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ARTICLE

Oops, I Sampled Again … the Meaning of "Pastiche" as an Autonomous Concept Under EU Copyright Law

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Abstract With the return of the *Metal auf Metal* case (*Pelham v. Hütter*) to the Court of Justice of the European Union (CJEU), the Luxembourg court will again be faced with the question under which circumstances the reproduction of parts of a sound recording requires authorisation. When the case was first argued before the EU's highest court, it revolved around the concept of partial reproduction of a sound recording and an interpretation of the quotation exception. In addition, the defendant had proposed that national courts, in the absence of an applicable exception, could provide for flexibility by allowing creative uses purely based on fundamental rights. The Court rejected this possibility, arguing that something akin to an open norm would create legal uncertainty. Following the first ruling, Germany, where the case

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originated, implemented the pastiche exception of Art. 5(3)(k) of the Information Society Directive into its national copyright law. In *Pelham v. Hütter II*, the CJEU is asked to give guidance on the interpretation of the concept of pastiche. Following the introduction of the exception under German law, German courts had interpreted the exception broadly, allowing a variety of derivative artistic uses. This article explores the concept of pastiche from an interdisciplinary and comparative perspective. After an overview of the relevant German decisions, it explores the various non-legal meanings of pastiche before comparing the development of the notion in the copyright laws of Italy, France and some other EU Member States. Since the non-legal as well as the different national legal understandings of pastiche do not crystallise a common understanding of the notion, pastiche is subsequently developed as an autonomous concept under EU law. In distinguishing pastiche from parody, which the CJEU developed as an autonomous concept in the *Deckmyn* case, the article proposes that pastiche should be understood as an exception that broadly permits referential uses that have no elements of humour or mockery – as distinct from parody – but are of an artistic nature. An important role must be assigned to the three-step test, which functions as a framework to balance the interests of rightholders and users in a given case.

Keywords Sampling · Copyright · Pastiche · *Metall auf Metall* · *Pelham v. Hütter*

1 Introduction

Sampling is back in town, more precisely in Luxembourg, where the Court of Justice of the European Union (CJEU) has been handed a second referral by the German Federal Supreme Court (Bundesgerichtshof) on the question whether the reproduction of a two-second sample infringes copyright in a sound recording. The first time the (in)famous *Metall auf Metall* saga toured Luxembourg, the CJEU ruled, in *Pelham v. Hütter*,[1] that the right of a phonogram producer is, as a general rule, infringed when a sample is reproduced, irrespective of the length of the sample.

Although the CJEU rejected the applicability of the quotation exception to sampling, it permitted the use of a sample when the latter was integrated into a new song, possibly in modified form, and became unrecognisable to the ear. This, the CJEU argued, would reflect a fair balance between the interest of the phonogram producer and the right to artistic freedom of the sampler. But if the sample were recognisable to the ear, and there were no applicable exception, sampling would constitute an unlawful practice.

Now, *Pelham v. Hütter* returns to Luxembourg with a different set of questions. As a result of the first *Pelham* ruling, the Federal Supreme Court found that a defendant in national proceedings had infringed the claimant's right by having reproduced a two-second-long sample.[2] The question before the CJEU in the second

[1] CJEU judgment of 29 July 2019, *Pelham and Others*, Case C-476/17, EU:C:2019:624.

[2] German Federal Supreme Court judgment of 30 April 2020 (I ZR 115/16) – *Metall auf Metall IV*, 122(8) Gewerblicher Rechtsschutz und Urheberrecht (2020), p. 843.

Pelham instalment is whether a sampler can rely on another exception or limitation to justify the unauthorised reproduction of a sample that does not meet the exclusionary qualification that the CJEU created in the first edition of *Pelham v. Hütter*.

This question is of crucial importance, as the defendant is relying on an exception under EU copyright law that has recently been made mandatory – albeit only for uses on online content-sharing service providers (OCSSPs) – by Art. 17 of the Directive on Copyright in the Digital Single Market (CDSMD),[3] the scope of which is very unclear. The exception for the purposes of pastiche has been part of the EU copyright *acquis* since the adoption of the Directive on copyright and related rights in the information society (InfoSoc, 2001),[4] albeit only as an optional exception, which Member States could, but were not obliged to, implement. Importantly, Germany did not implement the pastiche exception in its 2003 transposition of the InfoSoc Directive, but only after the adoption of the CDSMD. In the proceedings that led to the second referral to the CJEU, it was suggested that the pastiche exception could function as a broader and more flexible provision to enable creative/transformative re-uses, and at least two German decisions have interpreted it to that effect.

In this article we begin with a brief outline of the *Pelham* saga. Then we proceed by examining how the existing pastiche exceptions are interpreted in Germany, France and Italy with the hope of distilling a potential common understanding of the scope of the exception. Finally, we propose a potential interpretation of pastiche as an autonomous concept under EU law, and offer our opinion on how *Pelham v. Hütter II*[5] could – and should – ultimately be decided.

2 Is This All Just a Little Bit of History Repeating Itself …? *Metall auf Metall*

2.1 History – the "*Metall auf Metall*" *Saga*

Metall auf Metall started its long march in 2004 when members of the German band Kraftwerk sued hip-hop producer Moses Pelham for copyright infringement.[6] Pelham had copied a two-second segment from Kraftwerk's song "Metall auf Metall" and integrated it as a continuous loop into the song "Nur Mir", which Pelham had produced for the German artist Sabrina Setlur. Over the course of the following 13 years, the case would make its way through the instances of the

[3] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance), PE/51/2019/REV/1, OJ L 130, 17.5.2019, pp. 92–125.

[4] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, pp. 10–19.

[5] Case C-590/23, *Pelham*.

[6] For overviews of the litigation in its various stages *see* especially Frédéric Döhl, Systemwechsel – Vom Gebot des Verblassens zum Gebot der Interaktion. Kunstspezifische Betrachtung des Bearbeitungsrechts nach den Urteilen von EuGH (C-476/17) und German Federal Supreme Court (I ZR 115/16) in Sachen *Metall auf Metall*, 84(1) *UFITA – Archiv für Medienrecht und Medienwissenschaft* (2020), p. 236.

German court system, with two appearances at the Federal Supreme Court[7] and one intermission at the Federal Constitutional Court (Bundesverfassungsgericht),[8] culminating in the 2017 referral to the CJEU.[9]

Initially, the questions the German courts were concerned with were how the scope of the reproduction right of phonogram producers had to be interpreted, and whether Sec. 24 of the German Copyright Act (Urheberrechtsgesetz), as it then was, would apply to the sound recordings right. Eventually, in 2012, the Federal Supreme Court concluded that any reproduction of a sound recording or a part thereof, irrespective of the length of the sample, constituted an infringement. And while Sec. 24 of the Copyright Act applied in principle, its application was subject to the limitation that sampling was permitted only insofar as it was impossible for the user of the sample to recreate it.[10]

Pelham brought a constitutional complaint against this restrictive interpretation of the relevant provisions of the German Copyright Act, arguing that such an interpretation constituted an unjustified limitation of his right to artistic freedom under Art. 5 of the German Constitution, or "Basic Law" (Grundgesetz). The Federal Constitutional Court expressed doubts as to the constitutionality of applying the relevant German copyright rules in the light of Art. 5 of the Basic Law and remanded the case to the Federal Supreme Court.[11] It then referred a set of questions to the CJEU, seeking clarification on interpretation of German copyright law in the light of the InfoSoc Directive and the EU Charter of Fundamental Rights.[12] The CJEU rendered its judgment in July 2019,[13] holding that, interpreted in the light of Art. 2(c) InfoSoc, any reproduction of a sound recording, however long, constituted an infringement of the phonogram producers' exclusive right, unless the sample were integrated, possibly in modified form, into a new song so that it became unrecognisable to the ear.[14] The CJEU also put an end to Sec. 24 of the Copyright Act, arguing that an open and flexible norm would be irreconcilable with the closed list of exceptions of Art. 5 InfoSoc and the principle of legal certainty, and would

[7] German Federal Supreme Court 20 November 2008 (I ZR 112/06) – *Metall auf Metall*, 111(3–4) Gewerblicher Rechtsschutz und Urheberrecht (2009), pp. 403–407; German Federal Supreme Court 13 December 2012 (I ZR 182/11) – *Metall auf Metall II*, 115(6) Gewerblicher Rechtsschutz und Urheberrecht (2013), pp. 614–617.

[8] BVerfG 31 May 2016 (1 BvR 1585/13) – Zulässige Verwendung von Samples ohne Zustimmung des Tonträgerherstellers – *Metall auf Metall*, 118(7) Gewerblicher Rechtsschutz und Urheberrecht (2016), p. 690.

[9] In these proceedings the Advocate General submitted his Opinion in December 2018 (AG Szpunar, Opinion of 12 December 2018, *Pelham and Others*, Case C-476/17, EU:C:2018:1002), and it took the Court another seven months to render the judgment.

[10] German Federal Supreme Court, *Metall auf Metall II*, p. 616; critically Podszun (2016), pp. 606–613; Leistner (2016), pp. 772–777.

[11] *See, e.g.,* Jütte and Maier (2017), pp. 784–796.

[12] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407 (EU Charter).

[13] CJEU, C-476/17 *Pelham and Others*; *see, e.g.,* Jütte and Quintais (2021), pp. 213–225.

[14] CJEU, C-476/17 *Pelham and Others*, paras. 36–39. It remained unclear to "whose" ears the sample should remain unrecognisable. Critically Senftleben (2020), pp. 751–769.

hamper the InfoSoc harmonisation of exceptions and its role in the proper functioning of the internal market.[15]

Following the CJEU judgment, the Federal Supreme Court decided in 2020 that Pelham's use of the sample had been lawful up until 2001 under the limitation of Sec. 24 of the Copyright Act. However, with the adoption of the Infosoc Directive, Sec. 24 of the Copyright Act could no longer be applied and, as a result, Pelham's use was unlawful rather than a "free use" ("*freie Benutzung*").[16]

With the implementation of the pastiche exception in German copyright law, the legal assessment of Pelham's creative work might have changed again. Whether this is indeed the case depends on the scope and interpretation of the pastiche exception of the newly introduced Sec. 51a of the Copyright Act.

