

Parody in European copyright law and the two sides of the coin

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ABSTRACT

The purpose of this article is to examine the complexity of the concept of parody from dual perspectives, namely as a copyright defence provided by the InfoSoc Directive in Article 5(3)(k)¹ and as a manifestation of the freedom of expression which is guaranteed by the Charter in Article 11.² Mainly, the research identifies if there is a justified need of the European legislator for intervention on the current provisions that concern the European treatment of parody and examines whether the Commission's Digital Single Market intervention is an adequate step forward to modernizing the EU copyright framework.

1. INTRODUCTION

1.1 The Relevant EU Framework

By adopting the InfoSoc Directive, the EU legislator attempted to efficiently implement the four freedoms of the internal market, while relating to compliance with the fundamental principles of law and especially of property, including intellectual property, freedom of expression and the public interest.³ The aim of this instrument was to create a general and flexible legal framework at the Union's level to foster the development of the information society in Europe.⁴ The European Council strongly believed that a harmonised legal framework on copyright and related rights would encourage substantial investment in creativity and innovation, leading in turn to growth and increased competitiveness of European industry.

The outcome of this approach has been criticized by some critics, who have stated that “the effect is of rough harmonization only”.⁶ Particularly, some scholar voices considered that the optional nature of the list in Article 5(3) converted the InfoSoc Directive into a total failure regarding harmonization.⁷

Perhaps not coincidentally, AG Verica Trstenjak referred to the InfoSoc Directive as being a compromise that takes into account the different legal traditions and legal views in the Member States of the European Union, including in particular the common law and the continental European concept of copyright protection.⁸

Far from being subjective, it is noticeable that the InfoSoc Directive is sometimes contradictorily when it deals with the exceptions and limitations provided to the copyright protection. Naturally, existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced given the further development of transborder exploitation of works and cross-border activities.⁹ As the EU legislator stated, Article 5(3) InfoSoc takes due account of the different legal traditions in the Member States while, at the same time, aims to ensure a functioning internal application of these exceptions and limitations.¹⁰

The history of copyright is a complex and rich subject, considering the role that copyright law plays in shaping the notion of authorship, or the impact that copyright has on particular cultural practices. While it is understandable that lobby groups use or abuse the various justifications to further their ends, more problems arise when people begin to believe the rhetoric and assume that copyright law is determined and shaped by these philosophical ideas.¹¹

It is a fact that one of the currencies of the social world is the entertainment content people spread via the Internet, often as mimicry or for humorous purposes, concepts, catchphrases and pieces of media also known as Internet memes. From a copyright protection perspective, these works may raise debates that acquire primarily the assessment of whether a parody defence can be used in justifying their creation.

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

² Charter of Fundamental Rights of the European Union (2000/C 364/01).

³ InfoSoc Directive, Recital 3.

⁴ InfoSoc Directive, Recital 2.

⁵ InfoSoc Directive, Recital 4.

⁶ W. Cornish, D. Llewelyn, T. Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, London, Sweet & Maxwell, 2013, §13.

⁷ Eleonora Rosati, To what extent do current exclusions and limitations to copyright strike a fair balance between the rights of owners and fair use by private individuals and others? In *LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition*. [LIDC Contributions on Antitrust Law, Intellectual

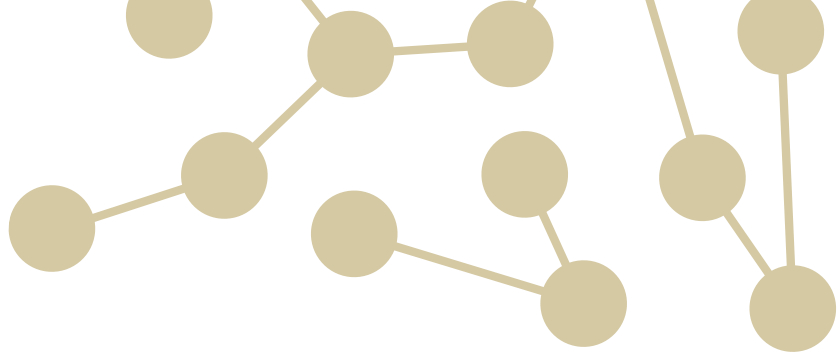
Property and Unfair Competition], 2017, (In Press), pg. 3, available at: www.ligue.org/uploads/documents/Cycle%202017/rapports%20B%20Rio/UKB.pdf.

⁸ Opinion AG in Padawan, C-467/08, ECLI:EU:C:2010:264, §41.

⁹ InfoSoc Directive, Recital 31.

¹⁰ InfoSoc Directive, Recital 32.

¹¹ L. Bently, B. Sherman, *Intellectual Property Law*, Oxford University Press, 2018, pg. 37.



The question thus becomes one of risk impact assessment: is the EU legislator choice of not imposing a mandatory exception on parody outdated?

The first step in providing an objective answer to this question it is to define the nature and conditions of the parody and to analyse its relationship with the freedom of expression.

1.2 Exceptions and Limitations to Copyright in the InfoSoc Directive

From an EU law perspective, the copyright protection is concerned with the production and availability of information and creative content for the benefit of society.¹² Modern digital applications such as blogs, podcasts, wikis and video sharing, enabled users to become active actors in the process of content creation and knowledge dissemination.¹³ Article 5(5) of the InfoSoc Directive sets out that “the exceptions and limitations provided for in paragraphs 1, 2, 3 and four shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder.”

While the text expressly refers to “limitations” and “exceptions”, it is fair to consider that in practice the meanings of the concepts overlap. In his recent studies at Stockholm University, Johan Axhamn quotes Senftleben’s views on the parallel use of both terms as a deliberate choice made to encompass the two different copyright traditions, namely the natural rights – focused continental tradition and the utilitarian approach of the common law. It is apparent that the term “exception” is preferred in the continental systems of law.¹⁴

The common law copyright model is said to be primarily concerned with encouraging the production of new works. In contrast, the civil law *Droit d’auteur* model is said to be more concerned with the natural rights of authors in their creations. This is reflected in the fact that the civil law model not only aims to secure the author’s economic

interests but also aims to protect works against uses that are prejudicial to an author’s spiritual interests, through moral rights.¹⁵

1.3 What is a Parody Under the InfoSoc Directive?

Parody is one of the purposes of the facultative exception to the copyright protection provided under Article 5(3) (k) InfoSoc Directive¹⁶, complying with specific requirements thereunder, as well as with the conditions of the three-step-test, as set out in particular in the underlying WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty.

Before the CJEU had the opportunity of ruling in *Deckmyn* on the definition of this unquestionably broad scope¹⁷, the parody related commonly to an original work by dealing with the content of that work or with its artistic features in an ironic, ridiculing way.¹⁸

1.3.1 Definition of Parody as an EU Autonomous Concept

The InfoSoc Directive does not define the term “parody”, and it does not include an express reference to the national law instruments of the Member States for this purpose. In this regard, The CJEU stated in its *Padawan* judgement that:

“[A]ccording to settled case-law, the need for a uniform application of European Union law and the principle of equality requires that the terms of a provision of European Union law which makes no express reference to the law of the Member States for determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the objective of the relevant legislation.”¹⁹

¹² Axhamn, *Access to information and knowledge in Access To Information And Knowledge: 21st Century Challenges in Intellectual Property and Knowledge Governance* / [ed] Dana Beldiman, Cheltenham: Edward Elgar Publishing, 2013, pg. 164.

¹³ *Idem*, pg. 166.

¹⁴ *Idem*, pg. 172.

¹⁵ L. Bently, B. Sherman, *Intellectual Property Law*, Oxford University Press, 2018, p. 36.

¹⁶ The exceptions and limitations in Article 5 refer logically only to the rights covered by the InfoSoc Directive, namely the reproduction right in Article 2, the distribution right for author in Article 4 and the right of communication to the public including making available under Article 3.

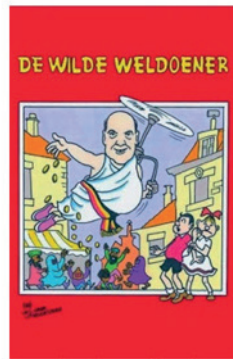
¹⁷ Opinion of AG delivered on 22 May 2015 in *Deckmyn*, Case C-201/13, ECLI:EU:C:2014:458, §33

¹⁸ Von Lewinski, Silke, M Walter, Michel, *European Copyright Law: A commentary*, Oxford University Press, 2010, pg. 1055, §11.5.67.

¹⁹ Case C-467/08, *Padawan*, ECLI:EU:C:2010:620, Judgement issued on the 21 October 2010, §32.



The original work by Vandersteen



The disputed work

The difficult task to define the concept of “parody” came to CJEU in the *Deckmyn* case, when asked by the national judge to assess its nature and meaning under the facultative exception of InfoSoc.

