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PARODY AND COPYRIGHT IN THE EUROPEAN UNION LAW

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TIIVISTELMÄ

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Tämä tutkielma tutkii parodian ja tekijänoikeuden välistä suhdetta Euroopan unionin oikeudessa. Tutkielmassa esitetään myös, miten tätä suhdetta säädellään EU-jäsenmaista Suomen, Ranskan, Alankomaiden ja Yhdistyneen kuningaskunnan lainsäädännöissä ja verrataan myös EU-oikeutta Australian, Kanadan ja USA:n oikeuteen. Oikeusvertailun tarkoituksena on antaa kuva siitä, millä muilla tavoin parodian ja tekijänoikeuden välistä suhdetta voidaan säädellä ja antaa ideoita EU-oikeuden kehittämiseksi.

Parodia ja tekijänoikeus ovat molemmat yhteydessä perusoikeuksiin EU-oikeudessa; parodia sananvapauteen ja tekijänoikeus ennen kaikkea omaisuudensuojaan, vaikka sen voidaan nähdä edistävän myös sananvapautta. Parodian ja tekijänoikeuden välistä suhdetta EU-oikeudessa säädellään ennen kaikkea tietoyhteiskuntadirektiivissä. Sen mukaan jäsenvaltiot voivat asettaa parodiapoikkeuksen, joka kohdistuu 2 ja 3 artikloissa oleviin tekijänoikeuden haltijoiden oikeuksiin (kappaleen valmistamista koskeva oikeus ja oikeus välittää yleisölle teoksia ja oikeus saattaa muu aineisto yleisön saataviin). Poikkeus tarkoittaa, että parodian tekeminen ja julkaiseminen ei riko näitä oikeuksia. Poikkeuksen asettaminen on jäsenvaltioille vapaaehtoista. Tietoyhteiskuntadirektiivi ei kuitenkaan määrittele parodiaa. Muutos tähän puutteeseen tuli Euroopan unionin tuomioistuimen (EUT) tuomiossa *Deckmyn ja Vrijheidsfonds* (Deckmyn), jossa se määritti parodian itsenäiseksi käsitteeksi EU-oikeudessa ja antoi sille yhdenmukaisen määritelmän EU-oikeudessa. EUT pohjasi määritelmän parodian tavalliseen merkitykseen. Määritelmän mukaan parodiassa ”yhtäältä viitataan olemassa olevaan teokseen mutta poiketaan siitä havaittavissa olevalla tavalla ja toisaalta se on huumorin tai pilailun ilmentymä”. Tutkielmassa esitetään, että määritelmässä huumori viittaa humoristiseen tarkoitukseen eikä humoristiseen vaikutukseen siksi, että tämä käsitys on yhdenmukaisempi sananvapauden kanssa ja käytännöllisten syiden vuoksi.

Jäsenvaltiot eivät todennäköisesti saa asettaa uusia ehtoja EUT-määritelmän ehtojen päälle, sillä muutoin muun muassa EUT-määritelmän harmonisointivaikutus heikkenisi. Joidenkin jäsenvaltioiden lainsäädännössä on edelleen jo ennen Deckmyniä olemassa olleita lisäehtoja parodialle. Niiden soveltamisen Deckmynin jälkeen voi nähdä olevan ongelmallista ja sen laillisuuden epävarmaa.

Ranska, Alankomaat ja Yhdistynyt kuningaskunta ovat lainsäädännöissään asettaneet parodiapoikkeuksen, Suomi ei, jossa parodia on sallittu vapaa muuttaminen tai sitaattioikeus -säännösten avulla. Muista maista Australia ja Kanada ovat asettaneet lainsäädäntöihinsä parodiapoikkeuksen, USA taas ei, jossa se on sallittu fair use -doktriinin avulla, jota ei ole EU-oikeudessa. Australiassa ja Kanadassa parodian ehtona on vastaava fair dealing -ehto. Työssä esitetään, että fair use -doktriinin lisääminen EU-oikeuteen voisi olla hyödyllistä sen varalta, että parodian tavanomainen merkitys muuttuu. Lisäksi työssä esitetään, että voisi olla hyödyllistä, jos EU säätäisi pakolliseksi jäsenvaltioille parodiapoikkeuksen asettamisen, sillä se parantaisi oikeusvarmuutta EU:ssa.

Avainsanat: Deckmyn, Euroopan Unioni, omaisuudensuoja, parodia, sananvapaus, tekijänoikeus

ABSTRACT

Henri Mattila: Parody and Copyright in the European Union Law
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This paper will examine the relationship between parody and copyright in the European Union law. In the paper will also be examined how the relationship is regulated in a few EU Member States (Finland, France, the Netherlands and the United Kingdom) and how the EU law compares to Australian, Canadian and US law. The comparison will be done to give a view on which other ways the relationship between parody and copyright may be regulated and to give ideas for the development of the EU law.

Parody and copyright are both linked to fundamental rights in the EU law; parody to the freedom of expression and copyright essentially to the right to property even though it can be seen to advance the freedom of expression as well. The relationship between parody and copyright in the EU law is regulated essentially in the Information Society Directive (The InfoSoc Directive). According to it the Member States may set out a parody exception to copyright holders' rights found in Articles 2 (right of reproduction) and 3 (right of communication to the public of works and right of making available to the public other subject-matter). The exception means that one can create and publish a parody without violating these rights. Setting out the parody exception is voluntary for the Member States. However, the InfoSoc Directive does not define parody. A change to the lack of definition was provided in the European Court of Justice's (ECJ) preliminary ruling *Deckmyn and Vrijheidsfonds* (Deckmyn) in which parody was established as an autonomous concept in the EU law and given a uniform definition in the EU law. The ECJ based the definition on its usual meaning. According to the definition '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'. It is argued in the paper that 'humour' refers to a humorous intent as opposed to a humorous effect because this is more in line with the freedom of expression and because of practical reasons.

Adding new conditions on the top of the conditions of the ECJ definition is not likely to be possible for the Member States as this would, for example, reduce the harmonization effect of the ECJ definition. Some Member States still have additional conditions for parody that existed already before Deckmyn. Applying them after Deckmyn can be seen to be problematic and it is uncertain whether this would be lawful.

France, the Netherlands and the UK have set out a parody exception into their laws, while Finland has not where parody is allowed under a conversion done in free association or quotation right provisions. Out of the other countries, Australia and Canada have set out an express parody exception into their laws, while the USA has not where parody is allowed under a fair use doctrine which does not exist in the EU law. Australia and Canada have as a condition for parody a comparable fair dealing condition. It is argued in the paper that adding a fair use doctrine into the EU Law could be beneficial in the case the usual meaning of parody changes. Furthermore, it is argued that it would be beneficial for the EU to set it mandatory for the Member states to set out the parody exception as this would increase the legal security in the EU.

Keywords: copyright, Deckmyn, European Union, freedom of expression, parody, right to property

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ABBREVIATIONS

ACA	(Australian) Copyright Act 1968
CCA	(Canadian) Copyright Act
CDPA	Copyright, Designs and Patents Act 1988
CFR	Charter of Fundamental Rights of the European Union
Deckmyn	Deckmyn and Vrijheidsfonds [C-201/13 (2014)]
ECHR	European Convention on Human Rights / Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
FCA	(Finnish) Copyright Act
FCC	Finnish Copyright Council
Infosoc Directive	Information Society Directive
IPO	Intellectual Property Office (UK)
OED	Oxford English Dictionary
Para(s)	Paragraph(s)
TV2 Danmark	DR and TV2 Danmark [C-510/10 (2012)]
WPPT	WIPO Performances and Phonograms Treaty

TABLES

1. INTRODUCTION

1.1 Introduction to the topic

Parody is an interesting art form. First, it usually uses relatively much of another work's material in order for it to achieve its goal. Secondly, it is often used to criticize the original work or its author or something unrelated to them which makes it a potent and important tool of freedom of expression. However, parody is in contradiction with the concept of copyright if it uses material protected by copyright. Therefore, in many legislations such as, the Netherlands, express exceptions have been made for parody or it has been allowed in other ways. If certain conditions are met, parody does not infringe on copyright. In this sense, it can be seen to restrict copyright as copyright holders do not have a right to decide whether to allow or not a parody and they are not entitled to a compensation either. Legal problems can arise when it is not clear whether the conditions have been met and existence of meeting these conditions is challenged.

Copyright restricts also parody. In the case of no exception or allowance for parody in legislation, copyright would be a major impediment to parody. Even though, in many legislations there are exceptions for parody or it is allowed to certain extent without express exception, if the conditions of parody are not met, a permission to use a copyright holder's material for parody or a compensation to them is needed. For a parodist, there might be financial impediments of not being able to afford the compensation for the copyright holder or a lack of want in doing so or in many cases the permission might be refused. After all, not many copyright holders would willingly permit the use of their work in the purposes of mocking the creator of the original work or the work itself. Therefore, parody and copyright are heavily in conflict with each other.

Parody and copyright can also be examined from the perspective of fundamental and human rights. Parody can be seen as a form of freedom of expression. Copyright can essentially be seen as an aspect of the right to property but it can also be seen to advance the freedom of expression. Thus, the conflicts do not exist just on the surface level of the concepts of parody and copyright but also on a deeper level of fundamental and human rights.

As said parody is a form of freedom of expression and also heavily related to copyright. According to *Lee* there are three big reasons 'for treating parody as an issue that raises particularly pertinent considerations in the context of copyright and the freedom of expression, according to the existing literature.' First, usually in order for the parody to be considered successful, it has to include a great amount of the original work; therefore, parodies are more in a risk of copyright infringement than other works that borrow material from other works.

The first problem has been summarized by a student note according to which the problem with parody is to deal with parody's nature with copying or imitating which is the very thing that is forbidden by copyright laws. The original work on which the parody is based must be able to be identified for the parodist to appropriately criticise the original work but the copying that is needed for that arguably violates the original work's copyright. *Michael Spence* comments that parodies often take material from an original work for the purpose of critique for the work or its author. In doing so they often use the parodied work as a representative for a variety of values that the parody undermines and for which there are no appropriate alternative ways for expression.

Second, as parody is many times employed as a way for a critical literary, political and social commentary, it is considered an especially valuable tool in regard to the freedom of expression. It enables authors to criticise a culture's quirks and weaknesses. 'It is the unforgiving mirror in which society is able to see itself most honestly reflected – warts and all.' By ridiculing political, social or religious subjects, parodists create 'healthy discourse and cultural self-examination'.[1]

Third, because parodies usually criticize the original work, the copyright holder of the original work in many cases will not be willing to give a suitable license to the person wanting to create the parody. This means that it is hard for the potential parodist to create the work they desire. An example of this would be a British case called *Williamson Music v Pearson Partnership* which was about a TV advertisement which included a parody of the music and lyrics of a song in the Rodgers and Hammerstein musical *South Pacific*. Evidence presented that it was

[1] *Lee* CREATe Working Paper 2015, pp. 107-109.

plaintiff's protocol that permission would not be given in any case for creating parodies of neither the words nor music of Rodgers' and Hammerstein's compositions. The judge also noted that even if the permission had been sought, the permission would not have been given no matter the price. Furthermore, as parody relies upon audience recognising it, the window of opportunity for creating a parody is many times particularly short. For a parodist to have its satiric point be reachable, a parody must be published when a parodied work is still popular and topical. [2] Therefore, a legal doctrine which does not allow the parodist to take material from present-day works restrains a parodist from commenting upon the present-day culture.

The relationship between parody and copyright is an especially relevant and topical topic in the European Union law because of the relatively recent European Court of Justice (ECJ) preliminary ruling called *Deckmyn and Vrijheidsfonds* (Deckmyn)[3] decided in 3 September 2014[4]. In the case, it was established that parody is an autonomous concept of the EU law and a definition was provided for parody in the EU law. In the context of copyright, the Member States of the EU cannot provide a definition for parody that would be in contradiction with the EU law definition. The definition of parody (or the conditions for it) is at the heart of the matter when deciding whether there has been a copyright infringement or not in parody cases. Therefore, in the European context, it is justifiable to focus the research on the European Union law perspective than solely on the perspective of national law(s).

The technological developments in the recent decades has made the parody and potential conflicts with copyright even more of a topical issue. Even though there has always been a great deal of demand for parodies, in the past two decades its supply has increased in a major way on a different platform: the internet. The internet is full of 'tributes, memes, remixes and parodies'. Quotation and intertextuality have become so omnipresent on the internet that many times they are said to be 'a central pillar of the internet's cultural logic'.[5] One example of parodies published on the internet are the numerous parodies made of a popular K-Pop song called Gangnam

[2] *Ochoa* Journal of the Copyright Society of the U.S.A. 1998, pp. 558-559.
[3] C-201/13 *Deckmyn and Vrijheidsfonds* (2014).
[4] C-201/13 *Deckmyn and Vrijheidsfonds* (2014).
[5] *Boxman-Shabtai* Poetics 2018, p. 1.

Style by Psy.[6] Some examples of these different parodies are Kim Jong Style, Mitt Romney Style[7] and Nasa Johnson Style[8].

The making of parodies is not thus a new phenomenon; only a new platform, the internet, has emerged and consequently a number of parodies created has increased. The internet makes it easy for anyone with an internet connection to have their own parody published for the whole world to see. Making of a parody does not require much talent per se any more for it to have a chance for a wide audience, as it could arguably have required in the past when a parodist usually needed to have a contract with, for example, a book publisher or a film company to have their parody published. This unforeseen possibility for all people to publish their own parodies could mean that many more people are making parodies without the knowledge of copyright law considering the limits of acceptable use of original works in parody context and taking ignorantly potentially huge financial risks. Therefore, even though the increased possibility for publishing one's own parodies can be seen as positive as it increases the amount of creative works published and enables greater freedom of expression for people, its downside can be the potential financial risks associated with it, especially in the case of ignorance of the copyright law.

