Kamila Kempfert; Wolfgang Reißmann

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1. Transformative Works and Creative Re-Use

The "remix" movement has shaken up our understanding of property and copyright. For a long time, it tried hard to overcome the legal boundaries and to sensitise the society to its existence, meaning and importance. The origin of the remix culture goes back to the idea that new content can be created with reference to old, already known works. We are surrounded by media phenomena such as *sampling, collage, meme, fan art, fan fiction* and all possible kinds of *transformative works* in our everyday life. All these forms of articulation are based on practices such as (re)arranging, quoting, combining, appropriating and extending.

Controversies on the meaning of authorship and originality, adaptation and recontextualisation were intended to break the original work's autonomy. Großmann (2011: 124) calls it "[...] the aesthetic game of perception, legibility, fragmentation, association and cultural semantics [...]" (our translation). First and foremost, this game aims to bring together material from different sources and mix those fragments with new inventions. The de/recontextualisation of work fragments gains a playful meaning and, therefore, a new shape. If we know the original source, we feel its presence in the transformative work. The relationship between both texts is openly acknowledged. The adapting artist tends to choose works with a high level of memorability.

Digital media and related practices make the cultural technique of remix accessible to anyone. These days we encounter it everywhere: in

novels, television, radio, internet and art galleries. In the "postmodern age of cultural recycling" (Hutcheon 2006: 3), derivations, just like adaptations, are ubiquitous. Recent mediatisation and digitisation processes challenge established ideas of non-professionals' agency in media production (Bruns 2008). Remix is seen as a specific literacy in digital media environments (Knobel/Lankshear 2008). Self-taught amateurs-turned-professionals claim the right not only to actively take part in the discourse on artistic production, but also in the production and publication of art. In Germany, their contribution is protected by Sec. 5 (1) of the German Constitution ("Grundgesetz", GG), which ensures the basic right of communication, and by Sec. 5 (3) GG, which guarantees the freedom of art and science. On the opposite side of this constitutionally guaranteed right, there is the interests of the original works' copyright owners whose property is protected by Sec. 14 GG, often combined with the moral interest stipulated by Sec. 2 (1) and Sec. 1 (1) GG. This heroic collision between constitutionally guaranteed positions is illustrated in the sampling decision[1] we will discuss later in this paper. Drawing a clear line between the competing interests turns out to be a great challenge. These difficulties are amplified by the growing legitimisation crisis of copyright law in the wider public. In this paper, we will first present basic assumptions and mechanisms of German copyright law. Against this background, we will introduce "boundary work" as a perspective to grasp translations and transformations of copyright law within different social worlds. Using fan fiction authors' reports on their writing and publishing practice as well as a legendary lawsuit from the music industry as examples, we will attempt to approach law in practice and demonstrate different modes and forms of boundary work.

2. Original and Derivative Works According to the German Copyright Act

German copyright law has a clear idea about the scope of protection of a copyrighted work and the required distance between the original and the derivative work.

In order to claim protection of one's work, it is necessary to fulfil the requirements of Sec. 2 of the German Copyright Act ("Urheberrecht", UrhG), the first of which is the existence of a protectable work. According to Sec. 2 (1) UrhG, German copyright law uses an open definition for a work. It suggests a list that includes *inter alia* literature, music, photography and movies. However, this list is not intended to be exhaustive (cf. Schack 2015: 102 ff.; Wandtke 2016: 64). The legislator sought to create a flexible solution that easily adapts to technical and cultural developments. Sec. 2 (2) UrhG requires a work to be the author's own intellectual creation ("persönliche geistige Schöpfung"). Although this definition seems blurry and somewhat ambiguous, it determines the criteria that define a protected work. A protected work is an author's own creation that embodies an intellectual content ("geistiger Gehalt") in a specific shape ("konkrete Formgestalt") (Schack 2015: 101 ff.). Together, they can be described with the generic term of individual creation ("individuelle Gestaltung") (Schack 2015: 99). If all criteria are cumulatively fulfilled, the author of the copyrighted work is protected by moral and exploitation rights.

Notably, the individual creation requires a human act. Following this logic, ready-made objects do not fulfil the criteria of a copyrighted work. In addition, it is a premise of intellectual content that the work is more than simple craftsmanship. It has to represent an expression of an individual mind ("Ausdruck des individuellen Geistes", cf. Schack 2015: 104). Metaphorically speaking, it is essential to recognise the author's fingerprint or a real person behind the art. The specific shape of expression means that the work has to be externalised in a creative form (cf. Schack 2015: 105; Wandtke 2016: 65). This externalisation

is not to be confused with an idea being put into written form (Schack 2015: 102). This is why ideas cannot be protected by copyright law. At the same time, the medium does not have to exist in its final form; it only has to be noticeable to others. So, fading improvisations, speeches, sketches and unfinished works are protected as well (Schack 2015: 102). The materialisation of creative thoughts is of great importance in distinguishing the form from the content in the case of a literary work. Since fan fiction is a major strand of our research, the scope of protection of literary work, with its fused dependence between outer and inner form, is an important factor in this paper. The *dichotomy of form and content*[2] does not fit in with the current understanding of a copyrighted work. When it comes to stories in particular, we tend to appreciate the plot of a book as its inner assembling process and creative nucleus, because it is the frame that makes a story unique. A content and its inner form are inseparable. This justifies the tendency in modern case law to develop a new understanding that allows the protection of a work of literature based on its content.[3] The requirement of individual creation produces additional complexity. The creator's individuality is the nucleus of the work. Sec. 11 (1) UrhG assumes an indivisible bond ("inneres Band") between the author and his/her work. A work is not merely protected because it originates in an author's efforts, but because it shows traits of his/her personality or individuality (Peifer 2014: 1100 f.). Today, many copyrighted works are mass produced items, which have to have an economic application beyond their individual aesthetic character (Podszun 2016: 606 f.). Relating to the production conditions of the media industry, to obtain protection, it is sufficient for the creator to have the scope to make choices ("Gestaltungsspielraum") between various alternative courses of action, in which he or she makes a creative choice (Dreier/Schulze/Schulze 2015: Sec. 2 para. 33).