This decision is topical in the EU debate on copyright exceptions and limitations in Article 5 of the InfoSoc Directive, as well as in the discourse around activism – rather than mere activity – of the CJEU in this area of the law.²⁰

The Court clarified that the term must be regarded as an autonomous concept and interpreted uniformly throughout the EU as:

“[M]eaning that the essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery. The concept of ‘parody’, within the meaning of that provision, is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should relate to the original work itself or mention the source of the parodied work.”²¹

1.3.2 Structural and Functional Features of the Parody

The analysis issued by AG Cruz Villalón in the *Deckmyn* case begins with the reminder that any EU law concept must be interpreted by considering the usual meaning of the terms of the provision in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part. He

assumed that it might be difficult in a specific case to assign work to caricature, parody or pastiche when these concepts are not in competition with one another. All these concepts have the same effect of derogating from the copyright of the author of the original work, which in one way or another is present in the derived work. The AG believed that it is not necessary to distinguish between these concepts since they are all aimed at setting an exception to the copyright protection.²²

Looking at the dictionary definitions of parody in some languages – which share a common etymological origin, i.e. the Greek work “paroidia”, the AG concluded that a parody is, in its most simplified formulation, structurally an imitation and functionally a mocking act.

As regards to its structural dimension, a parody must strike a certain balance between elements of imitation and elements of originality, on the basis that the inclusion of unoriginal elements, in fact, corresponds to the intended effect of the parody.²⁴ The opinion of the AG is fundamentally grounded in the fact that a parody is a dualistic concept:

“To a greater or lesser extent, a parody is always a copy, for it is a work that is never completely original. On the contrary, a parody borrows elements from a previous work (regardless of whether or not that work is, in turn, entirely original), and, as a matter of principle, these borrowed elements are not secondary or dispensable but are, rather, essential to the meaning of the work, as there will be occasion to see. The earlier work, some of whose characteristics are copied, must at the same time be ‘recognizable’ to the public at which the parody is directed. That is also a premise of a parody of an author’s work. In that connection, a parody always entails an element of tribute to, or acknowledgement of, the original work. (...) In addition, a parody is, naturally, always a creation. The alteration to some degree of the original work is part of the genius of the author of the parody. In short, it is the latter who, ultimately, has the most interest in that no confusion should arise between ‘his’ parody and the original, even if he is the author of both.”²⁵

Although relevant for an abstract interpretation of the concept, this distinction does not provide enough instructions on how to practically assess the creativity requirement of a parody. The AG only concluded that it is for the Member States in which the exception provided by

²⁰ Eleonora Rosati, Just a laughing matter? Why the decision in the *Deckmyn* is broader than parody? in *Common Market Law Review* 52, 2015, pg. 511.

²¹ *Deckmyn*, cit., §15.

The Ipkat: Breaking: Ag Cruz Villalon Says That Certain parodies may be prohibited if against fundamental values of society, <http://ipkitten.blogspot.com/2014/05/breaking-ag-cruz-villalon-says-that.html>.

²³ Opinion AG in *Deckmyn*, cit., §48.

²⁴ *Idem*, §58.

²⁵ Opinion AG in *Deckmyn*, cit., §50-51.

²⁶ *Idem*, §55.

²⁷ *Idem*, §64.

²⁸ Opinion AG in *Deckmyn*, cit., §67.

²⁹ Eleonora Rosati, Just a laughing matter? Why the decision in the *Deckmyn* is broader than parody?, cit.

³⁰ Opinion AG in *Deckmyn*, cit., §68.

³¹ *Idem*, §32.

³² *Deckmyn*, cit., §30 – 31.

³³ Silverman Iona, The parody exception analysed, *Managing Intellectual Property*. 26 (2015), pg. 30.

Article 5(3)(k) InfoSoc has been implemented to determine whether a parody entails sufficient creative elements about the parodied work or whether it is little more than a copy with insignificant alterations.²⁶

The AG also explained the functional feature of the parody, by distinguishing between “parody of” *i.e.* when the intention of the parody is directed at or concerned with the original work, and “parody with” *i.e.* when the intention of the parody is directed at a third-party, individual or object, by using the original work. In his analysis, he noticed that criticism of customs, social criticism and political criticism have also, from time immemorial and clearly for conveying a message effectively, made use of the privileged medium entailing the alteration of a pre-existing work, which is sufficiently recognizable to the public at which that criticism is directed.²⁷ The CJEU did not, however, refer in their decision to this category breakdown.

Deducing that disregard for the type of parody, one must pursue through the altering of an earlier work a particular humorous effect; the AG did not doubt that:

“It is that – so to speak – a selective reception that must of itself have a particular effect on the addressees, at the risk of being a complete failure.”²⁸

Some commentators have found the Opinion sometimes confusing²⁹, giving the fact that the AG did not provide further comments on the comic requirement of a parody, limiting himself just to state that the national courts have broad discretion when it comes to determining whether the work in question has the status of a parody.³⁰

The CJEU also established that the message intended by the author of the parody is a factual element, to be determined by the national judge in the light of all circumstances of the case.³¹ In explaining the consequences of addressing a discriminatory message through a parody, Deckmyn reminds however that freedom of expression is not an absolute right:

“[H]olders of rights have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message” (a.n. discrimination based on race, colour and ethnic origin).³²

The CJEU clarified though that a parody that is discriminatory might not rely on the parody exception as this

would not constitute a fair balance of the rights of the author of the original work compared with the freedom of expression of the person creating the parody.³³

2. PARODY IN THE LIGHT OF FUNDAMENTAL RIGHTS³⁴

There are authors who believe that intellectual property rights can create scarcity in some types of expression when copyright owners can entirely suppress some forms of speech by seeking injunctions against those who want to express themselves using unauthorized uses of copyright-protected material.³⁵ This situation is likely to happen in legal systems where the parody exception is not implemented, or when it can be counter-claimed on the grounds of moral rights.

The Charter regards intellectual property and freedom of expression as human rights of equal importance, as both are protected under Article 17(2), respectively Article 11. As a result, whenever there is a potential conflict between copyright and freedom of expression, the balance between these two rights must be achieved. Torremans considers human rights law as the intellectual property’s new frontier.³⁶ The author is not surprised that the European Court of Human Rights (ECtHR) did not develop a case-law on the conflict between the copyright and the freedom of expression, believing that there is enough room for individuals to express themselves freely by taking the ideas or non-original expressions or even the protected expressions of one’s work, by exercising an exception if the work has fallen in the public domain.³⁷

The first case ever heard by the ECtHR on this issue was in 2013, when the Court explained that a conviction based on copyright law for illegally reproducing or publicly communicating copyright protected material could be regarded as a violation of the freedom of expression and information under Article 10 of the European Convention for the Protection of Human Right and Fundamental Freedoms. Such interference must be by the three conditions enshrined in the second paragraph of Article 10 of the Convention. This means that a sanction based on copyright law, restricting a person’s freedom of expression, must be pertinently motivated as being necessary for a democratic society, apart from being prescribed by law and pursuing a legitimate aim.³⁸

²⁶ The Charter is sometimes confused with the European Convention on Human Rights. Although containing overlapping human rights provisions, the two operate within separate legal frameworks: the Charter of Fundamental Rights of the European Union was drafted by the EU and is interpreted by the Court of Justice of the European Union, while the European Convention on Human Rights, on the other hand, was drafted by the Council of

Europe in Strasbourg and is interpreted by the European Court of Human Rights. The Charter can be seen as the overarching framework for human rights in the EU, of which the European Convention on Human Rights forms only one part, albeit an important one.

³⁵ Helfer LR and Austin GW, “Rights to freedom of Expression, to Cultural Participation and to benefit from Scientific Advancements” Human Rights and Intellectual Property: Mapping the

Global Interface (Cambridge University Press 2011), pg. 221.

³⁶ Paul Torremans, *Intellectual Property and Human Rights*, Kluwer Law International, 2008, pg. 25.

³⁷ Copyright And The Right To Freedom Of Expression, www.rebe.rau.ro/RePEc/rau/client/SL13/CLI-SL13-A23.pdf.

³⁸ *Idem*, pg. 26.

2.1 The ECtHR's View on Copyright and Freedom of Expression

According to Article 2 TFEU:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

Further on, Article 52(3) of the Charter is aligned to at least the threshold of protection guaranteed by the Convention, whenever the right corresponds to both instruments. This compatibility has been recently confirmed by the practice of the CJEU and ECtHR. The Charter has a strong influence on the interpretation of legislation by the CJEU, particularly with its reference to the principle that intellectual property shall be protected.

It is clear from the European provisions that in addition to constitutional protection under Member States' domestic laws, copyright, as an integral part of intellectual property, enjoys protection under the umbrella of human rights guaranteed by the Convention. In *Scarlet Extended*, the CJEU reminded that in the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures.³⁹ The Court considers that an injunction to install the contested filtering system is to be regarded as not respecting the requirement that a fair balance be struck between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of the fundamental rights of that Internet Service Provider's (ISP's) customers, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 11 of the Charter respectively.⁴⁰

Some authors believe that in cases of parody, interferences with the right of freedom of expression and information, based on copyright law, will need to undergo a more careful balancing test between the two fundamental rights.⁴¹

2.1.1 Freedom of Expression as a Human Right

The tensions between copyright law and the freedom of expression were examined by the ECtHR in the case of *Ashby Donald and others v France*.⁴² When they reiterated that the freedom of expression as guaranteed by Article 10 of the Convention is intended to apply to communication using the Internet, whatever the type of message is intended to convey and even when the objective pursued is of lucrative nature, i.e. publication of photographs on a website.⁴³ This case is relevant for our topic as the ECtHR reminds the Member States that freedom of expression is one of the essential foundations of a democratic society, one of the essential conditions for its progress and the fulfilment of everyone and it should be restricted only in situations that imply a so-called “pressing social need”, i.e. when the restriction is prescribed by law, pursues a legitimate aim and is necessary for a democratic society.^{44 45}

The interpretation of the Court is far from meaning that freedom of expression is an absolute right, as this Decision restates that the need to protect the fundamental rights might lead the Contracting States to restrict other rights or freedoms also enshrined in the Convention which becomes a challenge to the national authorities to balance these potentially conflicting interests between two rights.⁴⁶

Following *Ashby Donald*, the ECtHR examined a new alleged violation of the applicants' right to receive information by sharing copyright protected material, in the case of *The Pirate Bay*. In examining the case, the ECtHR took into account various factors, for example, the nature of the competing interests involved and the degree to which those interests require protection in the circumstances of the case, and concluded:

“[S]ince the Swedish authorities were under an obligation to protect the plaintiffs' property rights in accordance with the Copyright Act and the Convention, the Court confirmed that the Swedish judge issued a balanced appreciation of the conflict because there were weighty reasons for the restriction of the applicants' freedom of expression.”⁴⁷

³⁹ Case C-70/10, *Scarlet Extended v SABAM*, ECLI:EU:C:2010:620, Judgement from 24 November 2011, §45.