2.2 Here Comes the Pastiche – the New Sec. 51a of the German Copyright Act

The introduction of Sec. 51a into the German Copyright Act was a reaction to the elimination of Sec. 24 thereof, which was necessary after the CJEU had ruled that provision incompatible with EU law. The introduction of such an exception was also a requirement under Art. 17(7) CDSMD, which made it mandatory for Member States to provide an exception for the purposes of parody, caricature and pastiche for the benefit of users uploading content on OCSSPs, which had not been expressly covered by the Copyright Act.[17]

The new provision stipulates that a published work may be reproduced, distributed and communicated to the public for the purposes of caricature, parody and pastiche. It therefore replicates the substantive language of Art. 17(7) CDSMD as well as of the older Art. 5(3)(k) InfoSoc. Besides the requirement of prior publication, the new rule does not provide any additional criteria for applicability. For parodies, the CJEU had already developed an autonomous concept in its 2014 decision in *Deckmyn v. Vandersteen*,[18] requiring that a parody must contain elements of humour or mockery and must evoke an existing work while displaying noticeable differences from the former.[19] For pastiche, there are still no eligibility criteria. The *Deckmyn* qualifying requirement does not apply, which makes the scope of pastiche broader and can include references that constitute a homage to the original work.[20]

Some guidance, albeit of a rather abstract nature, can be found in the recitals of the CDSMD Directive. Here, the European legislator underlines that the mandatory nature of the exceptions listed in Art. 17(7) reflects the necessity to strike a balance

[15] CJEU, judgment of 29 July 2019, *Pelham and Others*, Case C-476/17, para. 63.

[16] German Federal Supreme Court, *Metall auf Metall IV*, pp. 843–852.

[17] *See* the explanatory memorandum: BT-Drs. 17/27426, p. 89. (https://dserver.bundestag.de/btd/19/274/1927426.pdf); *see also* Kreutzer (2022a, b), p. 7. It should be noted that Art. 17(7) CDSMD only requires such exceptions to be available for uses on specific online platforms, but Member States generally chose to extend the application to such uses in other contexts, if such exceptions had not already existed before.

[18] CJEU, judgment of 3 September 2014, *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others*, Case C-201/13, EU:C:2014:2132.

[19] *Ibid*, para. 33.

[20] BT-Drs. 17/27426, p. 91.

between the interests of rightholders and users, particularly in the digital environment. According to Recital 70, users of OCSSPs coming within the scope of Art. 17 CDSMD must be able to perform acts that constitute parody, criticism and pastiche, and to exercise their right to freedom of expression and freedom of the arts. The explanatory memorandum relating to Sec. 51a Copyright Act further elaborates, albeit vaguely,[21] that while certain "classical" or analogue uses (i.e. caricature and parody) are confirmed and fortified by the introduction of Sec. 51a Copyright Act, pastiche in particular permits the creation of certain types of user-generated content (UGC) that cannot be classified as caricature or parody. The explanatory memorandum refers expressly to remixes, memes, GIFs, mashups, fan art, fan fiction and sampling.[22]

2.3 Post-CDSMD Case-Law in Germany

Following the introduction of Sec. 51a of the Copyright Act, German courts started shaping the notion of pastiche. So far, two decisions, one on transformative fine arts,[23] and another on musical sampling,[24] from which the new preliminary reference to the CJEU arose, have attempted to give shape to this new defence that is now expressly recognised under German law. These rulings suggest that, contrary to the ordinary meaning of the term "pastiche", the scope of the exception is not limited to the imitation of an artist's style, a use that would not require reliance on an exception but would rather fall within the limitation of the newly formulated Sec. 23(1), second sentence, of the Copyright Act. Instead, the pastiche exception enables the recognisable use of original elements of specific works[25] insofar as the new work engages in some form of discussion or intellectual interaction with the original work borrowed. This was already a requirement under Sec. 51 of the Copyright Act, which, as an implementation of Art. 5(3)(k) InfoSoc, enables the exercise of the right to freedom of expression and artistic freedom protected by Arts. 11 and 13 of the Charter of Fundamental Rights of the European Union (as well as the relevant norms of the Basic Law and the European Convention on Human Rights). According to the German courts, such uses, including parody, caricature and pastiche, require a dialogue, through references, with the original work.[26]

In addition to these substantive requirements, an important role in the balancing exercise is reserved for the three-step test. The CJEU considered this, although not

[21] Glückstein (2022), pp. 19, 21.

[22] BT-Drs. 17/27426, p. 91.

[23] LG Berlin, 2.11.2021 (15 O 551/17) – Zulässige künstlerische Auseinandersetzung mit einem übernommenen Werk – *The Unknowable*, 22(5) Gewerblicher Rechtsschutz und Urheberrecht Rechtsprechungs-Report (2022), p. 216.

[24] OLG Hamburg, 28 April 2022 (5 U 48/05) – Erlaubtes Tonträger-Sampling bei Überführung in selbstständiges Werk – *Metall auf Metall III*, 124(16) Gewerblicher Rechtsschutz und Urheberrecht (2022), p. 1217.

[25] *Ibid*, p. 1217, para. 70; LG Berlin, *The Unknowable*, p. 216, para. 28; *see also* Stieper (2020), pp. 699, 702–703.

[26] OLG Hamburg, *Metall auf Metall III*, p. 1217, para. 71.

by explicitly referring to Art. 5(5) InfoSoc, in *Deckmyn*.[27] In the light of this principle, courts applying an exception must ensure that, in each specific case, admitting a transformative use under Sec. 51a Copyright Act does not prejudice the legitimate interests of the rightholder.

Accordingly, German courts have interpreted the pastiche exception broadly, but not overly.[28] The general reference to all sorts of UGC does not necessarily mean that every meme or mashup can be considered a pastiche. However, at least under the definition given to pastiche by the courts so far, Pelham's use of the *Metall auf Metall* sample was found to fall within the scope of the provision.

The fact that, following a quarter century of litigation in the *Pelham* case, the new EU rules compel the Federal Supreme Court to refer the same sampling case, albeit under the disguise of a new exception, back to the CJEU, presents us with a fairly unique situation. In order to analyse the referral and predict the outcome of the new preliminary proceedings, we will first take a closer look at the contested legal concept, namely pastiche.

3 The Concept of Pastiche

3.1 The Prehistory of Pastiche

The ordinary meaning of pastiche and its usage in common language and everyday life is a good starting point for developing a definition of the notion within the context of copyright law. The Oxford Dictionary of English defines "pastiche" as "an artistic work in a style that imitates that of another work, artist or period," and "an artistic work consisting of a medley of pieces imitating various sources".[29] Whilst underexplored in law, pastiche has long been an object of study in the humanities.[30] Having a glimpse at the most influential conceptualisations of the notion in the literature may greatly help define its boundaries for the purpose of legal analysis.

Over the centuries, at least eight different understanding of pastiche have been developed. As early as the 16th century, pastiche meant (1) the artistic production of artificial stones and (2) the recombinative and decorative use of old/antique building materials.[31] From the early 17th century, the term assumed a meaning (3) relevant for the fine arts: that of the ironic/pejorative imitation of characteristic motifs and

[27] *Deckmyn*, *supra* note 18, para. 27; *see also Metall auf Metall III*, p. 1217, para. 72; and Glückstein (2022), p. 20.

[28] *See, e.g.,* Kraetzig (2024), pp. 170, 174–176, proposing, on the basis of the approach developed by the German Federal Supreme Court, a proportionality test that conflates a balancing of fundamental rights with the three-step test.

[29] The Oxford Dictionary of English, Oxford University Press, 3rd edn., s.v. "Pastiche".

[30] *See* especially Hoesterey (2001); Dyer (2006).

[31] Ortland (2022), pp. 3, 17.

stylistic elements, predominantly of paintings (occasionally counterfeiting or plagiarising the source work).[32]

From the 18th century, pastiche also meant (4) mixed compositions ("mélange" or "composition mêlée") of paintings, and later also of musical, literary and architectural works.[33] Pastiche in theatre/opera ("Pasticcio Opera"), using source works in a recombinative manner (5), also reached its peak in the 18th century.[34] Imitations of the style of literary works (6) started to mushroom in the late 18th century as well, and formed a part of public education and exercise in style until the 20th century.[35] Finally, two further meanings of pastiche emerged during the 19th century: (7) a satirical/critical exaggeration, moving pastiche closer to parody and caricature; and (8) the anachronistic recreation of works of faded ages.[36]

These eight historic interpretations clearly highlight a key feature of pastiche, that is its unclear meaning in *art*. The various understandings or emanations of pastiche over time even seem to contradict each other. For example, certain understandings of pastiche rest on close imitation whereas others require some form of creative or novel artistic activity. In some contexts, pastiche is negatively defined as a parasitic act of free-riding on the original author's work or fame. This contrasts with other readings, which conceptualise it as a form of artistic homage. Often, but not always, the style is connected to humorous or critical/satirical expression.

In fact, pastiche is significantly shaped by its geographical, cultural and social "home". How it is understood in *milieux* with a tendency towards imitative and humoristic uses, such as France, Scandinavia, and Eastern Europe, differs from how it is understood in environments such as Italy, Spain, and countries influenced by the British tradition, which give more weight to homage and creativity. Other distinctions are based on the contribution made by the *pasticheur*. Some traditions interpret pastiche as a clear and pure imitation of the original work. In other cases, pastiche is a "hybrid" expression that combines elements of the source work with a secondary creation to achieve an expression that transcends the meaning or aesthetics of the original work. Similarly, some readings see pastiche as a reminiscence of times past, while others are more progressive and explore new forms of expression. Finally, it is also worth noting that some conceptualisations of pastiche have fallen out of fashion or even disappeared as cultural phenomena over time, whilst others are still practised as part of contemporary art and culture.[37]

Gérard Genette's seminal work *Palimpsests* (1982) may be helpful in shedding light on the nature of pastiche and how it differs from parody, with which it is often conflated.[38] Parody and pastiche are two distinct manifestations of

[32] *Ibid*.

[33] *Ibid*, p. 18.

[34] *Ibid*, pp. 18–19.

[35] *Ibid*, p. 19.

[36] *Ibid*, pp. 18–19. Dyer lists 12 different meanings. *See* Dyer (2006), pp. 7–9.

[37] Ortland (2022), pp. 20–35.

[38] Gérard (1982); all following quotes are from the English translation, Genette (1997).

