Chapter 8
Fairness Aspects of Techniques of Referencing Cultures

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I. Referencing as a Cultural Phenomenon

Today, images gain their power and prominence through mass reproduction on social networks. The emergence of new digital technologies and apps means that our social relationship to images and originality is changing.[2] There are unprecedented opportunities to copy an original with minimal effort without losing quality. But it is only with the circulation of these images on social networks and their accompanying storage in cultural memory that images gained significance. With digitalization, not only the possibility of appropriation und referencing has changed, but also the general attitude towards it: The new media promote the "flow of images, ideas, and narratives across multiple media channels and demand more active modes of spectatorship".[3] The culture of participation on the Internet has led to appropriation and referencing becoming an everyday phenomenon.[4]

Despite this widespread culture of referencing, there is still a legal risk for those using other people's images. For example, the photographer of the well-known meme "Socially Awkward Penguin" has forbidden the use of the penguin's image.[5] Memes are image-text combinations shared on the Internet where the image often represents extraneous material.[6] The

1 This contribution draws from and is building upon previous work by the author on the same subject, see Bauer (2020).
2 As was already the case, for example, with the discovery of photography.
3 Jenkins (2006) 138.
4 For more detailed information on digital image culture, see Bauer (2020) 104 et seq.
5 Dobusch (2015).
6 Maier (2016) 397. Cultural studies scholar Shifman has defined digital memes as "(a) a group of digital entities that share common characteristics in content, form, and/or attitude, (b) created in conscious engagement with other memes, and (c) disseminated, imitated, and/or transformed by many users on the Internet", Shifman (2014) 44. See also von Gehlen (2020).

term meme originates from Richard Dawkins who defined it as a cultural counterpart to evolution, thus understanding memes as cultural entities that are like genes to genetics.[7] The "Socially Awkward Penguin" was used in different variations for three years by the tech blog GetDigital and in April 2015, they received a 785.40 Euro cease-and-desist warning from Getty Images, the photo agency that holds the rights to the image.[8] Originally, George F. Mobley was commissioned by National Geographic to photograph the Adélie penguin. The "Socially Awkward Penguin" meme uses this photo and positions it against a different background. Memes generally work by using a pre-existing image supplemented with their own text. The texts of the meme are modified again and again, so that the meme always produces new contexts and new meanings. While the text changes, the image or graphic remain the same. Thus, the concept of the meme becomes entrenched and takes on a life of its own and as a metatext. The metatext is the abstract properties of its content and form, how to add a meme correctly in a conversation and how to expand its meaning.[9] This metatext belongs to a meme type.[10] Meme types can be perpetuated by tokens that are generated repeatedly. The image is thus used to generate a new meme – and this meme is in turn to be used communicatively within Internet culture and social networks.[11]

Appropriation and referencing are explicitly seen as a feature of memes.[12] Yet copyright law has prevented this referencing culture regarding the use of the socially awkward penguin.[13] Copyright law assigns the rights to use an image to an individual who can control with its copyright whether and how such an image may be used. But if the image is now necessary for communication, why should the creator of the image still be allowed to control its use? If the creator uploads an image online, should it not be expected that other people will use it?

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7 "Examples of memes are tunes, ideas, catch-phrases, clothes fashions, ways of making pots or of building arches. Just as genes propagate themselves in the gene pool by leaping from body to body via sperms or eggs, so memes propagate themselves in the meme pool by leaping from brain to brain via a process which, in the broad sense, can be called imitation", Dawkins (1976/2006) 192.

8 See Kühl (2015).

9 Grünewald-Schukalla/Fischer (2018) 7.

10 See also Herwig (2018) 4.

11 Cf. in more detail on digital network culture Bauer (2020) 75 et seq.

12 See Grünewald-Schukalla/Fischer (2018) 7.

13 Meanwhile, a new public domain version of the "Socially Awkward Penguin" is also available (https:// www.getdigital.de/blog/getty-images-wants-license-fees-for-the-awkward-penguin-meme/).

Prior to the introduction of Art. 17 of the DSM-Directive 2019/790[14], these questions led to major debate and protest regarding user rights and the obligation to use upload filters. Opponents of this reform feared the end of the free Internet[15] and made their discontent known through petitions[16] and in Europe-wide demonstrations, using the hashtag #savethememe.[17] The demonstrators advocated an open referencing culture on the Internet to allow the use of other people's works through memes, GIFs, User Generated Content etc. The importance of referencing and appropriating should also play a role in copyright assessment – the rights to use an image should be distributed more fairly.[18] If copyright law does not take into account the conditions and norms of communication,[19] thus not considering the legal reality of users, the legitimacy crisis of copyright law will be exacerbated.[20] Copyright law can only effectively regulate interpersonal relationships if it is also accepted and followed.[21] Thus, if copyright law no longer reflects social reality and is therefore no longer supported by social consensus, the effectiveness of copyright law is also at risk.[22]

14 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.