⁴⁰ *Idem*, §50.

⁴¹ Dirk Voorhoof, Inger Høedt-Rasmussen, “ECHR: Copyright vs. Freedom of Expression”, 2013, pg. 7, available at: kluwercopyrightblog.com/2013/01/25/echr-copyright-vs-freedom-of-expression/.

⁴² *Ashby Donald and others v. France*, No. 36769/08, ECHR-2013.

⁴³ *Idem*, §34.

⁴⁴ *Idem*, §43.

⁴⁵ *Idem*, §38.

⁴⁶ *Idem*, §40.

⁴⁷ *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden*, No.40397/12, ECHR-2013.

⁴⁸ See Article 1 of Protocol No. 1 of the Convention.

⁴⁹ Buss Krisjanis, Copyright and free speech: the human rights perspective, *Baltic Journal of Law & Politics*, Volume 8, No 2, 2015, pg. 186.

⁵⁰ *Balan v. Moldova*, No. 19247/03, ECHR-2008, §31-32 and §37.

⁵¹ Curran, op. cit.

⁵² *Idem*.

⁵³ Graeme Dinwoodie, *Methods and perspectives in intellectual property*, Edward Elgar, 2013, pg. 33.

⁵⁴ *Idem*, pg. 34.

2.1.2 Copyright as a Human Right

Copyright, as a dimension of the right to property, is recognized as a human right for two reasons: firstly, because it is seen as property, and property in turn seen as human right,⁴⁸ and, secondly, according to a René Cassin, a Nobel Peace Prize winner and principal author of the Universal Declaration of Human Rights, because “[h]uman beings can claim rights by the fact of their creation”.⁴⁹

The case law of the ECtHR explains that the the word “possession” as used in the Convention Article 1 Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as “property rights,” and thus as “possessions” for this provision. The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, confer on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1.”⁵⁰

In conclusion, although the EU attempted to harmonise substantive law in the area of restrictions to copyright, the choice to provide to the Member States a list of non-mandatory exceptions under the umbrella of Article 5(5) InfoSoc appears to be unfortunate. This article has highlighted that ambiguities have arisen in respect, first, of the definition of the concept of “parody” itself. Since explanations on the nature and scope of this term were not provided anywhere in the work of the EU legislator – not even in the preparatory acts of the InfoSoc, the Member States were left with a significant margin of appreciation and interpretation.

Secondly, the CJEU when called upon to interpret Article 5(3)(k) InfoSoc, and while providing guidance in defining parody, left room for debates on more issues related to the concept (e.g. the purpose of the parody as provided by InfoSoc). Both the CJEU and ECtHR agree that neither copyright nor freedom of expression are absolute rights and remind constantly that both are human rights of equal importance. The EU Courts highlight the obligation of Member States, through national provisions as well as their interpretation and application issued by national judges, of achieving a balance between them in case of conflict.

In the light of the copyright framework, parody is at the moment an exception to the rule of requesting permission from the author to use the initial work. As freedom of expression, parody can be viewed as a dimension of free speech. The EU legislator could perhaps reflect on the modern mechanisms of communication, especially through social media platforms, as well as the new forms of entertainment online and to transform Article 5(3)(k) InfoSoc in a mandatory exception. It is doubted that such a measure could have any negative impact, as long as such a provision would not disrupt the balance desired between the interests of right-holders and parodists.

3. PARODY IN NATIONAL SYSTEMS

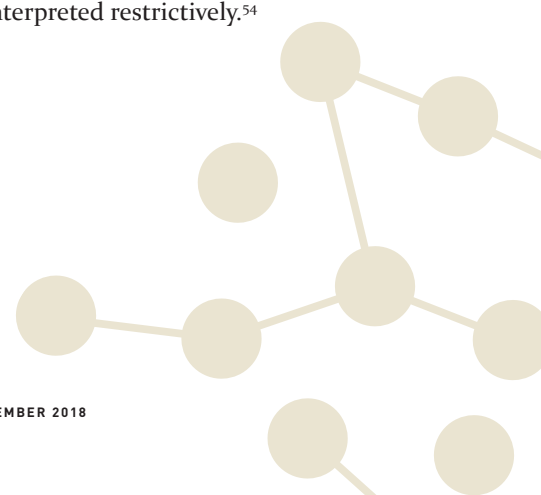
This section has the purpose to ascertain and explain the similarities and differences between the approach of three Member States regarding the implementation and interpretation of the InfoSoc exception.

Comparative research provides important insight related to the choice of the EU legislator regarding the non-mandatory character of the parody exception as allowing the Member States to adopt individual solutions, developed by the particular social and political contexts. More than illustrating the equivalence and validity of different approaches and heighten an understanding and respect for them,⁵¹ the objective of this section is to identify better solutions for modernising the EU system.

The choice law of systems seemed appropriate for our article because each chosen Member State views copyright differently: the UK copyright law was built on the utilitarian theory, the Romanian copyright law on the naturalist theory, while the Swedish copyright law proves a rather unique and even controversial approach of the parody concept.

The remarkable difference in the national regulation of copyright limitations becomes understandable in the light of the theoretical groundwork underlying common law and civil law copyright systems. The fair use approach can be traced back to the utilitarian foundation of the Anglo-Saxon copyright tradition that perceives copyright as a prerogative granted to enhance the overall welfare of society by ensuring a sufficient supply of knowledge and information.⁵² Professor Graeme Dinwoodie remembers that this theoretical basis only justifies rights strong enough to induce the desired production of intellectual works. Therefore, the exclusive rights of the authors deserve individual positive legal enactment. Those forms of use that need not be reserved for the right owner to provide the necessary incentive remain free. Otherwise, rights would be awarded that are unnecessary to achieve the goals of the system. In sum, exclusive rights are thus delineated precisely, while their limitation can be regulated flexibly in open-ended provisions, such as fair use. Oversimplifying the theoretical model underlying common law copyright, it might be said that freedom of use is the rule, rights are the exception.⁵³

Dinwoodie looks back into the history of copyright law and notices that the opposite constellation where rights are the rule, follows from the natural law underpinning of continental *Droit d’auteur*. In the natural law theory, the author occupies centre stage as his work is perceived as a materialization of the author’s personality. The author-centrism of the civil law systems calls on the legislator to safeguard right broad enough to concede to authors the opportunity to profit from the use of their self-expression, and to bar factors that might stymie their exploitation. In consequence, civil law copyright systems recognize flexible, broad exclusive rights. Exceptions, by contrast, are defined narrowly and often interpreted restrictively.⁵⁴



3.1 The UK Approach

At the time of implementing the InfoSoc Directive into its legal system, the UK Government took the view that relevant copyright exceptions already complied with Article 5(3).⁵⁵ Somehow reticent to the possibilities offered by the European provision, the UK, therefore, adopted a narrow list of exceptions to copyright (education, disabilities, libraries and archives, public administration).

The UK copyright law did not provide a special treatment for parody until recently. This involved assessing whether parody could count as criticism or review of a work, whether it is fair for that purpose, and whether implicit acknowledgement that is a prerequisite of effective parody is enough to comply with the sufficient acknowledgement requirement.⁵⁶

However, the numerous legal disputes on the matter demonstrate that many of the British authors of parody were not discouraged by this lack of legal protection. In this context, it is worth mentioning the original poster for the movie *Carry on Cleopatra*, that was withdrawn from circulation after 20th Century Fox successfully brought a copyright infringement claim. The UK court found that the design was based on a painting by Howard Terpning for which Fox owned the copyright and was used to promote the 1963 *Cleopatra* film.



On the 1st of October 2014 “The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014” introduced the exception of parody under Section 30A of the “Copyright, Designs and Patent Act 1988” (CDPA):

- “(1) Fair dealing with a work for caricature, parody or pastiche does not infringe copyright in work.*
- (2) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by this section, would not infringe copyright, that term is unenforceable.”*

The provision seems clear about the conditions that should be respected cumulatively by a parody for it to be protected by the new national law: the use of the initial work must be fair, and the purpose of the use must be a caricature, parody or pastiche.

The UK law does not provide a specific provision related to the three-step test in the CDPA, which could be explained by the idea that it is akin to the UK concept of fair dealing. Although using a minimalistic wording (e.g. without including references to the parodied work being published and receiving enough acknowledgement), Section 30A includes the reference to the need for a fair dealing with the original work, so to minimize the potential harm to relevant copyright owners. In spite of a lack of case-law

on this matter, the Guidance released by the UK Intellectual Property Office explains that under the new provision a comedian may use a few lines from a film or song for a parody sketch, a cartoonist may reference a well-known artwork or illustration for a caricature, an artist may use small fragments from a range of films to compose a larger pastiche artwork⁵⁷.

