

To what extent is the parody exception truly harmonised? An empirical analysis of the Member States' case law post-*Deckmyn*

*Estelle Derclaye

Abstract

Over the course of the last three decades, the European Union has adopted 11 legislative instruments in the field of copyright to harmonise many of its aspects and the Court of Justice of the European Union has over the years been very active in interpreting this copyright acquis, further harmonising it. A lot has been written on the copyright acquis and the Court's case law, criticising it and proposing further solutions. Much less has been written on whether the courts of the Member States have, down the line, correctly applied the Court's case law. This article aims to fill this gap in relation to the parody exception. It shows that since the only CJEU decision on parody (*Deckmyn v Vandersteen*) was decided, a sizeable number of national courts have not applied it well. The article proposes solutions to this state of practical disharmonisation.

Introduction

Since the 1990s, the European Union has adopted an impressive number of directives and regulations in the field of copyright to harmonise many of its aspects.¹ And since then, the Court of Justice of the European Union has been very active in interpreting this copyright acquis, further harmonising it. A lot has been written on the copyright acquis and the CJEU case law², criticising it and proposing further

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¹ There are 11 directives and one regulation namely Directive 2009/24/EC on the legal protection of computer programs [2009] OJ L 111/16; Directive 93/83/EEC on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248/15; Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28; Directive 2006/116/EC on the term of protection of copyright and certain related rights (codified version) [2006] OJ L 372/12; Directive 96/9/EEC on the legal protection of databases [1996] OJ L 77/20; Directive 2001/29/EC on the Harmonisation of certain aspects of copyright and related rights in the information Society [2001] OJ L 167/10; Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art [2001] OJ L 272/32; Directive 2012/28/EU on certain permitted uses of orphan works [2012] OJ L 299/05; Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L 84; Directive (EU) 2017/1564 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 [2017] OJ L 242; Regulation (EU) 2017/1563 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 [2017] OJ L 242; Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130.

² For a selection, see Lucie Guibault et al. (Part I) and Guido Westkamp (Part II), *Study on the Implementation and effect in Member States' laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (Final Report, 2007); Estelle Derclaye (ed.), *Research Handbook on The Future of EU Copyright* (Cheltenham: Edward Elgar, 2009); Christophe Geiger (ed.), *The Contribution of Case Law to the Construction of Intellectual Property in Europe* (Paris: Litec (LexisNexis),

solutions. Much less has been written on whether the courts of the Member States have, down the line, correctly applied the CJEU case law. This article is a first step in filling that gap and the first resulting from a bigger research project which empirically analyses the extent of (dis)harmonisation at the level of national courts of the Member States (and the UK) of EU copyright law's limits; namely protection requirements, duration, the harmonised economic rights, the exhaustion principle, exceptions/limitations to economic rights, protection of technological protection measures and database sui generis right.³ This discussion analyses the decisions by national courts of a representative sample of 17 Member States of the EU⁴, on the parody exception after the seminal CJEU decision in *Deckmyn*⁵ and shows how unharmonized it has been in its application.

One of the main hypotheses in this research is that in areas where the CJEU case law is clear,⁶ national courts will be more likely to apply the CJEU case law correctly. And conversely in situations where the case law is confusing owing to a single decision, which is either unclear or not detailed enough, or a series of relatively contradictory decisions (e.g. right of communication to the public), the national courts will more likely misapply the CJEU case law. The third hypothesis, whereby it is expected that there will be more confusion and disharmony in the national case law in controversial areas, but clear case law (such as in relation to three-dimensional functional works where some Member States had a higher level of originality), is confirmed.⁷ If this state of affairs is similar in (relatively) clear areas of the copyright *acquis*, it does not bode well for "practical harmonisation" i.e. at the lowest level where national courts and especially courts of first instance (CFIs) decide. The research already reveals⁸ that the test of infringement, which has been settled clearly and early on in the *Infopaq* decision⁹, is not applied consistently i.e. some Member States sticking to their traditions (like France with its similarities rather than differences test¹⁰) or adopting an overall impression test especially in the field of three dimensional functional works (e.g. some courts in Germany¹¹ and Finland¹²). This article shows that, in the second scenario (a decision lacking the necessary detailed guidance such as *Deckmyn*), a sizeable number of Member States' courts misapply it and sometimes quite profoundly. This confirms the hypothesis in relation to the parody exception.

The first part of the discussion looks at the EU copyright *acquis* on the parody exception. This is followed by an explanation of the article's methodology. The third section explores the decisions where the national courts have applied the *Deckmyn* ruling correctly while the fourth section discusses those which did not. The final section compiles the descriptive statistics on the state of compliance with the

2013); Eleonora Rosati, *Copyright and the Court of Justice of the European Union* (Oxford: Oxford University Press, 2019).

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⁴ We chose both "young" and "old" Member States (i.e. those who have acceded to the EU at the start such as France and Belgium and those who acceded more recently such as Hungary and Poland), from all parts of the EU, i.e. south, north, east and west and some with big populations and others with smaller populations.

⁵ *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* (C-201/13) EU:C:2014:2132.

⁶ E.g. a single clear and detailed case, or a series of clear and detailed non contradictory cases like those on the sui generis right.

⁷ Estelle Derclaye, "The Status of Three-Dimensional Functional Works Post-*Cofemel*. An Empirical Analysis of the Member States' Case Law Which Had an Artistic Merit Requirement", in T. Jäger, F. Thouvenin, A. Peukert and C. Geiger (eds), *Kreation / Innovation / Märkte – Creation / Innovation / Markets – Festschrift Reto M. Hilty* (Springer Nature), forthcoming 2023.

⁸ Estelle Derclaye, "The Status of Three-Dimensional Functional Works Post-*Cofemel*. An Empirical Analysis of the Member States' Case Law Which Had an Artistic Merit Requirement", in T. Jäger, F. Thouvenin, A. Peukert and C. Geiger (eds), *Kreation / Innovation / Märkte – Creation / Innovation / Markets – Festschrift Reto M. Hilty* (Springer Nature), forthcoming 2023.

⁹ *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECR I-6569.

¹⁰ *APM Monaco SAM v Societe Swarovski Crystal Online* (Court of Appeal of Paris, 23 March 2021).

¹¹ See e.g. first instance court of Duesseldorf, 14th Chamber, 17 September 2019, 14c O 225/17.

¹² See e.g. *Aarnio Design Oy v Lähdesmäki Oy Ilmajoki* (Court of First instance of Helsinki, 28 January 2020, MAO:25/20).

CJEU case law overall, by court level and per country, comments on the reasons for non-compliance and concludes with suggestions to remedy the current state of disharmony on the interpretation of the parody exception.

EU copyright acquis on the parody exception

The parody exception is laid out in article 5(3)(k) of the Information Society Directive (2001/29). It simply states that: “Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases ... use for the purpose of caricature, parody or pastiche.” The wording is extremely broad with no conditions attached. The reference to “use” means reproduction and communication/making available to the public as the exception applies to these rights which are set out in articles 2 and 3 of the Directive.

The exception has been interpreted once by the CJEU in the *Deckmyn* case.¹³ In this case, the defendant, Mr J. Deckmyn, a member of a Belgian far right political party, used the album cover of a comic book drawn by Mr Vandersteen to create the cover page of a calendar for the said political party. Mr Deckmyn replaced the flying character dropping coins towards people with the Mayor of the city of Ghent dropping coins to people of colour and people wearing with veils. The two works can be seen below.¹⁴



In the case, the CJEU held that the concept of parody is an autonomous concept of EU law as the Directive does not refer to the law of the Member States.¹⁵ Because the Directive does not define parody, it needs to be given its usual meaning in everyday language, the context in which the word “parody”

¹³ (C-201/13) EU:C:2014:2132.