15 See Kaesling (2019) 587.

16 In particular by the SavetheInternet campaign, https://savetheinternet.info.

17 See Mewes (2019). – In Munich alone, about 40,000 demonstrated at the action alliance #saveyourinternet, cf. '40 000 protestieren in München gegen EU-Urheberrechtsreform', SZ vom 23.03.2019, https://www.sueddeutsche.de/muenchen/demo-muenchen-urheberrecht-1.4380419.

18 For the differences in self-perception of the opposing digital cultures (community of internet users on the one hand, and copyright holders on the other hand), the mutual ignorance and the resulting misunderstandings on both sides, see Dreier (2022b).

19 Peukert (2014) 82.

20 Cf. on the crisis of legitimacy in relation to appropriations Bauer (2020) 222 et seq. Regarding the notion of legitimacy crisis in copyright law, cf. Marl (2017) 1; Hansen (2009) 40 et seq.; Stallberg (2006) 25 et seq.; Raue (2013) 280; Leistner/Hansen (2008) 479; Geiger (2008) 468.

21 There have always been legal regulations that have not been followed, but are nevertheless necessary, such as in fare dodging or tax evasion. Non-compliance with the law does not automatically lead to the loss of the justification of the legal regulation. However, one cannot keep law away from the social reality and assume that legal reality does not remain without repercussions on the legitimacy of a norm, cf. Hansen (2009) 74 et seq.

22 Hansen (2009) 75.

II. The Importance of Referencing Cultures

1. Historical use of referencing and appropriation

Appropriation and referencing have always been artistic devices. Originally, they served to achieve closeness to an artistic model by consciously adopting similarities or by learning artistic techniques through copying. Various artistic techniques were used to try to get as close to the original as possible. The Romans, for example, emulated the Greek ideal and created their marble statues after Greek bronze casts.[23] The concept of *aemulatio* is particularly interesting, meaning the emulation after a model – and through this emulation enabling the surpassing of the model.[24] Here, too, appropriation conveys closeness to the original. Importantly, referentiality also allowed artists to learn through copying the workshop master or later at art academies. Within the workshop it was important for artists to paint in the style of the master to ensure uniform standards of quality and by appropriating the master's, the co-workers and apprentices could show how close their skills were to their workshop masters'. Art academy students copied to learn from the original and thus be able to paint as similarly as possible the artist of the original work.[25] One's own art could also be enhanced by associating it through appropriation to other artists who were already significant. In this context, appropriation was also an expression of admiration as well as a teaching tool: by appropriating the picture, the necessary artistic skills could be acquired.

2. Appropriation art[26]

In modern times, art evolved towards non-objectivity and self-reflection on the nature of art. Appropriating and referencing were used to express one's own reflections on the original. Finally, Appropriation Art, in which someone else's complete work was appropriated, can be seen as the culmination of this development. This art movement elevated the adoption of other creators' images to an artistic concept.[27]

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23 Stähli (2008) 15.
24 Blunck (2011) 19.
25 Rebbelmund (1999) 47.
26 For a more detailed analysis of Appropriation Art and Copyright, see Geiger (2022).
27 Rebbelmund (1999) 13.

The term Appropriation Art was first used to describe a group of artists around Sherrie Levine, Mike Bidlo and others in New York in the 1980s[28]. It is also fundamentally used for artists that appropriate other images. It works with all means that can be used for appropriation, such as the copy, imitation, collage and others. Appropriation comes from the Latin *appropriare*, which means "to make one's own". Appropriation thus describes the process of adopting existing artworks or their parts into one's own artwork. It can either be directly physically integrated or indirectly reproduced through one's own production. In the latter case, the foreign imagery can be appropriated in such a way that the format, technique, motif and style are repeated as exactly as possible[29] not to plagiarize, however, but to create independent works of art. "The copy is the original", proclaimed the appropriationist Elaine Sturtevant.[30] Thus, Appropriation is an artistic concept: it's programmatically directed towards the most exact possible repetition of a work.[31]

