

PASTICHE and COPYRIGHT

Introduction

The purpose of this paper is to provide an overview of pastiche and UK/EU copyright law for the non-lawyer in the pastiche network. It will examine: the meaning of pastiche; the place of pastiche within the exceptions/limitations to copyright and fair dealing; intersections between pastiche and human and moral rights; and mention the connection between pastiche and parody.

Copyright grants to the owner a set of exclusive rights in a qualifying creative work. These include the rights of reproduction, distribution, rental and lending, public performance, communication and the right to make an adaptation of the work. Essentially, where an exception to these rights exists in copyright law, then the whole or part of a copyright work may be used without seeking permission from the owner of the copyright, and without infringing the copyright in the work used. It is one way in which a balance is struck between the interests of the author of the work, the owner of the copyright in the work, and the public interest in new works being created.

The author of a copyright work is the person who creates it – the artist or the writer for example – and is often the first owner of the copyright in the work (unless an employee acting in the course of employment). The author can sell (assign) the copyright in the work to another party – such as a publisher. The author can still exercise certain rights in relation to the work – notably moral rights - while the owner of the copyright (the publisher) can exercise the exclusive rights. This way there are likely to be three different interests being balanced by the law – those of the author, the owner and the public interest. The interests of these three parties may at times converge, but also often diverge. For example, the owner of the copyright may want as many exclusive rights over a work as possible, but the public interest may require that there are exceptions to those rights in the interests of being able to create new works.

Pastiche is an exception to copyright. Pastiche was introduced into UK copyright law in 2014. Section 30(A) of the Copyright, Designs and Patents Act 1988 (CDPA) provides that

Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.

When a court is asked to adjudicate on whether a particular work is a pastiche and whether an infringement of copyright, they would go through several steps. First, the court would decide whether there was a work and whether what was claimed falls within the definition of pastiche. Second, the court would consider whether what is done with the work is fair dealing. Third, as a consequence of case law from Europe concerning parody, the court may consider whether what has been done is a fair balance between competing fundamental rights (the right to property and the right to freedom of expression). Finally, the court would also consider how the author's moral rights (the right of attribution and the right of integrity) should apply to the facts.

There has been a recent case in the UK High Court which considered, among other things, what was meant by pastiche: *Shazam Productions Ltd v Only Fools the Dining Experience Ltd*. [2022] EWHC 1379 (IPEC). A court may also consider, by analogy, other case law that has dealt with the interpretation of the exceptions and limitations. One case that may be of relevance is *Deckmyn v Vandersteen* (Case C-

201/13) where the Court of Justice of the European Union (CJEU) was called on to deal with parody which, as noted above, appears in the same exception as pastiche in both EU and UK copyright law.¹

Defining/Describing Pastiche²

In artistic practice, pastiche has been described in a number of different ways with varying attributes:

- an artistic work in a style that imitates that of another work, artist, or period;³
- laudatory and non-critical imitation, such as creating a new work in the style of another artist or genre, and making a new work from a compilation or assembly of pre-existing works;⁴
- pastiche has a dual identity, referring to both a combination of aesthetic elements and a kind of aesthetic imitation,⁵ a pastiche work being neither original nor copy.⁶

It is claimed that 'postmodern works rely on pastiche, or the imitation of existing styles, in part to express the postmodern notion that it is no longer possible to create new styles'.⁷ As there is an appropriative element to pastiche,⁸ it has been argued that it overlaps with other aesthetic categories such as appropriation art, assemblage, collage,⁹ and sampling.

The dictionary definition of pastiche is broad and echoes ways in which pastiche has been described in artistic practice: 'A medley; a hotch-potch, farrago, jumble; spec. a. A musical composition made up of pieces from different sources, a pot-pourri: b. A picture or design made up of fragments pieced together, or in professed imitation of the style of another artist; also the style of such a picture, etc.'¹⁰

Comparing that dictionary definition of pastiche with caricature and parody, the breadth of what is claimed by pastiche becomes clear as each of caricature and parody have attributes that circumscribe the form. Caricature is 'Grotesque or ludicrous representation by exaggeration of parts, as in a portrait...'. Parody is: '...'. writing, music, art, speech, etc. that intentionally copies the style of someone

¹ *A note on Brexit: Much of the UK's copyright law has its roots in international treaties and is not dependent on membership of the EU. However, some aspects of UK copyright law are derived from EU directives. As a result of the Withdrawal Agreement, these have been incorporated into UK law with effect from 1 January 2021. Consequently, copyright law will not change in the short term. As regards European case law and going forwards, while UK courts may find decisions of the Court of Justice of the European Union (CJEU) to be persuasive, they will not be binding on UK courts. As a result, the law may diverge over time, including the law on pastiche. In the meantime, looking to case law from Europe will help to give some context for the discussion on how pastiche might be approached from a copyright perspective.*

² Pastiche seems to have originated in Italy, moving to France in the seventeenth century, where the practice became known as pastiche. Ingeborg Hoesterey, *Pastiche – Cultural Memory in Art, Film, Literature* (Indiana University Press 2001) 5

³ Encyclopaedia.com.

