Dagmar Hoffmann; Nadine Klass

Editorial. The Reference as Part of the Art Form. A Turning Point in Copyright Law?

2017

https://doi.org/10.25969/mediarep/16227

Veröffentlichungsversion / published version
Zeitschriftenartikel / journal article

https://doi.org/10.25819/ubsi/8175

Editorial: The Reference as Part of the Art Form. A Turning Point in Copyright Law?

Dagmar Hoffmann, Nadine Klass

On 31 May 2016, the Federal Constitutional Court of Germany ruled that specific forms of sampling may fall under the constitutionally protected freedom of art and takes precedence over the property interests of the rights holders (so-called sampling judgement, 1 BvR 1585/13 – "Metall auf Metall" (metal on metal)). The lawsuit concerned a two-second sample from the *Kraftwerk* song "Metall auf Metall" that had been used by producer *Moses Pelham* without permission for a Hip-Hop song performed by *Sabrina Setlur*. Over 19 years, the lawsuit passed through the entire German court hierarchy before recently being taken to the European level. In Germany, this ruling has revived the copyright debate on remixes and similarly transformative media practices within digital media environments. The Federal Constitutional Court seems to have strengthened the position of creatives who work with transformative techniques and, in this particular case, seems to value reference techniques like sampling as genuine forms of art. Thus, the "Metall auf Metall" decision is not only considered as a possible milestone in copyright law by legal circles, but it also affects many actors in those arts and creative industries where copyright issues are significant, e.g. remix, mashup, fan fiction, or collages. In consequence, the voices for a "right to reference" or a "right to remix" are becoming louder. What is at stake here is nothing less than the legally fixed conditions for the (non-) cooperation between copyright holders and those who build on others' works. Therefore, the key question is to what extent this decision can be

regarded as a game changer that may also have decisive consequences for other cases and areas of application.

Over the last 15 years, we have witnessed an enormous increase in user-generated works that are built on pre-existing and often well-known pieces. New forms of transformative works are being developed constantly. On the one hand, this has initiated debates over the extent to which creative processes and creative works may be self-professionalising or commercialising. On the other hand, one can also ask to what extent these transformative practices devaluate art and popular media production.

Those copyright-related questions as well as questions on recent tendencies in media cultures related to practices of reference were addressed during an interdisciplinary symposium at the University of Siegen in May 2017. Experts from different fields of research presented their investigations and theoretical considerations. The symposium was based on two pillars: approaches from music, culture, and media studies on the one hand, and legal perspectives and evaluations on the other.

Independent of the type of work (e.g., mashup, fan fiction, video essays), all contributions highlighted the normalisation of reference practices as an important part of contemporary culture and, at the same time, noted the discrepancies which emerge when confronting those practices with a copyright law that was not built for this kind of artificial articulation. Shared subjects across the disciplines were the contested definition of aesthetic independence of the transformative or derivative work and the omnipresent legal uncertainty of all involved parties. Among the essential questions that are difficult to answer in the light of the existing regulations of the German Copyright Act are the following:

Which degree or level of transformation is necessary to regard a work as independent in the sense of Sec. 24 of the German Copyright Act? Considering the fact that new forms of reference culture like fan-

fiction, remix, or appropriation art are built on the association with and a certain proximity to the original work and, therefore, aim to make the original work recognisable, is the criterion of "fading" set up by German case law still appropriate? How can it be ensured that the creator of a referential work does not only try to capitalise on the success of the original work? Which role does the commercial purpose play when assessing the legal conformity of transformative works? Is it necessary to differentiate between artistic and non-artistic forms of referential use of the original work? Can the derivative respectively transformative work be understood as a stylistic device, a genre or an art form? Does re-contextualisation, through its confrontation of 'original' and 'new', operate as a form of communication or as a contribution to freedom of speech? Finally: Given that copying is generally perceived as an unethical behaviour, especially when it comes to commercial contexts, does less adaptation automatically mean less unethical behaviour?

The papers included in this special issue document selected outcomes of the symposium.

