

Moral Rights v. Free Speech

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Moral right v. Free Speech

Areas of potential conflict

- ✓ Right of integrity v. parody
 - Right of disclosure v. news reporting
 - Right of withdrawal v. media archives
 - ✓ Perpetual moral right v. public domain
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Moral right v. Free Speech

Internalized in copyright law?

- Some flexibility in definition and scope of moral rights:
 - E.g. “prejudicial to his honor or reputation” (6bis BC): right of integrity is not absolute!
 - But many exceptions leave moral rights expressly intact
 - E.g. quotation right: indication of source, lawful publication
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French IP Code, Art. L-122-5

Lorsque l'oeuvre a été divulguée, l'auteur ne peut interdire :

- 1° Les représentations privées [...];
 - 2° Les copies ou reproductions réalisées à partir d'une source licite et strictement réservées à l'usage privé du copiste [...];
 - 3° Sous réserve que soient indiqués clairement le nom de l'auteur et la source :
 - a) Les analyses et courtes citations justifiées par le caractère critique, polémique, pédagogique, scientifique ou d'information de l'oeuvre à laquelle elles sont incorporées ;
 - b) Les revues de presse ; [et cetera]
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Moral right v. Free Speech

Internalized?

- Some flexibility in definition and scope of moral rights
 - Exceptions often leave moral rights expressly intact
 - Some exceptions also restrict moral rights, or are unclear
 - E.g. use of unpublished work may be *fair* (US)
 - Parody?
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European Copyright Code

Art. 5.6 – Relation with moral rights

- (1) Uses under this chapter are permitted without prejudice to the right of divulgation under article 3.2.
- (2) Uses pursuant to articles 5.2, 5.3, 5.4 and 5.5 are permitted without prejudice to the right of attribution under article 3.3, unless such attribution is not reasonably possible.
- (3) Uses pursuant to articles 5.1, 5.2, 5.3 and 5.5, are permitted without prejudice to the right of integrity under article 3.4, unless the applicable limitation allows for such an alteration or the alteration is reasonably due to the technique of reproduction or communication applied by the use.

Moral right v. Parody

Quid in betrekking tot de parodie? Mag men een werk aanwenden op burleske of groteske wijze? Alle twijfel schijnt ons uitgesloten: vermits de parodie opzettelijk de misvorming, het belachelijk maken van een gedachte, een uitdrukking nastreeft, wordt ongetwijfeld door de geparodieerde voorstelling of reproductie van een werk, of ruime delen ervan, het recht op integriteit geschonden.

Frans van Isacker (1961)

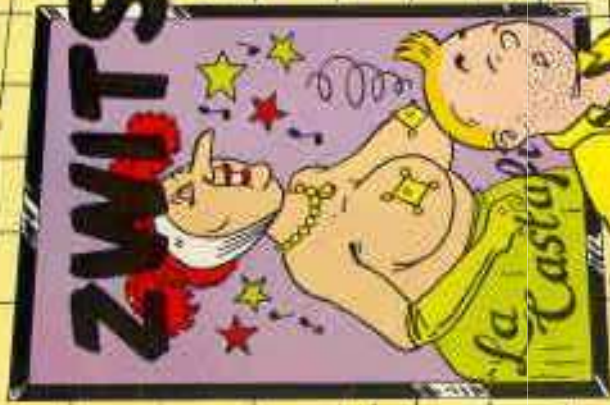
Moral right v. Parody

What about parody? May one use a work in a burlesque or grotesque fashion? There can be no doubt: if the parody is intended to mutilate or ridicule an idea or an expression, surely the right of integrity will be infringed by the parodied representation or reproduction of the work, or of large parts thereof.

Frans van Isacker (1961)

KUIFJE

IN ZWITSERLAND



CARAMBA PUBLIQUES

EM PAROLE DE KUIFJE
1974

Moral right v. Parody

Sous le fallacieux prétexte de faire oeuvre d'imitation burlesque et de caricature grotesque, le prévenu a, en réalité, mutilé l'oeuvre originale d'Hergé en transformant et en dénaturant les personnages que ce dernier avait créés; qu'en opérant cette déformation, C. Callico a violé le droit moral de l'auteur sur son oeuvre et porté atteinte aux droits patrimoniaux.

Crt. App. Brussel, 8 June 1978 (Tin-Tin en Suisse)

Belgian Nijntje (Miffy) parody



Nijntje (Miffy) parodies

«By using the design of this innocent children's character as user of forbidden substances the life's work of [author Dick Bruna] is being mutilated. [...] He need not agree to [...] Nijntje being associated with a dependence of forbidden drugs, such as cocaine.» Parody defense rejected.

