https://doi.org/10.25819/ubsi/8181

The Concept of "Pastiche" in Directive 2001/29/EC in the Light of the German Case *Metall auf Metall*

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I. Introduction: The Relevance of the *Metall auf Metall* Case

Initiated in 1999, the *Metall auf Metall* case has now become notorious. New court judgments are regularly reported in the leading news media, and everyone seems to have an opinion on this case these days. In the scientific context alone, the published comments have risen to boundless numbers, not to mention the volumes of views expressed online.

After almost 19 years and 7 court judgments[1] , the parties involved still pursue their legal dispute—over two seconds of music. Originally composed and recorded by the German band *Kraftwerk* in 1977, these two seconds formed part of their track *Metall auf Metall*. In 1997, a team around German music producer Moses Pelham used the sequence as a digital extract (sample) from *Kraftwerk*'s recording, incorporating it as a loop to create a background rhythm for the song *Nur mir*, performed by German rapper Sabrina Setlur. They had, however, failed to ask *Kraftwerk* for permission beforehand. *Kraftwerk* pressed charges, among others for damages and omission. An unprecedented odyssey began (Döhl 2016a: 23).

It takes a considerable effort to find another equally trivial matter in dispute—the digital appropriation of a two-second sliver of a relatively unspecific rhythm sequence and its subsequent processing without any discernible economic disadvantage to the copyright holder—that has occupied the judicial system for such a protracted period and resulted in 7 court decisions. Several times the matter was heard before the

highest judicial bodies provided for in German law, most recently the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) in 2016 and in 2017, for the third time, the Federal Court of Justice (Bundesgerichtshof, BGH). And if this was not enough, neither the end nor the outcome of this case, rich in unexpected turns, can currently be foreseen. Most recently, the BGH referred the matter to the European Court of Justice (ECJ: C-476/17 – *Hutter vs. Pelham*). It is this next step in the proceedings I will focus on in this article.

The basic facts and development of the *Metall auf Metall* litigation outlined above are extreme in every way, indicating that its core is a fundamental issue exceeding far beyond the triviality of the original matter in dispute. The issue the courts have to resolve is the appropriate legal approach to a now widespread digital cultural technique—sound sampling. In this protracted legal battle, sound sampling is a proxy for a number of similar participative digital techniques, ranging from fan fiction to mods and memes, in which the traditional dichotomy of producer and recipient blurs and recipients become producers themselves by adapting and processing material (Döhl 2016b). This phenomenon is not new. In the history of music, composing by reference to another piece of work is a fundamental principle (Dahlhaus 2002, 78). Certainly, the quantity and (potential) audience for adaptive products have reached an unprecedented dimension in the digital realm (O'Flynn 2013). The proof is evident in every single YouTube back room production. The landscape has changed fundamentally. Most likely, this is one of the main reasons for the huge public interest in this litigation: the appropriate balance of interests weighed up by the courts here will ultimately be relevant for many users, far beyond the initial parties to this litigation and even the artistic field of music.

II. The Development of the *Metall auf Metall* Case to Date

The procedural steps of the *Metall auf Metall* case until now illustrate how pre-digital copyright legislation struggles to come to terms with the reality of the changing landscape. The courts face the dilemma of finding a ruling that is neither ultimately ineffective due to a lack of acceptance nor sacrifices the interests and rights of stakeholders, that have been established as justified for a valid reason, to factual pressures. A viable ruling is not impossible, but requires an extremely complex compromise between the vast amount of contrasting interests and stakeholders now involved, including positions of parties who frequently change their point of view depending on the stage they are at in the discourse.

This is evident in the *Metall auf Metall* case. The defendant, namely Moses Pelham, is known for having taken legal action against the unlicensed third-party use of own and third-party works, among others via the German company DigiProtect Gesellschaft zum Schutze digitaler Medien mbH (Boie 2010). In the *Metall auf Metall* case, however, he does just the opposite by fighting for the right to use third-party material via sound sampling. His course of action is not shady or even improper, but completely legal. Incidentally, it is also perfectly normal when dealing with copyright law and it reflects a basic social disposition displayed in adaptive practice. Only a few adhere consistently to the same standard when dealing with their own and other people's work. Instead, it is not unusual for artists who unashamedly use third-party works in their own production to react extremely sensitively if others treat their work in the same way. This could be qualified as bigotry or double standards, but it is not illegal. Above all, it reflects the diverse positions in this field of discourse and the inherent mobility of all those involved in it.

In this paper, I will focus on the current state of the *Metall auf Metall* litigation and analyse the likely development at EU level. The background leading to the current situation has frequently been covered and commented on; I will therefore refrain from explaining it again.

For the purpose of this paper, I will just summarise the key facts of the case (Döhl 2016a: 23).

The particularity of sound sampling as a contemporary practice of music composing based on third-party works is not contingent on the relation to the techniques used for individual genres such as quotation, analogy, adaptation, allusion, fusion, collage, pastiche or parody; rather it is founded in the act of double reference to third-party works inherent in sound sampling: the adapted or transformed materials are third-party compositions, including lyrics, if available, but at the same time they are snippets of a specific performance taken from an audio recording of this composition which is also performed and recorded by third parties — whether the performance is documented by the recording medium or, more typically, simulated (and experienced) as a coherent performance although actually recorded in independent takes and production steps (Döhl 2016b: 14).

