

# THE PASTICHE IN COPYRIGHT LAW

EXPERT OPINION ON A COPYRIGHT-SPECIFIC  
DEFINITION OF PASTICHE ACCORDING TO SEC. 51A  
GERMAN COPYRIGHT ACT (URHG)

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This document constitutes a translation of the original expert opinion written in German and from a German law perspective. All direct quotes taken from German case law and legal literature have been translated.

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# I. EXECUTIVE SUMMARY

This expert opinion addresses the question of how the term “pastiche” in sec. 51a of the German Copyright Act (UrhG) is to be defined. Other studies, e.g. from the perspective of cultural history or musicology, have shown that although the term has long been used in various disciplines and languages, it is understood in very different ways. In light of this, a common understanding of the term “pastiche” cannot be determined. Essential for a legal – copyright-specific – interpretation are therefore the intentions pursued by the German and European legislators when introducing the pastiche exception.

According to the legislators, the pastiche exception serves to protect freedom of expression and artistic freedom, as well as social communication. It balances the interests of authors and users and is also intended to reconcile the interests of different kinds of authors, since the creators of pastiches will often be creatives themselves.

The German legislator has deliberately phrased the pastiche term in an open manner. It is clearly stated in the legislative materials that sec. 51a UrhG is intended to have a broad and dynamic scope of application. The pastiche exception serves to legitimize common cultural and communication practices on the internet, especially user-generated content and communication in social networks. It is supposed to be applied to remixes, memes, GIFs, mashups, fan art, fan fiction and sampling, among others.

An examination of the legislative materials further reveals that the legislator assumes that a number of characteristics are constitutive for the concept of pastiche and thus the application of sec. 51a UrhG. The proposal submitted here for a copyright-specific definition of “pastiche” is based on them:

“A pastiche is a distinct cultural and/or communicative artifact that borrows from and recognizably adopts the individual creative elements of published third-party works”.

To explain: An artifact is understood here to be a human-made product in the form of an immaterial object. Such an artifact may be a pastiche if it contains already published third-party works or if parts of works are “adopted” or borrowed, i.e. copied.<sup>1</sup> Style imitations or similar abstract borrowings are also sometimes referred to as pastiches. However, these are not relevant from a copyright point of view – and thus not relevant for a copyright-specific definition.

The central feature of the definition is distinction (independence). A cultural or communicative artifact is distinct if despite the borrowing(s), it has its own intellectual-aesthetic effect when compared to the source material.<sup>2</sup> This can manifest itself in a distinct semantic content/meaning (inner distance), which differs from that of the sources, and/or through a different overall impression (external distance). Put simply, the pastiche must have a different effect on the viewer than the borrowed works.

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1 See section IV. 1) for this aspect.

2 See section IV. 2) for this aspect.

Inner distance is created, for example, when the message is changed (antithematic, e.g. satirical uses), by insertion into a different context of meaning (e.g. mash-ups), or by recontextualization (as in the case of memes). External distance, on the other hand, lies in the design, i.e. in the fact that the borrowed material is edited to a greater or lesser extent. This is the case when a work is transformed into a different style or type of work (e.g. remix or fan fiction), when a number of different elements are put together (as in collages or mash-ups), or when very small elements are incorporated into much larger original works (as in sampling, for example).

It follows from the three-step test under European law in Article 5 (5) of the InfoSoc Directive that the application of the pastiche exception must not lead to unreasonable restrictions on the interests of the rights holder that were not intended by the legislator.<sup>3</sup> Specifically, this means on the one hand that the primary exploitation of the source material may not be restricted by the publication and exploitation of a pastiche. This will generally be avoided when the pastiche exception is applied according to the proposed definition.<sup>4</sup> On the other hand, “distortions” of the source material which the rights holder does not have to accept due to moral rights reasons are inadmissible. Whether this is the case must be examined in relevant (special) cases as part of a balancing of interests.

The specific application of the pastiche exception and of the above-mentioned definition is based on the individual case. The copyright-specific pastiche term will, as expected, apply to many (but not all) publications of the genres mentioned in the German explanatory memorandum to the copyright code (remixes, memes, GIFs, mashups, fan art, fan fiction, and sampling). The following arguments speak for or against this (viewed abstractly):

- Combining someone else’s image and your own text into a meme or GIF often creates an antithematic reference, which establishes distinction. As a rule, the primary use of the image will not be impaired due to the inner distance, but rather promoted.
- Remixes in which a single piece of music is completely transferred into a different style or a different key will usually lack sufficient distinction. An inner distance (e.g. an antithematic confrontation) will also usually not be present here. The same applies – even more so – to cover versions.
- Mash-ups, as video or music collages, will in any case have sufficient distinction if they are composed from a plurality of sources. The same will generally also apply to so-called bastard pop, in which two or more – usually very different – pieces of music are cut together and synchronized. In case of doubt, the distinction becomes all the greater when own performances (e.g. video or sound material) are added to the mashed source material. As a rule, these forms of transformative use do not replace the consumption of the source material and do not interfere with primary exploitation, but rather encourage its use.
- If a picture collage merely consists of a combination of complete works by the same artist, it will, in case of doubt, be primarily characterized by the original features of the sources. It then lacks “distinction”, which creates the risk of interference with the primary exploitation. In contrast, a combination of many small ex-

3 See section V. 3) for this aspect.

4 See section V. 3) c).

cerpts from works by the same artist can create a very distinct overall impression. Serious interference with its economic interests (reduction of sales opportunities, etc.) is not to be expected here.

- Fan art or fan fiction created by users will often be clearly recognizable as such, since independent content is created from the composition of existing elements. As a rule, this will have a rather positive economic effect on the exploitation opportunities of the source material.
- Lip-sync, karaoke or fan videos, in which complete pieces of music or film sequences are merely re-synced, are given custom subtitles or are intoned by the user, will generally lack the distinction required for a pastiche. Here, the source material is performed rather than transformed.
- Home videos in which protected music is played in the background will usually also lack distinction.
- Sampling will generally fall under the pastiche term. Samples are mostly very short excerpts that are integrated into pieces of music with an independent expression. They do not diminish the sales opportunities of the source material.

# II. INTRODUCTION

## 1) HISTORY AND WORDING

In the course of the implementation of the DSM Directive<sup>5</sup>, the German legislator introduced the new sec. 51a UrhG<sup>6</sup> with effect from June 7, 2021. It is part of the so-called “DSM-UrhR-AnpG”<sup>7</sup> and is based on Art. 5 (3) (k) of the InfoSoc Directive.<sup>8</sup> The new regulation reads as follows: <sup>9</sup>

### Sec. 51a Caricature, parody and pastiche

It is permitted to reproduce, distribute and communicate to the public a published work for the purpose of caricature, parody and pastiche. The authorization under sentence 1 includes the use of an illustration or other reproduction of the work used even if this is itself protected by copyright or a related right.

The main innovation of this regulation is the introduction of an exception for pastiche. Copyright exceptions relating to caricatures and parodies had already been recognized by the courts before. These exceptions were derived from the old sec. 24 UrhG.<sup>10</sup> However, the Federal Court of Justice (Bundesgerichtshof, BGH) had refused to infer a pastiche exception from the old legal situation.<sup>11</sup> Since the old sec. 24 had to be removed due to the case law of the ECJ, a new exception for caricature, parody and pastiche had to be introduced. Such an exception is now mandatory under national law due to the requirement in Art. 17 (7) subparagraph 2 lit. b of the DSM Directive.<sup>12</sup>

## 2) GENERAL REQUIREMENTS AND LEGAL CONSEQUENCES OF SEC. 51A

Re-uses according to sec. 51a are permitted with little restrictions. Caricatures, parodies and pastiches may be used by their creators in any way and for any purpose. Any type of work may be re-used, whether in part or in full.<sup>13</sup> Which intention is pursued with the re-use is generally irrelevant. The pasticheur may be guided by hu-

5 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.

6 All paragraph references are to the German Copyright Act (UrhG) unless otherwise stated.

7 Act to Adapt Copyright Law to the Requirements of the Digital Single Market of May 31, 2021 (BGBl. 2021 I p. 1204).

8 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

9 See the translation of the UrhG on the official repository maintained by the Federal Ministry of Justice: [https://www.gesetze-im-internet.de/englisch\\_urhg/englisch\\_urhg.html#p0379](https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0379).

10 Since this was deleted by the DSM-UrhR-AnpG, various new regulations were required, see explanatory memorandum BT-Drs. 19/27426, p. 89.

11 BGH GRUR 2020, 843, para 65 - Metall auf Metall IV.

12 Explanatory memorandum, BT-Drs. 19/27426, p. 89; Stieper GRUR 2020, 792, 793.

13 This follows directly from the wording of sec. 51a: “Permitted is the reproduction, distribution and communication to the public of a published work [...]”

mor or appreciation or simply by the fascination of playing with the material.<sup>14</sup> The pastiche can serve artistic or functional purposes, for example to illustrate an opinion or to underline an argument in a discussion.<sup>15</sup> The pasticheurs may pursue commercial interests<sup>16</sup> or merely wish to communicate; they may be a professional or a layperson.<sup>17</sup> In short, who makes the use and what the borrowing use<sup>18</sup> is intended for (commercial exploitation or non-commercial re-use, private use or publication, etc.), is not relevant for the applicability of sec. 51a. Nor is the quality of the borrowing use: Neither does it have to be a copyrighted work<sup>19</sup> nor a piece of art. Even amateurish everyday culture and communication is subject to the fundamental freedoms which sec. 51a aims to protect.<sup>20</sup> Moreover, neither attribution nor reference to sources is necessary (sec. 63 (1)) and modifications are permissible to the extent required by the purpose of use (sec. 62 (4a)).

Moreover, acts of use under sec. 51a are free of remuneration, but service providers must pay statutory remuneration if caricatures, parodies or pastiches are communicated to the public on a content platform as defined in sec. 2 of the Copyright Service Providers Act (UrhDaG) (sec. 5 (2) UrhDaG)<sup>21</sup>.

Considering the broad scope of the statutory limitation, the definition of the term “pastiche” is crucial for delimiting the scope of application. This will be examined in the following.

### 3) OBJECT OF EXAMINATION AND COURSE OF THE PRESENTATION

Specifically, this study addresses the question of how the term “pastiche” is to be understood from the perspective of German and European copyright law and which characteristics a use must have to be considered a pastiche. This study then develops criteria for interpretation in order to facilitate the application of the law.

Analysing these questions requires breaking novel legal ground. The term “pastiche” is new to German copyright law and accordingly has not been the subject of interpretation by the highest courts.<sup>22</sup> The ECJ has not yet ruled on this either, although pastiche exceptions have existed in some Member States for a long time.<sup>23</sup>

This expert opinion focuses mainly on an evaluation of the legislative materials. This includes in particular the

14 Ortland, ZGE 2022, 1 (33).

15 This shows a clear overlap with the right of citation, see VI. 2 below for the demarcation.

16 Explanatory Memorandum BT-Drs. 19/27426, p. 90. This means that both private and professional users are covered. However, whether or not marketing interests exist may be relevant to the balancing of interests that must be carried out when examining the third step of the three-step test (see V. 3) d) below).

17 Explanatory Memorandum BT-Drs. 19/27426, p. 90.

18 In accordance with the explanatory memorandum (BT-Drs. 19/27426, p. 89), the term “derivative use” is used in the following to refer to the result of the subsequent use (i.e. the respective parody, caricature or pastiche). Since this is not necessarily a “work” protected by copyright, terms such as “re-creative or transformative work” would be too narrow.

