

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.

YES. The Finnish Copyright Act now incorporates a specific provision (in the 2nd Chapter for Limitations on copyright and provisions concerning extended collective licence), namely section 23a, which has been introduced following the adoption of the DSM Directive (EU) 2019/790. The provision entered into force on 3 April 2023. The provision states *that a work made public may be used in parody, caricature, and pastiche.*

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

YES. While the Finnish Copyright Act does not explicitly provide a detailed definition for parody, it does mention of the concept as such. However, an explanation and definition of parody can be found in the preparatory works to the Finnish Copyright Act (Government Proposal 43/2022). This interpretation aligns with the CJEU's understanding of parody, as established in the *Deckmyn* judgment (C-201/13), hereinafter "the Deckmyn judgement".

Please see the point 4 below for definition.

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

YES. Since parody is an exception to copyright, it must comply with the three-step provided for in article 9(2) of 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;

YES. As established in the *Deckmyn* judgement, parody is an autonomous concept of EU law and the characteristics of parody must be interpreted in a uniform way throughout the Union. One of the essential characteristics of a parody is that it constitutes an expression of humour or mockery.

- b) Parody must be transformative or add some significant new creation to the original work;

YES. According to the *Deckmyn* judgement one of the essential characteristics of parody is to evoke an existing work, while being noticeably different from it. Thus, parody must, on a meta-level be transformative or add some significant new creation to the original work.

Prior to the introduction of the provision regarding parody, the Finnish Copyright Act included (and still includes) a provision addressing free adaptation. According to section 4(2) of the Finnish Copyright Act, if a person, in free association with a work, has created a new and independent work, the person's copyright shall not be subject to the right in the original work. Parodies were therefore previously allowed only if they constituted new and separate works.

The necessity for the latter work to be original is, however, no longer mandated. As stated in the *Deckmyn* judgement (para 33), the concept of parody 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.

- c) Parody must have a critical intent;

NO. Parody does not necessarily need to have a critical intent, but it can have.

- d) Parody must be directed at the original work (instead of targeting at society or other aspects unrelated to the original work)?

NO. Typically, parody can be directed towards the original work as well as societal or other aspects unrelated to the original work. Weapon parody is acceptable. Consequently, the two are not mutually exclusive.

- According to the *Deckmyn* judgement, it is not required that the parody should relate to the original work itself.

- e) Parody must be non-commercial;

NO. Parody does not necessarily have to be non-commercial; it can be, but it is not a requirement. The incorporation of parody in a commercial context is permissible, as seen in instances such as its use in advertising.

- f) Parody must not disparage or discredit the original work;

NO. According to preparatory works for the Finnish Copyright Act (Government Proposal 43/2022), a work may be used in parody when it aligns with the concept of good practice. While humour and mockery are allowed the parody exception should not be used in a manner that is discriminatory or otherwise in conflict with basic fundamental rights.

As stated in the *Deckmyn* judgement (paras 29-31), parody exception is subject to balancing where all factors are taken into account. Thus, parody should not convey a discriminatory message which has the effect of associating the protected work with such message. In assessing whether a parody is considered discriminatory, attention should be drawn to the principle of non-discrimination based on race, colour and ethnic origin as confirmed, inter alia, by Article 21(1) of the Charter of Fundamental Rights of the European Union. In those circumstances rights holders have a legitimate interest in ensuring that the work protected by copyright is not associated with such a message.

- g) Other - please explain.
No.

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

YES. The concept of parody is inherently based on freedom of speech (or freedom of expression).

Following the Deckmyn judgement (para 26 -28), the exception for parody must take all circumstances of the case into account and strike a fair balance between the interests and rights of authors and the users and the freedom of expression of the user who is relying on the exception for parody. The freedom of expression is a strong right that is supported constitutions and human rights agreements, but it is not absolute.

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

YES. All copyright works made public are subject to parody exceptions. The parody exception to copyright mainly concerns works of art and works of literature.