¹⁴ The works were both once upon a time reproduced in the judgment but no longer appear on the CJEU's website. The parody is also reproduced in the Advocate General's opinion (EU:C:2014:458) and the two works are also reproduced in Sabine Jaques, “Are national courts required to have an (exceptional) European sense of humour?” [2015] E.I.P.R. 134.

¹⁵ *Deckmyn* (C-201/13) EU:C:2014:2132, [14]-[17].

occurs, and the purposes of the rules of which it is part.¹⁶ To be avoid copyright infringement, a parody must fulfil two conditions. First, it must evoke an existing work while being noticeably different from it and second, it must constitute an expression of humour or mockery.¹⁷ In addition, as a sort of third condition, the application of the parody exception:

“must strike a fair balance between, on the one hand, the interests and rights of [copyright holders], and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody”.

To strike this balance, all the circumstances of the case must be taken into account.¹⁸ In doing so, when relevant (as it was in the *Deckmyn* case), the principle of non-discrimination based on race, colour or ethnic origin set out in Article 21(1) of Charter of Fundamental Rights should be taken into account as the copyright holder has in principle a legitimate interest in ensuring that the work protected by copyright is not associated with a discriminatory message.¹⁹ The CJEU also held that it is irrelevant, and therefore not conditions for the exception to be made out, that the parody:

“The concept of ‘parody’...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.”²⁰

In addition, the Advocate General, in his Opinion in the case, distinguished between a parody “directed at or concerned with the original work (“parody of”)” and “the original work parodied is merely the instrument of an intention aimed at a third-party individual or object (“parody with”)”²¹ and said that he thought the two concepts are comprised in the EU concept of parody.²² In the German *Auf Fett getrimmt* case²³ and the *Shazam* case decided by the Intellectual Property Enterprise Court of England and Wales²⁴, the courts said it was clear from the CJEU decision in *Deckmyn* that both types of parody are encompassed within article 5(3)(k) of the Directive.²⁵

This is arguably clear from the CJEU decision itself because the court states that it is irrelevant that the parody should relate to the original work itself. In addition to *Deckmyn*, in a trilogy of cases all involving exceptions, the CJEU has held that Member States cannot create exceptions in addition to those listed in Article 5 of the Directive, in other words, that list is exhaustive.²⁶ This is important as national courts had sometimes resorted to relying on the right to freedom of expression to exempt copyright infringement where the conditions of an exception were not otherwise satisfied. They can no longer do so. National courts, therefore, should no longer accept arguments based solely on Article 11 of the

¹⁶ Ibid., [19].

¹⁷ Ibid., [20].

¹⁸ Ibid., [27]-[28].

¹⁹ Ibid., [30]-[31].

²⁰ Ibid., [33].

²¹ *Deckmyn* (C-201/13), EU:C:2014:458, [61].

²² Ibid., [64]-[65].

²³ (2016) ZUM 985, 28 July 2016 rejecting claimant’s appeal (at [35]). For commentary, see Henrike Maier “German Federal Court of Justice Rules on Parody and Free Use” (2017) 12 J.I.P.L.P. 16-17.

²⁴ *Shazam Productions v Only Fools The Dining Experience et al* [2022] EWHC 1379 (IPEC), [170].

²⁵ Back in 2015, Rosati had argued that it is plausible that the CJEU embraced the Advocate General’s opinion on parodies of and with. See Eleonora Rosati, “Just A Laughing Matter? Why the Decision in *Deckmyn* is Broader than Parody” (2015) C.M.L.R. 511, 516.

²⁶ *Pelham GmbH & Ors v R. Huetter & F. Schneider Esleben* (C-476/17) EU:C:2019:624, *Funke Medien v Germany* (C-469/17) EU:C:2019:623 and *Spiegel Online GmbH v. Volker Beck* (C-516/17) EU:C:2019:625 (these cases will be referred to as “the trilogy”).

Charter of Fundamental Rights (or Article 10 of the European Convention of Human Rights) as any balance between copyright and expression is internal to the parody exception itself.

Whilst the CJEU *Deckmyn* decision appears at first sight to set out clear guidelines, it emerges quite quickly that it is not detailed enough for national courts to apply it uniformly. First, it does not define “humour” or “mockery” neither does it states whether it each has a European standard or a national one.²⁷ It also leaves a quite generous margin of discretion to Member States courts when they balance the interests of right holders and users.²⁸ It is nevertheless constrained by the Charter of Fundamental Rights. So courts could not accept the application of the parody exception when the parody is discriminatory for instance but otherwise, courts can exercise their judgment without many shackles. In a way, it is normal, as many aspects of a parody case will turn on the facts. It is not unusual for the CJEU to add that courts need to take all the circumstances of the case into account when making their decision.²⁹ However, the Court has not shied away from giving a non-exhaustive list of criteria to do so.³⁰ Another unclear aspect of *Deckmyn* is whether, the parody has to have a humorous or mocking intent and effect, as the Advocate General had argued, or just intent?³¹ It is broader if it includes intent only. and also more in line with freedom of expression.³² If it also needs to have an effect, then a court will need to consider whether the average person (or some amount of persons) in a particular society find it funny. As we shall see, this issue has already troubled some national courts in the aftermath of *Deckmyn*.³³

Elenora Rosati also wonders how the parody can be noticeably different from the parodied work but not be even slightly original.³⁴ However, as we shall see below in the *Aslan* case³⁵, there are cases where just adding a background and only showing part of the parodied work has been found to be a parody. Arguably, this is not very original. Ed Baden-Powell and Juliane Althoff suggest in relation to the balancing of interests that “[p]erhaps it may also be necessary to assess whether the parody borrows too

²⁷ Unlike the Advocate General who had left to Member States the appreciation of what is mockery, para. 69. See on this, Eleonora Rosati, “CJEU Rules on Notion of Parody (But It Will Not Be Funny for National Courts)” (2015) 10 J.I.P.L.P. 82; Ed Baden-Powell and Juliane Althoff, “The Parody Exception: Having the Last Laugh” (2015) 26 Ent. L.R. 16, 18.

²⁸ See Sophie Arrowsmith, “What is a parody? *Deckmyn v. Vandersteen* (C-201/13)” [2015] EIPR 55, 58; Bernd Justin Juette, “The Beginning of a (Happy?) relationship: Copyright and Freedom of Expression in Europe” [2016] E.I.P.R. 11, 20; Daniel Jongsma, “Parody after *Deckmyn* - A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and the Netherlands” (2017) 48 IIC 652, 679. This has prompted some to worry that courts may use this margin of discretion to censor parodies especially if they use as a standard, when deciding if the parody is offensive, the author and not society at large. See Jacques, “Are national courts required to have an (exceptional) European sense of humour?” [2015] E.I.P.R. 134, 137. As we shall see below, this has not (yet) happened.

²⁹ Including in relation to other intellectual property rights, see e.g. *Parfums Christian Dior v Evora* (C-337/95) [1997] ECR I-6013, [48] (trade mark law); *Doceram v Ceramtec* (C-395/16), EU:C:2018:172, [36]-[38] (design law).

³⁰ *Doceram*, *ibid.*

³¹ Arguing for such latter interpretation, see Jongsma, “Parody after *Deckmyn* - A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and the Netherlands” (2017) 48 IIC 652, 672; Jacques, “Are national courts required to have an (exceptional) European sense of humour?” [2015] E.I.P.R. 134, 136; Eleonora Rosati, “Just A Laughing Matter? Why the Decision in *Deckmyn* is Broader than Parody” (2015) C.M.L.R. 511, 518.

³² *Ibid.*, p. 518-519.

³³ See *Auf Fett getrimmt* (2016) ZUM 985, 28 July 2016.

³⁴ Rosati, “CJEU Rules on Notion of Parody (But It Will Not Be Funny for National Courts)” (2015) 10 J.I.P.L.P., 82.