3. Referencing as a medium of communication

With digitization, appropriation evolved from an isolated artistic strategy with a theoretical foundation to a means of communication. Communication through appropriation now represents everyday user behaviour in the digital world. Images are used as raw material in digital culture: they are constantly changed, combined and placed in new contexts. In times of mass communication, people increasingly communicate with images instead of text. Photos are constantly being snapped and shared with

28 Crimp (1977). The group originated with the exhibition "Pictures" at the New York Artists Space in 1977, in which the works of Sherrie Levine, Robert Longo, Jack Goldstein, Troy Brauntuch and Philip Smith were shown. In the meantime, the term Appropriation Art is no longer used only for the original exhibition group of 1977, but also comprehensively for postmodern art that deals with copying and quotation in art (cf. Rebbelmund (1999) 11), so that other artists can also be understood as Appropriationists. The terms "pictures generation", "pictures generation of appopriation" or "iterativism" have also been used for them, but ultimately the term Appropriation Art has prevailed. "The Art of Appropriation" was the title of an exhibition at the Alternative Museum, New York, year 1985.

29 Zuschlag (2012) 127.

30 Sturtevant (1999) 155.

31 Zuschlag (2012) 127.

smartphones. Instead of a detailed description, emojis[32] or memes are sent that summarize in a reduced way what one wants to express. The image speaks for itself. For this, images are constantly being produced and transformed. The iconic turn[33] has led to a new significance of imagery in communication – the "hegemony of images"[34] means that the predominant role of spoken and written language in our culture is being replaced by the image.

The productive and flexible use of images makes them particularly suitable as a means of communication on the Internet. Communication is therefore not only shifting to the digital sphere, but how people communicate is also changing. Both exploitation techniques and interactive procedures greatly simplify the transformation and combination of works[35] and make appropriation an everyday phenomenon. Appropriating and referencing are now undertaken for the purposes of communication and have become a communicative medium. With digital media, every user now produces and alters images for the purpose of communication – and thanks to digital communication possibilities, these images are now continuously available everywhere. Appropriating and referencing are detached from the context of art and used functionally as a medium of communication.

32 An emoji is a pictogram similar to an emoticon that refers to emotional states, objects, animals, places, etc., see Dudenredaktion (ed), Emoji, in: Duden. Deutsches Universalwörterbuch, 2015. On the use of emojis in digital image culture, see Rebane (2021) and Ullrich (2019) 39.

33 "Iconic turn" is a term by Gottfried Boehm, which he introduced in 1994, and which denotes a turn towards image science and the examination of how images influence people in their perception of the world and their behaviour, cf. Boehm (1994) 11. In 1992, W.J.T. Mitchell proclaimed the "pictorial turn", which has similar cultural changes in mind, but is more iconological (following Erwin Panofsky) than the "iconic turn", which seeks to establish a hermeneutics of the image, cf. Mitchell (1992). Cf. in detail also the correspondence between Boehm and Mitchell (2014) and fundamentally Maar/Burda (2004); Mitchell (1994); Burda (2010); Belting (2011); Sachs-Hombach (2013) and the website www.iconictur n.de of the Hubert-Burda-Stiftung.

34 Bredekamp (1997) 230.

35 Klass (2015) 298.

III. Under German Copyright Law

Under German copyright law, the lawful use of memes is still unclear. German copyright law considers communication in social networks such as Facebook groups or Instagram as public communication, even if it is often perceived as private.[36] Therefore, the use of a meme usually constitutes an interference with the copyright owner's right to make the work publicly available pursuant to § 19a German Copyright Law (UrhG).

This use arguably requires consent pursuant to § 23 (1) sentence 1 UrhG, as it is not a free use pursuant to § 23 (1) sentence 2 UrhG (see following 1.). It is also not justified by the exception of citation pursuant to § 51 UrhG (see following 2.). A justification via the newly introduced exception for caricature, parody or parody pursuant to § 51a UrhG also seems questionable (see following 3. and 4.).

1. Consent pursuant to § 23 (1) sentence 2 UrhG

The use of works without permission, now regulated in § 23 (1) sentence 2 UrhG, makes it possible to use a work without the permission of the copyright owner, provided that a sufficient distance ("Abstand") to the work used is maintained. Conversely, if this distance is not maintained, this constitutes an adaptation which requires the consent of the copyright owner for publication.