Once the original work's scope and conditions of protection have been clarified, it is important to discuss what qualifies the *derivative works*. The key question is: how much room does the German legislator[4]

leave for the existence of remix or re-use practices? An acceptable legitimate inspiration can be distinguished from an exploitative transfer of third-party content based on the interaction of Secs. 23 and 24 UrhG. It is important to keep in mind that the transition from one to the other may be fluid and that the boundaries are not static. The difference between *free use* ("freie Benutzung"), *adaptation* ("Bearbeitung") and simple *copy* ("Plagiat") is only the level of transformation between the original and the derivative work. It is apparent that we are confronted with a legal area full of uncertainties for all involved parties: artists, right holders, remixers, internet users. The conflict of interests is significant as soon as a property right is involved and the original work does not belong to the public domain ("Gemeingut"). The most common examples of patterns taken from the public domain are storylines or motives based on biographical events or historical fables.[5] The aim of Sec. 24 (1) UrhG is to balance the conflicting interests between the economic interests of rights holders and the social participation interests of creatives. A new remixed work can be qualified as *free use* in the sense of Sec. 24 (1), if it is an *independent* work of authorship and *distant* from the original.[6]

This condition does not necessarily apply to parody and other kinds of anti-thematic treatment[7] ("antithematische Behandlung") because of their exceptional character (Dreyer in Dreyer/Kotthoff/Meckel 2013: Sec. 24 para. 23). The nature of a parody requires a proximity to its source (or even a recognisability), so the features of the original work still have to be visible in the parody and cannot fade entirely (Schulze in Dreier/Schulze 2015: Sec. 24 para. 25). The aspect of recognisability in the derivative work is the condition that guarantees the critical-artistic interaction with the original, which is the main feature of parody (Dreyer in Dreyer/Kotthoff/Meckel 2013: Sec. 24 para. 23). In this case the obvious recognisability is not harmful if the required distance can be achieved in a different way (Schulze in Dreier/Schulze 2015: Sec. 24 para. 25). Both the judiciary and the literature use a legal construct called inner distance ("innerer Abstand") to deal with this issue. This

status can be obtained when the newly created work shows an inner distance to the characteristics borrowed from the older work through its original creativity (Schulze in Dreier/Schulze 2015: Sec. 24 para. 25). In this case the characteristics of the source are fading compared to the new creation as a whole.[8] In the case of parody, this inner distance is created through the anti-thematic treatment of the source material.[9] Although case law concerning parody has a long tradition, the European Court of Justice took this issue to a whole new dimension in 2014.[10] According to Sec. 5 (3)(k) of Directive 2001/29/EC, the member states may provide for exceptions and restrictions for the use for the purpose of parody, caricature and pastiche.

Returning to the regular cases of Sec. 24 (1) UrhG, according to which a work has to fulfil the requirements of independent use and distance, the newly created work itself has to represent a personal intellectual creation ("persönliche geistige Schöpfung") in the sense of Sec. 2 (2) UrhG. The derivative work therefore has to be produced independently, keeping enough distance from the original. To establish proximity and distance, copyright law distinguishes between common and individual characteristics of a work. The required distance is achieved, if the individual characteristics ("eigenpersönliche Züge") adopted from the original work fade ("verblassen") in comparison to the peculiarities ("Eigenart") of the derivative work.[11] The re-used work should not be excessively represented in the new work. A basic rule that helps to establish whether a derivative work qualifies as free use or as an adaptation is: the more distinctive the original work, the less it will fade in the new work. Conversely, the original work will fade more, the higher the individuality or originality of the derivative work.[12]

3. Boundary Work on Copyright Law

The introduction into the basic distinctions of German copyright law reads like a compendium of communication, media and social theory. Amongst others, its ingredients are content and form, idea and articula-

tion, originality and reproduction, human creative agency and technological automation. However, theories and conceptions are never fixed, but open-ended and in constant flux. Copyright law is consequently not static, but a continually contested and changing network of legal rules. Moreover, it is applied, translated, and appropriated in diverse social worlds and communities of practice.

To grasp the morphological and indexical nature of law, we use the notion of "boundary work". At first glance, the use of the term may be perplexing. As a theoretical concept, it is primarily associated with science studies and the foundational work of Gieryn (1983). He uses the term "boundary work" in connection with the ideological style and public activities of scientists to justify or defend intellectual authority and to assert scientifically produced knowledge as the "preferred truth" (Gieryn 1983: 783). Within this area of research, boundary work separates science from non-science (e.g. religion, art), experts from amateurs, one (sub)discipline from another.