"hypertextuality," which Genette defines as "any relationship uniting a text B […] to an earlier text A […], upon which it is grafted in a manner that is not that of commentary".[39] Hypertextuality is "a universal feature of literarity: there is no literary work that does not evoke (to some extent and according to how it is read) some other literary works, and in that sense all works are hypertextual".[40] Literature is always in the "second degree": all texts are necessarily linked to each other, the way the old, scraped writing of a palimpsest remains legible underneath the new one. While parody is a mode of derivation in which hypotexts are transformed (e.g. James Joyce's *Ulysses* relative to Homer's *The Odyssey*), pastiche, by contrast, is the imitation of style, of genre.[41] Parody and pastiche also differ in terms of function. Pastiche is a playful imitation, while parody is meant to be satirical.[42] A paradigmatic example of pastiche is *L'Affaire Lemoine*, in which Proust narrates the then-famous Lemoine case in the style of nine authors, including Balzac, Flaubert and Renan.[43] And although Genette primarily focuses on literary hypertextuality, he contends that derivation has a "transartistic character".[44] In his words, "derivational practices can thus be seen to be in no way the privilege only of literature but to apply also to music and the visual arts […]".[45]

However, as intellectually stimulating as those proposals emanating from various disciplines might be, one can hardly expect to distil from them a single, comprehensive, and functionally operating legal definition of pastiche.[46] In this sense, it might be useful to complement them with a comparative analysis of the term as it has developed under the copyright law of France and Italy, which represent two of the cultural and artistic beacons of pastiche in Europe.

3.2 Pastiche in French and Italian Copyright Law

The inclusion of the exception for "caricature, parody and pastiche" can be traced back to Italian and French influences – not cultural, but political. The original proposal for the InfoSoc Directive, drafted by Italy during its Presidency of the Council, omitted any reference to the parody, caricature and pastiche exception that later found its way into Art. 5(3)(k). It was only during the French Presidency in 2000 that this provision was introduced in its final form. The divergence in legislative approaches can be attributed to both differing interpretations of the artistic meaning of pastiche, and contrasting treatments of pastiche by the national legislators and courts of the two Member States. A comparison of the French and

[39] *Ibid*, p. 5.

[40] *Ibid*, p. 9.

[41] *Ibid*, p. 26.

[42] *Ibid.*

[43] Marcel (2006).

[44] *Ibid*, p. 384.

[45] *Ibid*, p. 391.

[46] Although we should mention convincing attempts at doing so: *e.g.* Hudson (2017), pp. 346, 348–351; Pötzlberger (2018), pp. 677–678; Stützle and Bischoff (2022), pp. 683, 690–691.

Italian approaches with the German experience further highlights the complexities of the issue that the CJEU will soon have to face.

3.2.1 France

The current exception for parody, pastiche, and caricature was introduced into French copyright law in 1957. It is understood by the doctrine, particularly after the CJEU ruling in *Deckmyn*, to be rooted in the fundamental right to expressive freedom.[47] Article L. 122-5-4° of the French Intellectual Property Code (Code de la propriété intellectuelle) reads: "Once a work has been disclosed, the author may not prohibit: […] 4° parody, pastiche, and caricature, observing the rules of the genre".[48] Article 5(3)(k) Infosoc incorporated the three categories from Art. L. 122-5-4° of the French Intellectual Property Code (CPI), without mentioning the rules of the genre. As such, Art. L. 122-5-4° was unaltered after 2001, and remained so after the adoption of the CDSMD, whose Art. 17(7) mirrors Art. 5(3)(k) Infosoc, albeit limiting the scope to digital uses on OCSSPs. Despite being located in the chapter of the IPC dedicated to economic rights (*droits patrimoniaux*), it is unequivocally established that Art. L. 122-5-4° IPC also tempers the author's moral right (up to the point of "excessive denaturation").[49] The pastiche exception necessarily implies a relative "paralysis" of the author's right to integrity (as, in the abstract, most, if not all, pastiches infringe the integrity of the works pastiched).

However, French law does not differentiate much, if at all, between these three categories/notions.

Statutory law is itself silent on what distinguishes a parody from a caricature, and those two from a pastiche. The "rules of the genre" referred to serve the purpose of framing each category, primarily to limit the scope of the exception.[50] Those rules are either "internal" to copyright law, reflecting customs and their evolution, or external to it, such as related to criminal law (e.g. a parody, pastiche, or caricature must not be defamatory, harm the author's honour, or result in excessive denaturation).[51]

In his seminal work *Le droit d'auteur en France*, Henri Desbois offered a classification based on the nature of the work involved (that is, of the work being either parodied, pastiched or caricatured). Thus, a parody is typically associated with a musical work, a pastiche with a literary work, and a caricature with a work of visual art. For the rest, the three share the "same intention": to "mock" ("*tourner en derision*") a work and/or its author.[52] Aside from its merits, that classification appears outdated as it omits audiovisual works altogether. In 1988, the French Supreme Court (Cour de cassation) adopted an alternative (formal) distinction. Unlike a pastiche and a caricature, a parody allows for the "immediate identification

[47] Lucas (2022), § 100.

[48] Art. L. 122-5-4° CPI.

[49] Blanc (2015), pp. 25 et seq.

[50] Lucas (2023), § 113.

[51] Vivant and Bruigiere (2019), pp. 669–671.

[52] Desbois (1978), No. 254.

of the work being parodied".[53] Furthermore, while a caricature intends to mock the author of the work, a pastiche aims at the style of the work.[54] In a similar vein, the Paris Court of Appeal ruled in 1990 that a pastiche was the "imitation of a style," whereas a parody "imitate[s] a serious work in a burlesque form".[55]

It seems those sibylline, and ultimately rather arbitrary, distinctions have not gained much approval, partly due to their departure from common understandings, as well as numerous overlaps.

Today, most scholars refer to Art. L. 122-5-4° CPI as the "parody exception", as parody, pastiche and caricature ultimately all fall under the same legal regime. For instance, Michel Vivant and Jean-Michel Bruguière, after having acknowledged that the distinction between parody, pastiche, and caricature holds "no particular practical interest", refer to "parody in a generic manner".[56] Similarly, André Lucas, Henri-Jacques Lucas, and Agnès Lucas-Schloetter write in their authoritative *traité* that "there should exist no objection to using the word 'parody' in a generic sense, since, among the terms used by the legislator, it is the one whose common meaning appears to be the broadest".[57] Finally, for Sabine Jacques, "the better approach is to understand parody as encompassing caricature, pastiche, and even satire".[58]

A similar trend is evident in case-law. In a much discussed 2011 decision, the Paris Court of Appeal asserted the general character of Art. L. 122-5-4° CPI, which it referred to generically as the "parody exception".[59] That exception "benefits all forms of work, without distinction for the genre to which they belong; thus, it is irrelevant whether the work being parodied is itself a humorous work, or whether the parody, as in this case, adopts a different genre (novel) from that of the work being parodied (comic strip)".[60] However, the Court later seemed to circumscribe pastiche to a secondary work adopting both the genre and style of the work pastiched: "Considering that the pastiche to which the appellant also refers to justify the alleged borrowings – whose legal regime is identical to that of parody – is not intended to legitimise a literary enterprise that adopts, as in this case, a different genre than the pastiched work and a different style […]".[61]

Commenting on that decision, Christophe Caron reaffirms that "parody, caricature and pastiche are all subject to the same legal regime",[62] and that if "exceptions are to be interpreted restrictively (*Exceptio est strictissimae interpretationis*)", "there is no justification for making distinctions *within parodies*,

[53] Cass. 1st Civ, 12 January 1988, No. 85-18.787, *Douces transes.*

[54] *Ibid.*

[55] CA Paris, 4th Chamber., 25 October 1990.

[56] Vivant, Bruigiere (2019), p. 666.

[57] Lucas, Lucas and Lucas-Schloetter (2012), p. 404.

[58] Jacques (2019), p. 22.

[59] CA Paris, 18 February 2011, No. 09/19272, *SAS Arconsil v. Sté de droit belge Moulinsart SA*.

[60] *Ibid.*

[61] *Ibid.*

[62] Caron (2012).

especially since we ought not to distinguish where law does not do so (*Ubi lex non distinguit nec debemus distinguere*)".[63]

The moment we consider pastiche to be a variation of parody, it is formed by two elements, moral and material, identified by André Françon in 1988. The moral (or subjective) element of a pastiche lies in the humoristic intent, while the material element is the copying of a pre-existing work on the condition that no confusion arises between the two. That approach is remarkably similar to the one adopted by the CJEU in *Deckmyn*, when parody was made an autonomous concept under EU law, and which is now binding upon French courts.

However, one might question the merits of subsuming pastiche and caricature under parody, where Art. L. 122-5-4° CPI makes an express, albeit undefined, distinction between the three (and as the reference to the "rules of the genre" seems to imply).[64] This effectively deprives pastiche and caricature of any substantial relevance. Sylviane Durrande, drawing on the respective definitions of parody, pastiche, and caricature that are prevalent in the humanities, criticises the reductionist approach of both scholarship and the courts. By assigning them to the same "satirical-comic" genre – she argues – all three concepts are drained of their rich nuances,[65] which needlessly limits freedom of expression. Pastiche, which she defines as the imitation of an author's style, is not necessarily meant to make one laugh or smile, nor is it always critical or satirical, but can also function as a homage.[66] She is joined by Sabine Jacques, who argues that, to the extent that parody, pastiche, and caricature must be intended as humorous, humour must "be understood more broadly than amusement or comedy, and compass tribute or criticism as well".[67] Durrande's material approach, which downgrades the importance of the intended purpose, appears to be the most persuasive, giving both the exception and the fundamental freedom it safeguards their full breadth.

3.2.2 Italy

The Italian Copyright Act (Legge italiana sul diritto d'autore (l.aut.))[68] has never contained an exception dedicated to parody, caricature, and pastiche. Nor did the Italian legislator deem it necessary to implement Art. 5(3)(k) InfoSoc when it overhauled the Title devoted to "exceptions and limitations" – known before the InfoSoc transposition as "free uses" (*utilizzazioni libere*).[69] That omission was justified on the grounds that Italian courts have traditionally and consistently

[63] *Ibid*. [emphasis added].

[64] According to Vivant and Bruguière: "Unfortunately, reference to those 'rules of the genre' has almost completely disappeared today. The rules of the genre are defined as those that include the absence of confusion and humorous intent". *See* Vivant and Bruigiere (2019), p. 671.

[65] Durrande (1995), pp. 134 et seq.

[66] *Ibid*, pp. 139 et seq.

[67] Jacques (2019), p. 22.

[68] Law of 22 April 1941, No.633, *Protezione del diritto d'autore e di altri diritti connessi al suo esercizio* (Protection of copyright and other related rights, OJ General Serie, No.166 of 16 July 1941.

