Questions

I) Current Law and practice

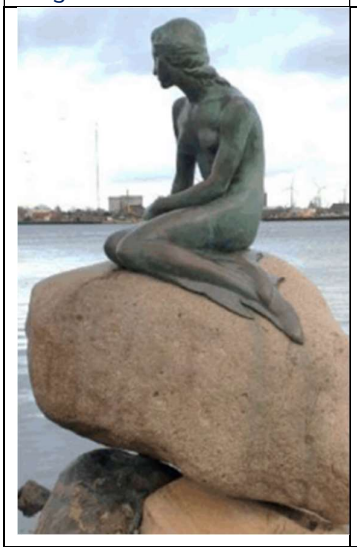
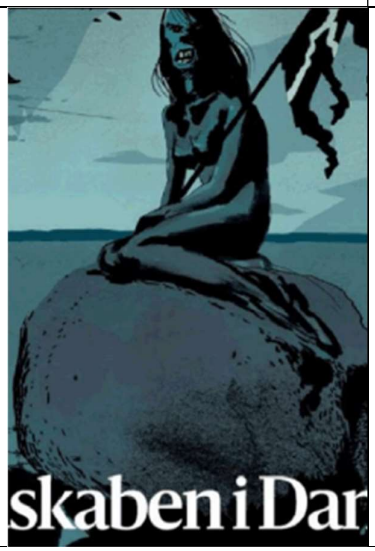
Please answer all questions in Part I on the basis of your Group's current law.

1. Does your law or case law provide for exceptions or limitations to copyright protection for the purpose of parody or any other similar exceptions (e.g. satire, caricature, pastiche)? Please explain.

In short, yes.

There has never in the Danish copyright law been an explicit statutory provision that allows for the creation of parodies etc., but in the literature, it has for a long time been assumed that despite this, parodies etc. based on copyright-protected works were allowed. This was assumed at least as early as 1965 by the arguably most influential figure in Danish intellectual property law, Mogens Koktvedgaard, in his seminal work, *immaterialretsdispositioner*[1]. Since then, there has been a debate in the literature concerning the legal authority and status of such exceptions; are parodies allowed because they constitute their own original works as they are adaptations of the work on which they are based, or are they allowed as there exists an unwritten exception to the exclusive rights conferred by the copyright?

Not until 2023 did the Danish Supreme Court[2] issue a decision, that explicitly dealt with the principle of parody of copyright-protected works. The judgement dealt with one of, if not, the most famous works in Denmark, sculptor Edvard Eriksen's sculpture of H.C. Andersen's *Little Mermaid*. During the Covid pandemic one of the largest newspapers in Denmark published a parody of the sculpture depicted as a zombie and a picture of the sculpture with a face mask:

Original	Zombie	Corona mask
		

The depictions were found to infringe upon the copyright related to the Little Mermaid in the two first instances, with the court in the second instance even stating that there does not exist a

[1] Page 249, petit.

[2] Judgement of 17 May 2023 in case BS-24506/2022

copyright exception in Denmark. The Supreme Court did, however, in no uncertain terms, confirm that there does exist a parody exception in Danish Copyright law.

Following the Supreme Court's judgement, the Danish parody principle can in general be said to have three dimensions: 1) as an exception to the exclusive economic rights[3] of the proprietor of the copyright holder; 2) as an exception to the droits moraux of the copyright holder; and 3) as part of the right to adaptation of original, protected works.

1) and 2) regarding parodies as an exception to the exclusive rights of the copyright holder, this is a similar understanding of parody principles as that expressed by the CJEU in case C-201/13 (Deckmyn), and the Danish Supreme Court explicitly references this judgement in its reasoning. When employed in this context, the parody principles allow a third party, for the purposes of parody and/or satire, to recreate and communicate the recreation of an original work despite the exclusive rights of the copyright holder, and the copyright holder cannot oppose this recreation and communication to the public.