Extending the understanding, we see further relevant meanings. Both literally and figuratively, to set, to shift, or to break down boundaries are basic social and material practices: in planning and creating architecture (Borden 2000), in social interaction and the mutual creation of "territories of the self" (Goffman 1971: 28 ff.), in habitually performed social and cultural distinctions (Bourdieu 1984) as well as in tactical and subversive practices aimed at circumventing existing power relationships (de Certeau 1984). In a legal context, boundary disputes primarily refer to conflicts over land ownership or neighbourly disagreements. Recently, attempts have been made to broaden the understanding and introduce "boundary work" as a more general and practice-oriented term (Macey 2015, environmental law).

In our area of interest, boundary work hinges upon the *contested conditions of acceptance of transformative works*. At the crossroads of literary theory and the history of law, Woodmansee (1984) and others (e.g., Bosse 1981) sensitised the scientific community to the bounded

history of copyright law, aesthetic theory, and living conditions of authors in 18th century Germany. The idea of intangible assets capable of being protected as property found a legitimate basis in the myth of the "author-genius", being itself a hybrid derived from the "unstable marriage" (Woodmansee 1984: 426) of the older concepts of the writer as a "craftsman" and "as divinely inspired". Both of the latter had in common that writers were not seen as responsible for their works or as a source of inspiration and creativity. In other words, from the perspective of more recent practice theory, they were seen as passage points of practices beyond individual agency. Only once the idea of inspiration was given more emphasis than the mere application of acquired skills *and* external inspiration (god, tradition) was replaced by individuals' personal creativity, copyright law as we know it could emerge.

Our intention is not to recount the prehistory of copyright law. Many other stories would have to be told, for instance on distinctions between idea and form within German idealistic philosophy, on concepts of property based on natural law or on pre-modern practices used by authors, printers and booksellers to certify printed texts as trustworthy (Johns 1998: 18 ff.).

Yet, it is apparent that boundary work of different stakeholder groups was required to "invent" and legitimise copyright as a legal infrastructure. Once established, there were ongoing arguments for or against it, and for maintaining and transforming it—often in response to technological change (Dommann 2014). Seen from this angle, the "digital revolution" is inducing "just" another wave of copyright wars, this time focusing on non-professional stakeholders and their media practices.

We do not restrict the term "boundary work" to public activities, controversy and explicit legitimisation efforts which all remain important modes. Certainly, civic protagonists and stakeholder associations campaigning for or against copyright law revisions, with their activities targeted at the general public, are deeply involved in communicat-

ing information on legal boundaries (see Reißmann/Klass/Hoffmann 2017: 165 ff.). Statements and drafts of politicians and parties, and the talks and publications of influential academics are also part of the negotiation game that is taking place inside and outside of academia, in multiple public communities and within the courts (Tushnet 2014). Nevertheless, boundary work can occur in different modes: explicit and implicit, symbolic/communicative and material, public and private, with or without apparent conflict. Unlike in Gieryn's approach, the field of our study cannot be moulded into a binary logic[13]. As a matter of course, just like any other scientific discipline, copyright law has to justify and legitimise its specific knowledge production. At the same time, copyright law is a cross-sector phenomenon, with national and international politics setting standards, stimulating processes of regulation and governance, with practical implementations by economic or cultural stakeholders such as publishers and platforms, with law applied by the courts, non-professional users acting inside or outside legal frameworks, with lobbyists and stakeholders attempting to influence developments frontstage and backstage. – Thus, rather than a binary struggle (law scholars vs. non-academics/other academics), we observe multiple communities of practice involved in diverse areas of boundary work, each being affected by copyright law in a unique way and using their own methods to appropriate and apply the law.

Next, we will share two examples to illustrate transformative works and copyright law as matters of boundary work. First we will take a look at fan fiction authors' reports on writing and publishing, then at the changing court interpretations in a controversial German (and now European) lawsuit on copyright infringement. These two examples derive from very different fields—fan fiction and sampling—and different research contexts—an empirical study (fan fiction) and a case-law analysis (sampling). Sharing a focus on remix practices and the question of (il)legitimate re-use of aesthetic material, both cases stand for the practical appropriation of existing law. A comparison of both cases sheds

light on the varying modes of boundary work. While fan fiction authors usually operate outside the machinery of law (albeit, of course, entering spaces governed by law by publishing their works), legal practitioners exert a direct influence on the legal framework by case-law interpretations from within.

4. Legitimising Fan Fiction: Boundary Work in Fannish Everyday Life

Our first example is taken from the empirical parts of the CRC's research project B07 "Media Practices and Copyright" (see introduction to this issue). This research focuses on the writing and publishing practices of fan fiction authors (Reißmann et al. 2017). We are conducting interviews with writers who engage in different fandoms (e.g. *Naruto*, *Dragon Age*, *Yu-Gi-Oh*, *One Piece*, *Star Trek*, *Supernatural*) and different forms of writing (single-authored and collective genres). Our sample consists of 35 fan fiction authors (31 interviews; 32 female; 3 male) aged between 17 and 61 years (as of February 2018). Additionally, we are analysing selected material (e.g. profiles, platform terms of service, platform interfaces) and deepening our understanding by ethnographic research. Participatory observation has been carried out with a group of women engaged in role play stories on *Stargate Atlantis* and with a female writer who runs a successful *YouTube* channel where she reads and performs cooperatively produced fan fiction.

