



# PASTICHE IN CONTINENTAL EUROPE

PRESENTATION TO COPYRIGHT AND PASTICHE NETWORK  
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# POINT OF DEPARTURE

## **Article 5(3)(k) Directive 2001/29/EC**

“use for the purpose of caricature, parody or **pastiche**”

Compare with:

## **Article L122-5 Code de la Propriété Intellectuelle (France)**

« 4° La parodie, **le pastiche** et la caricature, compte tenu des lois du genre ; »

## **Article XI.190 Code Economique (Belgium)**

« 10° la caricature, la parodie ou **la pastiche**, compte tenu des usages honnêtes; »

# FRANCE

- Exception exists since **1957** (Law of 11 March 1957 - Article 41 4°)
- **Desbois**: distinction between parody (music), caricature (art), pastiche (literature)
- **In practice**: pastiche is sub-category of parody; in case law, parody and pastiche are often used interchangeably.
- **Specific conditions** (case law)
  - No risk of confusion - no misappropriation
  - Humour ("intention de faire rire")
  - "Lois du genre" → Art. 10(1) Berne Convention: compatible with fair practice

# SPAIN

**Parody** - Article 39 Intellectual Property Law

**Caricature** - Law 1/1982 of 1 May 1982 on private law protection of honour, personal and family private sphere and personal image

**Pastiche exception** not in IP law, but in separate law (Royal Decree-Law 24/2021, Art. 70) - implementation of the DSM Copyright Directive (EU) 2019/790.

Explanatory memorandum refers to 'memes', but scope of pastiche exception probably much wider.

# AUSTRIA

## **§ 42f of the Austrian Law on Author's Right (UrhG)**

Exception for caricature, parody and pastiche introduced in § 42f (2) UrhG when implementing the DSM Copyright Directive (2019/790).

The exception is limited to the use of a disclosed work for the purpose of caricature, parody or pastiche by way of broadcasting or making available to the public on a large online platform and to the making of a reproduction for such purposes. Thus, the exception applies primarily to user-generated content in an online context.

# GERMANY - FREE USE

## **§ 24 aF Law on Author's Right (UrhG) - Repealed**

*(1) An independent work created in the free use of the work of another person may be published or exploited without the consent of the author of the work used.*

*(2) Subsection (1) shall not apply to the use of a musical work in which a melody is recognisably taken from the work and used as the basis for a new work.*

## **External + Internal distance**

**Declared incompatible** with Article 5 Directive 2001/29/EC - **ECJ in *Pelham*** (Case C-476/17)

# GERMANY - FREE USE REVIVED

## § 23 UrhG - Adaptations and transformations

(1) *Adaptations or other transformations of a work, particularly also of a melody, may be published or exploited only with the consent of the author of the adapted or transformed work. **An adaptation or transformation in the sense of the first sentence is not given where the newly created work bears a sufficient distance to the used work.***

### 'External distance'

Sufficient distance: the used work must fade in the new work

# GERMANY - PASTICHE

## § 51a UrhG

*The reproduction, distribution and communication to the public of a published work for the purpose of caricature, parody or **pastiche** is permitted. The permission pursuant to sentence 1 covers the use of a depiction or other reproduction of the used work even if it is itself protected by a copyright or related right.*

Introduced to implement the DSM Directive, effective from 7 June 2021

**'Internal distance'**: fading not necessary, but perceivable difference between used and new work required.



# GERMANY - PASTICHE II

**Explanatory Memorandum - Government draft, BT Drs 19/27426 of 9 March 2021**

## **General considerations for caricature, parody and pastiche:**

- The exception takes into account **freedom** of **expression**, of the **press** and of the **arts**
- **Common denominator** of § 51a UrhG: all forms of use evoke a pre-existing work
- **Perceivable difference** between the used and the new work (fading not necessary)
- **Artistic dialogue** with the used work
- **Fair balance** between rights and interests of rightholders and users
- **Exact difference** between parody, caricature and pastiche may be difficult to establish.
- No need to indicate the **source** (argument from *Deckmyn* extended to caricature and pastiche).

# GERMANY - PASTICHE III

**Explanatory Memorandum - Government draft, BT Drs 19/27426 of 9 March 2021**

## **Specific considerations for pastiche:**

- **Imitation of style** which involves the taking of entire protected works or parts of works
- **Artistic dialogue:** differently from parody and caricature, the pastiche exception can "also" be an expression of honour or appreciation such as a tribute or homage
- **Broad meaning**, pastiche can include remix, fan fiction, sampling, memes etc, subject to
  - (i) establishing a fair balance of the affected rights and interests by taking into account all circumstances in each individual case, and
  - (ii) respecting the three-step test.

# GERMANY - PASTICHE - CASE LAW

- LG Berlin 2.11.2021 15 O 551/19 - **The Unknowable**: computer graphic (Scorched Earth by Daniel Conway) used in new work (The Unknowable by Martin Eder): pastiche
- LG Berlin 19.10.2021 15 O 361/20: 12 synthesized tones in f minor over 2 bars (**Die Mensch-Maschine**, Kraftwerk) used in a similar, but slightly varied way in Hoes Up G's Down (Shirin David): § 51a UrhG does not apply, no "internal distance"
- OLG Hamburg 28.04.2022 5 U 48/05 - **Metall auf Metall** : Sampling of 2 second rhythmical sequence held to be pastiche. Now new reference to EU Court of Justice by BGH in new *Pelham* case - cf next two slides for the text of questions referred
- **LG Munich I 20.06.2022** - 42 S 231/21: use of an entire pre-existing photo with one additional sentence ("one picture says more than 1000 words"): no pastiche
- **LG Cologne 28.03.2024** - 14 O 181/22: transformation of a short story by Heinrich Böll into a teaching video by a teacher at a higher vocational school not justified under the pastiche exception as it does not pass the three-step test.

# **CASE C-590/23 PELHAM**

BGH of 14 September 2023, Case I ZR 74/22 - *Metall auf Metall V*

## **Question 1**

Is the provision limiting use for the purpose of pastiche within the meaning of Article 5(3)(k) of Directive 2001/29/EC a catch-all clause at least for artistic engagement with a pre-existing work or other object of reference, including sampling?

Is the concept of pastiche subject to limiting criteria, such as the requirement of humour, stylistic imitation or tribute?

# CASE C-590/23 II

## Question 2

Does use 'for the purpose of' pastiche within the meaning of Article 5(3)(k) of Directive 2001/29/EC require the determination of an intention on the part of the user to use copyright subject matter for the purpose of a pastiche, or is it sufficient for the pastiche character to be recognisable for a person familiar with the copyright subject matter who has the intellectual understanding required to perceive the pastiche?