19 In this respect, the requirements of sec. 51a differ from those established by case law for parodies under sec. 24, for example. This change had to be made due to the ECJ case law in the “Deckmyn” case (C-201/13, para. 21).

20 Ortland, ZGE 2022, 1 (31).

21 The UrhDaG contains the transposition of art. 17 DSM directive into German law. See [https://www.gesetze-im-internet.de/englisch\\_urhdag/index.html](https://www.gesetze-im-internet.de/englisch_urhdag/index.html).

22 Since the introduction of sec. 51a, however, initial decisions have been made by lower courts, such as District Court of Berlin GRUR-RS 2021, 48603; Hanseatic Higher Regional Court of Hamburg GRUR-RS 2022, 9866 - Metall auf Metall II; District Court of München I GRUR-RS 2022, 13963.

23 Döhl, ZGE 2020, 380 (381).

explanatory memorandum to the DSM-UrhR-AnpG as well as the DSM and InfoSoc Directives together with their recitals. A detailed etymological or semantic conceptual analysis is not undertaken here.<sup>24</sup> Moreover, the focus is neither on legal-historical analyses (especially of the old legal situation under sec. 24 UrhG) nor on considerations of the other elements of sec. 51a (parodies and caricatures). These topics are addressed only to the extent that appears necessary for the examination of the pastiche exception.

This introduction is followed in Part III by an examination of the purpose of the provision as intended by the German and European legislators. This provides the basis for setting out key principles for the interpretation of the pastiche exception in Part IV. The section ends with an attempt to define the term “pastiche”. The subsequent Part V addresses the question of whether the results of interpretation must be subjected to a balancing of interests either generally or in exceptional cases. Part VI contains thoughts on the demarcation of the pastiche exception from the other elements of sec. 51a (caricature and parody) as well as on the right of quotation and free use. Part VII examines questions of the burden of proof, and Section VIII contains a concluding remark.

## 4) PRELIMINARY REMARK ON THE APPROACH

The purpose of this study is to develop criteria for the interpretation of the pastiche exception in sec. 51a that are as practice-oriented as possible. An attempt to subject the term “pastiche” to a linguistic interpretation does not appear to be of any further use in this context. In-depth studies have already been conducted on this subject.<sup>25</sup> These studies have shown that the term is used multidisciplinary and is understood in very different ways.<sup>26</sup>

It is true that the ordinary (technical) usage of language is to be particularly taken into account in the interpretation of laws.<sup>27</sup> However, in the case of such an ambiguous term as pastiche, this does not lead any further. In any case,

“the meaning and scope of that term must, as the Court has consistently held, be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part.”<sup>28</sup>

It is therefore necessary to develop a copyright-specific definition of the term “pastiche” that coincides with

<sup>24</sup> See II. 4) below.

<sup>25</sup> See, for example, Döhl, ZGE 2020, 380 (381); Petri in Fischer/Nolte/Senftleben/Spocht-Riemenschneider (eds.), *Gestaltung der Informationsrechtsordnung – FS für Thomas Dreier*, 487 (489 ff.); Ortland, ZGE 2022, 1 ff. See further Hudson, *Intellectual Property Quarterly*, 2017(4), 346-368.

<sup>26</sup> See Ortland, ZGE 2022, 1 (29 f.), who, after his extensive analysis of the pastiche term in 17 different European languages, draws the following conclusion: “A decision as to whether imitations of any kind, possibly including deceptively similar imitations or copies, and/or also collages, medleys, mashups or remix compositions are meant as a privileged use under the directive-compliant exception rules, copies, deliberately alienating stylizations and/or also collages, medleys, mashups, sampling or remix compositions are meant as an intended use privileged by the exception, cannot be derived from the wording of the relevant legal acts ‘according to its usual meaning in everyday language’ alone, which after all offers a more or less broad basis for each of these interpretations.”

<sup>27</sup> ECJ (C-201/13, para. 19) – Deckmyn.; Döhl, ZGE 2020, 380, 425.

<sup>28</sup> ECJ (C-201/13, para. 19) – Deckmyn. Emphasis in direct quotations has been added by the author.

the objectives of German copyright law and the InfoSoc Directive.

This analysis therefore focuses on the meaning and purpose of sec. 51a as they appear in light of the legislator's expressions of intent. The most important sources in this regard are the explanatory memorandum to the DSM-UrhR-AnpG and the recitals to the DSM and InfoSoc Directives.

# III. PURPOSE OF THE PROVISION

The recitals of the DSM Directive<sup>29</sup> as well as the legislative materials to the DSM-UrhR-AnpG contain all kinds of references to the intention and ratio of the pastiche exception. These considerations are of particular importance for its interpretation – as they are for the interpretation of statutory exceptions and limitations in general – even if they are not part of the legal text.<sup>30</sup>

Recital 70 of the DSM Directive emphasizes the particular importance of an exception for cultural and communication practices that are common, especially on the internet, in user-generated content. It reads:

“The steps taken by online content-sharing service providers in cooperation with rights holders should be without prejudice to the application of exceptions or limitations to copyright, including, in particular, those which guarantee the freedom of expression of users. Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. That is particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union (‘the Charter’), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property.”

The fact that the EU legislator (lately) attaches great importance to the exception for caricatures, parodies and pastiche is underlined by the fact that it was declared to be mandatory by Art. 17 sec. 7, subpara. 2(a) of the DSM Directive (see the last sentence of recital 70 cited above).<sup>31</sup> Hence, the originally optional Art. 5(3)(k) of the InfoSoc Directive was promoted to the rank of one of the rare mandatory EU copyright exceptions and limitations.<sup>32</sup> Consequently, the ECJ now also refers to the statutory exceptions and limitations (“exceptions and limitations to copyright”) as “rights [of] the users of works or other protected subject matter”.<sup>33</sup>

The German explanatory memorandum also refers to recital 70 of the DSM Directive. It also stresses that sec. 51a is intended primarily to balance the interests of rights holders with those of users and other creators.<sup>34</sup> With regard to the latter, the protection of freedom of expression and artistic freedom as well as social communication<sup>35</sup> is to be safeguarded. In summary, “the function of sec. 51a UrhG is to enable creative re-uses of pre-existing works in order to protect the freedom of art and freedom of expression pursuant to

29 The InfoSoc Directive, on the other hand, does not contain a specific recital regarding the exception for caricatures, parodies and pastiches in Art. 5(3)(k).

30 Dreier in Dreier/Schulze, UrhG, 7th edition 2022, before sec. 44a ff., para 7a.

31 This is also the view of the German legislator, see BT-Drs. 19/27426, 90.

32 Art. 5(3)(k) (for caricatures, parodies and pastiche), Art. 5(1) (for ephemeral reproductions) and Art. 5(3)(d) (for quotations, criticism and reviews – this was also declared mandatory by Art. 17(7) DSM Directive) are the only mandatory exceptions and limitations in the InfoSoc Directive.

33 EuZW 2022, 458 (para. 87) – Compatibility of upload filters and freedom of expression.

34 Explanatory Memorandum BT-Drs. 19/27426, p. 91.

35 Explanatory Memorandum BT-Drs. 19/27426, p. 2.

Art. 5 (1) and (3) GG and Art. 11 and 13 EU-GrCh, and thus to create a balance between creatives.<sup>36</sup>

The explanatory memorandum<sup>37</sup> further substantiates this basic approach as follows:

“The purpose of sec. 51a UrhG-E is, on the one hand, to provide legal security for “classic” re-uses, such as political caricature in press media, a parody in a satirical television program or a literary pastiche. At the same time, modern forms of transformative use of copyrighted content, especially in the digital environment, can also be subsumed under the concepts of caricature, parody, or pastiche.”<sup>38</sup> (...)

Accordingly, the pastiche, in particular, allows certain user-generated content (UGC) to be legally permitted under sec. 5(1)(2) UrhDaG-E, which cannot be classified as parody or caricature and for which an appropriate balance is maintained in the context of balancing the rights and interests of authors and users. 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.”<sup>39</sup> (...)

According to the wording of Article 17(7) of the Directive, the provisions are intended to enable users to upload and share user-generated content (UGC). According to the fourth sentence of the first subparagraph of recital 70 of the DSM Directive, the users’ freedom of expression and artistic freedom in particular should be protected. Against this background, it seems appropriate to interpret these “classical” copyright exceptions in light of current social practices of creative engagement with pre-existing content (such as the social practice of “memes”).<sup>40</sup>

The legislator thus makes it clear that sec. 51a is intended to legitimize a wide range of modern communication and cultural practices. This also and especially applies to Internet-specific behavioral phenomena that are primarily practiced by prosumers. In this way, consideration is given to the fact that in the online sector in particular, especially in the case of user-generated content (UGC), the re-use of pre-existing copyright-protected content is a widespread technique. As a result, new forms of cultural discussion and communicative formats are constantly emerging, which are often of great importance in the exercise of fundamental rights for citizens. In order to enable them under copyright law, a statutory exception or limitation is required, since it would be impossible for users to acquire individual licenses for such uses. A statutory exception that is intended to meet these requirements must be designed in an open manner so that it can keep pace with the rapid development of cultural and communication practices as well as technical development.

These objectives are clearly reflected by the wording of sec. 51a as well as its explanatory memorandum quoted above. The terms caricature, parody and pastiche are kept very open. The statutory exception does not differentiate between types of works, categories of users or purposes of use. There is no limitation regarding the extent of the adoption of a work<sup>41</sup> and no requirements on the quality or protectability of the

36 So BeckOK Urheberrecht/Lauber-Rönsberg, 35th Edition Stand: 15.07.2022, sec. 51a, para 17; Hanseatic Higher Regional Court of Hamburg GRUR-RS 2022, 9866 (para 71) - Metall auf Metall II.

37 Explanatory Memorandum BT-Drs. 19/27426, p. 90.

38 Explanatory Memorandum BT-Drs. 19/27426, p. 89.

39 Explanatory Memorandum BT-Drs. 19/27426, p. 91.

40 Explanatory Memorandum BT-Drs. 19/27426, p. 135.

41 Unlike sec. 60a, for example, sec. 51a does not provide for any percentage limits. Entire works can therefore also be re-used.

pastiche that re-uses pre-existing works. The requirement to attribute the author, reference the source and the prohibition of alteration do not apply here, so as not to impede the freedoms of use. Although the explanatory memorandum itself mentions a whole series of current cultural and communication practices that may fall under the term pastiche, it only lists them by way of example. This shows very clearly that the legislator wants the scope of application of the pastiche exception to be understood very broadly.<sup>42</sup>

The EU Commission also understands Art. 17 Par. 7 DSM Directive and Art. 5 Par. 3 lit. k) InfoSoc Directive to be of great importance for the legitimization of user-generated content. A website with questions and answers on the DSM Directive states:<sup>43</sup>

“Will the Copyright Directive prevent users from expressing themselves in the same way as now? Will memes and GIFs be banned?”

No. Uploading memes and other content generated by users for purposes of quotation, criticism, review, caricature, parody and pastiche (like GIFs or similar) will be specifically allowed. Users will be able to continue to upload such content online, but the new rules will bring clarity in this respect and will apply in all EU Member States.”

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42 So also BeckOK Urheberrecht/Lauber-Rönsberg, 35th Edition Stand: 15.07.2022, sec. 51a, para 17; Döhl (albeit critically), ZGE 2020, 380 (383).

