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Editorial

The second issue of Media in Action assembles a variety of articles from media studies, media law and socio-informatics. A thematic focus is on 'Copyright Law' and the question of legal answers to the problems inherent in user-generated work that builds on pre-existing and often well-known works. A research article by Axel Volmar zooms in the 'nature' and purpose of formats and their relation to media theory. Finally, a conversation between Volker Wulf and Batya Friedman highlights experiences and explores the future direction of technology design by discussing the concepts of 'Grounded Design' and 'Value Sensitive Design.'

The editorial team hopes that you will enjoy reading the second issue of Media in Action!

Research Articles

Formats as Media of Cooperation

Axel Volmar

"If there is such a thing as media theory, there should also be format theory," writes media scholar Jonathan Sterne in his book *MP3: The Meaning of a Format* (Sterne 2012: 2). Some five years later, as a growing number of scholars from a variety of disciplines are expressing a particular interest in the study of formats, it seems adequate to speak of the emergence of *format studies* as a new research field. In 2017, three conferences in the German-speaking world alone investigated formats from various disciplinary perspectives: in September 2017, the symposium "Vom Medium zum Format?" took place at the Ruhr University Bochum; in October, the University of Bern organized a conference on formats from an art historical perspective; and finally, the University of Mainz hosted the international conference "Format Matters" in December 2017. However, and despite an increasing number of works, a "format theory" as envisioned by Sterne remains to be written. This article represents a first step toward outlining a systematic approach to the theory of formats. To this end, I will assemble some of the fundamental types, features, and functions of formats in past and present media cultures to assess their potential significance and relevance for contemporary media studies.

As I will demonstrate, formats—in their literal meaning as things brought into "form" or "order"—frame and configure media in fundamental ways while also linking different domains of media production, distribution, and reception. Moreover, I will show that formats are not only crucial for understanding the aesthetic dimensions of media but also how people create, work with, and consume media. In other

words, formats are linked, in fundamental ways, to *practices*. In recent years, Nick Couldry has prominently advocated for a practice-theoretical approach to media and communication studies, an approach he has termed "media practice theory" (Couldry 2012). Couldry's approach encourages media and audience research scholars not to limit themselves to the philology of media "texts" or the political economy of media institutions, respectively, but to direct their focus toward "what people [...] are doing with media" and specifically how they integrate media, and especially digital media, into their everyday lives: "It is only in everyday media practice and everyday assumptions about how to get things done through media, where to get information and images from, what can be circulated and how, that we get a grip on media's relations to society and world." For this reason, Couldry has termed his approach a "socially oriented media theory" (Couldry 2012: 6–9).

Couldry further calls for studying the "materiality of representations", with the aim of taking "seriously the social as a site of material constraint and possibility, and media's role in its construction" (Couldry 2012: 32). In his book, Couldry explains his approach by identifying a number of new fundamental media practices, such as "searching and search-enabling," "showing/being shown," "presencing," "archiving," and a variety of more complex media-related practices (Couldry 2012: 43–58). While this approach is both inspiring and productive in extending audience research beyond the realm of mere media consumption, its selection of practices, with a clear focus on end users, hardly covers the gamut of "what people [...] are doing with media." Moreover, due to the deliberate focus on representations, all practices chosen by Couldry emphasize "how the *meanings* circulated through media have social consequences" (Couldry 2012: 8, my emphasis). Thereby other, arguably less obvious but nevertheless equally ubiquitous practices that involve 'media,' such as bureaucratic or juridical practices of coordination, delegation, or registration/identification (Giessmann 2017), run the risk of evading the attention of such a perspective.

In contrast to Couldry's approach, which directs attention to the effects of "large-scale media institutions" on how individual media users process and circulate meaning, my goal here is to study how diverse forms of *work* and *cooperation*—between different actors both human and non-human—are being constituted, stabilized, governed, and changed by and with media technologies. In doing so, I follow recent efforts to reconceptualise media beyond their more traditional definitions as 'mass media' and 'media of communication' and instead as "logistical media" (Peters 2015; Rossiter 2016) and "media of cooperation" (Schüttpelz 2017). These efforts demand a shift not only in scholarly perspective from the content to the contexts and relational aspects of media but also toward promoting the study of media practices rather than media products. Thus, alongside considering media practices related to production and reception of content, i.e. representations or meaning, I focus on the quotidian purpose-oriented uses and mobilizations of media and their crystallizations in material artefacts. People not only consume media products, such as news, entertainment, or web content and services, but also organise their daily lives through them by means of "infrastructuring" (Star and Bowker 2002), or establishing, engaging in, and resorting to different forms of cooperation. These modes of cooperation occur in three different relationships: among humans, between humans and machines, and among different machines. This infrastructural conception of media use is closely aligned with what John Durham Peters has recently called "elemental media" (Peters 2015). In this context, formats can be regarded as the means and the objectified results of practices of infrastructuring media and infrastructuring with media; therefore, they are also the links or interfaces between a wide range of actors and their practices. As examples, formats can help practitioners and machines collaborate over geographic distances or help link professionals to consumers. With this in mind, I argue that formats should be considered fundamental materializations and reference points of work-related media practices.