What constitutes a parody follows, as recited by the Danish Supreme Court, from *Deckmyn*. the CJEU states 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.«[4] This interpretation of the concept of 'parody', according to the Danish Supreme Court, takes adequate account of the relevant fundamental rights concerned.

With regards to the so-called economic rights, these are EU-harmonised and are what *Deckmyn* and Article 5(3)(k) of Directive 2001/29 (InfoSoc Directive) concern. The Droits moraux are not EU-harmonised, but the Danish Supreme Court simply states that the principles in *Deckmyn* and Article 5(3)(k) of the Infosoc Directive also apply to the droits moraux.

According to the EU-harmonised parody exception, it is not a requirement that the parody itself is original. Thus, as 'parody' is an autonomous concept of the EU, this also applies to the Danish parody exception. If, however, the parody is original and does thus constitute a copyright-protected work in itself, it will not be legal due to the parody 'exception'. The parody will, instead, be legal as such use simply does not, under Danish law, fall within the exclusive rights of the copyright holder of the work that has been made into a parody[5]. Though this rule is quite broad and can be difficult to reconcile with the strong copyright protection offered under the EU[6],

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[3] The EU-harmonised exclusive rights to reproduction and communication to the public.
[4] C-201/13 (Deckmyn), paragraph 33.
[5] This rule seems to be a Danish (Nothern/Sacandinavian) oddity. The rule can be found in the Danish Copyright Act § 4(2). It is implemented to make sure that 'adaptations' of works are legal in that all works are to some extent made by the creator mixing and their influences – we all stand on the shoulders of giants.
[6] Copyright protects copies that are recognisable as the original work, and parodies by the definition offered in *Deckmyn* must »evoke« the original work.

the Supreme Court does seem to indicate that this is only the case because parodies have a fundamentally different purpose than the original work.

2. Does your law or case law define parody or any of the other similar exceptions mentioned in the above question? Please explain.

As Denmark is part of the EU, and the CJEU has stated that 'parody' is an autonomous concept within the EU, Denmark must use the definition put forth by the CJEU in *Deckmyn*:

> 14. It must be noted that the Court has consistently held that it follows from the need for uniform application of EU law and from the principle of equality that the *terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union*, having regard to the context of the provision and the objective pursued by the legislation in question (judgment in Padawan, C-467/08, EU:C:2010:620, paragraph 32 and the case-law cited).
> 15. *It is clear from that case-law that the concept of 'parody', which appears in a provision of a directive that does not contain any reference to national laws, must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union* (see, to that effect, judgment in Padawan, EU:C:2010:620, paragraph 33).
> 16. That interpretation is not invalidated by the optional nature of the exception mentioned in Article 5(3)(k) of Directive 2001/29. *An interpretation according to which Member States that have introduced that exception are free to determine the limits in an unharmonised manner, which may vary from one Member State to another, would be incompatible with the objective of that directive* (see, to that effect, judgments in Padawan, EU:C:2010:620, paragraph 36, and ACI Adam and Others, C-435/12, EU:C:2014:254, paragraph 49).
> 17. Accordingly, the answer to the first question is that Article 5(3)(k) of Directive 2001/29 must be interpreted as meaning that *the concept of 'parody' appearing in that provision is an autonomous concept of EU law*.
>
> [...]
>
> 18. Consequently, the answer to the second and third questions is that Article 5(3)(k) of Directive 2001/29 must be interpreted as *meaning 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.* [My *emphasis*].

3. Must the parody comply with the three-step test provided for in article 9(2) of the Berne Convention?

Yes. This three-step test and the Berne Convention are part of built into all exceptions to copyright in Danish Law. In its judgement of 18 December 2018 in case 171/2017 the Danish Supreme Court stated that exceptions to the exclusive rights of the copyright holder »must be interpreted restrictively and may not conflict with a normal exploitation of the work or other subject-matter and may not unreasonably prejudice the legitimate interests of the right holder.« The Supreme Court did not explicitly reference Berne Convention in its judgement, but instead based this interpretation on Article 5(5) of the Infosoc Directive. It is, however, apparent that the Inf-soc Directive and thus the Supreme Court simply implement the principles in the art. 9(2) of the Berne Convention.