43 [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_19\\_1849](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_1849).

# IV. INTERPRETATION OF THE PASTICHE EXCEPTION

According to the ECJ, the following approach applies to the interpretation of copyright terms that are not further defined in the directives (here using the example of parody):

“It should be noted that, since Directive 2001/29 gives no definition at all of the concept of parody, the meaning and scope of that term must, as the Court has consistently held, be determined by considering its **usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part.**”<sup>44</sup>

Accordingly, the decisive factor – if available – is the usual meaning of the term in everyday language, taking into account the systematics and telos of the provisions in which the term is used. In other words, the term must be defined in a copyright-specific manner.

As shown above, the term “pastiche” is ambiguous in everyday language and thus largely without contours.<sup>45</sup> Since it has no tradition in German copyright law and has hardly ever been tested in case law, this likewise provides no further insights regarding an interpretation of the wording. In this respect, a uniform “usual meaning in everyday language” cannot be ascertained.

Thus, the legislator’s intention for using the term “pastiche” in the context of sec. 51a is of decisive importance for the copyright-specific interpretation. Since “pastiche” is a term of European copyright law that must be interpreted uniformly in the European Union,<sup>46</sup> the recitals of the InfoSoc and DSM Directives and the case law of the ECJ would have to be taken into account as well.

However, the InfoSoc and DSM Directives do not contain any definition of the term pastiche, and the ECJ has not yet ruled on it.<sup>47</sup> Hence, it must be stated that there are currently no mandatory European legal specifications for the interpretation of the term “pastiche” in sec. 51a. How the ECJ will ultimately interpret it, is

<sup>44</sup> ECJ [C-201/13, para. 19] - Deckmyn.

<sup>45</sup> See above section I.

<sup>46</sup> See on the character of the facts of Art. 5 para. 3 lit. k) InfoSoc Directive as autonomous legal concepts of Union law below V. 1). The ECJ [C-201/13, para. 17] - Deckmyn has not yet ruled on the relevant characteristic of the pastiche term, but in the aforementioned decision only on the term parody. However, there are no apparent indications why parody should be classified differently from caricature and pastiche with regard to the question of a uniform European interpretation.

<sup>47</sup> Even if EU law has thus far been unproductive with regard to the conceptual interpretation of the pastiche exception, the intentions as expressed in the DSM Directive and in the German explanatory memorandum clearly coincide. In both legislative materials, the intention is clearly expressed that the exception for caricature, parody and pastiche (as well as the citation right) should also, and above all, enable user statements in the online area (“user-generated content”). This is unanimously regarded as elementary for the protection of freedom of expression and artistic freedom (see Section III above). The objectives of the European and German legislators are thus in line with each other.

currently completely open. In this respect, the German explanatory memorandum is the major source for the interpretation of sec. 51a.<sup>48</sup> The memorandum contains a number of indications in this regard.<sup>49</sup> They will be the basis for the following interpretation of the major elements of the term “pastiche” under sec. 51a of the German Copyright Act.

## 1) BORROWING

According to the explanatory memorandum, a pastiche borrows from pre-existing works. The memorandum states:

“The legally permitted, borrowing uses according to sec. 51a UrhG-E have in common that they are reminiscent of one or more pre-existing works. [...] However, the style as such is not protected by copyright. In this respect, there is no need for a copyright exception. Therefore, in the context of Article 5(3)(k) InfoSoc Directive, the pastiche in principle also allows the copyright-relevant adoption of foreign works or parts of works beyond the imitation of the style.”<sup>50</sup>

The ECJ also describes the aspect of borrowing by stating that the borrowing use (in this case it was a parody) “evokes an existing work”.<sup>51</sup>

Caricatures, parodies and pastiches thus obviously borrow from existing works. This can be done in many ways, for example by integrating other works or parts of works into the borrowing use or by imitating the style or adopting stylistic devices. However, in the context of the required copyright-specific interpretation of the pastiche term used in sec. 51a UrhG, the definitional space is narrower. From this point of view, measures of “borrowing” are only acts of use that fall under the scope of copyright protection. This does not apply to pure style imitations or similar abstract “borrowings”.<sup>52</sup>

This characteristic will regularly be fulfilled in all of the genres of referential practices mentioned in the explanatory memorandum<sup>53</sup> (remix, meme, GIF, mashup, fan art, fan fiction, sampling).<sup>54</sup> For what all of these have in common – insofar as they are relevant at all under copyright law – is that their creators play with pre-existing material and/or deal with it and borrow it in the process.

48 Whether it also contributes to gain to subject the regulations in other member states to a comparative analysis (according to Döhl, ZGE 2020, 380 (407 et seq.) may be left open. In any case, no compelling precedents for the ultimately decisive interpretation by the ECJ result from this. This is already the case since the pastiche exception must be reinterpreted in light of the DSM Directive in view of its upgrading to a mandatory exception (see above) and the sporadic implementations of the other Member States obviously all took place prior to its adoption (see Döhl, 408). Incidentally, the analysis of these already existing solutions does not give a homogeneous picture either and thus does not really lead anywhere (see also Döhl, p. 408 ff.).

49 Explanatory Memorandum BT-Drs. 19/27426, p. 89 ff.

50 Explanatory Memorandum BT-Drs. 19/27426, pp. 90 and 91.

51 ECJ (C-201/13, para. 20) - Deckmyn.

52 See also Explanatory Memorandum, BT-Drs. 19/27426, p. 91. This already shows that the vague usual meaning of the word - according to which style imitations can be pastiches (Ortland ZGE 2022, 1 (31 ff.) - deviates from the copyright specific meaning.

53 Explanatory Memorandum BT-Drs. 19/27426, p. 91.

54 Whether this actually applies to a concrete referential creation can only be assessed on a case-by-case basis.

## 2) INDEPENDENCE/DISTINCTIVENESS

### a) Specification of the explanatory memorandum

According to the explanatory memorandum, derivative uses pursuant to sec. 51a “must show noticeable differences from the original work in order to distinguish them from plagiarism (which is inadmissible under copyright law)”.<sup>55</sup>

The legislator has not explained in more detail what it understands by a “noticeable difference”<sup>56</sup>. However, the wording of the explanatory memorandum suggests that the differences do not have to meet a significant threshold. Otherwise, the legislator would have chosen a different wording, for example, of “significant differences” or the like.

In order to find a meaningful interpretation of this criterion, one should remember once again the regulatory purpose of sec. 51a.<sup>57</sup> The provision aims to balance conflicting interests protected by fundamental rights. The author’s interest in the protection of the work, which is recognized by the right to property (Art. 14 of the German constitution), is balanced against the freedom of expression and the freedom of art. It is intended to legitimize communicative and cultural practices in which pre-existing copyrighted material is re-used. However, the provision is not intended to enable free-riding and parasitic exploitation. It does not intend to legitimize taking advantage of another person’s work for one’s own benefit. It strives to legitimize creativity in the broadest sense<sup>58</sup> in cases where third-party content is used. According to the three-step test, interference with primary exploitation and inappropriate limitations of the rights holder’s interests must be avoided.<sup>59</sup>

All this can be ensured by the criterion of “noticeable difference”, by which a use under sec. 51a can be distinguished from “plagiarism” and other parasitic re-uses.<sup>60</sup> Noticeable differences are necessary to make a pastiche a distinctive creation of the pasticheur. Otherwise, the borrowing creation would merely be an adapted copy of the original that could be confused with the source material and compete with it.<sup>61</sup> If the source is not cited, that kind of use would be considered plagiarism. Such actions, in turn, generally do not fall under the protection of freedom of expression or freedom of art and would in any case not be worth protecting in view of the conflicting interests. Independence/distinctiveness is thus a constitutive criterion for the pastiche exception.<sup>62</sup>

55 Explanatory Memorandum BT-Drs. 19/27426, p. 90.

56 The wording refers obviously to the ECJ’s judgment in Deckmyn (“noticeably different”), see (C-201/13, para. 20). However, the ECJ does not elaborate on this either.

57 See section III. above.

58 See Section III above regarding the purposeless nature of the pastiche exception.

59 See below, V.3).

60 Explanatory Memorandum BT-Drs. 19/27426, p. 90.

61 Likelihood of confusion must be avoided, see Döhl (supra footn. 15), 436 et seq.

62 Also District Court of München I GRUR-RS 2022, 13963, para 35.

## b) Characteristics of independence

Independence<sup>63</sup> exists if the pastiche, in comparison to the borrowed material, has its own intellectual-aesthetic effect.<sup>64</sup> This can manifest itself in a distinct meaning, which differs from that/those of the source material and/or by an distinctive external “overall impression”.<sup>65</sup>

A pastiche in the copyright sense is never just a simple copy,<sup>66</sup> but a mixture of different (own and foreign) components.<sup>67</sup> By virtue of the combination, the pastiche conveys a different meaning and/or creates a different overall impression on the viewer and thus appears as independent. The own intellectual-aesthetic effect can be based on internal (meaning) or external (external impression) differences. Internal differences occur, for example, in antithematic uses or recontextualizations.<sup>68</sup> External differences, on the other hand, lie in the shaping, the presentation, i.e. in the fact that the borrowed material is altered to a greater or lesser extent. In the spirit of the terminology used by the German Federal Court of Justice (BGH) to distinguish between free use and adaptation, one could speak of an “internal or external distance” instead of internal or external differences.<sup>69</sup>

Internal or external distance can be created by different means. External differences arise, for example, in transformations into a different style or type of work (e.g. in remix or fan fiction), in the compilation of a plurality of different elements (as in collages or mash-ups), or in the adoption of very small elements into significantly more extensive original works (as in sampling, for example). Internal differences and hence an independent expression can be brought about by changes in the statement (antithematic, e.g. satirical uses), by insertion into a different context of meaning (e.g. in appropriation art) or by recontextualization<sup>70</sup> (as in memes).

Internal and external distance interact with each other. A smaller external distance can be offset by greater internal distance and vice versa. For example, even if the external impressions of the pastiche and source material are only slightly different, a significant internal distance may establish sufficient independence of

63 The term “Eigenständigkeit” (independence/distinctiveness) is preferred here, as it is neutral with respect to the type and quality of the borrowing use. Pötzberger (GRUR 2018, 675 (679)) speaks of an “own artistically relevant statement” (similarly Stieper, GRUR 2020, 792 (796) – “own artistic statement”). This interpretation, which Pötzberger admittedly bases essentially on an art-specific interpretation of the term pastiche, falls short with regard to the copyright-specific meaning of the term pastiche insofar as a pastiche in the copyright sense does not necessarily have to be attributed to art. Otherwise, the purpose of the provision, which according to the explanatory memorandum is intended to serve not only artistic freedom but also freedom of expression in general, could not be achieved.

64 Kreuzer, Verbraucherschutz im Urheberrecht, 2011, 73. On the concept of “intellectual-aesthetic effect” see Schulze in Dreier/Schulze, UrhG/Dreier, 7th edition 2022, sec. 2, para 12. This refers to the effect that the work in its concrete form triggers in the reader, listener or viewer. The term “aesthetic effect” is not to be equated with “appealing to the sense of beauty”, but is to be understood in a broad sense. It refers generally to the sensual perception by the user.

