

Copyright versus freedom of expression

(critique, satire and parody)

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Introduction



"The poet has two weapons to correct men: satire and canticle, Satan's laughter and God's smile; one, a whip that corrects by tearing, the other, a kiss that makes better by making the sky glimpse. " (Emile Zola)

Plan of the presentation

I. Parody under the prism of Deckmyn

II. Parody after the CJEU's trilogy of 29th of July 2019

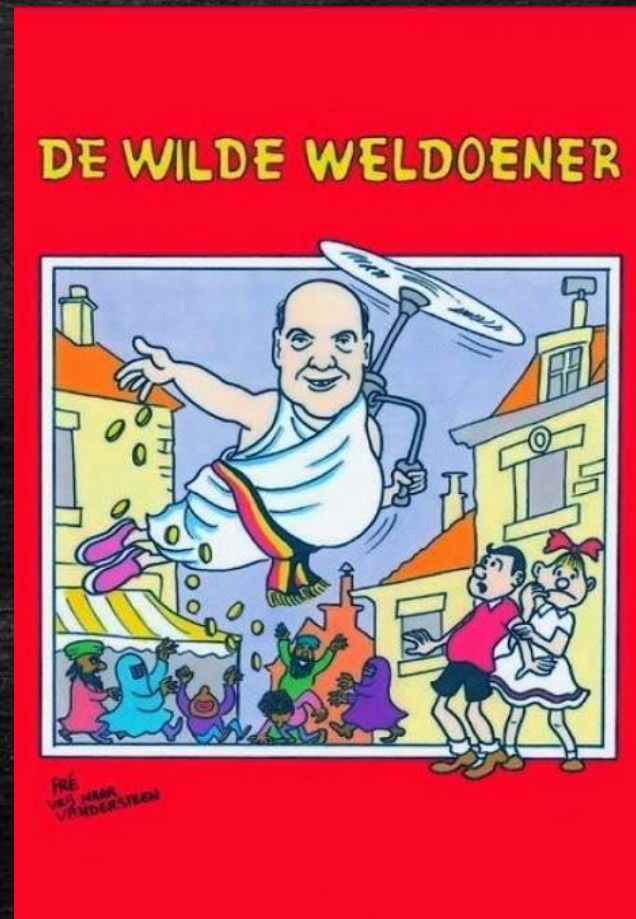
III. Grey areas on the application of the exception in the digital world