Crt.App. Antwerp 2 May 2006

Dutch Nijntje (Miffy) parodies



LIJNTJE

**Nijntje is al 3 dagen wakker
Ze zit lekker aan de coke**

**"Coke is slecht" zegt mammië
"Niet met me fokken"
roept Nijntje
"Ik sta super strak"**

**Nijntje weet wat goed spul is
Mammië is een Mellow teef**

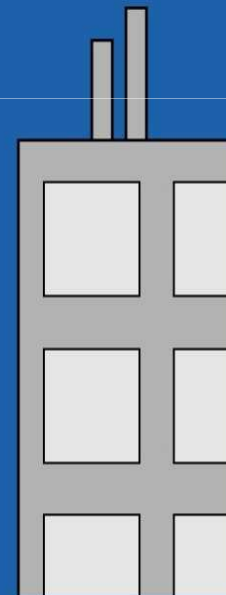
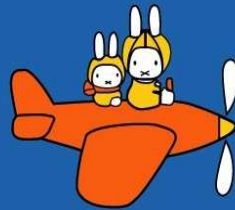
Dutch Nijntje (Miffy) parodies

«Whereas the texts of Dick Bruna are especially childfriendly and non-violent, the texts accompanying the defendant's pictures are mostly rude and aggressive. It is this contrast that is intended to inspire laughter. [...]» Parody defence successful.

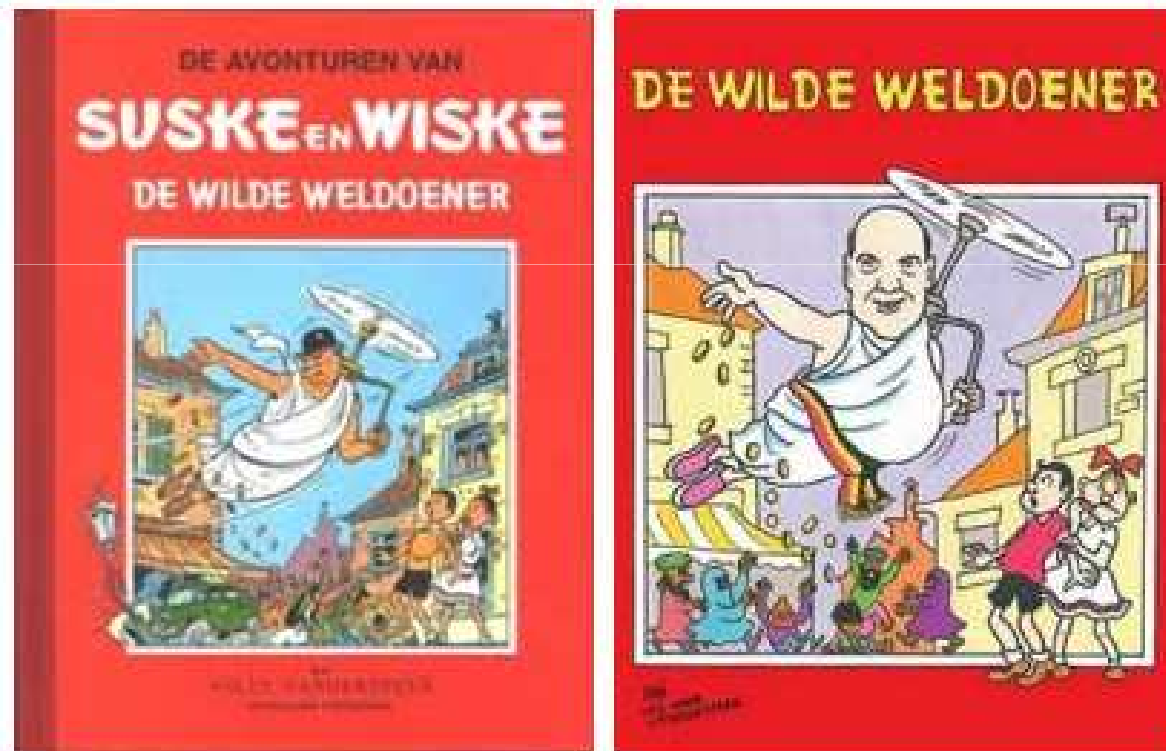
Pres. D.C. Amsterdam 22 December 2009

Nijntje (Miffy) parodies

nijn - eleven



CJEU Case C-201/13 (Deckmyn v. Vandersteen)



CJEU Case C-201/13

(Deckmyn v. Vandersteen)

(25) As regards the objective referred to in Article 5(3)(k) of Directive 2001/29, the objectives of that directive in general must be recalled, which include [...] a harmonisation which will help to implement the four freedoms of the internal market [...], including intellectual property, and freedom of expression and the public interest. It is not disputed that parody is an appropriate way to express an opinion.

CJEU Case C-201/13

(Deckmyn v. Vandersteen)

(27) [...] the application, in a particular case, of the exception for parody [...] must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k).

CJEU Case C-201/13

(Deckmyn v. Vandersteen)

- Parody must (1) evoke existing work while being noticeably different, and (2) ‘constitute an expression of humour or mockery’
- No conditions of originality (of parody); of attribution to person other than original author; of relation to the original work; of mention of source.

CJEU Case C-201/13

(Deckmyn v. Vandersteen)

(30) [...] attention should be drawn to the principle of non-discrimination based on race, colour and ethnic origin [...]