65 See on the term BGH GRUR 2016, 1157 (para 22) – Auf fett getrimmt: “If the respective overall impression differs, there is in any case neither a reproduction nor an adaptation, but possibly a free use. Free use is involved if an independent work has been created and the older work served as the basis for the creation of the new work.” The decision was made under the old law, under which parodies were qualified as free use according to sec. 24. Under the new law, the explanation would have to be somewhat different: Depending on the degree of difference, a deviating overall impression may constitute free use or also adaptation (possibly permitted as caricature, parody or pastiche under sec. 51a). If the overall impression is very different, the personal features of the source material fade away. Then it is a matter of free use. If the differences in the overall impression are smaller and the borrowing is all the more clearly recognizable, it may be a case of caricature, parody or pastiche. If the borrowed use is too close and thus does not have its own intellectual-aesthetic effect, it is not independent. In this case, it is an adaptation which may only be used with the consent of the author(s) of the source material pursuant to sec. 23.

66 Similarly, Advocate General Pedro Cruz Villalón in the opinion on the Deckmyn case (ECLI:EU:C:2014:458, para. 49): “From the point of view which I will call ‘structural’, parody is at the same time a copy and a creation.”

67 European Copyright Society (ECS) JIPITEC 2020, 115 (para. 44).

68 Stieper GRUR 2020, 792 (796).

69 Cf. BGH GRUR 1994, 191 (193) – Asterix-Persiflagen; Hanseatic Higher Regional Court of Hamburg GRUR-RS 2021, 27172 para 44 et seq. – Parody as free adaptation of a work. Regarding the concept of inner distance, the BGH states (GRUR 2016, 1157 (para 22) – Auf fett getrimmt): “Rather, the distance from the borrowed personal features of the used work required for free use may also be given – even in the case of clear adoptions, particularly in the design – if the new work maintains such a large internal distance from the borrowed personal features of the older work that it is to be regarded as independent in its essence. In such a case, too, it can be said that the borrowed individual features of the older work “fade away” in the newer work. The inner distance is particularly important in cases in which an artistic confrontation with an older work requires that this work and its characteristics, insofar as they are the subject of the confrontation, remain recognizable in the new work. In this case, the inner distance can be expressed in an antithematic treatment. However, this is not mandatory. Rather, an inner distance can also be established in other ways.”

70 Stieper, GRUR 2020, 792 (796).

the borrowing use.<sup>71</sup> This constellation is often found, for example, in memes or GIFs, in which images are in many cases used completely unchanged and are combined with the author's own texts, or the author's own images are combined with unaltered third-party music. This creates a recontextualization through antithematic confrontation, which can create a sufficient distance (depending on the individual case), although the visual differences are small.<sup>72</sup> If, on the other hand, the external differences are significant, as for example in the case of sampling the smallest fragments of sound, there is no need for an internal distance.

## c) Required degree of independence

The degree of independence (inner or outer distance) between pastiche and source material required for sec. 51a cannot be determined in the abstract. The legislator has, evidently consciously, decided against defining this more precisely.<sup>73</sup> The extent to which a pastiche must differ from the source material to be lawful under sec. 51a, or how much it may borrow, thus depends on the individual case.

In any event, however, the distance does not have to be, as the legislator expressly states,<sup>74</sup> so great that the original creative features of the source material in the pastiche "fade". This characteristic was used by the BGH in its case law on the old legal situation (sec. 23 a. F., sec. 24) to delimit the scope of copyright protection. In the case of "fading" of the original work's creative features, the BGH assumed free use, otherwise it assumed reproduction or adaptation requiring consent.<sup>75</sup> Accordingly, fading could be based on a considerable external distance as well as internal distance.<sup>76</sup> In the case of fading due to external distance, the creative features of the borrowed work recede into the background to such an extent that it "no longer shines through in a way that is relevant under copyright law".<sup>77</sup> Fading due to internal distance occurs, for example, in the case of antithematic, parodic confrontations with the source material.<sup>78</sup>

Cases of fading due to external distance are now regulated in sec. 23 (1) sentence 2, into which the function of limiting the scope of protection from the old sec. 24 has been transferred.<sup>79</sup> As before, they are therefore outside the scope of copyright (free use). The "fading" due to external distance thus defines the outer boundary of the scope of protection under copyright law. If, on the other hand, the differences between the source material and the borrowing use are smaller or consist primarily in an internal distance, the assess-

71 Illustrative Hanseatic Higher Regional Court of Hamburg GRUR-RS 2021, 27172 para 44 ff. - Parody as free adaptation of a work.

72 This was disregarded by the District Court of München I in its decision on sec. 51a (GRUR-RS 2022, 13963 (para 39)). Here, it was a matter of a complete, verbatim adoption of an image, to which a simple sentence was added. The court refused to apply sec. 51a because the external distance was too small. However, it would also have had to examine whether, despite this great external proximity, there was sufficient independence of the subsequent use due to internal distance. Even if this had been the case and the pastiche exception would have been applicable, the result could have been corrected, if necessary, via sec. 14 (in the case, a rather right winged political party (the AfD) had used a photo and thereby counteracted its message). Especially in the case of uses for political purposes, there will often be infringements of sec. 14 (see, for example, BGH GRUR-RR 2018, 61 (para 14) - Die Hühner). See more details below V. 3). d).

73 As already mentioned, the explanatory memorandum merely mentions "perceptible differences" without explaining this in more detail (BT-Drs. 19/27426, p. 90).

74 Explanatory Memorandum BT-Drs. 19/27426, p. 90: "However, 'fading' of the original work is not required - in contrast to sec. 23 (1) sentence 2 UrhG-E for uses that do not require consent."

75 See inter alia BGH GRUR 1994, 206 (208) - Alcolix; ZUM 1999, 644 (648) - Laras Tochter; BGH GRUR 2016, 1157 (para. 22) - Auf fett getrimmt.

76 Cf. BGH GRUR 2016, 1157 (para 22) - Auf fett getrimmt.

77 BGH GRUR 2016, 1157 (para 22) - Auf fett getrimmt. The ECJ describes this as a taking in an "unrecognisable form" (C-476/17, para 31) - Pelham GmbH ua/Ralf Hütter ua.

78 See also BGH GRUR 2016, 1157 (para 22) - Auf fett getrimmt: "The inner distance is particularly important in cases in which an artistic examination of an older work requires that this work and its characteristics, insofar as they are the subject of the examination, remain recognizable in the new work. In this case, the inner distance can be expressed in an antithematic treatment. However, this is not mandatory. Rather, an inner distance can also be established in other ways."

79 Explanatory Memorandum BT-Drs. 19/27426, p. 78. If there is an external distance between the source material and the borrowing use, the difference between free use and dependent use pursuant to sec. 51a is a gradual one. If the source material is clearly recognizable, the exception applies. If not (fading), it is a free use according to sec. 23 para. 1 p. 2.

ment, according to the legislator, should now be made according to sec. 51a.<sup>80</sup>

This differentiation is logical and makes sense.<sup>81</sup> Content in which the source material fades to such an extent that it obviously served at most as a stimulus is not subject to copyright restrictions.<sup>82</sup> It is also, by definition, not a pastiche. As explained above, the intellectual-aesthetic effect of the pastiche – defined in terms of copyright law – is based precisely on the fact that the borrowed sources are copied in, at least in part, while remaining recognizable. The pasticheur wants to lean on the source material and make it recognizable, but at the same time distinguish themselves from it.<sup>83</sup> If they distance themselves from the source to the point of unrecognizability, they are not dealing with reference culture, whose intertextuality is an essential characteristic of pastiche.<sup>84</sup>

## d) Standard and determination in lawsuits

The standard for recognizing the differences is an objective observer<sup>85</sup> who is familiar with the originals and has the intellectual understanding required for the new work<sup>86</sup>.

## e) Summary on the concept of independence

A pastiche is an independent cultural and/or communicative artifact<sup>87</sup>, which contains pre-existing works but is “noticeably” different from the borrowed sources in its intellectual-aesthetic effect. It is not necessary that it itself be protectable by copyright.

The differences between the pastiche and the source material cause the former to convey an independent overall impression that differs from that of the source material. How this effect is created is generally irrelevant. It can, for example, manifest itself in a visual or acoustical difference or – in the case of a high degree of similarity – it can also be brought about by an internal distance. To determine this, the overall impression of the pastiche must be compared with that of the source material(s) from the point of view of an objective observer. If the overall impression is so different that the borrowed works “fade” to such an extent that the borrowing use merely appears to be inspired by them, it constitutes a case of free use under sec. 23 (1)

80 Explanatory Memorandum BT-Drs. 19/27426, p. 78: “In contrast, other adaptations and transformations, for which, as in the case of parody before the repeal of sec. 24 UrhG a. F., an “inner distance” from the existing work was still assumed, generally fall within the scope of copyright protection under sec. 23 UrhG-E. In the future, these cases will be largely covered by the newly created sec. 51a UrhG-E, which legally permits uses for the purposes of caricature, parody and pastiche.”

81 The necessity of assessing subsequent uses that merely maintain an internal distance (and thus clearly fall within the scope of copyright) as free use within the meaning of sec. 24 (old) was in any case only a stopgap solution. It became necessary because the legislator had failed to implement Art. 5(3)(k) when transposing the InfoSoc Directive and to create a dedicated exception for caricatures, parodies and pastiches. Thus, the copyright basis for such uses, which are, however, of great importance for the protection of relevant fundamental rights, was missing. Since it is not considered possible to derive exceptions and limitations of copyright directly from fundamental rights (see BGH ZUM 2017, 760 (para. 51) – Metall auf Metall III and in detail below V. 2), courts had to make do by re-functioning sec. 24 as an open pseudo-exception for such cases. The ECJ put a stop to this in the Metall auf Metall decision of 2019 (C-476/17, para 56 et seq.) – Pelham GmbH ua/Ralf Hütter.

82 Explanatory Memorandum BT-Drs. 19/27426, p. 78: “If the newly created work maintains a sufficient distance from the pre-existing work, there is no impairment of the scope of copyright protection.”

83 So also Advocate General Pedro Cruz Villalón in the opinion on the Deckmyn case (ECLI:EU:C:2014:458, para. 51): “the latter [the author] who, ultimately, has the most interest in that no confusion should arise between ‘his’ parody and the original [...]”.

84 Thus already the explanatory memorandum (see above fn. 7), 9f; see also Pötzlberger, GRUR 2018, 675 (679), who, with reference to Richard Dyer, describes the reference to the source material as an essential characteristic of pastiche: “Richard Dyer formulates some core characteristics of this art form in his work “Pastiche” published in 2007. Thus, a reference to the original is intrinsic to the imitative character of pastiches.”

85 BGH GRUR 1994, 206 (209) – Alcolix; GRUR 2014, 258 para 33 – Auf fett getrimmt.

86 If the pastiche is designed for the perception by a special target group, the assessment can only be made by a person who either belongs to the target group himself or studies it very closely from the outside.

87 An artifact is understood here as a man-made product in the form of an immaterial object.

sentence 2. If the adopted components are not protected by copyright – as in the case of a pure imitation of style – there is also no case of sec. 51a (the borrowing is irrelevant in terms of copyright).

Independence can and often will be present in manifestations of all genres of referential practices mentioned in the explanatory memorandum<sup>88</sup> (remix, meme, GIF, mashup, fan art, fan fiction, sampling<sup>89</sup>).<sup>90</sup> Mashups, for example, will have sufficient autonomy as video or music collages if they consist of a plurality of source components. In my opinion, the same will generally apply to so-called bastard pop<sup>91</sup>, in which two or more – usually very different – pieces of music are cut together and synchronized.<sup>92</sup> The independence generally will become all the greater if own performances (e.g. video or sound material) are added to the mashed source material.