[69] For a general comment *see* Ercolani (2003), pp. 26 et seq. *See also* Valenti (2007), pp. 190 et seq.

protected transformative uses such as parody and caricature under the quotation exception (Art. 70 of the Italian Copyright Act).[70]

Article 70 l.aut. allows the summary, quotation, or reproduction of pieces or excerpts of a work and their communication to the public for purposes of criticism and discussion to the extent necessary for the purpose, and provided that they do not compete with the commercial exploitation of the original work, and that the original source and name of the work's author are mentioned. Over the years, the Italian courts have broadened the notion of "criticism" to cover also parodic or satirical acts characterised by a mockery intent,[71] and have developed an independent and consistent case-law on parody, which is still not perfectly in line with the CJEU's *Deckmyn* decision.[72]

Pastiche, however, has never been a part of the doctrinal and judicial debate, despite the fact that Italy was one of the beacons of "pasticcio", and its artistic and cultural milieu contributed to the development of the notion and its flourishing.[73]

Only a few doctrinal contributions delve into an analysis of the notion, mostly by referring to foreign experiences and debates. Some authors emphasise that it is difficult and relatively useless to distinguish the concept from that of parody, particularly in the light of the fact that they are both covered by the general quotation exception and its requirements.[74] Others underline that, in contrast to parody, "pastiche" may have, but does not require, an intent to mock. This makes it potentially broader, more encompassing, and less limited in scope than parody and caricature,[75] and thus capable of including any form of "appropriation art" that complies with the requirements of Art. 70 l.aut. For some commentators, the protection of "pastiche" is not covered under Italian copyright law since, where there is no satirical or comic touch, the creative reinterpretation of an original protected work would be deemed to be a derivative work, and thus covered by the adaptation right under Art. 4 l.aut.[76]

It is exactly in the realm of appropriation art that Italian courts had the opportunity to delve into the topic, finally going beyond parody and satirical acts to touch upon a different category, which is never qualified as "pastiche" but features all its characteristics as defined in the realm of art, music and literature. Two cases,

[70] *See* the clear reconstruction made by Spolidoro (2007), pp. 179 et seq.; Mayr (2003), pp. 276–300; Gambino (2002), pp. 127–134.

[71] Among the most recent decisions, *see* Italian Supreme Court (Corte di Cassazione), 1st Chamber, order of 30 December 2022, No. 38165, which stated: "The right to criticism and discussion could be exercised in different manners, among which also through irony, as in satirical works, and mockery, as in parodic works, which make use of grotesque provocations to ridicule characterising elements of the original work targeted". On the historical evolution of the judicial notion of parody in Italy, *see* Fabiani (1985), p. 461; Algardi (1978), pp. 274 et seq.; Ubertazzi (1994), pp. 78 et seq.

[72] On the most recent evolutions of Italian case-law on parody, *see* Caso (2013), pp. 806–810; Casaburi (2017), pp. 3779–3789.

[73] Along with the references reported *supra* note 70, *see also*, for literary works, Emiliani-Giudici (1844), pp. 1076 et seq.; for classical music, Jonasova (2023).

[74] As in Spolidoro (2007), p. 181. *See also* Chimienti (2006), p. 62.

[75] For a general overview *see* Donati (2018), pp. 86–99.

[76] In this sense Dell'Arte (2023), pp. 88–92.

both from the Court of First Instance of Milan (Tribunale di Milano) serve to illustrate the concept of pastiche as it is reflected in Italian copyright law.

In *Davoli v. Muschio* (2007),[77] Muschio, a painter, was accused of unauthorised reproduction of a series of original and protected photographic works by Davoli, their author. Muschio used the photos by repainting them slavishly on canvas, made his works available to the public on his website, had them published in newspapers, and sold them during TV shows and on the premises of an art gallery, without making any mention of the original source apart from a confusing reference such as "photographed by Davoli". The defendant claimed that his works were original, creative, and inspired by the hyper-realistic movement, without referring to any specific exception offered by copyright law.[78] In its very concise ruling, the Milan Court deemed irrelevant the fact that Muschio made use of a different artistic technique, since "the defendant slavishly imitated the representation of the subjects of the original works, reproducing in full those aspects of creativity and originality that represents the specific manifestation of the author's personality" and thus causing a likelihood of confusion in the public as to the origin of the work.[79] The decision does not make any reference to Art. 70 l.aut., instead applying the usual copyright infringement test.

Four years later, the same court was confronted with a similar case – *Fondazione Giacometti v. Fondazione Prada*.[80] This involved the imitation of statues of women stripped of their flesh and with unrecognisable faces, made by the famous Swiss artist Giacometti, and representing the sufferance and starvation during periods of war. John Baldessari – a US artist and member of the appropriation art movement – reproduced them on a larger scale and adorned them with fashion accessories such as corsages and ribbons, for the purpose of exhibiting them on the premises of the Prada Foundation. The aim of building on famous preexisting works was to raise awareness of eating disorders in the fashion industry.

The Milan Court initially granted a preliminary injunction in favour of Fondazione Giacometti, arguing that Baldessari's works constituted copyright infringement not covered by any exception. In the subsequent appeal against the order, the court reversed its approach. It focused on Baldessari's style – appropriative art – and distinguished between the revisitation of a work with the aim of honouring it and following its teachings, or making a parody of it, and slavish reproductions constituting infringement. For the first time, a distinction between parody and pastiche emerged, and led to an assessment that diverged from the usual in parody cases.[81]

The Milan Court, in fact, focused on the presence of a creative contribution, resulting in an original and new work, in a way that "the reproduction does not constitute plagiarism, either in the light of the completeness of its expression or of its novelty, which derives from its capability to represent an autonomous and

[77] Court of First Instance of Milan, IP Section, 24 September 2009 (*Davoli v. Muschio*).

[78] *Ibid*, p. 7.

[79] *Ibid*, p. 9.

[80] *Tribunale di Milano*, IP Section, 13 July 2011 (*Fondazione Giacometti v. Fondazione Prada*).

[81] *See* the comment of Spedicato (2013), pp. 118–131; Briceno Moraia (2011), pp. 357–363.

original creative contribution to the artistic milieu".[82] According to the court, such a contribution can be found also when the new work derives from a preexisting protected creation. The decision explicitly expanded the protection usually granted to mockery to cover "reinterpretations" of existing works, regardless of their aim.[83] The key criterion used by the Milan Court was not the intent underlying the act, but the independently creative nature of the new piece.[84] No relevance was given to the likelihood of confusion between the two works, nor to their degree of similarity, as long as the artistic message the two artists wanted to convey was different.[85] To support its conclusion, the Milan Court indulged in a lengthy digression and comparison of the balancing principles underlying Italian copyright law with the factors used by the US fair use doctrine and their judicial implementations, with a direct reference to *Rogers v. Koons*.[86]

Without mentioning the notion of pastiche, the Milan Court built on the consolidated case-law covering parody under Art. 70 l.aut., admitting that the provision might go as far as protecting transformative uses where the ultimate intent was not mockery but to revisit a renowned work in order to honour it and use its message, style and lessons for a different purpose – as the followers of "pasticcio" had been doing for centuries before.

3.3 EU Copyright Norms: Art. 5(3)(k) InfoSoc and Art. 17(7) CDSMD

When the EU legislator decided to intervene on copyright exceptions and limitations (E&Ls) – via provisions on minimum harmonisation, as also clarified by the CJEU[87] – pastiche was considered and included in Art. 5(3)(k) InfoSoc. According to that provision, Member States may derogate from the rights of reproduction and communication to the public when the work is used "for the purpose of caricature, parody or pastiche". The three genres were joined on the basis of the assumption that they all entail the borrowing of a pre-existing creative work protected by copyright.[88] Subsuming them under the same provision also had the aim of overcoming the differences in Member States' copyright laws and traditions. In fact, not only do national copyright systems diverge on the aim of the borrowing (humour and mockery for parody and caricature, imitation as a specific artistic genre for pastiche), but they also distinguish the three practices on the basis of the type of work they borrow from, whether literary, artistic/visual, or musical. Regardless of the aim of the use or the subject matter, the provision has the clear goal of striking a

[82] Fondazione Giacometti, cit., p. 7.

[83] *Ibid*, p. 9.

[84] *Ibid*.

[85] *Ibid*, p. 10.

[86] 960 F.2d 301 (2d Cir. 1992).

[87] CJEU, Judgment of 29 July 2019, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, Case C-469/17, EU:C:2019:623, paras. 39–44; CJEU, Judgment of 29 July 2019, *Pelham GmbH v. Hutter*, Case C-476/17, EU:C:2019:624, paras. 78–85; CJEU, Judgment of 29 July 2019, *Spiegel Online GmbH v. Volker Beck*, Case C-516/17, EU:C:2019:625, paras. 23–38.

[88] *See*, with further specifications, von Lewinski and Walter (2011), § 11.5.67.

balance between the moral and economic interests of authors, and the freedom of expression and artistic creativity of users. In practice, however, the balancing exercise is often difficult, since the "rules of the genre" of parody, caricature, or pastiche may entail offensive expression or denigration, bringing them borderline to defamation and resulting in a clash with moral rights and the protection they offer the author's honour and reputation.

As a response to concerns over the negative impact that automated content-filtering under Art. 17 CDSMD might have on the ability of users to upload content on OCSSPs, the EU legislator introduced Art. 17(7) late in the legislative process. The new paragraph states that "Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services: […] (b) use for the purpose of caricature, parody or pastiche". The provision is declared mandatory, which is a policy decision that is well justified by the underlying fundamental rights these E&Ls are meant to guarantee. The hiatus with the optional nature of the InfoSoc Directive's general parody exception, however, is evident. This inconsistency, engendered by the fact that the EU legislator preferred to introduce a provision *ex novo,* and limit it to the scope of Art. 17 CDSMD, rather than amending Art. 5 InfoSoc, has further exacerbated the patchwork of national approaches to the matter, with obvious negative effects on the state of EU harmonisation.

Neither before nor since the introduction of Art. 17(7) CDSMD has the CJEU given any direct guidance on the concept of pastiche. The only opportunity to expand on its meaning presented itself in *Deckmyn*. The primary purpose of the referral by the Brussels Court of Appeal was to clarify the meaning of parody. In this context, Advocate General (AG) Cruz Villalón offered his understanding of the relation between the three concepts contained in Art. 5(3)(k) InfoSoc:

> I do not believe that a comparison with each of the concepts with which it coexists is of particular relevance for the present purposes. It may be difficult in a specific case to assign a particular work to one concept or another when those concepts are not in competition with one another. *That being so, it does not seem to me to be necessary to proceed any further with that distinction, since, in short, all those concepts have the same effect of derogating from the copyright of the author of the original work which, in one way or another, is present in the – so to speak – derived work.*[89]

The CJEU, in its subsequent ruling, did not expand on the relationship between the three concepts, but focussed instead on the definition of the notion of parody. According to the Court, a parody must "evoke an existing work, while being noticeably different from it" and "constitute an expression of humour or mockery".[90] The Court further elaborated that a parody need not have an original

[89] AG, *Deckmyn*, para. 46 (emphasis added).

