

Kluwer Copyright Blog

Creative reuse online: How can all forms of creativity be supported?

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Free spaces in copyright law are fundamental. They allow us to use and enjoy copyright works, ultimately supporting the creation of future works. Yet, since the [Information Society Directive](#), European copyright law has preferred to protect and incentivise online business models over creativity. This post reflects on the role of exploiters, namely copyright holders with exploitation rights lacking any artistic contribution (e.g. publishers and producers), who are central to this development.



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The introduction of art. 17 [Copyright in the Digital Single Market \(DSM\) Directive](#) is the latest regulatory instrument to entrench the status of exploiters. The burden on platforms to police an exponential amount of content necessitates the use of algorithmic decision-making to determine potential infringement. Given the difficulty of defining free spaces, such as pastiche, it is feared that most platforms will simply block content to avoid unnecessary litigation risks. This risks negatively impacting creativity online, particularly for those that creatively reuse content. While some member states have implemented art. 17 in a way that supports freedom of expression online, the EU copyright system still requires reflection on its relationship with creativity, particularly creative reuses online.

This post proceeds as follows. Firstly, it suggests that a proportional balance between authors, users, platforms and exploiters can be achieved by implementing a broad construction of consent. This construct draws upon both authorship and the doctrine of exhaustion to outline the limits of authorial consent over future creative reuses. Secondly, it explores the extent to which authors can rebut the exhaustion of authorial consent. Thirdly, it assesses this approach using a [Pelham](#)-based factual scenario to illustrate how all forms of creativity should be supported equally online.

A broad approach to consent online

A broad construction of consent can facilitate creative reuse online. Drawing upon the doctrine of

exhaustion, consent can be framed as an essential component of creativity. The doctrine of exhaustion was initially conceived to ease tension between conflicting exclusive rights and competition law. The premise was simple: Following first sale or first sale with consent of the intellectual property (IP) rights holder, the ability to control further distribution disappears, supporting freedom of movement of goods.

For the Court of Justice of the EU (CJEU), consent is a question of context. For example, in *Deutsche Grammophon*, consent is interpreted by balancing free movement of goods against the exercise of IP rights, and in *Sterling*, to the choice of market. Subsequent copyright cases, particularly *Music Vertrieb*, the *Coditel* cases (and [here](#)) and *Football Association and Premier League* reveal that consent relates to the surrounding circumstances of the decision to place the goods on the market. Author remuneration is a key factor.

Outside of creativity, there are also examples in modern EU copyright law where acts were ‘authorised’ akin to an implied licence. Cases such as *Svensson* and *BestWater* evidence the CJEU broadly construing the ‘new public’ criterion of the communication right to allow expression online. Later, in *GS Media* and *Filmsteil*, the Court would include constructive knowledge of the unlawful behaviour and the presence of profit as key assessment factors. These cases demonstrate that not only are the economic interests relevant, but so is the balance of fundamental rights.

This post suggests that a similar approach should be applied for creativity where, dependent on contextual factors, consent is implied. This includes balancing the freedom of expression of both authors and users that create.

‘Exhausting’ authorial consent for creative reuse

Authorial consent draws upon a normative understanding of creativity akin to a social contract where authorship comprises space for creative reuse. This premise builds from the idea that access, use and artistic communication are essential components of creativity. It reflects the view that authorship is a fundamental doctrinal construct for self-definition and self-expression. But how can we exhaust authorial consent to allow creative reuse?

Following *UsedSoft* many have considered extending exhaustion online through art. 4(2) *Information Society Directive*. However, *Tom Kabinet* complicates its extension to non-software as the CJEU referred to the concept of tangibility to interpret the distribution right. The CJEU also affirmed the preference of the communication right as the applicable right online. In doing so, it seems to exclude exhaustion online for most creative content.

Despite authorship and consent providing space for creative reuse, limiting art. 4(2) to tangible goods supports the view that EU copyright law continues to entrench online revenue streams for exploiters. Art. 17 *DSM Directive* is a prime example. Though it was justified on the claim of a value gap between authors and platforms, the legislation allows *exploiters* to stake a claim on the monetisation of content by platforms. The question is whether exploiters should control artistic communication when creative reuse comprises part of authorship.