³⁵ *Aslan v Le Point* (Cass. Civ. I, 22 May 2019) (2019) Communication Commerce Electronique, Comm. no. 47, comment Caron; (2019) *Propriétés Intellectuelles*, no. 72, obs. Bruguière.

many elements from the original to deprive the owner of remuneration from the adaptation.”³⁶ As we shall also see below, some courts have used a similar factor to decide cases.³⁷

Methodology

This section focuses on how the parody cases were identified, rather than the methodology used for the bigger project. Nevertheless, for context, some of the latter needs explaining. The sample for the bigger project consists of the 50 most recent court decisions on substantive copyright law’s limits (as stated above at the start of the introduction) handed down by the civil³⁸ courts at all levels (first instance and any appeal) in Belgium, Cyprus, the Czech Republic, Germany, Denmark, Finland, France, Greece, Hungary, Ireland, Italy, Malta, Poland, Portugal, Romania, Slovakia and Spain. One of the factors why some countries have more copyright case law per year than others is because they have a larger population. It therefore means that for some, the decisions date back to a much earlier date (Ireland) while for others, they go only as far back as 2019 (Germany). And for some countries it was not possible to identify 50 decisions (e.g. Malta only has had eight since it joined the EU). Within these decisions, any cases involving the parody exception post-*Deckmyn* were identified. The cut-off date is 21 April 2021. Nine of these 17 countries have the parody exception namely Belgium, the Czech Republic, Germany, France, Malta, Romania, Slovakia and Spain.³⁹ The copyright legislation of all but one of the relevant Member States show that they have correctly implemented the Directive⁴⁰ so any deviation from the *acquis* must come from the courts. Italy does not have the parody exception in its statute but its courts have created one.⁴¹ However, as we shall see below, the Italian approach does not comply with the Directive.

To collect the judgments, publicly accessible legal databases in the 17 Member States were used as well as Darts-IP.⁴² For Ireland, Bailii.org, Lawtel and Westlaw were used. Westlaw was also used to find national decisions from EU Member States reported in relevant academic journals, namely, the European Intellectual Property Review (E.I.P.R.) and the International Review of Intellectual Property and Competition Law (I.I.C.). In Italy, some law reviews where decisions are published were also consulted. In Germany, Beck Online was also searched.

The gathering of the decisions was undertaken by research assistants,⁴³ who were all given the same detailed instructions. Where necessary the judgments were translated into English using DeepL or (less often) Google Translate and the assistants checked the translations. Out of the total number of decisions (777) from the 17 Member States, most related to protection requirements,⁴⁴ the right of reproduction and of communication to the public/making available to the public. There were fewer cases dealing with the exceptions to economic rights. There were almost no cases on the right of rental and public lending, the legal protection of technological protection measures, the term of protection and little on

³⁶ Baden-Powell and Althoff, Baden-Powell and Julianne Althoff, “The Parody Exception: Having the Last Laugh” (2015) 26 Ent. L.R. 16, 18.

³⁷ See e.g. *Société Moulinsart v Xavier Marabout* (Court of First instance, Rennes, 10 May 2021, n°17/04478) below.

³⁸ Therefore, this excludes criminal and administrative cases.

³⁹ While Cyprus, Denmark, Finland, Greece, Hungary, Ireland, Poland and Portugal do not currently have the parody exception, they must now at least implement one in relation to the application of article 17 of the Copyright in the digital market directive (Directive (EU) 2019/790). Since the implementation of the directive came after the cut-off date, any potential decisions from those countries is not in the dataset.

⁴⁰ German Copyright Act, art. 51a; Belgian Copyright Act, art XI.190 (10); French Intellectual Property Code, art. L 122-5, 4; Spanish Copyright Act, art 39; Copyright, Designs and Patents Act 1988, s. 30A; Czech Copyright Act, s 38g.

⁴¹ A case law-created exception can be treated as implementation of the Directive.

⁴² Funding to subscribe to the Darts database (<https://clarivate.com/darts-ip>) was obtained from the ESRC IAA.

⁴³ The assistants were all law students or legal professionals with training in intellectual property law. They were all native or fluent speakers in the language of the decisions they were assigned to work on with excellent command of English.

⁴⁴ This was mostly on originality rather than the idea/expression dichotomy.

the right of distribution and principle of exhaustion. Only 1.5 percent concern the parody exception. With such a small sample it is only possible to perform descriptive statistics.

There are some short, some medium-length and some long decisions. This follows the many different judicial traditions across the Member States. Inevitably, therefore, any analysis is often less easy when a decision is laconic. For instance, French Supreme Court⁴⁵ decisions are very short and sometimes very little can be gleaned from them; whereas at the opposite of the spectrum, the German highest courts (the federal court and the constitutional court) often have very detailed long decisions. Danish decisions are typically very detailed on the facts, but the ruling is often only one or two paragraphs long.

When analysing these decisions, by compliant with the CJEU case law, it is meant that the national court neither contradicts the letter nor the spirit of the *acquis* (i.e. if it adds to the CJEU's interpretation, it does not contradict it). Conversely, a non-compliant decision contradicts the letter or the spirit of the decision (so if it adds to it, it contradicts it). Non-compliant decisions will be those which, for instance, apply different conditions (or not all the conditions) for the parody exceptions than those set out by the Directive or by the court in *Deckmyn*. This classification between compliant and non-compliant decisions also provides yet another interesting statistic on the state of practical harmonisation in the EU.

The analysis covers national judgments handed down after the date of the *Deckmyn* decision, namely after 3 September 2014, until 21 April 2021. It also takes into account the additional CJEU rulings handed down on 29 July 2019 (*Pelham*, *Funke Medien* and *Spiegel Online*). In total, since *Deckmyn*, there have been 13 decisions on parody across seven of the nine Member States reviewed.

The following findings readily show the amount of disharmony at national court level. There were four supreme or constitutional court decisions, two court of appeal decisions and seven decisions from first instance courts. These numbers do not include the lower court decisions where an appeal was heard. In the case before the Czech court the case was remitted to the lower court but there was no decision as such on the merits. Overall, in five cases, the parody was held not to be infringing and in seven, it was found to infringe. Eight decisions (66.6%) comply with *Deckmyn* while four (33.3%) do not. At the level of supreme and constitutional courts, the French supreme court applies CJEU case law correctly in one case but in the second one, while it applies the right criteria, the balance of interests could arguably have gone the other way, while the Bundesgerichtshof (German Federal Court) applies it well. The Czech constitutional court remitted a case back for retrial on the grounds that freedom of expression had not been taken into account properly. It is however not entirely clear whether the court means that the freedom of expression has not been taken into account inside the parody exception or outside of it. One court of appeal decision in the sample (France) misapplies the CJEU case law. Among the CFIs, three misapply CJEU case law (one French and two Italian) while the other four comply (two French and two Belgian). Therefore, the hypothesis put forward in the introduction appears to be confirmed.

As we shall see in the third and fourth sections, while the decisions led to correct results on the facts, the non-compliant ones did so for the wrong reasons. The main problems the cases reveal are, first, that courts have to decide whether to apply an intent or effect humour test and in relation to the effect test, they also have to decide who is the target audience. They diverge on this point.⁴⁶ Secondly, in relation to the balance of interests, as the CJEU left a wide margin of maneuver to national courts, some have used it⁴⁷ while others have not. Therefore, in future the criteria used by national courts may differ, leading to inconsistent results. Third, one case shows an issue that the *Deckmyn*'s criterion of 'noticeably different' leaves unresolved, namely what if a parody is clearly mocking or humorous but uses a work without changing it in a context which is different? Fourth and fifth, some French courts have used a notoriety criterion to decide whether a parody is allowed or relied on Article 10 of the

⁴⁵ French supreme court refers to the Court of Cassation throughout the article.