In comparing and interpreting the interview data and other records, we discover tensions and ambivalence in the fan fiction writers' ways of explaining, justifying and working. Initially, we expected fans to make political claims and authors to use *us* as a channel to publicly address the need for fundamental copyright law changes. However, while there is an obvious desire to pursue personal passions without fear and with legal certainty, explicit and forthright criticism of existing copyright law is rare. Certainly, prosecution is unwelcome and a good (= relaxed) relationship between original authors and fan creators

is appreciated. At the same time, the logic of first and second order artefacts and the related property rights attributions are often reproduced. On the one hand it is *normal to create and publish fan fiction* and, by doing so, to consciously or unconsciously transcend legal boundaries. Copyright agreements are rarely obtained, the use of public domain material is the exception and, in case of doubt, it would be unlikely for fan fiction to qualify for the status of "free use" provided for in the German Copyright Act (see above). On the other hand, it is as *ordinary for fan fiction writers to accept* the legal status quo to not own the source material. From a legal perspective, this ambivalence could be interpreted as a lack of knowledge or lack of fear. Indeed, "notice and takedown" is the worst-case scenario for most fan fiction writers, fears of being prosecuted are limited. Eva (29), for instance, doubts whether her work will ever be noticed in the sheer bulk of fan fiction stories and authors: "(...) it is very unlikely that a mangaka, so someone who creates manga, will ever realise that there's a Yu-Gi-Oh story out there". The use of artists' names, the strict management and separation of identities (primarily to avoid unwanted attention for private/intimate fantasies from family members, fellow students, colleagues, and others), and the complexity of genre codes in platform-based indexing and searching foster a certain sense of security.

Yet, this is only one part of the story in understanding the ambivalence of *both transgressing and accepting law* at the same time. In our sample, most interviewees are aware that they are acting in a grey area between legality and illegality. Only a few authors make a strong effort to grasp the exact legal status of their actions.[14] Usually, research literature treats the complexity of law and the users' superficial legal knowledge as a problem to be resolved (e.g. Fiesler/Bruckman 2014). And obviously, it *is* a problem when copyright uncertainty leads to chilling effects and overly strict interpretations of legal provision—as suggested by Fiesler, Feuston and Bruckman (2015) based on an analysis of law-related online forum data in creative communities. From a praxe-

ological point of view, however, we prefer to take a step back. Because fan fiction authors are "under-informed", boundaries are left loose and in abeyance. *Ignorance* lifts the burden of moral unease and leaves room for idiosyncratic variations of (un)lawfulness—in all directions. Idiosyncratic interpretive (boundary) work may lead to chilling effects and discouragement. This is probably even more likely when fan fiction creators are responsible for running their own sites rather than merely being users of existing platforms. Conversely, the opposite of discouragement and chilling effects may occur. One constellation often given in interviews is (i) *not to question* the basic foundations of copyright, (ii) *to continue* writing fan fiction all the same, and (iii) to assume *legal conformity of one's actions*.

This can be illustrated by claims of "originality". Partly, we find evidence of what may be called postmodern creativity theory: you cannot not appropriate. Everyone builds upon other authors' works. Sara (61), who has been writing fan fiction for about 40 years, introduces quantum physics and string theory to describe this special relation of "original" and fan stories: "[M]any things can exist simultaneously," she states, "one particle can be somehow or other." However, the (modernist) coupling of originality and individuality is rarely overcome. Interviewees insist on (personally[15]) adding substantial new creativity. Although they belong together, Sara regards the "original" and her own story as being "completely different". Using the example of *Fifty Shades of Grey*, Flora (24) clarifies the difference between plagiarism and inspiration as follows:

> In my opinion, it's the difference between plagiarism and inspiration. So it's possible that something inspires you. And if your own stuff is quite different anyway, it's still just an inspiration. But when you use tracing paper to copy something and then only put new clothes on it, you can't really say anymore that it's a new inspiration. It's always quite difficult to make that distinction in artistic creations.

Rather than challenging traditional understandings of originality, the principles of a "personal intellectual creation" (distance, fading, individual articulation; see above) are repeated. Thus, one mode of boundary work is to transfer and translate these basic logics into practices—that, for various reasons, are conceived differently by legal experts and copyright holders.

Beyond this, boundary work aims to *establish fan fiction as a distinct and unique cultural sphere*. Noticeably, one cluster of adjectives and descriptions is grouped around joy and playfulness, gratitude to the creators for "having given the body of thought to us" (Pawel (25), with regard to the creator of *Naruto*), and the emotional bond with characters and story worlds of the fandom. Myriel (22) wants to "go wild" in writing fantasy stories. Sonja (38) wishes to immerse herself in the story world. Toying and "borrowing" (Jamison 2013: 17) are attributions also emphasised by other fan fiction studies. What is said by such descriptions of personal motivation is at least as important as what is *not* said. Without any prompts, none of our interviewees stated: "I want fan fiction to become more than a hobby. I want to earn money and make a living from writing fan fiction". This is not to say these aspirations do not exist or have not been realised (at least partly) by some. However, fan fiction primarily has to remain a cultural niche, a parallel universe, a "gift culture" (e.g. Hellekson 2009), separated from market logics and commercial exploitation. This is not a coincidence: companies and copyright holders may tolerate fan fiction as a means of fan bonding and free publicity, but deliberate attempts at serious commercial competition are usually the red line that fans should not cross.

It is obviously hard work to uphold the boundary of non-commerciality across a loose network of thousands and millions of individuals and groups contributing to this type of literature and defending it against those coming from the outside and looking for commercial benefits. Interviewees report having heard of cases in which fan fiction stories were copied and offered for sale on *Ebay* or *Amazon* without the

knowledge of their authors. Another way of making money is offering "commissions". Here, paid fan fiction is written upon customers' special request. However, the ethos of the non-commercial community is still resilient. Asked the question how copyright law should be shaped in the future, Sina (23) points directly to the question of commerciality:

> If no one makes money from it, I can't understand why it should be prohibited by law. If anything, the original author will get even more attention if people are discussing it a lot and potentially also buy their stuff. And this will really support the original author rather than damage them.

