

On the New Significance of the Pastiche in Copyright Law

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The concept of the pastiche is not only a concept found in the arts, with its long and varied history in the fields of aesthetics, criticism and artistic practice.¹ It is also a concept in law. In this latter context it is to be found in statutes, judgments, official notices and academic publications.

The pastiche, however, is not just any legal concept. It is about to become ‘the next big thing’, specifically to German copyright law – with its key legal framework being the German Act on Copyright and Related Rights (UrhG – Gesetz über Urheberrecht und verwandte Schutzrechte) – to which the concept of pastiche was unknown until recently. In music, the new legal development regarding the concept of pastiche explored here impinges directly on the rights of composers, lyricists, performers and producers of phonograms. But this development will eventually affect all the arts, as well as other holders of ancillary intellectual property rights, such as film makers and broadcasting corporations, which are comparatively seldom participants in litigation pertaining to exclusively music-related legal disputes. It is expected that in the near future the pastiche will experience not only a marked boom in legal disputes, but also in jurisprudential literature and dissertations, as observed in German-speaking countries over the past years in relation to the areas of sound sampling, the ubiquitous questions around the remix culture or the legal requirements for license-free use of artistic products by third parties.

The reason for this new significance of the concept of the pastiche for music in German copyright law (and beyond in Europe) is a judgment handed down by the European Court of Justice on 29 July 2019 under case number C-476/17. This musical dispute, better known under the abbreviated name of *Metall auf Metall* (English: “metal

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1 HOESTEREY, 2001; DYER, 2007.

on metal”) reverberated through the courts for 20 years. The dispute turns around two seconds of music which were originally composed and performed, produced and recorded in 1977 by the German band Kraftwerk as part of a track called *Metall auf Metall*. In 1997 a team around producer Moses Pelham used these two seconds as a digital extract (sample) from the Kraftwerk recording. They were used in a continuous loop to provide the rhythm underlay in a song titled *Nur mir* by German rapper, Sabrina Setlur, without Pelham & Co. having sought permission from the copyright holder to do so. The legally entitled members of the band Kraftwerk thereupon instituted legal proceedings, among other things for a claim to compensation and for a cease-and-desist order. The unparalleled legal odyssey thus began. In the legal proceedings Kraftwerk was both the author on the one hand as well as the performer and producer of the phonogram on the other – a unique constellation.

Metall auf Metall is a dispute unusually rich in jurisprudential collocations, which I have been scrutinizing and commenting on from a musicological perspective for some time.² In this essay, I deal with the last of these developments, namely those relating to the concept of the pastiche itself.

Metall auf Metall is the single most fascinating and fundamental litigation concerning itself with the subject matter “music” to be conducted in Germany in the new millennium. It is an absolute rarity for legal proceedings concerning music to be brought before the highest courts. In addition, it is unprecedented for legal proceedings relating to music to receive the attention of all the courts which could be occupied with such a legal matter – the Federal Court of Justice, the Federal Constitutional Court and the European Court of Justice. The judgment which has now been handed down by the European Court of Justice is already the eighth court decision to be handed down in this matter.³ After it, it was heard again by the Federal Court of Justice and currently continues on a regional level. In decisions on referral such as the present one, the European Court of Justice only adjudicates on questions of the interpretation of the relevant European law and not on the merits of the matter itself. It refers the matter together with the issues for determination back to the submitting national court. This is exactly what happened on 29 July 2019. Adjudications on interpretation of the relevant European law affects not only the matter which gave rise to the interpretation but also beyond that until such time as the law itself is changed or the court’s interpretation thereof. Experience has shown that we can assume that the decision will stand for a considerable time and that it will have a sustained and marked effect on cultural practice in the sphere of adaptation across all the arts for the time being.

The reasons for these lengthy, complex and drawn out legal proceedings, which cannot be dealt with here in detail, are simple.⁴ On the one hand, the parties are arguing

2 DöHL, 2011, 2013, 2015, 2016a, 2016b, 2017a, 2017b, 2018, 2019a, 2019b, 2019c, 2020a, 2020b; DöHL/WÖHRER, 2014.

3 LG Hamburg, 2004; OLG Hamburg, 2006; BGH, 2008; OLG Hamburg, 2011; BGH, 2008; BGH, 2012; BVerfG, 2016; BGH, 2017; ECJ, 2019; BGH, 2020.