⁴⁶ E.g. German case *Auf Fett getrimmt* (2016) ZUM 985; *Fait d'hiver* (Court of First Instance, Paris, 3rd ch., 1st section, 8 November 2018, case n. 15/02536), below.

⁴⁷ E.g. *Société Moulinsart v Xavier Marabout* (Court of First instance, Rennes, 10 May 2021, n°17/04478).

European Convention of Human Rights as an external limit to copyright in addition of the parody exception. Both contradict the CJEU case law.

In the following sections, the decisions are divided in two groups: those applying the CJEU case law correctly and those misapplying it. The only decision which is not grouped is that of the Czech constitutional court as it does not decide on the merits. In this case, Greenpeace used the claimant's audiovisual works to criticise the claimant's use of fossil fuels. In short, Greenpeace retained the soundtrack of CEZ's audiovisual works and occasionally replaced the original image with shots of damaged, dry and deforested forests and forest fires, accompanied by the description:

“CEZ coal fumes are damaging trees. And they are causing climate change that is drying up forests. The result is forest fires.”

The case went to the constitutional court, which annulled the decision of the lower courts because they did not explain why the restriction on freedom of expression was necessary:

“The [lower] court assessed the plaintiff's use of the work as an interference with copyright without considering the impact of the interim measures on the plaintiff's freedom of expression. By doing so, the courts effectively prejudiced the final outcome of the dispute, as the applicant's freedom of expression was effectively prevented following the contested decisions.”⁴⁸

The court's discussion seems to imply that the courts below did not take freedom of expression into account while considering the parody exception. This suggests it thought the freedom needed to be protected within it and not outside it. Nevertheless, this is not entirely clear as the decision is rather laconic and it has not been possible to find the lower court decisions to confirm it either way.

Let us now turn to the compliant decisions.

Compliant decisions

One of the most detailed decisions in the sample is that of the German Federal Court of Justice in the *Auf Fett Getrimmt* case.⁴⁹ This case concerned a photograph of a famous actress which the defendant, to parody it, photoshopped to make her look fat.

⁴⁸ *Greenpeace Czech Republic v CEZ* (Czech Constitutional court, 31 March 2020, I.ÚS 3169/19). Note that all translations in English from the national courts' decisions were done either with DeepL or Google Translate and the extracts reproduced here too.

⁴⁹ See *Auf Fett getrimmt* (2016) ZUM 985, 28 July 2016, above.



Claimant's photograph of Bettina Z.⁵⁰

Photoshopped photograph by defendant

Initially, the court goes into a rather long explanation of the free use exception in German law (a sort of “catch-all” exception) but then says that as this is a parody case EU law and *Deckmyn* must instead be followed. It is interesting because this case predates the 2019 CJEU trilogy of cases and the court already implicitly acknowledges that the free use exception, which is not in the list of permitted exceptions in Article 5 of the Directive, cannot be applied to the case at hand.⁵¹ The court clearly complies with *Deckmyn* but also goes further by *adding* the effect criterion and stating that the parody does not have to be recognised as a parody by everyone. Rather, says the court:

“whether a parody exists in an individual case is to be judged essentially objectively according to whether this type of anti-thematic treatment is recognizable to those who are familiar with the parodied work and who have the intellectual understanding required to perceive the parody⁵².”

Secondly, for the court, the balance of the copyright holder’s and user’s interests is not meant to be a “political correctness tool”. The important aspect is whether the author (not right holder as in the CJEU decision) has a legitimate interest in his work not being associated with such an infringement. This echoes what the Advocate General had stated in his opinion.⁵³

In two decisions in 2015 and 2019 (both pre-trilogy), two Belgian first instance courts also applied the *Deckmyn* decision correctly, both rejecting the application of the defence.

In the first, the claimant, a reputable professional photographer took a photo of Jean-Marie Dedecker, a Belgian politician during the 2010 elections.⁵⁴ The defendant, a reputable painter, made a painting entitled “A Belgian Politician” which reproduces the photograph. The defendant said his work was different because the background was different. He also claimed that the parody element comes from the title of his painting “A Belgian politician”, as it shows the deteriorating state of Belgian politics.

⁵⁰ Note that procedural rules in Germany mean that parties and most other persons appearing in court decisions are anonymised hence why we cannot credit the photographs here. The art works were published in (2017) 48 I.I.C. 474–480.

⁵¹ After the 2019 CJEU trilogy, Germany removed the free use exception from its copyright act.

⁵² Paragraph [33].

⁵³ Paragraph [85].

⁵⁴ *Katrijn Van Giel v. Luc Tuymans* (Civ. Antwerp, 15 January 2015) (2015) 2 Auteurs & Média 184 (). The case is further referred to as “A Belgian politician”.

The court rejected the parody defence because the painting is almost identical (except the background). The reasoning of the court is very short, perhaps because it was a rather clearcut case of appropriation art.



Claimant's photograph of J.-M. Dedecker⁵⁵

Defendant's painting "A Belgian politician"⁵⁶

In the second case, Studio 100 sued Greenpeace for infringement of the copyright in its character Maya the Bee, which it uses on meat products aimed at children.⁵⁷ Greenpeace was advocating eating less meat to reduce climate change. To criticise Studio 100, which produces meat products, Greenpeace produced an advert (film) depicting Maya the Bee smoking cigarettes, (Studio 100 does not make Maya the Bee cigarettes). The advert clearly ends by stating that while those cigarettes do not exist, some Maya the Bee products harm children. The advert, which was made available on the internet, had the logo of Greenpeace and a link to click to find out more. The reproductions below show Maya the Bee (original work) and then the Greenpeace advert depicting the bee with the cigarettes and various other extracts from Greenpeace's ad.



Above the parodied work, Maya the Bee. Source: Judgment.

⁵⁵ Source: <https://www.theguardian.com/artanddesign/2015/jan/21/luc-tuysmans-katrijn-van-giel-dedecker-legal-case>

⁵⁶ Ibid.

⁵⁷ *Studio 100 v Greenpeace Belgium* (Commercial Court of Brussels, A/18/03379, 4 April 2019). The decision was upheld by the court of appeal.



Above four pictures: Greenpeace's parody. Source: Judgment.

Translation: second image, Look quickly on Mayalight.be. Third and fourth images: Maya cigarettes do not exist. But there are products by Maya which can damage your children's health.

The Commercial Court of Brussels held, referring to *Deckmyn*, that the two first conditions were fulfilled but not the third, namely the balance tilted in favour of Studio 100. The court, in a meticulous judgment, discussed each condition at length. It was clear that Maya was recognisable but portrayed differently in the advert. Secondly, Greenpeace had the intention of making fun of Studio 100's products or sales methods. The fact it was shocking was normal in a work of ridicule or satire.⁵⁸ As to the balance of interests, it is worth citing the passage in which the court convincingly argues that:

"Studio 100 has an interest in protecting its good name and its (intellectual) property rights and has an interest in not seeing its entire company directly associated with a particularly harmful product such as cigarettes because of the sale of a potentially harmful product (meat) from its range. In the current case, that reputation and those rights were disproportionately affected by the fact that Greenpeace (i) opted for a format in which is advertised an undeniably particularly harmful product ("real cigarettes"), the sale of which to minors is prohibited by law in Belgium and for which advertising is almost completely prohibited; (ii) spread the ad through a mass medium such as the Internet, taking insufficient account of the obvious reach among young children, even if that was not the target audience. The message at the end of the spot completely misses them because they can't read yet or not sufficiently, because they won't be interested in the end credits of a cartoon anyway, or because they won't click through to scientific research results, which they certainly won't understand; and (iii) reproduced and incorporated the existing animation images almost unchanged into its ad, giving the impression that the ad was a Studio 100 production. Consequently, most children and some adults will only remember the 'positive' image of their favorite smoker character. The parody made by Greenpeace is an imperfect parody: Greenpeace may have intended to make fun of, but it did not achieve that result with a significant and important part of the public, on the contrary. Thus, Greenpeace failed to properly strike a balance between its right to freedom of expression and the interest of a commercial enterprise to maintain its carefully constructed child-friendly image. The

⁵⁸ Ibid., [20]-[21].

foregoing implies that Studio 100 can oppose the communication of the Maya the Bee ad to the public on the basis of its copyrights.”