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

YES to some extent. According to the preparatory works of the Finnish Copyright Act, as a main rule, the moral rights of the original work remain unlimited (Education and Culture Committee's Report 22/2022). However, as stated in the Deckmyn judgement (para. 33), the concept of parody is not subject to the conditions that it could reasonably be attributed to a person other than the author of the original work itself or that it should mention the source of the parodied work. In other words, the Deckmyn judgement limits paternity right to some extent.

Other moral rights remain unlimited. Section 3(2) of the Finnish Copyright Act protects the author's right of integrity: a work may not be altered in a manner which is prejudicial to the author's literary or artistic reputation, or to the author's individuality; nor may it be made available to the public in such a form or context as to prejudice the author in the manner stated.

The threshold for infringing moral rights has traditionally been high (the infringement of moral rights is objectively evaluated), and Finland strongly upholds freedom of expression. However, for example, publicly vandalizing an original work may be a violation of moral rights.

When a parody is original and thus a new work, it establishes a clear distinction from the original work and cannot infringe the moral rights related to the original work. The potential moral right considerations related to parodies that do not meet the threshold of originality is yet to be assessed.

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 definition of parody should be improved, and the Finnish Copyright Act should provide protection against false attribution (see questions 9(a) and (c) below).

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;

YES. As mentioned above, Finnish law permits the use of published works for parody, caricature, and pastiche. However, it lacks a clear definition of "parody". The Deckmyn judgement provides a definition, considering parody as an autonomous concept within EU law. It characterizes parody as a work that evokes an existing one while being noticeably different and constituting an expression of humour or mockery.

The court also noted that concept of parody it is not subject to the conditions that the parody:

- should display an original character of its own (other than displaying noticeable differences with original work)
- could reasonably be attributed to a person other than the author of the original work itself;
- should relate to the original work itself; or
- mention the source of the parodied work.

This definition is, however, open to interpretation and it could lead to inconsistent interpretations and legal uncertainty. For example, the terms 'noticeably different' and 'an expression of humour or mockery' are subjective and the latter can also be culturally specific. Moreover, academic research in literature and art often highlights that parodies, while often humorous, do not necessarily need to criticize or mock the original work. Therefore, the legal definition of parody should incorporate insights from interdisciplinary academic research.

This definition also does not consider whether a parodist's intention to be humorous suffices as 'an expression of humour or mockery' or if an objective standard should be applied. While freedom of expression necessitates a broad interpretation of the parody exception, it should not be used as a cover for copyright infringements. This should be balanced with the fact that copyright exceptions are generally interpreted strictly according to CJEU case law.

The legal definition of parody also leaves ambiguity about whether it includes satire. Unlike parody, which evokes an existing work, satire primarily targets societal and individual injustices and weaknesses. As an essential facet of freedom of expression, satire should be considered part of the exception if it uses a copyrightable work. Therefore, satire should be explicitly included in the exception, alongside parody, caricature, and pastiche, when it evokes an existing copyrighted work.

Although an exhaustive definition of parody may not be feasible, **a more precise definition of parody's characteristics is desirable**. While it is not necessary to define parody explicitly within the Finnish Copyright Act, more guidance could be provided in preparatory works of the act or case law. Considering that parody is an autonomous concept within EU law, the role of the CJEU in further defining parody is decisive.

b) Requirements for benefiting from such exceptions;

NO. The CJEU stated in the Deckmyn judgement that in order to determine whether, in a particular case, the application of the exception for parody preserves a fair balance between authors and users, all the circumstances of the case must be taken into account. Under Finnish law the parody exception is subject to the condition that it must be done in accordance with good practices, and the requirements are assessed on a case-by-case basis. The three-step test according to the Berne Convention also applies.

The requirements for benefiting from the parody, caricature, and pastiche exceptions should not be too strict, as they are an essential part of the discussion and creativity e.g. on the internet. With the rise of social media platforms, it is more important to recognize which content falls within the scope of the definition of parody rather than setting more requirements to benefit from the exception (such as that the parody should always be non-commercial).