I. Parody under the prism of Deckmyn

Deckmyn, C-201/13, 3 September 2014

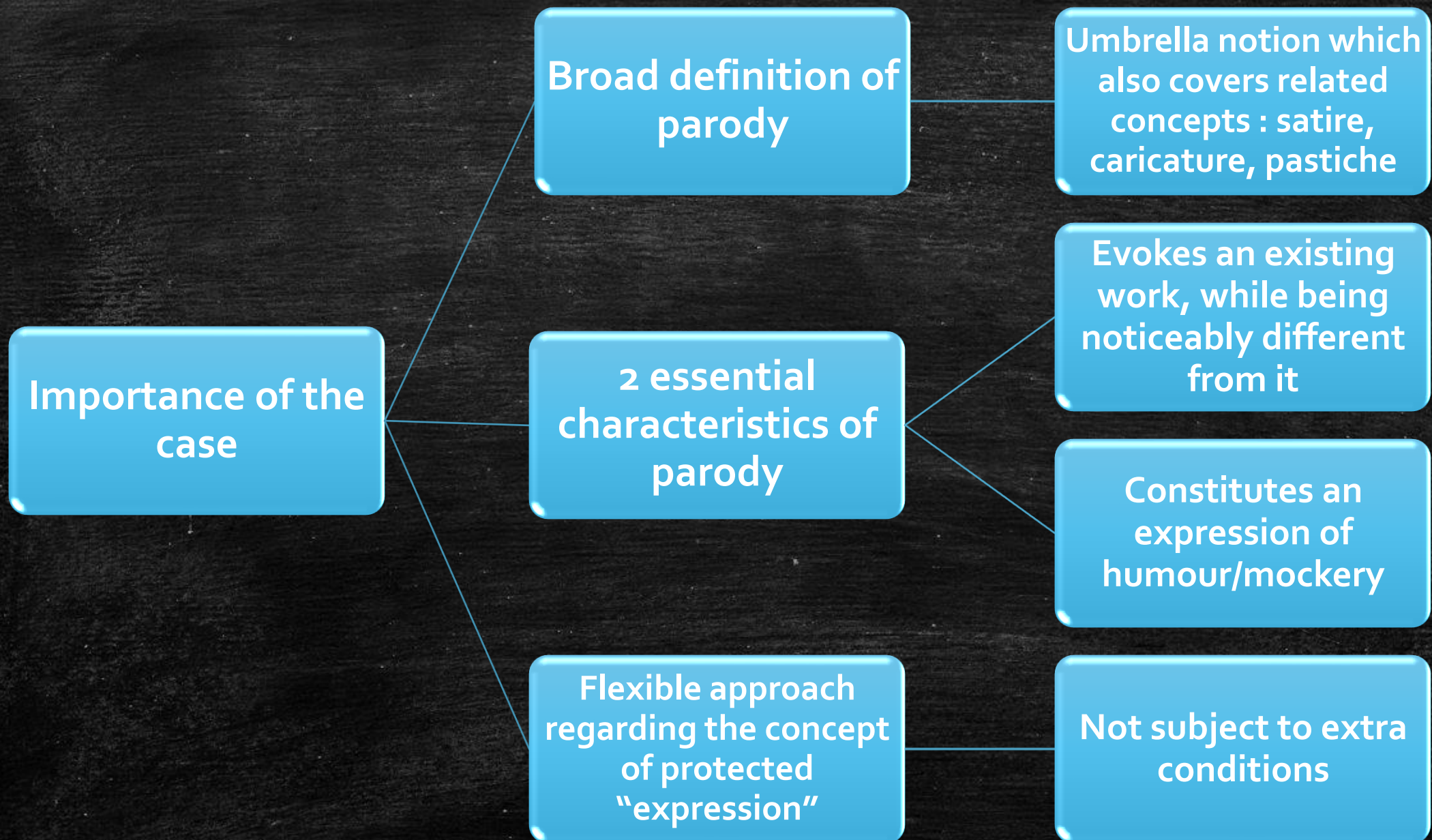


VS



Parody as an autonomous EU concept

- National judges should strike a fair balance between the rights and interests of the authors and the right of freedom of expression of the parodist
- Authors have a legitimate interest that their work is not associated with such a discriminatory message



No additional criteria

- 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*
 - *that it should mention the source of the parodied work ;*

Balancing mechanism



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graph LR; A((The balancing between the interests of the author and the freedom of expression is a core element of the parody exception as a matter of the EU Charter)) --> B((The balancing mechanism of the EU parody concept acts both abstractly (definition) and concretely (application in the specific case))); B --> A;
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The diagram consists of two light blue circles on a dark background. The left circle contains text about the balancing of interests and the parody exception. The right circle contains text about the balancing mechanism of the EU parody concept. Two large light blue arrows connect the circles: one pointing from left to right and another pointing from right to left, indicating a reciprocal relationship.

The balancing between the interests of the author and the freedom of expression is a core element of the parody exception as a matter of the EU Charter

The balancing mechanism of the EU parody concept acts both abstractly (definition) and concretely (application in the specific case)

The balancing of interests as a core element of the parody exception

what shall count
should be the
intention of the
parodist,
regardless of
whether a
humoristic effect
or result is
obtained



Moral rights

- Balancing shall be made between the right of freedom of expression of the parodist and of the author of the work that is parodied
- AG's Opinion in Deckmyn(par. 85) : no application of the parody exception for messages which are "*radically opposed to society's most deeply held beliefs, on which the European public space is constructed* "

Deckmyn is a decisive moment for the constitutional turn of EU copyright law

27 It follows that the application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, 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).

