

Parody and Copyright: Has *Deckmyn* Solved the Conundrum?

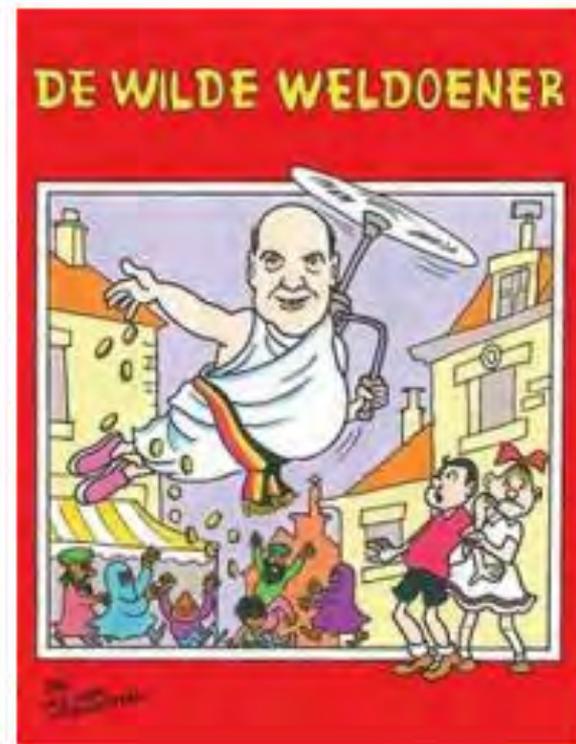
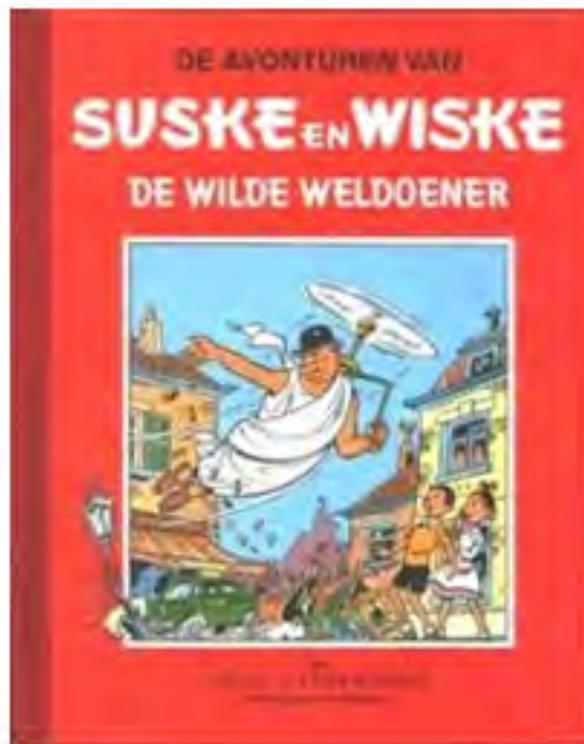
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Norsk Opphavsrettsforeningen

Oslo, 11 February 2015

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



The Parody Conundrum: a (Potential) Double Conflict with Copyright

- Parody as *misappropriation* of work
 - Infringement of economic right of adaptation
 - Regulated by rules on scope and exceptions
- Parody as *mutilation* of work
 - Infringement of moral right of integrity
 - Not well regulated

Dealing with Parodies in Copyright Law

- Parody is ‘new, independent work’
 - Nordic, NL (old)
 - Germany: *freie Benutzung* (“inner distance”)
- *Fair use*
 - US: *Campbell v. Acuff-Rose Music* (S.Ct. 1994)
- Specific parody exception
 - France, Bel (since 1994), NL (since 2004), UK (since 2015)
- External application of freedom of expression

“Darfurnica”