This distance is established, on the one hand, by the external "fading" of the work used, i.e. when, in view of the idiosyncrasy of the new work, the borrowed idiosyncratic features of the protected older work fade away ("verblassen").[37] Memes as a picture-text combination do indeed add a new, additional or even contradictory level of meaning to the adopted picture by adding a text. However, this is not evident in the outward fading of the image's features – even with the addition of a text, the image remains in its entirety with all its individual features. On the other hand, however, a distance can also be achieved with so-called inner distance ("innerer

36 Marl (2020) 150 et seq.

37 German Federal Court of Justice (BGH), case I ZR 42/05 of 20 December 2000, para. 29, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (2008) 693 – TV Total; BGH case I ZR 264/91 of 11 March 1993, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (1994) 191, at 193 – Asterix-Persiflagen; Bullinger (2019) para. 10; Schulze (2018) para. 8; Loewenheim (2022) para. 11. This so-called "fading formula" ("Verblassens-Formel") goes back to Ulmer (1980) 275.

Abstand") from the work used. This criterion of inner distance, "fading in the broader sense", was developed by the Federal Court of Justice of Germany (Bundesgerichtshof, BGH) for parody cases.[38] It is applicable if the distance is achieved in a way other than outward fading and if the new work is regarded as independent in its essence.[39]

Such an inner distance can be achieved through an art-specific interpretation ("kunstspezifische Auslegung") if an independent work of art is created by adopting the idiosyncratic features of the older work.[40] The freedom of art pursuant to Art. 5 (3) of the German Constitution (Grundgesetz, GG) creates a legal free space for art which must necessarily be considered within the framework of copyright law. This free space can also be considered as inner distance. For this to be the case, however, techniques of online referencing cultures such as memes or GIFs must be art within the meaning of Art. 5 (3) GG. This cannot be assumed because according to the material concept of art[41], art is the result of free creative design and

38 BGH, case I ZR 264/91 of 11 March 1993, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (1994) 191, at 193 – Asterix-Persiflagen. However, the inner distance is not only applied in cases of parody but is also considered a criterion for other art forms in which a third party's work is dealt with in an independent form, cf. Schulze (2018) para. 16; Bullinger (2019) para. 14.

39 BGH, case I ZR 264/91 of 11 March 1993, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (1994) 191, at 193 – Asterix-Persiflagen.

40 See on an art-specific interpretation of § 24 UrhG old version, on which § 23 (1) sentence 2 UrhG is based, German Constitutional Court (BverfG), case 1 BvR 1585/13 of 31 May 2016, para. 86, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (2016), 690 – Metall auf Metall; BVerfG, case 1 BvR 825/98 of 29 June 2000, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (2001) 149, at 151 – Germania 3. The decision Metall auf Metall, however, refers to the adoption of the smallest parts (scraps of sound) as an infringement of the rights of the producer of the sound recording and thus precisely not to an infringement of copyright. However, the principles of the judgment on the art-specific interpretation of § 24 (1) UrhG old version apply not only to neighbouring rights but also to copyright. Although the Germania 3 decision refers to the freedom of citation pursuant to § 51 UrhG, the principles established can be transferred, cf. Schulze (2018) para. 25; Summerer (2015) 94; Wegmann (2013) 195; Huttenlauch (2010) 153/154; for a different opinion see Ohly (2017) 967, who rejects a balancing between protection of the copyright owner and artistic freedom beyond the recognised case group of inner distance.

41 The material concept of art recognises as "the essence of artistic activity the free creative design in which impressions, experiences and experiences of the artist are brought to immediate perception through the medium of a specific formal language"; see BVerfG, case 1 BvR 435/68 of 24 February 1971, Neue Juristische Wochenschrift (NJW) (1971) 1645 – Mephisto, and case 1 BvR 765/66 of 7 July 1971, Neue Juristische Wochenschrift (NJW) (1971) 2163 – Schulbuchprivileg.

the expression of one's own personality.[42] However, communicative appropriations are not intended precisely to express the personality itself but to communicate effectively. From the very beginning, the production of these pictorial phenomena is geared towards sharing in communication structures: It is thus not about the representation of the appropriator's personality. Therefore, an art-specific interpretation is not applicable for communicative appropriations such as memes, GIFs and image montages.[43] Since memes thus do not maintain the necessary distance within the meaning of § 23 (1) sentence 2 UrhG, they constitute an adaptation within the meaning of § 23 (1) sentence 1 UrhG, so that consent to publication would be necessary.

2. *Citation according to § 51 UrhG*

A citation pursuant to § 51 UrhG requires, in addition to other requirements, the existence of a citation purpose ("Zitatzweck"). This means that there is an "inner connection" between the quoted and the quoting work.[44] The cited work must be used to explain the content of the citing work, not the cited work.[45] The citation must not have the aim of sparing the author's own explanations[46] or serve solely as an illustration.[47]

An art-specific interpretation, also made within the framework of § 51 UrhG, recognises the citation as an aesthetic medium on the basis of the right to the freedom of art pursuant to Art. 5 (3) GG and eases the requirements of "inner connection" for works of art.[48] For this, however, the

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In this context, artistic creation is understood as an expression of the artist's individual personality and less as a communicative act of communication.

