

Fair Use in the UK?

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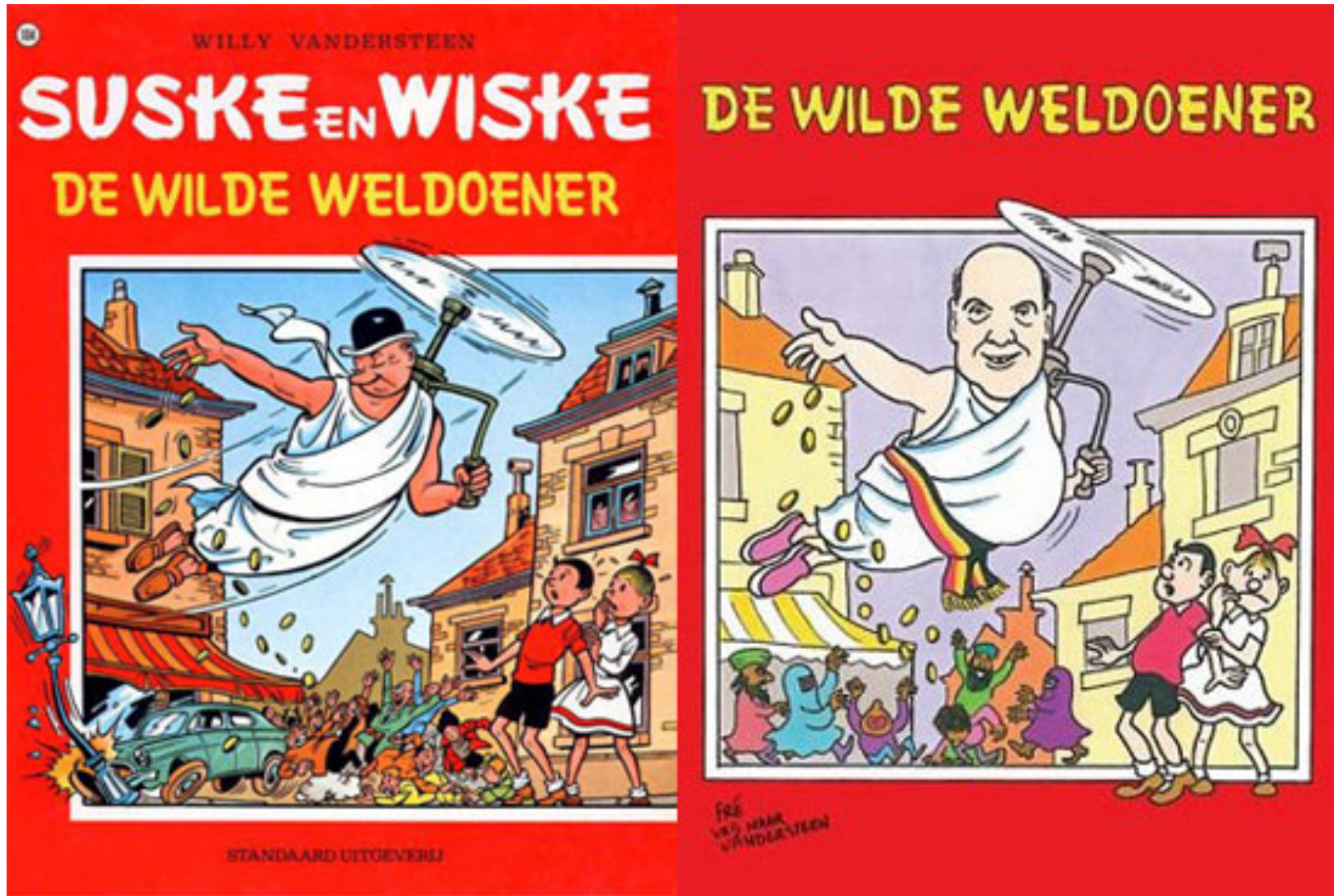
Fair Dealing

- CDPA 1988 had three fair dealing defences: research/private study; criticism/review; reporting current events
- If not for purpose, no defence. Cf 'fair use'
- With EU harmonization, IS Directive 2001/29, new conditions were added to these
- Hargreaves review: [5.19] legal advice – fair use not possible
- But has SI 2014/2356 (fair dealing for quotation, as well as parody, caricature and pastiche) introduced fair use?