Nadia Plesner/Louis Vuitton, Crt. The Hague 2011

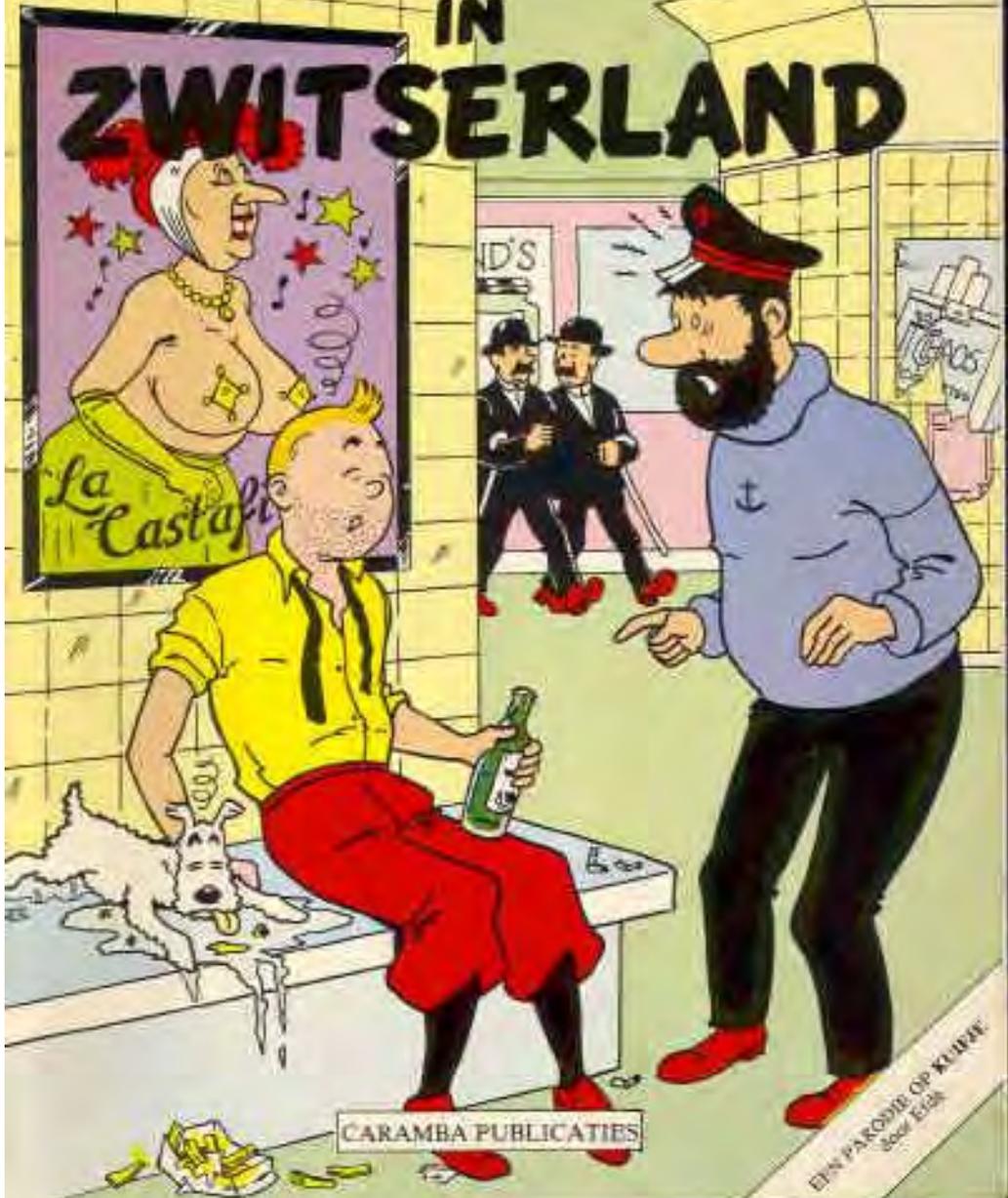


Parody: an Infringement of Moral Right?

“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 PUBLICATIES

EEN PARODIE OP KUIFJE
door Eric Smit

Parody and Moral Right

«Under the false pretext of parody the defendant has in fact mutilated the original work of Hergé by transforming and distorting the characters he had created; that by operating this deformation, C. Callico violated the moral rights of the author on his work ».

Crt. App. Brussel, 8 June 1978 (Tin-Tin in Switzerland)

Belgian Nijntje (Miffy) parody



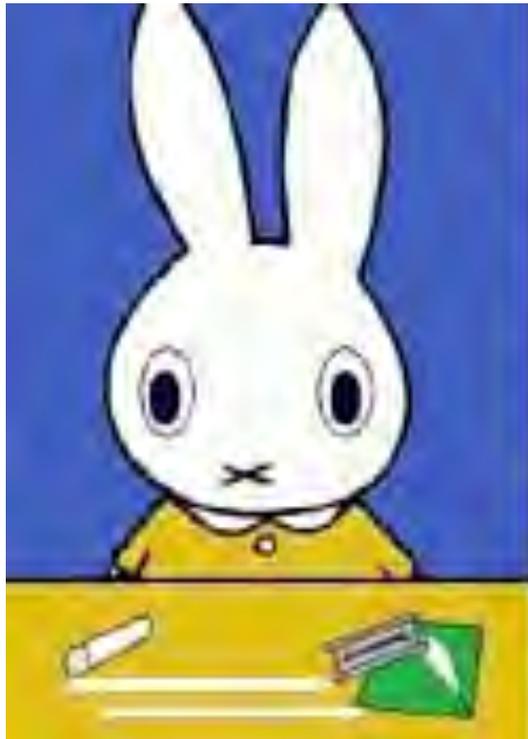
Nijntje (Miffy) parodies

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«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

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Dutch Nijntje (Miffy) parodies