In the remainder of this article, I argue that formats play particularly important roles in enabling and constituting diverse forms of cooperation. More specifically, I claim that formats are, in a paradigmatic sense, media of cooperation. Due to their capacity to both enable and enforce cooperation amongst potentially very heterogeneous actors and beyond the limits of local boundaries (Star and Griesemer 1989), I would further like to suggest that formats represent crucial prerequisites for the development of extensive and complex media systems, infrastructures, and industries (e.g. national or transnational). In order to demonstrate this, I first present a short overview of the current scholarly interest in formats. I then turn to the cultural history of formats—both in terms of etymology and material culture—from which I draw a preliminary typology of formats. In the final section, I discuss some of the common features and functions of formats to support my claims that practices of cooperation and scaling up rely on formats as necessary conditions of media possibility.

I. The current interest in formats

Before attempting to gather some of the building blocks for a general theory of formats, it seems adequate to recall relevant reasons behind the blooming scholarly interest in the topic throughout the last years. In his book on the history of the mp3, Jonathan Sterne examines why and how the mp3 format became the primary form in which recorded music was circulated via digital devices and network infrastructures at the turn of the 21st century. Using the mp3 as a case study, he addresses various epistemological, cultural, and political aspects within the history of digital audio to better understand the "distributed character of culture in our age" (Sterne 2012: 1). By covering a period of more than a century, Sterne shows that formats embody important sedimentations of scientific knowledge, cultural practice, and politics:

> The MP3 carries within it practical and philosophical understandings of what it means to communicate, what it means to listen or speak, how the mind's ear works, and what it means to make music. Encoded in every MP3 are whole worlds of possible and impossible sound and whole histories of sonic practices. (Sterne 2012: 2)

Therefore, he considers the mp3 file format to be the best entry point for a cultural history of sound and communication in the 20th century. And indeed, it appears to be an extremely smart move to tell the evolvement of 20th century acoustics and sound media along the lines of a format history because, without these inventions and developments, the mp3 would not have come into being as a "cultural artifact" in quite the same way it did (Sterne 2006). For Sterne, the emergence of digital file formats, and especially those based on techniques of data compression, prompts a shift in scholarly perspective from the conditions of media production and consumption to the processes of media distribution. The study of formats, according to Sterne, therefore demands a gradual shift in scholarly attention from the content of media—including its qualities and effects—to the logics and conditions of the circulation of media artefacts. This includes a close consideration of the ecological configurations, such as transmission networks and hard- and software infrastructures, that make these circulations possible—and profitable.

In his book, Sterne focuses primarily—though not exclusively—on digital file formats. However, of course, many other types of formats exist, all of which spark different sets of scholarly interests and research questions. In Germany, for instance, film scholars Oliver Fahle and Elisa Linseisen propose the study of film formats, such as HD (Linseisen 2017), as a solution to resolving the problem of media conversion, i.e. the perceived dissolution of individual analogue media (or *Einzelmedien*) in the universal medium of digital code. While the general process of digitalization might threaten to dilute the more traditional notions of "media," formats seem to lend a certain concreteness to how we can under-

stand the medium of "film" in the digital age. Moreover, small gauge and other substandard film formats point to different film cultures, appropriations, and practices of reception, for instance by amateurs (Jancovic 2017; Schneider 2016a, 2016b).