To maintain the existing boundary of non-commerciality, in the case of literary aspirations that are originally based on fan fiction, but then go beyond it, texts and identities undergo a *process of purification*. This is best illustrated by "pulled-to-publish"—a practice that has increasingly established itself in the realm of *Fifty Shades of Grey* and the growing sector of long-tail print-on-demand and/or e-book publishers. For instance, one of our interviewees, Jasmin (49), published a two-volume gay romance in German. Before its publication, the story was part of the *Sherlock* fandom. In addition to changing the characters' names, Jasmin cropped catchy quotes from the serial she had previously inserted into the fan fiction as recognisable triggers. Furthermore, she took down the German fan fiction version from the platforms before publication. The English version still exists, but is hard to find for outsiders due to the switch between languages and changed author names. For the publication, Jasmin created a second pseudonym different from the one she had previously used to release fan fiction.

In brief, entering the commercial markets means leaving the fan fiction world behind—at least in relation to the underlying text that is made lawful by purification, and personally, by creating an additional author identity.

However, the question remains to be answered to what extent recent attempts to commercialise fan fiction (from inside and outside) will operate as a game changer. Other interviewees have made less attempts to cover their tracks: sometimes reduced chapters of former fan fiction remain visible, intended as reading samples. Here, fan fiction is turned into a marketing tool. Other authors intend to bridge the two worlds by taking followers from one world (fan fiction) into the other (commercial publication markets). Finally, when stimulating authors' fantasies with hypothetical scenarios, for some monetary incentives lose absurdity.

5. "Metall auf Metall": Boundary Work in the German Judiciary

In our second example, we change the perspective. Boundary work is not limited to groups and stakeholders outside of the law, but also affects the practice of law. In this chapter, we will introduce the *"Metall auf Metall"*[16] lawsuit as a vivid example of how well-established boundaries in German copyright law[17] are affirmed, questioned and re-negotiated by legal practitioners and different authorities (see also Döhl in this issue). The case has occupied the German courts for almost 20 (!) years. At the current state of play, after the decision of the Federal Constitutional Court ("Bundesverfassungsgericht") — the highest German judiciary authority — in 2016[18], a number of traditional copyright law practices are now put into question. Both its provisional end and its development to date highlight boundary work within the judiciary: interpretations differ between the authorities involved as well as over time, with possible implications transcending this particular legal dispute and also sampling as a specific media practice.

The lawsuit involves the German music producer *Moses Pelham*, who used a two-second sample from the song *Metall auf Metall*, which is the intellectual property of the band *Kraftwerk*. Pelham introduced the sample in question, a cold metallic sound reminiscent of crashing metal, into the song *Nur mir*, performed by *Sabrina Setlur*, with the

artistic intention to give it a strong rhythm and an aggressive atmosphere. *Kraftwerk* holds the ancillary copyright as the phonogram producer ("Leistungsschutzrecht") of the sampled song *Metall auf Metall* in the sense of Sec. 85 UrhG and has been determined to defend its right in *seven* decisions to date—two more will follow, one by the European Court of Justice and another one by the German Federal Court of Justice ("Bundesgerichtshof").[19]

Although *Nur mir* shows no similarity to the referenced track *Metall auf Metall*, as its features are fading in *Pelham's* new creation, the case is problematic. A two-second sample does not reach the creative threshold to qualify as a personal intellectual creation according to Sec. 2 (2) UrhG; consequently, it does not fulfil the requirements for protection as a copyrighted work. Nevertheless, the economic value of a short musical fragment—even a two-second sample—is protected under the ancillary copyright law ("Leistungsschutzrecht")—to be more precise—as the ancillary rights of the phonogram producer (Sec. 85 UrhG). In the civil proceedings, guided by the Federal Court of Justice ("Bundesgerichtshof", BGH), the criterion of reproducibility ("Nachspielbarkeitskriterium") was introduced, i.e. the condition that the sequence concerned could not be reproduced in a way that sounded like the original, which took the litigation to a constitutional level.[20] A closer inspection of the dispute's evolution shows that the court authorities involved assessed the case differently, starting with the most important change in the proceedings in 2016, when the Federal Constitutional Court took a position on the case.[21] The music industry experienced a strong deprofessionalisation in recent years, as the emergence of the Web 2.0 enabled non-professionals to sample and create their own music. The outcome of the case will therefore affect a much wider audience. The latest development saw the case referred up to the European level, after the Federal Court of Justice submitted several questions concerning the interpretation of German provisions in the light of European law to the European Court of Justice.[22] This provoked an even wider public inter-

est in this important case which illustrates the challenges new kinds of artistic expression create to constitutionally guaranteed rights.