It is interesting to see here that the court stresses that a significant part of the relevant public will not see this as a parody. It is reminiscent of the German Federal Court’s ruling in *Auf Fett Getrimmt* that a parody does not have to be recognised as such by everyone, but only those who are familiar with the parodied work. However, by contrast, it clearly adopts an intent and result test to determine whether the parody exception is made out.

Finally, four French decisions also apply *Deckmyn* correctly. They are presented here chronologically. In a case concerning a parody (comic cooks) of the actor Bruno Cr  mer, who played Commissaire Maigret in a famous television series, the Court of Cassation upheld the decision of the court of appeal.⁵⁹ The latter had applied the two conditions of *Deckmyn* (the parody is humorous and does not lead to confusion or in other words is noticeably different from it). The Court of Cassation does not mention the third condition (the balance of interests) but it was not necessary in this case as the court had implicitly undertaken the balancing exercise by stating that the constitutionally protected freedom of expression is at the basis of the parody exception and holding that the parody neither denigrated the actor nor went beyond the rules of the genre.

In the next case, the defendant, Dieudonn   M’Bala M’Bala, produced a parody of the singer Barbara’s song “L’aigle Noir” with his song “Le Rat Noir”.⁶⁰ The court rejected the argument it fell within the parody exception because the author used vulgar terms to demean Barbara. Barbara’s song recalls that her father had committed incest with her, but the defendant’s song suggests that they were animals and some of the words he used were antisemitic. The defendant’s purpose was not to make a humorous song but, on the contrary, the defendant had

“an intention to harm by transforming a poignant song on incest into a vulgar ribaldry which is in addition detrimental to the respect and honour due to dead persons”.⁶¹

The court also ruled that there was clearly a distortion leading to a breach of Barbara’s moral right of integrity. This case is reminiscent of *Deckmyn*’s discriminatory undertones.

In the next case, the French supreme court considered a parody in the magazine *Le Point*’s reproduction, in a photomontage, of the bust of Marianne (sculpted by claimant, Aslan) half sunk in water.⁶²

⁵⁹ Cass., 1st civ. Ch., 10 September 2014, FR:CCASS:2014:C100999 (aff’d CA Paris, 21 September 2012).

⁶⁰ *M. Serf (Barbara) v M’Bala M’Bala* (Court of First Instance, Paris, 3e ch., 15 January 2015) (2015) *Propri  t  s Intellectuelles*, no. 55, 203, obs. Brugui  re.

⁶¹ *Ibid.*

⁶² See n. 32 above.



Marianne's bust by Alain Aslan (Brigitte Bardot)⁶³ Le Point's cover showing the bust in water⁶⁴

The court of first instance had found for the defendant on the basis of the parody exception and the court of appeal and supreme court both affirmed. One of the reasons given was that since the bust represents the French Republic it made sense to take it for a political parody. The court of appeal had said that the photomontage did not generate confusion with the copied work and that the submerged bust was a humorous metaphor showing the sinking of the French Republic and was meant to illustrate the text accompanying it. The supreme court accepted the lower court could properly conclude that the use of the bust did not prejudice disproportionately the legitimate interests of the author and copyright owner. The supreme court referred to *Deckmyn* and embraced the ruling, i.e. that parodies can be both parodies of and parodies with (as in *Deckmyn*, the present case dealt with a parody with). The court therefore applied the three conditions of *Deckmyn*, though one could disagree whether there was humour or mockery and in favour of whom the balance of interests should have leaned.⁶⁵

The last decision in the sample of French compliant decisions dealt with adaptations of Edward Hopper paintings including the comic book character Tintin.⁶⁶ The heirs of Hergé, who created Tintin, sued Xavier Marabout, a painter who specialised in parodies, for using Tintin in his paintings. Here is an example of the artwork:



⁶³ Source: <https://www.boutiquesdemusees.fr/en/european-art/marianne-brigitte-bardot-by-alain-aslan/1973.html>

⁶⁴ Source: <https://www.lequotidiendelart.com/articles/15379-pas-de-contrefa%C3%A7on-pour-la-marianne-d-aslan.html>

⁶⁵ More on this in the last section.

⁶⁶ *Société Moulinart v Xavier Marabout* (Court of First instance, Rennes, 10 May 2021, n°17/04478). For commentary, see also The Bird & Bird IP Team, "National Copyright Decisions Round-Up 2021" (2022) 17 J.I.P.L.P. 233, 244-245. Two examples of the parodies are published in this issue of J.I.P.L.P. one of which is reproduced for convenience below.

The idea behind Marabout's works was, among others, to put Tintin next to beautiful women to contrast the lack of Tintin's love life in Hergé's comic books. As the example above shows, none of Marabout's works were in anyway denigrating Hergé's work but rather questioning them. The court therefore found the works were fulfilling the first two *Deckmyn* conditions. There was clearly no confusion and there was humour. For the court:

“[t]he humorous effect is constituted by the incongruity of the situation with regard to the sobriety if not the usual sadness of the works of Hopper and the absence of a female presence alongside Tintin, with the exception of the caricatural characters of Bianca Castafiore and Irma, this effect invites the viewer to imagine a sequel that provokes a smile”.

As to the third *Deckmyn* condition, the court added that there was no denigration of Hergé's works and the works did not affect the copyright holder's interests disproportionately. To come to this conclusion, the court compared the modest income that Marabout was making from the paintings compared to the high revenues received by Hergé's heirs generated by products derived from Tintin's comic books. The court also mentioned that Marabout's audience is not the same as that of connoisseurs of Tintin books or its derived products so that the prejudice to Hergé's heirs was minimal if any.

The final case illustrates an interesting and problematic feature of some parodies. Can the defence apply if the work is reused, but in a different context, or where the parody is actually another work affixed to the parodied work? On a normal reading of the *Deckmyn* ruling, these should fail as parodies because even if there is humour or mockery, the work is not noticeably different from the parodied work. These cases therefore highlight a potential lacuna in the conditions laid out in *Deckmyn*.

The next case is from the court of appeal of Madrid, which held that the defendant infringed the claimant's related rights in the musical work "Cara Al Sol" (authored by Don Carlos) by reason of the unauthorized reproduction, distribution and public communication of it in the audiovisual work "Buen Viaje, Excelencia".⁶⁸ The film is a comedy on General Franco's last days and uses Don Carlos' fascist song unchanged as part of the film mocking the then Spanish fascist regime. At one point in the film,⁶⁹ three soldiers of General Franco's personal guard are observed whistling the song while tilting their heads from side to side. Later in the film a second sequence involves a group of police officers entering a bar and urging everyone to go to the Plaza de Oriente. Suddenly, two characters who had been appearing in the film as loyal defenders of Franco begin to sing the work, one of them being clearly intoxicated. The appeal court agreed with the judge below and held that 'parodies with' are not allowed.⁷⁰

⁶⁷ See also <https://www.theguardian.com/books/2021/may/12/tintin-heirs-lose-legal-battle-over-artists-edward-hopper-mashups>

⁶⁸ *Soledad, Tarsila and Doña Vicenta v Lola 2002 S.L. & Video Mercury* (Court of Appeal (Audiencia Provincial) Madrid (Section 28), 23 November 2018, Aranzadi Civil 2019, no. 341, aff'ing Mercantile Court No. 1 of Madrid, 2 February 2016).

⁶⁹ The first sequence was at 52m35s and the second at 110m.