Parody under the aegis of the EU Charter

- Jonathan Griffiths (2019) : there must be room in the domestic laws to strike this balance and in case where the balancing will favour the user, the user's freedom of expression would prevail
- Specific parody exception, flexible interpretation of other exceptions, constitutional protection of freedom of expression

II. Parody after the CJEU's trilogy of 29th of July 2019

(Spiegel on line, Pelham and Funke Medien)

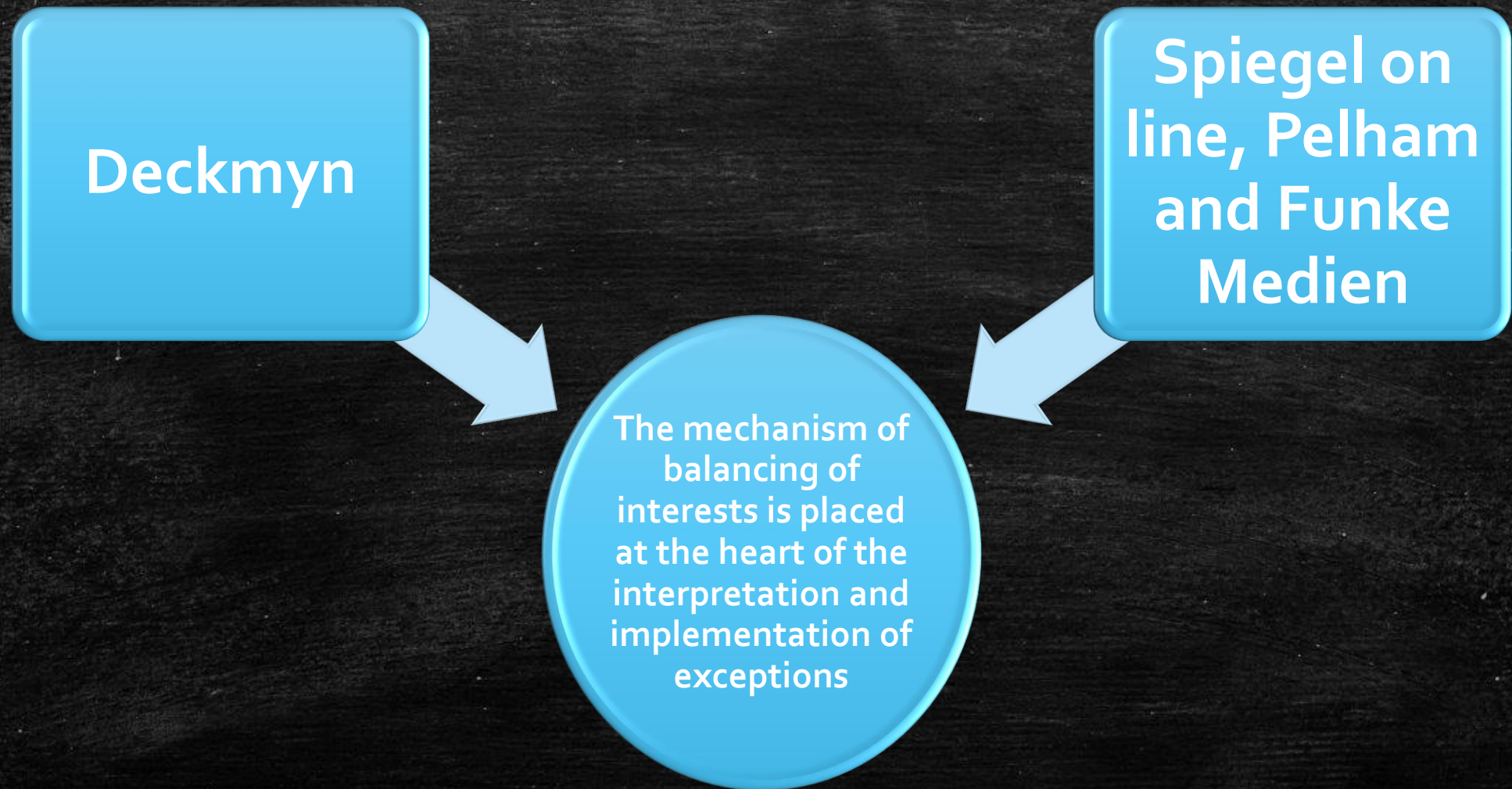
No direct application of freedom of expression as an external limitation to copyright law

- Exhaustive nature of the list of exceptions
- Destabilising impact of a fundamental rights analysis for the EU copyright harmonisation

Should the parody exception be mandatory as a matter of primary EU law?