Related to this technological development, what also makes the relationship between parody and copyright topical in the EU law, is the Directive on Copyright in the Digital Single Market which came into force in 2019[9]. It is a directive which caused controversy and wide criticism from many different quarters. It was feared that one of its articles would cause the widespread blocking of memes (which may be seen as a form of parody) on the internet.[10] Even though parody (and thus also memes) had an exception in the Information Society Directive (InfoSoc Directive)[11], to the final version of the Directive a parody exception was added. As the directive

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[6] [https://www.theguardian.com/music/musicblog/2012/oct/19/gangnam-style-video-parodies-psy] (24.03.2019).
[7] [https://www.theguardian.com/music/musicblog/2012/oct/19/gangnam-style-video-parodies-psy] (24.03.2019).
[8] [https://www.youtube.com/watch?v=2Sar5WT76kE] (24.03.2019).
[9] Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.
[10] [https://www.bbc.com/news/world-europe-44722406] (22.10.2019).
[11] 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.

came into force this year, this is another factor showing the relevance of the relationship between parody and copyright in today's European Union law.

Finally, the relationship between parody and copyright is a topical issue in national jurisdictions as well, such as in Finland. Over there the Finnish Copyright Council (FCC)[12] gave a statement in 2017 on an issue that concerned the copyright of paintings and parody. Another example country is the Netherlands in which there were two notable court cases a few years earlier in 2011, *Darfurnica* and *Miffy*, that concerned the relationship between parody and copyright.

1.2 Research problem and the structure

Research problem of the paper can be broken into three questions: What is the relationship between parody and copyright in the European Union law? How is it regulated in a few EU Member States' laws (Finland, France, the Netherlands and the United Kingdom)? How is it regulated in a few non-European countries' (Australia, Canada and the United States of America) laws and how their laws compare to the EU law and laws of the selected EU Member States?

Chapter 2 will dive into the definition of parody which is, as was mentioned, at the heart of the matter when deciding whether there has been a copyright infringement in a parody context. It will give definitions from a comparative literature and legal (EU law) perspectives. A comparative literature perspective will be given to avoid too one-sided a perspective to parody. After all, parody is also studied in comparative literature and other sciences being an art form and literature type; thus, providing a definition from another perspective besides legal gives a reader a wider perspective to the phenomenon of parody.

Chapter 3 will focus on the regulation of copyright and parody. First, copyright and parody will be discussed from the perspective of fundamental and human rights. Second, essential norms for parody and copyright in the EU law will be discussed. Third, a legal case relating to the relationship between parody and copyright in the EU law (*Deckmyn*) will be discussed. Chapter

[12] See the subchapter 4.1 for the explanation of the Finnish Copyright Council.

4 will firstly present how the relationship between copyright and parody is regulated in a few EU Member States' law and their laws will be compared to each other and to the EU law. Second, it will present how the relationship is regulated in a few non-European states and comparisons will be made between their laws and the EU law and the laws of the selected EU Member States. In Chapter 5 developmental proposals in regard to the EU law, i.e. how could the EU law regarding the relationship between parody and copyright be developed, are discussed. Finally, Chapter 6 will include the conclusion.

1.3 Methods and sources

The legal discipline that the paper is concerned with of which methods are employed, is doctrinal legal research. Furthermore, methods of a legal discipline of comparative legal research (comparative law) are employed. [13] Doctrinal legal research is also known as 'theory-testing or knowledge building research in the legal academia' and it is concerned with 'studying existing laws, related cases and authoritative materials analytically on some specific matter'. Because its jurisprudential base is on positivism, "doctrinal legal research is 'research in law' rather than 'research about law'". 'Doctrinal legal research studies legal propositions based on secondary data of authorities such as conventional legal theories, laws, statutory materials, court decisions, among others.'[14]

In the Finnish legal academia, the tasks of doctrinal legal research are seen to be interpretation and systematisation of legal norms. More precisely in its interpretation task doctrinal legal research tries to find out what is the content of current legislation and what is the relevance of the material found in laws and other legal sources (such as the ECJ's rulings).[15] In this paper the actual methods of doctrinal legal research that are used are textual interpretation and textual analysis of legal norms and other texts.

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[13] Both doctrinal legal research and comparative legal research may be argued to be legal disciplines rather than methods. My viewpoint on the matter is, based on how they are usually defined (some of these definitions can be seen in this paper), that they are essentially legal disciplines. Thus, they are not described as methods in this paper as they many times are in Finnish law theses.
[14] *Kharel* (2007), p. 1.
[15] *Hirvonen* 2011, pp. 22-23.

In comparative legal research the aim is to compare national law to foreign laws.[16] There are different viewpoints on what comparative legal research essentially is. The most relevant approaches to comparative legal research in regard to the approach taken in this paper can be seen to be the following. *Husa* understands comparative legal research as 'a broadly understood field of legal study which can use various approaches based on differing methodologies.'[17] *Glenn* argues that under comparative law there are many different methods.[18][19]

What is essential from the viewpoint of this paper, is to showcase what kind of methods of comparative legal research are employed in this work. In this paper, comparisons will be made between different laws regarding the relationship between parody and copyright, most importantly between the EU law and the laws of Australia, Canada and the USA. An actual method how this is done is a textual comparison; comparing different legal texts into each other and finding similarities and differences between them. The purpose of comparing the EU law to the laws of the selected non-European countries is to showcase different ways the relationship between parody and copyright can be regulated and to give ideas for the development of the EU law.

The sources of the paper consist mainly of the case law and laws of the EU and a few countries and primarily English-language legal research articles and books. Some Finnish legal research articles and books will be used as well.

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[16] *Hirvonen* 2011, p. 26.
[17] *Husa* Lakimies: Suomalaisen Lakimiesyhdistyksen aikakauskirja 2017, p. 1088.
[18] *Glanert* 2012, p. 62.
[19] *Glanert* argues in the same lines with Husa that comparative law is not a method itself. (*Glanert* 2012, p. 81). *Mattei, Ruskola* and *Gidi* see that comparative law may be used 'for a variety of practical or scholarly purposes'. Some see it as 'not only a method of thinking but also a method of working while some comparative law researchers see it as a 'cognitive method'. *Gutteridge* sees that 'comparative [l]aw' denotes a method of study and research'. Alan Watson sees comparative law as a discipline "which addresses 'a study of the relationship, above all, the historical relationship, between legal systems or between rules of more than one system'". *Zweigert* and *Kötz* argue that '[t]he basic methodological principle of all comparative law, from which stem all the other methodological principles – the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, etc. – is that of functionality'. (*Glanert* 2012, pp. 61-63).

2. WHAT IS PARODY?

2.1 Dictionary and comparative literature definitions

Oxford English Dictionary (OED) defines parody as

> 'a literary composition modelled on and imitating another work, *esp.* a composition in which the characteristic style and themes of a particular author or genre are satirized by being applied to inappropriate or unlikely subjects or are otherwise exaggerated for comic effect. In later use extended to similar imitations in other artistic fields, as music, painting, film, etc.'. [20]

Originally parody comes from the Greek word parōidia which means 'burlesque poem'. The word constitutes of the parts para- (besides) and ōidē which means 'ode'[21] which is a type of song.[22] Judging by the OED definition, parody is therefore an imitation of sort of another author or a specific genre. The parody takes the recognizable styles and themes of the author or genre and modifies them. These styles and themes are either magnified or used to 'inappropriate or unlikely subjects'; in other words, used in another context. These are done in order to create a comic effect. It can be seen from this definition too why parody can conflict with copyright. This is because parody takes major elements from other works.

In the comparative literature parody has been defined *by Boxman-Shabtai* as a specific kind of intertextuality, particularly 'a text's reliance upon the meaning structures of other texts'. In a broad way it may be defined as a type of imitation which leaves critical distance. Parody comments on the way a text or genre functions. The way it does this is by merging 'duplication and distortion'. In parody the most noticeable features of a work's style and subject matter are taken and then by using varied ways of modification, it distorts the original and displays its flaws.[23] Another researcher *Hutcheon* defines parody relatively similarly: 'repetition with critical distance that allows ironic signaling of difference at the very heart of similarity'. She also claims

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[20] [www.oed.com/view/Entry/138059]. (20.12.2018).
[21] [https://en.oxforddictionaries.com/definition/parody] (24.03.2019).
[22] [https://en.oxforddictionaries.com/definition/ode] (24.03.2019).
[23] *Boxman-Shabtai* Poetics 2018, p. 2.

that parody also pays homage to its target.[24] It is a notion that *Chatman* agrees, and he further claims boldly that "No one can deny the claim that parody is at once ridicule and homage".[25] However in this quote also can be seen the difference between Chatman's notion of parody and Boxman-Shabtai's and Hutcheon's. Chatman sees ridicule as an element that forms the essential part of the definition of parody which Boxman-Shabtai and Hutcheon do not. He justifies the essentiality of ridicule by two ways. One is by avoidance of using more unpleasant synonyms, for instance 'derision' (which implies 'bitterness and contempt'), 'mockery' (which implies 'scorn') and 'taunting' (which implies 'puerile jeering and provocation'). Chatman argues that the ridicule that might want to be used to describe parody can be best expressed through words that encapsulate 'the ambivalence of criticism and homage'. Parody should then be of a kind that even the target appreciates. Secondly, he argues that Hutcheon's definition 'imitation with ironic difference' is altogether too extensive.[26]

2.2 European Union law definition

The European Court of Justice defined in *Deckmyn* what parody means in the European Union law. The definition is 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. 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."[27]

As can be seen from the definition, it defines the essential, crucial characteristics of parody; what makes 'parody' parody. It does not therefore give a clear-cut definition but aims to give

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[24] *Hutcheon* Cultural Critique 1986, pp. 185 and 194.
[25] *Chatman* Poetics Today 2001, p. 33
[26] *Chatman* Poetics Today 2001, p. 33-34.
[27] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), paragraph (para) 33.

the essence of what parody is. There are two characteristics in parody according to the definition. First, 'it has to evoke an existing work, while being noticeably different from it'. Therefore, it has to be associated or be seen in connection with another work but be at the same time distinctively dissimilar. Secondly, it has 'to constitute an expression of humour or mockery'. Therefore, it has to be intended to be funny or humorous or mock something/someone. Mockery is defined by the OED as 'derision, ridicule; a mocking or derisive utterance or action; an instance of mocking'.[28] These two conditions then constitute, according to the ECJ, the fundamental parts of the concept of parody.

What may be seen as problematic in the definition, is the fact it is unclear what 'noticeable difference' is. Noticeable refers to the fact that something is being able to be noticed but what level of difference needs to be noticed in parody before it is considered to be acceptable. This issue is left to courts to decide. The other problem is the fact that who should determine whether the work contains humour or mockery. Notions of what is funny or humorous are highly subjective; it depends on the sense of humour one owns. In some cases, it probably is easier to determine whether humour or mockery element is present but in harder cases, it might be difficult. Should this be left to the judges to decide or should perhaps researchers of comparative literature or arts be consulted? These are difficult questions that the definition raises.

Furthermore, the ECJ rules that the work does not have to be original, be associated with other than the author of the parodied work, be related to the original work or state the source of the original work. The ECJ also stated that regarding the use of parody, there has to be a fair balance between copyright holders' rights and interests and those of the person(s) who rely on using the copyrighted work for parody purposes.[29]

[28] [www.oed.com/view/Entry/120540] (15.11.2019).
[29] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), para 34.

2.3 Comparisons between the EU law definition and the other definitions

The OED and the EU law (or the ECJ definition) share similar elements in them. In both definitions another work must be the base for parody ('evoke an existing work', 'imitate another work') but it must be modified ('being noticeably different', 'being applied to inappropriate or unlikely subjects or otherwise exaggerated') and to contain humour ('constitute an expression of humour or mockery', 'for comic effect'). The essential difference between them is that the OED definition is more specific; it sets out that it must be 'the characteristic style and themes of a particular author or genre' that are satirized, whereas the ECJ definition does not mention what must be the object of ridicule or mockery. This difference between the definitions can be further demonstrated by referring to the concepts of target and weapon parody[30]; the OED definition seems to contain only target parody and the ECJ definition both forms of parody.

The difference between the ECJ definition and the definitions of Boxman-Shabtai's and Hutcheon's is essentially the fact that the latter ones' definition does not include the humour or mockery as one of the constituent elements of parody whereas the ECJ definition does. In regard to the humour element, Chatman's notion of parody is more in the same direction as the ECJ's definition as Chatman sees ridicule as a constituent element of parody. However, the ECJ also mentions that mockery can be the essential element in the definition. Chatman then again regards that one should not see mockery as an element in parody and instead finds that humour of a more appreciative kind is one that can be seen to be a part of the definition of parody. Therefore, the legal definition by the ECJ is broader in its humour element than Chatman's.

Another crucial difference between the ECJ definition and Boxman-Shabtai's and Hutcheon's and in this case also Chatman's notion of parody is the fact that in the ECJ definition is mentioned that a parody could 'reasonably be attributed to a person other than the author of the original work itself" and it does not have to "relate to the original work itself", whereas in the latter ones' definition/notion of parody either comments on the way a text or genre functions (Boxman-Shabtai) or it pays homage to the original work (Hutcheon and Chatman) which

[30] See the next subchapter (2.4) for the explanations of target and weapon parody.

implies that it must comment on the original work (as it is hard to argue why commenting on something else would constitute homage to the original work[31]). This issue also relates to the difference between target and weapon parodies.

What may be seen as similar in the definitions can be found in what the ECJ refers to as the condition for a noticeable difference to the original work and the critical distance by Boxman-Shabtai and Hutcheon. Both elements refer to a fact that the parody must be distinguishable from the original work. However, the latter ones' critical distance element may be seen as more ambiguous than the ECJ's condition for a noticeable difference, even though ambiguity is present in the ECJ's condition as well.