A framework for creative reuse online

In my view, a broader construction of consent supports both the initial author and the user that creates. Once authors are paid, their authorial consent over creative reuse can be exhausted. However, it is not the user who pays, but the platform which monetises creative reuse. As a creative reuse fails to act as a copy or substitute of the initial work, exploiters' interests and rights remain unaffected. Instead, it is argued, the focus should be on supporting the artistic communication of authors and users through the requirement for authorial remuneration and the exhaustion of authorial consent.

In particular, there are some circumstances where consent cannot be implied as it is contrary to the author's personality and relationship with their work.

Artistic reputational harm

An exception to implied consent asks whether authors can withdraw consent from future creative reuse of their works due to artistic reputational harm. In both *Soulier and Doke* and *Spedidam*, the CJEU explained that authorial consent can be implied if interpreted strictly in a balanced manner. Particularly in *Spedidam*, the CJEU adopted a practical approach in response to the unauthorised dissemination of recordings of a late musician. The alleged infringement was balanced against the unauthorised use's purpose (i.e. conservation and the marketing of French cultural heritage). The Court found that if consent was not implied, it would have a knock-on effect on other copyright interests.

A similar approach can be used regarding creative reuse by balancing copyright interests through fundamental rights, particularly freedom of expression. While many cases focus on the degree of transformative use (*Malka v Klasen*, *Koons v Franck Davidovici* and *Swedish scapegoats*), my suggestion is that the exception should consider the author's perspective. We should ask whether the association with the creative reuse is negative or harmful to their artistic reputation.

Support can be found in *Deckmyn*, where the CJEU held that rights holders have a legitimate interest in not being associated with, in this case, a racist or discriminatory message. Naturally, some suggest that *Deckmyn* risks the very essence of parody as it will nearly always have a negative connotation for the author or with their work (see, *Maya the Bee*). In response, it can be argued that reputation-based trade mark infringement (art. 10(2)(c) *Trade Mark Directive*) is a useful starting point to consider artistic reputational harm.

While blurring, tarnishment and unfair advantage broadly extend the possibilities of trademark infringement (and thus the scope of protection), they require an objective standard: If injury is to be proven, the trade mark owner must demonstrate that a link has been formed in the mind of the relevant public (*Adidas v Fitnessworld*). That is, that the public must believe that there is some connection or relationship between the trade mark and its alleged infringer. The question is how to structure this in copyright law.

One does not have to look too far. Politicians' walk-on music, like Liz Truss' 'Moving on Up' by the M-People or Donald Trump using REM's 'The End of the World', are constant sources of frustration for artists. In a copyright context, this has been considered by the German Higher Regional Court in Jena in *Helene Fischer*. Here, the Court found that performance rights were infringed by a German far-right political party, the NPD, playing Fischer's song at a political campaign, as it was an unauthorised use and was an indirect mutilation ('eine Entstellung/andere

Beeinträchtigung’). The Court explained that a use is harmful if the average consumer cannot exclude the possibility that there is a connection between the political party and the artist relating to political beliefs. Upon establishing the link, it is then balanced against contextual factors including the relevant interests, the intensity and impact of the mutilation, the economic interests and the level of creativity.

Clearly there are parallels between the approach in *Helene Fischer* and reputational-based trade mark infringement. My proposal is that a similar objective approach to artistic reputational harm serves to balance the competing artistic interests of both artists given the inherent space for creative reuse within the notion of authorship.

Practical reflections for a creative reuse framework

This section applies a broader construct of consent to a *Pelham*-based factual scenario. In this case, the band Kraftwerk alleged copyright infringement against the producer Moses Pelham. Pelham had sampled two seconds of a rhythm sequence in a later song without authorisation. While this case centres on the status of the (now defunct) German free use provision and freedom of expression, this post moves beyond specific copyright exceptions, to reflect on the role of authorial consent within the EU copyright system.

If Kraftwerk’s authorial consent can be exhausted to allow for Moses Pelham’s creative reuse, the first issue to be addressed is the characterisation of the reuse. Is it transformative in nature or is it a new and original work of a transformative nature (*OLG Hamburg Pelham* – see the [recent CJEU preliminary reference](#) regarding the limits of pastiche and sampling). It is suggested that the potential commercial nature of a creative reuse should not play a factor in this assessment. Support for this position is clear from art. 17 discourse where both the EU Commission Guidelines and Advocate Øe’s opinion in *Poland* propose limiting infringing uploads to those that are “manifestly” infringing. This would exclude “ambiguous” uses, which avoids the question of whether a use is sufficiently transformative or non-commercial.

