The Legal Art of Judging Art

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In another round of the case „Metall auf Metall“, the German Federal Court of Justice (Bundesgerichtshof – BGH) is asking the Court of Justice of the European Union (CJEU) how to define the concept of pastiche. The CJEU response will not only be crucial for the rules of artistic imitation, but also set the legal frame for the digital reference culture of millions, as expressed in Memes and GIFs every day. This Article takes the referral to the CJEU as an opportunity to recapitulate the proceedings with a sideways glance at the Supreme Court’s Warhol case. Its discussion of transformative use addresses the questions the CJEU will have to answer when defining “pastiche”. How should we deal with the art of imitation?

“Metall auf Metall”: An engine of legal progress

More than 20 years ago, Moses Pelham took about two seconds of a rhythm from the track „Metall auf Metall“ by Kraftwerk for Sabrina Setlur’s „Nur mir“. He did not obtain a license to use it, nor did he include a reference to the origin of the sequence. After two decades, there is still no final decision in this case known as “Metall auf Metall”. However, the case already shaped German copyright law: from the interpretation of the right of reproduction (Case C-476/17, para 39) to the influence of the fundamental right of artistic freedom in copyright law (BVerfG, Judgement of 31 May 2016 – 1 BvR 1585/13, para 66 et seq.; Case C-476/17, para 34).

The actual importance of the case certainly is that it has raised awareness of the fact that artistic freedom must have a place in copyright doctrine. Creativity rarely arises ex novo (as noted as early as in BVerfGE 31, 229 (246)). Art depends on artists not only being inspired by older artworks, but also incorporating them in their own works. In German copyright law, the artistic reference of pre-existing works in own works was formerly guaranteed in § 24 German Copyright Act (UrhG) by the legal doctrine of “free use“ which allowed the free use of a work when its personal features fade away in a new copyrightable work. It *also* covered uses of works for parodies or caricatures, forms of expressions that use distorting imitations of an original work to achieve comic, satirical or critical effect (BGH, Judgement of 28 July 2016, para 22 et seq.). Due to the lack of a corresponding exception and limitation in the exhaustive list of Art. 5 InfoSoc Directive, the CJEU answered in the first Metall auf Metall-preliminary ruling procedure that a Member State is prohibited from providing for such a concept of free use in its domestic law (Case C-476/17, para 65).

Germany had to abolish § 24 UrhG and split its two functions into two new provisions: If the newly created content maintains a sufficient distance from the existing work, § 23 (1) sentence 2 UrhG now states that, in the absence of an adaptation of the existing work, the latter’s scope of protection under copyright law is not infringed (BT-Drs. 19/27426, page 78). Parodies, caricatures and pastiches

are now covered by the „Schranke“ of § 51a UrhG, which implements the exception and limitation of Art. 5 (3) lit. k) InfoSoc Directive. On this last concept, that of pastiche, the procedure will center: Is the exception and limitation for the purpose of pastiche to be read as a fall-back provision for any artistic reference to pre-existing works? Do restrictive criteria such as the requirement of humor, imitation of style or homage apply? When is a work used „for the purpose“ of a pastiche? Is the subjective intention of the user or the impression for third parties relevant? The CJEU's answers will determine not only how artists, but all of us may use pre-existing works for artistic expression or digital communication in everyday life.

How to balance imitation and difference?

Pastiche means imitation and therefore resides in the shadow of the copy: without license, the original sin of copyright (Drassinower, What's wrong with copying, 2015). On the other hand, imitation is culturally important because art often enough arises from older art. It is difficult to find a work of art in which the influence of preceding works cannot be detected. Therefore, the law has to differentiate different kinds of influences: imitation as copies and imitation as productive interpretation. But how to define the combination of imitation and difference?

The same anxiety of influence is to be found in legal doctrine: The decision of the CJEU will not be made ex nihilo, but as a choice between different traditions. In this respect the artistic meets a legal imitation game: How much do European judges follow national tradition? And is the other side of the Atlantic a good model?

The Supreme Court recently decided on a similar topic in its long-awaited ruling in Andy Warhol Foundation v. Goldsmith. It is based on the fair use doctrine, for which there is no equivalent in European copyright law. But its element of transformative use addressed basically the same problem of imitation and difference that the CJEU will address when defining the meaning of pastiche. The American case shows the advantages and disadvantages of an approach that does not rely on aesthetic values. According to the Supreme Court, the same copying might be fair when used for one purpose but not for another. The majority of the judges resolved the case on the basis of the interests of the creator of the original work in the case of a specific use. In the Warhol case, the old and new works competed and the old prevailed. The continental tradition argues for a different solution in Metall auf Metall: The concept of pastiche allows for an interpretation that balances imitation and difference in a way that does not focus on the economic interests of the creators and individual uses, but on the artistic quality of the old and the new work.

Anxiety of Influence: The Warhol case

In the United States, the Supreme Court recently ruled on Andy Warhol's use of a photograph of the artist Prince by Lynn Goldsmith, which he used as a template for a well-known silkscreen series. The photograph was licensed by Vanity Fair for one-time use: Warhol was contracted to use it to illustrate a story about the musician. Warhol did not only that, he also used the photograph to produce further

works. Years later, his estate licensed one of those works to Condé Nast, again for the purpose of illustrating a magazine story about Prince. Goldsmith wasn't compensated.