The current requirements for benefiting from parody, caricature, and pastiche exceptions are sufficient and strike a fair balance between the rights holders and

third parties. Accordingly, the current legislation seems well-balanced and does not require further refinement.

- c) The interplay between parody exceptions and moral rights;

YES. Finnish law protects an author's moral rights, including the right of attribution and integrity (Section 3 of the Finnish Copyright Act). Parodies, by their inherent nature, borrow elements from the original work, often making it challenging to attribute the original author, especially when the intent is to parody the original work itself.

The Deckmyn judgement clarified that a parodist does not need to attribute the parody to a different author or mention the source of the parodied work (para. 21). At the same time, it emphasizes that rights holders have a legitimate interest in ensuring their work is not associated with a discriminatory message (para. 31). The CJEU seems to prioritize the right of integrity over the right of attribution, but given the purpose and nature of parody, the CJEU's ruling strikes a fair balance between freedom of expression and above-mentioned moral rights.

Besides the right of integrity and the right of attribution, the Deckmyn judgment does not clarify the interplay between parody exception and other moral rights. It is noteworthy that mentioning the original author's name can sometimes lead to confusion about the creator of parody. While Finnish law protects the right of attribution, it does not offer **protection against false attribution**. This right allows individuals to not be associated with works they did not create. The Finnish Group would welcome this addition, as it would be an effective way to avoid misinformation while promoting freedom of expression.

- d) The types of work that may benefit from such exceptions;

NO. The Finnish parody exception is not limited to only certain types of works or media, but instead it covers all types of works. Considering the freedom of expression and artistic freedom, the parody exception should continue to be broad and cover all types of works. Therefore, the current legislation does not require further refinement.

- 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?

A parody defence primarily promotes freedom of expression and freedom of speech, which are fundamental rights in Finland and in the EU. A parody defence allows for critique and satire in social and political discourse, balancing this with the author's rights. Further, a parody defence also fosters creativity and innovation.

- 11) Are there any policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

There are no ongoing policy considerations and/or proposals regarding the Finnish law in this regard.

Please see questions 9(a) and (c) above for the policy changes suggested by the Finnish Group.

III) Proposals for harmonization

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

If YES, please respond to the following questions without regard to your Group's current law or practice.

YES.

- 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)? If YES, please explain.

YES. Exceptions or limitations to copyright protection should exist for the purpose of parody, satire, caricature, and pastiche. These exceptions serve to promote freedom of expression, freedom of speech, and creativity, as discussed in response to question 10 above.

In today's digital age, the rise of social media platforms has amplified the reach and impact of these forms of expression. As such, it is crucial to harmonize these exceptions across jurisdictions. Harmonization ensures that creators can freely express themselves without fear of legal repercussions, regardless of their geographical location. It also provides a consistent legal framework that respects both the rights of original authors and the societal value of parody, satire, caricature, and pastiche.

- 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. The three-step test is a fundamental principle in international copyright law. This test ensures that exceptions to copyright do not conflict with normal exploitation of the work and do not unreasonably prejudice the author's interests. Parodies, being 'special cases', do not replace the original work but provide a new interpretation. They should not harm the author's ability to benefit from their work. Thus, compliance with the three-step test balances freedom of expression with the rights of the rights holders.

However, there may be alternative ways for harmonization than article 9(2) of the Berne Convention. Please see question 19 below.

- 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;

POTENTIALLY. The intention of the parodist to create a parody should be evident. This intention can be expressed through humour or mockery, at least to some audience. What is considered humorous, or mocking is however culturally specific and should be left to the judiciaries to interpret.

Given that interdisciplinary academic research does not mandate parodies to be humorous or mocking, this should not be a requirement in all cases (refer to question 9a above). Humorous or mocking intent could be seen as a factor speaking in favour of justified exception.

- b) Parody should be transformative or add some significant new creation to the original work;

YES transformative. Significant new creation may not always be necessary even in case the parody is noticeably different from the original work, but original creative expression could be seen as a factor speaking in favour of justified exception.