⁷⁰ "According to Community jurisprudence [the court means *Deckmyn*], the parody can affect the original work or be used for the purpose of carrying out a burlesque satire unrelated to the work, but in any case, what is parodied must be the protected work itself. That is to say, the parody of the musical work could irradiate the film, but not the other way around, the parody of the film does not necessarily imply the parody of the work." Article 39 of the Spanish intellectual property act states: 'The parody of the published work will not be considered a transformation that requires the author's consent, as long as it does not imply a risk of confusion with it or infer damage to the original work or its author.' See Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia, art 39.

However, it seems that the real reason why the Spanish court rejected the parody defence was not because the work was used as a ‘parody with’, but rather because the original song was used unchanged:

“no perceptible differences can be seen that allow the interpreted work to be clearly differentiated from the original work. What conveys the satirical message is the context represented in the film, in whose environment the song is performed, but the satire does not follow from the performance of the musical work as such.”⁷¹

As the parodied work was unchanged, even if it was used in a different comical context, following *Deckmyn*, it did not fall under the exception.

Non-compliant decisions

As we saw, the first French decision, from the supreme court⁷² which was handed down just a few days after the *Deckmyn* decision applies it well. This would appear to set the scene for the lower French courts to follow its lead. However, subsequently, two courts, notably one appellate one, misapplied the exception. The two first two non-compliant French decisions are grouped together as they both concern appropriation art by Jeff Koons. Thereafter, the last two non-compliant decisions, both from Italy, are reviewed.

In a case decided by the third chamber of the Paris court of first instance, the allegedly parodied work was a photograph (titled “Fait d’hiver”) created for an advert for the clothing company Naf Naf depicting a young woman with short brown hair laying in the snow with a little pig who is wearing a St Bernard dog’s barrel around his neck whilst leaning over her.⁷³ The defendant (the artist Jeff Koons) made a sculpture from this photograph. There were some differences (as can be seen below) but the court held them minimal and found infringement.



Franck Davidovici, *Fait d’hiver*⁷⁴



Jeff Koons, *Fait d’hiver*⁷⁵

The court made reference to the CJEU’s decision in *Deckmyn* (referring to the first two conditions but not the third, balancing, condition) and held that since the claimant’s work cannot be recognized, the first condition of the parody exception is not met, therefore it is not applicable. It stated:

“it is clear that the *lack of notoriety* of the allegedly parodied photograph does not reasonably allow *the public* to distinguish the parodied work from the parody, *which means* that the condition laid down by the aforementioned decision of the Court of Justice of the European Union to refer to an existing work, is not fulfilled” (emphasis added).

⁷¹ *Cara Al Sol* (Court of Appeal (Audiencia Provincial) Madrid (Section 28), 23 November 2018, Aranzadi Civil 2019, no. 341

⁷² *Crémer* (Decision of 21 September 2012).

⁷³ *Fait d’hiver* (Court of First Instance, Paris, 3rd ch., 1st section, 8 November 2018, case n. 15/02536).

⁷⁴ Source: <https://streep.fr/2018/11/19/jeff-koons-condamne-pour-avoir-contrefait-le-cochon-naf-naf/>

⁷⁵ *Ibid.*

The court also rejected the defendant's argument based on Article 10 of the European Convention of Human Rights. This was because the photograph is not well-known and Jeff Koons could not pretend to have tried to suggest, through his sculpture, a debate of general interest or a debate about art, which would justify the appropriation of the photograph. The court therefore misapplies *Deckmyn* - as the first condition does not require the parodied work to be famous in any way. It also contrasts with the German Federal Court and other compliant decisions such as *Maya the Bee* which held that the parody does not have to be recognised as a parody by everyone. If it had been decided post-trilogy, the court should also have dismissed any argument based solely on Article 10 of the Convention. That said, in this case, the end-result is probably right as the sculpture was not noticeably different from the photograph.

In the other case, the heirs of French photographer Jean-Francois Bauret sued Jeff Koons for a reproduction of one of his black and white photographs from the 1970s photos titled "Enfants" depicting two naked young children holding each other by the shoulder in an atmosphere of purity. Koons reproduced the photo by making a porcelain sculpture which he called "Naked" with some additions. The court of appeal of Paris confirmed the court of first instance's judgment.⁷⁶

First, the court balanced copyright with freedom of expression (Article 10 of the European Convention of Human Rights). Indeed, in addition to the exceptions to a copyright holder's economic rights laid out in the French Intellectual Property Code, French courts introduced an external limit to copyright law based on article 10 of the Convention, namely that of freedom of creation.⁷⁷ But in this case, the court held that the restriction to Koons's freedom of creation was proportionate. Koons did not have to use this photograph to make his point (which was totally different from that of the photograph, the addition of the flower held by the boy with a pistil evoking a penis to suggest a metaphor of desire and sexuality awakening). Secondly, like in the *Fait d'hiver* case, the appellate court in a handful of short paragraphs, held that the fact that the picture was little known meant that the public was not able to identify and distinguish it from Koons's sculpture, but more importantly, the sculpture lacked any humorous expression or intent. Therefore, the parody defence could not apply.

In this case, the same two mistakes made by the Court of first instance of Paris in the *Fait d'hiver* case were reiterated by the Paris Court of Appeal in the *Bauret* case (although technically the reliance on Article 10 of the European Convention of Human Rights in the first case was not problematic since it predated the trilogy). The absence of humour meant the exception did not apply but if it had not been for that, the defence may have failed because the photographs lacked notoriety. Secondly, the court should not have accepted to discuss the argument based on the Convention since it is now forbidden owing to the trilogy which predates the appellate court decision.

The last two cases both require that the parody be creative in order to fall within the exception, something the CJEU clearly ruled out in *Deckmyn*.

In the first case, the defendant, the Malawian artist Samson Kambalu, reproduced and exhibited works of the claimant, Gianfranco Sanguinetti, and showed them in an exhibition.⁷⁸ He made use of the works in an art installation which implicitly criticised and parodying Sanguinetti's works. The court of Venice held that the defendant could benefit from the parody exception because there was mockery, but the

⁷⁶ *Bauret v Koons* (Court of Appeal, Paris, 5th plénière (i.e. full chamber), 1st ch., 17 December 2019 (2020) *Propriétés Intellectuelles*, no. 75, 96, obs. Bruguère aff'ing CFI Paris, 9 March 2017). For commentary, see also the Bird & Bird IP team, "National copyright decisions round-up 2019" (2020) 15 J.I.P.L.P 332, 341 and also Sabine Jacques, *The Parody Exception in Copyright Law* (Oxford: Oxford University Press, 2019), among others pp. 153-154. The two works can be seen at <https://www.trademarkandcopyrightlawblog.com/2017/05/french-court-finds-jeff-koons-appropriated-copyrighted-photograph-that-saved-him-creative-work/>

⁷⁷ See also *Fait d'hiver* (Court of First Instance, Paris, 3rd ch., 1st section, 8 November 2018, case n. 15/02536), above.

⁷⁸ *Sanguinetti v La Biennale di Venezia* (Court of Venice, 7 November 2015) (2018) *Rivista di Diritto Industriale*, 1, II, 81.

court also repeated a few times that Kambalu's work was creative although the CJEU does not require it to be. The court referred to *Deckmyn* but did not systematically apply the three conditions, only the humour condition.

In the second case, Unidis sued Paramount because its film "Rango" reproduced the characteristics of the "man without a name" played by Clint Eastwood in the Sergio Leone Westerns.⁷⁹ The court of Rome held that the "man without a name" character was not original and so there was no infringement, but obiter, the court discussed the parody exception. It held it was not a parody because there was no humour even if the work was recognisable. The court went further and held that the quotation exception would have been applicable. However, like in the earlier decision of the court of Venice, the court stated, when quoting *Deckmyn*, that the parody "gives rise to new and original authorial rights with respect to the parodied work". Again, it therefore misinterprets the CJEU on this point.



