The Court of Justice of the European Union ("CJEU") recently gave guidance in Deckmyn v Vandersteen (Case C-201/13) as to the meaning of Article 5(3)(k) of the Copyright Directive 2001/29/EC (the "Directive"), which allows member states to provide for a parody exception to copyright. Belgium, where this case originated, has a parody exception enshrined in legislation from 1994, while Ireland has yet to introduce such an exception.

Background
Mr Deckmyn, a member of the Flemish Nationalist party Vlaams Belang, distributed calendars for 2011 with a drawing on the cover page which resembled the cover of a comic book entitled "Suske en Wiske". The original cover depicted a character wearing a white tunic throwing coins to people trying to pick them up. The cover page of Mr Deckmyn's calendar replaced this character with the mayor of Ghent who was depicted throwing coins to people wearing veils and people of colour.

Suske en Wiske

Mr Vandersteen, creator of the original cartoon in 1961, took proceedings against Deckmyn and others for infringement of his copyright in the original comic cover. Deckmyn claimed that his cover was a political cartoon that fell under the parody exception in Belgian law.

The Court of Appeal in Brussels, conscious of the implications that the parody exception under Article 5 of the Directive could have on Belgian law, decided to refer a number of questions to the CJEU for a preliminary ruling. It essentially asked:

1. whether "parody" is an autonomous concept of EU law; and
2. what criteria a work must meet to be regarded as a parody.

Decision
Following the Padawan decision, the CJEU held that parody is an autonomous concept of EU law, even though the exception is optional under the Directive.

As to the second question, the Court laid out the following criteria for a work to be considered a parody:
1. It must evoke an existing work, while being noticeably different from it (the CJEU expressly stated that it does not need to have an original character of its own); and

2. It must constitute an expression of humour or mockery.

The CJEU qualified this test by stating that the exception for parody must also strike a fair balance between the rights of the copyright owner on the one hand and of freedom of expression on the other. Unsurprisingly, it was left for national courts to apply these principles to the particular facts.

The CJEU gave some additional guidance to the Belgian Court of Appeal on the facts of this case that could be instructive for others in the future. Firstly, it confirmed that if the parody exception exists in national law, it cannot be so reduced by conditions as to render it ineffective. Secondly, all of the circumstances of the case must be taken into account in balancing the rights of the copyright owner and the person trying to rely on the exception. In particular, it recommended that the national court should look at the EU principle of non-discrimination based on race, colour and ethnic origin, as is enshrined in the Charter of Fundamental Rights of the EU. It also noted that the copyright owners have a legitimate interest in not having their work associated with a message that runs contrary to those principles.

Comment
The statement by the CJEU that parody is an autonomous concept at EU law should be viewed in light of its jurisdiction and the fact that an express parody exception is an elective choice in the Directive. In any event, it does not mean that the CJEU will decide what constitutes parody in each case. The Court only went so far as to outline a broad and culturally neutral test that national courts can apply when looking at the parody exception, with a view to creating a level of consistency across the EU. At the same time, the CJEU suggested that works with racist overtones should find it very difficult to fall under the parody exception and underlined that national courts must take broad EU principles into account in this regard.

Although Ireland (like many other common law countries excepting the UK) does not yet have an express parody exception in its copyright legislation, fair dealing exceptions have been relied upon in the past to achieve a similar result. The acceptance of the recommendation of the Copyright Review Committee in 2013 to include an express parody exception will bring much-needed clarity to the area.