How could one assess if that dealing is fair? Fairness is primarily a British concept. Authors have placed the concept under a situation when a person has made use of someone else’s work, in the absence of a transaction between parties.⁵⁸ Despite being an old concept, fairness can be an elusive one, particularly as there is no statutory criteria or definition and has not been tested about parody. The concept of fairness appears as a multifactor test, in contrast with the 5(5).

The UK Courts found that in deciding the purpose for which the work was used, the fair dealing test does not depend on the subjective intentions of the alleged infringer. It was settled out that under such circumstances an objective criterium must be used.⁵⁹ Further on, the concept was explained as being a question of “degree and impression”. Some judges applied the criterium of a “fair-minded and honest person” to assess if the dealing is fair.

More recently, in *Ashdown v Telegraph Group Ltd*, the Court considered “essential not to apply inflexibly test based on precedent, but to bear in mind that considerations of public interest are paramount.”⁶⁰

In the UK legal framework, a crucial factor in deciding if the dealing is fair is the quantity and quality of what is taken.⁶¹ However, in many cases, use is more likely to be fair when the defendant has re-contextualized the part taken from the initial work, showing that the dealing was transformative.⁶²

The evoking of the existing work should be as slight and discreet as possible, as the parody must be noticeably different from it. In the case of a successful parody, the audience understands that the parodist’s work is referring to earlier work and is expected to know the authorship of that earlier work. To require a parodist to identify expressly the authorship of the work being parodied could in some circumstances seem to require them to admit that the parody had failed.⁶³

Another factor that influences the decision as to whether a dealing is fair relates to the impact and the commercial success that the dealing is probable to have on the market for the initial work.⁶⁴ In this sense, the UK case law has decided that “a dealing by a person with a copyright-protected work for his commercial advantage – and to the actual or potential commercial disadvantage of the copyright owner – is not to be regarded as a fair dealing, unless there is some overriding element of public advantage which justifies the subordination of the rights of the copyright owner”.

The UK legal framework satisfies the EU fair balance standards required in relations between fundamental rights as the parody exception must strike a fair balance between the interests of copyright holders and the freedom of expression of the parodist. In the light of this guarantee, it should be observed that the UK law maintains

a relatively conservative and traditional view, as it currently lacks a statutory defence rooted within the freedom of expression.

As there has been no case-law involving parody after it has been introduced as an exception, it can be assumed that the test used so far is suitable for assessing the fair dealing under the new provision. It is interesting to notice that British users have become more confident about grounding their actions on it. The BBC invoked the new exception about a TV-trailer, after being accused of breaching copyright from “The Sound of Music” soundtrack. The spot was promoting a reality-show about cooking and baking.

The lyrics of the classic tune were changed as it follows:⁶⁶

*“The hills are alive with the sound of music,
With songs, they have sung for a thousand years.
The hills fill my heart with the sound of music.
My heart wants to sing every song it hears.”
“The hills are alive with the smell of baking,
With cakes that we baked for a thousand years.
The hills fill my heart with a love of baking.
I just want to taste every cake that I baked.”*

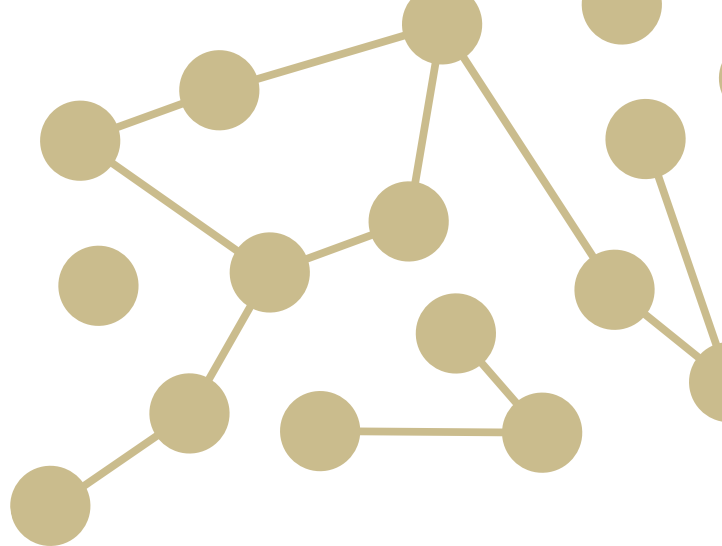
It can be concluded that the Section 30A takes advantage of the freedom provided by InfoSoc but qualifies the breadth of that freedom by adding a requirement of fairness. Acknowledging the realities of an “age of digital creation and re-mixing,”⁶⁷ the new UK law allows the limited use of someone else’s work. Per a contrary, an act of use that is not fair will still require the grant of permission or license from the copyright owner.

3.2 The Romanian Approach

The Romanian copyright system should be understood as descending from the French intellectual property doctrine which states that:

“The right to respect the work can be considered as a corollary of the right of disclosure, in the sense that the author would not have disclosed his work to the public if he knew in advance that his work would be abusively deformed.”⁶⁸

The Romanian legislator embraced the views of some French authors who even believed that the respect for the work pursues a double purpose: to protect the author’s personality in the form of his expression in the creation and the communication to the public of the work, just as



the author wanted it to be.⁶⁹

Law No. 8 of 10 March 1996 on Copyright and related rights provides the exception of parody in Chapter VI, under Article 35(b): The transformation of a work without the author’s consent and without payment of remuneration is allowed in the following situations: (...) b) if the result of the transformation is a parody or a caricature, provided that the result does not create confusion as to the original work and its author.”

An analysis of this provision illustrates the need for a clear delimitation between the work and the author of the original work and the work and the author of the derivative work must be applied, contrary to the violation of the paternity of the work. The exceptions to copyright are filtered by the Romanian legislator through the triple-step test, as a complementary tool to the requirements of the closed list of limitations. In practice, the Romanian courts have generally used the triple test as a supplementary test to confirm the application of the exceptions and limitations provided by Articles 33 and 34 of the Romanian Copyright Law.

The High Court of Justice settled this matter explaining that the exceptions to copyright protection under the Romanian Law are:

“[S]ubject to multiple conditions, such use not being allowed in all circumstances. (...) These conditions are the following: that the work was made public beforehand, and that the use be one in accordance with good practice, does not affect the normal exploitation of the work and does not prejudice the author or the holders of the exploitation rights.”⁷⁰

⁵⁵ Cornish, *op. cit.*, §11-12.

⁵⁶ Bently, *op. cit.*, pg. 251.

⁵⁷ Bently, *op. cit.*, pg. 251.

⁵⁸ *Idem*, pg. 254.

⁵⁹ *Idem*, pg. 224.

⁶⁰ [2001] EWCA Civ, 1142, *Ashdown v. Telegraph Group Ltd*, §71.

⁶¹ Bently, *op. cit.* pg. 254.

⁶² *Idem*.

⁶³ *Idem*.

⁶⁴ CDPA, Section 80B.

⁶⁵ [2001] UKHL, *Newspaper Licensing Agency v*

Marks Spencer, §257.

⁶⁶ *Bake Off’s Sound of Music advert is axed after BBC is accused of breaching copyright*, Article published in Daily Mail on 3 August 2015, available at: <http://www.dailymail.co.uk/news/article-3183262/Great-British-Bake-Sound-Music-advert-axed-BBC-accused-breaching-copyright.html#ixzz5DIWJRMNW>.

⁶⁷ Intellectual Property Office Online, *Exceptions to copyright: Guidance for creators and copyright owners*, pg. 5, available at:

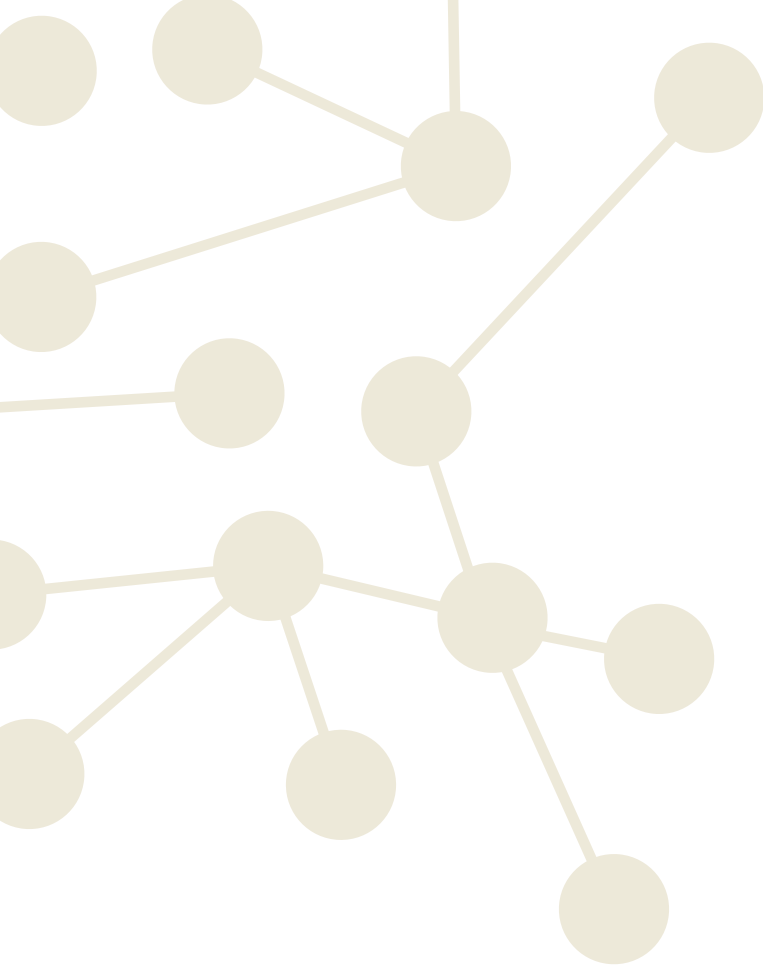
<https://assets.publishing.service.gov.uk/>

government/uploads/system/uploads/attachment_data/file/448274/Exceptions_to_copy-right_-_Guidance_for_creators_and_copy-right_owners.pdf.