⁴ Emily Hudson, 'The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting?' (2017) 4 I.P.Q. 346, 347

⁵ *ibid.*

⁶ Ingeborg Hoesterey, *Pastiche – Cultural Memory in Art, Film, Literature* (Indiana University Press 2001) 5.

⁷ Nicholas B. Lewis, 'Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-Contextualized Forms of Music and Art' (2005) 55 Am U L Rev 267, 281

⁸ Chloe Francis, 'The Protection of Contemporary Art Under UK Copyright Law' (2018) 23 (4) Art, Antiquity and Law 289, 309

⁹ Emily Hudson, 'The Pastiche Exception in Copyright Law: A Case of Mashed- Up Drafting?' (2017) 4 I.P.Q., 346, 349

¹⁰ Oxford English Dictionary

famous or copies a particular situation, making the features or qualities of the original more noticeable in a way that is humorous: or something that so obviously fails to achieve the effect that was intended that it is stupid.’

By contrast to the breadth of the term pastiche in artistic practice and dictionary definitions, the way the term has been articulated by the UK Intellectual Property Office (UKIPO)¹¹ is narrower. While no statutory definition of pastiche exists in the CDPA or in the EU Information Society Directive¹² (from which the legal obligation to include pastiche into UK law is derived), the UKIPO placed emphasis on the fact that the words caricature, parody or pastiche have independent meaning,¹³ and their usual meaning in everyday language. Narrowly the UKIPO suggested that pastiche is a ‘musical or other composition made up of various sources or one that imitates the style of another artist or period’.¹⁴

In *Shazam Productions v Only Fools the Dining Experience* [2022] EWHC 1379, the judge referred to publications by both Emily Hudson and Richard Dyer. In her article *The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting*, Hudson had referred to Dyer’s view that pastiche is ‘a kind of imitation that you are meant to know is an imitation’. Agreeing with Hudson, the judge said that the essential ingredients of pastiche are that:

- a. The use imitates the style of another work; or
- b. It is an assemblage (medley) of a number of pre-existing works.
- c. In both cases ... the product must be noticeably different from the original work.

The variation and evolution in the meaning of the term in different creative circles¹⁵ prompted Dyer to opine that ‘the word pastiche is in practice extremely elastic’, which can result in ‘generally fruitless discussion about whether such and such really is pastiche’.¹⁶

Questions:

How would you, as an artist describe your work? Would you call it pastiche? Or something else?

If a pastiche work is one that brings together a variety of sources, what makes a work one of pastiche as opposed to, for instance, parody or caricature?

If the law permits pastiche, but not cut and paste, what are the differences between the two?

¹¹ The UK Intellectual Property Office (UKIPO) is the official government body responsible for intellectual property rights in the UK and is an executive agency of the Department for Business, Energy and Industrial Strategy.

¹² Chloe Francis, ‘The Protection of Contemporary Art Under UK Copyright Law’ (2018) 23 (4) *Art, Antiquity and Law* 289, 308-309. See also Copyright, Designs and Patents Act 1988. Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

¹³ See UK Intellectual Property Office, *Exceptions to Copyright: Guidance for Creators & Copyright Owners* (UKIPO, 2014) 6

¹⁴ Intellectual Property Office, ‘Exceptions to Copyright: Guidance for Creators and Copyright Owners’ (Newport March 2014), 8. It is notable that the Government introduced these exceptions as part of a wider copyright reform, where the overarching aim is to promote a strong and growing economy,¹⁴ Sabine Jacques, ‘Are the New ‘Fair Dealing’ Provisions an Improvement on the Previous UK Law, and Why?’ (2015) 10 (9) *Journal of Intellectual Property Law & Practice* 699, 699. See also Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

¹⁵ Emily Hudson, ‘The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting?’ (2017) 4 *I.P.Q.* 346, 349.

¹⁶ Richard Dyer, *Pastiche* (Routledge 2007) 9.

If you could think of your work as one of pastiche, does it convey a particular message? Or have a particular purpose? Does it need to?

Shazam Productions suggested that pastiche needed to imitate the style of another work or be an assemblage of a number of pre-existing works. Are there any other characteristics pastiche should, or must, have?

What is not pastiche?