Apart from the three-step test in the Berne Convention, there is also a principle in the EU, which has been implemented by the Danish Supreme Court[7], that all exceptions to exclusive rights must be interpreted restrictively. This usually leads one down the same alley as the Berne Convention.

4. Are there any other special conditions or requirements for a parodist to benefit from this exception?
   a) Parody must constitute an expression of humour or mockery;
      It is difficult to say. The definition of 'parody' in *Deckmyn* and implemented by the Supreme Court explicitly states that a parody must »constitute an expression of humour or mockery«. This would seem to indicate that the answer is 'yes'.

      However, the Danish case concerning the Little Mermaid does not seem to be an obvious example of 'humour' or of 'mockery'. It, of course, cannot be ruled out that certain readers of the articles to which the pictures were attached found them funny, but it also does not seem obvious that humour was the intention. Instead, the intention seems to have been that the Little Mermaid has value as a national symbol and the newspaper thus wished to critique the nation as such (specifically the polarised approach to the Covid-19 pandemic), and the Little Mermaid was thus simply used for its value as a symbol.

      One could argue that the newspaper was trying to mock the Danish population and the Danish politicians, but this would seem to go beyond the natural interpretation of 'mockery'.

      It thus seems that parodies may, in fact, be legal, even if they are not an expression of mockery or humour but are instead used as a symbol in a critical, political debate. This conclusion is, however, a cautious one as neither of the two pictures were allowed by the Supreme Court on the basis of the parody exception. The drawing was instead allowed as its own adaptive work, and the picture with the face mask was allowed on the basis of a different exception.

   b) Parody must be transformative or add some significant new creation to the original work;
      It follows explicitly from the definition originally put forward by the CJEU that this is not a prerequisite: »[...] The concept of 'parody', within the meaning of that provision, is not

[7] judgement of 18 December 2018 in case 171/2017.

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; [...]«.

A parody may, however, also constitute an original work, In such cases, the parody is legal not because it fall within an exception of the original/parodied work, but simply because it does not constitute an illegal recreation of the original/parodied work.

c) Parody must have a critical intent;
A parody must not be 'critical' in the sense that the parody is used as a part of a larger, societal discussion, though the Little Mermaid case strongly indicates that this would weigh in the favour of the parody being allowed if the parody is used in such critical discussions.

If 'critical' is simply interpreted as meaning that most humour and mockery make fun of (are critical of) someone or something, then most parodies will be 'critical' in this sense. It is, however, as such not an explicit requirement.

d) Parody must be directed at the original work (instead of targeting at society or other aspects unrelated to the original work)?
It follows explicitly from *Deckmyn* that a parody may mock or be critical of something other than the parodied work itself:

> »[...] The concept of 'parody', within the meaning of that provision, is not subject to the conditions that the parody [...] should relate to the original work itself [...]«.[8]

e) Parody must be non-commercial;
No explicit requirement exists, but as the application of the parody exception must always be done on a case-by-case basis, I find it likely that whether the parody had a (partly) commercial intent will be part of the elements that the court includes in its concrete assessment.

f) Parody must not disparage or discredit the original work;
In *Deckmyn* the CJEU states that there may be instances where the parody contains messages etc. that the creator of the original work may have a legitimate interest in not being associated with and may thus have a legitimate interest in opposing that their work gets associated with through the parody.

This is thus something that is part of the overall assessment of the legality of a parody, but there is no rule that states as such that parodies may not disparage the original work.