- c) Parody should have a critical intent;

NO, mere purpose of entertainment and amusement should be sufficient, provided that it comments on the work or social matters. Critical intent could be seen as a factor speaking in favour of justified exception.

- d) Parody should be directed at the original work (instead of targeting at society or other aspects unrelated to the original work)?

POTENTIALLY. The humour or mockery can but do not need to be directed at the pre-existing work itself (so-called 'target parody') or be used to illustrate broader ideas or commentary (so-called 'weapon parody'). Certain parodies may simultaneously fall under both categories, and it should be borne in mind that the concept of parody is not exact. However, clarification of characteristics of parody and introducing a definition of satire could help clarify the distinction between target parody and weapon parody.

- e) Parody should be non-commercial;

NO, but it could in certain circumstances be seen as a factor speaking in favour of justified exception.

- f) Parody should not disparage or discredit the original work;

YES. Moral rights, including right to integrity should be maintained while also maintaining a high threshold for interfering in freedom of speech of the parodist and the property rights of the owner of the work. Public disparage and discrediting the original work should nevertheless in certain exceptional cases violate the moral rights, for example, in disgraceful vandalizing of the original work publicly.

Copies should, however, be available for use by parodists. There is a thin line between critical expression that discusses the motives of the original work and expression that is seen as disparaging or discrediting. While humour and mockery should be allowed, the parody exception should not be used in a manner that is discriminatory or otherwise in conflict with basic fundamental rights.

In addition, the balancing of interest and rights of the authors and users in the assessment of parodies may lead to prohibition of false attribution which can support the moral rights of integrity and paternity to some extent.

- g) Other - please explain.

There may be a need to reconsider if the current law manages to avoid false attribution. False attribution can mislead the public and it may disparage or discredit the author of the original work. For example, changing of the year of publication may be unjust, when the society and values have changed due to increased information and understanding. In addition causing likelihood of confusion of the origin of the parody, or misrepresentation of the author could be prohibited through false attribution.

- 16) Should freedom of speech principles (or any other policy objective) play any roles when assessing lawfulness of a Parody?

YES. Freedom of expression is one of the fundamental rights and it should be respected to the extent that stronger rights have not been legislated for the protection of others. These stronger rights may be used to prevent illicit and illegal use of any work or publication, including parodies. The parody exception should not override any criminal law and it should never be used as an alternative for such legislation. Copyright should remain distinct from these laws and the assessment of parody

exception should not be affected by policy or freedom of speech considerations. If those policies and freedom of speech regulations change over time and during the validity of copyright, the parody assessment remains a copyright matter.

- 17) Should all types of works be subject to parody exceptions?

YES, there are no reasons to exclude any types of works. However, software for example, is unlikely to be subject to parody because of the transformative criteria - with or without any specific work type exclusions.

- 18) Should there be any exceptions or limitations to moral rights associated with parodies? If YES, please explain.

YES. Parodist should not need to mention the author of the original work. An attribution of a work may in certain cases be compliant with good practices, but such cases are likely to be exceptional as the parody should be noticeably different from original work. Attribution could, however, in certain cases be seen as a measure against false attribution.

The threshold for infringing the integrity right should be assessed taking into consideration the inherent nature of parody, and therefore it could be higher than with respect to other types of use.

Moral rights should be applied also in favour of authors of parodies whenever the parody constitutes a work. In other words, parody must meet the threshold for originality for its author to enjoy moral rights. Lesser modifications and contributions do not reflect the personality of the person who made them and therefore there is no need to legislate on moral rights.

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

In the absence of express satire exception, parody exception is likely to be interpreted broadly and with an attempt to find characteristics of parody in satire. It could lead to complicated case law with further uncertainties.

The Three-Step Test is relevant to the parody interpretation, but Article 10(1) of the Berne Convention, i.e., the quotation exception would provide alternative basis for the exception. See for example Tanya Aplin and Lionel Bently in *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge University Press, 2020).

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

N/A - yet