The act of sampling therefore affects three different rights: the composer's (and potentially the lyricist's) copyright (Secs. 1 and 2 of the German Copyright Act (Urheberrechtsgesetz, UrhG)), the ancillary copyright of the performers recorded (Sec. 73 UrhG) and the phonogram producer's right to the recording that is owed to the economic and organisational investment in the production (Sec. 83 UrhG).

Irrespective of the quantity or significance of the sequence taken from the original piece via sound sampling and of the process used in the adaptation, a zero tolerance approach was applied in Germany to protect the rights related to the phonogram producer's investment according to Sec. 85 UrhG, even in the case of micro-sampling, until the BGH's first judgment in the *Metall auf Metall* case in 2008 (Döhl 2016b: 214). Before that, the legal position on sound sampling (which had taken hold in the market both technically and commercially in the 1980s; Roads 1996: 115–156; Kirk/Hunt 1999: 26–29; Metzer 2003: 160–187; Tschmuck 2012: 163–196) as a practice not subjected to consent according to Sec. 24 (1) UrhG was just as rigorously restricted as the adaptation of

melodies had been in Germany for decades (Sec. 24 (2) UrhG). In practice, however, a possibility of free use would be of major importance in sound sampling as there are no compulsory licensing rules and a clearing of sampling rights is routinely virtually unfeasible or impossible to quantify economically (Döhl 2016b: 41–48). While the undifferentiated nature of copyright law in terms of aesthetics and cultural policy at the time offered legal certainty, it was disappointing from the musicological perspective (Döhl 2018a). Those involved in the art discourse had soon agreed that sound sampling can promote significant creativity—it does not have to and often does not, but it can—and is not just a technically simple solution to compensate for a lack of own ideas or effort (Metzer 2003: 160–187; Binas-Preisendörfer 2004: 242–257; Schloss 2004; Großmann 2005: 308–331; Bonz 2006: 333–353; Diederichsen 2006: 390–405). Each case needs to be assessed individually. But this was initially prevented by Sec. 85 UrhG.

The *Metall auf Metall* case, which provoked a change, and the development it triggered are quite complicated from a legal point of view. However, the matter can be broken down to the core issue that an act of sampling affects several rights simultaneously (Döhl 2016a: 23): is it right and legal to apply zero tolerance to the rights of phonogram producers, while the other two rights are subject to a threshold of originality below which users can sample anything without permission (European Copyright Society 2017)? The courts of the first and second instance ruled against Pelham based on the zero-tolerance approach to the infringement of *Kraftwerk*'s phonogram producers' rights. (To date no full decision has been made on the infringement of the two other rights.) In a highly controversial decision, the BGH began to relax the zero-tolerance argument in 2008, but shied away from a clear cut. After a clarification in the two subsequent rulings, the BGH's second ruling in 2012 provided that only short samples without third-party melodies could be used freely and only in cases in which these samples could not be reproduced or recorded by the user—the fictitious benchmark

was an average producer—and "faded" in the new piece of music. Compared to the starting point, a major gain had been achieved in theory, but in practice it was negligible. The zero-tolerance argument had been replaced by a 'de-facto never' standard. Consequently, the court ruled against Pelham on the (new) grounds that he could have produced the two-second sequence himself.

In 2016, the BVerfG overturned the decision and ruled that the constitutional reconciliation of interests should be governed by an "art-specific approach". Eventually, the court formulated a catalogue of practicable solutions to create the necessary balance of interests. In particular, this balance can be achieved based on

1) an assessment of independent use, i.e. an analogue application of Sec. 24 (1) UrhG (BGH 2008: para. 19–25; BGH 2012, para. 15–24; BVerfG 2016, para. 110);
2) an assessment of the adverse economic impact on the original author—a limitation of Sec. 85 UrhG (BVerfG 2016, para. 110);
3) standardised upstream consent and participation systems—corresponding to cover versions (see Sec. 42(a) UrhG, 34 VVG);
4) downstream revenue sharing systems (BVerfG 2016, para. 80);
5) the establishment of privileged purposes of use in application of the principles of Sec. 51 UrhG (BVerfG 2016, para. 110);
6) privileging micro-sampling in analogy to the threshold of originality or a de facto *de minimis* rule (BVerfG 2016, para. 85 f., 99, 104, 108; see also the rationale in the *Goldrapper* case in BGH 2015).

These are all very different and, taken by themselves, perfectly reasonable alternatives. From a musicologist's perspective, however, an "art-specific approach" only allows for the first alternative, as I have discussed in detail elsewhere (Döhl 2016b: 314–344; Döhl 2018a).

Below I will focus on the second request the BVerfG made when referring the case back to the BGH: to verify whether there was a duty to

submit the case to the European Court of Justice (ECJ). The BGH complied with the request and submitted the case, accompanied by a catalogue of questions, to the ECJ in early June 2017.