4 Cf. n. 2.

with the obstinacy of a dispute between neighbors which has long since become a matter of principle, and most especially a matter of winning. Without such perseverance, it would not have been possible to take this dispute so far. On the other hand, digital editing hard- and software, as utilized in sound sampling, have become part of everyday culture since the mid-1980s when they became easily affordable and accessible. Today it is possible to edit musical passages with any smartphone. To boot, sound sampling is only one example of the many digital remix techniques available, from photo memes to video mashups. At the same time, the adaptation rights aspects of copyright and related rights law still have their origins in the pre-digital age. In Germany, in essence, they have been in operation since the 1960s. *De facto* the *Metall auf Metall* litigation has thus become a test case for an entire sphere of life, with a reach far beyond music alone. Over and above the subject matter in dispute, the cardinal question being posed is whether the legal framework needs to be readjusted to the changed realities of modern life. This explains not only the extreme duration of the proceedings but also the many legal permutations and the great interest in this debate from outside of the jurisprudential fraternity and the music industry. In so doing, the harmonization of conflicting interests in a manner that is appropriate to the digital present as well as the subjects of artistic freedom and a law that is true-to-life and responds to the changed methods of interaction and communication in the modern media, are being debated in the public forum. The modern media especially are diametrically opposed to the protection of aesthetic and financial investments, resulting in a conflict of interests which is difficult to resolve. So, in short, we have two well-known professionals in the music world who may be litigating over a special music problem, but after the proceedings have run their course, the final decision will have a profound impact that will reach far into everyday cultural life, far beyond the realm of music. This is also the case with the concept of the pastiche as a doctrine in law, which the proceedings in the European Court of Justice have now drawn into focus.

However, the consequences which are relevant for this discussion have been kept comparatively vague in the text of the judgment. The term pastiche itself does not occur at all. The full import of the entire matter is not yet evident. For legal practitioners, however, they are expressed unambiguously in the third sentence of the operative part of the judgment, which states: “Member States may not provide in their national law for an exclusion or limitation with regard to the phonogram producer’s right under Article 2 (c) of Directive 2001/29, which is not envisaged in Article 5 of that directive.”⁵

We can render the content of this paragraph, its background and most especially its consequences, in simple language: everything about the German right of adaptation of artistic works will change and specifically for all non-primary adaptations of the protected creative works of third parties which are not primarily intended as humoristic critiques (known in legal parlance as ‘anti-thematic’ adaptations). The judgment therefore is particularly tangential to musical appropriations which are neither parody nor caricature and thus the vast majority of typical cases of “musical borrowing”.⁶

5 ECJ, 2019, ruling No. 3.

6 BURKHOLDER, 2018; BURKHOLDER, 2019.

So, what has happened? There is a fundamental need in copyright and ancillary property rights law to balance the interests on the one hand of the monopoly rights granted by it which are mainly economic and moral/personality rights to musical works, performances and audio recordings on the one hand, and on the other hand the need to make usage freely available in the service of cultural diversity and productivity, so as to secure the fundamental right of freedom of artistic pursuit and take into account the fact that new art is regularly created through active engagement with already existing art, even the most original and innovative contributions: “composition as editing”⁷ as the norm in music history.⁸ The traditional German system of guaranteeing these equally essential but difficult to balance interests had solved the task since the promulgation of section 13 of the Law on Copyright in Works of Literature and Musical Art (LUG – Gesetz betreffend das Urheberrecht an Werken der Literatur und Tonkunst) in 1902, with generally applicable clauses providing for adaptations based on protected portions of works by third parties to be permitted, without consent in the event of the adaptation itself having aesthetically independent qualities.⁹ The applicable version of the current German copyright law uses the term “independent” in section 24 par. 1 Act on Copyright and Related Rights (UrhG). “Free use” is the name given to this harmonization of interests. In practice the point of contention in individual cases always remains the point from when this “independence” can be deemed to have been achieved. But the lever for the harmonization of interests is clearly intended to be fundamentally arts-orientated.¹⁰ And this is precisely the requirement of the Federal Constitutional Court in Germany in balancing the fundamental rights of freedom of art and ownership.¹¹

This traditional German system of harmonizing interests has now been declared to be in contravention of the law of the European Union by the European Court of Justice.¹² This decision was reached quite correctly, and hardly surprisingly, in the judgment of 29 July 2019.¹³ The decision did not only emerge subsequent to the vote of the Attorney General at the European Court of Justice in the same matter, which explicitly focused on this.¹⁴ Free use as envisaged in the current sec. 24 par. 1 of the German Act on Copyright and Related Rights (UrhG) simply cannot be equated with what has become EU copyright and related rights law since 2001 by way of EU directive no. 2001/29/EC. And it is precisely this EU copyright and related rights law that the European Court of Justice refers back to in the quoted section of the operative provisions of its judgment in *Metall auf Metall*. It is in fact this Directive 2001/29/EC which contains the concept of pastiche.