2.4 Target and weapon parodies, satire and pastiche

According to *Spence* parody can be defined in the context of intellectual property as 'the imitation of a text for the purpose of commenting, usually humorously, upon either that text or something else'. As can be implied from the definition, Spence suggests there are two types of parody: target and weapon parody. *Target parody* aims to comment on the work or its creator whereas *weapon parody* uses that work to comment on something else.[32]

The existence of weapon parody is not in contradiction with the ECJ definition of parody as the ECJ incorporates in its definition both target and weapon parody even though these are not explicitly mentioned. This is because in the definition it is mentioned that a parody could 'reasonably be attributed to a person other than the author of the original work itself" and it does not have to 'relate to the original work itself'.

However, Boxman-Shabtai argues in her article that parody is occasionally mixed up with satire. The difference between them, according to her, is the target which they aim to critique. Satire's target is social conventions while parody's target is aesthetic conventions. However, parody

[31] It can be argued that it would be hard to find even target parody as paying homage to its target if ridicule is seen as an element of parody.
[32] *Norman* 2011, p. 228. (The original Spence article could not be found; thus, the use of a second-hand source)

many times ‘confronts social structures through aesthetic critique’. It seems what Boxman-Shabtai sees as satire is weapon parody according to Spence’s categorisations.

Furthermore, it seems that Boxman-Shabtai, Hutcheon and Chatman all see only target parody as parody, not weapon parody. This is because, as was mentioned earlier, their definition/notion of parody either comments on the way a text or genre functions (Boxman-Shabtai) or it pays homage to the original work (Hutcheon and Chatman).

Parody differs from pastiche. According to Boxman-Shabtai both employ imitation in their approaches, but parody aims at critical transformation of its target whereas pastiche’s operating principle is using similarity and loyalty towards the work it modifies.[33]

2.5 Examples of parodies

As said, parodies vary nowadays in their forms; they can be for example songs, films or literature works. First, some parodies that have not raised major legal issues (if any) will be covered to give a wide glimpse of the various kinds of parodies made. One of the popular film parodies in the 2000’s are *Scary Movie* films which mainly parody the genre of horror films.[34] An example of a book parody is *Bored of the Rings* (1969) which parodied the popular *Lord of the Rings* book by *J.R.R. Tolkien*.[35] One of the well-known music parodists is *Weird-al Yankovic* who many times parodies particular songs.[36] One of these songs is *Couch Potato* which parodies the song *Lose Yourself* by *Eminem*.[37]

As said the aforementioned parodies are not, however, ones which have caused major problems as regards to their legality. A parody that has, however, caused legal problems in the USA, having been claimed to violate copyright holders’ rights, is the song ‘*Pretty Woman*’ by *2 Live*

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[33] *Boxman-Shabtai* Poetics 2018, p. 2.
[34] [https://en.wikipedia.org/wiki/Scary_Movie_(film_series)] (24.03.2019).
[35] [https://en.wikipedia.org/wiki/Bored_of_the_Rings] (24.03.2019).
[36] [https://en.wikipedia.org/wiki/%22Weird_Al%22_Yankovic] (24.03.2019).
[37] [https://en.wikipedia.org/wiki/Couch_Potato_(song)] (24.03.2019).

Crew which parodied the song called '*Oh, Pretty Woman*' by *Roy Orbison*.[38][39] This parody will be discussed in detail in Chapter 4.

Another example of a parody that has raised legal concerns in a different jurisdiction, Belgium and the European Union, is a parody drawing which bore a resemblance to a drawing which was on the cover of the '*Suske en Wiske*' comic book entitled '*De Wilde Weldoener*' and was evidently claimed to violate the copyright holders' rights. The dispute was taken to the ECJ and it gave the aforementioned preliminary ruling *Deckmyn* which is perhaps the most central EU law case regarding parody and copyright.[40] In the Netherlands, legal problems have raised the *Miffy* parodies published on two Dutch websites which parodied the rabbit character 'Miffy' in picture books made by *Dick Bruna*. The parodies gave a rise to a dispute that was taken to Court of Appeal of Amsterdam.[41][42] In Finland, legal problems has raised a painting case which considered two paintings made by 'G' that resembled the claimant's two paintings.[43]

[38] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), pp. 572-573.
[39] The parody and the original song can be listened to respectively on Youtube: [https://www.youtube.com/watch?v=rMqnPVU207M] and [https://www.youtube.com/watch?v=3KFvoDDs0XM]
[40] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), paras 1-3.
[41] *Guibault* JIPITEC 2011, p. 237.
[42] [https://www.miffy.com/about-miffy] (25.09.2019).
[43] TN 2017:4.

3 PARODY AND COPYRIGHT IN THE EU LAW

3.1 Parody and copyright as fundamental rights

3.1.1 Parody as a form of freedom of expression

As was discussed in Chapter 1, parody can be seen as a form of freedom of expression. This is also the ECJ's stance on the matter.[44] This way parody has a close connection to fundamental rights in the EU law through the Charter of Fundamental Rights of the European Union (CFR). Beyond the EU law, parody also has a connection to human rights through the European Convention on Human Rights (ECHR)[45]. Next, the freedom of expression will be discussed in the context of the CFR and the ECHR. The ECHR context will be provided as well despite the convention not being a part of the EU law as all the CFR articles that are discussed in this subchapter are based on the ECHR articles.

The CFR was created 'to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments.' The strengthening would happen as those rights were made more visible by creating the Charter. It includes rights common to the Member States and appearing in various treaties, charters and case law.[46] The ECHR is a human rights convention created by the Council of Europe. One of its purposes was to strengthen the unity between the members of the Council of Europe.[47]

Article 11 (the right to freedom of expression and information) of the CFR which corresponds to Article 10 of the ECHR[48] and is identical to it word by word, is written as follows:

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[44] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), para 25.
[45] The European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.
[46] 2012/C 326/02 Charter of Fundamental Rights of the European Union, p. 395.
[47] The European Convention on Human Rights, p. 5.
[48] C 303/17 - 14.12.2007 Explanations relating to the Charter of Fundamental Rights, p. 5.

> 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'

When the provision is applied to parody, every person has a right to make parodies (parody can be seen as a form of opinion as well) and communicate them to others and, in turn, others have a right to receive these (naturally depending on the conditions set out by the author of the parody) without public authorities interfering to this.

According to Article 52(3) of the CFR the meaning and scope of Article 11 correspond to those found in the ECHR.[49] The limitations which may be placed on it cannot thus be greater than those regulated in Article 10(2) of the ECHR according to which:

> 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

There are, thus, many potential reasons for why limitations may be imposed upon the freedom of expression, and consequently on parody.

[49] 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

3.1.2 Copyright as an aspect of the right to property and as a right advancing the freedom of expression

Copyright is a form of intellectual property.[5051] As such it is seen as an aspect of the right to property in the EU law.[52]

Article 17 of the CFR regulates the right to property:

> '1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
>
> 2. Intellectual property shall be protected.'

The article is based on Article 1 of the Protocol to the ECHR:

> 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'

As can be seen, these articles are relatively similarly formulated.

In the second paragraph of Article 17 intellectual property is explicitly mentioned which highlights the importance of intellectual property as an aspect of the right to property. It was explicitly mentioned for the reason that it has a growing significance and because of Community secondary legislation.[53] Community secondary legislation presumably refers to the directives

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[50] *Kur - Planck - Dreier* 2013, p. 3.
[51] Some others are, according to *Kur - Planck - Dreier* 2013 p. 3, 'related rights, patents, industrial designs and trade marks'.
[52] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), p. 5.
[53] C 303/17 - 14.12.2007 Explanations relating to the Charter of Fundamental Rights, p. 7.

regarding intellectual properties, such as the InfoSoc Directive. The EU has also clarified that the guarantees included in the paragraph 1 'shall apply as appropriate to intellectual property'.[54] The intellectual property is thus as well protected as 'conventional property', namely physical property, is in the EU law.

Copyright in the EU law can, however, also be seen as a right that advances or encourages the use of the freedom of expression. As the InfoSoc Directive allows an author to receive compensation for the use of their work[55], it can be seen for this reason to encourage authors to make more works or more authors to make works. If there were no copyright laws enabling an author to receive compensation, this could discourage making of works as an author's income from the work could reduce when others could freely use their work.

Copyright law in the EU can thus also be seen to encourage the creation of parodies in those EU countries who have the parody exception (or allowed parody in other ways) in their legislations. As parody is acceptable in the EU law and a creator of a parody knows, because of the other provisions in the EU copyright law, that they are able to receive compensation, copyright law can be seen to encourage the creation of parodies.

3.2 Parody in the EU Law

The InfoSoc Directive is a directive which regulates harmonisation of certain aspects of copyright and related rights in the information society. The Directive Article 4(3) also mentions parody as one of the exceptions a Member State is able to set to the rights in Articles 2 and 3 of the Directive. The wording is the following:

> "Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: …(f) use for the purpose of caricature, parody or pastiche."

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[54] C 303/17 - 14.12.2007 Explanations relating to the Charter of Fundamental Rights, p. 7.
[55] Essentially by giving rights (such as the reproduction right) to an author when they can decide that they require a compensation from someone using their work.

This is the only time parody is mentioned in the directive. Therefore, the information directive does not provide any substantial regulation on parody. The directive does not provide a definition for parody which is something that can be seen in other legislations as well.[56] . However, a definition of these terms is something that might have been useful to ensure coherent and uniform appliance of the legislation in the Member States. However, this is not a problem anymore as the ECJ provided its definition on parody in *Deckmyn* as was previously discussed in this work. Furthermore, the article has caricature, parody and pastiche written in the same sentence which is typical of this kind of legislation.[57] They are similar types of art forms; thus, it is natural to mention them in the same context.

As *Seucan* has remarked, the word '*may*' indicates the voluntary nature of the provision. Thus, the Member States are free to choose whether they provide an exception in the case of parody.[58]

3.3 Copyright in the EU Law

3.3.1 Background

'Copyright protects original works in the field of literature and the arts.' Conventionally, these have consisted of writings, musical compositions and works of visual arts and other creative works. Copyright in the restricted sense and related rights constitute copyright in the wide sense.[59] Related rights (i.e., rights related to copyright), which are also known by the name of neighbouring rights, are given to 'performing artists, producers of phonograms and broadcasting organisations.'[60] More recently, computer programs and databases have become under protection of copyright as well. Unlike some other intellectual properties, copyright comes into being without registration.[61] Therefore, copyright is easily established, and the protection commences after creating the work. The duration of copyright is restricted. The duration of copyright in the EU is 70 years after the death of an author. It is long compared to other intellectual properties;

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[56] See Chapter 4 Parody in national laws.
[57] For instance, in the British legislature the same practice has been used.
[58] *Seucan* Juridical Tribune Journal = Tribuna Juridica 2015, p. 102.
[59] *Kur - Planck - Dreier* 2013, p. 241.
[60] *Kur - Planck - Dreier* 2013, p. 3.
[61] *Kur - Planck – Dreier* 2013, p. 241.

for example, the duration of patent is 20 years from the date the application was made and the trade mark's registration lasts 10 years at a time. The durations of related rights are generally shorter than that of copyright.[62]

At the moment there are eleven EU directives[63] and two regulations[64] regulating copyright.[65] Until the year 2001, harmonisation of copyright within the EU law had worked in a way that each directive had regulated either 'individual categories of works (computer programs, databases), individual rights (rental and lending; broadcasting by satellite and cable retransmission; related rights) or other individual issues (term of protection).' The directives before the year 2001 (see the footnotes on the current page), according to *Statamoudi and Torrens*, were already planned in the European Commission's Green Paper on 'Copyright and the Challenge of Technology' and were included in the first of two sets of directives ('first generation of Directives').

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[62] *Kur - Planck - Dreier* 2013, pp. 123, 165 and 241.

[63] 1) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission,
2) Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases,
3) 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,
4) Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights,
5) Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property,
6) Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs,
7) Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights,
8) Directive 2012/28/EU Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works,
9) Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market,
10) Directive 2017/1564/EU of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society and
11) Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

[64] 1) Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and
2) Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

[65] [https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation] (09.11.2019).

After these directives, a more comprehensive directive was created: the Information Society Directive. This directive with the Enforcement Directive, which is concerned with the enforcement of intellectual property rights, were included in the second set of planned directives ('second generation Directives) in the European Commission's Green Paper.[66] After these came several other directives such as the Orphan Works Directive which regulates orphan works (works of whose rightholder is not known or cannot be found even after 'a diligent search'[67]) and the Directive on Copyright in the Digital Single Market which is the newest directive. Furthermore, in 2017 two regulations came into force.

3.3.2 The Information Society Directive

The essential piece of the EU legislation regulating copyright is the Information Society Directive. According to *Stamatoudi and Torremans,* despite its name, the Directive's provisions are binding also in the analogue world.[68] This can be inferred from the fact that Article 1 mentions the particular emphasis on the directive is on the information society but it does not exclude the analogue world. Furthermore, the directive makes references to the analogue world in Article 1. The InfoSoc Directive implements into the EU law the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) both of which were decided in 1996.[69]

In this chapter Articles 1-3 will be discussed. Other articles in the directive regulating of what constitutes copyright law are not particularly relevant what comes to parody; these will not be therefore discussed in this paper.

Article 1 of the InfoSoc Directive regulates the scope of the directive. It states:

> 'This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.'

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[66] *Statamoudi - Torrens* 2014, p. 397.
[67] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, Article 2(1).
[68] *Stamatoudi – Torremans* 2014, p. 397.
[69] Decision 2000/278/EC approving the World Intellectual Property Organisation Copyright Treaty and the World Intellectual Property Organisation Performances and Phonograms Treaty on behalf of the EU.