In U.S. copyright law, the determining factor is whether the transformative use of the work is „fair." One of four factors of the fair use doctrine (Section 107 Copyright Act) is whether the new artwork (the silkscreen) can substitute for the older one (the photographs) in the marketplace – the decision only deals with this factor. In a controversial interpretation, the majority of judges focused on the competition between the two works in one specific use case: the illustration of a magazine article about Prince. Because Warhol's artworks could substitute for the photographs in the marketplace, Warhol's use of the photographs was not „fair". Justice Kagan did not agree. In her dissent she plays through a thought experiment: An employee asks the editor of Vanity Fair or Conde# Nast to decide between the Goldsmith photo and the Warhol portrait for an article about prince. According to the ruling of the majority of judges, the editor would not care because they are both just "portraits of Prince". Her critique is based on an approach that values the aesthetic quality of Warhol's work.

In the majority's opinion, it is not determined once and for all whether the distance to a pre-existing work is sufficient and its level of creation high enough, but whether a specific use competes with the source work. The decision thereby burdens imitating works with a permanent proviso. Its creators have to live with the anxiety of influence of the creator of the original work (for this problem in literary theory, see Harold Bloom, The Anxiety of Influence: A Theory of Poetry, 1973). In this way, a balance of interests can be achieved without the need of aesthetic judgements about the value of the artworks in question – but at the price that the aesthetic value of an artwork which was created via imitation no longer plays a role. In the majority's argument, the quality or cultural significance of Warhol's work has no place. The Creator of a masterpiece has no more rights then the creator of a soccer-meme.

Framing the European Law of Imitation

"Warhol" shows that the renunciation of aesthetic judgments does not necessarily create legal certainty. It is much more preferable to determine once and for all whether an imitative work has sufficient difference to be protectable in its own right and not infringe the rights of the creator of the imitated work. For this, it is not possible to focus on concrete uses; rather, the works – for example "Metall auf Metall" and "Nur mir" – must be placed side by side and qualitatively evaluated. Inserting such an evaluation into the concept of pastiche allows for a consideration of the artistic quality of the work of art produced by imitation. The continental tradition of intellectual property and the fundamental rights that overarch it argue for such an evaluation to consider the aesthetic value of the new work: the more beautiful the content, the larger the frame.

In Europe, "copyright" is a misnomer. In the US and the UK the term signifies an inclination towards the protection of those who do the copying: the printer and later other economic players, who reap the benefit of cultural production. The German Urheberrecht, the French droit d'auteur, the Italian diritto d'autore: The

continental law centers on the author, not his economically overpowered, but creatively barren corporate partners like publishing houses or record labels. Author's rights were invented in the time of revolutions and codified thereafter, safeguarding not economic goods but valuable expressions – national convention passed the law for the protection of copyright, which the rapporteur Joseph Lakanal called the "déclaration des droits du genie" (Locré, La législation civile, commerciale et criminelle de la France, Paris 1827, vol. 9, p. 8). Author's rights may be goods, but their roots are embedded in the idea of personal expression (Lennartz/Kraetzig, RuZ 2022, 161). Not every expression has artistic value. Therefore, the UrhG states its primary raison d'etre in its first paragraph: "authors of works in the literary, scientific and artistic domain enjoy protection for their works". Shadowing article 1 of the Berne Convention, protection is focussed on a special set of creators: Literary writers, researchers, artists. In the past, the CJEU has shown little interest in these roots. It shuns aesthetic criteria with the consequence that the concept of work has lost much of its form – even cream cheese was considered as a protectable artifact, although without success (Case C#310/17). Still, tradition argues for an approach that values the level of artistic achievement.

Tradition may convince, but not compel. It's different with fundamental rights. According to the case law of the CJEU, the exception and limitation of Art. 5 (3) lit. k) InfoSoc Directive and therefore the concept of pastiche is to be interpreted in such a way that it can achieve a fair balance between the interests of the right holders and the freedom of expression of the user of a protected work (Case C#201/13, para 34). If this is the case, artistic freedom also must be taken into account when artists include copyrighted subject matter in their own artworks. There are obvious cases where the later work of art is more valuable than the earlier one: The Berlin Court of Appeals, for instance, had to rule on a case in which a corny digital picture was included in a painting whose painter regularly picks up and processes elements of bad taste. The court rejected a pastiche because of a lack of a contextual reference of the painting to the digital picture (Berlin Court of Appeals, Judgement of 30. October 2019 – 24 U 66/19). The case law of the German Federal Constitutional Court gives good reasons for a different decision: In "Metall auf Metall", it ruled that, based on the German freedom of the arts (Art. 5 (3) German Basic Law), which, unlike the corresponding provision in Art. 13 CFR, has a long history of case law, artistic uses are privileged over other uses. The Court has been carrying out a detailed examination of works of art for years and has come to good results (Lennartz, JZ 2023, 521). It is to be hoped that Luxembourg will follow this lead.