42 See also Wandtke (2019) 143.

43 See as to the same conclusion Maier (2016) 379.

44 BGH, case I ZR 83/66 of 3 April 1968, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (1968) 607, at 609 – Kandinsky I.

45 Court of Appeals (Oberlandesgericht, OLG) Munich, case 29 U 1204/2 of 14 June 2012, Archiv für Presserecht (AfP) (2012) 395 – Mein Kampf; Dreier (2022a) para. 3; Spindler (2020) para. 30.

46 Court of Appeals (Kammergericht, KG) Berlin, case 5 U 1457/69 of 13 January 1970, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (1970) 616, at 618 – Eintänzer.

47 BGH, case I ZR 69/14 of 17 December 2015, para. 25, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (2016) 368 – Exklusivinterview.

48 BVerfG, case 1 BvR 825/98 of 29 June 2000, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (2001) 149, at 151 – Germania 3; BGH, case I ZR 42/05

citation must be used as a means of artistic expression and artistic design to make its own artistic statement. In the case of memes, this requirement is not fulfilled, as mentioned before.[49] The inner connection to the cited image will usually not suffice. In memes the image has no supporting function[50] since it does not serve to cite one's own remarks but is the main component of the meme.

3. *Caricature or parody according to § 51a UrhG*

The exception provision of § 51a UrhG was introduced as a consequence of the CJEU ruling in the case *Pelham/Hütter* by the Act on the Adaptation of Copyright Law to the Requirements of the Digital Single Market (Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes[51]). Here, the CJEU held that a Member State may not provide in its national law for an exception or limitation – such as the provision of § 24 (1) UrhG old version – with regard to the right of the phonogram producer which is not provided for in Art. 5 Information Society (InfoSoc) Directive 2001/29/EC.[52] The exception of § 51a UrhG corresponds to Art. 5 (3) lit. (k) of the InfoSoc-Directive.

At first glance, § 51a UrhG appears to be applicable to justify the use of third-party copyright works by means of an exception provision. This is because the exception allows for the use of pre-existing copyrighted works.[53] There is, however, a fly in the ointment at a closer examination.

According to recent CJEU case law, it is not necessary that a new personal intellectual creation within the meaning of § 2 (2) UrhG is created by the use of the third party's work when invoking the § 51a UrhG exception in contrast to the older version pursuant to § 24 UrhG.[54] Therefore, the re-

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of 20 December 2008, para. 44, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (2008) 693 – TV Total; OLG Brandenburg, case 6 U 14/10 of 9 November 2010, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (2011) 141, at 142 – Literarische Collage.

49 BVerfG, case 1 BvR 825/98 of 29 June 2000, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (2001) 149, at 151 – Germania 3.

50 Cf. also Maier (2016) 397.

51 German Official Journal (Bundesgesetzblatt, BGBl) Part I of 4 June 2021, 1204.

52 CJEU case C-476/17 of 29 July 2019, para. 65, ECLI:EU:C:2019:624 – Pelham/Hütter.

53 Cf. German Government (2021) 89.

54 Ibid.; see also CJEU case C-201/13 of 3 September 2014, para. 21, ECLI:EU:C:2014:2132 – Deckmyn und Vrijheidsfonds; BGH case I ZR 9/15 of

sult of the permitted use does not need to reach the level of creation of a copyright work. The legally permitted derivative uses under § 51a UrhG are all reminiscent of one or more pre-existing works. In order to distinguish them from plagiarism (which is inadmissible under copyright law), they must at the same time show perceptible differences from the original work.[55] However, a "fading" of the original work is not required, in contrast to § 23 (1) sentence 2 UrhG for uses which do not require consent. Finally, the use of the pre-existing work must serve a substantive or artistic engagement of the user with the work or another object of reference.[56] This is generally the case with memes, as they express the freedom of expression and communication pursuant to Art. 11 (1) of the Charter of Fundamental Rights of the European Union (CFR).

However, memes are neither parodies nor caricatures. Parody is an autonomous term of EU law and is therefore to be interpreted uniformly.[57] The characteristics of a parody are that it is reminiscent of an existing work, while simultaneously displaying perceptible differences from it. Additionally, it must be an expression of humour or mockery.[58] Thus, it is no longer necessary that the parody relates to the original work itself or indicates this work[59], as was previously required by the Federal Court of Justice of Germany (BGH).[60] It is true that memes can be regarded as Internet jokes which use the foreign material in a surprising and humorous way.[61] However, their main function is to communicate, not to be a humorous work.[62] Only in a few individual cases, then, will a meme satisfy the requirements of parody.