III. The Likely Future Development of the *Metall auf Metall* Case

This is the case as it stands. While the matter in dispute is trivial and stereotypical from the perspective of the remix and sampling culture, the *Metall auf Metall* litigation is very enlightening for research on adaptation in the arts, which is one of my research focuses (Döhl 2016b; Döhl 2018a). This applies both to the progress of the case to date and the potential future developments I will now focus on. It is obvious that, since the first appeal before the BGH, the *Metall auf Metall* litigation, initiated in 1999, has been focusing primarily on the question to what extent the balance of interests provision under Sec. 24 (1) UrhG is applicable to sound sampling. This means the courts are attempting to clarify whether it is possible for digital adaptations, which by their nature draw from other musical works and media at the same time, to become—at least in a legal sense—something that qualifies as an "independent work" under German copyright law, i.e. an artistic entity in its own right and with its own identity.

A welcome endeavour: in adaptation research, it is commonly acknowledged across all arts that, as a matter of principle, all adaptations can reach such a state of artistic identity in their own right, no matter how prominent the original material is in the new work (Döhl/Wöhrer 2014). The controversial question is how and when they reach this state, rather than whether they can reach it at all (Genette 1993; Hutcheon 2013, Sanders 2016). The number of reference examples is vast, ranging from Richard Wagner's *Ring des Nibelungen* to James Joyce's *Ulysses*, and from Leonard Bernstein's *West Side Story* to Quentin Tarantino's movies. A large proportion of research in the various artistic disciplines is dedicated to studying direct dependencies from older works, ranging from mere inspiration to allusion or appropriation, while ultimately

illustrating the specific quality and independence of the more recent work. In an "art-specific approach", which the BVerfG demanded so vehemently in 2016, the German route of basing decisions on a general clause of independent use as an aesthetical category therefore seems to be absolutely appropriate (Döhl 2016b: 314–344).

From an arts perspective—or music in this case—the concept of independent use as an aesthetic category is an appropriate tool of a free balance of interests (i.e. entirely decided on a case-by-case basis).[2] Besides, an aesthetic differentiation between 'quasi-analogue' and digital appropriation is simply not justifiable (Döhl 2016b: 304). From an aesthetic point of view, a discourse on the potential application of Sec. 24 (1) UrhG to digital appropriations—a route now followed by the *Metall auf Metall* case—is imperative. However, from an economic or moral perspective or in terms of privacy rights or legal policy, this may be an entirely different matter. Accordingly, the discourse on the treatment of sound sampling in copyright law is very controversial, because all these inextricably linked considerations, including aesthetic aspects, will have an effect on and compete for influence in copyright law. In the *Metall auf Metall* case, the aesthetic perspective is clearly supportive of efforts to introduce the concept of independent use as a tool of differentiation to achieve a balance of interests when music has been adapted without prior consent.

The order for reference *Metall auf Metall III* issued by the BGH in early June 2017 shows that the court intends to uphold its decision to introduce the free use provision for digital appropriation practices and prefers to pursue this path, provided it is permissible by European law (Döhl 2018a). If this was the case, both the law and the arts would have to raise the question what exactly is "independent use".[3] In German law, this is a neglected issue for non-humorous, non-critical art that is neither caricature nor parody (Döhl 2013; Döhl 2015). This applies to music in particular, because the question of independent use is examined only in exceptional cases such as the appropriation of a pure rhythm se-

quence in the *Metall auf Metall* case due to the aforementioned particularity of German law for melodies for which a prior consent is imperative (Sec. 24 (2) UrhG).

It is not unlikely, however, that the *Metall auf Metall* case will follow a different route, now it has left the German jurisdiction—and that the recently changed rules allowing free use in digital appropriation practices will be de facto reversed, before the discourse around the potential of the independent use concept for achieving a balance of interests in the case of adaptations that are neither caricature nor parody can gain momentum. To argue the adequacy of the independent use concept and to include it into the forthcoming proceedings of the *Metall auf Metall* case, before a decision is taken that may set the scene for a long time, we need to understand the alternative that "threatens" to take shape. Explaining this alternative scenario is my focus in the following.

The main legal basis for the BGH's order of reference in terms of copyright law is the European Directive 2001/29/EC.[4] The rights of reproduction (Sec. 2), communication (Sec. 3) and distribution (Sec. 4) laid down in the Directive are fully harmonised (Grünberger 2015: 276, 284). Exceptions and limitations to these rights in favour of third-party use or processing similar to the *Metall auf Metall* case may only be provided in the cases listed in Sec. 5 (Grünberger 2015: 284). Sec. 5 (3)(k) is the only one that applies directly in this case. For the purposes of this paper, I will assume that the ECJ's upcoming *Metall auf Metall* decision will ultimately focus on this norm, that its content will need to be analysed—and that none of the theoretically possible alternative scenarios will apply (Jütte/Maier 2017).