However, in the case of very extensive borrowings that have only been modified with minor own contributions, a restrictive interpretation of the facts on the basis of the second step of the three-step test may be necessary.<sup>93</sup> This can be considered first of all in the case of remixes, if – in contrast to the above-mentioned mashups – a piece of music is merely completely transferred into another style or another key. This alone will often not be enough to establish sufficient independence, and an internal distance (e.g. an antithematic confrontation) will often also be missing here. The application of sec. 51a also raises similar difficulties in the case of fan videos, for example, which merely re-synchronize complete film sequences or add custom subtitles. This may be permissible both as a parody and as a pastiche. However, the extent of the borrowing and the potentially rather small contribution to the aesthetic effect would at least require that a very considerable internal distance be maintained.

The ubiquitous home videos accompanied by music also cause difficulties in the application of sec. 51a. If the music is not altered, but merely used to accompany the film, it will usually not be a pastiche.<sup>94</sup> The application of sec. 51a to lip-sync or karaoke videos and similar manifestations will also often fail, since the intention here is precisely not to create a significant distance from the source material, but rather to use the work faithfully. Most of such types of user-generated content will continue to depend on rights clearance – usually by the major platforms on which they are made available.

88 BT-Drs. 19/27426, p. 91.

89 See on sampling, memes and GIFs already above section I.

90 Here, too, it should be noted that generalized assessments of the applicability of the constituent elements to various genres of reference-cultural practices will ultimately remain as fuzzy as the definition of such genres themselves. The manifestations of "remix," for example, are so diverse that abstract statements in this regard will be extremely crude. The examples of application here can therefore only serve as orientation.

91 Probably the most famous example is the "Grey Album" by DJ Danger Mouse, in which he mixed the legendary "White Album" by the Beatles with the "Black Album" by Jay-Z (see Döhl ZGE 2020, 380 (423)). The aesthetic effect of the album thus created differs so significantly from that of the source albums that both confusion and interference with primary exploitation appear to be ruled out.

92 Different Stieper, GRUR 2020, 792 (797), who, however, assumes – contrary to the final version of sec. 51a – that the borrowing use must in turn constitute a copyright protected work with its own "artistic statement".

93 See V. 3) c) below.

94 So also Stieper, GRUR 2020, 792 (797). It is conceivable, however, that sec. 57 (incidental works) could be applied.

### 3. INNER CONTEXT

A pastiche must, on the one hand, have a certain distance to the borrowed material, but on the other hand it must also have a certain connection to it<sup>95</sup>. This is referred to here as the “inner context”.<sup>96</sup> Like the citation right, sec. 51a requires that there be a certain “interaction” between the borrowed use and the source material.<sup>97</sup>

This criterion is again based on a broad concept. According to the explanatory memorandum<sup>98</sup>, a direct interaction with the work or the author is not required; rather, a loose connection is sufficient: “The pastiche must show an **interaction with the pre-existing work or other object of reference**. Unlike parody and caricature, which require a humorous or mocking component, the pastiche may also contain an expression of appreciation or reverence for the original, for example as a homage.”

Further indications of the meaning of this criterion are provided by the forms of creative or communicative pastiches listed exemplarily in the explanatory memorandum. Here, “in particular, practices such as remix, meme, GIF, mashup, fan art, fan fiction or sampling come to mind”. The variety of conceivable borrowings practiced in these cultural and communication practices is so great that the legislator’s intention to define the criterion very openly and broadly becomes evident.

The inner context can relate to the subject matter or message of the source material – as is often the case with memes, for example. However, it can also be directed at the specific work or its creator, for example as a homage. However, a reference to the source material and/or author is not mandatory. The context may also be different, as the legislator makes clear with the above-mentioned wording. The pastiche may also convey a message of its own, completely independent of the source material (its own meaning, as in the case of a collage, for example). The reference may also be critical, antithematic, appreciative, honorific or even value-neutral. What (kind of) statement the pasticheur intends or what they are engaging with is irrelevant. The quality of the argument or statement likewise makes no difference. It is sufficient that it falls within the scope of protection of the freedom of expression or artistic freedom of the person making the statement. Whether the statement is clever, stupid, analytical or superficial, humorous or factual is irrelevant.<sup>99</sup>

To put it in a formula: An “inner context” or “certain reference” of the pastiche exists if it makes a statement and it is possible to establish an intellectual connection to the borrowed material or its author.<sup>100</sup>

95 The ECJ expresses this in relation to parodies as follows (C-201/13, para. 20 – Deckmyn): “... that the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it...”

96 Ortland (ZGE 2022, 1 (31)) calls this aspect “relationality”: “Fundamental to the ‘pastiche’ concept in all its meanings is relationality: A pastiche in every case places something in a certain relation to something else, be it that an existing work, a classical form, a style, or even something deliberately perceived as anachronistic is imitated, be it that set pieces from different sources are placed in a new context and a new relation to each other and thus become something they were not in their previous contexts in that way.”

97 Hanseatic Higher Regional Court of Hamburg GRUR-RS 2022, 9866 (para 71) – Metall auf Metall II: “A recognizable adoption of components of third-party works therefore only constitutes an outflow of artistic freedom and freedom of expression if, as in the case of the quotation exception, there is interaction with the work used or at least with its author.” The latter is – according to the explicit wording in the explanatory memorandum (BT-Drs. 19/27426, p. 90, citation see above) not required. The interaction can also be directed at another object of reference.

98 BT-Drs. 19/27426, p. 91.

99 In view of the breadth, this characteristic is hardly suitable for demarcation. Free of any content or statement with any reference may be at best pointless claptrap.

100 Similarly, Stieper, GRUR 2020, 792 (797): “A pastiche is understood to be the borrowing of the original creative features of a model in a new work (typically of the same type of work), which serves as a stylistic device of resonance or contrast or homage to establish a mental connection to the referenced works or their authors, without requiring the unaltered incorporation into the new work is recognizable as a foreign element, which is the characteristic of a citation.”

## 4. PUBLISHED WORKS

Sec. 51a only permits the use of “published” works. According to sec. 6 (1), a work is published “if it has been made available to the public with the consent of the rights holder.” This results in restrictions for some reference-cultural practices such as found footage.<sup>101</sup> This aspect is only mentioned here for the sake of completeness. For its interpretation, the reader is referred to the commentary literature.<sup>102</sup>

## 5. DEFINITION OF THE TERM PASTICHE

Based on all the above, the following copyright-specific definition of pastiche is proposed.<sup>103</sup>

“A pastiche is a distinct<sup>104</sup> cultural and/or communicative artifact<sup>105</sup> that borrows from and recognizably adopts the original creative elements of published third-party works<sup>106</sup>.”

101 See for definition [https://de.wikipedia.org/wiki/Found\\_Footage](https://de.wikipedia.org/wiki/Found_Footage). In this art form, mostly unpublished film excerpts are used in film collages or the like or are cut together to form such. Since the right of quotation also applies only to borrowings from published works, such uses – although often artistically valuable and of low copyright infringement intensity – are not likely to be permissible without rights clearance. The film “Hitlers Hitparade” is an example of what the need for licensing can mean for such works. On the “pitfalls of rights clearance,” see a lecture by producer Cay Wesnigk: <https://www.youtube.com/watch?v=zu3ZMPP9kQk>.

102 See, for example, Dreier/Schulze, *UrhG/Dreier*, 7th ed. 2022, sec. 6, para. 6 ff. See, incidentally, ECJ (C-516/17 para. 86 et seq.) – Spiegel Online GmbH/Volker Beck. Here, the ECJ subjected the concept of “lawful publication” to a Europe-wide binding definition (para. 89): “Thus, it must be held that a work, or a part of a work, has already been lawfully made available to the public if it has been made available to the public with the authorisation of the copyright holder or in accordance with a non-contractual licence or a statutory authorisation.”

103 Similarly Petri in Fischer/Nolte/Senftleben/Specht-Riemenschneider (eds.), *Gestaltung der Informationsrechtsordnung – FS für Thomas Dreier*, 487 (493): “Accordingly, the pastiche is, in summary, an art form that imitates other works, also makes these borrowings obvious and, moreover, thematizes these borrowings in its internal structure.” See also Kreutzer, *Verbraucherschutz im Urheberrecht*, 2011, 65: “Transformative uses of works are to be understood here as actions in which material protected by copyright and/or ancillary copyright is used in whole or in part in order to create a new work within the framework of a creative/artistic debate, which has a new meaning of its own, independent of the works used, and represents a new form of expression. Transformative uses are to be understood only as those that (precisely because they open up a different way of enjoying the work and of receptive perception) do not constitute a substitute for the work or works used.”

104 Distinctiveness can arise from a distinct meaning, which differs from that/those of the source material and/or by a distinctive external “overall impression”.

105 An artifact is understood here as a man-made product in the form of an immaterial object.

106 “Borrow” hereunder means “copying of protected works, in whole or in part, in altered or unaltered form.”

# V. BALANCING OF INTERESTS

## 1) ECJ AND BGH: OBLIGATORY BALANCING OF INTERESTS IN INDIVIDUAL CASES IN THE CASE OF PARODIES

According to the case law of the ECJ<sup>107</sup> and the BGH<sup>108</sup>, in the application of laws and regulations based on Art. 5 (3) k) InfoSoc Directive, an “appropriate balance” of rights and interests of authors and users is to be ensured. Specifically, “the application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k).” In this regard, “all the circumstances of the case must be taken into account.”<sup>109</sup>

In its decision “Auf fett getrimmt” (“Trimmed to be fat”), which is based on the ECJ’s Deckmyn ruling, the BGH clarified this and put it into perspective. It recognizes that a free-floating, undefined balancing of interests would be problematic:

“In the interest of the freedom of expression, which is virtually constitutive for the common good and is brought to bear to a particular extent by the privilege for parody provided for by the EU legislator, **the balancing of interests must not be misunderstood in the sense of a general ‘political correctness check’**. Hence, **not every infringement of legally protected interests caused by the parody is of significance in the balancing to be undertaken**. Rather, it depends on whether the **rights of third parties are infringed by the changes to the work that fulfill the concept of parody and whether the author has an interest worthy of protection in ensuring that his work is not associated with such an infringement.**”<sup>110</sup>

Presumably based on this ruling, the German government in the government draft of the DSM-UrhR-AnpG had proposed a wording of sec. 51a which provided for an obligatory balancing of interests in individual cases<sup>111</sup>. How-

107 ECJ (C-201/13, para. 26) - Deckmyn.

108 GRUR 2016, 1157 para 37 f. - Auf fett getrimmt.

109 ECJ (C-201/13, para. 27, 28) - Deckmyn. Although these principles have been established for parody, it is not evident that the supreme courts do not want them to be applied in principle to the other elements of sec. 51a. In this respect, the ECJ has generally referred to Art. 5(3)(k).

110 The last part of the wording indicates that, when balancing the interests, particular attention must be paid to aspects of (copyright) personality law, which would also have to be examined in the context of a distortion objection pursuant to sec. 14. See V. 3) d. below.