In *Deckmyn* the CJEU phrases it in the following manner:

> 26. In addition, as stated in recital 31 in the preamble to Directive 2001/29, *the exceptions to the rights set out in Articles 2 and 3 of that directive, which are provided for under Article 5 thereof, seek to achieve a 'fair balance' between, in*

[8] C-201/13 (Deckmyn), paragraph 33.

particular, the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other (see, to that effect, judgments in Padawan, EU:C:2010:620, paragraph 43, and Painer, C-145/10, EU:C:2011:798, paragraph 132).

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).
28. In order to determine whether, in a particular case, the application of the exception for parody within the meaning of Article 5(3)(k) of Directive 2001/29 preserves that fair balance, *all the circumstances of the case must be taken into account.*
29. Accordingly, with regard to the dispute before the national court, it should be noted that, according to Vandersteen and Others, since, in the drawing at issue, the characters who, in the original work, were picking up the coins were replaced by people wearing veils and people of colour, *that drawing conveys a discriminatory message which has the effect of associating the protected work with such a message*.
30. If that is indeed the case, which it is for the national court to assess, attention should be drawn to the principle of non-discrimination based on race, colour and ethnic origin, as was specifically defined in Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22), and confirmed, inter alia, by Article 21(1) of the Charter of Fundamental Rights of the European Union.
31. *In those circumstances, holders of rights* provided for in Articles 2 and 3 of Directive 2001/29, such as Vandersteen and Others, have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message.
32. Accordingly*, it is for the national court to determine*, *in the light of all the circumstances of the case in the main proceedings*, whether the application of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, on the assumption that the drawing at issue *fulfils the essential requirements set out in paragraph 20 above, preserves the fair balance* referred to in paragraph 27 above. [My emphasis].

g) Other - please explain.

5. Do freedom of speech principles play any role when assessing lawfulness of a Parody?

Yes. In *Deckmyn* this follows explicitly from paragraphs 34:

34. However, 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). [My *emphasis*].

This was explicitly referenced by the Danish Supreme Court in the Little Mermaid case. The Supreme Court further stated in line with the CJEU – that all relevant factors of a case must be part of the assessment and that though all expressions enjoy protection, it is particularly important to protect expressions relating to societal discussions.

6. Are all types of copyright works subject to parody exceptions?

Danish Copyright law must be interpreted in line with EU law. For copyright this means particularly, the Infosoc Directive. The infosoc Directive lists the kinds of works to which exclusive rights may exist in art. 2. Art. 5 of the Infosoc Directive which contains the exceptions to the exclusive rights states that it applies to those rights listed in art. 2. This means that, in theory, the exceptions (including the parody exception listed in art. 2(3)(k)) apply to all types of copyright-protected works, except computer programs that are not listed in the Infosoc Directive. Computer programs are, however, explicitly defined as literary works in the Danish Copyright Act, and thus all the exceptions do apply to all types of works under the Danish law.

Thus, the parody exception is legally/theoretically applicable to all types of works. It is, however, unclear what this will mean in practice as one can easily imagine that how the parody exception will apply may vary depending on the type of work parodied. Some works it may not be practically possible to parody – how does one make a parody of a computer program?

For music works, one may imagine that the lyrics of the song are changed in a humorous manner. What rights are implicated? If the lyrics are completely changed then the lyrics are not used. Thus, one could argue that the parody lyrics will fall outside the scope of the exclusive rights of the original lyrics. Thus, the rightsholder cannot oppose the change (the parody lyrics may even be an original work). The melody (likely) is not changed at all as the melody is (in terms of music theory at least) wholly independent from how it is expressed: If it is sung, the melody per se is not changed simply by changing the lyrics, and the melody per se remains the same if it goes from being sung to being played on an instrument. Should the fact that the parody exception allows for changing the lyrics (this presupposes that the parody lyrics actually constitute a recreation of the original lyrics) also allow for using the music per se? Even if the music is written by (an the copyright thus belongs to) different people than the lyrics?