The exceptions and limitations in Copyright Law

Copyright exceptions are 'provisions that allow a person to carry out an exclusive act in relation to a copyright work, without having to remunerate the owner.'¹⁷ Copyright limitations are 'provisions that allow a person to do an exclusive act, in return for paying remuneration of some kind'.¹⁸ The purpose of exceptions and limitations is to balance the public interest in the dissemination of information and ideas, with the interests of the right holder in earning reward from the exploitation of the work and the public interest in encouraging the author's activities.¹⁹ This concept of balance and the role that exceptions play in it is described in a variety of ways. For instance, exceptions seek to protect 'common constitutional values such as freedom of expression and information and freedom of arts and sciences, while also serving the public interest in a comprehensive cultural life.'²⁰ The intention of exceptions is to secure the 'interests of both creators and users of copyrighted material and thus secure a fair balance between the protection of, and access to, copyright works.'²¹ And as Hargreaves pointed out, 'copyright exceptions are designed to allow uses of content that offer benefits deemed either more important than those delivered by the core aims of copyright and/or benefits that do not significantly detract from those aims.'²²

Importantly for artists, where an exception – in our case pastiche - operates in relation to an artistic practice, no permission is needed from the copyright owner to use an existing work or part of a work, no payment is due to the copyright owner for the use of the work. The exception will act as a defence to an action for infringement of copyright.²³

Questions:

As a [pastiche] artist, and thinking about the various stakeholder interests in copyright law, what balances do you think would need to be made when devising appropriate limits to pastiche?

Whose interests are being balanced?

How are they balanced and what role does pastiche play in that balance?

How should those interests be balanced when thinking about pastiche?

¹⁷ Aplin T., Davis J., *Intellectual Property Law – Text, Cases and Materials* (Oxford University Press 2017) 222.

¹⁸ *ibid.*

¹⁹ Brown A., Kheria S., Cornwell J., Iljadica M., *Contemporary Intellectual Property – Law and Policy* (Oxford University Press 2019) 43.

²⁰ Christophe Geiger, Jonathan Griffiths, Martin Senftleben et al., 'Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion of the European Copyright Society on the Judgement of the CJEU in Case C-201/13 Deckmyn' (2015) 46 IIC 93, 95

²¹ *ibid.*

²² *Digital Opportunity: A Review of Intellectual Property and Growth: An Independent Report by Professor Ian Hargreaves* (London Intellectual Property Office 2011) 46.

²³ Bently L., Sherman B., Gangjee D., Johnson P., *Intellectual Property Law* (Oxford University Press 2022) 226.

Pastiche in the UK courts

In 2022 the High Court got an opportunity to consider what is meant by pastiche (among other things) in the case of *Shazam Productions v Only Fools the Dining Experience* [2022] EWHC 1379. The case concerned the TV production of Only Fools and Horses, whose owners objected to the 'Only Fools the Dining Experience', an immersive production based on and incorporating characters and other elements from Only Fools and Horses. During the dining experience which included an interactive pub quiz, the actors used the appearance, mannerisms, voices and catchphrases of Del Boy, Rodney, Uncle Albert, Cassandra, Boycie, and Marlene – characters in the TV show. Shazam productions claimed the dining experience infringed their intellectual property in the scripts, the lyrics and opening theme song and the Only Fools and Horses characters.

The judge found that copyright did indeed exist in these elements, and that the defendants had infringed Shazam Productions copyright.

The question then arose as to whether there was a defence to infringement of copyright under Section 30(A) of the Copyright Designs and Patents Act 1988 - the defence for parody, pastiche or caricature. On the pastiche defence, the judge said that the use made of the characters, their backstories, jokes and catchphrases was not for the purposes of pastiche because:

- a. The dining experience did not use elements from the TV show to imitate the style of Only Fools and Horses, and neither were the elements in a medley or assemblage. Rather the characters and their back story were taken and represented in the immersive dining experience.
- b. The use made of the characters from Only Fools and Horses was the wholesale borrowing of content – and thus closer to reproduction by adaptation than pastiche.
- c. None of the planning or marketing material used for the immersive dining experience referred to the show being intended to be a pastiche of Only Fools and Horses.
- d. None of the reviews of the immersive dining experience referred to pastiche.
- e. The scripts were used to give the audience the feeling that they were coming into contact with the characters from Only Fools and Horses rather than being an attempt to use the style of the TV programme.

Questions:

Do the references to style, medley and assemblage resonate with work that you do?

Is there a difference between using existing works for the purposes of pastiche, and a work of pastiche?

How important do you think it might be to refer to pastiche in relation to your work? Would you want to?