Rather than a general clause for free use as stipulated by German copyright law, Sec. 5 (3)(k) only includes a provision similar to, but more restrictive than Sec. 24 (1) UrhG. The Directive includes a list of case groups rather a general clause, which in principle should be narrowly construed (Haberstumpf 2015: 449): Member states may only provide for exceptions to the rights granted by Directive 2001/29/EC for appro-

priation without consent in case of a "use for the purpose of caricature, parody or pastiche".[5]

As to the European legal provisions for the partial use of third-party works of art for purposes that are not anti-thematic but like in the *Metall auf Metall* case primarily for purposes other than expressing critique, humour and/or mockery (Grünberger 2017: 332), many dogmatic and conceptual questions remain to be answered, in particular because of a lack of rulings (Grünberger 2017: 331 f.). Yet, one of the major issues likely to emerge during the course of the proceedings here is obvious and crucial, at least for the various sciences of the arts: the currently most likely and—at least for adaptive creative practices—potentially most momentous scenario seems to be an outcome in which "'free use' [...] will be broken down into a 'provision for a scope of protection' and a 'statutory exception for parody, caricature and pastiche'" (Ohly 2017: 969). For this scenario to arise, further preliminary assumptions have to be made for the purposes of this article, which include:

1) the scope of protection for all copyrights and ancillary copyrights affected by an act of sampling would ultimately have to be measured in the same way against Sec. 5 of Directive 2001/29/EG (similar to the legal situation in Germany after the BGH's conclusion by analogy in *Metall auf Metall I*) (Grünberger 2015: 284; Ohly 2017: 965);
2) the scope of protection of Directive 2001/29/EC would also apply for a partial use of third-party works in a modified form, provided they are still recognisable (Leistner 2014: 1148; Stieper 2015: 302; von Ungern-Sternberg 2015: 537; Ohly 2017: 966);
3) the case of micro-sampling to be decided here is not exceptionally classed as too small or insignificant, or as not invoking the original work's aesthetic identity, which would mean that the scope of protection provided for in Directive 2001/29/EC would not apply;[6]
4) the case will be classed as not having an adverse impact on the value and use of *Kraftwerk*'s original according to the three-step test and

> that the rights holders' justified interests in the original will not be considered as unduly infringed (von Ungern-Sternberg 2015: 538 – this is the BGH's assumption [BVerfG 2016: para. 102], contrary view for instance Dreier/Leistner 2014: 16).

Assuming that this is the outcome, in the end this will lead the process of decision making to the statutory exception for a "use for the purpose of caricature, parody or pastiche". This is, however, clearly different from evaluating the aesthetic independence of an adaptation without any preliminary decision. What would be the consequence? Would the German provision of free use in accordance with European law ultimately have to be interpreted (Grünberger 2017: 332; Ohly 2017: 969) – i.e. narrowed down[7] – to the effect that, in the future, the question of an adaptation's independence should generally only be examined within the case groups of caricature, parody and pastiche? Would it mean that, beyond these groups, a privileged treatment of individual cases as opposed to the comprehensive protection of usage rights stipulated in Secs. 2 to 4 of Directive 2001/29/EC would no longer be possible?

This is the hypothetical outcome of the *Metall auf Metall* litigation on which the following considerations will be based.

For humorous and critical appropriations such as caricatures and parodies, this hypothetical legal situation appears to be fairly uncomplicated, as the BGH explains in the context of *Metall auf Metall III* (BGH 2017: para. 39) and has already demonstrated, for instance in its decision in the *Auf fett getrimmt* case (BGH 2016). Fine-tuned for decades, the instruments used in treating these anti-thematic appropriations in the context of Sec. 24 (1) UrhG can be maintained without major difficulties, as they essentially correspond to the current European regulatory content (Haberstumpf 2015; 458) and would only be extended and possibly modified with relevant EU law in the future (BGH 2017: para. 39).

In the *Metall auf Metall* case, the intended use was obviously not a caricature or parody, as the BGH rightly points out (BGH 2017: para. 40).

This is quite typical for the musical adaptation of sounds, not least in the context of the sampling culture—an artistic practice of appropriation in which humorous and critical intentions are negligible or subordinated factors (an example can be found in Mashup, Döhl 2016b: 199 f.). Consequently, the only possible category left in the relevant scenario for music of this type would be the pastiche. In accordance with EU law, the German provision of free use would have to be interpreted in the light of this category.

In the case of the *Metall auf Metall* adaptation, the courts would have to take a step back and clarify the legal definition of pastiche. In the hypothetical scenario assumed here, a classification of the adaptation as a pastiche would be the only substantive exit option for the defendants that would avoid a guilty verdict. It is a scenario which assumes that, besides Sec. 5 (3)(k), no other scope of application is available for Sec. 24 (1) UrhG (Haberstumpf 2015: 449; Ohly 2017: 967). The concept of pastiche is therefore the crucial point.

So even if this question will not be addressed by the ECJ in the end due to the considerations listed before, it is likely that another case will follow soon with a larger sample than the two seconds used in the *Metall auf Metall* case. At some point, we will end up being forced to address the question of pastiche in the fields of non-critical/-humorous digital adaptation practices. And it is important to address this question because: "Sampling for the purpose of music composition is protected by artistic freedom in such cases just as fully as if the sampling were done for purposes of engaging in a critical dialogue with the original" (BVerfG 2017: para 96).

But what could pastiche mean?

IV. The Concept of Pastiche

To establish this, it is common practice to consult the law first. However, this is not very helpful in this case as there is no legal definition of pastiche. Neither are there any rulings established on a national level

in analogy to European regulations, which exist in the case of caricatures and parodies. Consequently, to date, there has been no discourse on the concept of pastiche, or even an established and unequivocal definition in legal literature that could be used as a foundation (Stieper 2015: 304 f.). The few sentences attempting a definition of the term even provide varying answers to the question whether a pastiche is a purely imitative practice or a practice which allows specific adaptations (Mullin 2009: 105 f.; Bently/Sherman: 241–244; Lavik 2015: 83–85; Peukert 2014: 89; Mendis/Kretschmer 2013: 3; Haberstumpf 2015: 451; Stieper 2015: 304 f.; Ohly 2017: 968). It is therefore impossible to find a quick and simple resolution.