7 RIETHMÜLLER, 1988, pp. 13-16, 165-182.

8 DAHLHAUS, 2002, p. 77.

9 DÖHL, 2016b, pp. 314-344.

10 IBID.

11 BVerfG, 2016.

12 ECJ, 2019: para 65. See for immediate consequences DÖHL, 2020b.

13 DÖHL, 2017a; OHLY, 2017, p. 969.

14 SZPUNAR, 2018, para 59.

It is via this judgment of the European Court of Justice that Directive 2001/29/EC with its reference to the pastiche now comes into play in Germany. In the German copyright discourse, this has not been the case before, despite the fact that Directive 2001/29/EC has already been in force since 2001 (the implementation period ended December 2002). Until now this has been jurisprudential *terra incognita* to a large extent because the idea of pastiche as a legal concept does not stem from German legal tradition, and German courts as well as jurisprudence have until now not been forced by legal disputes and litigation to take issue with the concept of pastiche. It was taken cognizance of, but otherwise ignored. First tentative and increasing familiarization with the concept of pastiche has only recently started taking place.¹⁵ This will now change; it will have to change.

Whilst a unified, overarching EU copyright and related rights law is not yet in existence, parts have in fact become standardized. Following a series of first steps in regard to cross-border questions in areas such as trade in goods, broadcasting rights and protective periods, the aforementioned Directive 2001/29/EC, which in turn partially implemented international treaties (WIPO copyright treaty, WCT, and WIPO Performances and Phonograms Treaty, WPPT), was in the year 2001 the first substantial legislative measure at EU level in copyright and related rights law.¹⁶ And it has remained the authoritative statutory source for the sphere of artistic adaptation until today. In particular, Directive 2001/29/EC defines “reproduction right” (Art. 2), “right of communication to the public of works and right of making available to the public other subject-matter” (Art. 3) and “distribution right” (Art. 4). As we will see, the concept of pastiche comes into play in adaptation cases with regard to Art. 2. The juristic operation of Art. 2 sets out the right of reproduction clearly and its immediately apparent applicability to music and adaptation of music:

“Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: (a) for authors, of their works; (b) for performers, of fixations of their performances; (c) for phonogram producers, of their phonograms; (d) for the producers of the first fixations of films, in respect of the original and copies of their films; (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.”

Directive 2001/29/EC, to the extent that it contains provisions regulating for instance the reproduction right, is fully harmonized EU law.¹⁷ This means that it is European law which, to the extent that it regulates copyright and related rights law, is binding on all

15 PEUKERT, 2014, p. 89; HABERSTUMPF, 2015, p. 451; STIEPER, 2015, pp. 304f.; OHLY, 2017, p. 968; GABLER, 2018, pp. 223-225; PÖTZLBERGER, 2018a, pp. 252-263; PÖTZLBERGER, 2018b, pp. 676f. On the legal discourse regarding pastiche see in detail DÖHL, 2020b.

16 DÖHL, 2019, pp. 535f.

17 GRÜNBERGER, 2015, pp. 276, 284.

EU member states and leaves no leeway for country-specific deviations unless they have been provided for in the directive itself, or by acknowledgement of their existence in the course of the interpretation of the directive by the European Court of Justice, being the relevant judicial instance.

The quoted section of the reasons for the judgment of the European Court of Justice is thus binding on the German courts. And it will now, after a delay of almost two decades, force a fundamental re-examination of the German right of adaptation of artistic works, incorporating the harmonization of interests outlined, which has been in existence for over 100 years without referring to the concept of the pastiche. That has changed with immediate effect. Most likely, the concept of pastiche will instead have a pivotal role from now on within the German copyright regime when it comes to adaptations.

It is not all about pastiche now: there are other special exemptions from the all-encompassing rights guaranteed in Directive 2001/29/EC in Art. 2 to Art. 4, notably from the right to reproduce. First of all, this is the case for minimal reproductions. If sections taken from works or performances of third parties are below the so-called threshold of originality, they neither fall under the scope of protection of Directive 2001/29/EC, nor do they fall under that of the German Act on Copyright and Related Rights (UrhG). This activity is freely permissible. Minimal reproduction refers to everything that can be called the musician's tools of the trade. If it is done digitally (sound sampling), the European Court of Justice now also requires that the copied material be rendered unrecognizable by further adaptation or processing. But what is clear is that trivialities are sifted out. The new aspect is that this is now solidified and clarified as the state of the law with regard to the reproduction right of the phonogram producer in cases of acts of minimal digital adaptation of music ('microsampling') – a question that has been widely disputed throughout the *Metall auf Metall* litigation.

In all other cases where material is taken over, however, Directive 2001/29/EC takes full effect and is binding. Member states may only make provision for exceptions within the framework of the options set out in Article 5 of this directive. For musical appropriations only two provisions are relevant, as the European Court of Justice has emphasized in its recent judgment. However, experience shows that the fundamentally dubious qualification of a reproduction as a quotation (Art. 5 par. 3 (d) in Directive 2001/29/EC), i.e.