We imagine that if a case of musical parody ever made it to trial, the court would treat the parodied song as a whole. This seems logical, and the court did not, it would to some extent erode the parody exception, but it would be difficult to argue that the court was wrong to conclude that an exception allowing for the use of the lyrics (in a more or less changed manner) should allow one to use the music in an unchanged manner.

7. Does your law or case law provide for any exceptions or limitations to moral rights associated with parodies? Please explain.

Yes. The national jurisprudence on parodies is still quite new and limited as only one judgment has been passed, and it was passed in 2023. This judgement does, however, make it clear that the parody exception also applies to the droits moraux:

> »Even though the right of respect, which in Denmark follows from § 3(2) of the Danish Copyright Act, falls outside the scope of the Infosoc Directive, the Supreme Court finds that there is no basis to conclude that the parody principle has a different scope when it comes to § 3(2) then for the economic rights in § 2 of the Danish Copyright Act.«

The exact extension of what this means is not elaborated upon, but the natural implication is that the right of respect does not prohibit a third party from making parodies.

II) Policy considerations and proposals for improvements of your Group's current law

8. Could your Group's current law or practice relating to parody defences to copyright claims be improved? If yes, please explain.
   Yes. The 'implementation' and interpretation of the parody rules in the Little Mermaid case leads to the rules relating to parodies seeming to be different in different parts of Danish Copyright law.

   Parody as adaptive free use
   Initially, the fact that parodies may be allowed within the free-use rule of 'adaptation' in Danish law has inappropriate consequences. Firstly, this does not seem to be the intention behind a well-reasoned rule. The rule basically states that if a person creates an original work by adapting one or more previous works (to which they do not have the rights) but the new work is actually a new, distinct work, the new work does not infringe upon the previous, adapted works. This rule is simply meant as an explicit adoption of the principle that we are all »standing on the shoulders of giants« and that all original works are based on previous works – if only as those previous works served as influences for the creator of the new work. Thus, the new work will still infringe upon the previous work(s) of the original, protected elements of the previous work can be identified in the new work. In such cases, the new work is not an adaptation but simply a »reproduction […] in part« as it is phrased in Art. 2 of the Infosoc Directive.

   The difference between whether the new work (in this context parody) has been an original adaptation as opposed to a 'reproduction in part' is whether the original elements[9] are recognisable in the new work, but for a parody, this must necessarily be the case, as parodies are defined as »evoking« the parodied work. In order to do this, elements of the original, parodied work, must be recognisable in the new work/parody. To interpret this free-use rule as allowing parodies seems counter to previous case law as well as the reasons for having the rule. Though the principles of freedom of speech behind the Supreme Court's decision must be acceded to, the legal theory of concluding that the free-use rule of adaptation contains a parody rule is dubious at best, as it seems quite odd for the originality of a work to be dependent upon the critical or satirical intention of the creator. It leads one to wonder if

[9] One element should be sufficient.

there are other intentions that affect the legal status of the copyright-protected work and its status as such?

The difference between parodies in different parts of copyright law

The parody exception definitely established in the Little Mermaid judgement is the one found in art. 5(3)(k) of the Infosoc Directive and relates to 'classical' copyright. The CDSM-Directive[10], however, also contains a parody exception in its Art. 17(7)(b). This article is implemented in § 52 c(10) of the Danish Copyright Act. There is no reason to assume that the EU legislature intended this parody exception to be interpreted differently than the one in the Infosoc Directive. When § 52 c was implemented, § 11 was changed to accommodate the change, but this change and implementation ended up meaning that the requirements for a parody to be legal online are stricter than the requirements for parodies pursuant to the Infosoc Directive. These requirements explicitly include respecting the droits moraux of the creator of the original work as well as having legal access to the parodied work. These requirements do not exist for the parody exception applicable outside of the scope of the CDSM-directive/§52 c. This is unlawful since the CJEU has stated the concept of 'parody' is an autonomous concept of the EU[11].