Since 1997[23], the civil court proceedings between *Pelham* and *Kraftwerk* passed through the entire German court hierarchy, before being taken to the constitutional and, recently, the European level. In 2004, the case was initially heard in front of the Hamburg Regional Court[24] ("Landesgericht (LG) Hamburg"), which decided in favour of *Kraftwerk* with an injunctive relief, declaring *Pelham's* sample an unlawful appropriation. Then, in 2006, *Pelham* appealed in front of the Higher Regional Court in Hamburg[25] ("Oberlandesgericht (OLG) Hamburg"), which was rejected. *Kraftwerk* took the case to the Federal Court of Justice (BGH)[26], which ruled that the use of the small audio fragment was an infringement of the phonogram producers' rights. The ruling declared the use as inadmissible for sound sampling as long as the musician had the possibility of reproducing the sound sequence by him/herself or the sound sequence could be defined as a melody.[27] The existence of a musician's economic benefit or a phonogram producer's economic disadvantage was not considered relevant by the courts. However, the highest German civil court pointed out that the Higher Regional Court in Hamburg should take into account Sec. 24 (1) UrhG.[28] As a consequence, the Federal Court of Justice reversed the ruling of the Higher Regional Court in Hamburg and passed the claim back to the previous court. In 2011, the Higher Regional Court in Hamburg[29] decided again, this time considering Sec. 24 (1) UrhG, that the *free use* provision was not applicable in the case between *Pelham* and *Kraftwerk* if it was possible for a music producer of average skills and technical possibilities to reconstruct a sound sequence of similar quality by him/herself, with the quality being measured by the addressed audience.[30] The appeal of this judgment remained ineffective, because the Federal Court of Justice[31] decided again in favour of the ancillary copyright holder[32]. *Pelham* submitted a constitutional complaint to the Federal Constitutional Court[33], claiming that the Federal Court of Justice's judgments infringed on the

freedom of arts. The legislator balanced the interests of the protection of property, guaranteed in Sec. 14 (1) GG and represented in this case by the phonogram holder's rights, with the freedom of arts, guaranteed in Sec. 5 (3) GG and represented by the interest of artistic expression guaranteed by Sec. 24 (1) UrhG.[34] The Federal Constitutional Court annulled the decision of the Federal Court of Justice and referred the case back to it for a new judgment, suggesting a clarification under European regulation.[35] In consequence, the Federal Court of Justice[36], unable to make a ruling based on the supplementary interpretation of the infringement of the phonogram producers' rights submitted the questions to the European Court of Justice[37], whose decision is still pending. The conflict between the freedom of arts and the protection of ownership is now being considered from the perspective of European law (see also Rossa 2017: 665). The main questions to be clarified through the European Court of Justice are the supplementary interpretations of matters such as the protection of sound fragments in the light of the performance protection law, the legitimacy of limiting the scope of protection ("Schutzbereichbegrenzung") in the case of the German *free use* provision, and the balance of interests for statutory exceptions in the creative transformation of pre-existing works as in in the case of digital sound sampling (see also Ohly 2017: 964). Therefore, a purely national view on this problem is no longer possible (see also Ohly 2017: 969). Referring to the Federal Constitutional Court's decision, Podszun (2016: 606) calls this case a cornerstone for the music genre, represented by the plaintiffs of the constitutional complaint. They will, however, not be the only ones benefitting from the outcome of this case. The final ruling will be decisive for the approval of cultural techniques such as sampling, remixing and appropriating in general. Unlike the rulings of the Federal Court of Justice over the past years, the Federal Constitutional Court's decision benefitted *Moses Pelham*. In summarising the outstanding key points of the Federal Constitutional Court's decision, we identify three important changes at national level from the previous court rulings: (1)

The court rejected the condition of admissibility of sampling (as an analogue use of Sec. 24 (1) UrhG), used by the Federal Court of Justice, which allowed the *free use* of sampling only when the sampling artist did not have the possibility to reproduce the sequence by him/herself and had attempted to license the required sequence from its right holders. Both options would infringe on the freedom of artistic activity ("künstlerische Betätigungsfreiheit") and restrict cultural development. (2) The court declared a violation of the freedom of arts if the artistic composition is weighed up against the interference with copyright or neighbouring rights, limiting the exploitation in a minor way. In the scenario described, the interest of the rights holders may have to recede in favour of the freedom of artistic expression.[38] The crucial point in this revised decision is the *minor exploitation of the property right*. There are no concerns about declining sales for the phonogram rights holder as long as the newly created work is sufficiently different from the original, so both of them can gain a competitive proportion of the market[39] (cf. Ohly 2014: 41). To determine the level of exploitation, the crucial factors are the artistic and time distance between both works, the significance of the adopted sequence, the economic damage caused to the copyright holder of the original work, and its level of recognition. (3) It is important to clarify the position of the Federal Constitutional Court regarding the ancillary copyright law. The court underlines its meaning as a purely economic right to protect investments (Podszun 2016: 609). Following this logic, it is not necessary to allocate all conceivable possibilities of economic use to the phonogram producer. The social obligations of property ("Sozialbindung des Eigentums") require that a work, once published, becomes a part of the cultural artefact and belongs to the current state of the artistic discourse on a social level.

From this we can conclude that the Federal Constitutional Court is strengthening the freedom of arts in the case of sampling because of its cultural importance as a medium of artistic dialogue in hip hop music. In hip hop, the direct use of an original piece of music is a cru-

cial element of the experimental synthesising process[40]; consequently, the use of samples is an indispensable style element in the genre of hip hop. Without the technique of sampling itself, the whole art form would therefore be non-existent. The recognition of this dependence is a critical issue for referential forms of artistic practice in general.[41] The nature of Sec. 5 III GG requires an art-specific approach ("kunstspezifische Betrachtung"). The crucial consideration is the requirement to apply standards specific to the art in dispute, based on the freedom of arts (Duhanic 2016: 1007, 1012). This encourages us to take a fresh look at the originality of a work and perhaps change our perception. Although the postmodern concept of re-use as an artistic tool became popular through pop culture, art and technology decades ago, only now does the legislator recognise it as a way of artistic expression and composition. The transformative and derivative use changes the relationship between the original work and the copy. The distinction may appear harder because the differences between the original and derived work become more subtle, while the continuing elements such as the status and the identity of the original work remain the same (see also Klass 2017: 152).