Consulting the relevant decisions on Sec. 5 (3)(k) of Directive 2001/29/EC at EU level is equally futile, because so far, like the legal literature, they only focus on caricatures and parodies.[8] The Advocate-General of the European Court of Justice mentions the European Commission's opinion that a pastiche is "an imitation of a work protected by the Directive, which is not a caricature or a pastiche and which denotes a humorous or mocking intention" (ECJ 2014: para. 41). While this statement also lacks the substance to gain clarity, at least the European Commission seems to see a difference between caricature, parody and pastiche.

Of course these are only the first vague attempts of a definition; in addition, these positions cannot be taken for granted within the EU member states. This is where the challenges begin. The Kingdom of Belgium, for instance, declared in connection with the *Deckmyn* case that "the distinction between 'parody', 'caricature' and 'pastiche' must not play a role in the definition of parody, because the three concepts are too similar for it to be possible to distinguish between them" (ECJ 2014: para. 42). A look at French legislation may illustrate why the Belgian government makes this assessment. The legal situations of France and Belgium are very similar (Vanbrabant/Strowel 2012: 140). The French legal system only allows imitative appropriation and a largely transformative use, and parody, pastiche and caricature are all considered

varieties of humorous and critical appropriation. Consequently, it is assumed that all three have a humorous and critical intention. The distinction is made in the first instance based on the type of arts, with pastiche primarily being used for literature and the visual arts (Sundara Rajan 2011: 72 f.; Carre 2012: 408; Mendis/Kretschmer 2013: 18). It is essential to be aware of this legal position on the concept of pastiche, because EU regulation was aligned to the French provisions in art. L 122–5 of the Code de la Propriété Intellectuelle when it was drafted.

If this legal position was made imperative for the concept of pastiche in general and therefore applicable in Germany after a corresponding decision of the ECJ in the *Metall auf Metall* case (or some other future case), there would no longer be any scope for non-humorous and non-critical appropriations to be published in Germany without the rights holder's prior consent. This would affect the majority of typical applications of sound sampling that are not 'anti-thematic', i. e. directed against another content, as in the *Metall auf Metall* case. 'Anti-thematic' refers to what Richard Dyer, in his study on pastiche, calls an "evaluative attitude towards their object of reference" (2007: 22), and regularly appears as "inner distance" in court decisions on parody in the form of a deliberate and intentional (Förster 2014: 59) humorous and critical comment on the material used. This requires the adaptation to develop a semantically targeted "independent conceptual content" (Summerer 2015: 175). For a long time, it was assumed that the humorous and critical content had to target the material used itself. However, the BGH (BGH 2016) abandoned this position recently following the ECJ's decision in the *Deckmyn* case (ECJ 2014) (Specht/Koppermann 2016: 23) – likewise the requirement that the adaptation itself has to attain the quality of a work (Jongsma 2017: 665). The intention to create humorous and critical conceptual content is now sufficient (BGH 2016: para. 35). This means that the humorous and critical conceptual content can now be directed against a third medium and that the use of the original work becomes a means to an end. Yet, a humorous and critical intention is a require-

ment in any case (Nordemann/Kraetzig 2016). This recent change of position is therefore of little use to musical production: a typical case of sound sampling rarely has its main motivation in a humorous and critical intention[9] , as the users tend to engage primarily in sampling to reuse specific sound aspects of the original for its own sake as for instance in the *Metall auf Metall* case.

In the case of sound sampling, the intention is also not the crucial point, because sound sampling can never be just an imitation. "Imitation is not the same as reproduction" (Dyer 2007: 22), but reproduction is imperative in sound sampling. Certainly, sound sampling can be used to imitate a third aspect, for instance a specific style. However, the sampled material can by definition only serve as an imitation, but not be an imitation itself. It is always something that has been extracted and adopted. It might not be a "substantial reproduction" in legal terms in any case which might lead to the situation that cases of micro-sampling are excluded from the field covered by Directive 2001/29/EC (European Copyright Society 2017). If, however, pastiche would be understood as an exclusively imitative practice, matters in dispute similar to the *Metall auf Metall* case would always, from the outset and without considering the individual case, be excluded from the privileged treatment of being qualified as free use, no matter how substantial the act of sampling is.