Despite these suggestions, the CJEU in *Poland* avoids confirming what types of uses should be infringing and taken down, placing the burden on member state legislation, albeit safeguarded by the principle of proportionality. Beyond relevant exceptions, I argue that “manifestly” infringing uploads undoubtedly act as a substitute for copyright works, similar to the doctrine of exhaustion. Once an author decides to place the goods on the market, the copyright holder cannot prevent further distribution, as second-hand goods cannot compete with those not on the market in terms of quality. A similar logic is also evident when comparing Kraftwerk’s ‘*Metall auf Metall*’ with Moses Pelham’s ‘*Nur Mir*’ – they are not in competition with each other.

This outcome means that once Moses Pelham shares ‘*Nur Mir*’ online, a payment obligation arises for the creative reuse directly to Kraftwerk. This view is supported by *Reprobel*, where the CJEU held that only the harm on behalf of the author requires fair compensation when connected to an exception. This approach to reconciling interests, based on harm, also strengthens the argument that creative reuses do not act as a copy or substitute of the original work. It also means that once Kraftwerk receives fair compensation any right to control the creative reuse *prima facie* exhausts.

The only issue left to consider is whether Kraftwerk can rebut consent due to artistic reputational harm. This is dependent on an objective negative link between the artists being proven (*Helene*

Fischer). In the case of sampling, there are similarities with brand collaboration from a trade mark perspective. Kraftwerk could argue that the public could perceive the creative reuse as authorised, and a confirmation of an artistic relationship between the artists. Perhaps, more generally, the public could conclude that Kraftwerk consider hip hop music on a par with their own music and status.

Rich Prada, a recent General Court trade mark decision, offers some insight on analysing whether an objective link could be formed. Here, the well-known fashion house, Prada, failed to prove a link between itself and a Balinese four-star hotel named ‘Rich Prada’ as the goods and services were neither identical nor similar. By extension, one could argue that given ‘Nur Mir’ fails to act as a copy or substitute for ‘Metall auf Metall’ it is unlikely to spark reactions that this is an official collaboration between the two artists. Secondly, if Kraftwerk were to make a claim that the creative reuse impacts its artistic reputation by association with hip hop music generally, more is needed than a claim of infringement of phonogram rights. A claim of artistic reputational harm following *Helene Fischer* requires Kraftwerk to objectively evidence such a link from the relevant public.

It is therefore argued that both artistic expressions can coexist online if balanced through a broad construct of consent and author remuneration. In this line, future shaping of the EU copyright system requires reflection on creativity as opposed to allowing extensive economic rights which deter artistic communication.

While art. 17 [DSM Directive](#) certainly challenges a proportional balance between creativity and exploiters, [the German implementation](#) demonstrates a way forward. Adopting a ‘stay-up’ approach (compared to [France’s ‘stay-down’ approach](#)), [the German Act](#) uses ex ante safeguards such as tagging works as legitimate to ensure that creative reuses stay up until the upload is found infringing. There is also a direct payment from platforms to authors for these types of uses. The result is two-pronged: the [time sensitive](#) nature of creative reuses online is safeguarded, avoiding filtering, and exploiters are incentivised to enter into licensing agreements. It becomes clear that a broad approach to consent can protect, facilitate and foster all types of creativity online.

This post is based on the author’s recently defended doctoral thesis, which posits a broad construction of consent, based in effect on the doctrine of exhaustion, to balance copyright interests and support creativity online.

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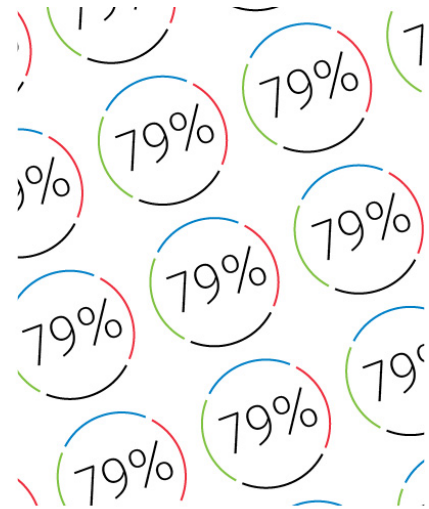
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