Fair Dealing and the three-step test

Where the pastiche defence does apply, the court has also to consider whether what was done was fair dealing. The text of the exception in section 30(A) is: ***Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.***

Fair dealing in the legislation is a vehicle for achieving a balance between the exclusive rights of the copyright owner, the pastiche artist and the public interest.²⁴ Dealing in the context of fair dealing means the use by one person of another's copyright work, usually without that other person's knowledge or consent. In asking whether that dealing was fair, a number of factors will be taken into account which will depend on the context. These include:

- whether the alleged fair dealing commercially competes with the proprietor's exploitation of the copyright work, such as to be a substitute for the probable purchase of authorised copies;
- whether the work that is used has already been published or otherwise exposed to the public;
- the amount and importance of the work that has been taken. While a substantial part of the work must have been taken (qualitative or quantitative (taking of an insubstantial part of a work does not infringe copyright)), fair dealing may not operate if an excessive amount is taken, or small amounts are taken on a regular basis;
- the motives of the user.²⁵

The court must also interpret fairness in a manner consistent with the European Convention on Human Rights, including the right of freedom of expression.²⁶

How these factors are applied, and the weight given to each, will depend on the facts of the particular case that comes before the courts. As this is not a mechanical test, and what amounts to fair dealing is a matter of fact, degree and impression, one can only speculate as to how the factors may be applied by the courts in a case of pastiche. As a broad rule of thumb courts have said that the question to be asked is whether 'a fair minded and honest person would have dealt with the copyright work in the manner as the defendant did,' although it has been doubted whether asking this question takes the analysis very far.²⁷

Fair dealing may be considered by a court alongside the 'three step test'. This is a test which is found in international and European law the aim of which is to provide some parameters when crafting the extent of the exceptions. As the name suggests, it has three steps. It provides that literary and artistic works may be reproduced (1) in certain special cases, (2) provided such reproduction does not conflict with the normal exploitation of the work, and (3) does not unreasonably prejudice the legitimate interests of the author.

As regards pastiche, this is likely to be seen as a special case. In relation to the normal exploitation of the work, what is relevant here are not only ways in which the copyright owner does and might extract value from the work but also how that should be balanced against other interests, such as freedom of expression of the pastiche artist. On unreasonable prejudice, this step requires consideration of

²⁴ Catherine Colston, 'Fair Dealing: What Is Fair' (1995) 10 Denning LJ 91, 95.

²⁵For a review of the jurisprudence on the factors relevant to the analysis of fair dealing, see Bently L., Sherman B., Gangjee D., Johnson P., Intellectual Property Law (Oxford University Press 2022); K Garnett, G Davies & G Harbottle, Copinger & Skone James on Copyright, 17th ed (Sweet & Maxwell, 2016) 9-74. In *England and Wales Cricket Board Ltd v Tixdaq Ltd* [2016] EWHC 575 (Ch), Arnold J. noted that (i) the motives of the user and (ii) the nature of any accompanying material and the relation that it bears to the material taken from the copyright work are also relevant to the assessment of fairness (at [85]).

²⁶ *Ashdown v Telegraph Group Ltd* [2002] Ch. 149 (CA), 173-174

²⁷ *Newspaper Licensing Agency v Marks & Spencer* [2000] 4 All ER 239 (CA); *Hyde Park Residence v Yelland* [2001] Ch. 143

proportionality and where the balance may be struck between the interests of the copyright owner and the interests served by the exception – in our case, the pastiche artist.²⁸

Taking into consideration both fair dealing and the three step-test, these are some of the factors that a court may weigh when considering a defence of pastiche.

Commercial exploitation: On the question of commercial exploitation, this is relevant both to commercial opportunities lost by the copyright owner, and opportunities gained by the pastiche artist. Many of the exceptions in the legislation depend on the use of the protected work being for a non-commercial purpose; for instance, another of the exceptions refers to ‘research for a non-commercial purpose’. No such express limitation is placed on pastiche. Would a market for the original copyright protected work be lost by a work of pastiche? A pastiche work plays a different role to an original so would they be in competition? It could be that a pastiche with a particular message that may not be wholly complimentary to the original work may cause the owner to lose sales – but should that be a factor in deciding whether the dealing was fair?

In relation to the possibility of a pastiche artist making money from a work of pastiche, this is not expressly prohibited by the legislation, but is something that often seems to trouble owners of the original copyright work. Should a pastiche artist be able to make money from exploitation of the pastiche work?

[A] dealing by a person with a copyright work for his own commercial advantage – and to the actual or potential commercial disadvantage of the copyright owner – is not to be regarded as a ‘fair dealing’ unless there is some overriding element of public advantage which justifies the subordination of the rights of the copyright owner.²⁹

This is a strong statement against commercial advantage of the person claiming fair dealing, but is linked to commercial detriment of the copyright owner. In the case of pastiche, what would be the detriment to the owner?