But the Franco-Belgian take on pastiche is not the only interpretation. Other jurisdictions have also adopted Sec. 5 (3)(k) of Directive 2001/29/EC into national law, but apply a concept of pastiche with a different emphasis. It is therefore not certain that the Franco-Belgian approach will be adopted by European law. The United Kingdom is one of the countries that apply a different concept of pastiche. Sec. F97 30A of the Copyright, Designs and Patents Act 1988, as amended, stipulates: "Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work."[10] Here again, a legal definition of pastiche has yet to be provided. However, in 2014, the In-

tellectual Property Office of the United Kingdom published a guidance document that includes a sentence illustrating the opinion of the UK administration on what constitutes a pastiche: "[...] an artist may use small fragments from a range of films to compose a larger pastiche artwork."[11] While this is not a definition of pastiche, it is evidently a permission to adopt fragments. This concept of pastiche is closer to a collage and not limited to imitations.[12] Even so, the UK administration clearly intends to restrict this blanket privilege to micro-sampling, which does not meet the needs of many sampling cultures such as the mashup (Döhl 2016b) – and consequently does not comply with the imperative of an "art-specific approach", in particular when "genre-defining aspects" (BVerfG 2017: para 99) are to be taken into account. What proportion of the pastiche can or must be original material and how it is handled in the adaptation to legally qualify as a pastiche are also questions still unanswered.

It is certainly important to recognise that even at EU level different member states approach the concept of pastiche differently, albeit very tentatively. The interpretations offered so far are all very restrictive. If the jurisdiction required the appropriation to be purely imitative, sound sampling would *per se* be excluded. If, alternatively, it allowed an adoption of material, albeit restricted to fragments, as is permissible in UK law, it may make a difference in the *Metall auf Metall* case. On the whole, however, this would only apply to a small proportion of the sampling culture and result in a far-reaching preliminary artistic decision (privileging micro-sampling just for the minor size of the sample and not with regard to its aesthetic relevance for original and adaptation). The same—a far-reaching preliminary artistic decision—would apply if the definition of a pastiche was based on a humorous and critical intention as in France or Belgium.

In all these cases, with this new European version of the 'right of free use without consent', sound sampling as a cultural practice would only be left with one option to achieve legality without obtaining a li-

cence: a "*de minimis* rule" similar to the USA or at least a corresponding ruling, for instance by applying the "threshold of originality" model to cases of sound sampling[13] or by asking for a "substantial" part of the original recording to be sampled (European Copyright Society 2017). In the USA, micro-sampling was recently repeatedly classed as fair use (without any corresponding decision of the higher and supreme courts) (Kocatepe 2018). The argument also arose several times in comments on the *Metall auf Metall* case, which is, with its two-second sample, a textbook example for these "musical snippets" targeted by a "*de minimis* rule". Consequently, all that remains would be the hope that an evolving copyright law would conclude that, at least in cases of micro-sampling, the scope of protection stipulated in Directive 2001/29/EC is not applicable (as in the above scenario described by Ohly 2017) – and that, therefore, any further discussions would be futile. All other cases of sound sampling, however, would offer no scope for a privileged treatment under the law, no matter what happened to the sampled material in the adaptation, i.e. irrespective of its artistic quality and cultural relevance.

From an artistic perspective, this is the crucial point (Döhl 2016b). If one of the aforementioned current legal concepts of pastiche would be applied as a guideline for the future interpretation of Sec. 24 (1) UrhG, with the exception of the artistically very specific practice of micro-sampling and the relatively rare cases of sound sampling with a humorous and critical intention, artists would be left with the choice to either license, refrain or sample illegally. However, the BVerfG has already flagged up that the possibility of licensing (which is only theoretically available in practice) is incompatible with the constitutionally legitimised imperative of an "art-specific approach" (BVerfG 2016: para. 98). This objection would a fortiori apply to the options of 'refrain' or 'sample illegally' that de facto are still open to the majority of the sampling culture, because, with its general nature, such a legal interpretation would not satisfy the imperative of an "art-specific approach". This is immediately obvious when looking at sampling cultures such as

the mashup. While both micro-sampling and the humorous and critical intention only play a very limited role in this genre, users here create works of high originality composed from 100% third-party material which are then widely recognised as pivotal musical testaments of our time, such as Brian Burton aka DJ Danger Mouse's *Grey Album* (Döhl 2016b).

This raises the question whether a critical engagement with the artistic practices and the related discourses could help establish a concept of pastiche that may be a better fit also in the realms of copyright law.

As surprising as it might be, the sciences of the arts, however, also have yet to come up with a more detailed concept of pastiche. In the relevant literature, particularly in interdisciplinary arts research on pastiche (Hoesterey 2001; Dyer 2007), the concept remains equally vague compared to the aforementioned legal discourse. The status of the humorous and critical intention and impact as a necessary and sufficient condition for a pastiche is also controversial here (Jameson 1991: 17 f.; Dyer 2007: 7, 22; Gloag 2012: 61; Austin 2013: 3 f.). It is also not clear whether pastiche imperatively has to be a purely imitative practice, which may reference specific personal styles and works—but only in an imitative and not integrative form, i.e. a specific transfer from the original work as in the case of sound sampling (Dyer 2007: 1; Sanders 2016: 5). In some cases, the pastiche therefore seems to be closer to the collage or both terms are even used synonymously (Hyde 2003: 135). In other cases, it seems closer to an allusion, for instance in Kenneth Gloags' comments on George Rochberg's *Third String Quartet*, a classic piece of post-modern avantgarde music:

> The five-movement quartet is based around newly composed music that intentionally sounds old. […] However, in keeping with the pastiche nature of the music, in contrast to the specificity of intertextual relationships in the collage works, these are only suggestive, being at most allusions than direct quotations" (Gloag 2012: 91 f.).