From this extract can be clearly seen the essential role of copyright in this directive. The framework the directive is concerned with is the common market. *Lodder and Murray* argue that the focus is therefore on the economic aspects of copyright (and its related rights) although it seems to touch on cultural and societal aspects as well. Lodder and Murray have inferred the latter remark from the recital 8:

> 'The various social, societal and cultural implications of the information society require that account be taken of the specific features of the content of products and services.'[70]

This seems to be a correct interpretation as Article 1 concerning the scope of the directive mentions internal market but not the cultural and societal aspects which seems to give the greater focus on the internal market. However, as the cultural and societal aspects are mentioned in the directive but only in the introduction, they seem to have a role of small importance as well. A particular focus is on the information society which is reflected in the name of the directive.

Article 2 states:

> '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.'

Thus, it is concerned with the right to be able to decide about reproduction which the Member States are obliged to give to different parties: authors, performers, phonogram producers, film

[70] *Lodder – Murray* 2017, pp. 60-61.

producers and broadcasting organisations. The right of reproduction is seen as 'one of the most basic economic rights of authors and related rights holders'.[71] The right is defined as

> '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'.

In the provision 'indirect reproduction' refers to, according to *Statamoudi and Torrens*, reproductions that are many times those in which another means of communication is used in the reproduction process. They give a following example: instead of copying a sermon in a church by writing it, one records it, then listens to it and writes it down. Indirect reproductions are also those in which the work is transmitted or communicated to the public from the record.[72] A parody example of an indirect reproduction could be one in which a parodist first copies a book by an author X and then makes a parody of this copy.

Article 2 also covers temporary reproductions. This partly contributes to the fact that the reproduction right may be considered to be a substantial and wide-reaching right. According to *Walter and von Lewinski* the main goal in explicitly mentioning the reproduction right was to clarify that this right entails temporary reproductions occurring in the digital environment.[73] Lodder and Murray state that these temporary reproductions include even 'reproductions in the cache or RAM (Random Access Memory) of a computer.' Because every access and every use of a digital form requires many of these reproductions, the regulation could be seen as an overextension of the right. However, in Article 5(1) there is an exception to the temporary reproductions:

> 'Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
> (a) a transmission in a network between third parties by an intermediary, or
> (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance,
> shall be exempted from the reproduction right provided for in Article 2.'

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[71] *Statamoudi – Torrens* (2014), p. 401.
[72] *Statamoudi – Torrens* 2014, p. 402.
[73] *Walter - von Lewinski* 2010, p. 964.

The 5(1) a covers copies made during an internet transmission process which enable an efficient internet usage. It refers to 'transmissions between networks, servers or routers of internet service providers' where several copies are created to make the transmission process easier, and which are either not stored or are stored temporarily and solely in the process of such transmission. The 5(1) b covers copies made in the process of doing a lawful activity. Statamoudi and Torrens give an example of copies being created in the RAM memory of a computer so that one can listen to a music track bought legally in an online store. These are not actions that have independent economic significance.[74] In the parody context, temporary reproductions could also be made for example when one is researching material for a parody from the internet. Statamoudi and Torrens claim that these exceptions are made to avoid needless expansion of the reproduction right and to exclude actions which are seen to be only use of the work.[75]

However, Lodder and Murray see this method of first stretching the right very wide and then limiting it, as abnormal.[76] It seems to be a redundant and unnecessarily complex way of regulation indeed; it would be clearer to immediately set the right as wide as one intends without having to limit it in another article.

The provision includes reproductions '*by any means and in any form*'. This means that both analogue and digital reproductions of the work are under this regulation regardless of the form (analogue or digital) of the original work and the form the reproduction takes (digital or analogue). Also, the original work or the reproduction may be of any digital form or made into any material carrier, such as when an art piece made of wood is photographed and uploaded to the internet and after that made into an art piece made of stone.[77] This referral to any means and any form seems to aim to reduce evading adherence to the provision by making claims that there has not been a copyright violation because of a different format or because copying was done by unusual means. These claims could possibly be seen if this provision was not made. In a parody context, an example of the situation falling under this provision could be one where an original

[74] *Statamoudi – Torrens* 2014, p. 403.
[75] *Statamoudi – Torrens* 2014, pp. 403-404.
[76] *Lodder – Murray* 2017, pp. 64-65.
[77] *Statamoudi – Torrens* 2014, p. 402.

work was made in an analogue form, such as a book, and a parody is made into a digital form, such as a video which is uploaded on to the internet.

The provision also caters reproductions done either *'in whole' or 'in part'*. Partial reproductions are considered reproductions particularly in jurisdictions which do not demand a considerable part of the work to be reproduced. In this regard, Statamoudi and Torrens claim that 'even music, video or news sampling may be considered a reproduction'.[78] This seems a correct interpretation as a sample of, for example a song, is essentially a part of the whole song. However, it is unclear how long a sample or a clip would have to be in order for it to be considered a reproduction. Hypothetically speaking, is a one second sample from a song enough to constitute a reproduction? If we interpret the 'in part' literally, there would technically not be a minimum limit as to the duration of the sample in order for it to be considered a reproduction. A partial reproduction perspective is relevant in the context of parodies too, as parodies always reproduce parts from the original work. However, if too much is reproduced, this would be seen as an infringement on copyright.

Article 3 considers 'right of communication to the public of works and right of making available to the public other subject-matter'. It is clear that if parody fulfils the conditions of parody set out by the ECJ, it has had a right of reproduction and thus it follows that the author of parody has then a right of communication and making available as well. This is because the parody exception considers both Article 2 and 3 and reproduction phase naturally has to come first. Article 3 is presented here in order to provide a reader an image what kind of rights under that article an author of an lawful parody has an exception to or, to put in another way, what an author of a legitimate parody has a right to. On the other hand, presentation of Article 3 also provides the reader an insight what kind of rights authors of illegitimate parodies or others who communicate these to the public are violating. Article 3 states:

> '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

[78] *Statamoudi – Torrens* 2014, p. 404.

> 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.'

The article, which is in conformity with Article 8 of the WPPT[79], establishes a comprehensive right for authors to authorise or prohibit the communication to the public.[80] There is no definition for an author in the Directive. Thus, anyone considered an author under a national law of a Member State is covered by the article.

According to the InfoSoc Directive Recital 23 the right of communication to the public should be comprehended broadly by including all communication to the public who are not present at the location where the communication originates. It should cover 'any - transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.' The right does not include other acts according to the recital. Because of the right's broad nature, Statamoudi and Torrens view the right of communication as an umbrella term. They also remark that some level of transmission is essential for the communication to the public to be considered to have happened.[81] This is relatively self-explanatory as the Recital 23 states that the public needs to be in a different location than where the communication originates from in order for

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[79] '(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.'
[80] *Kur - Planck - Dreier* 2013, p. 66.
[81] *Statamoudi - Torrens* 2014, p. 408.

the communication to the public to be considered to have taken place. This can only be achieved by some sort of means of transmission.

The right of communication contains 'TV and radio broadcasting, internetTV and radio, simulcasting, webcasting, streaming, near-video-ondemand (NVOD), pay-per-view, near-on-demand-pay TV, podcasting as well as cable and online transmissions in general.' Only providing physical facilities for enabling or making a communication to the public does not comprise a communication to the public.[82] We could think hypothetically that a provision of physical facilities, such as an ISP connection, for an author of a parody whose parody does not fulfill the conditions of parody, would not comprise a communication to the public itself.

The article does not cover then situations where communication is done at the same place and time as where the public is. This is seen as public performance, recitation or display.[83][84] It is a situation where both the reproduction and communication happen simultaneously. From the perspective of parody, even a parody that would not fulfil the conditions for parody and thus would not have reproduction right either, would be acceptable to be performed publicly at the same location and time as where the public is.

The right of 'making available' is also included in the 'communication to the public'. Statamoudi and Torrens argue that this means that when interpreting the former, the interpretation should be done consistently with the communication right, and that the making available right is regulated with the same limitations and exceptions. What is distinctive of this right is that works (or subject matter) are made available in a way that members of the public are able to access them where and when they choose (on demand). The provision does not demand that the public is addressed at the same time, or that the public is assembled in a certain place or that a pre-determined programme is supplied. It is not relevant in which form works are made available. They may be in a downloadable form or streamed.

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[82] *Statamoudi - Torrens* 2014, p. 409-410.
[83] *Statamoudi - Torrens* 2014, p. 409.
[84] This was categorically confirmed by the ECJ in 'the joined Cases C-403/08 and C-429/08 Football Association Premier League and Others and in Case C-283/10, Circul Globus Bucureşti', (*Lodder - Murray* 2017, p. 67).

The provision is also 'technologically neutral' in a way that it is not relevant which technological device a person uses to access a work, be it a mobile phone, tablet or computer. Also, an internet connection type, for instance a wireless or wired, is not relevant either.[85]

Furthermore, the public does not in actuality need to access the work. In the ECJ judgement SGAE, it was considered adequate in order for an act of communication to the public happen, that the work is made available to the public in a manner that the persons constituting that public are able to access it, and it was not determining whether the public in reality had access to the work by turning on the television.[86] What is thus essential is 'the act of providing the work to the public' and the possibility of them to access the work when they want.[87] This means that the right of making available is indeed very wide if the mere possibility of a public accessing a work is enough to constitute an act of communication. However, this is understandable as the article's purpose is to discourage and prevent an unauthorised communication of copyright-protected works to the public and in some cases, it might be hard to prove whether the public have in actuality accessed a work or not. If the mere possibility of a public accessing a work was not considered an act of communication, this could mean that the numbers of occasions where the article is violated would increase.

The number of times a work is in reality accessed or the type of use (for instance viewing, listening or downloading) is not relevant. The right only applies for the person (or entity) that makes the work available to the public and not for a member of the public who accesses it.

The right of making available includes all on-demand services, for instance video on demand, pay per view TV, online databases of, for instance of films or music tracks, which one can access with the help of a search engine or special software and selects when and where to use it. Pod-casts are also covered by the right. Statamoudi and Torrens claim also that computer programs and copyright databases are covered under the right as well.[88]

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[85] *Statamoudi - Torrens* 2014, p. 411-412.
[86] C-306/05 *SGAE* (2006), para. 36.
[87] *Statamoudi - Torrens* 2014, p. 412.
[88] *Statamoudi - Torrens* 2014, p. 412 and 414.

An author of a work or a legitimate parody thus has a very wide right of authorising or prohibiting the communication to the public and making it available.

3.3.3 The Directive on Copyright in the Digital Single Market

The Directive on Copyright in the Digital Single Market is a directive of which proposal version especially caused controversy and wide criticism from social media users, academics and technology leaders before the voting took place. There were two articles causing the criticism: Articles 11 (in the final version Article 15) and 13 (in the final version Article 17).[89] Article 11 was about compensation for the use of press publications. Article 13, which was relevant from the perspective of parodies published on the internet, stated:

> 'An online content sharing service provider shall obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC in order to communicate or make available to the public works or other subject matter. Where no such authorisation has been obtained, the service provider shall prevent the availability on its service of those works and other subject matter.'[90]

It was feared that the article would cause the content sharing service providers to adopt automatic filters to block all copyrighted material and consequently block also legal usages of copyrighted material such as parodies and memes which can be considered a form of parody and thus allowed because of the parody exception in the InfoSoc Directive.[91] After all, memes and parodies are a huge part of the internet world today and blocking these would have major consequences for many internet users.

In the final version of the Directive which was passed on the European Parliament, Article 17 states:

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[89] [https://www.bbc.com/news/world-europe-44722406] (22.10.2019).
[90] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market 9134/18.
[91] [https://www.bbc.com/news/technology-44412025] (22.10.2019).

> ‘1. An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.’
> ‘4. If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter.’
> ‘8. The application of this Article shall not lead to any general monitoring obligation.’

According to the article, online content-sharing service providers will still be liable for publication of copyright-protected works but the article does not require service providers to prevent unauthorised uploads of copyright-protected works. This is highlighted in the paragraph eight with the mention of service providers not being obliged to perform general monitoring which is what the fears of the critics of the directive were directed to.

In addition to these, a parody exception, Article 17(7), was added, presumably because of the fears surrounding the status of parodies and memes even though parody was already allowed in the InfoSoc Directive:

> ‘Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services: …(b) use for the purpose of caricature, parody or pastiche.’

This can be seen to further strengthen the status of parodies because the exception means that users’ rights to use copyrighted material for the purpose of parodies shall be ensured. Perhaps one way of ensuring this could be that the Member States obligate online content-sharing services to set up systems that enable uploads of parodies. It can be argued that automatic filters that filter all unauthorised copyrighted material and do not discriminate between legal and non-legal uploads of this kind of material could be seen to go against the parody exception provision. Because of the expression ‘Member States shall ensure’ is relatively strong, it could be that a subsequent appeal system does not ensure well enough users’ rights to upload parodies.

3.4 Case law regarding parody and copyright (Deckmyn)

3.4.1 General information

The ECJ preliminary ruling *Deckmyn* is a very significant decision in the EU law on the field of parody and copyright. As mentioned before, it established that parody is an autonomous concept in the EU law and provided a uniform definition for parody in the EU law. In the InfoSoc Directive there is no definition for parody, thus Deckmyn provided clarity and uniformity in the EU law regarding parody. In this subchapter Deckmyn will be discussed in detail because of its major significance on the field of parody and copyright in the EU law.