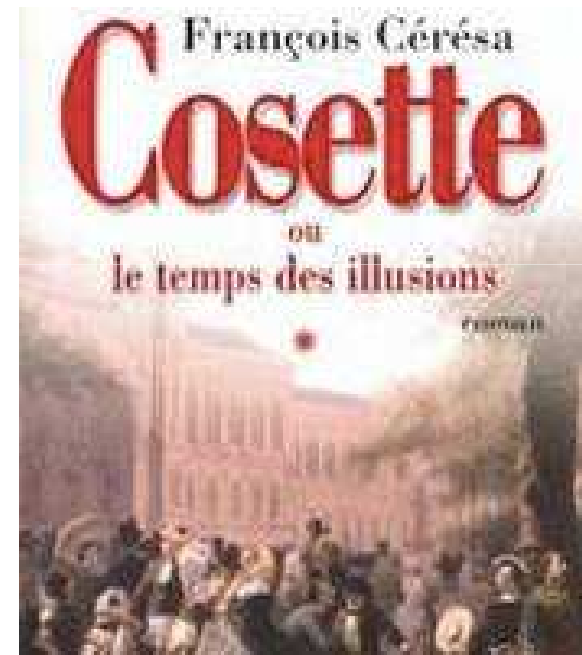
(31) In those circumstances, holders of rights provided for in Articles 2 and 3 of Directive 2001/29 [...] have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message.

CJEU Case C-201/13

(Deckmyn v. Vandersteen)

- EU law requires liberal and flexible application of parody exception ('fair balance'), i.a. to protect free speech
- However, if parody conveys message that author deems discriminatory this is to be factored in
 - This reeks of moral right of integrity, *which is not harmonized!*

Perpetual moral right v. public domain



Perpetual moral right v. free speech

Société Plon e.a. v. Pierre Hugo & Société des gens de lettres,
Cour de cassation F, 30 January 2007:

«...qu'interdire toute suite aux Misérables ne pouvait constituer, ainsi qu'il était soutenu à tort, une atteinte au principe de la libre création puisque, en l'espèce, cette oeuvre, véritable monument de la littérature mondiale, d'une part, n'était pas un simple roman en ce qu'elle procédait d'une démarche philosophique et politique, ainsi que l'avait explicité Victor Hugo et , d'autre part, était achevée, qu'il s'ensuivait qu'aucune suite ne pouvait être donnée à une oeuvre telle que "Les Misérables" sans porter atteinte au droit moral de Victor Hugo... »

Perpetual moral right v. free speech

Société Plon e.a. v. Pierre Hugo & Société des gens de lettres, Cour de cassation F, 30 January 2007:

- Making sequel does not infringe perpetual moral right of V. Hugo, if rights of paternity and integrity are respected
- Perpetual adaptation monopoly of ‘true monument of world literature’ would impinge on ‘freedom of creation’
- Express reference to 10 ECHR

Moral right v. Free Speech

External scrutiny: fundamental freedoms

- Freedom of expression is fundamental freedom (10 ECHR, 11 EU Charter, 19 UDHR)
 - Restrictions to freedom of expression must be ‘necessary in a democratic society [...] for the protection of the reputation or rights of others [...]’
 - Copyright is interference with freedom of expression, but for legitimate purpose (ECtHR 2013, *Ashby Donald v. France*)
 - Freedom of the arts and sciences (13 EU Charter)
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Moral right v. Free Speech

External scrutiny: fundamental freedoms

- But moral right is also a fundamental (human) right
 - Right to privacy (8 ECHR), data protection (8 EU Charter), protection of IP (17.2 EU Charter)
 - “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author” (27.2 UDHR)
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Moral right v. Free Speech

External scrutiny: fundamental freedoms

- No general precedence between fundamental rights/freedoms → balancing, proportionality test
 - ECtHR: States enjoy variable *margin of appreciation* in applying freedom of expression depending on type of use & purpose of speech:
 - political debate, news reporting: strict(er) scrutiny
 - *Ashby Donald v. France*: broad margin of appreciation in case of commercial speech (use of fashion photos on weblog)
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Can parody rules withstand scrutiny under 10 ECHR?

- EU law after *Deckmyn* fairly liberal, but limiting parody to parodic uses that are not discriminatory is questionable:
 - Is it the role of copyright law (i.e. right holders) to enforce anti-discrimination laws?
 - Freedom of expression is freedom to ‘shock, offend or disturb the State or any sector of the population’ (ECtHR *Handyside*)?

Can perpetual moral right withstand scrutiny under 10 ECHR?

- Privacy rights normally do not extend post mortem
- Moral rights do lapse in most Eur. countries
 - *Akdas v. Turkey* (ECHR 2010): Turkish ban on Appolinaire's 'Les 11.000 verges' disproportionate, i.a. because widely and legally available elsewhere in Europe
- Public interest in unlimited use will increase as work becomes (more) iconic
 - Cf. erosion of privacy rights of 'public figures'
- Preservation of cultural heritage is not a legitimate aim for restricting free speech