The concept of pastiche described here is obviously about a more general play on "cultural memory" (Hoesterey 2001: xi) rather than about a direct adoption from an older piece of music which is often subject of copyright issues in music. "Speaking in a dead language" (Jameson 1991: 17), as Fredric Jameson calls it metaphorically, is at the centre of how this concept of pastiche is understood, i.e. the appropriation and use of cultural forms and practices which are not originally the user's own, irrespective of whether they belong to an era, a genre or a personal style. Sometimes the way the boundary between high and popular culture is handled (challenging or even dissolving it) constitutes a pastiche, another time pastiche is understood as the opposite of high culture (a 'purely' negative judgement on quality) (Hoesterey 2001: xi,1). Another controversial question is whether a pastiche has to be recognised as such in its reference to other works or whether there needs to be an intention of a potential recognition (Dyer 2007: 9 f., 22 f.).

Two lists illustrate how complex, inconsistent and imprecise the discourse on the concept of pastiche is in the arts, too: over several pages, Ingeborg Hoesterey (2001: 10–15; see also Dyer 2007: 9, 11–16, 22 f., 25–47) defines a multitude of related terms from A for adaptation and appropriation to T for travesty, all of which are used more or less differently from pastiche. Richard Dyer (2007: 7 f.) lists more than a dozen frequently used definitions of pastiche, including supporting evidence for how they have been used. The term "pastiche" therefore invokes a large number of frequently related, but aesthetically distinct concepts (Austin 2013: 3). Hence, there is no binding definition used in the history of the arts (Fletcher 2017: 48). This is particularly evident in interdisciplinary studies which focus specifically on the concept of pastiche, providing numerous examples, namely those published by Hoesterey and Dyer:

> "Pastiche is a widely used critical term: it is used a lot and loosely. […] All of these usages are proper. One sees what they all mean, even

> though they do not all mean the same thing. […] In both its shifting history and current multiplicitous use, the word pastiche is in practice extremely elastic" (Dyer 2007: 7–9).

To sum up: In no way is the concept of pastiche narrower and therefore more precise and legally certain than the old German concept of "independent use". Whereas the latter is aesthetically neutral, the concept of pastiche is linked to a multitude of traditional, partially contradicting usages in past and present artistic practices which are sometimes centuries old.[14] So the question arises: what would be the gain compared to the old German category of "independent use" in terms of legal certainty, for the legal system, but above all for the artists if cultural practices such as sound sampling would be forced to contort themselves into the concept of pastiche? In exchange, certain variants and usages of the term would have to be declared as 'correct' which would be completely ahistorical.

Not only would this approach be wrong from the perspective of the concept's history, it would also not hold up if the genre category was used as a point of entry into the relevant artistic practices as requested by the BVerfG (2016: para. 99) and stipulated in art. L 122–5 of the French Code de la Propriété Intellectuelle ("La parodie, le pastiche et la caricature, compte tenu des lois du genre"). It is not even necessary to analyse the complexity and heterogeneity of the genre concept here (an introduction in Döhl 2018b) to recognise this. A random spot check in the genre involved in the *Metall auf Metall* case is sufficient enough to illustrate the point: hip-hop.

In hip-hop, pastiche is described as a specific form of reviewing third-party works largely without modifications, a method of securing an intentional intertextuality that the audience can recognise, and that had only a particular relevance for the genre in a specific phase, i.e. until the 1990s (Schur 2009: 31 f.). Other researchers see the imitation and integration of third-party texts and music as equally relevant forms of

pastiche in hip-hop, but they question whether the element of intertextuality that is recognisable for the audience is the major motivation for using this artistic method and therefore the prerequisite for applying the concept of pastiche in hip-hop (Williams 2013: 7 f., 177 f.). Others again demand specific aesthetic outcomes such as a "juxtaposition of disparate aesthetic systems, blank parody, fragmentation, lack of historicity, and so forth" (Schoss 2014: 65) as a condition for including sound sampling in hip-hop in the concept of pastiche. There are also many who discuss sound sampling in hip-hop without making any connection to pastiche—and thereby provoke the question whether this category is appropriate for the issue at hand or whether it has been taken from other artistic contexts and imposed on hip-hop (Klein/Friedrich 2003; Pelleter/Lepa 2007; Katz 2012; Sewell 2013; Edwards 2015; Williams 2015). For this overview of the obviously diverse opinions on the use of the concept of pastiche in hip-hop, I have only consulted a number of well-recognised scientific books without delving too deeply into the academic literatur on hip-hop. Not only are these opinions diverse and will fan out even further the more they are analysed, but theory and practice of the concept of pastiche are also not necessarily identical (Hoesterey 2001: ix). This suggests that an in-depth ethnography within a genre like hip-hop here may produce an even more complex view of the significance—or possibly insignificance—of the concept of pastiche for the genre in question.

All this is an argument in favour of fighting for the general clause of "independent use" which would allow for a more flexible approach to the balance of interests and would be better suited to the aesthetic objects and closer to each individual case, without requiring a large number of preliminary decisions (Döhl 2016b). It is to be expected (or at least hoped) that the further proceedings in the *Metall auf Metall* case will make this necessity abundantly clear—and turn the attention of the discourse away from the question of the mere size of a sample towards the question what "independent use" shall mean in the context

of contemporary digital appropriation practices in all arts that do not primarily focus humorous and/or critical intentions.[15] Like the *Metall auf Metall* case.