In the discourse of art history, the study of formats even reaches back into the 19th century. In 1896, the well-known German art historian Jacob Burckhardt delivered a talk entitled "Format und Bild" ("Format and Image"), in which he pondered how art works related to their immediate surroundings and how they were altered by practices of reframing and reproduction (Burckhardt 1918). Recently, David Joselit has also placed a similar emphasis on the relation of art works to socio-political, economic and physical environments in the context of contemporary art. In his book *After Art*, Joselit conceptualises contemporary art works as forms of "international currency," which are—just like other currencies—both stored locally in "banks," i.e. museums and galleries, and circulated and traded globally (Joselit 2013). With this focus on the worldly rather than symbolic effects of art, Joselit is interested less in the meaning of specific art works, or what they represent, than in their concrete operations in the world. In an interview with David Tasman, Joselit explains:

> What I define as a "format" is a strategy for activating the space between what an image *shows* and what an image *does*. [...] The artwork almost always contains vestiges of what might be called the roots—or infrastructural extensions—of its entanglements in the world. These might include the means of production of the image, the human effort that brought it into being, its mode of circulation, the historical events that condition it, etc. The artwork's format solidifies and makes visible that connective tissue, reinforcing the idea that the work of art encompasses both an image and its extensions. (Tasman 2015: n.p.)

It is revealing that both Joselit and Sterne point to the significance of "infrastructural extensions" of artefacts, which is to say the relational aspects between objects and the social environments and physical infrastructures that surround them as well as the conditions and practices of their circulation. Formats, it seems, embody specific affordances that specify less what objects mean than what can be done with them. Before discussing possible consequences of this particular property for a general theory of formats, I will first ask more broadly, in the next section, how formats emerged as phenomena and objects, what kinds of different formats evolved, and ultimately, how we might conceptualise them theoretically.

II. A Typology of Formats

The noun "format," which seems to have first appeared in the form of the Modern Latin *liber formatus*, "a book formed" in a certain shape and size, is derived from the past participle of the verb *formare* ("to form") and literally means something brought into a certain form or order. In the 16th century, the notion became widely used as a technical term within the emerging printing industry, where the format indicated the spatial dimensions of paper sheets and books. The designations of book formats, however, referred not to absolute geometric values but rather to the number of pages produced from a single sheet of paper by means of folding it. The *atlas* or *great folio* format, for instance, indicated the use of unfolded sheets for printing (thus consisting of a front and a back page), while the *folio* format, as the name suggests (*foliō* is ablative of *folium*, the Latin word for "leaf"), produced four pages per sheet by folding it once and having two pages on each side. Following the same principle, books in the *quarto* format consisted of eight pages per sheet (two folds), the *octavo* format of sixteen pages (three folds), and so forth (Gaskell 1972: 80 f.). As this example makes clear, formats have served from the very beginning to *organize information* on material inscription surfaces and, to a certain extent, came to *embody labour practices and*

workflows. Throughout the following centuries, the notion of the format became a general container term for the indication of sizes, dimensions, and aspect ratios of objects and media artefacts in general. We can discriminate at least five fundamental types of formats (possibly more), all of which are connected to both media technologies and media practices.

1. Size-and-shape formats

Originating from book formats, *size-and-shape formats* frame and dimension the display and presentation of—usually visual—content by means of limitation, orientation, and alignment. This is probably the most common type of format. Two-dimensional size-and-shape formats determine standardized and non-standardized sizes of inscription and display surfaces and indicate the physical properties of the involved materials and storage media. There are print formats to designate the size and ratio of paper sheets, letters, books, or newspapers, image formats in photography, and moving image formats in film and television. Moreover, formats often also specify the orientation and aspect ratios of the presented information—think portrait vs. landscape format. Different denominations relative to size, such as "small gauge," "pocket book," or "large size" further hint to the fact that even simple size-and-shape formats are already closely linked to practice, as they are often specifically tailored to facilitate or encourage certain uses—both in the realms of media production and consumption. Paperback books, for example, are lighter and smaller than regular books to enable reading outside of the home, while 8-mm film formats were conceived to render film making affordable for non-professionals. In this respect, formats can both unite and divide different user groups or "communities of practice" (Lave and Wenger 1991; Wenger 1998), such as professionals and amateurs.