⁶⁸ Colombet Claude, *Propriete litteraire et artistique et droits voisins*, Dalloz, Paris, 1999, pg. 255.

⁶⁹ Bellefonds, Xavier Linant, *Droit d’auteurs et droits voisins*, Dalloz, Paris, 2002, pg. 255.

⁷⁰ ICCJ, s. I civ., Decision no. 1109 of 24 April 2015, available at www.scj.ro.



On a similar note, The Bucharest Court of Appeals has indicated that the conditions are cumulative, that is, each of the four general conditions provided by this provision needs to be met in order for any limitation provided therein to apply, in addition to the special conditions required to qualify under any of the “special cases” specifically indicated by law.⁷¹

The case-law supports, therefore, the idea that the triple-step test appears to serve as confirmation for situations where the special cases in which use of the work without the consent of the author and without payment would appear to apply and it is, in fact, so used by the Romanian courts. In practice, the courts have tended to verify the meeting of the special conditions first and, where satisfied, verify whether the general conditions are also cumulatively met.⁷²

The Romanian copyright law recognizes freedom of expression as one of the grounds of the exceptions and limitations closed list. This is confirmed by the Romanian High Court that has held that in evaluating the exceptions to copyright in light of the purpose for their establishment, it is the immediate and direct purpose that was to be attained by the exception that is to be kept in mind.

In a case concerning the reproduction, on a blog, of photographs from calendars made by a business magazine featuring their female employees, for the purpose of a satirical article, it was held by the 4th District Court of Bucharest to fall within the exception provided by Art. 33 par. (1) letter b) of the Romanian Copyright Law but also to have been made “within the defendant professional journalist’s right to freedom of expression guaranteed by Art. 30 of the Romanian Constitution and Art. 10 of the

European Convention on Human Rights, being also guaranteed by Art. 31 of the Romanian Constitution and the right to access to public information.”⁷³

The exceptions and limitations are therefore generally assumed to have been enshrined pursuant to the need to ensure a proper balancing of copyright with the exercise of other rights, most relevant being the freedom of expression, the right to information, and the right to education. However, the economic justifications for the implementation of such exceptions and, even more, for properly delimiting their scope, have also been addressed in the literature.⁷⁴

Under Article 35(b) one can create a parody provided that the result does not cause confusion with the *original* work and the author thereof (emphasize intended). The wording used by the Romanian legislator is rather confusing and, *de lege ferenda*, the provision should be rephrased. Article 8(a) expressly guarantees the protection of the derivative work as it follows: “[D]erivative works that have been created from one or more preexisting works are also subject to the copyright protection, namely: (...) b) translations, adaptations, annotations, documentary work, musical arrangements and any other transformation of a literary, artistic or scientific work which is an intellectual creative work.”

Clearly, the intention of the text when referring to the “original” work is to write about the work that has been first made available to the public, and not to question the originality of a parody. Although the claims of damages for copyright infringement are subject to a very small judicial stamp duty tax, irrespective of the amount claimed, the Romanian courts did not hear many cases on this matter. From the jurisprudence collections that are accessible to the public, including those on demand, the research identified one single judgement issued by the Tribunal of first degree Slobozia. The Claimant, who was mayor at the time of the alleged tort of the town Amara, claimed infringement of copyright of the campaign flyer distributed by the local organization of the party where he was politically affiliated. The Defendant has modified the flyer without the party’s consent and replaced the image of the Claimant with a photograph of the actor Al Pacino acting as the well-known crime family leader in the movie “The Godfather”.

The Court considered that the result of the transformation is a mere parody, and since the defendant did not make any statement related to acts of the Claimant that must be supported by evidence, he did not infringe any copyright or moral right of the political party or of any of its members.

In the light of the above, it can be concluded that the regime of exceptions and limitations to copyright under Romanian law is rigid by design and its qualification as an exception, placing the burden of proof on the user and only allows application of the defence where all conditions are cumulatively met.

3.3 The Swedish Approach

The Swedish Copyright Act does not have a provision dedicated to parodying, but the exception can be covered by

Article 4(2) that provides that if the work is created in free association to another work, then the new creation will be novel and independent.

Some authors believe that “the Swedish case shows how copyright was associated with the progress of European civilization in a partly ambiguous way. On the one hand, the supporters of a strong international copyright law saw this as stepping up to the legal and cultural standards of the rest of Europe, on the other hand those who opposed such a law, predominantly the publishers, feared that copyright protection of translated works would make foreign literature too expensive for the Swedish consumers and thus isolate Sweden from the rest of the European culture.”⁷⁵ The Swedish copyright law seems to be rooted in “a growing of Sweden’s literary export, when new authors such as August Strindberg and Selma Lagerlöf became popular abroad, which suddenly made mutual protection of translated works profitable for Swedish publishers.”⁷⁶

Although Sweden reacted with compliance dictated by a will to be accepted as belonging to a common European civilization, as a peripheral part of the old world,⁷⁷ the national framework on copyright and particularly on parody are rather innovative and anticipate well the fast progress of culture and technology.⁷⁸

As noted above, within the Swedish copyright system it is a tradition that parodies are lawful even though there is no explicit article dictating this in the law. This is the situation when it comes to the economic and moral rights of the work.⁷⁹

The preparatory work for the Copyright Act stated that even though a parody is very similar to the original, maybe even containing copied fragments of it, is still to be seen as an independent work and not an adaptation, due to the different effects of the two.⁸⁰ Professor Marianne Levin of Stockholm University highlighted that it is however important not to confuse the parody with the original, because then the parody will lose its intended effect.⁸¹

3.4 Which Approach is Superior?

To conclude, the fair use approach adopted by the UK has the advantage of flexibility. The courts can broaden and restrict the scope of copyright limitations to safeguard copyrights delicate balance between exclusive rights and

the competing social, cultural and economic needs.⁸² The UK still has difficulties of adapting to the rapid development of the digital world and continues to have some rigid approaches, e.g. when it comes to increasing the efficiency of fundamental freedoms defences in national procedures. On the other hand, the Romanian case seems to support the idea that precisely defined exceptions may offer a high degree of legal certainty under the national framework. With a closed catalogue of exceptions and a detailed description of their scope, it becomes foreseeable for Internet users and/or parody authors which forms of use fall under the control of the copyright holder and can serve as a basis for the exploitation of the copyrighted material and which represent an infringement.⁸³ The Swedish system seems the most simple approach of the ones analysed here - compared to the UK and the Romanian systems, the claims brought in the Swedish courts are to be dealt with in a more efficient manner, with minimum risk of subjectivity manifested by the judges.

The Swedish approach could influence in a positive manner the EU legislator’s future copyright reforms, as it supports the idea that the legal protection of parody works could generate a burst of creativity with no negative impact on the authors’ rights. The authors of the InfoSoc Directive developed a system that frustrates from the perspective of both objectives: the present regulation of copyright limitations in the EU offers neither legal certainty nor sufficient flexibility.⁸⁴

4. TO FILTER OR NOT TO FILTER? THAT IS THE QUESTION.

4.1 The Digital Single Market Strategy

In May 2015 the EU Commission released the Digital Single Market Strategy (DSMS) for Europe that targets the steps to be taken towards reducing differences between national systems and connecting them for generating additional growth in the EU.⁸⁵ The DSMS is built on three pillars: better access for consumers and businesses to online goods and services across Europe, creating the right conditions for digital networks and services to flourish, and maximizing the growth potential of the European Digital Economy.⁸⁶

⁷¹ Bucharest Court of Appeals, s. IX civ., Decision no. 67A of 25 February 2014.

⁷² Buta, Paul-George, Repport on Romanian Copyright Law for LIDC, Available at: <https://www.ligue.org/uploads/documents/Cycle%202017/rapports%20B%20Rio/RomaniaB.pdf>.

⁷³ 4th District Court of Bucharest, s. civ., Decision no. 1314 of 4 February 2016, confirmed by Bucharest Tribunal, s. III civ., Decision no. 3859 of 14 October 2016.

⁷⁴ Buta, Paul-George, op. cit.

⁷⁵ Fredriksson, Piracy, globalisation and the colonisation of the Commons, published in Global Media Journal, 2009, available at: https://www.researchgate.net/profile/Martin_Fredriksson3/publication/277754662_Piracy_Globalisation_and_the_Colonisation_of_the_

[Commons/links/56c64ef908ae0d3b1b603de7/Piracy-Globalisation-and-the-Colonisation-of-the-Commons.pdf?origin=publication_detail](https://www.researchgate.net/publication/277754662_Piracy_Globalisation_and_the_Colonisation_of_the_Commons/links/56c64ef908ae0d3b1b603de7/Piracy-Globalisation-and-the-Colonisation-of-the-Commons.pdf?origin=publication_detail).