Clint Eastwood starring the Man with No Name in Westerns. Source: IMDb.



Rango character in the Rango movie. Source: BBC.

⁷⁹ *Unidis Jolly Film srl v. Paramount Pictures et al.* (Court of Rome, 16 April 2021 *aff'd* by Court of Appeal of Rome, 31 August 2022), further referred to as the man without a name, reported in the Ipkat at <https://ipkitten.blogspot.com/2022/09/another-shot-for-rango-but-incidentally.html> (as far as we understood - as the link to the decision no longer works -, the court affirmed that the character was not protectable and that the fair use exception was not applicable in Italian law).



The Spirit of the West character in the Rango movie. Source: Rango.Fandom.com.

Synthesis of the divergences and convergences

The first striking aspect is that 33.3% of the decisions do not comply with CJEU case law. It will be interesting to see if this trend is followed in the other 10 Member States. That said, the sample here includes the majority of the most populous Member States which is a major factor explaining why most of the case law is bound to exist so we do not expect the state of affairs to be better in the remainder of the other jurisdictions (namely Austria, Bulgaria, Croatia, Estonia, Lithuania, Latvia, Luxembourg, the Netherlands, Slovenia and Sweden).⁸⁰ It is possible to see where more than one decision is issued in a particular country they are either split (France)⁸¹ or fully compliant (Belgium) or fully non-compliant (Italy). This shows the convergence and divergence can exist not only between countries but within countries.

It is interesting that whatever the level of the court, a more or less equal number of courts misapply the CJEU case law as apply it correctly. However, it appears that the highest courts are better at getting it

⁸⁰ In the present study, there were very few decisions in low populated states (Cyprus (11), Malta (8) and Ireland (10)). From a previous study of design case law, n. 6 above, the amount of case law in the least populous states was very low.

⁸¹ The two French supreme court decisions and one CFI decision are compliant and the others (one CFI and one CA) are not compliant and those non-compliant ones are all posterior to the first supreme court decision.

right. That said, the numbers are really too low to conclude anything meaningful (only three cases from the highest courts⁸²).

In many cases, the courts only apply the two first *Deckmyn* conditions and not the third. This may be because the facts are clear and one or both of the conditions are not fulfilled and so that it is not necessary to even mention the third one. In others, the balance of interests is done implicitly by the court. Most cases also do not go into the definition of humour or mockery. For instance, in relation to the French case involving Aslan's Marianne bust, J.-M. Bruguière suggests there is no humour in presenting the French Republic as sinking, rather it is a purely political message. This makes the factual scenario somewhat similar to that in *Deckmyn*. For him, the balance of interests could have gone the other way, it was not necessary to reproduce that particular bust of Marianne as there were others in the public domain which could have used to achieve the desired effect.⁸³ One thing which makes the case sit on the borderline is that the work was not really changed (although one could argue it was since it was not fully visible as it was half sunk and a background (sky and water) was added to the bust). This would mean the interpretation of the exception by the court was rather broad.⁸⁴

It will be interesting to see in future whether parties will push the envelope further on this point and will other defendants use the quotation exception or pastiche exception if it has been implemented in their law, if parody does not work?⁸⁵

The decisions which applied *Deckmyn* correctly are good for creators and more generally for freedom of expression and creation / freedom of the arts. They show that in practice, the CJEU's decision struck the right balance (e.g. *Auf Fett getrimmt*, *Tintin*). Cases of appropriation art could have perhaps been allowed under pastiche (such as Jeff Koons cases) if the copyright laws in the countries in question had the exception (and the claimants had raised the issue). In the cases which involved factual scenarios similar to *Deckmyn* (such as *Le Rat noir* and *Maya the Bee*) or mere copies (such as *A Belgian Politician*), the defendants had little chance to win and the courts rejected the exception's application.

In some cases, national courts have clearly stated *Deckmyn* encompasses 'parodies with' in addition to 'parodies of', and interestingly, it is the two highest courts of Germany and France who took this view.⁸⁶ This wider view of the exception is welcome. Indeed, it is implicit from the *Deckmyn* decision itself and, in any case, both types of parodies are necessary to give the exception its effectiveness.

In the *Maya the Bee* case, the court seems to add a condition to those in *Deckmyn* requiring the parody to be funny to a significant and important part of the public. In contrast, in *Auf Fett getrimmt*, the German court took a more nuanced view that the exception's application does not depend on whether the character of the work as a parody is recognized by everyone. Furthermore, in *Maya the Bee*, the court adopts an "intent and result" test to determine whether the parody exception is made out whereas in *Le rat noir* and *Crémer*, the courts refer only to "intent". On the other hand, in both *Bauret* and *Fait d'hiver*, the courts adopt an "effect" criterion, referring to the "public" not being able to recognise the works but not specifying which public, probably thus meaning the public in general.

This is symptomatic of the *Deckmyn* judgment itself not being detailed enough on how national courts should apply the humour condition. This lack of guidance has led to disharmony between Member States and even inside Member States (France). Arguably, because the CJEU did not make the recognisability of a parody a condition, the determination must be something it left to national courts. Thus, it is suggested that the German federal court's approach and those courts referring to intent only

⁸² The Czech constitutional court is not the Czech supreme court.

⁸³ See (2020) *Propriétés Intellectuelles*, no. 75, 96, obs. Bruguière.

⁸⁴ Bird & Bird IP team, "National copyright decisions round-up 2019" (2020) 15 J.I.P.L.P 332, 340-341.

⁸⁵ This situation happened, albeit obiter, in the man without a name case, and successfully. In *Shazam* [2022] EWHC 1379 (IPEC), the defendant tried pastiche but lost on that ground too.

⁸⁶ German Federal court in *Auf Fett getrimmt* (2016) ZUM 985, 28 July 2016, French supreme court in the *Aslan v Le Point* (Cass. Civ. I, 22 May 2019) (2019) *Communication Commerce Electronique*, Comm. no. 47, comment Caron; (2019) *Propriétés Intellectuelles*, no. 72, obs. Bruguière.

are to be preferred;⁸⁷ otherwise, it invites population surveys or other expensive methods of determining the views of the general public. It may be that the matter could be clarified by a further referral to the CJEU, but it would have been better, of course, had the court given more guidance in the first place.

In only a few decisions has there been a thoughtful application of the third balance criterion. In the *Tintin* case, a comparison of earnings of the claimant and defendant was used. The court also held that the parodist's audience was not the same as that of connoisseurs of Tintin books (or its derived products) and so the prejudice to Hergé's heirs was minimal, if any. This approach is reminiscent of the three step test which balances the rights of the right holder and those of the user for all exceptions to economic rights.⁸⁸ And arguably, this balance has to be done as per article 5 of the Directive.

While all appellate courts including the supreme courts confirmed the lower courts' decisions, it seems that in France, courts of appeal are split since two applied *Deckmyn* correctly and one did not. In *Bauret*, it was the first chamber of the fifth pole, while in *Crémer*⁸⁹ and *Aslan* it was the second chamber of the fifth pole.⁹⁰ However, it is unclear whether these chambers of the Paris court of appeal are truly split because in *Crémer* the actor who was parodied was famous and in *Aslan* likewise the Marianne bust was famous but in neither case did the court discuss this issue.