Before the analysis, it would be useful to explain what a preliminary ruling is in the EU law. A preliminary ruling is an ECJ decision requested by a national court which is considering a case in which a question of interpretation of EU law has raised. This request will be given an answer in the form of a preliminary ruling 'when a question of interpretation is new and of general interest for the uniform application of EU law, or where the existing case-law does not appear to give the necessary guidance to deal with a new legal situation.'[92]

Deckmyn considered the interpretation of Article 5(3) of the InfoSoc Directive. This request was made by the hof van beroep te Brussel (Court of Appeal, Brussels) 'in proceedings between Mr Deckmyn and the Vrijheidsfonds VZW, a non-profit association, and various heirs of Mr Vandersteen, author of the *Suske en Wiske* comic books (known in English as *Spike and Suzy*, and in French as *Bob and Bobette*) and the holders of the rights associated with those works ('Vandersteen and Others')' as well about the distribution by Mr. Deckmyn of a calendar which involved a drawing (the drawing at issue[93]) looking similar to a drawing which had been on the cover of one of the books in the Suske en Wiske series.[94]

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[92] [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14552] (10.11.2019).
[93] The term used by the ECJ in Deckmyn.
[94] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), paras 1-2.

3.4.2 Legal background

The ECJ states that the provisions in the EU law relevant for the ruling are the following ones found in the InfoSoc Directive:

> Recital 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.'
>
> Recital 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…'
>
> Article 5(3):
>
> 'Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3[, entitled respectively "Reproduction right" and "Right of communication to the public of works and right of making available to the public other subject-matter",] in the following cases:
> - (k) use for the purpose of caricature, parody or pastiche'[95]

The first mentioned Recital 3 means that the proposed harmonisation in the Directive relates to adherence to the right to property, including intellectual property, and the freedom of expression. Thus, it is seen in the Recital that both fundamental principles of law are to be complied with. What is essential in Recital 31 what comes to parody and copyright is the fact there must a fair balance between rightholders (copyright holders) and users of protected subject-matter

[95] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), paras 3-5.

(which can be seen to mean also parodists). Thus, both sides, copyright holders' right and parodists' right to parody, must be taken into account.

The lastly mentioned parody exception, which has been discussed before, means that if a Member State has provided a parody exception, a person can reproduce a copyright-protected work for the purpose of making a parody and communicate that work for the public or make it available to public.

In the Belgian copyright law [Article 22(1) of the Law of 30 June 1994 on copyright and related rights (Belgisch Staatsblad of 27 July 1994, p. 19297, Belgian Copyright Act)] is found the following relevant provision:

> 'Once a work has been lawfully published, its author may not prohibit: -
> 6. caricature, parody and pastiche, observing fair practice'[96]

Thus, in the Belgian law there is an express parody exception. Next the dispute will be discussed in detail.

3.4.3 Course of events

Mr. Deckmyn is a member of Vlaams Belang political party[97] while the purpose of the *Vrijheidsfonds* is the financial and material aid of the party. At the reception that was held on 9 January 2011 by the City of Ghent in Belgium for the celebration of the New Year, Mr. Deckmyn distributed calendars in which he was marked as the editor. The cover page of the calendars included the drawing at issue.

The drawing at issue looked similar to the one which was on the cover of the *Suske en Wiske* comic book entitled '*De Wilde Weldoener*' (which can be approximately translated as 'The Compulsive Benefactor'), which was finished in 1961 by Mr Vandersteen. In that drawing is

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[96] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), para 6.
[97] At least he was at the time of the ruling.

seen one of the comic book's main characters who is wearing a white tunic and throwing coins to people who are attempting to collect them. In the drawing at issue[98] the character was substituted with people who were wearing veils and people of colour.

Vandersteen and Others were of the opinion that the drawing at issue and its communication to the public amounted to a violation of their respective copyrights and therefore took legal action against Mr Deckmyn and the Vrijheidsfonds before the rechtbank van eerste aanleg te Brussel (Court of First Instance, Brussels) which decided that the defendants must stop the use of the drawing and if they will not do that they are required to pay a periodical penalty.

Before the referring court heard the appeal against the decision given at Court of First Instance, Mr Deckmyn and the Vrijheidsfonds stated, especially, that the drawing at issue is considered a political cartoon which is within the scope of parody regulated in the Belgian Copyright Act.

Vandersteen and Others disagreed with this interpretation and in their view, parody had to meet certain criteria which were not met in this case: 'to fulfil a critical purpose; itself show originality; display humorous traits; seek to ridicule the original work; and not borrow a greater number of formal elements from the original work than is strictly necessary in order to produce the parody.' They also argued that the drawing at issue expressed a discriminatory message because of the fact that the characters who were collecting coins in the original drawing, were substituted in the drawing at issue by people who were wearing veils and people of colour.[99]

3.4.4 Questions asked from the ECJ

In the aforementioned situation, the hof van beroep te Brussel (Court of Appeal, Brussels) chose to stay the proceedings and to refer these questions to the ECJ for a preliminary ruling:

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

[98] View the original drawing and the drawing at issue: [https://en.wikipedia.org/wiki/Deckmyn_v_Vandersteen].
[99] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), paras 7-12.

> 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?'[100]

The questions 2 and 3 narrow down to what is meant by parody in the EU law.

To the first question the ECJ answered affirmatively: parody is an autonomous concept in the EU law. It justified this decision by first stating the Court has in a consistent manner been of the opinion that it stems from

> 'the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question…'[101]

From this can be seen the conditions when an autonomous and uniform interpretation for a term/terms is needed in the whole of the EU; this is a case if a provision of the EU law does not refer directly to national laws for them to decide on its meaning and scope. One must however take into account the context of the provision and the objective of the legislation under consideration which makes the Court's opinion somewhat vaguer as it is no clear how the context of the provision or the objective are to be taken into account exactly. This last sentence could have

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[100] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), para 13.
[101] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), para 14.

been given to ensure that legislation of which purpose has been to enable the Member States the right to define a term can do this even if for some reason an express reference to the law of the Member States had been left out.

The ECJ suggested also that, based on the EU case law[102], the concept of 'parody' which is mentioned in a provision of the InfoSoc Directive which does not refer to national laws, has to be considered as an autonomous concept of EU law and given a uniform interpretation in the whole of the EU.[103] Article 5(k), the parody exception, indeed does not refer to national laws and thus the ECJ concludes it an autonomous concept of EU law and one that has to be given a uniform interpretation.

The ECJ states that this interpretation of parody being an autonomous concept of EU law and needing a uniform interpretation is not undone even though Article 5(3) is of its nature voluntary. The ECJ claims that if the Member States that have implemented the exception could decide themselves the limits in an unharmonized fashion, varying from a Member State to another, this would be in opposition to the objective of the directive.

For the justification for this claim the ECJ offers two earlier judgements considering the InfoSoc Directive; *Padawan*[104] and *ACI Adam and Others*[105].[106] In both cases the ECJ stated that an interpretation according to which the Member States which have introduced the private copying exception,

> "provided for by EU law and including, as set out in recitals 35 and 38 in the preamble to that directive, the concept of 'fair compensation' as an essential element, are free to determine the limits in an inconsistent and unharmonised manner which may vary from one Member State to

[102] Such as a 'judgment in Padawan, C-467/08, EU:C:2010:620, paragraph 32' [C-201/13 *Deckmyn and Vrijheidsfonds* (2014), para 14].
[103] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), para 15.
[104] C-467/08 *Padawan* (2010).
[105] C-435/12 *ACI Adam and Others* (2014).
[106] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), para 16.

> another, would be incompatible with the objective of that directive of harmonising certain aspects of the Law on copyright and related rights in the information society."[107]

Thus, it can be seen from the ECJs earlier case law that the ECJ has already earlier taken stance that in the case of voluntary introduction of an exception in the InfoSoc Directive, if there is an undefined term related to that, its limits should not be left for the Member States to decide. It is logical and from the perspective of legal certainty right for the ECJ to apply the same interpretation in this case as well.

Regarding the second and third question, the ECJ states that for the reason that the InfoSoc Directive does not provide a definition for the concept of parody, the meaning and scope of the term has to be, as the ECJ has consistently noted, decided by regarding its usual meaning in everyday language, while at the same taking into consideration the context in which it appears and 'the purposes of the rules of which it is part'.

The ECJ then argues that taking into account 'the usual meaning of the term 'parody' in everyday language', it is not challenged, as the Advocate General regarded in his Opinion[108] that the crucial elements 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.'[109]

As was touched upon earlier, one could criticise the definition for its lack of clarity. As one of its conditions is humour [and if one assumes this refers to having a humorous effect (intent is another possibility)], one has to conclude that it is simply impossible to regulate what constitutes humour in detail; there are so many types of humour that any definition would need to be very wide and it would not probably bring anymore clarity compared to the situation of not having the definition at all. Defining humour, in any case, would be too complex a task. As the definition is not desirable, who is, then, to decide whether a parody is funny or not. There is probably no piece of creative work (or any other existing thing) that all people find funny. Determining

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[107] C-467/08 *Padawan* (2010), para 36; C-435/12 *ACI Adam and Others* (2014), para 49.
[108] Opinion of Advocate General Cruz Villalón - 22 May 2014 - Case C-201/13, point 48.
[109] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), paras 19-20.

the existence of humour can be a highly demanding task in some cases. In some cases, the task will be easier; for example, in the case of physical humour accompanied with certain kind of music. A difficult field of humour could be, for instance, black humour in which humour is found in making fun of shocking or disturbing issues. At face value or to some persons, parody embodying black humour could look as if there is no humour in it but if presented to a person who finds black humour funny, the judgement could be different. If the humour condition means parody needs to have a humorous effect, national courts who are making these decisions whether a parody is funny or not, could in hard cases perhaps consult researchers of arts or comparative literature, as was suggested earlier. This would bring a needed objectivity[110] to the determination of the existence of humour in a parody.

However, as *Rosati* has noted on the condition of humour or mockery, there was no explanation whether a parody has to contain a humorous intent or in addition to that create a humorous effect. If the condition was 'intent' (as according to Rosati seems to be case under US law), then the parody exception would be wider in scope than if there was a requirement for a humorous effect. After all, only requiring intent would be more in in line with the freedom of expression. Rosati further remarks that in regard to Article 10 of the ECHR the European Court of Human Rights has stated consistently that *everyone* is guaranteed the freedom of expression, and even the purpose of the expression, for instance whether the expression is done for profit or not, has no relevance in deciding whether protection should be provided under Article 10. Thus, *Rosati* regards that it would be overly restrictive if merely people who were funny had a right to parody as a part of the freedom of expression and those who fail to achieve a humorous effect would not be protected under Article 10.

If the condition was 'effect', Rosati argues that it is not clear who would decide when this requirement is fulfilled. Would it be the judge? Or would the humour be evaluated 'according to the standards of that particular Member State'? If this was the case, then there could exist parodies permitted under the laws of some Member States and forbidden in others. This would

[110] Although one could argue that their opinion is not completely objective either but arguably more objective when taking into account their knowledge.

constitute an unfavourable effect on the free movement of goods and services and, fundamentally, the aimed harmonisation of the parody exception.

Rosati suggests that one more option might be that a humorous effect is evaluated by reflecting it to the standards of the 'society' (perhaps European/EU society) which the Advocate General referred to in his opinion. However, if this was the approach taken, there could be cases in which parodies that are country- or sector- specific could be seen not to achieve a humorous effect by the European/EU society. In this case, Rosati sees that the trade mark law concept of 'average consumer' could be brought into copyright law.

Finally, Rosati states that the problems associated with the requirement of a humorous effect and as a humorous intent best complies with Article 10 lead to the conclusion that the condition of humour refers to a humorous intent.[111]

I agree with Rosati's arguments here. If the condition was a humorous intent, this would be much more in line with the freedom of expression. This removes also the need for evaluation whether a work is funny or not, as was discussed earlier would be very difficult, and these evaluations can be seen to be prone to subjectivity. If the condition was a humorous effect, this could be seen to decrease the number of parodies made in the fear of it not being deemed funny or would perhaps lead to several parodies of which intent was humour judged as failing to achieve a humorous effect and thus unlawful. This could then also reduce the variety of different parodies as arguably less parodies containing more subtle humour would be made as these would impose a greater risk being judged as non-humorous. The European/EU society perspective could lead to, as Rosati suggests, to prohibition of parodies of which humour is country-specific; arguably in the EU and Europe exists country-specific humour as humour is not likely to be uniform in Europe/the EU. Determining the conditions for what constitutes standards of European humour would be a very difficult and demanding task also. The employed standards would likely lead to the decrease in parodies made and the reduction in the variety of different parodies. Furthermore, the number of unlawful parodies could increase.

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[111] *Rosati* 2015, pp. 6-7.

The potential effects of the condition of humour being a humorous effect (whichever way this would be implemented) would not be a welcome development from the perspective of freedom of expression. Thus, from the viewpoint of practicality and freedom of expression the best interpretation would be the humorous intent.

However, if having a humorous intent is enough, then how would this would be demonstrated? Is it enough that a creator of a parody says so or is there need for an additional proof? There could also be a case where a creator of a work has not had a humorous intent but because of a copyright infringement claim refers to having had one. This could be problematic from the perspective of copyright holders.

The question of whether a humorous intent or effect is better is a difficult one. One can, however, argue that the large difficulties in implementation and the great restriction on the freedom of expression outweigh the potential damages of the condition of a humorous intent on copyright holders; the freedom of expression can be argued in the case of a humorous effect being the condition be more restricted than what copyright holders the right to property would be if the condition was a humorous intent and thus the right balance between the rights that the ECJ demands would not be met. Thus, it can be argued that an interpretation of the condition being one of a humorous intent would be fairer and preferable taking into account the right balance between the rights.

Considering the conditions presented by the referring court, the ECJ regards that it is not evident either from the ordinary meaning of the term 'parody' in everyday language or from the choice of words of Article 5(3)(k) of the InfoSoc Directive, that the concept of parody would contain the conditions that were presented by the referring court in its second question, that is:

> '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; could reasonably be attributed to a person other than the author of the original work itself; should relate to the original work itself or mention the source of the parodied work.'[112]

[112] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), para 21.