If money is to be made from a pastiche work, should account be taken of the possibility of a market existing for licensing works for pastiche use such that the artist would need to license the works used in the pastiche? But (as with parody) a system that requires pastiche to be licensed seems nonsensical when weighed against freedom of (artistic) expression as the ability to make a pastiche work would then depend on the copyright owner agreeing to it.³⁰

Questions:

If a pastiche artist could never make money from the work of pastiche, what is the value in an exception for pastiche in the copyright legislation?

How might the commercial exploitation factor affect your work?

Would exploitation of your [pastiche] work commercially disadvantage the copyright owner?

²⁸ *England and Wales Board Limited v Tixdaq Limited* [2016] EWHC 575 (Ch) at [90] – [92]:

²⁹ *Newspaper Licensing Agency v Marks & Spencer* [2000] 4 All ER 239 (CA)

³⁰ See also Jonathan Griffiths, ‘Fair Dealing After Deckmyn - the United Kingdom’s Defence for Caricature, Parody or Pastiche’ in M Richardson and S Ricketson, *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar 2017).

Unpublished works: If material is taken which has not been published this would militate against fairness. For parody it may be hard to see that an unpublished work would be taken as the work a parody evokes needs, by definition, to be known. But that is not necessarily the case for pastiche. One can envisage a pastiche of unpublished works, for instance from an unpublished archive. In case law while taking unpublished works (such as private letters) militates strongly against a dealing being found fair, more leeway tends to be given where what the unpublished material discloses is in the public interest.

Questions:

Can a scenario be envisaged for pastiche where unpublished works are taken? How might this impact on the question of whether the dealing is fair? Do you ever use unpublished works?

Amount taken: Often the amount taken from a work and the importance of what is taken have been important factors in deciding whether a dealing is fair. Courts have tended to consider a use unfair if it takes a large amount of the original work in absolute or proportionate terms, or takes large amounts of the important elements of the original work. A number of these cases were decided in connection with facts where the copyright owner wanted to keep written material out of the public gaze, or have cut into the copyright owner's market by virtue of the amount reproduced. What the courts have not yet considered is what might be considered fair where elements of an existing work(s) are used in the creation of a new artwork with its own message.

Questions:

Should greater leeway be given for artistic purposes of pastiche where what may be important for the pastiche takes the heart of the original work, the whole of the original work, or repeated takings from the same work?

How much do you take from existing works? And how important are those parts to the original work, either quantitative or qualitative?

Do you make repeated takings from the same work?

Motives of the user: the motive of the user can be a relevant factor in deciding if a dealing is fair. For instance, if a user acts dishonestly, this may militate against a finding of a use being fair. Also relevant has been where a user has been motivated by financial gain. Whether this would also go against a finding of a use being fair when taken by a pastiche artist for a work that is to be sold would once again raise a question of the viability of the exception where the pastiche artist makes a living for their art, and link to the commercial exploitation discussion above.

Questions:

Looking at the fair dealing factors, how might these be applied to your work?

Where do you think a fair balance between your work [as a pastiche artist], and the interests of the copyright owner do/should lie?

A Fair Balance

There are suggestions that there may need to be a 'fair balance' assessment when considering the defence of parody – which may also be relevant to pastiche. The European case of *Deckmyn v Vandersteen* (Case C- 201/13) was a case in which parody was claimed as a defence. It concerned a

calendar made by Deckmyn to give as a gift to fellow members of the Belgian far-right political party. The calendar contained a drawing which made clear reference to the cover of a popular comic book, Suske en Wiske, but which included xenophobic references. The heirs of the author of Suske en Wiske sued for copyright infringement. Deckmyn claimed the parody exception in Belgian law.

The court applied a human rights balancing or proportionality exercise when applying the parody exception: a fair balance must be struck between the interests of the copyright holder and freedom of expression of the user who makes the parody of the protected work. On the *Deckmyn* facts, the court suggested that when the national court applied the findings and in implementing a fair balance requirement, it should take into account that, given the discriminatory message of the parody, copyright holders 'have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message.'³¹

A human rights fair balance in a pastiche case may need to take into account the property right in copyright on the one hand, and freedom of expression on the other; the interests of the copyright owner would be weighed against freedom of expression of the pastiche artist. As regards freedom of expression, there is a long-established jurisprudence on the weight to be given to various claims. Interference with political expression and expression of matters in the public interest are scrutinised closely. Artistic and other creative forms of expression also merit high level of protection. By contrast, commercial speech is not so strongly protected. A work of pastiche with a political message may be given more leeway than one, for example, made as part of a commercial advertisement.

If the UK courts introduce such a fair balance exercise, it may require them to consider the nature of the use made of the work; for instance, is the use one of artistic expression? Does it have a political message?