Notes

1 Regional Court Hamburg (Landgericht (LG) Hamburg), 308 O 90/99 [08/10/2004] – *Metall auf Metall*, in: *BeckRS* (2013), no. 07726; Higher Regional Court Hamburg (Oberlandesgericht (OLG) Hamburg): 5 U 48/05 [07/06/2006] (*Metall auf Metall I*), https://openjur.de/u/172802.html; Federal Court of Justice (Bundesgerichtshof(BGH)):IZR112/06[20/11/2008] (*Metall auf Metall I*), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=de95cc84c2ce749f20ccca0093c4992e&nr=46823&pos=8&anz=9; Higher Regional Court Hamburg (Oberlandesgericht(OLG)Hamburg):5U48/05 [17/08/2011] (*Metall auf Metall II*), https://openjur.de/u/172802.html; Federal Court of Justice (Bundesgerichtshof (BGH)): I ZR 112/06 [20/11/2008] (*Metall auf Metall I*), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=de95cc84c2ce749f20ccca0093c4992e&nr=46823&pos=8&anz=9; Federal Court of Justice (Bundesgerichtshof (BGH)): I ZR 182/11 [13/12/2012] (*Metall auf Metall II*), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=8d7c7a778781154a3db48d225d6a88f5&nr=64004&pos=6&anz=9; Federal Constitutional Court (Bundesverfassungsgericht (BVerfG)): 1 BvR 1585/13 [31/05/2016] (*Metall auf Metall*), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/05/rs20160531_1bvr158513.html;jsessionid=E2B9A1BB65BD723D88D203FCC11FE8F3.1_cid361; Federal Court of Justice (Bundesgerichtshof (BGH)): I ZR 115/16 [01.06.2017] (*Metall auf Metall III*), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=c061a07212bff4ca7b0cded8d6c2daa0&nr=78870&pos=0&anz=9 [all 24/01/2018].

2 The legal discourse takes an entirely different view (Ohly 2017: 967).

3 The author is currently studying for a doctorate at the University of Hamburg, focussing on this topic.

4 Directive 2006/115/EC might also come into play (European Copyright Society 2017) but for the purpose of the questions I am interested in the following it can be left aside.

5 See Directive 2001/29/EC, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001L0029 [24/01/2018].

6 This is suggested by Ohly (2017: 969) and the European Copyright Society (2017). As the Higher Regional Court

Hamburg (Oberlandesgericht (OLG) Hamburg) had already reached a verdict of independent use, which presumes that the German scope of protection stipulated in Secs. 1 and 2 UrhG applies, it seems reasonable to expect and to justify that, despite the brevity of the *Metall auf Metall* sample, the European Court of Justice will also consider the scope of protection of Sec. 2 to 4 of Directive 2001/29/EC as applicable.

7 This means narrowing down to the three case groups I am focusing on here; at the same time the provisions are expanded because the German 'fading' threshold is not readily transferable (Ungern-Sternberg 2015: 539).

8 See ECJ: *InfoCuria – Case-law of the Court of Justice*, http://curia.europa.eu/juris/recherche.jsf?language=en [24/01/2018].

9 The most famous example for this in terms of copyright law is the US *Campbell v. Acuff-Rose Music* case, 510 U.S. 569 (1994), https://www.law.cornell.edu//supct/html/92-1292.ZS.html [24/01/2018].

10 The National Archives: *Copyright, Design and Patents Act 1988*, http://www.legislation.gov.uk/ukpga/1988/48 [24/01/2018].

11 Intellectual Property Office: *Guidance. Exceptions to Copyright*, 2014, https://www.gov.uk/guidance/exceptions-to-copyright [24/01/2018].

12 The definition and use of the concept of collage are in no way more precise than for pastiche (Großmann 2005; Czernik 2008; Voigts-Virchow 2008: 514 f.; Emons 2009; McLeod/Kuenzli 2011; Banash 2013).

13 In fact, this is the legal situation at EU level at present: "if the individual creative characteristics of the work used are not reflected in the new work […] the original work is not 'exploited' in the sense of Secs. 2–4 of Directive 2001/29/EC" (Stieper 2015: 303). See also Ohly 2017: 969, who supports this as appropriate for the *Metall auf Metall* case of micro-sampling.

14 The history of the term is very old. It dates back to the renaissance and had, for instance in France in the mid-18th century, been scientifically classified as an imitation of another artist's style or of a third-party work (Radisich 2014: 34). For a more detailed early and later history of the term, see Hoesterey 2001: 1–16; Fletcher 2017: 48–62.

15 I would like to thank the sub-project B7 "Media Practices and Copyright Law: Social and Legal Framework for the Cooperative and Derivative Creation of Copyrighted Works in the Digital Environment" within SFB 1187 *Media of Cooperation*, namely Professor Dagmar Hoffmann for the invitation to present my paper at the conference "*Die Referenz als Teil der Kunstform: Zeitenwende im Urheberrecht?*" and now in this special edition of *Media in Action*. The sub-project attempts exactly the kind of interdisciplinary exchange between the law and related disciplines in an institutionalised way as I am proposing here.

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