them from being economic competitors and to prevent confusion, discrediting and disparaging should be allowed, which is after all the very aim of and nature of certain parodies.

g) Other - please explain.

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

The fundamental right to freedom of expression forms a basis for the parody exemption. A parody defence should enable authors to express their opinion about existing works, but it also allows them to discuss or criticise societal issues in an engaging manner. It is therefore inherent that the right to freedom of expression plays a role when assessing the lawfulness of a parody. This should not necessarily be made explicit.

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

Yes, there is no reason to exclude certain types of work from benefiting from the parody exception.

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

It is essential that a parody does not create confusion regarding the authorship of the original work. However, the author of the parody should be allowed the same protection as the author of the original (or any other) work, which includes moral rights.

The name of the original author should be mentioned if this is reasonably possible, and if the original author wishes to be mentioned as the author of the original work. However, if the parody qualifies as a copyrighted work, then the author of the parody should not be forced to accept that the original author is mentioned in such a way that suggests that the original author is also the author



of the parody. The original author should also have the right to request not to be mentioned as the original author.

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

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

The questionnaire and its answers have been shared with representatives from large and small/medium sized companies.