111 This preliminary version of sec. 51a reads (see BT-Drs. 19/27426, 15): “Permitted is the reproduction, distribution and communication to the public of a published work for the purpose of caricature, parody and pastiche, provided that the extent of the use is justified by the specific purpose.”

ver, it was removed by the Committee on Legal Affairs and is no longer included in the final version.<sup>112</sup>

Nevertheless, the currently still limited case law<sup>113</sup> and the commentary literature<sup>114</sup> on the pastiche exception in sec. 51a seem to assume without further consideration that in all cases a more or less comprehensive balancing must be conducted, the criteria for which are not clearly defined.<sup>115</sup> This may seem to be in line with the aforementioned case law of the ECJ and BGH. However, it is inconsistent in various respects. In addition to the – in my opinion – diametrically opposed principles of the BGH and the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) in other decisions (see below V. 2).), this approach also misses the goal of full harmonization that Art. 5(3)(k) seeks to achieve. Specifically, on the one hand, the exception for caricatures, parodies and pastiches serves the purpose of full harmonization, on the other hand, the courts are instructed to perform a completely open balancing of interests without defined criteria or rules when applying it. This does not match.

This inconsistency can be seen fundamentally in the clear discrepancies between the case law on the exception for news reporting (Art. 5(3)(c) InfoSoc Directive, sec. 50 UrhG) and for caricatures, parodies and pastiches (Art. 5(3)(k) InfoSoc Directive, sec. 51a UrhG). The wording of Art. 5 (3) (c) leaves room for interpretation, which can be filled by the legislator and the courts by balancing interests. Accordingly, the acts of use regulated therein are permissible “to the extent justified by the informatory purpose”. Sec. 50 UrhG also contains this feature and declares the use of protected material for daily reporting “permissible to the extent required by the purpose”. The ECJ and BGH conclude the following:<sup>116</sup>

“In interpreting sec. 50 UrhG in conformity with Union law, it must be taken into account that the scope of the exception or limitation regulated in Art. 5(3)(c). (c) case 2 of Directive 2001/29/EC is not fully harmonized. It follows from the phrase ‘to the extent justified by the informatory purpose’ that the Member States, when transposing this provision and applying the national legislation for its implementation, have a considerable margin of discretion which allows them to balance the interests involved.”

Art. 5(3)(k), on the other hand, does not contain any wording of this kind (nor does sec. 51a). The ECJ therefore understands the concept of parody contained therein as an “independent concept of Union law” which is to be interpreted uniformly throughout the entire European Union.<sup>117</sup>

According to the case law of the ECJ, Article 5 (3)(k) is therefore fully harmonized<sup>118</sup>, while Article 5 (3)(c) is not<sup>119</sup>. The logical consequence of this classification would have to be that when implementing and applying the fully harmonized Art. 5 (3)(k) – unlike the non-fully harmonized exception for news reporting – there is no room for an open, free-floating balancing of interests. Otherwise, the goal of full harmonization can hardly be achieved.

112 For the justification, see the recommended resolution (BT-Drs. 19/29894, 90). It is based on the formal argument that a deviation from the text of the InfoSoc Directive should be avoided and the substantive argument that such a balancing of interests is always necessary anyway in the case of statutory exceptions. However, it is unclear what is specifically meant by this.

113 District Court of Berlin, GRUR-RS 2021, 48603, para. 33; District Court of München I GRUR-RS 2022, 13963 para. 35; Hanseatic Higher Regional Court of Hamburg GRUR-RS 2022, 9866 (para. 72 et seq.).

114 Dreier/Schulze, UrhG/Dreier, 7th edition 2022, before sec. 44a ff, para 7a, BeckOK Urheberrecht/Lauber-Rönsberg, 35th edition as of 15.07.2022, sec. 51a, para 19.

115 See, for example, the Pastiche decision of the District Court of Berlin (GRUR-RS 2021, 48603, paras. 39–47). Here, the court carried out an extensive balancing based on a whole series of aspects, especially with regard to the assumed economic consequences of the subsequent use.

116 BGH ZUM 2020, 790 (para. 29) – Afghanistan-Papiere II; similarly ECJ (C-469/17, paras. 42–44) – Afghanistan-Papiere.

117 ECJ (C-201/13, para. 14–17) – a Deckmyn.

118 ECJ (C-201/13, para. 16) – Deckmyn.

119 BGH ZUM 2020, 790 (para. 29) – Afghanistan Papiere II.

Although the ECJ also expressly emphasizes this objective in the case of the exception for caricatures, parodies and pastiches,<sup>120</sup> an appropriate balance is to be struck in the application (i.e. by the courts), which is to be determined by balancing the interests in the individual case.<sup>121</sup> The Deckmyn decision does not provide criteria for this balancing, nor is there a clear reference to the facts of the respective exception. Why the court here does not even demand – unlike in the decisions on news reporting<sup>122</sup> – that the balancing take place within the framework of the exception or limitation, remains in the dark.<sup>123</sup> The dictate of the balancing of interests is succinctly justified with recital 31 of the InfoSoc Directive. However, this only contains a general reference that the different interests must be appropriately balanced when designing the statutory exceptions.<sup>124</sup>

It is also unclear how the requirement to balance the interests in the individual case relates to the three-step test (Art. 5(5) InfoSoc Directive) in cases under Art. 5(3)(k). Curiously, this is not even mentioned in the Deckmyn decision.<sup>125</sup> This is all the more surprising since, according to the case law of the ECJ and the BGH, the three-step test should also be taken into account by the courts when applying the law in relation to exceptions and limitations,<sup>126</sup> with the three-step test (at the third step) also providing for a balancing of interests in individual cases.<sup>127</sup> It is unclear how the above-mentioned balancing of interests is related to that under the three-step test. The ECJ does not clarify whether the general balancing of interests in the application of Art. 5(3)(k) InfoSoc Directive (i.e., sec. 51a in Germany) should be based on its Article 5 (5).

## 2) BVERFG AND BGH: IN PRINCIPLE, NO “FREE-FLOATING” BALANCING OF INTERESTS OR FUNDAMENTAL RIGHTS

Additional confusion arises from the fact that the case law of the BGH and the BVerfG has always assumed that, when interpreting copyright exploitation rights and exceptions and limitations, it is **not necessary** to carry out a general balancing of interests that is outside the scope of copyright regulations. The BGH formulated this maxim in its Gies-Adler judgment as follows:<sup>128</sup>

“In general, the Copyright Act regulates the rights and limitations of copyright exhaustively. The interest of

<sup>120</sup> ECJ (C-201/13, para. 25) – Deckmyn.

<sup>121</sup> ECJ (C-201/13, para. 27) – Deckmyn.

<sup>122</sup> See Stieper, ZUM 2020, 753 (754) on the case law of the ECJ in the “Afghanistan Papiere” and “Reformistischer Aufbruch” cases (regarding Art. 5(3)(c)): “On the other hand, the ECJ emphasizes that this balancing must always be carried out within the framework of the relevant exception offense, and thus expressly speaks out against a ‘free-floating’ balancing of interests outside of concrete exception offenses.”

<sup>123</sup> This seems almost paradoxical in view of the fact that Art. 5(3)(c) opens up a much wider margin of discretion than Art. 5(3)(k).

<sup>124</sup> It states: “An appropriate balance of rights and interests must be ensured between the various categories of rights holders and between the various categories of rights holders and users of protected subject matter.” In my opinion, this is an instruction to the legislator, not an instruction to the courts to apply the law.

<sup>125</sup> Hudson, Intellectual Property Quarterly, 2017(4), 21, also wonders about this.

<sup>126</sup> BGH ZUM 2020, 790 (para 57) – Afghanistan-Papiere II; Hanseatic Higher Regional Court of Hamburg GRUR-RS 2022, 9866 (para 77) – Metall auf Metall II.

<sup>127</sup> BGH GRUR 2014, 549 (para 56) – Meilensteine der Psychologie.

<sup>128</sup> BGH GRUR 2003, 956 – Gies-Adler (first lead sentence). Confirmed by BGH ZUM 2017, 753 para 42 – Afghanistan Papiere I.

the general public to access and use protected works mostly unrestrictedly may be considered in the determination of the scope of the author's exploitation rights and in interpreting the exceptions and limitations. **A balancing of rights and interests subsequent to the copyright assessment is out of the question.**"

In its more recent decision "Afghanistan Papers II", among others, the BGH reaffirmed this and explained it in more detail with reference to the context of European law:<sup>129</sup>

"A **general balancing of interests outside the** copyright exploitation rights and exception and limitations provisions is **out of the question**. In view of the explicit provisions of the Directive, **a balancing of fundamental rights by the courts detached from the interpretation and application of the copyright provisions would** interfere with the relationship between copyright and the exceptions and limitations already provided for by the EU legislator within the scope of its legislative freedom."

This is also the view of the BVerfG:<sup>130</sup>

"In view of the explicit statutory provision, there was no need for a separate balancing of fundamental rights in addition to the interpretation and application of the copyright provisions; rather, the balancing had to take place within the framework of the interpretation and application of sec. 50 UrhG (...). A **detached balancing of interests by the courts in the individual case would interfere with the relationship between** copyright and the news reporting exception, which has already been generally **regulated by the legislator within its legislative freedom.**"

The BVerfG thus refers to the primacy of legislative decision-making derived from the principle of separation of powers.<sup>131</sup> The balancing of copyright and user interests is generally carried out by the legislator. Conflicting interests are identified, weighed and balanced in the legislative process – inter alia through consultations with "interested parties" and expert hearings. The result is reflected in the specific wording of the legal norm. It can therefore be assumed that the legislator has already struck a fair balance between the conflicting interests and fundamental rights positions in the form of the statutory regulations.<sup>132</sup>

This principle not only ensures the separation of powers. It is also of elementary importance for the practical application of the exceptions and limitations. These are rules that in many cases primarily regulate the conduct of laypersons (think, for example, of private copying, the exceptions for education and science or, indeed, the quotation exception and the related exception for parodies, caricatures and pastiches). A requirement of a comprehensive, "free-floating"<sup>133</sup> assessment of all relevant circumstances of the individual case therefore would not exclusively, and not even primarily, concern the courts. Rather, the courts decide only on decisions made by the users, who would be the first to be affected by the resulting legal uncertainty<sup>134</sup>. Laypersons will often already be overwhelmed with the assessment of whether their conduct is in

129 ZUM 2020, 790 (para. 27) – Afghanistan Papiere II, see also BGH ZUM 2017, 760 (para. 51) – Metall auf Metall III.

130 ZUM-RD 2012, 129 (para 14) – Art exhibition in the online archive.

131 Schricker/Loewenheim, Urheberrecht/Stieper, 6th ed. 2020, before sec. 44a ff., para 24: "A correction that goes beyond the application of a statutory exception is therefore always reserved for the legislator because of Art. 20 para. 3, 100 para. 1 of the German Constitution."

132 Schricker/Loewenheim, Urheberrecht/Stieper, 6th ed. 2020, before sec. 44a ff., para. 24. This is also assumed by the ECJ in the Painer decision (C-145/10, para. 135).

133 Stieper, ZUM 2020, 753 (754).

134 The parody decisions of the ECJ and BGH do not seem to take this sufficiently into account (see below).

accordance with written copyright law.<sup>135</sup> To subject the result found in the context of the interpretation of a legal norm to an additional balancing of all relevant circumstances of the respective individual case, detached from the specific provision, would completely overwhelm them. With such a requirement, they would hardly be able to assess whether their conduct is lawful. In other words, the need for an all-encompassing balancing of interests or even an assessment of fairness would fundamentally undermine legal certainty in dealing with copyright exceptions and limitations.