[90] *Deckmyn*, para. 33.

character itself but must merely display "noticeable differences with respect to the original parodied work".[91]

In the absence of any further guidance on the meaning of caricature and pastiche, the contours of pastiche as an autonomous concept under EU law must be developed by the CJEU.[92] However, *Deckmyn* contains two interesting systematic approaches that could guide the Court towards finding a definition. First, and very briefly, the Grand Chamber in *Deckmyn* stated that parody was an autonomous concept under EU law and therefore had to have an autonomous meaning within the EU.[93] The AG had suggested that Member States retain a margin of discretion to determine specific additional criteria as part of their own domestic legal traditions.[94] With the Court's rejection of this "diversity in parody" approach, it seems clear that the other concepts in Art. 5(3)(k) InfoSoc must also constitute autonomous concepts. Second, and this is more problematic for the broad understanding of pastiche towards which the German courts seem to lean, the CJEU, following the AG's argument, adopted an interpretation of parody in its "usual meaning in everyday language".[95] Such an interpretation has been expressly rejected by the Federal Supreme Court, partly because no exception would be required if pastiche were to be understood in its usual meaning for copyright purposes. Fortunately, the CJEU added that account must be taken of "the context in which [the term] occurs and the purposes of the rules of which it is part".[96]

3.4 National Transpositions of the InfoSoc and the CDSMD

Article 5(3)(k) InfoSoc is an optional provision: Member States are free to decide whether to implement it. As for other E&Ls under Art. 5 InfoSoc, national transpositions are fragmented and various, which makes it impossible to speak of a genuine EU-wide harmonisation. However, the fundamental role played by parody, caricature, and pastiche in regulating the interplay between copyright enforcement and freedom of expression makes their consideration and protection a feature of all Member States' copyright systems, albeit in different forms and through different mechanisms and tools.

In this sense, national solutions may be classified into three different clusters. The first one comprises countries that opted for a verbatim implementation of Art. 5(3)(k) InfoSoc – e.g. Czechia (Sec. 38(g) CzCA), Germany (Sec. 51a UrhG), Latvia (Sec. 19(1)(9) LaCA), Ireland (Sec. 52(5) CRRA) and Malta (Art. 9(1)(s) MCA).

The second cluster features Member States that transposed the provision but introduced additional requirements, limitations or conditions. There are many examples. In Belgium (Art. XI. 190. Sec. 1. CEL) the exception is subject to *des*

[91] *Ibid.*

[92] *See* section 4.2. below.

[93] *Deckmyn*, paras. 14–17.

[94] AG, *Deckmyn*, paras. 53–56.

[95] *Deckmyn*, para. 19.

[96] *Ibid.*

usages honnêtes (honest practices) being observed; in Poland, Art. 29[1] UPA states that "works may be used for the purposes of parody, pastiche, or caricature, to the extent justified by the rights of these artistic genres", just as France did before the advent of the InfoSoc Directive (Art. L.122-5-4° CPI). Similarly, in the Netherlands (Art. 18(b) AW) the parodic work should comply with what social customs regard as reasonably acceptable. Going a step further, Romania (Art. 37 (b) RDA), Slovakia (Sec. 38 ZKUASP), Slovenia (Art. 53(2) ZASP), and Spain (Art. 39 TRLPI) require that there be no likelihood of confusion between the original work and the new derivative one, while Spain requires that no harm be done to the original work or its author (Art. 39 TRLPI). Croatia (Art. 206 NN), Estonia (Sec. 19(7) AutÕS), and Lithuania (Art. 58(12) LiCA) put in place the additional condition that the new work indicate the work targeted and the name of its author, unless this were to prove impossible. Croatia (Art. 206 NN) and Estonia (Sec. 19(7) AutÕS) also limit the use of elements of the original works to those strictly necessary for the purpose of the exception. On top of all these requirements, Luxembourg (Art. 10(6) LuDA) adds that the derived work must not denigrate the original one. Interestingly, the Estonian (Sec. 19(7) AutÕS), Lithuanian (Art. 58(12) LiCA), and Luxembourgish (Art. 10(6) LuDA) exceptions expressly include *parody* and *caricature* only, apparently excluding pastiche. The same applies to Czechia and Lithuania, which, however, amended Sec. 38(g) CzCA and Art. 21(1) LiCA, respectively, to include pastiche in the context of the implementation of Art. 17(7) CDSMD.

The third cluster is composed of Member States that have not transposed Art. 5(3)(k) InfoSoc. These are Austria, Bulgaria, Denmark, Finland, Italy, Greece, Portugal and Sweden. Among them, Finland (Sec. 4(2) TL) and Sweden (Art. 4(2) URL) cover parody, caricature, and pastiche under their general free-use provisions, which allow the re-elaboration of protected works if the new creation is original and the distinctive feature of its original source cannot be distinguished in the adaptation. Bulgaria, Italy, Denmark and Portugal have consistently considered parody, caricature, and pastiche under their quotation exception,[97] an approach that has led to decisions featuring a greatly divergent degree of flexibility.[98] Austrian courts, instead, have applied horizontally the constitutional provision on freedom of

[97] In this regard, Portugal's approach is the most particular, for it recognises the existence of parody as a creative, independent work but does not devote a specific exception to it (*see* quotation, Art. 75(2)(g) CDA).

[98] In Denmark (Sec. 22 DCA), this translated into a very restrictive implementation. *See* Ugeskrift for Retsvæsen 2007.280SH; Ugeskrift for Retsvæsen 1999.547Ø; Ugeskrift for Retsvæsen 2019.1294. Importantly, in Ugeskrift for Retsvæsen 2023.3772H, the Danish Supreme Court found a Zombie-like drawing of the famous Little Mermaid sculpture a parody, the creation of which did not infringe either the author's economic or moral rights. *See*, *Little Mermaid*, Decision of the Supreme Court of Denmark (Højesteret) 17 May 2023 – Case No. BS-24506/2022-HJR; 54(10) *IIC – International Review of Intellectual Property and Competition* Law (2023), 1594–1603, https://doi.org/10.1007/s40319-023-01407-7. *See* further Blomqvist, Rosenmeier and Schovsbo (2023), pp. 1632–1639. For Bulgaria, the scope of the flexibility seems consistent with the InfoSoc standard. The Bulgarian Supreme Court has extended the scope of the subjective criteria of the quotation exception also to uses for the purposes of parody. *See* case No. 1771/2016 of 2 August 2017.

expression to protect parodic uses (and thus, by analogy, also caricature and pastiche) against strict copyright enforcement.[99]

Unlike parody, caricature and pastiche have not been subject to a substantial number of national judicial decisions. This makes it difficult, if not impossible, to infer general conclusions on the state of their harmonisation as living concepts in court. However, the abundant case-law in the field of parody and the close similarity of some of the main features of the three figures may allow some of the judicial principles developed for parodic uses to be applied to pastiche by analogy and, in this sense, give an indirect picture of how the potential approaches of national courts to the matter converge and diverge.

Against the background of the plain, general, and sometimes broad definitions offered by copyright statutes, national judicial decisions have, year after year, introduced additional requirements to the parody exception – some of which may need to be revised or repealed after the *Deckmyn* decision. Most of these requirements have been applied horizontally to the interpretation of provisions covering parody, caricature, and pastiche together, thus also in borderline cases involving acts closer to pastiche than to parody. They range from (1) the perceivable difference between the parodic work and the original work (structural parameter) to (2) the presence of humour or mockery (functional parameter), applied only to parodic works; (3) the explicit targeting of the original work by the derived one; (4) the indication of paternity of the earlier work; (5) the absence of any intention to compete with the original work or profit from its fame; (6) use of the original work to an extent that does not exceed what is necessary to fulfil the purpose of the exception; (7) the respect of moral rights and/or any other legal instruments that protect the original author's honour and reputation.

The structural parameter (1), spelled out in *Deckmyn*, is a requirement that was already widely used and established in national judicial decisions before the intervention of the CJEU, but with largely different approaches. In some Member States, courts focus on the likelihood of confusion with the original work, in line with their statutory provisions (Romania, Slovakia, Slovenia, Spain). However, also France (Art. L. 122-5-4° CPI)[100] and the Netherlands (Art. 18(b) AW), whose parody exceptions do not contain this particular requirement, see their courts applying it in their case-law to different degrees and in different variations. While Dutch courts actually analyse only the likelihood of confusion between the two works,[101] French courts often link the criterion to the application of an independent

[99] OGH 4 Ob 66/10z.

[100] French decisions hold that parody should not confuse the public as to the difference between the parodic and the original works (*see* CA Paris, 5th Division, 2nd Chamber, 18 February 2011; TGI Evry, 9/07/2009, RG No. 09/02410, confirmed by CA Paris, 18/02/2011, RG No. 09/19272, Propr. Int. 2011 No. 39 (Saint-Tin case). *See also* Supreme Court of France, 1st Chamber, 3 June 1997, Bulletin 1997 I, No. 184, p. 123. The likelihood of confusion rules out the possibility of justifying the infringement of authors' moral rights (Cour de Cassation, 1st Chamber, 27 March 1990, Bull. Civ. I, No. 75).

[101] On this basis, the use of an image of "Rudolph the red-nosed reindeer" on a bottle of an alcoholic beverage (Court of First Instance of Maastricht, 18 September 2006, ECLI:NL: RBMAA:2006: AY8784), a parody of a Yellow Pages commercial (Court of First Instance of Breda, 24 June 2005, IER 2005, 80, *Gouden gids*) and the use of a cartoon in a satirical video (Court of First Instance of Northern-

originality threshold, which is not consistently applied.[102] In other Member States, the requirement is interpreted so as to set a much higher threshold of originality for the exception to apply. This is the case in Finland and Sweden, which do not have a specific exception but cover it under the umbrella of their free-use clause, which requires that the new work be genuinely new and independent of the one used as an inspiration.[103] The same applied in Germany until the introduction of a specific parody E&L in 2021,[104] and in Belgium,[105] Austria[106] and Italy.[107] Such a reading stands in clear contrast to the CJEU decision in *Deckmyn*, which specifies that the EU parody exception does not contemplate the need for the parodic work to be original in order to be applicable, as also noted in subsequent decisions of Swedish[108] and German[109] courts.