Let us re-examine the definition of parody by *Oxford English Dictionary* presented in Chapter 2:

> "a literary composition modelled on and imitating another work, esp. a composition in which the characteristic style and themes of a particular author or genre are satirized by being applied to inappropriate or unlikely subjects or are otherwise exaggerated for comic effect.'

The OED has established itself as 'the accepted authority on the English language'[113], thus it can be argued that from its definitions can be seen ordinary meanings of words in English language. In the definition is not seen the conditions presented by the referring court, thus they are not part of the common meaning in English language. The Advocate General also used the OED as his source for the English definition and also provided the definition of parody in German, Dutch and Spanish and, as was earlier indirectly mentioned, came to the same conclusion that the common meaning of parody contains does not contain the conditions presented by the referring court.[114]

The ECJ argues that the interpretation of the concept of parody not containing the conditions presented by the referring court is not challenged when taking into account the context of Article 5(3)(k) which sets out an exception to the rights given in Articles 2 and 3 and 'must, therefore, be interpreted strictly'. What the ECJ means by this strict interpretation is that the interpretation of the concept of parody has to permit the effectiveness of the exception and in that way be protected and its purpose observed.[115]

What the ECJ seems to mean is that if we were to put too many conditions on the concept of parody, it would essentially render the exception in the Infosoc Directive useless. The exception would thus not be able to achieve the purpose why it was created, namely: to act as an effective exception to the rights in Article 2 and 3. Thus, to secure its effectiveness, not too many conditions should be put on the concept of parody.

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[113] [https://languages.oup.com/oed] (23.10.2019)
[114] Opinion of Advocate General Cruz Villalón - 22 May 2014 - Case C-201/13, point 47.
[115] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), paras 22-23.

Jongsma regards that it can be argued that as the Member States are permitted not to have an exception for parody, they also have a right to set an exception that has a more limited scope than what the parody exception in the directive has. Another issue is whether the ECJ agrees with this. This is a particularly relevant issue to the Member States, such as Belgium, France, the Netherlands, that have additional conditions for parody. Strictly speaking, the ECJ merely took the view that the concept of parody itself should be interpreted uniformly. However, the usefulness of a uniform interpretation could be cast into doubt if this interpretation would be possible to undermine by permitting the Member States to use additional conditions for parody that were rejected in the ECJ's definition. In addition to that this would also subvert the operating of the internal market which is a crucial idea in the Infosoc Directive. Jongsma also notes that in *DR and TV2 Danmark* (TV2 Danmark) case which considered the interpretation of Article 5(2)(d) of the InfoSoc Directive, the ECJ expressly rejected the notion that the Member States have a right to narrow the scope of the exceptions that have been harmonised[116].[117]

Thus, Jongsma argues that the Member States are probably not permitted to change the scope of the exceptions (including parody) found in the Infosoc Directive by adding extra conditions for them. In the case of parodies, however, it is uncertain how much change is needed to do for the existing additional conditions in the national laws.[118]

This seems to be a correct interpretation. If new additional conditions were permitted to be set, as Jongsma argues, it would weaken the effect of the ECJ's definition. If the uniformity has been the goal in defining the parody, it is logical that the Member States are not allowed to impose new conditions on the top of the ECJ's definition. One can also look at the issue directly from the perspective of *Deckmyn*. If after the ECJ's preliminary ruling and in it having set out the conditions for parody in the EU law, the Belgian court could decide to impose additional conditions for the parody, the effect of this decision on this particular case in the Belgian court would be weakened. Taking into account TV2 Danmark, the interpretation can be argued to be correct. What comes to the permissibility of the additional parody conditions that already existed

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[116] C-510/10 *DR and TV2 Danmark* (2012), para 36.
[117] *Jongsma* IIC - International Review of Intellectual Property and Competition Law 2017, pp. 670-671.
[118] *Jongsma* IIC - International Review of Intellectual Property and Competition Law 2017, p. 671.

in national laws before Deckmyn, the issue is difficult. From the perspective of uniformity, which was the goal in providing the definition, it would be logical that the additional parody conditions that already existed before Deckmyn would have also become non-applicable because of the ECJ's decision.

Rosati argues that in regard to these different additional conditions that existed before Deckmyn in national laws, it is unlikely that it would be possible, for example, for France to require that parodies must observe the rules of the genre.[119] Thus, she seems to suggest that applying these conditions is not allowed for any Member State after Deckmyn. This could well be so but how the issue actually is remains to be seen.

Next, the ECJ recalls the objectives of the directive from recital 3 in the preamble to the Directive, in which it was mentioned, inter alia, that the freedom of expression is to be complied with. The ECJ, then states that it is not questioned that parody is a suitable method to express an opinion.

Furthermore, the ECJ mentions that in recital 31 in the preamble to the Directive, the exceptions to the rights established in Articles 2 and 3 of the Directive, aim to attain a 'fair balance' between, especially, the rights of the authors and the rights of users of copyright-protected works. Thus, it stems from that that, in a particular case, the application of the exception for parody, has to find a fair balance between the rights of the copyright holders of an original work and the freedom of expression of the user of that original work who is depending on the exception for parody.

The ECJ states that in order to decide whether, in a particular case, the application of the exception for parody maintains the fair balance, all the circumstances of the case have to be considered. The ECJ further states that one should take into account the opinion of Vandersteen and Others; they are of the opinion that because the characters who were collecting coins in the original drawing were substituted in the drawing at issue by people who were wearing veils and

[119] *Rosati* 2015, p. 6.

people of colour, the drawing presents a discriminatory message which has the consequence of linking the original work with such a message. If that is the situation, which the ECJ reminds is for the national court to evaluate, one should pay attention to:

> 'the principle of non-discrimination based on race, colour and ethnic origin, as was specifically defined in Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22)[120], and confirmed, inter alia, by Article 21(1) of the Charter of Fundamental Rights of the European Union[121],[122]

The ECJ notes that in situations where a discriminatory message is presented in parody, the holders of rights supplied in Articles 2 and 3, such as Vandersteen and Others, have, in general, a valid reason for making sure that a copyright-protected work is not linked with such a message.[123]

Thus, it can be drawn from this that even if a parody fulfils the conditions for the parody exception in the EU copyright law, it is not protected if it conveys a discriminatory message or its nature is discriminatory which is against 'the principle of equal treatment between persons irrespective of racial or ethnic origin' in the Race Equality Directive and the CFR.

However, this consideration of right holders having a reason to make sure their work is not linked with a discriminatory message has been under a lot of critical discussion. For example it has been noted that the ECJ does not determine exactly what comprises a discriminatory message to which right holders have a reason to oppose to, that discrimination is 'a diffuse concept' and of which application may result in the banning of every critical and humorous parody if its proper meaning is misunderstood, that permitting right holders to oppose to undesirable associations of their works might limit largely the scope of the parody exception, that copyright is not

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[120] (The Race Equality Directive) Article 2(1): 'For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.'
[121] 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'
[122] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), paras 25-30.
[123] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), para 31.

the most well suited method to tackle xenophobic and discriminatory expressions and that protection against undesired associations belongs traditionally more to the field of moral rights, which is an area of law that is unharmonized. Furthermore, it has been noted that it is crucial to notice that a parody will not always be attributed to 'the author of the work on which it is based', which raises the question whether there actually exists a valid interest for right holders to oppose to such discriminatory messages.[124]

These are valid concerns. For example, I agree that as discrimination is a vague concept and not defined by the ECJ, applying it to parodies might well cause many parodies that do not aim to discriminate to be deemed discriminatory because they were understood incorrectly. This vagueness is a similar problem which is found with the earlier discussed humour condition. As one is dealing with an important exception which relates to the freedom of expression, it is problematic if it can be limited with vague norms which can cause the exception to lose its effectiveness. The effectiveness of the parody exception was, after all, something that the ECJ deemed important. However, if one were to take the evaluation of discrimination to parody cases in the EU law as the ECJ suggests, evaluating whether a parody has had a discriminatory effect would be again problematic for the same reasons as it would be with whether parody has had a humorous effect. Thus, the same interpretation of intent as was suggested earlier with the humour condition could be taken here; if the intent of a parody has been discriminatory, it would not be considered lawful and in turn, if it has not been discriminatory, it would be lawful.

The ECJ states that it is the responsibility of the national court to decide, taking into account all of the circumstances of the case, whether the application of the exception for parody, on the presumption that the drawing at issue fulfils the crucial conditions, maintains the fair balance.[125] Thus, the ECJ did not decide, among other mentioned things, whether the parody in this case fulfils the conditions for the parody exception. This was left for the national court to decide as well, which is in accordance with the division of the responsibilities between the ECJ and national courts. The ECJ is responsible to give an answer to the interpretation of EU law if a national court requests this, but a national court must make the actual decisions so to say.

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[124] *Jongsma* IIC - International Review of Intellectual Property and Competition Law 2017, p. 666.
[125] C-201/13 *Deckmyn and Vrijheidsfonds* (2014), para 32.

Thus, the definition for parody was provided in the answers to the second and third questions. The ECJ's answer to the second and third questions can be summarised to: The parody exception has two conditions in the EU copyright law of which a parody has to fulfil: evoking of 'an existing work while being noticeably different from it', and, constituting 'an expression of humour or mockery'. It does not have other conditions. However, a fair balance must be attained between the copyright holders' rights and the rights of those who use original works for parody purposes.

4. PARODY AND COPYRIGHT IN NATIONAL LAWS

4.1 EU Member States

In this subchapter will be examined how the relationship between parody and copyright is regulated in a few EU Member States' law; Finland, France, the Netherlands and the United Kingdom. As all these countries are EU Member States and there is EU law regulating the relationship between parody and copyright, there are no major differences as to this regulation of parody and copyright between the EU law and national laws, but an overview will be given of the regulation in these national laws to show a reader some examples of states which have set out a parody exception and one that has not. Furthermore, an overview will be given of conditions for the parody exceptions found in national laws that are not found in the ECJ's definition. One must note, however, the earlier discussion in this paper about the uncertain status of the additional parody conditions that already existed in national laws before *Deckmyn* (France and the Netherlands) and ones that came into force after Deckmyn (the United Kingdom). One must not assume that these additional conditions are still valid even though they are presented here. The conditions will be shown to demonstrate that national laws do not necessarily reflect the ECJ's definition yet.

4.1.1 Finland

In the Finnish Copyright Act (FCA) there is not an express exception for parody. The same applies to pastiche and caricature. However, in the legal academia parody has been traditionally viewed as a part of conversion done in free association [the FCA section (§) 4.2] and in some cases could be considered to under a quotation right (22 §).[126] The FCA 4.2 § and 22 § state respectively:

> 'If a person, in free association with a work, has created a new and independent work, his copyright shall not be subject to the right in the original work.' (4.2 §)

[126] *Alén-Savikko* 2017, p. 204.

> 'A work made public may be quoted, in accordance with proper usage to the extent necessary for the purpose.' (22 §)

According to *Alén-Savikko* parody can be considered as a part of conversion done in free association (4.2 §) because it uses the original work for an unfamiliar purpose. However, it must transcend the threshold of work which means it has to fulfil certain conditions to enjoy the protection under the FCA.[127] These conditions are that a work must be 1) independent and 2) original. These conditions are essentially the same as the conditions in the FCA 4.2 §.[128] Thus, the conditions for parody in the Finnish law, if evaluated from the perspective of conversion done in free association, are that it has to be independent and original or new. According to *Harenko and Tarkela* the transcendence of the threshold of work is evaluated on a case-by-case basis at the courts but for different types of work there are established interpretations considering which kinds of works are protected under the law.[129]

The Finnish Copyright Council, which is established by the Copyright Act and the Copyright Decree, gives statements, when requested, on how to apply the Copyright Act and also gives assistance to the Ministry of Education and Culture in the processing of matters that are connected with copyright. Its statements are recommendations and non-binding[130], but they have had a guiding effect on to the interpretation of the Copyright Act.[131] Its statements are also discussed in legal research.[132]

The FCC has given statements regarding parodies as well. One of these statements[133] (TN 2010:3) was requested to be given to questions relating to a Helsinki Court of Appeal case (HO 15.5.2011 no. 1157) [Pelastakaa pedofiilit (Save the Paedophiles) case] in which the defendant B had been accused of creating a website very similar to the website of the organisation called

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[127] *Alén-Savikko* 2017, p. 207.
[128] It can be argued that 'new' refers to 'original' in the FCA 4.2 § even though the usual meaning of new is not the same as original.
[129] *Harenko – Tarkela* 2017, p. 18.
[130] [https://minedu.fi/en/copyright-council] (21.09.2019)
[131] *Harenko – Tarkela* 2017, p. 574.
[132] See for example *Alen-Savikko* 2017.
[133] Others include, for example, TN 2017:4 which considered copyright and parody of paintings.

Pelastakaa lapset ry (Save the Children) and using on it parts of the texts from the Pelastakaa lapset website. The logo on the 'parody website' had also been accused of being of a kind which could be mistaken for the logo of Pelastakaa lapset ry. The requester of the statement, the prosecutor of the jurisdictional district, had requested answers for the following questions: 1) Was the C's (the creator of the Pelastakaa lapset website) work considered to transcend the threshold of work and 2) if so, did B's website infringe on the C's moral rights (especially there was an interest to know whether the B's website was considered to be a parody) or the usage/financial rights of Pelastakaa lapset ry that C had given to it.[134]

The FCC concluded that the logo and parts of the text on the Pelastakaa lapset website transcended the threshold of work. What came to the parody website, the FCC assessed that the logo appearing on it, even though somewhat similar to the logo of Pelastakaa lapset ry, transcended the threshold of work; it was considered to be a conversion done in free association. Considering the texts appearing on the parody website, they were almost word-to-word copied from the Pelastakaa lapset website. However, according to the FCC even extensive word-to-word usage could be justified for parody purposes when a new and independent work is considered to have been created. The FCC argued that in this case the Pelastakaa pedofiilit website was considered to be a parody. However, because the text on the parody website consisted almost completely of a text that is protected under Copyright Act 1 § and the changing of the word 'lapset' (children) to 'pedofiilit' (paedophiles) did not represent independent and original work, it was not thus an independent and original work. The website's usage of the text was not considered to fall under 22 § either which considers the quotation right. Furthermore, the FCC considered the parody website to infringe on the moral rights of C. [135] The Helsinki Court of Appeal agreed with the statement of the FCC and gave a judgement accordingly.[136]

What is notable in this case, that the FCC (and the Helsinki Court of Appeal agreed with this) concluded that even a wide word-to-word usage in parodies could be justified in the Finnish law. However, the work still needs to be considered independent and original. The wide word-

[134] TN 2010:3, pp. 1-2.
[135] TN 2010:3, pp. 6-9.
[136] *Alén-Savikko* 2017, p. 225.

to-word usage could be considered to give a considerable amount of leeway to a parodist as to how much they can reproduce the original textual material. In this case, however, there were simply too few original elements on the website in order for it to be considered original and thus it failed to meet the originality condition.