2. Diagrammatic and structural/structuring formats

Formats provide a general framing of information but in many cases, they also determine the spatial, temporal, or logical *structure* in which content is stored, transmitted, and presented. In that sense, the notion relates to the evolutionary term "formation" and is further reminiscent of the fact that the word "information" literally refers to data and other symbolic content that have been brought in formation, i.e. arranged in a specific form. This entails, in particular, the *diagrammatic* division and ordering of information surfaces, e.g. in the form of lists, tables, and especially forms and other previously structured, pre-formatted documents (Gitelman 2014), all of which bring to mind saturated histories of bureaucratic practices, e.g. for registration, inventory, and book keeping. As for instance Bernhard Siegert has emphasized in his book *Passage des Digitalen*, such diagrammatic subdivisions of writing spaces, e.g. of cuneiform tables, already bear symbolic meaning themselves, and not only in terms of their content (Siegert 2003, 39). Moreover, some inscription surfaces demand specific practices of preparation and care before they can actually be used as symbolic media. Such practices of *formatting* are among the oldest cultural techniques we know: for instance, we can read the ploughing of land in order to prepare the soil for proper cultivation as a practice of formatting. Derrida reminds us of this connection in *Of Grammatology* where he writes about the connection of ploughing to the history of scripture:

> It is a matter of *writing by furrows*. The furrow is the line, as the ploughman traces it: the road—*via rupta*—broken by the ploughshare. The furrow of agriculture, we remind ourselves, opens nature to culture (cultivation). And one also knows that writing is born with agriculture which happens only with sedentarization. (Derrida 1997: 287)

Like the soil, inscription surfaces, such as cuneiform tablets or parchment, need to be cultivated and prepared in order to allow writing. By way of formatting, practices of usage are once again inscribed into the formats themselves. Formatting, of course, is also one of the key concepts in typesetting and graphics design, used in conjunction with rules and practices of text and image layout (see also Müller 2014).

3. Metaphorical uses

Presumably derivative of large book and image formats are metaphorical significations of the term. In German, for instance, the noun "Format" is commonly used as a denomination to acknowledge individuals of high rank or extraordinary capabilities, achievements, character, or authority. For instance, a person is supposed to *have* format ("Format haben") if they are deemed capable, thanks to e.g. expertise, talent, or moral greatness, of filling in an imaginary *frame of expectation*. Individuals may also *show* or *demonstrate* format ("Format zeigen"), for instance in situations that call for great courage or present difficult choices, such as between the individual and the greater good.

4. Encoding of information and data streams

Another frequent type of formats comprises techniques of encoding information and data streams. These are formats used for number, calendar, and time or those conceived to store and reproduce audio and video information, including digital file formats. Such formats are characterized by the introduction of additional data, or metadata, into the content or signal flow, such as information about how to render the content into a usable or consumable form. Primarily but not exclusively tailored to enable automated forms of reading, writing, and processing, these metadata—such as the playback speeds of vinyl records, line and page breaks in analogue TV signals or information in the headers and structure of digital file formats—regulate how information and data flows

are to be handled (e.g. stored, transmitted, displayed, or processed) by both people and—especially—technological apparatuses.

5. Event and narrative formats

Finally, the term "format" has increasingly come to denote strongly regulated and scripted events that follow predefined concepts, rules, or sequences, such as performance, trading, or auction formats. First and foremost, however, this group of formats entails and comprises the many event and narrative *formats* for different categories of shows, such as news, music, talk, or game formats, which were conceived in the broadcasting industry. In this signification, formats often refer to the overall concept, trademarking, and branding of—generally copyrighted—media programmes or even entire stations, as becomes apparent in the so-called "format radio" stations, commercial stations which are tailored to cater to narrow target audiences in order to maximize ad revenue. German media scholar Knut Hickethier defines such media formats as "media-industrially optimizable genres," a definition which emphasizes the often highly serialized, commodified, and industrial character of the term (Hickethier 2010: 152). In the case of narrative media formats, the connection to practice is particularly manifest, since "format" denotes specific framings of performative actions.

Contrarily to artistic "styles," however, which—stemming from the Latin term for *stylus*—point to the creative process and individual forms of artistic expression, or the notion of "genre," the different types of which commonly emerged out of an evolvement of narrative elements and forms over longer time periods, broadcasting formats are usually the result of deliberate decisions directed at raising attention and increasing recognition value. Formats, such as *Who wants to be a Millionaire?* or *The Voice*, usually consist of meticulously defined recipes, which are tailored to specific target groups and designed to enable the industrial production, potential franchising and international licencing of a show or media product in multiple geographic locations and markets,

while still allowing for smaller adjustments, for instance to accommodate a particular national or cultural context. A narrative media format, in this sense, is a genuinely economic construct conceived to allow a particular concept to be both uniquely recognizable and transferable to new local contexts within the international media market.