Question:

How might this line of argument shape the work that pastiche artists do?

How do you think a fair balance test could/should/might operate in relation to your work?

Moral Rights

In addition to economic rights which are granted to the first owner of a copyright work, the legislation also grants moral rights to authors of some works.

The moral rights of the author that are most relevant to pastiche are:

the right to be identified as an author or director (right of paternity),

³¹ Case C- 201/13 para 31. There are several views as to how this test might be approached by UK courts: that it is a test that is separate to fair dealing and should be applied cumulatively; that it will replace fair dealing (but that the final analysis may not differ greatly); that it may entail significant change in the way in which the fair dealing exceptions are approached. If, or how the UK courts will deal with this is yet to be determined. For these discussion purposes, we will consider this as a separate test, as issues that it raises can help to inform thinking about the parameters of pastiche.

This right is granted to the author of an original literary, dramatic, musical and artistic work, and to the director of a film. There are exceptions, such as works made for the purpose of reporting current events or a contribution to a newspaper or magazine. The right must also be asserted, and there exist a range of circumstances when attribution is required – such as when an artistic work is published commercially or exhibited in public – and exceptions to the right such as fair dealing of a work for the purposes of reporting current events. The legislation permits that a work can be used for the purposes of pastiche without sufficient acknowledgement – but it has been argued that as no exception has been provided to the moral right of paternity, a pastiche artist could be acting unlawfully if the authorship of the work is not made clear.³²

the right to object to derogatory treatment of work (right of integrity),³³

For this right to apply there must be a treatment of a work, which includes an addition to, deletion from, alteration to or adaptation of the work. It seems uncontroversial to suggest that a pastiche would be a treatment. A treatment is derogatory where it amounts to a distortion or mutilation of the work or if it is otherwise prejudicial to the honour or reputation of the author. There have been few UK court cases elaborating on what this means, nor whether the test is subjective or objective. It has been suggested that a parody may not harm the reputation of an author if the author of the parodied work is not known, but may harm their honour if a subjective test.³⁴ It is notable that there is no transformative use exception to infringement – such as when a pastiche is made.

the right to object to false attribution of a work,³⁵

The rights of paternity and integrity last as long as the economic rights in a work while the right to object to false attribution lasts for 20 years after the death of the author. While there are many arguments for and against moral rights, one, relevant for this discussion is the argument that moral rights interfere with the free market. Because economic rights can be bought and sold while moral rights remain with the author, the author could rely on moral rights to stop exploitation of a work.

In this vein, when the UK introduced the parody, pastiche or caricature fair dealing exception, it was suggested that the protection for moral rights available under the CDPA would provide a valuable constraint on the scope of the provision.³⁶ Specifically, and referring to parody, it was suggested that ‘the existing moral rights regime will be maintained unchanged, so that creators will be protected from damage to their reputation or image through the use of works for parody.’³⁷ It has been suggested that for parody, ‘the parodist must be wary of liability for breach of the right to object to derogatory

³² Bently L., Sherman B., Gangjee D., Johnson P., *Intellectual Property Law* (Oxford University Press 2022) 292

³³ CDPA s 77.

³⁴ Bently L., Sherman B., Gangjee D., Johnson P., *Intellectual Property Law* (Oxford University Press 2022) 230.

³⁵ CDPA s 84.

³⁶ Jonathan Griffiths, ‘Fair Dealing After Deckmyn - the United Kingdom’s Defence for Caricature, Parody or Pastiche’ in M Richardson and S Ricketson, *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar 2017) 8.

³⁷ See also Modernising Copyright: A Modern, Robust and Flexible Framework: Government Response to Consultation on Copyright Exceptions and Clarifying the Law (HM Government 2012) 31.

treatment of the work ... and of the right to object to false attribution of authorship ...³⁸ because the moral right of integrity could amount to derogatory treatment and harm an author's honour or reputation. By contrast, it has been argued that it will not be easy for a pastiche work to violate the right to integrity because 'by its very nature, a pastiche work is a laudatory imitation of a style and makes no attempt to ridicule, lampoon or satirize the copied work, or comment critically on that work or another theme.'³⁹ This takes us back to the earlier question, 'what is pastiche?'

Questions:

Do you acknowledge the author of the original work in your work expressly or by implication? If you had to acknowledge the author, would this change the nature of your work? Would you be able to produce your work [of pastiche] if the original author(s) needed to be acknowledged?

How do you think the right of integrity might apply to the works that you use in your [pastiche] work? Might the right of integrity limit what you do in your work? Where are the boundaries between the right of integrity and ethical considerations around the re-use of work [in pastiche]?

Having considered the types of questions that a court could consider when deciding if a work of pastiche fell within the exception to copyright law and thus did not infringe the rights of the copyright owner, how do you think the law could be interpreted to best support you in your work?

