CATÓLICA Global School of Law

CATÓLICA RESEARCH CENTRE FOR THE FUTURE OF LAW
LISBOA · PORTO

CGSL WORKING PAPERS

No. 2/2022

Are EU Member States required to have a sense of humor?

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Humor is at least as old as mankind. It has been used in literature for centuries – think of the satirical works by Lucian of Samosata or of *Don Quixote*. Humor is also a vital part of contemporary digital culture – think of memes, GIFs, WhatsApp stickers and literal versions of famous videoclips posted on YouTube.

As readers will certainly know, copyright law is generally not oblivious to the importance of humor. And neither was the latest legislative instrument in the EU copyright *acquis* – the CDSM Directive.[1] Specifically, the infamous Article 17 provides a pro-humor safeguard against the over-blocking of user-uploaded content, with paragraph 7 stating that users must be able to rely on the parody exception in making their content available on online platforms.

As is also well known among copyright aficionados, some Member States are yet to fully transpose the CDSM Directive into their domestic legal orders. Of those Member States, a few have so far failed to include a parody exception in their national copyright laws (among which my own – Portugal –, as much as it saddens me to say it). In EU copyright law, the general parody exception is laid down in Article 5(3)(k) of the InfoSoc Directive[2] – one of the many optional exceptions in the catalogue.[3] In transposing Article 17, the Member States that presently lack a parody exception have one fundamental choice: either they include a provision allowing for parodic uses in the context of the liability regime of Article 17 only; or they implement a broader

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[1] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

[2] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[3] The EU legislature seems to have learnt the lesson meanwhile, with mandatory exceptions now being the trend. The post-InfoSoc exceptions in the Orphan Works, Marrakesh and CDSM Directives are all mandatory for Member States to implement.

parody exception once and for all, covering not only those online acts, but also others, online and offline alike, that are not related to Article 17.

Hungary, one of the Member States that had not transposed Article 5(3)(k), opted for the latter in its Copyright Reform Act of 2021, codifying a general parody defense.[4] This, however, was not strictly required by the CDSM Directive. Under Article 17(7) and Recital 70, the obligation to transpose the parody exception is limited to the need to ensure that users are allowed to make their content available on platforms like YouTube, TikTok, Instagram or Vimeo. If this interpretation is correct, the CDSM Directive makes the parody exception mandatory indeed, but only for acts falling within the coverage of Article 17. Apart from this type of online uses, parody remains an optional privilege.[5] Or does it?

The question I wish to explore here is whether having a general parody exception in national catalogues is still a *choice* that Member States have, or whether, on the contrary, the transposition of such an exception is compulsory as a matter of EU copyright law.

To answer that question, we need to go back to a notorious trio of CJEU rulings delivered in the summer of 2019: *Pelham*, *Funke Medien* and *Spiegel Online*. In all three decisions the judges made the same (somewhat enigmatic) statement: the exceptions in Article 5 of the InfoSoc Directive, they said, "may, or even must, be transposed by the Member States".[6] The idea that these exceptions *may* be transposed by Member States into their national laws is self-evident, as the twenty exceptions provided in Article 5(2)-(3) are optional. What is not so clear is what the Court meant with the segment "or even must".

It could well be argued that the expression refers to the privilege laid down in Article 5(1) for acts of temporary reproduction – the only non-optional exception on the list.

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[4] *See* Article 34/A(1)(b) of the Hungarian Copyright Act. Prior to the implementation of the exception, Hungarian courts had refused parody-based arguments advanced by unauthorized users, on grounds that Hungarian law provided no such defense. *See* Péter Mezei, *No Time to Laugh – The Parody Defence is Unavailable under Hungarian Copyright Law*, 15(7) Journal of Intellectual Property Law & Practice 499 (2020).

[5] For the argument that the entitlements conferred by copyright exceptions should, in general, be qualified as privileges, as opposed to rights, *see* Tito Rendas, *Exceptions in EU Copyright Law: In Search of a Balance Between Flexibility and Legal Certainty* (Kluwer Law International, 2021), pp. 71-77.

[6] CJEU, *Pelham*, para. 60; CJEU, *Funke Medien*, para. 58; and CJEU, *Spiegel Online*, para. 43.

But there is an alternative and arguably more plausible interpretation, which involves reading that segment of the decision in light of a ground-breaking (and clearer) statement made by AG Szpunar in his Opinion in *Pelham*. What the AG then said was that, since some of the exceptions in Article 5 reflect the balance that the EU legislature sought to strike between copyright and various fundamental rights, "[f]ailing to provide for certain exceptions in domestic law could therefore be incompatible with the Charter [of Fundamental Rights of the EU]".[7] In saying that some exceptions "must" be transposed and, simultaneously, in not rebutting AG Szpunar's revolutionary statement in *Pelham*, the judges were more likely than not adhering to his view on the mandatory nature of those exceptions that bear a special connection with fundamental rights.[8]

Although AG Szpunar did not name the exceptions that merited this status, parody is an obvious candidate, as it finds its rationale in the queen of fundamental freedoms – freedom of expression (Article 11 of the Charter). As AG Cruz Villalón put it in his opinion in *Deckmyn*, "parody is a *form of artistic expression* and a manifestation of *freedom of expression*. It can be one thing as much as the other and it can be both things at once".[9] Similarly, the CJEU judges recognized that the application of the parody exception must strike a fair balance between the interests and rights of copyright holders, on the one hand, and the freedom of expression of users, on the other.[10]

The very definition of "parody" adopted by the CJEU in *Deckmyn* renders this link with freedom of expression manifest. According to the Court, for the parody exception to apply the work must (i) "evoke an existing work, while being noticeably different from it", and (ii) "constitute an expression of humour or mockery". Thus, in order to qualify as a parody, the use must, at a single blow, create a new work and criticize or at least comment on something else, namely the earlier work that it borrows from. And, if it is effective, it may also make people laugh.

This connection between parody and freedom of expression is also mentioned in the text of the CDSM Directive: the mandatory nature of the parody and quotation

[7] AG Opinion, *Pelham*, para. 77.

[8] Siding with this reading, *see* Bernd Justin Jütte & João Pedro Quintais, *The Pelham Chronicles: Sampling, Copyright and Fundamental Rights*, 16(3) Journal of Intellectual Property Law & Practice 213 (2021).

[9] AG Opinion, *Deckmyn*, para. 70.

[10] *See* CJEU, *Deckmyn*, para. 27.

exceptions in the context of Article 17 is said to be "particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union (…), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property".[11]

Taken together, what all these elements suggest is that reading the InfoSoc parody exception[12] as optional and failing to include it in national catalogues is not compatible with EU copyright law when interpreted in light of the Charter.

The restrictive approach of providing for a parody defense only for Article 17-related activities, which was followed by Italy,[13] should therefore be avoided. Instead, countries like Cyprus, Greece and Portugal, that lack a general parody exception and that, at the time of writing, have not yet transposed the CDSM Directive, would be well-advised to embrace humor in their domestic copyright laws, by using the opportunity provided by the implementation to finally recognize such a defense.

[11] Recital 70 of the CDSM Directive.

[12] As well as other exceptions that are intimately connected to fundamental rights, such as the one for quotations (which is already mandatory under the Berne Convention) or the one for teaching and research.

[13] *See* Article 102-*nonies* of the Italian Copyright Act.