Kluwer Copyright Blog

The dawn of pastiche: First decision on new German copyright exception

Susan Bischoff (Morrison Foerster) · Wednesday, June 7th, 2023

Image by Aida KHubaeva from Pixabay

"*No artist starts from scratch in a vacuum*". This finding of the Berlin Regional Court seems obvious. But copyright law faces daunting challenges when copyrighted material not only inspires a creative process, but becomes the very object of it. From Italian opera to Andy Warhol to memes – incorporating and referencing other works has always been an integral part of the way people engage with the world around them through artistic means. The copyright exception for pastiche has received little attention in this regard. But the first decision on the new German pastiche provision reveals its potential.

Pastiche in history: From casserole to art

The word 'pastiche' originates from the Italian term *pasticcio*, which comes from the vulgar Latin *pasticium* for being composed of *pasta*, meaning dough, pastry cake, or paste. Accordingly, *pasticium* and *pasticcio* describe dishes made from a mixture of ingredients, such as savory pies, casseroles, or baked pasta with meat. But, unfortunately, this blog post is not about pasta. In the 16th century, the general meaning of *pasticcio* – a muddle of components – made its way out of the kitchen. As a term for artistic reuse, *pasticcio* then referred specifically to the Italian opera form consisting of pre-existing arias and musical pieces, which emerged in the 18th century. Eventually, its French counterpart *pastiche* became established for artistic mashups of all kinds, from fine art

imitating other artists' motifs or styles, often with fraudulent intent, to literary works imitating or integrating texts, styles, or genres. It is these elements that contemporary art scholarship often still ascribes to pastiche: imitation and imminent reference to the original.

Pastiche in EU copyright law: All dressed up but nowhere to go?

According to Art. 5(3)(k) InfoSoc Directive (2001/29/EC), Member States may implement an exception or limitation for the use of copyrighted material "for the purpose of caricature, parody or pastiche". Because of its vagueness, pastiche has been condemned to an existence in the shadow of the much more familiar concepts of parody and caricature. This is not surprising considering that in the first two decades of the InfoSoc Directive only one in four Member States had implemented a pastiche provision. In 2019, Art. 17(7) of the Directive on Copyright in the Digital Single Market (EU 2019/790, DSM Directive) made it *mandatory* to allow for caricature, parody, and pastiche uses. However, this provision limits the mandatory scope of the exception to uses in the context of online content-sharing service providers, as regulated by Art. 17 DSM Directive. Apart from that, Member States remain free to permit pastiche uses. So far, national legislators have opted for mere literal transpositions of Art. 17(7) DSM Directive and have not gone beyond its scope by introducing an additional general pastiche exception.

The case that brings pastiche to life: Fine art meets digital graphic art

Until the Court of Justice of the EU (CJEU) defines pastiche as an autonomous concept under EU law, it is up to the national courts to specify it. A German case sheds a first but bright light on what the copyright notion of pastiche entails.

First, let's look at what led to this decision. A London-based digital concept artist visited a well-known London art gallery that was showing a solo exhibition by a renowned, Berlin-based German painter. Perplexed, as he documented on Instagram, he spotted "The Unknowable", an oil painting measuring 2.85 x 3.80 meters. The painting would catch anyone's eye; a hyper-realistic rear view of a naked, elderly woman leaning on a wooden window cross, looking out into a dystopian world of apocalyptic mood, with lava cliffs, withered trees, and a disproportionately large songbird, towered over by Caspar David Friedrich's cemetery. But what attracted this visitor's attention was the pink cherry blossom tree sitting atop the cliffs in the upper right-hand corner of the painting, subtly but notably framed as a picture within the painted picture. In this kitschy cherry tree, the London artist recognized the digital graphic "Scorched Earth", for which he claimed authorship.

The painter, recognized for his conceptual and often collage-like approach, describes his works as a walk through cultural history, as wandering "*through all the rubbish that is thrown at me every day, in my eyes, in my ears*". He explained that he had found the cherry tree graphic "*by chance years ago as one of those countless trash no-name images from the internet,* […] *it was everywhere*" and that his painting "*describes the cold look into the afterlife*" through which the lady "*asks herself: is this supposed to be the afterlife, the paradise that it was worth living for so long? No, thank you! She stares into the abyss of a copy-paste kitsch world*".

Despite the case being almost entirely rooted in England – the painting was first and last exhibited in London, but only temporarily shown on the painter's website – the London digital artist pursued

his copyright claims in the Berlin courts.

The preliminary proceedings: "Free use" has left the arena

The Berlin Regional Court initially granted a preliminary injunction in favor of the English artist, but ultimately denied a copyright infringement after a full hearing (Landgericht Berlin, 23.4.2019 – 15 O 102/19)[1]. The court found that the painting demonstrated an antithetical interaction with the incorporated graphic and was therefore permitted under the "free use" provision of then-Sect. 24(1) German Copyright Act (UrhG).

But the Regional Court's focus on "free use" proved to be fatal. Three months before the appeal decision, the CJEU found then-Sect. 24(1) UrhG to be incompatible with EU law (Case – C-476/17 *Metall auf Metall*, paras. 56-65, commented here). The Berlin Higher Regional Court was therefore unable to uphold the preceding decision on the basis of free use (Kammergericht, 30.10.2019 – 24 U 66/19). Due to the lack of a humorous or mocking interaction, the court further rejected the parody exception. Pastiche, which was neither explicitly recognized in the UrhG nor a well-known concept, was also briefly negated. As a result, the court reinstated the preliminary injunction against the painter.