Yet the essential characteristics of a caricature have not yet been clarified at the level of EU law. A caricature usually involves a drawing or other pictorial representation which, by satirically highlighting or exaggerating

28 July 2016, para. 28, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (2016) 1157 – auf fett getrimmt.

55 German Government (2021) 89.

56 Concerning parody see CJEU case C-201/13 of 3 September 2014, ECLI:EU:C:2014:2132 – Deckmyn und Vrijheidsfonds.

57 CJEU case C-201/13 of 3 September 2014, para. 17, ECLI:EU:C:2014:2132 – Deckmyn und Vrijheidsfonds.

58 Ibid. para. 33.

59 Ibid.

60 The so-called anti-thematic treatment as a prerequisite of parody is thus no longer necessary.

61 Maier (2016) 398.

62 See Ullrich (2016).

certain characteristic traits, exposes a person, thing or event to ridicule.[63] In the case of memes, this – if at all existent – is not the main focus of using the pre-existing image.

4. *Pastiche according to § 51a UrhG*

The pastiche exception provision has so far received little attention in German legal literature.[64] It was modelled on Art. 5 (3) lit. (k) of the InfoSoc-Directive, which originates from French copyright law (Art. L 122–5 Code de la propriété intellectuelle). The French copyright law assigns the three terms to three categories of work: caricature concerning pictorial art, parody concerning music, and pastiche concerning literature.[65] For one thing, this distinction is not very useful, since European and also German copyright law do not differentiate between the genres of art, music and literature, but all fall under the same concept of a copyright work. In addition, parody is already not understood in a genre-specific manner according to previous CJEU case law: in the *Deckmyn* judgment, a drawing, i.e., a pictorial work of art, was classified as a parody.[66] The pastiche is thus not limited to a specific genre of referential work.[67]

If the terms caricature, parody and pastiche are therefore not assigned to different genres, the question arises as to how they can otherwise be distinguished from one another and what they have in common. In common usage, the term pastiche is not very widespread in the German language, unlike in French or English.[68] In the English language, pastiche is used as a generic term for a wide variety of forms of adoption and similarity.[69] In music theory, the term pastiche is more common and refers to a work that

63 German Government (2021) 91.
64 See Ohly (2017) 969; Stieper (2015) 304, who argued for a usability of the pastiche exception even before the CJEU decision in C-476/17 of 29 July 2019, para. 65, ECLI:EU:C:2019:624 – Pelham/Hütter.
65 See Vlah (2015) 43. Similarly, Hess (1993) 95, who also distinguishes between the three terms according to the genres of the originals understanding caricature as the imitation of persons, parody as the imitation of genres/styles or works of art history, and satire as using situations and customs.
66 CJEU case C-201/13 of 3 September 2014, para. 18 et seq., 29, ECLI:EU:C:2014:2132 – Deckmyn und Vrijheidsfonds.
67 Pötzlberger (2018a) 680.
68 On this subject, see Stieper (2015) 304.
69 Brinkmann (2021) 68/69 with further references.

is mainly or entirely composed of existing music.[70] Pastiche is also used in legal literature to refer to new musical forms such as remix or sampling.[71] The literary pastiche term refers to a process of stylistic imitation of an author or group of texts by different authors, e.g. of a particular period or genre.[72] The pastiche reveals its intertextual structure.[73] Such a notion of pastiche cannot be used when interpreting Art. 5 (3) lit. (k) InfoSoc-Directive. This is because the style of a work is not protected by copyright law[74], consequently there is no need for a legal exception for stylistic imitations.[75]

It remains open which interpretation of pastiche underlies the new § 51a UrhG. Since it is an autonomous term of EU law, the CJEU must ultimately decide this. Therefore, possible interpretations of the term pastiche are now examined.

a) A broad understanding of pastiche in the Explanatory Memorandum to the German Act implementing the DSM-Directive

The Memorandum of the German draft bill ("Gesetzesentwurf") on the Adaptation of Copyright Law to the Requirements of the Digital Single Market (Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes) of 9 February 2021 is based on such a broad understanding of the term pastiche that it is being transformed into an open-ended general clause. Accordingly, pastiche – just like parody or caricature – deals with a pre-existing work. Unlike parody and caricature, which require a humorous or mocking component, a pastiche may also contain an expression of appreciation or reverence for the original, for example as a homage.[76] In particular, pastiche permits, pursuant to § 5 (1) no. 2 of the new "Law on the Copyright Responsibility of Service Providers for Shar-