4.1.2 France

In the French legislation, there is an express exception for parody, which existed before *Deckmyn*. The exception is supported by the freedom of expression.[137] According to Article L 122-5 of the French Intellectual Property Code:

> 'Once a work has been disclosed, the author may not prohibit:
> - 4°. parody, pastiche and caricature, observing the rules of the genre.'

As one can see parody, pastiche and caricature are again mentioned in the same context with parody. In order for the parodying work to be included under the parody exception, it has to fulfil certain conditions. First of these is that the goal in transforming the original work must be humour; to cause people to laugh. Secondly, the parodying work must not cause harm to the author of the original work. It should not harm either their moral or commercial rights. However, the commercialisation of the parody itself is not forbidden which has been demonstrated in the French case law. Thirdly, the transformative work must contain a considerable modification to the original work.[138]

4.1.3 Netherlands

There is an express exception for parody in the Dutch Copyright Act (Article 18b), which existed before *Deckmyn*, and states as follows:

> 'Not regarded as an infringement of the copyright in a literary, scientific or artistic

[137] *Mendis and Kretschmer* 2013, p. 18.
[138] *Mendis and Kretschmer* 2013, pp. 18-19 and 21.

> work, is the making public or reproduction of it in the context of a caricature, parody or pastiche, provided the use is in accordance with what social custom regards as reasonably acceptable.'[139]

Here again the caricature and pastiche are mentioned in the same context as parody. Notable is the last clause regulating the fact that the use must be in accordance with what social custom regards as reasonably acceptable. This can be considered to have given a leeway to the courts in the past on deciding what constitutes social custom regarding the issue (as the situation is at the moment uncertain as to the applicability of the additional conditions of parody in national laws). After the provision was introduced, the Dutch courts have demonstrated larger readiness to invoke freedom of speech in parody cases, such as the *Darfurnica* and *Miffy* cases.[140]

Next the Miffy case (2011)[141] will be discussed. One must note that the case is essentially about moral rights of copyright (and trademark rights). Moral rights are part of an area of copyright law which has not been harmonised in the EU law but the case will be shown as a demonstration of the importance that the Dutch courts have put on the freedom of expression as opposed to copyright. The Miffy case[142] concerned punt.nl, one of the largest hosting providers in the Netherlands, and *Miffy* (Nijntje in Dutch), the rabbit character in picture books created by *Dick Bruna*.[143][144] On the website www.gratisanimaties.punt.nl and www.terreurmutsie.punt.nl were published seven cartoons that portrayed Miffy in unexpected conditions. There was, for instance, a cartoon which showed Miffy with big red eyes and sniffing cocaine ('lijntje'[145]) and another one in which Miffy was 'in an airplane about to crash into a skyscraper' (nijn-eleven'). Other ones included sexual themes.[146]

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[139] *Eechoud*: Copyright Act – Auteurswet - Unofficial translation.
[140] *Lee* CREATe Working Paper 2015, p. 115.
[141] Court of Appeal of Amsterdam, decision of 13 September 2011, LJN: BS7825, (*Mercis B.V. / Punt.nl B.V.*) overturning District Court of Amsterdam, 22 December 2009 LJN: BK7383 (Mercis B.V. / Punt.nl B.V.).
[142] No English translation was found about the Miffy case; thus, the decision to base the information on it on the Guibault's article.
[143] *Guibault* JIPITEC 2011, p. 237.
[144] [https://www.miffy.com/about-miffy] (25.09.2019).
[145] Meaning a line in English [https://www.linguee.com/dutch-english/translation/lijntje.html] (25.09.2019).
[146] *Guibault* JIPITEC 2011, pp. 237-238.

The copyright holders *Mercis and Bruna* opposed to the cartoons based on copyright and trademark rights. Punt.nl used the aforementioned parody exception as the justification for the publication of the cartoons.[147]

The Court of Appeal of Amsterdam decided that all seven parodies on the websites hosted by Punt.nl did not infringe on copyrights of Mercis and Bruna. The Court of Appeal stated that parodies of Milly connected with sex, drugs and terrorism are not 'necessarily illegal'. The Court of Appeal also created a central principle: all cartoons undeniably have a humoristic and ironising nature, although not everyone will find them funny. Therefore, the seven parodies could not be forbidden on the basis of copyright law or trademark law.[148]

The case can be seen to be a significant decision in favour of parody (and the freedom of expression) as opposed to copyright. The themes that were connected with Miffy in the seven parodies, could be seen as offending to the copyrights of Mercis and Bruna. The severity, for example, of the association of drugs and terrorism with a child book character, while taking into account the great contrast between the child book themes and the innocence associated with child books and the themes used in the parodies, could be seen to offend significantly the moral rights of the copyright holders; thus the decision could well be made in the favour of copyright holders. However, the freedom of expression and parody was favoured. I agree with the decision as, even though the themes can be seen as offending (even significantly) copyrights of Mercis and Bruna, favouring the freedom of expression in this case sets an example that parody can be even shocking or disturbing and still be in line with copyright law. Making a decision any differently would probably have a chilling effect on creation of parodies, at least in the case of cartoons and probably other works as well, which would not be a welcome development.

Judging on this case, in the Netherlands parody and the freedom of expression, at least in cartoons, seem to be favoured highly as opposed to copyright. Probably, one could draw an analogy that the favouring in similar cases would be seen also in other visual and textual creative works, such as parody films and books.

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[147] *Guibault* JIPITEC 2011, p. 237-238.
[148] *Guibault* JIPITEC 2011, p. 237-238.

4.1.4 United Kingdom

In the UK there is an express parody exception, which came into force after *Deckmyn* in 1 October 2014[149]. Before this exception was set out there were some earlier cases in the British case law which seemed to demonstrate that a creator of parody would not be responsible for copyright infringement despite having taken a large part of an existing original work to make the parody if they had devoted adequate mental labour to what they had taken 'so as to render her parody an original work'. In *Glyn v Weston Feature Films* it was established that the defendant had devoted adequate mental labour so as to produce an original work.

The same outcome was concluded in *Joy Music v Sunday Pictorial Newspapers* which entailed a parody of a successful song called 'Rock-a-Billy'. The parody, of which purpose was to be in support of Prince Philip's activities who had faced criticism in other areas, employed the words ''Rock-a-Philip, rock' in the way similar to the words 'Rock-a-Billy, rock' in the original work's chorus. There was considered to be no copyright infringement by the creator of the parody as the parody 'was produced by sufficient new work' and thus was not a reproduction of the original work.

However, the view taken on these two cases was discarded in latter case law. In *Schweppes v Wellingtons*, the judge regarded the test (condition) used in *Joy Music* to be incorrect and the sole test was whether the creator of parody had 'reproduced a substantial part of the original copyright work'. This approach was later accepted in *Williamson Music v Pearson Partnership*. The current position (2015) according to *Lee* is that in evaluating whether a parody constitutes an infringement of the original work's copyright, it should be treated the same way as other types of possibly infringing works.[150]

This constituted a major change to the earlier position taken in *Glyn* and *Joy Music*. The latter approach meant that parody had no special position when it comes to copyright issues. It threatened to take the usage of parody as an art form almost to no existence as it is in the core of

[149] *Lee* CREATe Working Paper 2015, p. 112.
[150] *Lee* CREATe Working Paper 2015, p. 112.

parody to take substantial parts of the work for the audience to recognise what work it is parodying. There is no point in making a parody if it is not allowed to take major parts of the original work and if it is vague that it is a parody and essentially what it is parodying.

However, when these cases were decided, the Copyright, Designs and Patents Act 1988 (CDPA) did not include an express statutory exception for parody. After these cases, one such an exception has been added (in force in 1st October 2014).[151] The exception is found in the CDPA 30(1) and states

> "Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work."

Here again we can see the mention of caricature and pastiche in the same context with parody. However, the UK Government decided to not to include no statutory definitions for these terms.[152] There are always risks involved when crucial terms are not defined in the legislation as this can cause insecurity what the law is referring to when it is regulating about a specific issue. However, a definition has been provided in the UK's Intellectual Property Office's (IPO) Guidance leaflet: 'In broad terms, parody imitates a work for humorous or satirical effect, commenting on the original work, its subject, author, style, or some other target.'[153] One must note that Deckmyn already provided a definition for the parody before the provision came into force but the IPO's definition does not seem to add any additional conditions to the ECJ's definition and in this way seems to be unproblematic.

There is no statutory definition for fair dealing, but the IPO mentions in its leaflet factors that have been determined by the courts in assessing whether a particular dealing with a work is considered fair:

1) 'Does using the work affect the market for the original work?'

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[151] *Lee* CREATe Working Paper 2015, pp. 111-112.
[152] *Lee* CREATe Working Paper 2015, p. 113.
[153] *Intellectual Property Office* 2014, p. 8.

2) ‘Is the amount of the work taken reasonable and appropriate? Was it necessary to use the amount that was taken?’[154]

However, it can be argued that the fair dealing condition is especially problematic in regards to the ECJ’s definition as the British parody exception came into force after Deckmyn. As has been argued in this paper, these kinds of additional conditions are not likely to be applicable in the EU Member States.

4.1.5 Comparisons

Out of these four example states, France, the Netherlands and the United Kingdom have set out an express parody exception into their copyright laws as the EU law permits. The only state out of these four that has not set out an express parody exception is Finland. Two states’ (France and the Netherlands) exceptions had come into force before *Deckmyn*, one (the UK) after it. In Finland, the legal academia has considered parody as being a part of conversion done in free association or sometimes falling under the quotation right. This is a different approach to parody compared to the other three states.

There are differences as to the number of conditions that the four countries have for parody. While France has five conditions, Finland has two and the Netherlands and the UK one. Additional conditions that are in the laws of France, the Netherlands and the UK in relation to the conditions in the ECJ definition and similarities between the conditions of parody in the Finnish law and the conditions in the ECJ definition are considered next.

Additional conditions that French legislation has for parody in relation to the ECJ definition, are 1) it has to observe the rules of the genre and 2) it must not cause harm to the author of the original work. The only condition that exists in Dutch law is also an additional one to the ECJ definition (the use must be is in accordance with what social custom regards as reasonably acceptable). In the United Kingdom, the only condition is also an addition to the ECJ definition (it must be done in fair dealing). The conditions that exist in the Finnish law for parody (it has

[154] *Intellectual Property Office* 2014, p. 10.

to be independent and original/new) is similar to the part in the ECJ definition which says that parody must be noticeably different from the original work.

Thus, the French legislation has the greatest number of conditions for parody while Finland, the Netherlands, and the United Kingdom have the least. All except Finland may be seen to have additional conditions to the ECJ definition (as the Finnish condition is very similar to one of the elements in the ECJ definition). It can be then seen that those countries that have set out a parody exception into their legislations may have additional or an additional condition(s) to parody in their legislations. What can also be seen from this comparison is that even though an EU Member State (such as Finland) has not set out a parody exception, it may still allow a parody in other ways.

4.2 Other countries

In this subchapter an overview will be taken on the laws of three non-European countries, Australia, Canada and the USA, to give a comparative perspective how parody and copyright is regulated outside the EU and to give ideas for the development of the EU law. As will be seen, the regulation differs from that of the EU law and the laws of the selected EU Member States.

4.2.1 Australia

In Australian Copyright Act 1968 (ACA), there is an express parody exception which was introduced in the Act in 2006[155]. According to the Part III, Division 3, Section 41A:

> 'A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.'

Furthermore, ACA Section 103AA (as amended) states:

[155] *Mendis and Kretschmer* 2013, p. 24.

> 'A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of parody or satire.'

Thus, a parody that uses a literary, dramatic, musical or artistic work or an audio-visual item is not a copyright infringement if it is done in fair dealing. However, the Australian legislation does not provide a definition for parody (or satire). This has led to criticism from several commentators.[156]

In relation to Section 40, which considers fair dealing for the purpose of research or study, there exists a five-factor doctrine under Section 40(2) to decide when the dealing is considered 'fair'.

These are the following:

> '(1) The purpose and character of the dealing;
> (2) The nature of the work or adaptation;
> (3) The possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
> (4) The effect of the dealing upon the potential market for, or value of, the work or adaptation; and
> (5) In a case where part only of the work or adaptation is reproduced – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.'

However, such a doctrine is not assigned to criticism, review, news reporting or parody. Despite this Australian Parliament has recommended and it is extensively presumed that the doctrine applies to all fair dealing exceptions (nowadays including parody). After all, the exception explicitly mentions that the dealing of the copyright work has to be fair.[157]

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[156] *Spies* 2006, p. 1130.
[157] *Mendis and Kretschmer* 2013, p. 24.

4.2.2 Canada

In Canadian Copyright Act (CCA) there is an express parody exception. According to Section 29:

> 'Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.'