⁷⁶ Idem.

⁷⁷ Idem.

⁷⁸ Idem.

⁷⁹ Lisette Karlsson, Copyright and the Parody Problem An examination between the UK, Sweden and Canada, Lund University, 2013, pg. 29.

⁸⁰ Preparatory works of the Swedish Copyright Act, Art. 4.

⁸¹ Lisette Karlson, Copyright and the Parody Problem An examination between the UK, Sweden and Canada, Lund University, 2013, pg. 30.

⁸² Graeme Dinwoodie, Methods and perspectives in intellectual property, Edward Elgar, 2013, pg. 34.

⁸³ Idem.

⁸⁴ Graeme Dinwoodie, op. cit., pg. 37.

⁸⁵ EU Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, 2015, pg. 2, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN>.

⁸⁶ Idem, pg. 3.

Among its ambitious legislative measures, the DSMS aims to modernize copyright rules in the light of the digital revolution and changed consumer behaviours. Regarding the IP reform, the EU Commission noted that:

“[T]he rules applicable to activities of online intermediaries in relation to copyright protected works require clarification, given the growing involvement of these intermediaries in content distribution. Measures to safeguard fair remuneration of creators also need to be considered in order to encourage the future generation of content.”⁸⁷

The DSMS is revealed by the EU Commission to be the result of a durable process of reflection on the evolution of digital technologies and of reflection on how the works are created, produced, distributed and exploited.⁸⁸ Further on, it noted that the DSMS is well-rooted in the current EU copyright framework as the outlined targeted actions aim to adapt it to the new realities, in an effort of achieving the long-term vision to modernize the rules.⁸⁹ Proposed initiatives would encompass a clarification of the rules on the activities of intermediaries in relation to copyright-protected content.

The Commission points out that the evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution and access to copyright-protected content.⁹⁰ With regard to this, it further stresses that:

“In this framework, rightsholders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works. This could put at risk the development of European creativity and production of creative content. It is, therefore, necessary to guarantee that authors and rightsholders receive a fair share of the value that is generated by the use of their works and another subject-matter.”⁹¹

Article 13 of the proposed Copyright Directive introduces new concepts and interpretations of the liability of the internet service providers but is far from being transparent and unambiguous.

4.2 The Impact Assessed by the Commission

The Commission envisioned the modern EU space as a market in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, along with a high level of consumer and personal data protection, irrespective of their nationality or place of residence.⁹² In this regard, the EU Commission affirmed its mission to achieving a copyright marketplace that works efficiently for all players and gives the right incentives for investment in, and dissemination of, creative content.⁹³

In reaching its proclaimed aim of the new copyright measures, the EU Commission found that intervention at the national level would not be sufficiently efficient to ensure a well-functioning digital single market for the distribution of copyright-protected content and could create new obstacles,⁹⁴ such as fragmentation generated by initiatives from the Member States.⁹⁵

On the point of the copyright framework, the EU Commission noted that:

“In the areas covered by this section of the [impact assessment], the rationale for EU action stems both from the harmonization already in place (notably in terms of rights) and the cross-border nature of the distribution of content online.”⁹⁶

It is true that the proposed Copyright Directive is described as being consistent with the existing EU copyright legal framework. If regarding the E-Commerce Directive as not being, strictly speaking, a pillar of the copyright legal framework. It has a horizontal approach, which makes it relevant in some cases of copyright infringement. Despite this obvious tension between the two instruments, there is no general statement regarding the consistency of the proposal with the E-Commerce Directive.⁹⁷ The Commission addressed the issue of the negative impact that the E-Commerce Directive⁹⁸ could have on the development of the Internet in Europe, when Internet intermediary service providers are not liable for the content that they transmit, store or host as long as they act in a strictly passive manner.⁹⁹

The Commission took into consideration the impact

⁸⁷ Idem, pg. 2.

⁸⁸ EU Commission Staff Working Document Explanatory Note Accompanying the document Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, pg.2, available at:

<https://ec.europa.eu/digital-single-market/en/news/explanatory-note-accompanying-commission-recommendation-relevant-product-and-service-markets>.

⁸⁹ Idem, pg. 2.

⁹⁰ EU Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0593&from=EN>.

⁹¹ Idem.

⁹² EU Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, pg. 3.

⁹³ Commission Staff Working Document Impact Assessment on the modernisation of EU copyright rules Part 1, (SWD(2016) 301 final) Accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, pg. 134.

that the DSMS could have on a social level, as well as on fundamental human rights. After analysing these effects individually, the Commission concluded that DSMS might have an impact on copyright as a property right as well as on the freedom to conduct business.¹⁰⁰

4.3 Freedom of Expression Under the Value-gap Proposal

The Explanatory Memorandum issued by the Commission dedicates a paragraph to fundamental rights in a manner that primarily focuses on the importance of Article 17(2) of the EU Charter.¹⁰¹ With regards to fundamental rights, the EU Commission affirmed that:

“[B]y improving the bargaining position of authors and performers and the control rightholders have on the use of their copyright-protected content, the proposal will have a positive impact on copyright as a property right, protected under Article 17 of the Charter”¹⁰².

Although crucially relevant to the EU legal order, the balancing exercise with fundamental rights is somehow left aside the topic by the EU legislator with regards to the DSMS Proposal. While the EU Commission does not perform a thorough analysis of a potential conflict between copyright and freedom of expression, it assesses that:

“[T]his impact is a limited effect on the freedom of expression and information, due to the mitigation measures put in place and a balanced approach to the obligations set by the relevant stakeholders”¹⁰³.

No further explanation is provided by the EU legislator to support this point, be it in the Explanatory Memorandum or in the Impact Assessment.

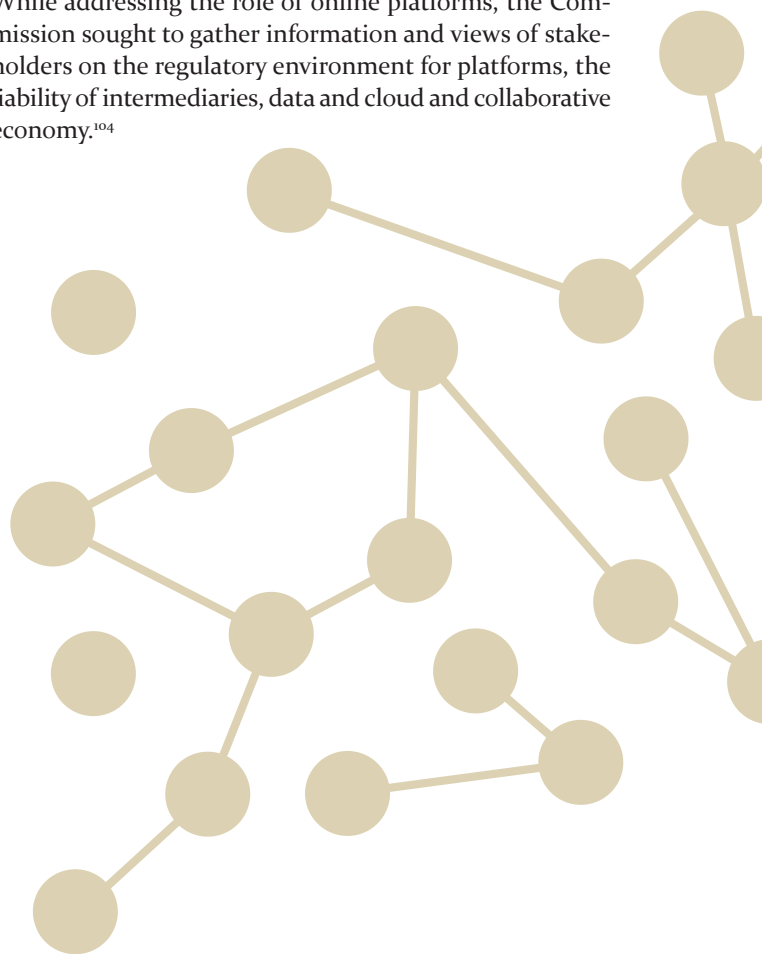
4.4 Public Debates or the Clash of Internet Titans?

The main debates around the DSMS illustrate some irreconcilable views of rightholders and Internet users on how the new measures are compatible with their fundamental rights. Generally, critics maintain that Article 13, in its initial wording, would put rightholders on a preferential position while violating user’s fundamental rights.

Similar concerns were expressed by voices from both the academic and social world. According to Article 52 of the EU Charter:

“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

The public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy was undertaken in September 2015 and ended on the 6th of January 2016. While addressing the role of online platforms, the Commission sought to gather information and views of stakeholders on the regulatory environment for platforms, the liability of intermediaries, data and cloud and collaborative economy.¹⁰⁴



⁹⁴ Idem, pg. 133.

⁹⁵ Idem.

⁹⁶ Commission Staff Working Document Impact Assessment on the modernisation of EU copyright rules Part 1, (SWD(2016) 301 final) Accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, pg. 133.

⁹⁷ Bourdillon, Rosati and Others, An academic perspective on the copyright reform, Computer

Law & Security Review, [33], 2017, pg. 7.