70 Stieper (2015) 304.
71 Pötzlberger (2018a), 680/681; Ohly (2017) 968.
72 See Stieper, Fan Fiction als moderne Form der Pastiche, AfP 2015, pp. 301, 304 with reference to Antonsen in Müller (Hrsg.) Reallexikon der deutschen Literaturwissenschaft Bd. III, 2003, p. 34.
73 Stieper (2015) 305.
74 BGH, case I ZR 135/87 of 8 June 1989, Neue Juristische Wochenschrift (NJW) (1990) 1986, at 1987/8 – Emil Nolde; Schack (2017) para. 235.
75 See also Stieper (2015) 305; Pötzlberger (2018a) 676; of a different opinion Walter (2010) who argues that pastiche in the sense of Art. 5 (3) InfoSoc-Directive only means imitations of style.
76 German Government (2021) 91.

ing Online Content" (Gesetz über die urheberrechtliche Verantwortlichkeit von Diensteanbietern für das Teilen von Online-Inhalten, Urheberrechts-Diensteanbieter-Gesetz, UrhDaG), use without the rightholder's consent of certain user-generated content which cannot be classified as parody or caricature. Such use also maintains an appropriate balance when assessing copyright interests, namely owners and users.[77]

The draft bill memorandum even assumes that memes constitute a pastiche and thus, are covered by the exception: "Quoting, imitating and borrowing cultural techniques are a defining element of intertextuality and contemporary cultural creation and communication on the 'social web'. In particular, practices such as remix, meme, GIF, mashup, fan art, fan fiction or sampling come to mind."[78] This is the case, as EU law expressly justifies in § 17 (7) subpara. 2 DSM-Directive and recital 70 DSM-Directive the obligation to introduce the exceptions which protect freedom of expression and artistic freedom, now enshrined in § 51a UrhG. This broad understanding of pastiche can be justified by the fact that the new § 51a UrhG is meant to replace old § 24 (1) UrhG (old version), which was repealed due to its unlawfulness under EU law.[79] However, § 51a UrhG does not even require latter works to keep an appropriate (inner or outward) distance from the copyrighted work used, thus stipulating fewer requirements than the old version.

b) A narrow understanding of pastiche

However, there are many arguments against this broad interpretation. Most importantly, there are major doubts as to whether it is consistent with the meaning of the pastiche exception at the European level.[80] The pastiche exception was only implemented in a few member states, and if at all implemented it is not understood to have such a fundamental, almost general clause-like meaning. As seen above, the introduction of the pastiche exception in Art. 5 (3) lit. (k) of the InfoSoc-Directive originates from French law which does not view it as a general clause for referencing. Even when it was introduced into EU law, pastiche was not intended to be an exception for creative uses – rather, the pastiche exception did not play any

77 Ibid.
78 Ibid.
79 Döhl (2020) 380.
80 Ibid. 413.

role in in the legislative documents on the InfoSoc-Directive[81] or in the numerous decisions of the courts in the cases concerning the litigation under the names of *Metall auf Metall* and *Pelham/Hütter*.[82] The sampling at issue in these judgements would probably now be a prime example of what the draft bill memorandum intended pastiche to mean.[83] If it were so obvious that referencing and creative appropriation were to be included under the pastiche term, this would have been discussed in this year-long dispute about the meaning of sampling.

Even when § 5 (3) lit. (k) of the InfoSoc-Directive was introduced, the aim was not to introduce a general clause for creative referencing for the simple reason that social media, user-generated content and referencing culture on the Internet were not an issue in 2001. Rather, the main objective of the InfoSoc-Directive was to prevent digital piracy and file sharing.[84] Thus, there is no unintentional regulatory gap within the term pastiche, which cannot now be converted into a general clause exception. In the draft bill memorandum however, pastiche becomes a synonym for recombining existing material of any kind and quality, regardless of the scope, purpose or commercial nature of the reference. All of this suggests that the concept of pastiche is not suited to claim such a broad, overarching, and fundamental exception as the draft bill memorandum determines.