Freedom of speech as a copyright exception per se

Of note finally, is that one of the images in the Little Mermaid case was not found to be a lawful parody based on an exception to the exclusive rights or as an adaptation. It was, instead, simply found to be lawful on the basis of it being an expression, and should thus be protected as such. The legal authority referenced was simply Art. 10 of the ECHR. The ECHR thus seems to have served as a de jure exception to the exclusive rights conferred by copyright. This is problematic since the CJEU has stated that though fundamental rights play a role in interpreting the legal exceptions to copyright, they cannot serve as exceptions on their own. In Case C-516/17 (Spiegel Online) the CJEU stated it in the following manner:

> 49. In the light of the foregoing considerations, the answer to the third question is that freedom of information and freedom of the press, enshrined in Article 11 of the Charter, are not capable of justifying, beyond the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29, a derogation from the author's exclusive rights of reproduction and of communication to the public, referred to in Article 2(a) and Article 3(1) of that directive respectively.

The same conclusion was reached by the CJEU in C-469/17 (Funke Medien) paragraph 64.

9. Could any of the following aspects of your Group's current law relating to parody defences be improved? Please explain:
   (a) Definition of Parody or of other similar exceptions;
   The definition found in *Deckmyn* and recited by the Supreme Court seems adequate, but it would be nice to know what exactly is meant by a parody having to be humorous. See my comments on what it means for a parody to be 'critical' under question 4 c.

[10] Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.
[11] C-201/13 (Deckmyn) paragraph 15.

(b) Requirements for benefiting from such exceptions;
The fact that in order to be a legal parody under the free-use rule, the intent of the author/creator may be relevant seems inappropriate and practically impossible to control. Though it is, of course, true that most parodies are satirical and are likely intended to be so, this ought not have an influence on whether or not the parody is original.

(c) The interplay between parody exceptions and moral rights;
The difference between moral rights when it comes to parodies on online platforms and in all other cases seems inappropriate.

(d) The types of work that may benefit from such exceptions;
Yes. See question 6 above.

10. In your Group's view, what policy objective (such as free speech, or another objective) would a defence of parody promote and help accomplish? Does the policy objective drive the types of expression that should be allowed under a parody defence?

Freedom of speech is, arguably, the most important right we have, and this right must be protected.

Speech related to societal and/or political discussions is important and should be allowed to the broadest possible extent. The same goes for humour and satirical speech – tyrants dislike humour, which is why it must be protected.

All exceptions to the exclusive rights of the copyright holder are to some extent a limitation on the property rights of the right holder. Thus, exceptions ought not be too broad or too abstract, but the two types of expression described seem – at the time of writing – to be the most worthy of limiting the property rights of the creator of a work for. That said there may be exceptions in each direction: Some political messages may reasonably not allow for the use of a protected work in the spreading of the message; and some non-political messages may reasonably be worth limiting the copyrights to a work over.

An example of the first instance was that in the main proceedings in the Deckmyn case. Here, the political message expressed in the parody could be perceived as discriminatory and the creator of the original work may not want to be associated with such a message. This was also pointed out by the CJEU:

29. Accordingly, with regard to the dispute before the national court, it should be noted that, according to Vandersteen and Others, since, in the drawing at issue, the characters who, in the original work, were picking up the coins were replaced by people wearing veils and people of colour, *that drawing conveys a discriminatory message which has the effect of associating the protected work with such a message*.
30. *If that is indeed the case, which it is for the national court to assess*, attention should be drawn to the principle of non-discrimination based on race, colour and ethnic origin, as was specifically defined in Council Directive 2000/43/EC of 29 June 2000 implementing

the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22), and confirmed, inter alia, by Article 21(1) of the Charter of Fundamental Rights of the European Union.

31. In those circumstances, holders of rights provided for in Articles 2 and 3 of Directive 2001/29, such as Vandersteen and Others, have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message.
32. Accordingly, it is for the national court to determine, in the light of all the circumstances of the case in the main proceedings, whether the application of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, on the assumption that the drawing at issue fulfils the essential requirements set out in paragraph 20 above, preserves the fair balance referred to in paragraph 27 above.