Can you articulate a meaning for pastiche that might place some parameters around what could be considered pastiche and the contexts in which pastiche might be relevant?

Pastiche Reference to the CJEU

At least some of these questions may be addressed in the coming year (or two). A reference concerning the interpretation of pastiche and music sampling has been made by a German court to the European Court of Justice (ECJ). The request stems from a decision made on September 14, 2023 (case number: I ZR 74/22), involved a sample from Kraftwerk's 'Metall auf Metall'. This issue traces back to 1977 when Kraftwerk released 'Metall auf Metall', and two decades later, Pelham's 'Nur mir' featured a looped segment from this track. During the case it was argued that the sampling should be regarded as pastiche.

Two questions were raised in this context. The first addresses the requirements for pastiche: whether the pastiche exception broadly encompasses all forms of artistic engagement with copyrighted works, such as sampling, under a general provision. Alternatively, does it need specific conditions like humour, imitation of style or homage? The second question concerns whether identifying a pastiche depends on the user's deliberate intention to use copyrighted content to create a pastiche. Or, is it adequate if an informed individual, familiar with the original work or subject matter, can recognise the work as a pastiche?

³⁸ Ronan Deazley, 'Copyright and Parody: Taking Backward the Gowers Review?' (2010) 73 (5) *Modern Law Review* 785, 798.

³⁹ Joshua Marshall, 'Balancing the Right to Integrity with Caricature, Parody and Pastiche' (2018) 13 (12) *Journal of Intellectual Property Law & Practice* 955.

December 2023.

BIBLIOGRAPHY

CASES

Ashdown v Telegraph Group Ltd [2002] ECC 19 (CA)
Deckmyn v Vandersteen Case C- 201/13 [2014] ECDR 21
England and Wales Cricket Board Ltd v Tixdaq Ltd [2016] EWHC 575 (Ch)
Football Association Premier League and Others [2011] ECR I-09083
Hubbard v Vosper (1972) 2 QB 84 (CA)
Hyde Park v Yelland (2000) RPC (CA)
Newspaper Licensing Agency v Marks and Spencer [2000] 4 All ER 239 (CA)
ProSieben Media v Carlton UK Television Ltd [1999] 1WLR605 (CA)
Sillitoe v McGrawHill [1983] FSR

LEGISLATION

Copyright, Designs and Patents Act 1988
Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society

TREATIES

Berne Convention for the Protection of Literary and Artistic Works 1886

BOOKS

Aplin T., Davis J., *Intellectual Property Law – Text, Cases and Materials* (Oxford University Press 2017)
Bently L., Sherman B., Gangjee D., Johnson P., *Intellectual Property Law* (Oxford University Press 2022)
Brown A., Kheria S., Cornwell J., Iljadica M., *Contemporary Intellectual Property – Law and Policy* (Oxford University Press 2019)
Dyer R., *Pastiche* (Routledge 2007)
Garnett K., Davies G., Harbottle G., *Copinger & Skone James on Copyright* (Sweet & Maxwell 2016)
Griffiths J., 'Fair Dealing After Deckmyn - the United Kingdom's Defence for Caricature, Parody or Pastiche' in M. Richardson and S.Ricketson, *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar 2017)
Hoesterey I., *Pastiche – Cultural Memory in Art, Film, Literature* (Indiana University Press 2001)
Samuelson P., 'Justifications for Copyright Limitations & Exceptions' (2015) in Ruth Okediji (ed.), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017)
Spence M., 'Justifying Copyright' in D. McClean and K.Schubert (eds), *Dear Images : Art, Copyright and Culture* (Ridinghouse 2002)

JOURNALS

Arnold R., Rosati E., 'Are National Courts the Addressees of the InfoSoc Three-Step Test?' (2015) 10(10) 741 *Journal of Intellectual Property Law & Practice* <<https://doi.org/10.1093/jiplp/jpv138>> accessed March 2023
Austin G., 'EU and US Perspectives on Fair Dealing for the Purpose of Parody or Satire' (2016) 39 *U.N.S.W.L.J.* 684 <<https://heinonline.org/HOL/P?h=hein.journals/swales39&i=695>> accessed March 2023
Barker G. R., 'The Law and Economics of Copyright Law and Copyright Exceptions, Limitations, and Immunities' (2019) <<http://dx.doi.org/10.2139/ssrn.3315619>> accessed March 2023.