One problem raised by the *Deckmyn* conditions is the parody exception not applying if the work is not changed. The Spanish court in the *Cara Al Sol* case said the exception did not apply precisely because the parodied work was unchanged even though it was used in a parodic context, i.e. music included in a comic film. A broad interpretation of the exception to cover 'parodies with' could have given a different result. Was the court worried about misapplying *Deckmyn* by doing so and thus sticking to the wording of the CJEU ruling? This uncertainty could be remedied by another reference to the CJEU. Arguably, in situations like *Cara Al Sol*, parodies should be allowed. There is clearly mockery of a fascist song when it is used in a film making fun of fascism. The unchanged nature of the work does not negate this nature and purpose of its use. Indeed, it "enable[s] the effectiveness of the exception to be safeguarded thereby established and its purpose to be observed".⁹¹

According to CJEU case law, exceptions should not only be read strictly but be effective and their purpose should be respected.⁹² While presenting the work, unchanged, in a comic context should be able to be a parody, this will vary according to the circumstances of each case. There should not be a hard and fast rule. Daniel Jongsma argues in a similar vein relying on a Dutch decision prior to *Deckmyn* where just this was held.⁹³ Having the legal concept of parody embracing all sorts of parody is important because while some uses may also fall within the quotation exception, the acknowledgement requirement, and the rather restrictive CJEU case law interpreting it,⁹⁴ mean it will not apply in respect of many contextual parodies.

⁸⁷ Jongsma Daniel Jongsma, "Parody after *Deckmyn* - A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and the Netherlands" (2017) 48 IIC 652, referring to *Auf Fett getrimmt* (2016) ZUM 985, 28 July 2016 case, is also of this opinion.

⁸⁸ Daniel Jongsma, "Parody after *Deckmyn* - A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and the Netherlands" (2017) 48 IIC 652, 674, argues that the CJEU balance of interests could be done on the basis of the three step test.

⁸⁹ Decision of 21 September 2012.

⁹⁰ Decision of 27 December 2017.

⁹¹ *Deckmyn* (C-201/13) EU:C:2014:2132, [23].

⁹² This was also stated in many other CJEU cases, for a list see Jonathan Griffiths, Christophe Geiger, Martin Senftleben, Raquel Xalabarder and Lionel Bently, "The European Copyright Society's Opinion on the Judgment of the CJEU in Case C-201/13 *Deckmyn*" (2015) E.I.P.R. 127.

⁹³ Daniel Jongsma, "Parody after *Deckmyn* - A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and the Netherlands" (2017) 48 IIC 652, 675 ("The Dutch Miffy case can once more be used to illustrate this: sufficient distance to the original was created by the addition of text and another pictorial element, not by changes to the work itself, without disproportionately harming the interests of the author").

⁹⁴ See *Pelham* and *Spiegel Online*, n. 23 above.

Requiring the work to be famous⁹⁵ may seem benign. An argument could be made that if the parodied work is not famous, most people may not recognise that the second work is a parody and so may not find it funny or mocking. Therefore, requiring this notoriety of the work parodied seems to be akin to saying that the parody does not fulfil the humour or mockery condition of *Deckmyn*. But as Sabine Jacques notes, commenting on some recent French decisions using the well-known character of a work as a condition, this reasoning is doubtful.⁹⁶ One might think that this fame condition comes from the French case law predating *Deckmyn*, which may even have established a tradition, however such use of the notoriety condition does not appear in any of the reporting on this case law.⁹⁷ Requiring the work be famous may lead to a condition that most people recognise the work but this is not necessary (as the German federal court stated in *Auf Fett getrimmt*). In other words, using the parodist's intent rather than effect on the public, or a test such as that elaborated in *Auf Fett getrimmt*, will preserve the full extent of the right to freedom of expression and thus the effectiveness of the exception.

A court relying on using Article 10 of the European Convention of Human Rights or Article 11 of the EU Charter as a separate exception⁹⁸ may lead to the same result in many cases. This is because, in practice, what the application of freedom of expression does is balance the right to property of the copyright holder⁹⁹ with the user's freedom of speech. This is in effect what the third *Deckmyn* condition requires. Nevertheless, if a court rejects the parody exception and instead relies on the right to freedom of expression this would be contrary to the CJEU's 2019 rulings in the trilogy. As a reminder, this CJEU hard and fast rule has EU harmonisation as its basis as it would allow Member States to create new exceptions outside the permitted list in Article 5 of the Information Society Directive.. As stated above, parody is an embodiment of freedom of expression so the results should normally be the same if the court applies the parody exception or (improperly) relies directly on freedom of expression. Nevertheless, there may be cases where there is a divergence between parody and free expression and these French courts' decisions send the wrong signal to litigants and if applied by future French courts could lead to a breach of EU law.

Lastly and more worryingly, some Italian courts require that the parody itself be original for the defence to apply. This is in blatant conflict with the *Deckmyn* ruling. This requirement of originality follows a long Italian tradition dating back at least from the 1960s.¹⁰⁰ While it made no difference in the cases in question, it is clearly inappropriate to apply it in the future.

Conclusion

In conclusion, the practical application of the parody exception in national courts post-*Deckmyn* and post-trilogy has not been harmonious. In some countries, such as Belgium, Germany, the courts respect the CJEU case law but in the other countries at least some courts do not. The silence of the CJEU in *Deckmyn* on some issues (humorous intent/effect and whether a change of context of the parodied work is enough) creates a malaise. As it takes time, and money, for a case to reach the CJEU, there is an urgent need for national courts to be able to learn from other national courts and perhaps for the Commission to issue guidelines on the application of the parody exception, especially if a revision of

⁹⁵ *Bauret v Koons* (Court of Appeal, Paris, 5th plénière (i.e. full chamber), 1st ch., 17 December 2019 (2020) *Propriétés Intellectuelles*, no. 75, 96, obs. Bruguière aff'ing CFI Paris, 9 March 2017); *Fait d'hiver* (Court of First Instance, Paris, 3rd ch., 1st section, 8 November 2018, case n. 15/02536).

⁹⁶ Jacques, Jacques, *The Parody Exception in Copyright Law* (Oxford: Oxford University Press, 2019), 106 (however, she does not cite any of these decisions and does not comment further).

⁹⁷ *Ibid.*, André Lucas, Agnès Lucas-Schloetter and Carine Bernault, *Traité de la Propriété Littéraire et Artistique*, 5th edn (Paris : Lexis Nexis 2017), paras 480ff, Daniel Jongsma, "Parody after *Deckmyn* - A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and the Netherlands" (2017) 48 IIC 652.

⁹⁸ *Bauret v Koons* (Court of Appeal, Paris, 5th plénière (i.e. full chamber), 1st ch., 17 December 2019 (2020) *Propriétés Intellectuelles*, no. 75, 96, obs. Bruguière aff'ing CFI Paris, 9 March 2017); *Fait d'hiver* (Court of First Instance, Paris, 3rd ch., 1st section, 8 November 2018, case n. 15/02536).

⁹⁹ European Convention of Human Rights, Prot 1, art 1; Charter of Fundamental Rights, art 17(2).

¹⁰⁰ Gabriele Spina Ali, "The (Missing) Parody Exception in Italy and its Inconsistency with EU law" (2021) 22(5) JIPITEC [10], note 19.

the Directive is not on the forthcoming agenda. The small number of cases post-*Deckmyn* and the lack of any referral to the CJEU in cases such as *Cara Al Sol* shows that in the meantime it is litigants, and more generally authors, copyright holders and copyright users who suffer from the disharmonious state of the law. It is also hoped that in future, the CJEU gives more detailed guidance when difficult issues first appear, as they do in cases like *Deckmyn*.¹⁰¹ And if a new parody case reaches the CJEU, it would be good if it clarified its jurisprudence, even if obiter, as all depends on the questions asked by the referring national court. Last but not least, the EU should think about forcing all Member States to publish decisions in free public databases that can easily be searched in English. Or it should ask them to send the decisions to a designated EU institution such as EUIPO which then would set up a database of national decisions (as it already does for some national trade mark and design decisions). That would increase transparency and efficiency for everyone, and ultimately lead to more practical harmonisation.

¹⁰¹ The *Deckmyn* case was decided by a full court. This has the advantage of involving all the judges and thus lead to more detailed guidance as more judges mean potentially more opinions. On the other hand, it could also mean a shorter or more diluted ruling since all judges have to agree as the CJEU does not allow for dissenting opinions.