Here one can notice at least two similarities to Australian copyright regulation. First, both parody and satire are explicitly mentioned. Secondly, the article imposes the condition of fair dealing for parody. If parody is done in fair dealing, it does not infringe copyright. Furthermore, there is no definition of parody in the CCA as was the situation with Australian law as well.

In addition to this, there is a provision in the CCA that sets out the conditions for allowing user-generated content which may include parodies that are not considered to be under the fair dealing exception.[158] It contains several conditions for these kinds of works.

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[158] According to Section 29.21:

'It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;
(b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;
(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and
(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.'

4.2.3 The United States of America

In the US copyright law, there is not an express exception for parody[159] but parody may be considered to be under fair use.[160] The USA, then also has the fair dealing doctrine in its law as Australia and Canada do, but the difference is that the USA does not have an express parody exception. According to Lee, the most important judgement on the status of parody under copyright law in the US is the ruling of the US Supreme Court *Campbell v Acuff-Rose Music*[161].[162] In the case, the plaintiff was Acuff-Rose Music, Inc. which owned the rights to the Song 'Oh, Pretty Woman'. A music group called 2 Live Crew created a parody of that song called 'Pretty Woman'. Consequently, Acuff-Rose Music brought legal charges against 2 Live Crew and its record company Luke Skyywalker Records, for infringing copyright. The Supreme Court decided that 2 Live Crew's parody was under fair use.[163]

The Copyright Act of 1976 Section 107 regulates about fair use under which copyright infringement is considered acceptable.

> 'Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.'

When it is considered whether an infringement is acceptable, the same section (107) states four factors to be taken into account:

> '(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;

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[159] *Lee* CREATe Working Paper 2015, p. 115.
[160] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), p. 569.
[161] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
[162] *Lee* CREATe Working Paper 2015, p. 115.
[163] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), pp. 572-573.

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.'

In the case, the Supreme Court justified the decision with taking these four factors into account. With regard to the first factor, the Court stated that if use is commercial of its nature it does not automatically mean that it cannot fall under fair use. If such a rule existed, this rule would contain 'nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research since these activities "are generally conducted for profit in this country"'.[164]

With the second factor, the Court stated that the factor demands acknowledgement of the fact that "some works are closer to the core of the copyright protection than others". This has a consequence of making it harder to show fair use when works closer to the core are copied. However, this factor was of no use in this case or not likely to help a great amount to distinguish between fair use and infringement in parody cases, because parodies very frequently copy well-known works.[165]

With regards to the third factor, the Court stated that when parody parodies a certain original work, it must be able to quote enough material from it, so the target work is recognized. What constitutes this recognizability is its most original or notable features which the audience will certainly recognize. Even if the copied part is said to go to the "heart" of the original work, this fact alone does not mean the copying goes beyond what is enough. By contrast, this "heart" usually is the most recognizable part of the parodied work. In this case 2 Live Crew had copied the opening riff and the first line and those could be considered to go to the "heart" of the original. However, at the same time, they made many different modifications to the original song.[166]

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[164] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), p. 584.
[165] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), p. 586.
[166] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), p. 588-589.

The court stated that the fourth factor

> 'requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . .would result in a substantially adverse impact on the potential market" for the original.'

As to the harm caused to the original work's market in the cases of parody, usually parody is a substitute for the original and they operate in different markets. Therefore, harm is not so easily to be assumed. Even though harm, in the form of decreased demand, could be caused to the original work's market by 'a lethal parody', this kind of harm is not protected under the Copyright Law. The potential market refers to a derivative market that original works have; these are works that the original creators would create in general or license others to create. However, it is unlikely that licenses would be given to works that criticise the original; thus 'there is no protectible derivative market for criticism'. The Court also concluded that harm was not shown to be caused to the potential rap market of the song.[167]

4.2.4 Comparisons

First, if we compare whether there is an express parody exception in the national laws of the countries, we find that Australia and Canada have an exception (as do France, the Netherlands and the UK) but the USA does not (as does not Finland). In the USA, parody is however allowed under fair use.

Next, one can compare the conditions for parody, firstly, between Australia, Canada and the USA and, secondly, their conditions to the conditions of the EU and its Member States. The similarity in the conditions between Australia, Canada and the USA is that parody is allowed if it is under fair use (the USA) or fair dealing (Australia, Canada). If one compares this condition to given examples of EU Member States, only the UK shares this condition (framed as fair dealing). Thus, this condition is something that seems to be common among common law

[167] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), p. 590-593.

countries. When the conditions of these countries are compared to the EU conditions we find that there are no shared conditions.

Furthermore, there is not a definition for parody in any of the three countries, thus the EU law differs in this perspective from the law of those as it does have a definition. One can, however, compare the similarities in the factors that are used to determine when the dealing/use is considered fair between the three countries. In Canada there are no established conditions for what is generally considered fair use (an exception is the provision that considers user-generated content). In Australia and the USA shared conditions are: 1) 'the purpose and character of the dealing' (in the US law also commercial nature or non-profit educational purpose is taken into account while in the Australian factor this is not explicitly mentioned), 2) 'the nature of the work', 3) 'the effect of the use upon the potential market for or value of the work' 4) 'the amount and substantiality of the part copied taken in relation to the whole work'.[168] The conditions are otherwise the same except for the inclusion of commercial nature vs. non-profit educational purpose to the first factor in the US law and one additional condition in the Australian law ('the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price'[169]). In the user-generated content provision in Canadian law, there is also one factor that is similar to the third common factor to Australia and the USA.[170]

[168] Australian Copyright Act 1968 Section 40(2) and the Copyright Act of 1976 Section 107.
[169] Australian Copyright Act 1968 Section 40(2).
[170] Canadian Copyright Act Section 29.21: '(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.'

Table 1: The ways parody is allowed in different countries and the inclusion of a fair use doctrine/fair dealing provision.

COUNTRY	EXPRESS PARODY EXCEPTION	PARODY ALLOWED IN ANOTHER WAY, WHICH?	FAIR USE DOCTRINE/FAIR DEALING PROVISION
EU Member States			
Finland	-	Yes, under a conversion done in free association or quotation right provisions.	-
France	Yes	-	-
Netherlands	Yes	-	-
United Kingdom	Yes	-	Yes
Non-European countries			
Australia	Yes	-	Yes
Canada	Yes	-	Yes
USA	-	Yes, under a fair use doctrine.	Yes

5 DEVELOPMENT PROPOSALS IN REGARD TO THE EU LAW CONSIDERING PARODY AND COPYRIGHT

What are some issues that could be developed within the EU law what comes to the relationship between parody and copyright? When this kind of question is presented one has to take into account from which perspective one is looking at the issue? As has been established, both parody and copyright have a connection to fundamental rights. Parody is a form of freedom of expression and copyright is an aspect of the right to property in the EU law. Parody and copyright can thus be seen to be in conflict with each other. Copyright can also be seen indirectly to advance or encourage the use of the freedom of expression because it enables the authors to receive a compensation for the use of their works. Considering the relationship especially between parody and copyright, if copyright was very strong as opposed to parody, it might encourage some people to make more creative works or increase the number of people making those but if the strengthening was done at the cost of parody, it would likely decrease the number of parodies made and make it more difficult. Thus, the argument of copyright encouraging the freedom of expression only works from the parody perspective if it is not done at the cost of parody. Thus, the relationship between parody and copyright is complex.

Theoretically speaking, from a pure copyright perspective or a right to property perspective, the EU law could be developed in a way that would make it more difficult to make a lawful parody. This could mean that to the definition of parody would be added some additional conditions to the already existing ones. These could be for example ones that were suggested in *Deckmyn* by Vandersteen and Others. If taken to extreme, a possibility for setting out a parody exception could also be removed altogether. This is however very hypothetical thinking and arguably very few people would be supporting this as this would effectively remove a major form of freedom of expression from use. This would be unacceptable in a democratic society which needs a variety of means of criticism for it to function properly. Secondly, it would be detrimental from the perspective of comprehensiveness of arts, as one significant art form would be banned. However, from a copyright perspective it would be beneficial to add additional conditions to parody and presumably there are many people in the creative industries that would welcome this kind of development.

From the perspective of freedom of expression or parody, the parody exception is already a positive development step. It is important to acknowledge in the EU law the right to set out a parody exception; this might increase the number of parody exceptions set out in the EU Member States. It is also significant that the European Union gave a uniform definition for parody. This way those states that have set out the exception have to use the same conditions to consider whether a parody is lawful or not. Furthermore, there are no surprises in regard to the conditions of parody when making a parody of a work made in a state which has set out the parody exception. This increases legal certainty which is one of the general principles of the EU law[171] and can encourage people to make more parodies of works which are made in another EU country further promoting the use of the freedom of expression.

What could be developed, then, in the EU law from the perspective of freedom of expression or parody? At the moment, the EU has only established the right for the EU Member States to set out a parody exception; it is voluntary. Here lies the development possibility; the EU could set it mandatory for the Member states to set out the parody exception. Why would this be a welcome approach? It would increase the legal certainty in the EU and uniformity among the laws of the EU Member States. At the moment, one has to find out first how parody is regulated in a country whose work one wants to use for parody. This brings extra work on the behalf of a potential parodist and might discourage the making of parodies. However, if it was mandatory for all the EU Member States to set out the parody exception, this would make making parodies an easier process and a parodist would know for certain what the conditions of parody are.

Furthermore, the ECJ definition of parody can be argued to be relatively well-formulated and as such one which is acceptable to preserve as the definition even if the parody exception were made to be mandatory. The definition is based on the usual meaning of parody which gives it credibility and makes it perhaps easier to accept even if one does not regard parodies positively. It is also wide enough and not too restrictive[172] from the perspective of parody to enable the purpose of the parody exception to be fulfilled; that is to enable effective making of parodies.

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[171] C-183/14 *Salomie and Oltean* (2015).
[172] It would arguably be too restrictive, if the conditions that Vandersteen and Others asked the ECJ to give an opinion to, were to be added to it.

Another question that could be presented in the light of the overview on the legislations of Australia, Canada and the USA which all have either a fair use doctrine (USA) or a fair dealing provision (Australia and Canada) in their laws: should the EU law adopt a fair use doctrine or a provision from the perspective of parody? *Tapio* argues that it would be beneficial to add a fair use doctrine to the European copyright law. He argues that continental European copyright law has been slow in reacting to fast changes. Also, the possibilities for courts to find new solutions to these changes are limited. He also argues that flexibility and reaction sensitivity are needed from the exceptions of copyright because of the technological developments and because of natural expansiveness of copyright. A fair use doctrine similar to the USA would bring this flexibility to European copyright law. He argues that then courts could take into account competition and fundamental rights as well. Furthermore, European fair use would help to bring copyright exceptions closer together on the international level.[173]

From the perspective of parody, would this fair use doctrine or provision[174] be beneficial to adopt into the EU law? The ECJ definition is already, as was mentioned, already relatively broad (if we assume the humour condition to refer to a humorous intent) and does not set too many conditions for parody. Parody only has to evoke an existing work but be distinctly different and contain humour or mockery. Thus, it already allows flexibility in the case new forms of parodies appear; parody does not have to be in a specific form (for instance a technological format). However, as the ECJ definition is based on its usual meaning we could argue that if its usual meaning were to change, then a fair use doctrine would be faster to react to this. In this regard, I would argue that a fair use doctrine could be a beneficial addition to the EU law. However, one could argue that parody's usual meaning is not very likely to change for many years as these kinds of changes take a long time to happen. However, in the case this kind of change were to happen, it would be beneficial for a fair use doctrine to exist. From the perspective of other copyright exceptions as well, a fair use doctrine could naturally be useful as well as it would allow greater flexibility, as Tapio argues. Thus, a fair use doctrine could be something that could be put under consideration to add to the EU law.

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[173] *Tapio* Suomalaisen Lakimiesyhdistyksen Aikakauskirja 2013, p. 41.
[174] These are referred together as 'a fair use doctrine' from this point onwards.

6 CONCLUSION

The relationship between copyright and parody in the EU law is a very fascinating one. They are both strongly linked to fundamental rights, parody to the freedom of expression, copyright essentially to the right to property. Thus, there exists tension on a deep level between them.

In the EU law, the relationship between parody and copyright is essentially regulated in the InfoSoc Directive and in *Deckmyn*. The InfoSoc Directive regulates that a parody exception to the rights covered in Articles 2 (right of reproduction) and 3 (right of communication to the public of works and right of making available to the public other subject-matter) can be set out. Deckmyn was perhaps the most important decision of the ECJ from the perspective of parody and copyright. It established that parody is an autonomous concept in the EU law and provided a definition for parody in the EU law. According to the definition parody 'must evoke an existing work while being noticeably different from it, and - to constitute an expression of humour or mockery.' It was argued in this paper that 'humour' refers to a humorous intent as opposed to a humorous effect, which is more in line with the freedom of expression.

Furthermore, it was argued that adding new conditions on the top of the conditions of the ECJ definition is not likely to be possible by the Member States as this would, for example, reduce the harmonization effect of the ECJ definition. Some Member States still have additional conditions for parody that existed already before Deckmyn. Applying them after Deckmyn can be seen to be problematic and it is uncertain whether this would be lawful.

France, the Netherlands and the UK have set out a parody exception, while Finland has not where parody is allowed under a conversion done in free association or quotation right provisions. Out of the other countries, in Australia and Canada there is an express parody exception in their legislations, while in the USA there is not where parody is allowed under a fair use doctrine. Australia and Canada have as a condition for parody a comparable fair dealing condition.

It will be interesting to see how the relationship between parody and copyright in the EU law will develop in the future. Will a mandatory parody exception be set out? Or will the development turn in some point to favour more of the side of copyright? These are interesting questions and ones which the answers to will be left to see. However, it is clear that the strong tension between parody and copyright in the EU law will be left to stay because of their connection to fundamental rights.