Aside from the structural and functional parameters, all other requirements were explicitly banned by the CJEU in *Deckmyn*. Yet, some of these criteria are still part of consolidated national case-law in some Member States.

Footnote 101 continued
Netherlands, 18 November 2014, ECLI:NL: RBNNE:2014:6095) were not allowed owing to the likelihood of confusion with the original works.

[102] This high variance is particularly evident in France. In *Douces Trances* (Cass., 12 January 1988, RIDA, No. 137, 98) and *Les Feuilles Mortes* (Court of Appeal of Paris, 1st Chamber, 11 May 1993), a reproduction of original music accompanied by a modification of lyrics was deemed sufficient to avoid the likelihood of confusion. In the *Tintin* case (Court of First Instance of Paris, 11 June 2004, *Moulinsart et Fanny R. v. Eric J.*, Propr. intell. 2005, p. 55), an adaptation of Tintin using drugs and involved in sexual acts was not allowed because the style and the setting were not sufficiently different to avoid confusion. In *Peter Klase* (Court of Appeal of Paris, 1st Chamber, *Malka v. Klasen*) a mere change of colour and incorporation into another work were not sufficient to make a distinction. In general, "perceptible differences" are sufficient (Tribunal judiciaire de Rennes, 2nd Civ. Chamber, No. 17/04478 10/05/2021, *Soc. Moulinsart v. Xavier Marabout*).

[103] *See* TN 2017:4, TN 2010:3/ Helsinki Court of Appeals HO 15.5.2011 No. 1157 (*Helsingin hovioikeus*).

[104] With Sec. 51a of the Copyright Act. *See* German Federal Supreme Court, decision of 11 March 1993, file No. I ZR 263/91 – *Alcolix;* German Federal Supreme Court, decision of 20 March 2003, file No. I ZR 117/00 – *Gies-Adler;* BHG 26 March 1971, Case No. I ZR 77/69, GRUR 1971, 588, 589 – *Disney-Parodie*; BHG 15 November 1957, Case No. I ZR 83/56, GRUR 1958, 354, 356; BHG 20 March 2003, Case No. I ZR 117/00, GRUR 2003, 956, 958 – *Gies-Adler*.

[105] *See* Court of Appeal of Antwerp, 8th Chamber, 11 October 2000, A&M 2001, 357 (*Pommeke)*, Court of First Instance of Antwerp, 12 May 2005, A&M 2005, 304; appeal rejected by Court of Appeal of Antwerp, 2 May 2006, *Mediaforum* 2006, 201, (*Mercis en Bruna v. Code* case); Court of First Instance of Brussels, 14th Chamber, 29 June 1999, A&M 1999, 435 (*Michel Vaillant* case).

[106] The new work needs to show an independent, individual and autonomous character so that the features of the earlier one fade away in the new adaptation (OGH 4 Ob 66/10z).

[107] *See*, *e.g.,* Trib. Venezia, Sez. spec. Impresa, 7 November 2015. Trib. Milano, 13 July 2011, *Fondazione Giacometti c. Fondazione Prada,* analysed *supra*, section 3.2.2.

[108] For instance, *see* Swedish Patent and Market Court of Appeal (PMÖD), PMT 1473-18, 15 July 2019 (*Mobilefilm* aka *Metal pole case*).

[109] German case-law experienced a similar change in the reading of the free-use provision with *Auf fett getrimmt* (BHG, 28 July 2016, file No. I ZR 9/15), where the German Federal Supreme Court held that parody could be allowed under German law even if the *Blaessetheorie* did not apply and there was no *antithematische Behandlung* (para. 35). In this sense, originality is not required for the free-use clause to apply (para. 28).

For instance, a number of Member States require that the original work be mentioned, albeit to a different extent. This is often a consequence of applying the quotation exception where there is no dedicated E&L (Bulgaria, Hungary, Italy and Portugal). French courts allow the exception to be applied even if the new work conveys a message that was not present in the referenced work; the same applies in the Netherlands.[110] By contrast, Germany[111] and Belgium[112] have traditionally been strict about applying the requirement.

Another requirement banned after *Deckmyn* but present in national court decisions is the not-for-profit nature of the parodic work, which excludes from the scope of the exception creations that compete with the original work, thus unduly profiting from its fame, or potentially undermining its normal exploitation. Owing to the great differences in how national courts assess commercial interests and the nature of profit, this criterion too is responsible for the remarkable fragmentation of national solutions. There is general convergence on the outright exclusion of advertising uses.[113] However, if the main aim of the parody was not to produce revenue, and its dissemination was functional to the exercise of freedom of expression,[114] countries diverge on the treatment of reinterpretations that are used to attract attention by exploiting the fame of the original work,[115] or that undermine its normal exploitation. This criterion is particularly relevant in countries using the

[110] Gerechtshof Amsterdam, 13 September 2011, ECLI:NL: GHAMS:2011:BS7825 *(Mercis en Bruna/ Punt.nl).* In *Staat der Nederlanden v. Greenpeace*, the use of a government logo to convey a parodic message that targeted neither the government nor the original work was considered a parody (Court of First Instance of Amsterdam, 22 December 2006, AMI 2007, 62).

[111] *See* BHG 26 March 1971, Case No. I ZR 77/69, GRUR 1971, pp. 588, 589 – *Disney-Parodie*; BHG 15 November 1957, Case No. I ZR 83/56, GRUR 1958, pp. 354, 356 – para. 34.

[112] In Court of Appeal of Ghent, 7th Chamber, 2 January 2011, A&M 2011, 327, *De Bevere-Blanckaert en Lucky Comics v. Dedecker et al.*, the use of a famous comic strip for a political advertisement that featured a party leader as the main character and his main opponents as the "bad guys", was not justified as a parody, as it conveyed a political message and did not target the comic strip itself. In Court of First Instance of Brussels, 14th Chamber, 8 October 1996, A&M 1997, 71, the Court ruled that the only case where the requirement could be waived was when parody mocked its formal expression and conveyed a message that did not relate to it. *See also* Court of First Instance of Brussels (*KBVM et al./LS Music en Deloyelle*), 19 March 1999, A&M 1999, 373.

[113] In Germany, *see* Court of Appeal of Frankfurt am Main, 25 April 1995, ZUM 1996, pp. 97, 99, the use of a painting by Magritte on a condom package was banned since it had only a commercial and advertising purpose. *See also* District Court of Berlin, 13 December 1972, GRUR 1974, 231, 232. In the Netherlands, *see* Court of First Instance of Haarlem, 26 June 2001, KG 2001, 207 (imitation of a commercial was considered unfair competition); Court of First Instance of Breda, 24 June 2005, IER 2005, p. 80, *Gouden Gids* (imitation of a commercial for the Dutch Yellow pages had a competitive instead of humorous intention). In France, *see* Court of First Instance of Paris, 1st Chamber, 30 April 1997, *Pagnol v. Sté Vog*, not published, where the reproduction of excerpts from a film for advertising fashion products was not allowed.

[114] Especially in France. *See* Cour de Cassation, 13 January 1998, No. 242; CA Paris, 20 September 1993, *Agrif v. Godefroy,* Légipresse, No. 108, II, p. 9; CA Paris, 8 July 1992, *Caroline Grimaldi v. Société Kalachnikof,* Légipresse 1992, No. 100, 40.

[115] *See*, for instance, Austria and Belgium. Court of First Instance of Brussels, 14th Chamber, 8 October 1996, A&M 1997, 71, *HUMO* (use of adapted Tintin covers by the publication HUMO not allowed); Court of First Instance of Brussels, 14th Chamber, 29 June 1999, A&M 1999, 435, *Michel Vaillant* (use of the name Michel Vaillant in radio commercials for a go-karting operator not allowed); Court of First Instance of Antwerp, 12 May 2005, A&M 2005, 304, *Mercis en Bruna v. Code* (use of the character Miffy

quotation exception, for example Italy, where Art. 70 l.aut. makes application of the provision contingent upon a lack of commercial exploitation.

A similar pattern can be traced for the benchmark of necessity, which limits the amount that can be taken from the original work to the extent strictly necessary for the purpose. Along with those countries that already have this criterion in their statutory provisions (Croatia, Estonia, Luxembourg, Poland), some Member States have had it applied by the courts, again owing to the application of the quotation exception (Belgium,[116] the Netherlands and Germany).[117] Austria follows the same path but, due to the direct application of the constitutional provision on freedom of expression, the requirement is applied only if no alternative means are available to allow the author to adequately express their artistic freedom.[118]

The respect for moral rights and the absence of risk of reputational harm are two criteria that were excluded by Deckmyn but still figure in the case-law of Luxembourg, Spain, Austria and Germany.[119] By contrast, France[120] and the Netherlands[121] consistently refuse to consider damage to an author's reputation as a reason to deny the applicability of the provision.

The introduction of a mandatory exception covering parody, caricature and pastiche under Art. 17(7) CDSMD, albeit limited in scope to activities taking place on OCSSPs, could have brought about genuine EU-wide harmonisation also on the general E&Ls. Unfortunately, three years down the road of national implementations, and with only Poland still waiting for transposition, the scenario characterising parody, caricature and pastiche is possibly more fragmented than before.

Several countries have adopted an almost verbatim implementation of Art. 17(7) CDSMD: Austria (Sec. 42f(2) UrhG), Cyprus (Art. 38(9) CL), Denmark (Sec. 52c(10) DCA), Finland (Art. 23(a) TOL), Germany (Sec. 5 UrhDaG), Greece (Art. 20(8) GCA), Hungary (Sec. 34/A(1) Szjt), Italy (Art. 102^{nonies} (2) l.aut), Latvia (Art. 19(12) LCA), Luxembourg (Art. 70bis (8) LuDA), Malta (Art. 16(7) MCA), the

Footnote 115 continued
(Nijntje) on the front page of the publication Deng not allowed); *see also* Court of Appeal of Ghent, 7th Chamber, 2 January 2011, A&M 2011, 327, *De Bevere-Blanckaert en Lucky Comics v. Dedecker et al.*

[116] *See* Court of First Instance of Ghent, 13 May 2013, A&M 2013, 352, *Wittevrongel en csrten v. Aspeslag en Cocquit*, stating that parodies should be limited to elements that are strictly necessary to make fun of the earlier work.

[117] *See*, for Germany, BHG, 13 April 2000, Case No. I ZR 282/97, GRUR 2000, 703; Court of Appeal of Munich, 23 October 1997, ZUM-RD 1998, 124.