- The AG Spuznar has been more explicit than the Court on this points:
- Opinion, Spiegel online, (par. 62) : the judiciary might intervene in exceptional cases in which the essence of a fundamental right is at stake
- Opinion, Pelham (par. 77) failing to provide for certain exceptions in domestic law could be incompatible with the Charter

Deckmyn's confirmation

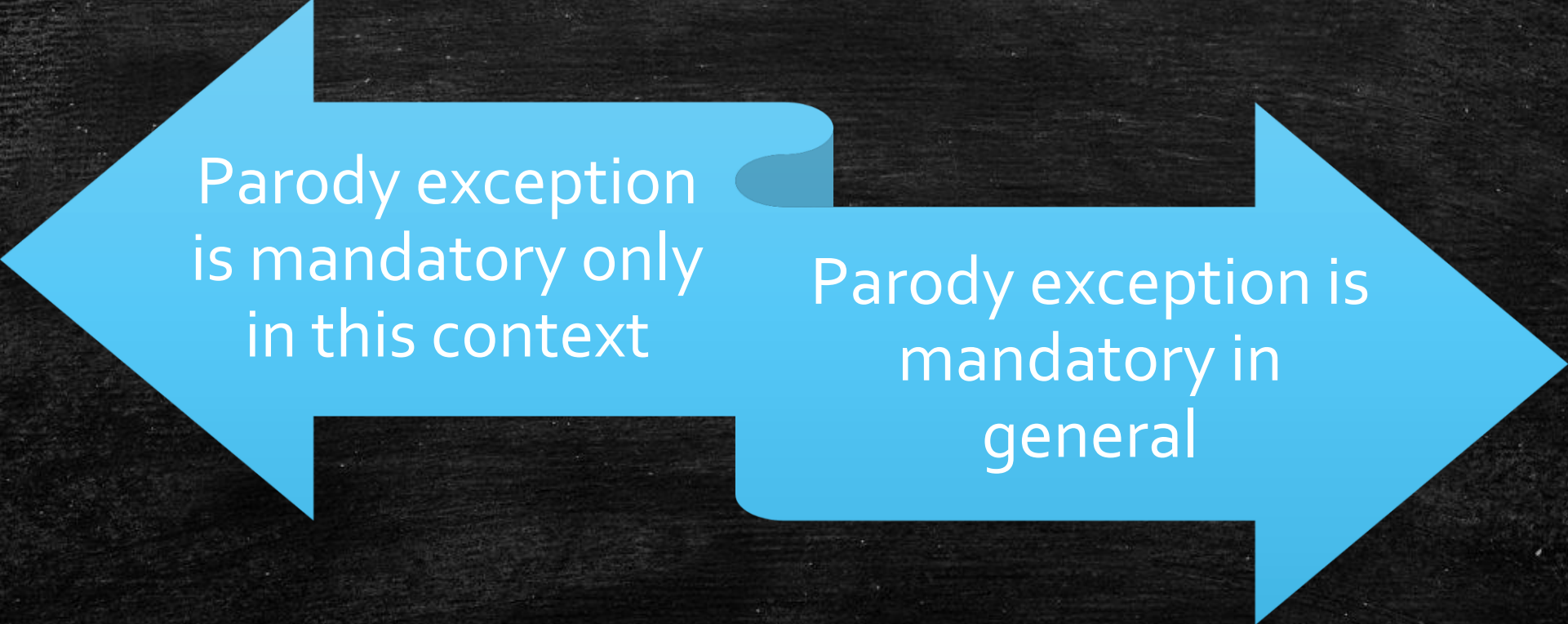


III. Grey areas and on the application of the exception in the digital world

Art. 17 (7) of the CDSM Directive

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services: (a) quotation, criticism, review; (b) use for the purpose of caricature, parody or pastiche.

Interpretation of article 17 (7)



