"I don't get it… Is that a parody? Why autonomous and uniform *interpretation* will never lead to autonomous and uniform *application*", Conférence dans le cadre du panel *Parody and quotation* lors du Webinaire *ReCreating Europe – State of Exceptions & Limitations* le 1er juin 2021

Let me share with you a personal experience. Back in 2012, I was in New York attending a copyright law class at Columbia Law School. While discussing fair use, we started commenting on this, envisaging its status as a parody. I was puzzled and I was thinking "I don't get it… Why are they talking about parody?". The most surprising to me was that when I looked around, I noticed that all American guys in the room were shaking their head, either nodding or showing disapproval. So basically, they actually did get it and I was the only one scratching his head with the question: Why is that a parody?...

For those of you who share with me now the same feeling of loneliness I had at the time, the reason is probably because you're not familiar with Dr. Seuss' "The Cat in the Hat". As I would figure out later, this book is actually a classic in children literature, that every American kid has read in his early days. In other words, "The Cat in the Hat" is a common reference for all Americans. It is self-speaking for anyone in the US. This is why they could discuss whether "The Cat is NOT in the Hat" is a parody or not, without any further explanation. And this is also why as a Belgian guy freshly arrived on the other side of the Atlantic, I did not get it.

This little story illustrates perfectly the point I want to make here in the five minutes I have.

The parody, as such, is a topical figure of what's called in general "intertextuality". The term was coined first by Julia Kristeva, who stressed out that "Every text is constructed as a mosaic of quotations". The reference here to the "text" can be broadened to every type of material, as intertextuality is present in every field of artistic creation.

It is quite easy to understand how intertextuality comes at odd with copyright law, since copyright protection can lie in small pieces of an author's work, that can be used by another author for the purpose of creating something else. From a copyright law perspective, that type of copying would amount to infringement, except where a valid defense can be raised. What however makes intertextuality different from mere plagiarism, lies in the relation between the

two works. Here, the relation is not concealed. To the contrary, intertextuality performs its aesthetical function exclusively and only to the extent that it is perceived as such by the observer. It supposes therefore a certain command by the observer, a command that is desired or assumed by the author.

In the field of quotation, the recognition of the presence of intertextuality is traditionally eased by the author who will mention the source, which often performs additional tasks, like evidencing the reliability of the information used, or the authority of the critics.

But what about parody? Mentioning the source is not common in the field of parody, and the Court of Justice in *Deckymn* confirmed that the concept of "parody" should not be subject to such a condition. Does it mean that a parody can exist where the source is not identified?

Still in *Deckmyn*, the Court of justice stated that the parody "must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union". It considered that its essential characteristics are, "first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery". The application of this broad definition is however left to the national judge who will have to "take into account all the circumstances of the case" in order to "strike a fair balance" in such application.

"To evoke an existing work while being noticeably different from it", that is the first condition, seems to me impossible where the work that is evoked is unknown from the observer. In a previous study of mine and my colleague Maxime Lambrecht, based on a thorough analysis of the case law of Belgium of France, we concluded that the target of the parody has to be (to a certain extent) famous at the time of the parody. That conclusion was supported by the case law, the literature and by the fact that we could not identify one single decision finding a lawful parody making use of an unknown work. Similarly, in his Opinion in *Deckmyn* the Advocate General Cruz Villalon seemed to assume that the parody could be legitimate where there is an "alteration of a preexisting work, which is sufficiently recognizable to the public at which that criticism is directed".

Which leads me to my main point. The qualification of parody is highly subjective, in the sense that it is subject to a relational and contextual assessment from the point of view the observer. But here the idea of a "subjectivity" infusing the notion is not akin to the one that attracts criticism like in the assessment of originality for example, in particular in Member States where the aesthetic or artistic value were relevant before *Cofemel*. It is not either the type of unwelcome subjectivity one would see in the qualification of a hyperlink as a communication to the public after *GS Media*.

No, here, the "subjectivity" is inherent to the concept of parody because its very existence, both from an aesthetic and legal standpoint, depends on the observer, his/her knowledge and his/her understanding. And even if the Court of justice in *Levola* stressed out the need to rule out subjectivity from the assessment of copyright protection, there is still room for the type of subjectivity at stake in the intertextuality. In that regard, in *Pelham*, through reading the quotation exception in the light of the freedom of the arts protected under Article 13 of the Charter of fundamental rights, the Court of justice emphasized that the application of the exception was subject to a use intended to "entering into dialogue with the work from which the sample was taken", which supposes that it is "possible to identify the work concerned by the quotation at issue". Which leads to the obvious and difficult question: by whom?

It is impossible to answer that question here but to conclude, I think it is worth recalling that original works, including parodies, are intended to an audience. Sometimes, this audience can be that wide that it covers the population of a whole country, as big as the US, with a common culture well anchored. Sometimes, to the opposite, this audience will be very local, in place and time. But whatever the audience, it will always be decisive to give it a place in the analysis of a parody, as it is necessary in order to address, in one particular case, the fair balance between the protection of copyright and the freedoms of expression and the arts. This is why autonomous and uniform *interpretation* will never lead to autonomous and uniform *application*. At least I hope so, for the sake of the arts.