In addition, such a “cross-check” would open the door to subjective valuations in the application of the law. In this way, all kinds of extraneous considerations could be introduced (e.g. in legal disputes) in the form of personal valuations and subjective assessments, for example in moral, political, ethical or economic terms or simply on the basis of personal preferences.<sup>136</sup>

Against this background, it becomes apparent that the dictate of a comprehensive balancing of interests in individual cases could seriously damage the practical benefit of the exception for caricatures, parodies and pastiches. This would be incompatible with the special importance attributed to the freedoms of expression, art and communication by Art. 5 (3)(k) InfoSoc or sec. 51a.<sup>137</sup>

### 3) PROPOSED SOLUTION

It is difficult to resolve the contradictions that have been identified. Should the courts be following a consistent and dogmatically stringent concept, they are keeping explanations on that to themselves. Without further clarification, the case law appears contradictory. There is hence a need for a mediating practicable approach to the question of whether and to what extent a balancing of interests must be undertaken when applying sec. 51a.

In this context, conflicting objectives must be balanced. On the one hand, the instrument of balancing interests creates flexibility and serves the legitimate goal of establishing justice in individual cases. On the other hand, there is a risk that the intentions of the legislator and its intended overall balancing could be undermined and thwarted. Moreover, predictability and legal certainty suffer if the courts weigh interests freely and without clear criteria, and in this way are able to restrict the application of exceptions and limitations by means of a “cross-check”. This goal is in conflict with the goal of case-by-case justice.<sup>138</sup>

A conceptual approach must take both interests into account and balance them. It would be expedient to provide for a balancing of interests only in special cases in which a restrictive interpretation of the facts or a

<sup>135</sup> See in detail Kreuzer, *Das Modell des deutschen Urheberrechts und Regelungsalternativen*, 2008, 412 (fn. 1776 f.).

<sup>136</sup> It is well known that user-generated content is a source of controversy. User statements in social media (think of memes, for example) are often polarizing, taken seriously and considered important by some and banal or superfluous by others. Such value judgments must not affect the copyright assessment. Under the guise of a general, comprehensive balancing of interests, however, they can easily find their way in and lead to judgments based on irrelevant considerations. For this reason, the stipulation of a general balancing of interests in individual cases made by the ECJ in the *Deckmyn* decision was also received very critically by the international legal literature. See in detail Jongsma IIC 2017, 652 (666) with further references.

<sup>137</sup> See section III above.

<sup>138</sup> See above, V. I).

correction under copyright law appears necessary to prevent results that would otherwise be grossly inappropriate. Furthermore, such a “hardship correction” should be possible exclusively in line with copyright law.

Legal instruments are available for this purpose, which have been sufficiently specified by case law to ensure a defined scope for review and balancing. In contrast, there is no need for a free-floating balancing of interests without clear criteria, nor is it – for the reasons mentioned above – expedient.

The solution proposed here takes the European three-step test as its starting point.<sup>139</sup> It is to be applied in any event – taking into account the regulatory intentions of Art. 5(3)(k) and sec. 51a – when interpreting their definitional elements (see V. 1) above). Thus, it does not require a “general balancing of interests outside of the copyright exploitation rights and exceptions and limitations”, which the BGH and the BVerfG generally reject for constitutional reasons (see above). Moreover, such an approach would result in the establishment of a meaningful relationship between rule and exception<sup>140</sup>, through which the goals of case-by-case justice and legal certainty would be appropriately balanced.

## a) Function and wording of the three-step test

The three-step test “is first and foremost a design requirement for the legislator”<sup>141</sup> with regard to the shaping of the statutory exceptions and limitations. It is also (at least in steps 2 and 3, see below) “a benchmark for the application of the relevant provisions of the Copyright Act in individual cases”.<sup>142</sup> In this respect, it acts as a corrective to prevent unintended effects of usage freedoms. It also serves to ensure an interpretation of the constituent facts of the copyright limitations in conformity with EU law.<sup>143</sup>

Art. 5(5) InfoSoc Directive reads:

“The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases [step 1] which **do not conflict with a normal exploitation of the work or other subject-matter** [step 2] and do not **unreasonably prejudice the legitimate interests of the rights holder**. [step 3]”  
The three steps are neither particularly distinct nor clearly contoured.<sup>144</sup>

## b) Step 1: Special case

In my opinion, the first step as a design order is directed exclusively at the legislator.<sup>145</sup> According to this,

<sup>139</sup> This complies with the ECJ’s requirement that it be applied in the interpretation of exceptions by the courts, see V. 1 above).

<sup>140</sup> As a rule, no balancing takes place, but only in special cases of evident imbalance of interests.

<sup>141</sup> BGH ZUM 2020, 790 (para 57) – Afghanistan Papiere II.

<sup>142</sup> BGH ZUM 2020, 790 (para 57) – Afghanistan Papiere II.

<sup>143</sup> Schricker/Loewenheim, Urheberrecht/Stieper, 6th ed. 2020, before sec. 44a et seq., paras. 30 and 40.

<sup>144</sup> Dreier/Schulze, UrhG/Dreier, 7th edition 2022, before sec. 44a ff., para 21.

<sup>145</sup> This is also the approach taken by the BGH, for example in the decision Afghanistan–Papiere II (ZUM 2020, 790). Here (para. 58), it affirms the first step by stating that sec. 50 regulates a specific special case and is therefore only ever applicable in this special case. Compliance with the first step thus results from the characteristic of the provision as a statutory exception limited to certain cases. See also Dreier/Schulze, UrhG/Dreier, 7th edition 2022, before sec. 44a ff., para 21.

statutory exceptions and limitations may only be applied in special cases, but may not restrict the intellectual property right as a whole.<sup>146</sup> This applies to sec. 51a, since it concerns the special case of the use of third-party works for the purposes of caricature, parody or pastiche.<sup>147</sup> No further restrictions (regarding the jurisprudence) result from the first step. In particular, it does not require “that the exception or limitation regulating a special case must also be applied only in a special – with regard to the exception norm – case.”<sup>148</sup>

## c) Step 2: Conflict with “normal exploitation”

According to the BGH, an interference with the “normal exploitation of the work” occurs if “the use in question enters into direct competition with the conventional use, i.e. if the primary exploitation is interfered with.”<sup>149</sup> Provided that there is no direct competition between the work and the subsequent use that would “necessarily reduce the volume of sales or other lawful transactions in connection with protected works”<sup>150</sup>, the possibilities of primary exploitation are preserved. Thus, the second step does not protect every conceivable exploitation possibility.<sup>151</sup>

In particular, restrictions on revenue and licensing opportunities that the legislator already took into account when introducing the statutory exception or limitation and that are inherent to it must not be taken into account. Thus, it is precisely the purpose of sec. 51a that no individual licenses need to be acquired for the uses permitted therein for the purpose of caricature, parody or pastiche. Accordingly, it is a logical consequence that rights holders cannot negotiate a market price for such uses, but at most (in the case of platform uses pursuant to sec. 5 (2) UrhDaG) receive statutory remuneration. When the legislator mentions sampling, for example, as a standard case for the pastiche exception in sec. 51a, it has already included in its consideration that, as a rule, no royalties can be obtained for samples.

Only if a pastiche enters into competition with the source material and would accordingly interfere with its primary exploitation<sup>152</sup> could a corrective protection of the material interests of the rights holder be derived from the second step. As a rule, such an effect will only be conceivable if the complete work is taken over.<sup>153</sup>

This risk does not occur if the term “pastiche” is interpreted in accordance with the rules developed above<sup>154</sup>.<sup>155</sup> Accordingly, the copyright-specific interpretation of the term pastiche requires that the borrowing use is independent. Understood in this way, the pastiche borrows from the source material, but has a

146 Dreier/Schulze, UrhG/Dreier, 7th edition 2022, before sec. 44a ff., para 21.

147 The compatibility of sec. 51a with the first step regulated in Art. 5(5) of the InfoSoc Directive is already evident from the fact that Art. 5(3)(k) of the same Directive is hereby implemented almost word for word.

148 BGH GRUR 2014, 549 (para 48) – Meilensteine der Physik.

149 BGH GRUR 2014, 549 (para. 50 u. 52) – Meilensteine der Psychologie; BGH ZUM 2020, 790 (para. 59) – Afghanistan-Papiere II.

150 Thus ECJ (C-435/12, para 39) – ACI Adam/Thuiskopie.

151 Dreier/Schulze, UrhG/Dreier, 7th edition 2022, before sec. 44a et seq.

152 This is not the case with sampling, for example, see Hanseatic Higher Regional Court of Hamburg GRUR-RS 2022, 9866 (para 79 f.) – Metall auf Metall II.

153 See BGH GRUR 2014, 549 (para 54) – Meilensteine der Psychologie. Since the pastiche exception does not contain any restrictions regarding the scope of the borrowing, complete borrowings are generally permissible. As a rule, however, they will not lead to an interference with the primary exploitation, provided that it is a pastiche in the copyright-specific sense understood here (see below). However, if this should be evident in exceptional cases or if the rights holder submits a claim, a correction can be made via step 2 by interpreting the criteria in the specific case more narrowly.

154 Of decisive importance in this respect is the criterion of “distinctiveness”, see IV. 2. Above.

155 For a detailed justification, see Kreutzer, Verbraucherschutz im Urheberrecht, 2011, p. 73 (fn. 197) in relation to his proposal at the time, similar to today’s sec. 51a, for a statutory exception for “transformative uses of works.”

different meaning and/or a different overall impression. Thus, it addresses other interests and, as a rule, other users. Understood in this way, a pastiche cannot compete with the source material in general. In other words, if a derivative use is so close to the source material that it appears to be virtually interchangeable with it, so that there is a risk of substitution,<sup>156</sup> it is not a pastiche in the copyright sense.<sup>157</sup>

This produces results that are in line with the intention of the statutory exception and the three-step test, as can be seen from the following typical case examples:

- Using an image of Bart Simpson as a background for a meme or as a GIF will not decrease sales of the Simpsons franchise and related licensed products. No one will not watch the series or not buy a merchandising product because of a freely available meme. On the contrary, it will increase the popularity and thus the sales of the work.
- A mash-up that consists of many own and borrowed video clippings and/or musical elements does not replace the consumption of the source material. Rather, it promotes its use.
- If a picture collage consists only of works by the same artist and is thus predominantly characterized by the original creative features of the sources, it lacks “originality”. It could serve as a substitute product for the source material and would then not be permissible.
- Fan art or fan fiction created by users will usually have a positive economic impact on the object of the homage. Good fan culture is advertising, not parasitism that would reduce the rights holder’s revenue.
- Samples do not diminish the sales opportunities of the original recording.<sup>158</sup> The fact that royalties could theoretically be collected for this is not relevant for the application of the three-step test (but is included as such in the balancing of interests that the legislator has undertaken).

## d) Step 3: Undue infringement of the interests of the rights holder

In the third step, in addition to the purely economic interests (which are primarily considered in the second step), further interests of the rights holder must be taken into account. Whether the interest in the use outweighs the negative impact on the rights holder’s interest must be determined on a case-by-case basis.<sup>159</sup> As already mentioned, the steps are not particularly clear-cut. However, the fact that step 2 addresses the protection of economic interests indicates that the third step is primarily concerned with the non-material,

<sup>156</sup> This is how the Hanseatic Higher Regional Court of Hamburg interprets the second step, see Hanseatic Higher Regional Court of Hamburg GRUR-RS 2022, 9866 (para 79 f.) – Metall auf Metall II.

<sup>157</sup> This example shows that the three-step test – in accordance with the requirements of the BverfG and the BGH – can be applied without further ado within the framework of the interpretation of the constituent elements, i.e. within the copyright regulation. A consideration detached from this is not necessary.

