

Kluwer Copyright Blog

The Pastiche in Copyright Law – Towards a European Right to Remix

Till Kreutzer (iRights.info) and Felix Reda (GFF (Society for Civil Rights)) · Monday, March 13th, 2023

Pastiche is one of the newer harmonized user rights in EU copyright law. The exception for caricature, parody and pastiche was made mandatory as part of Article 17 of the Copyright in the Digital Single Market Directive (CDSMD) in 2019. Although the implementation deadline passed in 2021, several Member States have yet to transpose the directive. In the absence of any jurisprudence from the Court of Justice of the European Union (CJEU) on pastiche, the concept remains under-examined in the copyright literature and national courts have little guidance when applying this user right, which is novel to many national copyright laws, including that of Germany. To fill this gap, German fundamental rights NGO [Gesellschaft für Freiheitsrechte e.V.](#) (GFF) has commissioned Dr. Till Kreutzer ([iRights.Law](#)) to propose a copyright-specific definition of pastiche as transposed into German copyright law. Although the study “The Pastiche in Copyright Law” concerns section 51a of the German Copyright Act (UrhG), we believe that it is relevant beyond the German context. This is because section 51a UrhG faithfully transposes EU law and because pastiche – like parody – is likely to be an autonomous concept of EU law. The proposed definition of pastiche can therefore be applied to any faithful transposition of pastiche in any national copyright law and can enrich the interpretation of pastiche by national courts. Today we publish an [English translation of the full study](#) and summarize its most important elements in this blog post. A video recording of an English-language presentation of the study results at “[Filtered Futures](#)” conference is [available here](#).

Need for a copyright-specific approach

An analysis of the available literature on pastiche shows that the term has a long history in various disciplines and languages, but a common understanding of the term is lacking. For example, in some contexts “pastiche” is used to refer to a stylistic imitation, which would fall outside of the scope of copyright altogether and therefore cannot be the subject of a copyright exception. In other contexts, pastiche is used to refer to collages of different works or to imitations of a single work. A legal interpretation of pastiche in copyright law can therefore not rely on the wording of the provision alone. Instead, the study analyses the intentions of the European and German legislator when introducing the provision.

Before the adoption of the CDSMD, an optional exception for caricature, parody and pastiche was

provided for in Art. 5 (3) (k) InfoSoc Directive. Towards the end of the negotiations on the CDSMD, the EU legislator added an obligation on Member States to ensure that users can rely on this exception when uploading works to online platforms in Article 17 (7) CDSMD. This addition was intended to safeguard freedom of expression and freedom of the arts amid concerns that the stricter copyright enforcement framework introduced by Article 17 CDSMD would undermine fundamental rights and [social communication on the Internet](#). It balances the interests of authors and users and is also intended to reconcile the interests of different kinds of authors, since the creators of pastiches will often be creatives themselves.

This context, which is evident from recital 70 CDSMD as well as the public discussions during the legislative process, is also reflected in the [legislative materials](#) accompanying the adoption of the German transposition. The German legislator has deliberately phrased the pastiche term in an open manner to achieve a broad and dynamic scope of application. The pastiche exception serves to legitimize common cultural and communication practices, inter alia on the internet, especially user-generated content and communication in social networks. The justification of section 51a UrhG even includes an open list of areas of application, covering remixes, memes, GIFs, mashups, fan art, fan fiction and sampling, among others.

Elements of the definition

The study goes on to identify several characteristics that are constitutive for the concept of pastiche. Based on those, the following copyright-specific definition of “pastiche” is proposed:

“A pastiche is a distinct cultural and/or communicative artifact that borrows from and recognizably adopts the individual creative elements of published third-party works”.

An **artifact** is understood here to be a human-made, immaterial object. Such an artifact may be a pastiche if it contains already published third-party works or if parts of works are “adopted” or borrowed, i.e. copied. Mere style imitations or similar abstract borrowings are not relevant from a copyright point of view – and thus not relevant for a copyright-specific definition.

A cultural or communicative artifact is **distinct** if despite the borrowing(s), it has its own intellectual-aesthetic effect when compared to the source material. This can manifest itself in a distinct semantic content/meaning (**inner distance**), which differs from that of the sources, and/or through a different overall impression (**external distance**). Put simply, the pastiche must have a different effect on the viewer than the borrowed works, i.e. it tells a different story, it reads, looks or sounds other than they do.

Inner distance is created, for example, when the message is changed (antithematic, e.g. satirical uses), by insertion into a different context of meaning (e.g. mash-ups), or by recontextualization (as in the case of memes). **External distance**, on the other hand, lies in the design, i.e. in the fact that the expression of the borrowed material is edited to a greater or lesser extent. This is the case when a work is transformed into a different style or type of work (e.g. remix or fan fiction), when a number of different elements are put together (as in collages or mash-ups), or when very small elements are incorporated into much larger original works (as in sampling, for example).