The main proceedings: Enter pastiche

In 2021, German copyright law was extensively revised, mainly to implement the DSM Directive. Since the CJEU had pulled the plug on the long-established free use, the German legislator also took the opportunity to explicitly permit uses for the purposes of caricature, parody, and pastiche: the new Sect. 51a UrhG.

The theory: The legislator's idea of pastiche

The explanatory memorandum reveals that the German legislator sees pastiche as crucial for securing artistic freedom. Like caricature and parody, pastiche is considered an "*integral part of the European culture*", suitable both for "classic" uses such as a literary pastiche and for modern transformative uses in the digital world. The legislator emphasizes that "*quoting, imitating and borrowing cultural techniques are a defining element of intertextuality and contemporary cultural creation and communication on the 'social web'*" and explicitly lists practices such as remixes, Memes, GIFs, mashups, fan art, fan fiction, and sampling when assessing the importance of a pastiche exception.

Notwithstanding pastiche's importance for digital uses, the legislator underlines that Sect. 51a UrhG covers *any* incorporation of third-party works or parts thereof, provided that an interaction with the original can be discerned. In contrast to caricature and parody, such an interaction does not have to be humorous or mocking, but can also be an appreciation or homage to the original. The interaction may also thematize, for example, persons, other works, or social events through the reused work as a cultural reference or representative.

The practice: The court's application of pastiche

Issued less than four months after the entry into force of Sect. 51a UrhG, the judgment of the Berlin Regional Court is the first application of the pastiche exception (Landgericht Berlin, 2.11.2021 – 15 O 551/19).

The court describes pastiche as a "*communicative act of stylistic imitation*" and states that Sect. 51a UrhG covers any "*evaluative reference to an original*" by incorporating it with an altered appearance in the new work. The requirement of alteration does not preclude a complete adoption of the original, but may also be achieved by adding further elements or integrating it into a new design or context. The court emphasizes that Sect. 51a UrhG permits reuses in digital creations as well as, "*in reverse*", the incorporation of a digital graphic into an oil painting.

The parties disagreed as to whose interpretation of the painting was relevant for assessing whether it makes an interactive reference to the graphic. Is it the painter's own understanding of his work? This would certainly strengthen the fundamental freedoms of art and expression, but would also be open to the accusation of subsequently justifying the use of other works. Or is it the view of the original's author, who here stated that the incorporation was only done to spare the effort of creating a background? Or must the interaction be visible to scholars or even to everyone? The Berlin court relies on the objective perception of a viewer who is familiar with the original work and has the intellectual capacity to perceive the artistic interaction. Someone who looks at the will recognize that the graphic has been placed in a new context.

The judges conduct a detailed assessment of the painting, analyzing its individual components, their interpretation and collage-like composition, as well as the different levels of detail in the painting technique. The court concludes that the cherry tree is not only a background motif but a collage element. With regard to the necessary interaction, the court finds that this "*is to be seen in the fact that a typical kitsch picture, which is supposed to offer the consumer something beautiful and attractive, becomes the content of a collage-like representation, which forces it to be viewed in a different, critical context*" as "*the viewer of the painting puts herself in the position of an elderly person who* […] *is looking at a panorama in which the vibrant green in the foreground near this person is replaced all around by a gloomy, unreal-looking scenery*". The painter's own interpretation and his body of work are recognized as further indications of an artistic interaction.

The court balances the interests involved, as required by the three-step test of Art. 5(5) InfoSoc Directive. The fact that the graphic has been reused "*largely true to the original*" does not, per se, weigh in the claimant's favor, since the interaction required a complete incorporation. In favor of the painter, the court takes into account that he did not perform a simple "*copy-and-paste process*" from digital to digital, but expressed a much greater artistic achievement and distance from the original by "*transferring* [the graphic] *by hand with oil paints and brushes onto a canvas to create a unique analogue work*". It is further noted that the painter did not pursue any commercial interest in the painting (it was gifted to the collector who exhibited it for free in London) and that the graphic is neither distorted nor its commercialization impaired.

Summary and Outlook

Sect. 51a UrhG provides a pastiche exception for analogue and digital incorporations of pre-existing material – and all mixed forms in between. The first practical test by the Berlin Regional Court shows how the exception can be applied in an art-sensitive way. Without pastiche,

interactive reuse of copyrighted material that falls outside the scope of parody and caricature would lack a legally secure permission – not least relevant for digital adaptations. Use cases and disputes under the national implementations of Art. 17(7) DSM Directive may further renew awareness of pastiche. The CJEU could also provide such an impetus in the medium term. Following its Berlin launch, pastiche has found its way into the epic "Pelham/Metall auf Metall" case. The Higher Regional Court of Hamburg has confirmed a pastiche for the incorporation of a short, distinctive sound fragment (28.4.2022 – 5 U 48/05 *Metall auf Metall III*). The appeal is currently pending before the German Federal Court of Justice (BGH – I ZR 74/22) and it remains to be seen whether it will again refer to the CJEU, this time provoking a harmonized definition of pastiche.

As part of the team of Christiane Stützle (lead) and Patricia Ernst of Morrison & Foerster (Berlin), the author was involved in all proceedings before the Berlin courts on the side of the defendant painter. An in-depth article on the copyright law assessment of artistic reuse, pastiche, and the present case has been published by Stützle/Bischoff in the German Journal of Copyright and Media Law (ZUM), 2022, pp. 683-694.

[1] Published in GRUR-RS 2019, 59879

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