<sup>158</sup> Hanseatic Higher Regional Court of Hamburg GRUR-RS 2022, 9866 (para 79 f.) – Metall auf Metall II.

<sup>159</sup> BGH GRUR 2014, 549 (para 56) – Meilensteine der Psychologie.

personal interests of the rights holder. These are codified in German law by the moral rights of the author.

At this step, too, the intention of the legislator and the regulatory purpose of the statutory exception must of course also be considered.<sup>160</sup> Restrictions on interests that are immanent to the statutory right to use under sec. 51a and have been taken into account accordingly by the legislator may not be used to justify a restrictive interpretation.

Thus, it is the essential purpose of sec. 51a that users need not obtain permission from the copyrights holder for the use. In consequence, the copyrights holder cannot prohibit the use for caricatures, parodies or pastiches, even if and although these clearly borrow from the source material, integrate it and thereby change and embed it in other contexts. A necessary further consequence is that sec. 51a largely abolishes the protection of the integrity of the work (the right to adapt, sec. 23) in its scope of application. The general prohibition of alterations is excluded pursuant to sec. 62(4a) "to the extent necessary for the purpose of the use in accordance with sec. 51a." The obligation to acknowledge the source is also expressly excluded by sec. 51a in conjunction with sec. 63 para. 1.

However, the protection against distortion of the work pursuant to sec. 14 is not (entirely) abolished.<sup>161</sup> Neither the wording of the law nor the explanatory memorandum indicate that the prohibition of distortion under copyright law does not apply in the context of the application of sec. 51a. Here, too, it must of course be taken into account that uses under sec. 51a by definition interfere with the integrity of the source material. This is a restriction of the integrity interest inherent in the statutory exception, for which the legislator has deliberately opted. The fact that the material is altered and redesigned therefore cannot justify a defense under sec. 14 as such. This leaves only limited room for corrections under sec. 14. It is only applicable if the interests of the author are "particularly affected" by the caricature, parody or pastiche.<sup>162</sup>

If distortion is brought up in the individual case, sec. 14 – as well as the third step of Article 5 (5) of the InfoSoc Directive – requires a balancing of interests.<sup>163</sup> Any infringements of the non-material interests of the rights holders can therefore also be assessed and weighed along the lines of a copyright regulation. In the context of the balancing under sec. 14, it would be examined – considering the regulatory intention of sec. 51a – whether the author has a legitimate interest in "not being associated" with the borrowing use.<sup>164</sup> A free-floating, detached balancing of interests is neither meaningful nor necessary in this regard either.

The right to defend oneself against distortions or "any other derogatory treatment" regulated in sec. 14 is a flexible instrument. It is formulated openly and understood broadly. The prohibition of distortion protects not only against alterations of the work itself, but also against "contextual effects" which, from the point of view of the author's interests in the work, do not have to be accepted. This refers, for example, to uses of the work in which the source material itself is not changed or changed only insignificantly, but is placed in a factual context that is unacceptable from the point of view of the author's interests in the work. For exam-

160 ECJ (C-469/17, para. 59) – Afghanistan Papiere.

161 BeckOK Urheberrecht/Lauber-Rönsberg, 35th edition as of 15.07.2022, sec. 51a, para. 4.

162 BGH GRUR 2016, 1157 para 38 – Auf fett getrimmt.

163 See the wording of sec. 14: "The author has the right to prohibit the distortion or any other derogatory treatment of his or her work which is capable of prejudicing the author's legitimate intellectual or personal interests in the work."

164 See above v. 1) and BGH GRUR 2016, 1157 para. 39 – Auf fett getrimmt; ECJ (C-201/13, para. 31) – Deckmyn: "In those circumstances, holders of rights provided for in Articles 2 and 3 of Directive 2001/29, such as Vandersteen and Others, have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message."

ple, the BGH has ruled that the playback of pop music at an election campaign event of a party classified as radical right-wing can be prohibited by the rights holders pursuant to sec. 14.<sup>165</sup> The combination of an (unchanged) work with another object, which gives the impression that it would be a complete work of the author, may also constitute an unlawful distortion.<sup>166</sup>

If the borrowing use infringes “third-party rights outside copyright” and if this results in a legitimate interest of the author not to be associated with it, this may also be taken into account – in the sense of the ECJ<sup>167</sup> – in the balancing according to sec. 14.

The advantage of this approach (balancing of moral rights interests only under sec. 14) over an ominous all-encompassing balancing of interests should be obvious. Above all, the former is oriented at a specific regulation within copyright law with a flexible legal framework that has nevertheless already been extensively clarified by case law. The concerns of the third step of the three-step test are also to be considered under sec. 14. Nevertheless, the balancing under sec. 14 is precisely not “free-floating” and detached from copyright law, but relates to specific copyright considerations. This sharpens the scope of assessment enormously and thus contributes to legal certainty. General considerations of fairness, moral or ethical conceptions or even personal value judgments can hardly come into play within this framework.

In addition, this approach meets the above-mentioned need for a sensible relationship between rule and exception. A balancing according to sec. 14 will – if sec. 51a is applied accordingly – only be necessary in rare special cases. It is by no means to be examined in every case “by law”, but only if rights holders refer to particular impairments of their non-material interests and argue that these are violated to an excessive extent (“unduly”) by the use of a pastiche.

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<sup>165</sup> BGH GRUR-RR 2018, 61 (para 14) - Die Höhner.

<sup>166</sup> See BGH GRUR 2002, 532 ff. - Unikatrahmen. In case of doubt, such a use would not be legitimized by the new pastiche exception. Here the borrowing use does not create an independent overall impression, but on the contrary the aesthetic-cognitive effect of the source material is taken over.

<sup>167</sup> ECJ (C-201/13, para. 31) - Deckmyn.

# VI. DIFFERENTIATION FROM OTHER CONCEPTS

## 1) DIFFERENTIATION FROM CARICATURE AND PARODY

A clear differentiation of the various concepts of sec. 51a will not always be possible.<sup>168</sup> The boundaries become blurred. There may be pastiches that are also parodies and vice versa.<sup>169</sup>

The explanations in the explanatory memorandum make it clear that the term “pastiche” is broader than the concepts of caricature and parody.<sup>170</sup> The latter are generally critical and humorous statements. The forms of expression and appearance of pastiche, on the other hand, are much more diverse.<sup>171</sup>

Ultimately, the differentiation is of minor practical importance and can be left aside here. After all, the legal consequences for uses as caricatures, parodies or pastiches do not differ.<sup>172</sup>

## 2) DIFFERENTIATION FROM CITATION, SEC. 51

A differentiation from quotations may be necessary, as the user’s complementary obligations and legal consequences differ in some cases. In the case of quotations, the prohibition of alteration (sec. 62) and the obligation to acknowledge the source (sec. 63) must be observed. In addition, the communication to the public of quotations on platforms – unlike caricatures, parodies or pastiches – is not subject to remuneration.

The right to quotation and the exceptions under sec. 51a are also not completely distinct. In principle, they differ in that quotations are used unaltered and with clear reference to the cited work.<sup>173</sup> In contrast, the borrowing uses in caricatures, parodies or pastiches must be perceptibly different from the source material.<sup>174</sup> However, since the difference can also be due to contextual changes and/or antithematic uses of an unchanged work or excerpt of

<sup>168</sup> Explanatory Memorandum BT-Drs. 19/27426, p. 90.

<sup>169</sup> Ortlund ZGE 2022, 1 (33 f.).

<sup>170</sup> Pötzlberger, GRUR 2018, 675, 679 also comes to this conclusion according to his art historical interpretation.

<sup>171</sup> Justification of the law BT-Drs. 19/27426, p. 91: “Unlike parody and caricature, which require a humorous or mocking component, in the case of pastiche this can also contain an expression of appreciation or reverence for the original, for example as a homage.”

<sup>172</sup> Dreier in Dreier/Schulze, 7th edition 2022, sec. 51a, para 9.

<sup>173</sup> ECJ (C-476/17, para 71) – Pelham GmbH / Ralf Hütter.

<sup>174</sup> See above IV. 2) e).

a work,<sup>175</sup> overlaps between sec. 51 and sec. 51a are possible.<sup>176</sup> However, this is likely to be primarily of practical relevance to the question of remuneration pursuant to sec. 5 (2) UrhDaG, which is not the focus of this study.

### 3) DIFFERENTIATION BETWEEN FREE USE PURSUANT TO SEC. 23 (1) SENTENCE 2 AND ADAPTIONS PURSUANT TO SEC. 23 (1) SENTENCE 1

In contrast to that, the differences between uses under sec. 51a, free uses and dependent adaptations is considerable. Free uses are not subject to copyright. Here, no interests have to be weighed up and, of course, no remuneration has to be paid. Dependent adaptations, on the other hand, may only be used with the consent of the original author. Uses according to sec. 51a are possible without consent, but here a balancing of interests may have to be carried out and remuneration may have to be paid.

The differentiation lies in the degree of borrowing and the differences in overall impression between source material and borrowing use.

If the overall impression is very different, the personal features of the source material fade. If the differences in the overall impression are smaller and the borrowing is all the more clearly recognizable, it may be a case of caricature, parody or pastiche pursuant to sec. 51a. If the borrowing use shows too great a proximity and thus no independent intellectual-aesthetic effect, it is not independent and thus a dependent adaptation.

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175 See above lv. 2) a).

176 Ortland (ZGE 2022, 1 (62)) attempts a typification of pastiche forms that would not be admissible as citations.

# VII. BURDEN OF PROOF ISSUES

Generally, the principle of civil procedure that each party must prove the facts favorable to them, insofar as they rely on them, also applies when applying sec. 51a. The rights holder must prove the facts giving rise to the claim (i.e. for example, that they are the rights holder, that their work has been used, etc.)<sup>177</sup> and the subsequent users must prove the facts on which they base the claim that their use is covered by an exception.<sup>178</sup> Thus, anyone who creates and disseminates a pastiche must prove that their work is an independent, nevertheless borrowing use with reference to the source material.

If the rights holder were to object that the pastiche may not be exploited due to a violation of the three-step test or sec. 14, they would have to prove the facts on which they base this defense.<sup>179</sup> If, for example, it is objected that – despite the criteria of the pastiche exception are fulfilled – the use of the pastiche impairs the primary exploitation, the rights holder would have to prove that. The same applies to arguments that a pastiche is a distortion that “unduly infringes” their interests.

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<sup>177</sup> Schricker/Loewenheim, Urheberrecht/Wimmers, 6th ed. 2020, sec. 97, para 349.

<sup>178</sup> BGH GRUR 2017, 798 (para 37) – AIDA Kussmund.

<sup>179</sup> In this respect, the three-step test acts as limitation for the application of exceptions (see section V.3 a) above).

# VIII. CONCLUDING REMARKS

In the context of a copyright-specific consideration, the term “pastiche” is defined here as follows:

“A pastiche is a distinct cultural and/or communicative artifact that borrows from and recognizably adopts the original creative elements of published third-party works.”

Understood in this way, the term has the openness desired by the legislator, which makes it possible to bring creative user-generated content out of illegality, regardless of the zeitgeist and technical possibilities. Not all user expressions are thereby legitimized. The definitions of the constituent elements in this expert opinion should ensure that creative works that are worth protecting because they fall under the freedom of expression and/or artistic freedom are lawful. At the same time, it avoids that parasitic uses are being subsumed under sec. 51a.



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