⁹⁸ Article 15 - “No general obligation to monitor”.

⁹⁹ EU Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, cit., pg. 12.

¹⁰⁰ Impact Assessment, cit., pg. 136.

¹⁰¹ Rosati and Others, cit., pg. 7.

¹⁰² Explanatory Memorandum, pg. 9.

¹⁰³ Idem.

¹⁰⁴ EU Commission, Synopsis Report on the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries and the Collaborative Economy, available at: <https://ec.europa.eu/digital-single-market/en/news/results-public-consultation-regulatory-environment-platforms-online-intermediaries-data-and>.



The EU Commission observed that, as far as online intermediaries and their role in the process of tracking illegal content concerned, the views of the respondents were divided. While some were generally satisfied with the current framework envisaged by the E-commerce Directive and considered that it does not need changes, other respondents shared the opinion that some measures need to be taken, particularly towards a clarification and guidance of the instrument.¹⁰⁵ A majority of respondents considered that different categories of illegal content require different policy approaches, but again opinions differed as to whether and what kind of duties should be imposed on intermediaries. “Right holders generally reported on the growing use of protected content without their authorisation by online platforms or through licensing agreements containing, in their view, unfair terms, complaining about legal uncertainties. (...) Other stakeholders, representing different categories of respondents, argued for the importance of freedom of expression and the applicability of the liability exemption under the e-commerce directive to online platforms”.¹⁰⁶

The DSMS recalled that as the amount of digital content available on the Internet grows, the EU Commission had to identify potential challenges to define the limits on what intermediaries can do with the content that they transmit, store or host before losing the possibility to benefit from the exemptions from liability set out in the E-Commerce Directive. Taking account of the view of some stakeholders that action against illegal content is often ineffective and lacks transparency, the Commission

analysed the need to enhance the overall level of protection from illegal material on the Internet. The test of the Commission also tracked the new measures’ impact on the fundamental right to freedom of expression and information, such as rigorous procedures for removing illegal content while avoiding the take down of legal content, and whether to require intermediaries to exercise greater responsibility and due diligence in the way they manage their networks and systems – a duty of care.¹⁰⁷

The Commission’s starting point in assessing the impact of the proposed measures was that the negotiation position of rightholders is generally affected by the fact that they are not in a position to keep their content away from these platforms: “when uploaded content is infringing, they can only ask the platforms to take down the content, in each individual case, which leads to significant costs for them and appears insufficient to them, given the large scale of uploads.”¹⁰⁸

Further on, the Commission noticed that some platforms have voluntarily taken measures to help rightholders in identifying and monetizing the use of content on their services, through content identification technologies:

“Solutions have been developed both by user uploaded content platforms and technology providers and (...) are applied at the time of upload of the content or later on to verify through an automated procedure whether the content uploaded by users is authorized or not, based on data provided by rightholders. The Commission did, however, acknowledge the identification of some types of content, such as bootleg remixes and DJ sets, or more generally of content that has been transformed or differs significantly from the original content, may be very challenging.”¹⁰⁹

The Commission’s statement might show existing concerns regarding the risks potentially raised by the actions of tracking derivative works that are legally permitted. On this account, the EU Commission stressed that the disabling of access to and the removal of illegal content by providers of hosting services could be slow and complicated, while content that is legal can be taken down erroneously.¹¹⁰ This comment is aimed also to cases of parodies, which at the current stage of technological development is apparent that it can be difficult to be identified as such. The chance that content identification technologies may lead to “false positives” are present, i.e. situations where content is wrongly identified and removed.¹¹¹

This research has identified social online campaigns carried out by civil society associations, that raised questions on negative consequences of the unilateral right of platforms to decide the illegal character of the uploaded content on the freedom of expression.¹¹²

One of these movements is the OpenMedia campaign and was also considered by the the EU Commission¹¹³.

The OpenMedia Campaign was mostly supported by the Internet users, who generally found the existing laws providing a delicate balance between free expression and legal speech to “inhibit abusive behaviour, not free expression of opinion; protect free speech with largely effective checks and balances to protect individual and corpo-

rate rights whilst allowing a society to discuss, learn, create and expand.” The same respondents viewed sharing content online as a cornerstone of “freedom of speech” that allows users to promote a more informed and inclusive world. Secondly, the respondents of the campaign considered that monitoring actions should be a last-resort mechanism because generally, the intermediaries are not qualified to act as judges as “this concern links to automated systems and their inability to detect context, thus potentially unfairly censoring legal speech and expression”.¹¹⁴

Nearly all respondents viewed online copyright infringement as a case-per-case assessment, considering that combining all types of illegal content under the same framework would lead to disproportionate measures.¹¹⁵

It is apparent that Internet users understand the new DSMS measures can have a direct impact on their Internet behaviour, raising concerns regarding the potential negative impact on what and how they will be allowed to spread content on the Internet. Privacy related decisions are heavily context specific, dependent for example, on how much a user is thinking about privacy at the time, along with his or her trust in the other party and often inaccurate assumptions about how data will be used, which could lead the Internet user to not create parody works, even if within the legal framework¹¹⁶. This consequence is generally interpreted by the Internet users as a restriction of their freedom of expression and on a larger scale is perceived by the public as a discouraging factor on people’s creativity.

4.5 Relevant CJEU Case-law in the Value-gap Proposal Debate

Recent judgements from the CJEU reasserting fundamental rights in the online environment stand in stark contrast to the lack of leadership shown by the Member States, which, according to some scholars, appear fearful of ensuring that powerful multinational platform providers are fulfilling the states’ human rights obligations.¹¹⁷

The main proceedings in Case SABAM vs. Netlog¹¹⁸ concerned the compatibility with the EU law of a system that filters information in order to prevent files from being made available which infringe copyright. The claims were brought by SABAM, a Belgian management company which represents authors, composers and publishers of musical works and is responsible for, inter alia, authori-

sing the use by third parties of copyright-protected works of those authors, composers and publishers. The Respondent was Netlog, a company that ran an online social networking platform where every person who registered acquired a personal space known as a ‘profile’ which the user could complete himself and which became available globally.¹¹⁹ The CJEU was essentially asked to verify if Netlog’s social network also offers all users the opportunity to make use of, by means of their profile, the musical and audio-visual works in SABAM’s repertoire, making those works available to the public in such a way that other users of that network can have access to them without SABAM’s consent and without Netlog paying a fee.¹²⁰

The Court stressed that holders of intellectual property rights may apply for an injunction against operators of online social networking platforms who act as intermediaries within the meaning of those provisions, given that their services may be exploited by users of those platforms to infringe intellectual property rights.¹²¹

This prerogative was generally confirmed in the CJEU case-law. However, the Court did point out that a general monitoring action carried out by ISPs is incompatible with the EU standards. Firstly, in the *Scarlet Extended* Case, it had been decided that Member States are allowed to implement national rules that would allow them to order the ISPs to take measures aimed not only at bringing to end infringements already committed against intellectual-property rights using their information-society services but also at preventing further infringements.¹²² Secondly, the Court established that the EU law prohibits national authorities from adopting measures which would require a hosting service provider to carry out general monitoring of the information that it stores.¹²³

¹⁰⁵ EU Commission, Full report on the results of the public consultation on the Regulatory environment for Platforms, Online Intermediaries and the Collaborative Economy, pg. 2, available at: <https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries>.

¹⁰⁶ Idem.

¹⁰⁷ Proposal, cit., pg. 12.

¹⁰⁸ Communication from the Commission, cit, pg. 140.

¹⁰⁹ Impact Assessment, cit., pg. 140.

¹¹⁰ Communication from the Commission, cit., pg. 12.

¹¹¹ Impact Assessment, cit., pg. 141.

¹¹² Full Report on Public Consultations, cit., pg. 6.

¹¹³ Idem, pg. 20.

¹¹⁴ Content filtering: illegal, unpopular, and broken, 2017, available on <https://openmedia.org/en/content-filtering-illegal-unpopular-and-broken>.

¹¹⁵ Idem, pg. 20.

¹¹⁶ Emily Taylor, The privatization of human rights: illusions of consent, automation and neutrality, Global Commission on Internet Governance, Chatham House, The Royal Institute of International Affairs, Paper series: no 24, January 2016, pg. 15.

¹¹⁷ Emily Taylor, The privatization of human rights: illusions of consent, automation and neutrality, Global Commission on Internet Governance, Chatham House, The Royal Institute of International Affairs, Paper series: no 24, January 2016, pg. 16.

¹¹⁸ Case C-360/10, SABAM v Netlog, ECLI:EU:C:2012:85, Judgement issued on 16 February 2012.

¹¹⁹ Idem, §15 – 16.

¹²⁰ Idem, §17.

¹²¹ Idem, §28.

¹²² *Scarlet Extended*, cit., §31-32.

¹²³ See, by analogy, *Scarlet Extended* § 35 and SABAM v Netlog §32-34.