“the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user, since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into ‘dialogue’ with that work”,¹⁸

18 ECJ, 2019, para 71.

rarely applies to music in practice. In most cases there remains only one of the provisions that could actually come into consideration: Article 5 par. 3 (k). If this exception also does not apply, the permission of the relevant rightsholder is required for the appropriation. The rightsholder is of course under no obligation to give permission and is able to set any price for the granting of such permission. In practice, licensing is often simply not an attainable option, as the German Federal Constitutional Court has emphasized.¹⁹ For this reason alone the provisions relating to free use in creative practice have great importance.

Now, Article 5 par. 3 (k) of the directive is the section in the European copyright and related rights law in which the concept of the pastiche appears. Article 5 par. 3 (k) states: “Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: [...] (k) use for the purpose of caricature, parody or pastiche.” Pastiche will thus be a pivotal exit option to attain the privilege of deeming an unauthorized appropriation as free use, and in future the qualification as a pastiche will consequently be a key concept in the law of adaptation, in determining the borderline between illegality and legality in the described harmonization of interests.²⁰ It is not necessary to be a legal expert for it to become immediately clear that this is a change of system. Pastiche is a classifiable, subsumable category. To subsume an adaptation to this category or not is something categorially different compared to the determination of the aesthetic relationship between two artistic entities in individual cases and to measure the degree of aesthetic independence of the younger work from the older. The modalities of the harmonization of interests in the law pertaining to adaptation are therefore undergoing fundamental change in Germany right now, and the concept of pastiche will have a central role to play from now on (becoming e.g. para 50a UrhG as of June 2021).

Far-reaching change brings with it systemic challenges; in this case they concern the fundamental question of how the balancing out of the described and necessary harmonization, can be carried out; this aspect has been dealt with in detail by me in other publications.²¹ It does, however, already present a problem at a very basic level, which I would like to highlight here. Whilst the concept of the pastiche occupies a central position in European copyright law with regard to adaptations, it is nevertheless not yet clear what the legal content of the term pastiche, i.e. what it means, will be. Directive 2001/29/EC does not provide a legal definition. There has not been any case law emanating from the European let alone the German courts to date which has defined or even described the concept of pastiche passably coherently. To the contrary, intensive research has shown that there are many differing perceptions of the meaning of the word pastiche circulating in the European copyright discourse, as I have described at length elsewhere, providing exhaustive documentary evidence.²² For example, it is already in dispute whether there are any material differences between the categories of caricature,

19 BVerfG, 2016, para 98.

20 See in detail DöHL, 2020b.

21 DöHL, 2016b.

22 DöHL, 2020b.

parody and pastiche at all, and whether these terms do not ultimately designate the same phenomenon occurring in different art forms. It is debatable, for instance, whether a humoristic-critical intent is a prerequisite for a pastiche in the legal context, as it is for parody and caricature. Furthermore, it is also debatable whether a pastiche in the legal sense is a 'mere' imitation of the style of another, or whether the taking over of material components from the original artwork is actually permissible. These points of dispute serve to demonstrate that the law has not yet considered those practices which go beyond this, but still fall under the generic term of pastiche. One only has to consider the practice forming the central theme of this publication, namely the practice of the *pasticcio*, the disparagingly named patchwork operas of the 18th century, or, in the context of modern music, of the internet culture of the mashup.²³

Here, therefore, a field is opening up for the arts-related humanities to enter the discourse on copyright law. A dialogue of this nature is imperative. Only a scientifically informed administration of justice which is alive to the meaning of pastiche in the individual artistic forms and practices at a given time and in a specific context can allow the European Court of Justice to interpret Directive 2001/29/EC in a manner that is appropriate to the arts and has the tools to hand down judgments that are art-oriented and differentiated in individual cases. And it is precisely this that the German Federal Constitutional Court is demanding, for instance, when it prescribes that in order for the aforementioned harmonization of interests to be achieved the relevant special characteristics of a respective genre affected by a case are to be taken into account, i.e. the legal term of pastiche shall not be interpreted in a generalized manner but with "genre-specific" sensibility and flexibility.²⁴ So far the interest of the courts and jurisprudence has been limited to sporadic and anecdotal literature emanating from research in the arts-related humanities. The bibliographies of the numerous dissertations and footnotes to the many essays surrounding the *Metall auf Metall* proceedings, and the references in the eight court judgments which have already been handed down in this matter to date are a sad confirmation of this general *status quo*. It is up to the arts-related humanities to make the challenge that this is not sufficient. At the same time, it is up to them to extend the invitation to dialogue and offer knowledge about the concept of the pastiche to the law to enable the courts to pass judgements that are at least based on a full understanding of the relevant artistic practices and its aesthetic specifics. In this regard, the ongoing *Metall auf Metall* proceedings are an opportunity for both sides, arts-related humanities and law, to strengthen and expand their dialogue to foster mutual understanding.

Translation: Dierdre Scheibert

23 DÖHL, 2016b.

24 BVerfG, 2016, para 99.

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