Döhl derives from the use of the term of pastiche in art science and musicology that in § 51a UrhG it probably means "a kind of disclosed forgery, writing in a foreign aesthetic language, which admittedly does not want to be fraud, but thus serves an interacting artistic purpose".[85] An understanding of pastiche as an artistic transformation that serves the exercise of the

81 Ibid. 414.

82 BGH, case I ZR 115/16 of 30 April 2020, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (2020) 843 – Metall auf Metall IV; CJEU, case C-476/17 of 29 July 2019, para. 65, ECLI:EU:C:2019:624 – Pelham/Hütter; BVerfG, case 1 BvR 1585/13 of 31 May 2016, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (2016), 690 – Metall auf Metall; BGH, case I ZR 112/06 of 20 November 2008, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (2008) 403 – Metall auf Metall I; BGH, case I ZR 182/11 of 13 December 2012, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (2013) 614 – Metall auf Metall II; BGH, case I ZR 115/16 of 1 June 2017, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (2017) 895 – Metall auf Metall III.

83 Sampling is explicitly mentioned, see German Government (2021) 91; Döhl (2020) 389.

84 Döhl (2020) 416.

85 Ibid. 439.

fundamentally protected artistic freedom in Art. 13 CFR[86] seems to be the interpretation preferred by legal history and the will of the EU legislator. Since the CJEU in *Pelham/Hütter* provided a much narrower requirement for sampling by requiring perceptible differences to a work, this artistic understanding of pastiche can already be understood as broad.

c) Pastiche does not achieve a systemic change

The pastiche exception in § 51a UrhG does not bring about the systemic change in copyright law that the German legislator envisaged according to the draft bill memorandum. Since § 51a UrhG is based on Art. 5 (3) lit. (k) of the InfoSoc-Directive, the term must be interpreted as an autonomous term of EU law. It can be assumed that the CJEU and probably also the German courts will adopt a narrow interpretation of the term. This is because the pastiche exception was not intended to create a general clause for referencing techniques.

Even if an exception for referencing techniques is desirable,[87] it is not yet achieved by the pastiche exception in § 51a UrhG. This is because the introduction of the pastiche term would otherwise protect techniques which, according to unanimous legal literature and case law, were not previously permitted by way of free use pursuant to the older version of § 24 UrhG. It is not acceptable that the implementation of a hitherto vague and unclear exception from the InfoSoc-Directive should lead to a systemic change in copyright law, which has often been called for, but which has not been legally anchored in any way. In particular, it is not possible to impose an exception for creative usages on other EU member states through the back door by way of norm interpretation on which no political consensus has yet been reached.[88]

86 See also Bauer (2020) 288.

87 As already called for in numerous cases by Bauer, Die Aneignung von Bildern, 2020, p. 293 ff.; Bauer (2011) 392 et seq. (exception provision for user-generated content); Ziegler (2016) 253 (exception for social sharing); Pötzlberger (2018b) 298 et seq. (exception for creative remixing); the initiative "Recht auf Remix", https://rechtaufremix.org, (exception for remixes); Kreutzer (2011) 73; (exception for transformative uses of works); Geiger (2008) 463/464 and 467 (exception for creative uses); Vlah (2015) 194 et seq. (exception for parodies); Döhl (2016) 314 et seq. (exception for creative usages).

88 See also Döhl (2020) 440.

For memes, this means that they are not justified as pastiche pursuant to § 51a UrhG. For even if one adopts an artistic conceptual understanding of pastiche, memes are not to be classified as artistic, as already mentioned above, and are also not protected by artistic freedom pursuant to Art. 5 (3) GG or Art. 13 CFR.

V. Concluding Remarks

Summing up, the assessment of memes under German copyright law remains a highly relevant problem even after the introduction of § 51a UrhG. There are no exceptions applicable, so they will continue to constitute copyright infringements. The pastiche exception in § 51a UrhG will not be able to solve this problem even though the draft bill memorandum explicitly mentions memes as a case of pastiche. However, this broad understanding would represent a change in the copyright law system which was not intended when implementing Art. 5 (3) lit. (k) InfoSoc-Directive into the German Act and equally, was not possible. Since pastiche is an autonomous term of EU law, only the CJEU can ultimately clarify how the exception provision should be interpreted. However, there are no indications that the introduction of an exception for creative repurposing and referencing was intended.

Thus, there continues to be a discrepancy between the rigid legal assessment of appropriation and referencing techniques on the one hand, and the changed communication behaviour in social media on the other. Without a legal exemption for communicative appropriations, the legitimacy crisis of copyright law intensifies. For if copyright law no longer reflects social reality, it will no longer be supported by social consensus. Thus, the assignment to introduce an exception provision for non-commercial appropriations remains with the EU legislator.[89]

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89 Cf. in detail Bauer (2020) 288 et seq.

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