[118] As in OGH 4 Ob 66/10z.

[119] The German Federal Supreme Court in *Alcolix* (*supra* note 102) held that the respect of moral rights was a relevant factor for recognising free use. In *Auf fett getrimmt* (*supra* note 109), it also held that, while moral rights were not a decisive factor for defining parody, they ought to be considered in the second step of the assessment, where a fair balance is struck between the conflicting interests.

[120] Cour de Cassation, 2 March 1997, JCP II jurispr. No. 5, 28 January 1998, p. 185; CA Paris, 28 February 1995, Légipresse, 1995, No. 8125, I, p. 92; TGI Paris, 12 January 1993, Légipresse, 1993, No. 108, II, p. 11; TGI Paris, 26 February 1992, Légipresse, 1992, No. 96, p. 127; Cour de Cassation, 13 February 1992, Légipresse, 1992, No. 93, p. 87. However, obvious intentions to degrade the original work were prohibited by CA Paris, 13 October 2006, and TGI Paris, 11 June 2004, *Societé Moulinsart, Mme Fanny R. v. Eric J.*

[121] *See,* in particular, Court of First Instance of Antwerp, 12 May 2005, A&M 2005, p. 304, *Mercis en Bruna v. Code*.

Netherlands (Art. 19(5) AW), Slovenia (Art. 163.e ZASP), Sweden (Art. 52(p) URL). Significant divergences may be found in Ireland, which did not implement Art. 17(7) CDSMD in the light of the existing coverage of online uses by its E&Ls, and in Slovakia (Sec. 64(d) ZKUASP), which, like Belgium (Art. XI.228/6. Sec. 1 CDE) and France (Art. L.137-4 CPI), extended the provision on OCSSPs to all E&Ls.

As a result of this development, countries like Finland, Hungary, Portugal and Sweden now have a specific online-parody provision, even though they do not have the related general exception, while countries like Latvia now have an OCSSPs exception covering parody, caricature and pastiche that is not included in their general E&Ls.

Other Member States have taken the opportunity offered by the transposition of Art. 17(7) CDSMD to update their general E&Ls. This has led to the introduction of pastiche in Spain (Art. 32(1) TRLPI, specifying its extension also to digital uses), Lithuania (Art. 21(1) LiCA) and Romania (Art. 128.2(6) RDA, covering also online uses). Only a handful of national legislators used the implementation to streamline both online and general E&Ls. Examples are Portugal (Art. 75, inc. x CDA), Lithuania (Art. 21(1) LiCA), which, however, did not repeal the original exception (Art. 58(12) LiCA), and Bulgaria, which recently opted for a technologically neutral provision that may well apply to offline contexts (Art.22b(1) CNRA).

This unharmonised patchwork of national solutions, which did not benefit as hoped from the entry into force of Art. 17(7) CDSMD, along with the lack of clear indications from national courts on the distinction between parody and pastiche, makes the Federal Supreme Court referral to the CJEU a historical opportunity to clearly define and distinguish the features of different forms of reinterpretation of existing works, going beyond the purpose-bound parameters of quotation and parody. In this context, and after *Deckmyn*, the CJEU intervention will hopefully help produce convergence among the fragmented national approaches, to the benefit of the still fragile and uncertain balance between copyright enforcement and freedom of artistic expression.

3.5 Partial Conclusion: Time for an Autonomous Definition of Pastiche

Against this background, it is clear that the time has come for the CJEU to define the contours of the autonomous concept of pastiche under EU copyright law. Since pastiche is included in InfoSoc and the CDSMD alongside parody and caricature, the CJEU might need to consider, first, whether these three are identical or distinct artistic forms of expression. Then, if the CJEU holds them to be distinct from one another, it should address whether or not, and to what extent, pastiche needs to meet the requirements that have been defined for parody (and plausibly for caricature), that is evoking an existing work, while being noticeably different from it, and constituting an expression of humour or mockery.

Based on these two factors,[122] there could be four different approaches to defining pastiche vis-à-vis parody and caricature:

1. *identical artistic expression but distinct legal requirements* – an option that looks conceptually unacceptable;
2. *identical artistic expression and identical legal requirements*, concluding on a conceptual level that EU norms are only exemplification, and any or all similar forms of expression (e.g. travesty, persiflage, bluette, etc.) might fit into Art. 5(3)(k) InfoSoc;
3. *distinct artistic expression but identical legal requirements,* approaching the issue pragmatically, and concluding that, despite the artistic differences of various forms of expression, a single "parody over all exception" exists in EU copyright law;[123]
4. *distinct artistic expression and (at least partially) distinct legal requirements*, which aims to give legal relevance to the differences between various artistic genres, leading to (i) clarification of the shared background, features and functions (if any) of the three forms, to justify why they are all covered by the same EU provision(s), and (ii) the specification of different requirements for parody, caricature and pastiche, which better define their boundaries and scope. Depending on the interpretation that the CJEU gives to pastiche, the latter may also become a sort of catch-all exception for all forms of transformative use of original works in EU copyright law.[124]

4 *Pelham v. Hütter II*

With *Pelham v. Hütter* back to Luxembourg, and in the light of the content of the Federal Supreme Court's referral to the CJEU, the mystery of the contours of pastiche as an autonomous concept of EU copyright law will likely be revealed soon.

The Federal Supreme Court referred two questions to the CJEU.

First, it asked for clarification of the objective criteria for determining what a pastiche was. In its referral, the German court supported, in the form of a rhetorical question, the interpretation of pastiche offered by the lower national courts, which read it as a "catch-all" clause that enabled "artistic engagement with a pre-existing work or other object of reference". This, according to the Federal Supreme Court, could also include sampling. In addition, the Federal Supreme Court also inquired whether any additional criteria applied, such as "humour, stylistic imitation or tribute".

[122] The referring court also highlights the possibility of treating parody, caricature and pastiche either identically or differently. *See* German Federal Supreme Court, Beschluss 14 September 2023 (I ZR 74/22) – *Metall auf Metall V*, 125(21) Gewerblicher Rechtsschutz und Urheberrecht (2023), pp. 1489, 1534.

[123] This approach was recommended by Sabine Jacques in her swift review of the CJEU referral. *See* Jacques (2023).

[124] Numerous papers consider irrelevant the requirement of expressing humour or mockery in the case of pastiche. *See* Hudson (2017), pp. 363–364; Raue (2022), pp. 1, 7–8; Kreutzer (2022a, b), p. 847.

Second, the Federal Supreme Court asked whether the expression "for the purpose" required intention on the part of the user that could be objectively determined, or whether it sufficed that "a person familiar with the copyright subject matter who has the intellectual understanding required to perceive the pastiche recognised the pastiche as such".

4.1 The Autonomous Concept of Pastiche

The definition of "pastiche" will possibly be the last contribution that "*Metall auf Metall*" makes to the understanding of EU copyright law, albeit an important one. How *Pelham v. Hütter II* will define the notion of pastiche will have certain crucial implications.

The task at hand is one of simple legal interpretation, for which purpose the CJEU can rely on established interpretative techniques. Since this concept is not defined by Art. 5(3)(k) InfoSoc, and that provision makes no express reference to Member States' laws, the Court may define pastiche as an autonomous concept of EU law. The Court thus has the competence and duty to determine its meaning and scope "by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part".[125] This is what the Court already did in *Deckmyn*, which related to the same legal provision.

As already outlined above, defining the notion of pastiche seems rather difficult, given how differently the various Member States understand it, and the suggestions made in the questions posed by the Federal Supreme Court to the CJEU. The etymological interpretation of the term will depend heavily on the sources (including encyclopaedias and scholarly papers) that the Advocate General relies on – something that is almost impossible to predict at this point. It could also be argued that the divergences in national definitions make it impossible to operate a *reductio ad unum* into an EU-wide concept, and that this endeavour must be abandoned from the start.

From a pragmatic standpoint, it might then be more useful to focus solely on the second phase of the definition of pastiche as an autonomous (legal) concept of EU law, namely the context, object and purpose of Art. 5(3)(k) InfoSoc. Based on the content of the preliminary reference made by the Federal Supreme Court, five questions need to be addressed. These are: (a) whether pastiche is merely an imitation of an artistic style; (b) what "distance" there must be from the original work for the exception to apply; (c) whether the expression of humour or mockery is a necessary requirement; (d) whether the resulting (pastiched) expression should itself be an original work; and (e) what criteria should be applied to determine whether a particular pastiche is proportionate, that is to say whether it complies with Art. 5(5) InfoSoc and its three-step test.

We will not, however, address any subjective, or intentional, element. To put it briefly, intention should not be a requirement. It is not required for parodies – or, presumably, caricatures – and should not be required for pastiches either. Even

[125] Case C-201/13, judgment, para. 19.

accidental pastiches must be covered by the exception. As such, the legal concept of pastiche could embrace the various forms of art in an objective manner, with the broadest possible scope, and irrespective of intent. Ultimately, the pastiche exception could work as a neutral tool to support freedom of speech and artistic freedom.

4.1.1 Imitation of Style?

In his Opinion in *Pelham*, First Advocate General Szpunar referred to pastiche as a mere "imitation of the style of a work or an author without necessarily taking any elements of that work".[126] Both German case-law[127] and the academic literature[128] seem to disagree with this opinion. Pastiche is not restricted to the imitation of the style of a work or an author for at least three reasons.

First, "style" has typically been left out of the concept of protected subject matter in the EU Member States. Style has historically been treated as an idea, rather than an expression. Indeed, it is a very subjective concept, occasionally representing common features of artistic movements (e.g. cubism or dadaism) or remaining largely unnoticed during the lifetime of the author (e.g. in the case of Van Gogh). If any of these points are true, the use of style can have no legal relevance in the analysis of pastiche.

Second, in line with the above, both InfoSoc and the CDSMD expressly refer to pastiche as an exception or limitation to the relevant economic rights. Such rights of reproduction, distribution and communication to the public apply solely to copyright-protected works.

Finally, the equitable balance of copyright with fundamental rights such as artistic freedom and freedom of speech represents a consolidated principle in the CJEU's case-law. Since artistic creativity fundamentally includes the freedom to rely on sources independently selected by the artist, secondary (transformative) uses must not be excessively limited.[129] If distinct fundamental rights collide, they must be counterbalanced. However, the analysis of proportionality is independent of the possible scope of sources for secondary artistic activities. Pastiche would be unduly restricted if only the use of non-protected parts of the contents used (including the style of the work/author) were to be allowed.