With regards to a filtering system, the Court found that its implementation would require:

- a) that the hosting service provider identify, within all of the files stored on its servers by all its service users, the files which are likely to contain works in respect of which holders of intellectual-property rights claim to hold rights;
- b) that it determines which of those files are being stored and made available to the public unlawfully; and
- c) that it prevents files that it considers to be unlawful from being made available.¹²⁴

The Court concluded that preventive monitoring of this kind would thus require active observation of files stored by users with the hosting service provider and would involve almost all of the information thus stored and all of the service users of that provider.¹²⁵

The consistency of the system with the EU law was assessed by CJEU in relation to the protection of human rights. In that regard, the Court observed that filtering systems would ensure the protection of copyright, which is an intellectual-property right, enshrined in Article 17(2) of the Charter. The Court stressed that the right is not inviolable, and it must be balanced against the protection of other fundamental rights.¹²⁶

Although the examination of the Court concerned the relation of copyright with the freedom to conduct a business enjoyed by operators such as hosting service providers, the interpretation issued in *Netlog* can be extended to other fundamental rights that might enter in conflict with IP rights, such as the freedom of expression.¹²⁷ The findings of the Court that such monitoring has no limitation in time, is directed at all future infringements and is intended to protect not only existing works but also works that have not yet been created at the time when the system is introduced, is relevant in the context of the current debate around the value-gap proposal and can be linked to the general EU approach of parody:

“[T]hat injunction could potentially undermine freedom of information, since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications. Indeed, it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another.”¹²⁸

At this stage of technological development, it should therefore not be accepted too quickly that content recognition technologies solve all problems, as they are not able to take into account context in order to avoid suppressing lawful uses of content.¹²⁹

The judgement issued in *The Pirate Bay* case appears to confirm the view of the new DSMS Copyright Directive, that “it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used thereof.” Until further explanations, this can mean that even if a given platform does qualify for the safe harbour from the E-commerce Directive, it is still subject to injunctive relief. By correlating the Decision of the CJEU with Article 13 DSMS, it would not be unreasonable and incompatible with the EU law to impose to online platforms a duty to take measures even where they fall within the safe harbour.

4.6 Current Negotiations on the Value-gap Proposal

The negotiations on a final version of the proposed Copyright Directive are currently ongoing, with proposals drafted by both the EU Parliament¹³⁰ and the Council of the European Union¹³¹.

Article 14 of the E-commerce Directive provides a balance of different interests (both of rightholders and intermediaries) and, if applied correctly, already grants protection against infringements committed by ‘false’ hosting providers. As such, a revision of Article 14 of the E-commerce Directive would not serve to expose passive hosting providers to the risk of primary liability for making available copyright works provided by third-party users of their services. The situation could differ in relation to secondary liability, but intervention in this area would mean carrying out an extensive harmonisation effort that – so far – has substantially eluded EU legislature.¹³²

In relation to the current EU policy discussion of the so called ‘value gap proposal’, the judgment issued in *The Pirate Bay* reinforces the position of the EU Commission, especially the basic idea that making available, by a hosting provider, third-party uploaded copyright content may fall within the scope of the right of communication to the public. The Court’s reasoning also prompts a reflection as to whether a hosting provider that is primarily responsible for acts of communication to the public is eligible for the safe harbour within Article 14 of Directive 2000/31.¹³³

¹²⁴ SABAM v Netlog, cit., §36.

¹²⁵ Idem, §37.

¹²⁶ Idem, 40 – 42.

¹²⁷ Idem, §48.

¹²⁸ SABAM v Netlog cit., §50.

¹²⁹ Rosati & Others, cit., pg. 9.

¹³⁰ EU Parliament, Draft compromise amendments on Article 13 and corresponding recitals, 21 February 2018.

¹³¹ Council of the European Union, Proposal for

the DSMS - Mandate for negotiations with the EU Parliament, 23 April 2018.

¹³² Eleonora Rosati, Why a reform of hosting providers’ safe harbour is unnecessary under EU copyright law, pg. 14.

¹³³ Eleonora Rosati, The CJEU Pirate Bay judgment and its impact on the liability of online platforms, pg. 2.

¹³⁴ Idem, pg. 15.

¹³⁵ Emily Taylor, The privatization of human rights: illusions of consent, automation and neutrality, Global Commission on Internet Governance, Chatham House, The Royal Institute of International Affairs, Paper series: no 24, January 2016, pg. 17.

¹³⁶ Info available at: https://europa.eu/european-union/about-eu/countries/member-countries_en.

Although the rationale underlying the EU Commission's proposal seems rooted within earlier CJEU case law, the Pirate Bay decision has aligned case law to policy action and might have even gone further than the latter.¹³⁴

The judgment is expected to have substantial implications for future EU and domestic proceedings and prompts a broader reflection on the current EU copyright reform debate.

To conclude, the proposed EU system fails under some circumstances to provide detailed guidance on the content of the remedies that can be sought for detecting illegal content uploaded on the Internet. Although the debates around the DSMS are far from over, it is fair to predict that the national courts and lastly the CJEU will be left with the task of filling out these gasps.

It appears that there are high risks that the ISPs' will track parodies through automatic filtering and find it as infringing original works. Under the current legal framework, there could be anticipated an increased threat towards parodist treatment online.

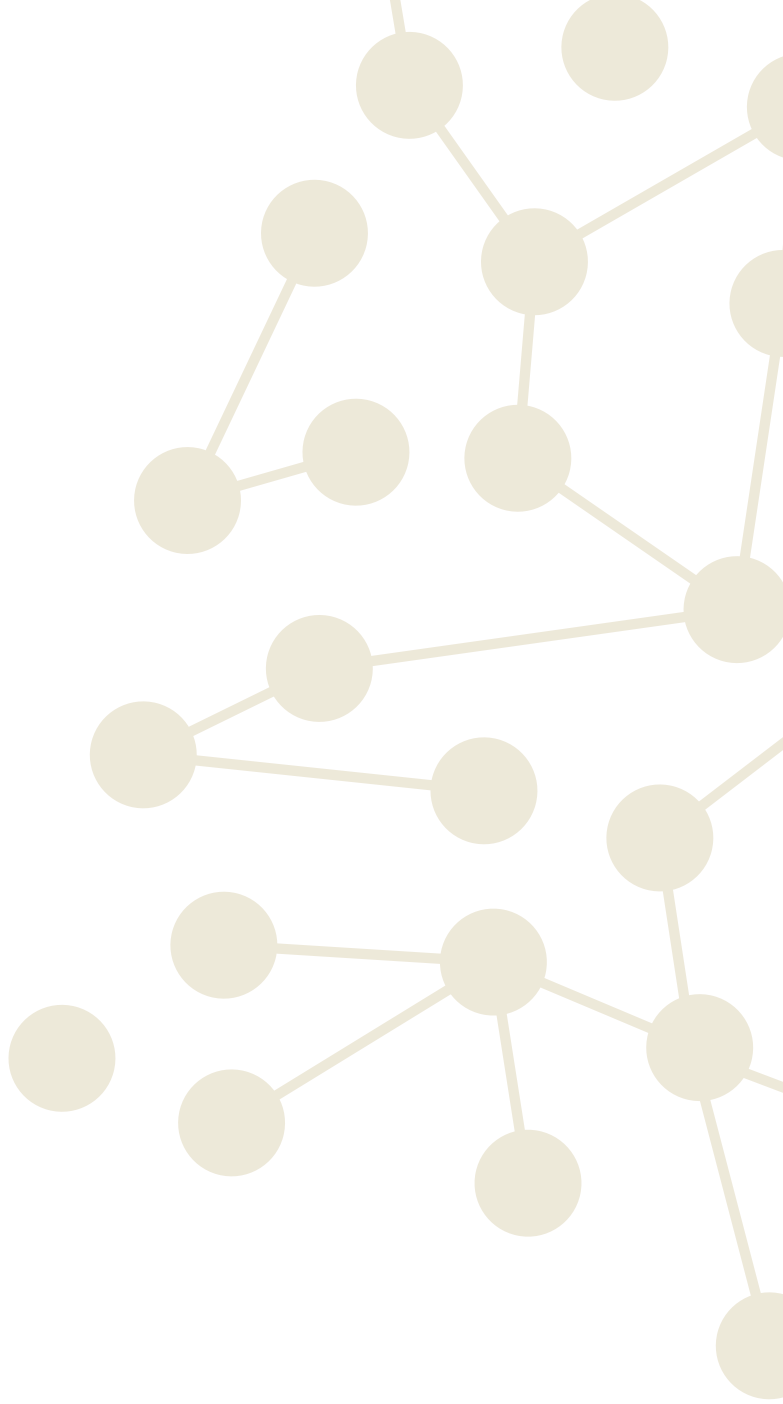
5. CONCLUDING REMARKS

The parody exception provided by the InfoSoc Directive has been implemented differently by the Member States, according to various political agendas and was consequently interpreted differently by the national judges.

At this point of EU copyright reform, it is easy to assume that an exclusive and absolute right to control information flows constitutes an interference with the freedom of expression and would have a discouraging effect on the authors of parodies, which would contravene with the legal framework of the Member States where the parody exception was implemented.

Undoubtedly, the EU legislator must ensure future balanced measures that respect the framework of parody, where nationally implemented. With this regard, it should be possible to evolve independent monitoring bodies using the combined efforts of private, voluntary and state vehicles, if this work is done transparently, effectively and responsibly.¹³⁵

At this moment, the parody exception is implemented or partially implemented in 24 out of 28 Member States (counting the UK, for the time being a full member of the EU with the standing obligations to apply EU law in and to the UK).¹³⁶ In this situation, it could be appropriate that the EU legislator reflects on appropriate measures regarding the treatment of the parody works, for reducing and ultimately eliminating the fragmentation of the internal market, as well as ensuring that both IP rights and the freedom of expression enjoy an equivalent level of protection throughout the EU.



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