What remains to be said from the perspective of the German provision of *free use*? Free use should be taken into account in the case of Secs. 23 and 24 UrhG. According to Peifer (2016: 805, 809), three requirements need to be fulfilled within the scope of Sec. 24 (1) UrhG in the context of referential forms of art: (1) The derivative work must show evidence of artistic achievement (effort); it will be sufficient if it constitutes a form of art. (2) It must not impact the market of the original work. (3) To qualify as free use, the derivative work needs to be a result of an artistic dialogue with its source. The incorporation into a new work itself can be understood as an artistic dialogue. (4) The re-use has to be revealed: it is important to identify the original work and name its source, although the courts require this disclosure only for quotations in accordance with Sec. 51 UrhG[42] (cf. Peifer 2013: 99, 108 f.).[43] It is important to keep in

mind that Sec. 24 (1) UrhG represents a norm not reflected at a European level. It is doubtful whether this norm will withstand after the submission to the European Court of Justice. It is expected that, in the future, the challenge of transformative use will be measured by Art. 5 Directive 2001/29/EC at the European level (see also Ohly: 2017: 968).

It remains to be seen whether and to what extent the Federal Constitutional Court's wishful prediction will be taken into consideration in the civil authorities subsequent court decisions. The outcome depends entirely on the European perspective. The open-minded and forward-thinking ruling of the Federal Constitutional Court brings hope for referential practices of art and pop culture itself. To what extent this ruling that is favourable to the arts is applied depends on the amount of case law presented in the postmodern spirit. We fail to see the importance of the quantity of judgments, but focus mainly on qualitative factors which should not be underestimated. The paradigm can be shifted by the courage to pursue a case, as shown by *Moses Pelham*. Out-of-court settlements in copyright cases are more common these days as a way to avoid disputes in the short-term, considering the legal uncertainty and expenses (see also Klass 2016: 804). However, taking a longer-term view, in avoiding case law, we may miss the opportunity to overcome the legal inertia by sensitising the stakeholders—and society in general—to this specific problem.

6. Conclusion

Remix practices not only represent a challenge to German copyright law, but have wider repercussions. Modernist conceptions of individuality and originality make it difficult to handle the increasing popularity of works built upon other works. Resolving this question is more important than ever, considering that it is impossible to create a purely individual work, without references or similarities to existing works and taking into account that remix has become an extremely common artistic expression in pop culture several decades ago.

Against the background of German copyright law, we have looked at remix practices and transformative works from a boundary work perspective. Using both fan fiction authors' reports on their writing and publishing practice and a lawsuit on sampling as examples, we have attempted to approach copyright law in practice.

In the case of fan fiction authors, copyright law affects fannish everyday life. One mode of boundary work consists in translating some elements of copyright law (originality, individuality, fading of the source in the new work) to fan's own derivative or transformative works and simultaneously almost ignoring the legal implications. Certainly, boundary work may also occur in the opposite way, i.e. by publicly arguing for the need of copyright revisions by gathering detailed legal knowledge and questioning legal foundations. In the lives of fans, in particular those who are politically indifferent and have no responsibility for (own) media infrastructures, ignorance is a condition for unfolding idiosyncratic understandings of (un)lawfulness.

In the case of "Metall auf Metall", boundary work is undertaken by legal practitioners inside the judiciary. Here, it is clearly a knowledge-rich procedure of experts' in-depth interpretation of copyright law. Perceptions of the legality of (micro-)sampling depend on shifting interpretations and changing focuses on the question which rights should be judged favourably. In the *Metall auf Metall* case, boundary work was performed by changing the balance between ancillary copyright law and artistic freedom. Part of this re-balancing is the greater appreciation of remixing as an artistic expression in its own right. Certainly, many previous lawsuits and the boundary work of stakeholders within the media industries reconfirm the existing boundaries. In Germany at least, the Federal Constitutional Court's decision cannot be ignored. In the long run, it may have consequences for the understanding of originality and creativity in copyright law and jurisdiction more generally.

If so, legal and fannish boundary work could be considered as slightly converging.

This also applies with regard to issues of commercial success and competition. Fan fiction can be distinguished as a unique cultural sphere, separated from market logics and commercial exploitation. It requires boundary work both to maintain and to transgress this boundary, as illustrated by the practice of pulled-to-publish and the purification of transformative works in order to commercialise them. In our second example, commercial competition and the related evaluation criteria (e.g. serving the same or different markets; minor or major exploitations of property rights; time gap between works) are crucial. It can be assumed that these criteria will be increasingly important in deciding legal conflicts, when the differences between the original and the related works become subtle and remix practices are more recognised as artistic expressions.

Although practised in very different and separate spheres, the boundary work of fans and legal practitioners can be seen as more interconnected than it may seem at first glance. The fans' work is essential for achieving a greater acceptance of remix practices and highlighting grey areas in law. Conversely, whether existing boundaries are reaffirmed or shifted, legal practitioners react to changing forms of creative articulations and media environments. Ultimately, of course, the flexibility that remix practices will have in the future will not be decided by the courts, but by legislation, by political action, and related to that, the "success" or "failure" of boundary work undertaken by all the different stakeholders attempting to influence political processes. Thus, the boundary work of fan creators always mirrors the boundary work of other parties.