The CJEU, however, also rightly indicates that the balance between the various interests represented in parody cases must be made on a case-by-case basis and must take account of all the factors of the given case.

At the time of writing, the current author cannot give an example of a situation where a non-humorous and non-political/societal message may rightly lead to the limitation of the exclusive rights of the copyright holder, but it would be too dangerous to discount the option out of hand. Thus the principle explicitly adopted/implemented in paragraphs 29-32 of *Deckmyn* (whereby the balance must always be found on a case-by-case basis and taking into consideration all facts of the given case) should be the central and serve as the point of departure for all policy considerations.

11. Are there any police considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?
Not that we can think of.

III) Proposals for harmonisation

12. Do you believe that there should be harmonisation in relation to exceptions and defences based on parody?

Yes. The copyright system is highly EU harmonised, and exceptions to the exclusive rights would likely not have the intended effect in practice if they were not harmonised.

An approach implementing minimum harmonisation may not work as the different member states may[12] attach slightly different values to freedom of expression when compared to property rights. In other areas of law, slightly different implementations can be accepted, but this cannot be accepted when the implementation concerns the balancing of two opposing fundamental rights.

[12] With 27 member states it indeed seems inevitable.

13. Should there exist exceptions or limitations to copyright protection for the purpose of parody or any other similar exceptions (e.g. satire, caricature, pastiche)?
    Yes.

14. Should parodies comply with the three-step test provided for in article 9(2) of the Berne Convention in order to benefit from the exception?
    Yes. In the individual cases it should comply with the Art. 9(2) of the Berne Convention, so as to ensure that freedom of speech does not completely overrule the fundamental property right.

15. Should there be any other special conditions or requirements for a parodist to benefit from this exception?
    (a) Parody should constitute an expression of humour or mockery;
    The parody should either have 'critical intent' or be satirical in nature. In many cases, there will likely be overlap.

    (b) Parody should be transformative or add some significant new creation to the original work;
    This should not be a prerequisite for the legality of the parody, but depending on the originality of the parody, it ought to enjoy the same copyright protection as translations: the translation is copyright protected, but the translator cannot exercise their right without the permission of the original, translated text. For parodies, the parody exception would, however, allow the creator of the parody to exercise their rights over the parody within the limit set by Art. 9(2) of the Berne Convention.

    (c) Parody should have a critical intent;
    The parody should either have 'critical intent' or be satirical in nature. In many cases, there will likely be overlap.

    (d) Parody should be directed at the original work (instead of targeting at society or other aspects unrelated to the original work)?
    No. Such a requirement ought not be implemented. A parody ought to be directed at whatever, the creator of the parody finds worth of mockery/critique.

    (e) Parody should be non-commercial;
    No. Such a requirement ought not be implemented.

    The commercial character of a parody may instead be part of the overall assessment.

    (f) Parody should not disparage or discredit the original work;
    No. Such a requirement ought not be implemented.

    (g) Other - please explain.

16. Should freedom of speech principles (or any other policy objective) play any roles when assessing lawfulness of a Parody?
    Yes. The reason for having a parody exception is primarily freedom of speech principles.

17. Should all types of works be subject to parody exceptions?
    As far as is practically possible, yes. See question 6.

18. Should there be any exceptions or limitations to moral rights associated with parodies? If YES, please explain.
    If the parody itself is original (as explained above under question 15(b)) the parody will confer droits droits moraux to the creator of the parody.

    The parody exception should also allow the creator of a parody to ignore the droits moraux of the creator of the original work.

19. Please comment on any additional issues concerning exceptions and limitations to copyright protection related to parody you consider relevant to this Study Question.

20. Please indicate which industry sector views provided by in-house counsels are included in your Group's answers to Part III.