LIJNTJE

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

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

Nijntje weet wat goed spul is
Mammie is een Mellow teef

Dutch Nijntje (Miffy) parodies



Dutch Nijntje (Miffy) parodies

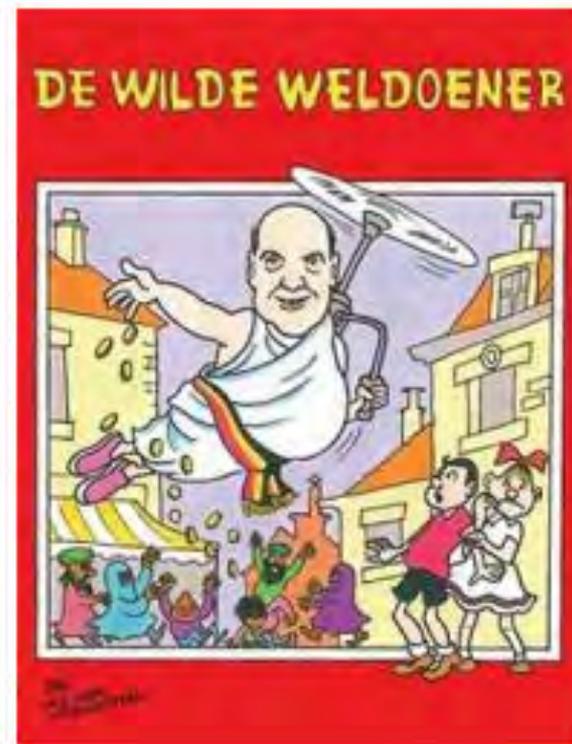
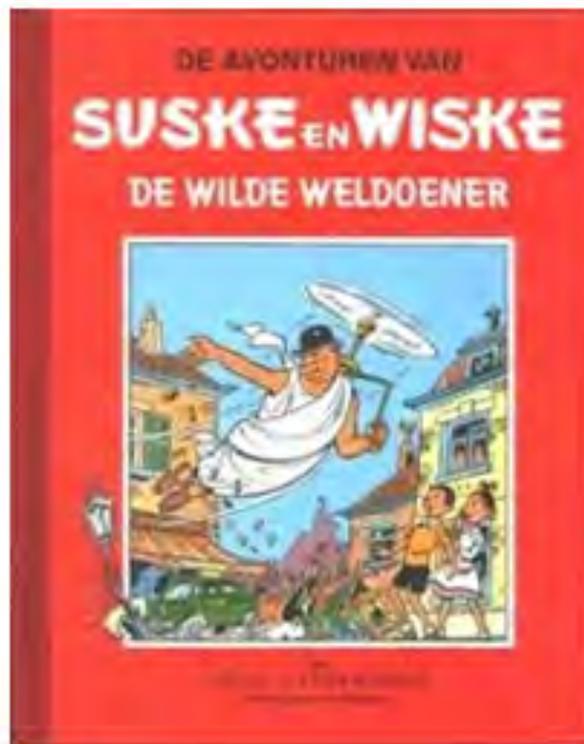
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«Whereas the texts of Dick Bruna are especially childfriendly and non-violent, the texts accompanying the defendant's pictures are mostly rude and aggressive. It is this contrast that is intended to inspire laughter. [...]» Parody defence (partly)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

D.C. Amsterdam 22 December 2009

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



Deckmyn v. Vandersteen

What is a Parody?

- Parody is autonomous concept of EU law, which should be given its “usual meaning in everyday language”
- “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”

Deckmyn v. Vandersteen

Interpreting parody exception in InfoSoc Directive

- Principle of narrow construction
- Interpretation in light of objectives of InfoSoc Directive “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.
- ‘Fair balance’ between rights/interests of author/right holders and of parodist

Deckmyn v. Vandersteen

Fair Balance

(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).

Deckmyn v. Vandersteen

Parody: other criteria?

- No requirement:
 - of originality of parody;
 - that parody cannot be reasonably ascribed to author of parodied work;
 - that parody relate to (comment on) parodied work;
 - parody “with” also allowed
 - indication of source
-  But: other criteria not addressed by CJEU

Deckmyn v. Vandersteen

Moral right?

(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.

Deckmyn v. Vandersteen

Summary

- EU law requires liberal application of parody exception ('fair balance'), i.a. to protect free speech
- However, if parody conveys message that author deems discriminatory this may to be factored in
 - This reeks of moral right of integrity, *which is not harmonized!*
 - How about freedom to 'shock, offend or disturb ... any sector of the population' (ECtHR *Handyside*)?

Has *Deckmyn* Solved the Parody Conundrum?

- Moral rights questions unsolved:
 - No harmonization (yet)
 - Moral interests creeping in through back door
 - Room for national solutions/divergences
- Economic rights questions partly solved:
 - Scope of parody exception clarified
 - But: underlying adaptation right not harmonized, scope of adaptation right may vary nationally

Consequences of *Deckmyn* for Nordic copyright law?

- Parody is optional exception
- Nordic countries have not explicitly transposed 5(3)k InfoSoc, so arguably *Deckmyn* has no consequences
- On the other hand, literal implementation is not required (transposition “as to the results” also includes judge-made law)