Notes

1 German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), GRUR 2016, p. 690, 697 – Metall auf Metall.

2 This refers to the notion that copyright protection can be established only because of the form of a copyrighted work and never because of its content.

3 RG, GRUR 1926, p. 441, 443 – Jung-Heidelberg; BGH, GRUR 1999, p. 984, 988 – Laras Tochter; OLG München, NJW-RR 2000, p. 268, 268 f. – Das doppelte Lottchen; LG Hamburg, ZUM 2003, p. 403, 405 – Die Päpstin.

4 BGH; GRUR 1994, p. 191, 206 – Asterix-Persiflagen; BGH, GRUR 1994, p. 206, 209 – Alcolix; BGH, GRUR 1999, p. 984, 988 – Laras Tochter; OLG München, NJW-RR 2000, p. 268, 268 f. – Das doppelte Lottchen; LG Hamburg, ZUM 2003, p. 403, 405 – Die Päpstin; BGH, GRUR 2014, p. 258, 263 – Pippi Langstrumpf-Kostüm.

5 OLG München, NJW-RR 2000, p. 268, 268 f. – Das doppelte Lottchen; LG Hamburg, ZUM 2003, p. 403, 405 – Die Päpstin.

6 BGH, GRUR 1961, p. 631, 632 f. – Fernsprechbuch.

7 Other exceptions are caricatures or pastiches according to Sec. 5 (3)(k) Directive 2001/29/EC.

8 BGH, GRUR 1994, p. 191, 193 – Asterix-Persiflagen.

9 BGH, GRUR 1958, p. 354, 359 – Sherlock Holmes; BGH GRUR 1971, p. 588, 589 – Disney-Parodie.

10 EuGH, GRUR 2014, p. 972, 974 – Vrijheidsfonds/Vandersteen.

11 BGH, GRUR 1999, p. 984, 987 – Laras Tochter.

12 BGH, GRUR 1981, p. 267, 269 – Dirlada.

13 We would like to thank Cornelius Schubert for making us aware of this conceptual difference.

14 More engagement can be found when interviewees are not only platform users, but involved in more active ways (e.g. as forum moderators), run own sites (see also Einwächter in this issue) or find themselves in the position to be well-known or famous in their communities.

15 The situation is more complex in (per se) collective genres of writing. In role play stories, the group may be perceived as an acting unit. Yet, this does not affect the question of (collectively) producing something new and different compared to the source material.

16 BVerfG, GRUR 2016, p. 690 – Metall auf Metall.

17 In this specific lawsuit, we are confronted with the difficulty of neighboring rights, not copyright law itself. It is discussed in the context of neighboring rights of the phonogram producer because of the analogue application of Sec. 24 (1) UrhG and the constitutional assessment.

18 BVerfG, GRUR 2016, p. 690 – Metall auf Metall.

19 Proceedings: LG Hamburg, BeckRS 2013, 07726; OLG Hamburg, GRUR-RR 2007, p. 3, 5 et seq. – Sampling; BGH,

ZUM 2009, p. 219, 219 et seq. – Rhythmussequenz; OLG Hamburg, MMR 2011, p. 755 – Metall auf Metall II; BGH, GRUR 2013, p. 614, 614 et seq. – Metall auf Metall II; BVerfG, GRUR 2016, p. 690 – Metall auf Metall; BGH, GRUR 2017, p. 895, 895 et seq. – Metall auf Metall III; outstanding verdict: ECJ.

20 BGH, GRUR 2013, p. 614, 616 – Metall auf Metall II.

21 BVerfG, GRUR 2016, p. 690 – Metall auf Metall.

22 BGH, GRUR 2017, p. 895, 900 – Metall auf Metall III.

23 The year in which the sample was created.

24 LG Hamburg, 8.10.2004 – 308 O 90/99.

25 OLG Hamburg, 07.06.2006 – 5 U 48/05.

26 BGH, 20.11.2008 – I ZR 112/06.

27 BGH, ZUM 2009, p. 219, 222 – Metall auf Metall.

28 BGH, ZUM 2009, p. 219, 222 – Metall auf Metall.

29 OLG Hamburg, 17.08.2011 – 5 U 48/05.

30 OLG Hamburg, GRUR-RR 2011, p. 396, 398 – Metall auf Metall II.

31 BGH, 13.12.2012 – I ZR 182/11.

32 BGH, GRUR 2009, p. 403, 407 – Metall auf Metall I; BGH, GRUR 2013, p. 614, 617 – Metall auf Metall II.

33 BVerfG, GRUR 2016, p. 690 – Metall auf Metall.

34 BVerfG, GRUR 2016, p. 690, 694 – Metall auf Metall.

35 BVerfG, GRUR 2016, p. 690, 696 – Metall auf Metall.

36 BGH, 01.06.2017 – I ZR 115/16.

37 CJEU—C- 476/17 (pending).

38 BVerfG, GRUR 2016, p. 690, 693 – Metall auf Metall; earlier already BVerfG, GRUR 2001, p. 141 f. – Germania 3.

39 BVerfG, GRUR 2016, p. 690, 694 f. – Metall auf Metall.

40 BVerfG, GRUR 2016, p. 690, 694 – Metall auf Metall.

41 BVerfG, GRUR 2016, p. 690, 693 – Metall auf Metall.

42 BVerfG, GRUR 2016, p. 690, 695 – Metall auf Metall.

43 Only if the German free use provision survived the European ruling.

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