Parody

- S 30A(1) Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.
- Reflects Info Soc Dir, Art 5(3)(k)

Case C-210/13, *Deckmyn* (GR Ch, 3 Sept 2014)



Case C-210/13, *Deckmyn* (GR Ch, 3 Sept 2014)

[20] ‘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’

[27] the application, in a particular case, ...must strike a fair balance between, on the one hand, the interests [of rightsholders], and, on the other, the freedom of expression of the user

Remaining questions...

- Is it OK to reproduce music , when parodying lyrics of a song? Is that 'evocation'?
- What is 'caricature'? What is 'pastiche'?
- May correspond or be broader than some aspects of 'fair use' in US law. But certainly not 'fair use'.

Fair Dealing By Use of a Quotation

Exception: CDPA s 30 (1ZA)

Copyright in a work is not infringed by the use of a quotation from the work (whether for criticism or review or otherwise) provided that—

- (a) the work has been made available to the public,
- (b) the use of the quotation is fair dealing with the work,
- (c) the extent of the quotation is no more than is required by the specific purpose for which it is used, and
- (d) the quotation is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise)."

Reflects

- InfoSoc Dir, 2001/29/EC, Art 5(3)(d)
- Berne Convention, Art 10(1) (**'It shall be permissible** to make quotations from a work)

Why this is more like fair use...

- For the first time, “fair dealing” is not limited by purpose
- “by the use of a quotation from the work (whether for criticism or review **or otherwise**)”

An important change

- Fair dealing for criticism or review required (i) criticism (ii) of a work or performance of a work
- So quotation would not be permitted if
 - (i) no element of criticism/review or
 - (ii) even if there was, it was not of a work (but rather eg of political decision, behaviour etc).

How far could it go?

- *Modernising Copyright* (2012), 28

“References and citations in research papers, the use of titles and short extracts to identify hyperlinks in Internet blogs and tweets.”

- Dictionary of quotations?
- Digital sampling?
- Megamixes?
- News aggregation?

Ultimately, a question of European (and international) law

A broad view of quotation

- A segment of a pre-existing work that is re-presented in any way
- Ricketson and Ginsburg, 788, [13.40]: ‘the taking of some part of a greater whole – a group of words from a text or a speech, a musical passage or visual image taken from a piece of music or a work of art’
- Senftleben, Draft *Memorandum of Understanding Concerning The Interpretation of The Right of Quotation* (2012)

A narrow conception of quotation

- a segment from an existing work
- presented as such (kept separate or distinct)
- in a new work or communication
- where the part quoted supports or plays a part in the new work or communication
- but is secondary to the new work or communication

Walter and v Lewinski, [11.5.58], 1050

- “Making a ‘quotation’ implies the requirement of using a part of another person’s work or even, where excerpting is not possible, and entire work (such as a photograph or short poem), for the purpose of illustrating or providing a proposition related to the quoted work; it must be ancillary to the work that includes the quotation.’

A narrow conception of quotation: Case C-145/10, *Eva Maria Painer/Standard VerlagsGmbH* (1 Dec 2011)AG Trstenjak, AG210]

[AG210] ‘natural language usage’

- third-party intellectual property is reproduced without modification in identifiable form.
- There must also be a material reference back to the quoted work in the form of a description, commentary or analysis. The quotation must therefore be a basis for discussion.
- [Ag213] Could be whole (in case of photographs)

The ECJ? Case C-145/10, *Eva Maria Painer/Standard VerlagsGmbH* (1 Dec 2011)

[134] Article 5(3)(d) of Directive 2001/29 is intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.

Does this point towards broad understanding?

Even if broad view is adopted...

- The proportionality condition (“(c) the extent of the quotation is no more than is required by the specific purpose for which it is used) limits excessive uses
- The ‘fair dealing’ condition means that it is unlikely that the exception will damage existing markets (film clip sales; news aggregation: *Modernising Copyright*, 27)
- ‘Fairness’ might well also affect *legitimate purposes*; ‘The Government will amend the Copyright Act to permit the use of quotations for *other fair purposes*.’ (MC, 28)
- Courts might be reluctant to find quotation ‘fair’ if doing so undermines policies evident elsewhere (exclusion of photographs from reporting current events exception – s 30(2); deliberate inclusion of background music – s 31(3))

But it is still not “fair use”: limited by
type of act

- Limited to “use of a quotation.”
- So would not cover:
 - home copying (*Sony*);
 - parody (*Campbell v Acuff Rose*)
 - mass digitisation (eg for non-expressive uses)