Parody exception
is mandatory only
in this context

Parody exception is
mandatory in
general

Parody, a mandatory exception for the benefit of all users

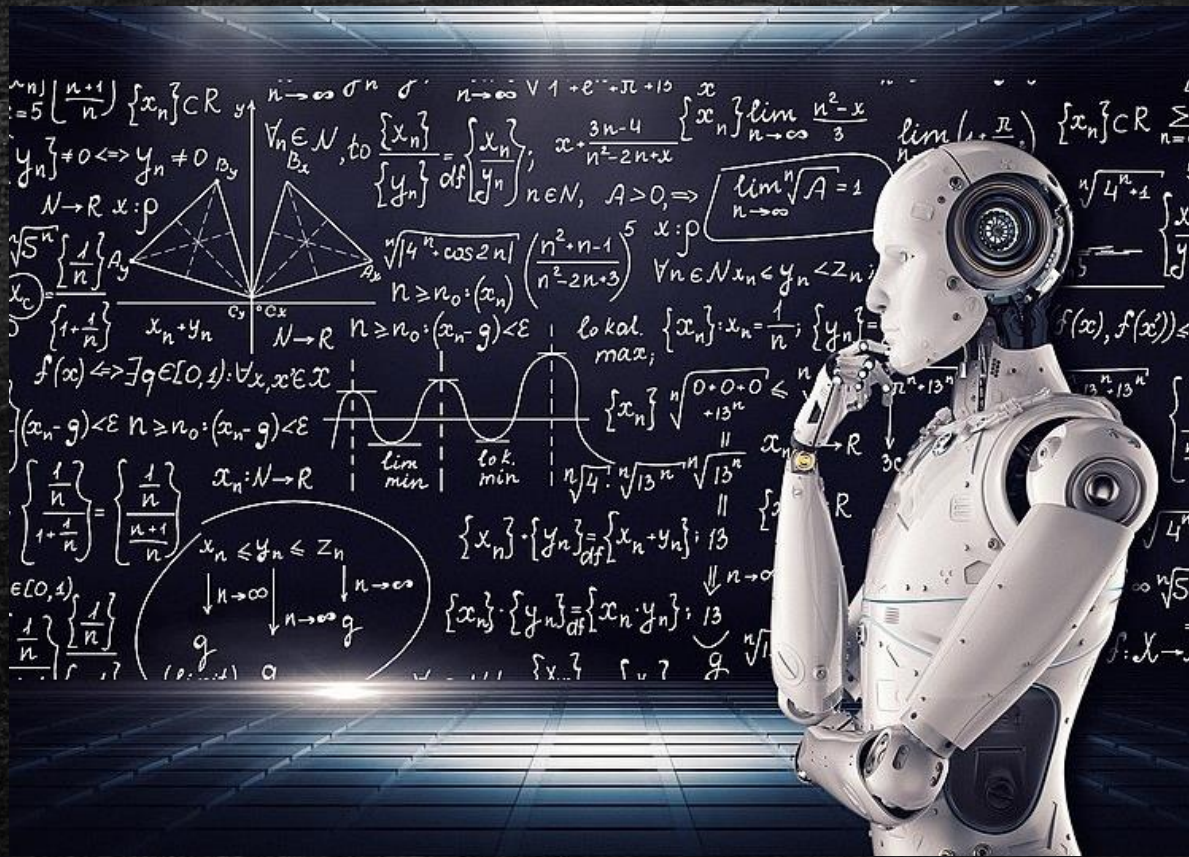
- Systematic interpretation of Art. 17 CDSM and of Art. 5 of the Infosoc under the prism of the EU charter (freedom of expression, principle of equal treatment) would require that MS are obliged to provide the means to strike this balance by establishing the parody exception as mandatory for all users
- State liability?

The mandatory character of the parody exception for all users across the EU

- Has been indirectly confirmed by the CJEU's recent decision in Case C-401/19 – *Poland v Parliament*, 26 April 2022
- Par. 87: in view of the particular importance of those exceptions and limitations for freedom of expression and freedom of the arts and, therefore, for the abovementioned fair balance, it was necessary to make such exceptions and limitations, which are among those provided for on an optional basis in Article 5 of Directive 2001/29, mandatory, **in order to ensure that users receive uniform protection in that regard across the European Union.**

The safeguarding of the parody exception in the digital sphere

Mike MacKenzie (2018) CC.



- Requires the advancement of filter capable of distinguishing parodies
- Difficulties for algorithmic assessment

Application to memes, deepfakes and other



"[shitposting](#)" : non sensical, surreal, and ironic online posts which often aim to derail productive discussion and distract readers

Conclusion

- The establishment of the exceptions of quotation and parody as mandatory and the fundamental rights-based interpretation made by the CJEU are signs of a significant evolution of EU copyright law in the recognition towards more flexible norms
- Journey towards “transformative uses” and an EU fair-use mechanism ?