Bradshaw D., 'Fair Dealing as a Defence to Copyright Infringement in UK Law: An Historical Excursion from 1802 to the Clockwork Orange Case 1993' (1995) 10 Denning LJ 68
 <<https://heinonline.org/HOL/P?h=hein.journals/denlj10&i=67>> accessed 24 September 2020

Colston C., 'Fair Dealing: What Is Fair' (1995) 10 (1) Denning LJ 91
 <DOI: <https://doi.org/10.5750/dlj.v10i1.252>> accessed March 2023

Deazley R., 'Copyright and Parody: Taking Backward the Gowers Review?' (2010) 73 (5) Modern Law Review 785 <<https://doi.org/10.1111/j.1468-2230.2010.00818.x>> accessed March 2023

Francis C., 'The Protection of Contemporary Art Under UK Copyright Law' (2018) 23 (4) Art, Antiquity and Law 289 <<http://web.b.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=1&sid=b17fb7c5-232c-40c9-a13b-d201b6be02b7%40pdc-v-sessmgr05>> accessed March 2023

Geiger C., Griffiths J., Senftleben M. et al., 'Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion of the European Copyright Society on the Judgement of the CJEU in Case C-201/13 Deckmyn' (2015) 46 IIC 93 <<https://doi.org/10.1007/s40319-015-0297-0>> accessed March 2023

Hudson E., 'The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting?' (2017) 4 I.P.Q. 346 <<https://espace.library.uq.edu.au/view/UQ:687947>> accessed March 2023

Hudson E., Aplin T., Burrell R., 'Submission to the IPO Consultation: Post-Implementation Review of 2014 Copyright Changes' (2019) King's College London Law School Research Paper Forthcoming
 <<http://dx.doi.org/10.2139/ssrn.3376268>> accessed March 2023

Jacques S., 'Are the New 'Fair Dealing' Provisions an Improvement on the Previous UK law, and Why?' (2015) 10 (9) Journal of Intellectual Property Law & Practice 699 <<https://doi.org/10.1093/jiplp/jpv137>> accessed March 2023

Jacques S., 'Mash-Ups and Mixes: What Impact Have the Recent Copyright Reforms Had on the Legality of Sampling?' (2015) Entertainment Law Review (Sweet and Maxwell)
 <<http://dx.doi.org/10.2139/ssrn.2893261>> accessed March 2023

Jongsma D., 'Parody After Deckmyn – A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and The Netherlands' (2017) 48 IIC 652 <DOI 10.1007/s40319-017-0619-5> accessed March 2023

Lewis N. B., 'Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-Contextualized Forms of Music and Art' (2005) 55 Am U L Rev 267
 <<https://pdfs.semanticscholar.org/2005/10d024dd8d311b7afb18a679ff3e9fb1acb5.pdf>> accessed March 2023

Marshall J., 'Balancing the Right to Integrity with Caricature, Parody and Pastiche', Journal of Intellectual Property Law & Practice (2018) 13 (12) 955 <DOI: 10.1093/jiplp/jpy072> accessed March 2023

Meale D., England P., 'Barry Trotter and the Infringement of Copyright – Parody Rules in the UK' (2008) 34 (178) Managing Intellectual Property 34
 <<https://search.proquest.com/docview/233241573?accountid=8155>> accessed March 2023

Petridis S., 'Postmodern Cinema and Copyright Law: The Legal Difference Between Parody and Pastiche' (2015) 32 (8) Quarterly Review of Film and Video 728 <DOI: 10.1080/10509208.2015.1078273> accessed March 2023

Rosati E., 'Just a Matter of Laugh? Why the CJEU Decision in Deckmyn is Broader than Parody' Common Market Law Review <<https://eprints.soton.ac.uk/422801/>> accessed March 2023

Silverman I., 'The Parody Exception Analysed' (2015) Managing Intell Prop 26
 <<https://heinonline.org/HOL/P?h=hein.journals/manintpr254&i=28>> accessed March 2023

OTHER

Digital Opportunity: A Review of Intellectual Property and Growth: An Independent Report by Professor Ian Hargreaves (London Intellectual Property Office 2011)

Gowers Review of Intellectual Property (HM Treasury 2006)

Herman A., 'Ticking Away: Christian Marclay's The Clock and Copyright Law' Institute of Art and Law (12 September 2018) <<https://ial.uk.com/marclay-clock/>> accessed March 2023

Intellectual Property Office, 'Exceptions to Copyright: Guidance for Creators and Copyright Owners' (Newport March 2014)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/315025/copyright-guidance-creatorsowners.pdf> accessed March 2023

Mendis D., Kretschmer M., 'The Treatment of Parodies Under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles. Parody and Pastiche. Study II', Intellectual Property Office (January 2013) <<http://www.ipo.gov.uk/pro-ipresearch.htm>> accessed March 2023

Modernising Copyright: A Modern, Robust and Flexible Framework: Government Response to Consultant on Copyright Exceptions and Clarifying the Law (HM Government 2012)