Frédéric Döhl thoroughly analyses the development of the "Metall auf Metall" lawsuit from the beginning in 1999 until now and reviews all legal positions on micro-sampling. Moreover, he introduces "pastiche" as an exception in European copyright as a possible basis for the foundations of future copyright. So far, it remains to be clarified whether and how digital adaptations from other musical works and media can achieve the status of an "independent work" according to German copyright. *Döhl* reminds us that, in adaptation research, it is commonly acknowledged across all arts that, as a matter of principle, all adaptations can reach a state of artistic identity in their own right, no matter how prominent the original material may be in the new work. The controversial question is how and when these new works pass that threshold rather than whether they reach it at all. From an artistic point of view, the concept of independent use as an aesthetic category is a suitable instrument for a free balance of interests.

Drawing on the basic assumptions and mechanisms of German copyright law and the main problems concerning transformative works, *Kamila Kempfert* and *Wolfgang Reißmann* introduce "boundary work" as a praxeological perspective to grasp translations and transformations of copyright law within different social worlds. Using the example of fan fiction practices and the lawsuit of "Metall auf Metall", they attempt to approach law-in-practice and demonstrate different modes and forms of boundary work. In the case of fan fiction authors, boundary work consists of (unconsciously) translating elements of basic assumptions of copyright law to their own works as well as distancing themselves from commercial exploitation, while simultaneously almost ignoring the factual legal situation. In the "Metall auf Metall" lawsuit, boundary work was performed by changing the balance between ancillary copyright law and artistic freedom and by emphasizing commercial effects as important evaluation criteria. The different boundary works partly converge, partly they are contradictious.

Sophie G. Einwächter sheds more light on the digital transformation of fan culture leading to the phenomenon of entrepreneurial fans who now gather large audiences for their media and make money with practices that were initially purely rooted in fan culture. *Einwächter* presents two different cases: First, the well-publicised case of fan-fiction-turned-bestseller-author E. L. James (*Fifty Shades of Grey* trilogy), which evoked a negative response from within her former online community, (with the criticism mostly referring to the ethical rather than the legal status of her work) and, second, the German case of Harry-Potter-fan-turned-comedian Kathrin Fricke, also known as Coldmirror, which shows that practices of fan culture can find a professional market without causing community backlash. Furthermore, *Einwächter* demonstrates how especially those fan producers who are in charge of their own sites and media infrastructures respond to copyright uncertainty by using copyright disclaimers, reaching an agreement with

copyright holders, expanding their own legal knowledge, or by engaging in risk distribution or pragmatic productivity.

Eckart Voigts and *Katerina Marshfield* turn to another field of reference culture and focus on videographic essays as a genuine form of scientific or intellectual performance. They report from a student project entitled "Producing and Podcasting Film Analytical Audio Commentaries" and characterise these productions as a new form of learning and a possibility to appropriate a certain degree of multiliteracy. Especially mashups allow for mixing texts, footage, images, and sounds without having to create substantial semiotic expressions. In their opinion, mashups and videographic essays are becoming increasingly important as a multi-channel cultural technique for constituting, exchanging, and presenting meanings, ideas, and materials, both for establishing amateur media studies as well as for emerging professional and academic approaches. In their contribution, they discuss the lack of established criteria for such kind of audio-visual student work as well as the lack of clarity regarding copyright issues when referencing audio-visual material.

Sibel Kocatepe takes a look beyond the borders of the German jurisdiction and analyses US-American copyright law and their regulations with regard to referential forms of art. She elaborates on the so-called "fair use" doctrine as a limitation on copyright and its application in US-American judicial practice. Her contribution emphasises that the often-lauded American fair use limitation provides the necessary flexibility for solving conflicts of interests between copyright holders of original works and artists that use them within the restrictions of copyright. At the same time, Kocatepe highlights the fact that this flexibility might also result in a certain degree of unpredictability and legal uncertainty. In this context, she discusses whether the flexible fair use doctrine is actually able to balance conflicts of interests, in order to evaluate whether a legal transplant of this standard is, in fact, advisable. Kocatepe also touches upon the question whether the new Cana-

dian "YouTube Exception" for non-commercial user-generated content might be a more preferable limitation for the German and ultimately the European jurisdiction.

The symposium entitled "The Reference as Part of the Art Form: A Turning Point in Copyright Law?" was initiated and organized by the CRC Media of Cooperation research team "Media Practices and Copyright Law" (project B07). At this point, we would like to thank the Institute for Media and Communication Law (IMKR) and the German Research Foundation for the generous financial support of the conference. We also extend our thanks to Christian Henrich-Franke for his editorial support.