4.1.2 Interaction with the Source Work Versus Distance from the Source Work (Fading Out)

One of the most important takeaways of the CJEU's *Deckmyn* judgment is that the user is free to depart from the source work and its author, and express humour about

[126] Opinion, Case C-476/17, footnote 30.

[127] OLG Hamburg, *Metall auf Metall III*, para. 70, p. 1220; German Federal Supreme Court, *Metall auf Metall V*, para. 27, p. 1533.

[128] Cf. Pötzlberger (2018), p. 676; Lauber-Rönsberg (2020), pp. 738–739; Ohly (2022), pp. 54–56.

[129] *See* especially *Funke Medien*, para. 67 et seq; *Pelham*, para. 59 et seq; *Spiegel Online*, paras. 42 et seq.

or mock any other expression (the "parody with" concept). By contrast, in his Opinion in the *Pelham* case, AG Szpunar, when addressing the quotation exception, dismissed the lawfulness of uses "in which the works or other subject-matter are used, not for purposes of interaction, but rather in the creation of new works bearing no relation to the pre-existing works".[130] In other words, the AG required the existence of an artistic connection between the sampled work and the secondary work, and hence supported the application of a criterion taken from the quotation exception.

The major difference between these two standpoints clarifies why is it so important whether the CJEU (and the AG) will decide to follow the *Pelham* or the *Deckmyn* judgment, that is to say, whether it will opt for a "pastiche of"[131] or a "pastiche with" approach.

In line with its *auf fett getrimmt*[132] judgment, in which the Federal Supreme Court reassessed the parody exception in the post-*Deckmyn* world under the German Copyright Act, the Federal Supreme Court seems to support the requirement of recognisability.[133] However, at the same time, it seems to refuse the need to keep a certain distance from the source work.[134] A similar position was taken by the OLG Hamburg in its *Metall auf Metall III* judgment with regard to the requirement of "inner distance".[135] German courts have found anti-thematic uses as well as uses in different styles fit for the purpose of pastiche.[136] Similarly, German scholarship confirms that the "*Referenzkultur*" does not restrict secondary authors from venturing beyond the confines of the source work and its context.[137] This is equally in line with the recent reform of German coypright law, following which uses that keep the necessary distance from the source work might fit into the free use under Sec. 23 of the German Copyright Act rather than under the new pastiche exception per Sec. 51a thereof.

4.1.3 Humour or Mockery?

One of the most important differences between the various domestic approaches to pastiche is whether there is any expression of humour or mockery for the purposes of pastiche. As shown above,[138] humour or mockery is a conceptual element of pastiche. The German reform proposal was based on the opposite logic and listed

[130] Opinion, Case C-476/17, para. 96.

[131] Malte Stieper favours the need for dialogue in the case of pastiche too. *See* Stieper (2023), p. 1662.

[132] German Federal Supreme Court 28 July 2016 (I ZR 9/15) – Unionsrechtlicher Begriff der Parodie im Rahmen der reinen Bildbearbeitung [The term "parody" under EU law in the context of pure image processing] – *auf fett getrimmt*, 118(1) Gewerblicher Rechtsschutz und Urheberrecht (2016), p. 104.

[133] German Federal Supreme Court, *Metall auf Metall V*, para. 31, p. 1534.

[134] *Ibid*, paras. 41–42, p. 1535.

[135] OLG Hamburg, *Metall auf Metall III*, paras. 74–75, p. 1221.

[136] *Ibid*. para. 76, p. 1221.

[137] *See* especially Pötzlberger (2018), p. 679.; Ortland (2022), p. 57; Stützle and Bischoff (2022), p. 691.

[138] *See* section 3.4. *supra*.

typically non-humorous expressions amongst pastiche.[139] This legislative decision was later put into practice.[140] In the AG Opinions in the *Deckmyn* and *Pelham* cases, neither AG Szpunar[141] nor AG Cruz-Villalón mentioned humour or mockery as a conceptual element of pastiche.[142]

It is therefore not surprising that the Federal Supreme Court referral challenges the need for a lawful pastiche to feature any humour, mockery or other purposes – including homage.[143] This understanding can be supported by a systematic reading of the "parody, caricature and pastiche" exception as a three-pronged provision covering three distinct forms of expression. One could certainly argue that a list of three permitted uses under the same InfoSoc rule implies that the latter share common traits – one of them potentially being umour. However, it is safer to say that Art. 5(3)(k) InfoSoc groups the three forms of expression together because of their nature as transformative expressive uses, even though they have different purposes and thus different characteristics. This assumption is shared, in fact, by a number of national legal formats across Member States.

4.1.4 Originality Is Not a Condition for Pastiche

It is difficult to argue for an originality requirement for pastiche for several reasons. First, no other limitation or exception under Art. 5 InfoSoc imposes such a requirement. In *Deckmyn*, the CJEU already rejected a similar reading suggested by the referring court.[144] Nor would such a requirement be apparent either from the wording of the term "pastiche" or from the wording of the provision itself.[145]

Even if we assume that Art. 5(3)(k) InfoSoc lists three distinct categories and not three exemplary, but open, categories in the form of a catalogue,[146] and thus pastiche may be subject to different requirements than parody, neither the ordinary meaning of "pastiche"[147] nor the wording of the InfoSoc provision implies that such a criterion should apply.

However, there must be some difference from the original work, even if not necessarily reaching the level of originality. This already follows from the various national infringement tests, which demand that pastiche be substantially dissimilar. That said, how dissimilar a creation must be in order to qualify as pastiche is, as some of the literature has pointed out, difficult to determine by way of an abstract

[139] Gesetzesbegründung BT-Drs. 19/27426, pp. 90–91. Compare with Raue (2022), pp. 7–10; Kreutzer (2022a, b); Döhl (2022); Stützle and Bischoff (2022), pp. 683–694.

[140] Confirmed by OLG Hamburg, *Metall auf Metall III*, pp. 1217–1225; and LG Berlin, *The Unknowable*, pp. 216–223.

[141] AG, *Pelham and Others*, footnote 30.

[142] AG, *Deckmyn*, footnote 14.

[143] German Federal Supreme Court, *Metall auf Metall V*, para. 31, p. 1534. *See* further Ortland (2022), p. 58.; Stützle and Bischoff (2022), p. 691.; Stieper (2023), p. 1663.

[144] *Deckmyn*, paras. 12 and 21.

[145] *See also* Jacques (2019), pp. 127–128, pointing out that French courts used the level of originality as part of a fairness assessment relating to the "rules of the genre".

[146] *See* Parchomovsky and Stein (2015), p. 165.

[147] Kreutzer (2022a, b), p. 9.

norm.[148] Effectively, a pastiche must be somewhere between an infringing copy and a work in which the original (or parts thereof) disappears. The standard established by the CJEU in *Pelham*, which requires the sample to be unrecognisable to the ear, could be reversed. In that sense, a pastiche would qualify as such only if part of an existing work or other subject matter (including samples) were recognisable (to the ear, eye or any other sensory organ). The recognisable part or whole of a work adopted in the pastiche must then add something more than merely being a reproduction/infringement.

4.1.5 Proportionality and the Three-Step Test as Mitigators of Competing Interests

"Pastiche" cannot be a fully flexible "*Auffangtatbestand*" or "catch-all clause". Such a construction would not be compatible with the CJEU's systematic approach to the interpretation of Art. 5 InfoSoc or with copyright exceptions in general. The difficulty of circumscribing the notion of pastiche will, however, leave some room for a flexible interpretation as part of a proportionality analysis, particularly in the context of the third step of the three-step test.

The difficulty of circumscribing pastiche leaves a significant role for Art. 5(5) InfoSoc, a role that the test also plays in relation to other exceptions of the copyright *acquis*.[149] The CJEU has explored this space in *Deckmyn*, where it made the application of the parody exception subject to the balancing of conflicting fundamental rights, without however referring expressly to Art. 5(5) InfoSoc. The relevance of the test was more clearly pronounced in *Funke Medien,* in which the Court underlined that provisions that did not constitute full harmonisation of exceptions or limitations were limited by a number of factors that included the three-step test.[150]

5 Conclusion

Early academic reactions to the latest German case-law on pastiches vary. At one end of the spectrum, some have quickly claimed that the US fair-use doctrine has been taken up by German courts.[151] Others remain cautious and call pastiche an "unknown territory" ("*terra incognita*")[152] or "the great unknown" ("*die große Unbekannte*"),[153] reflecting the unpredictability of the outcome of *Pelham v. Hütter II*. Again, others warn that the expectations regarding the functioning of pastiche as a general copyright exception might be too high.[154]

[148] Kraetzig (2024), pp. 6–7, Kreutzer (2022a, b), pp, 16 et seq.

[149] *See* only the wording of Art. 5(5) InfoSoc and Art. 7(2) CDSMD; *see*, however, its inconsistent application by the CJEU: Jütte (2017), pp. 289–293; Rendas (2021), pp. 107–108.

[150] *Funke Medien*, paras. 42–54, in particular para. 42.

[151] Liebenau (2023), pp. 687–688.

[152] Döhl (2021), p. 215.

[153] Ortland (2022), p. 9.

[154] Peters (2022), p. 1482.

In this paper, we have aimed to provide a balanced, multi-national and multi-dimensional analysis of the concept of pastiche. We come to the conclusion that, first, pastiche is a distinct legal concept from its legal triplets (parody and caricature) and therefore imposes on its user (at least partially) distinct legal requirements. Second, a reduction of the pastiche exception to the literal meaning of the term, in its traditional understanding, would already be irreconcilable with the recitals of the InfoSoc Directive. Similarly, the explanatory notes on the introduction of the exception in Germany suggest a much broader scope. The Federal Supreme Court itself argued that pastiche in the traditional sense, i.e. the emulation of a style, would not require an exception, as such uses would not fall within the scope of protection of the exclusive right of reproduction. Therefore, the pastiche exception must bring within its scope uses that leave the appropriated work recognisable. In other words, *Pelham v. Hütter II* starts where the scope-limitation of *Pelham I* ends. It remains to be seen, however, whether the pastiche exception will apply equally, and equally broadly, to original works and sound recordings. The particularly broad scope of protection for sound recordings, as exclusive rights based on an investment rationale, could leave room for arguing that the pastiche defence as applied to sound recordings should have a somewhat narrower scope. This would also arguably be in line with a stricter application of the three-step test. On the other hand, the right to artistic freedom would strongly weigh in favour of a parallel application, with identical scopes, of the pastiche exception (and others) to original works and related rights.

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