It follows from the three-step test under European law in Article 5 (5) of the InfoSoc Directive that the application of the pastiche exception must not lead to unreasonable restrictions on the interests

of the rights holder that were not intended by the legislator. Specifically, this means on the one hand that the primary exploitation of the source material may not be harmed by the publication and exploitation of a pastiche. This will generally be avoided when the pastiche exception is applied according to the proposed definition. On the other hand, “distortions” of the source material which the rights holder does not have to accept due to moral rights reasons are inadmissible. Whether this is the case must be examined in relevant cases as part of a balancing of interests. One example would be the use of a song for a right-wing political campaign.

Applying the Definition to Memes, Remixes Etc.

The specific application of the pastiche exception and of the above-mentioned definition is based on the individual case. The copyright-specific pastiche term will, as expected, apply to many (but not all) publications of the genres mentioned in the German explanatory memorandum to the copyright code (remixes, memes, GIFs, mashups, fan art, fan fiction, and sampling). The following arguments speak for or against this (viewed abstractly):

- Combining someone else’s image and your own text into a **meme or GIF** often creates an antithematic reference, which establishes distinction. As a rule, the primary use of the image will not be impaired due to the inner distance, but rather promoted.
- **Remixes** in which a single piece of music is completely transferred into a different style or a different key will usually lack sufficient distinction. An inner distance (e.g. an antithematic confrontation) will also usually not be present here. The same applies – even more so – to **cover versions**. However, **remixes** in which one or more pre-existing works are completely rearranged, resulting in a significant inner or external distance, can meet the definition of pastiche.
- **Mash-ups**, as video or music collages, will in any case have sufficient distinction if they are composed from a plurality of sources. The same will generally also apply to so-called **bastard pop**, in which two or more – usually very different – pieces of music are cut together and synchronized. In case of doubt, the distinction becomes all the greater when own performances (e.g. video or sound material) are added to the mashed source material. As a rule, these forms of transformative use do not replace the consumption of the source material and do not interfere with primary exploitation, but rather encourage its use.
- If a **picture collage** merely consists of a combination of complete works by the same artist, it will, in case of doubt, be primarily characterized by the original features of the sources. It then lacks “distinction”, which creates the risk of interference with the primary exploitation. In contrast, a combination of many small excerpts from works by the same artist can create a very distinct overall impression. Serious interference with its economic interests (reduction of sales opportunities, etc.) is not to be expected here.
- **Fan art or fan fiction** created by users will often be clearly recognizable as such, since independent content is created from the composition of existing elements. As a rule, this will have a rather positive economic effect on the exploitation opportunities of the source material.
- **Lip-sync, karaoke or fan videos**, in which complete pieces of music or film sequences are merely re-synced, are given custom subtitles or are intoned by the user, will generally lack the distinction required for a pastiche. Here, the source material is performed rather than transformed.
- **Home videos** in which protected music is played in the background will usually also lack distinction.
- **Sampling** will generally fall under the pastiche term. Samples are mostly very short excerpts that

are integrated into pieces of music with an independent expression. They do not diminish the sales opportunities of the source material.

Speaking of Sampling... A CJEU Referral in the Making?

Unlike its sister concept of parody, which the CJEU has defined in *Deckmyn*, pastiche has not yet been examined by the EU's highest court. Given that the Court considers parody an autonomous concept of EU law, the same is likely to be true for pastiche and a referral of the concept to the CJEU is only a matter of time. This opportunity may arise sooner rather than later, as the scope of the pastiche provision is likely to prove central to one of EU copyright law's most long-standing disputes, that between iconic German electronic music band Kraftwerk and German Hip-Hop producer Moses Pelham.

The *Metall auf Metall* case concerns the use of a two-second Kraftwerk sample in one of Pelham's productions from the 1990s (see previous coverage on the blog [here](#)). The case has been making its way through the court system for over twenty years and is currently pending before the German **Federal Court of Justice** for the fifth time, after Kraftwerk appealed the latest judgment of the Upper Regional Court of Hamburg, which ruled that the sample in question qualified as pastiche under section 51a UrhG. Should the **Federal Court of Justice** refer the case to the CJEU, based on this analysis, the resulting judgment could constitute a significant step towards a European Right to Remix.

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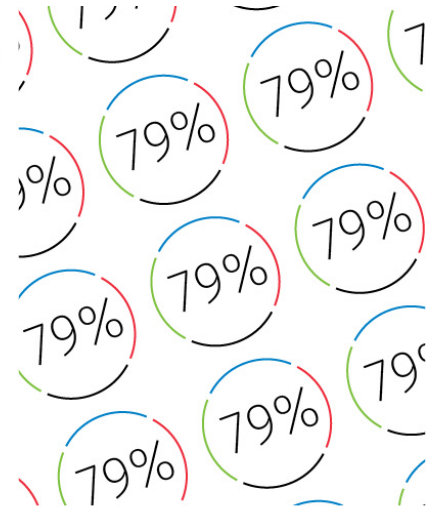
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