With all of these format types unfolded, a number of questions arise. How do these different types of formats connect? What do they *do*? And more broadly: how can we conceptualise them? To answer these questions, I will consider some of the basic features and functions of formats expressed in the last section in order to draw a number of conclusions as to how we can understand formats more broadly.

III. Common Features and Functions of Formats

Presumably the most fundamental feature of formats concerns *limitation*: formats frame and otherwise determine the spatial dimensions and aspect ratios (e.g. 16:9) of inscription surfaces or regulate the volume or temporal dimensions of art forms or media content (think short stories vs. novels, short films vs. feature films, and singles vs. long-playing records). Thereby, formats govern a number of basic qualities and "affordances" of a given medium (Gibson 1979). Secondly, formats determine the diagrammatical (spatial) or sequential (temporal) *structure* of the content, information, or data in question. In documents, such as lists and forms, for instance, spatial layout is used to prescribe what kinds of information are expected in a bureaucratic procedure (from filing tax reports to registering for an app or online site). Thereby, the formatting of the inscription surface ensures, for instance, the homogeneity, accountability, and completeness of the data (Gitelman 2006; Schüttpelz 2017; Siegert 2003). In the temporal domain, formats determine essential narrative elements on various scales, from the sequential organization of a TV show to the micro-segmentation of information flows in technical media, such as television signals or digital multimedia formats.

Through limiting and structuring content, formats also shape, directly or indirectly, the *ratio between the information content and the physical capacities of a given medium*, be it storage space, transmission bandwidth, or the processing power of a technological system, network or labour chain. After the introduction of optical film sound in the late 1920s, for example, the image frames on 35-mm film stock had to be slightly reduced in size (while preserving the aspect ratio) in order to literally make space for the sound track. Since the introduction of digital sound, analogue film stock became even more crowded with information stemming from the Dolby Digital and SDDS sound tracks and the DTS sync codes. In a similar manner, the limited bandwidth available for television broadcasting presented constraints in the temporal and spectral domain, which, for instance, affected how engineers defined the resolution and colour coding schemes of the NTSC colour television signal in the early 1950s (Mulvin and Sterne 2016).

In short, this relation between the volume of information on the one hand and the limited capacities to store, transmit, and process information on the other illustrates how deeply information processing is rooted in material realities. Hence, one of the main functions of formats consists in reconciling the differing demands regarding the content and the materialities of a given medium, respectively. This interrelation is also the reason for the close connection between formats and infrastructures or, as Joselit calls it, the "infrastructural extensions" of formats (Joselit, as cited in Tasman 2015). Since the technologically possible is more often than not hampered by the economically justifiable, formats are introduced as intermediaries to match the shape and structure of individual messages (including their sizes, aesthetics, affordances, etc.) with the requirements enforced by the surrounding infrastructures and media ecologies usually designed to be utilized by a large number of users (Sterne 2015).

This fundamental function further explains why formats tend to make heavy use of cultural techniques of compression. Compression

techniques—from the folding of letters through microfilm photography to digital compression algorithms—enhance the capacities of limited resources by strategies of efficient packaging, coding, or reducing the size or definition of content. Compression techniques are usually deployed to keep storage or transmission costs in check (high-resolution analogue film stock, for example, is expensive to buy while digital film can be expensive to store) but can determine the degree of mobility or portability of messages and media artefacts in relation to the capacities of the infrastructures in which they travel (see also Sterne 2012). However, the benefits of compression are likely to come at the cost of an altered aesthetics and experiential quality of compressed media artefacts. In order to travel well through economic and physical infrastructures, reproductions populate the world predominantly as what Hito Steyerl has called "poor images" (Steyerl 2009). Jonathan Sterne describes this trading zone as an ongoing interplay in the history of media technologies between the ideals of "verisimilitude" and the ideals of "compression" (Sterne 2012). Thus, by harmonizing media artefacts with infrastructures, formats assume fundamental *logistic and economic functions* within media systems. Once new formats become accepted as trade-offs between different demands, they tend to fade into the "background" of infrastructure (Star and Ruhleder 1996) and can prove to remain stable over relatively long periods of time.

A second key function of formats concerns their ability to foster and sustain *compatibility and interoperability*. As many of the abovementioned examples have shown, the majority of formats tends to possess considerable degrees of standardisation (Schueler, Fickers, and Hommels 2008). Although the terms "standard" and "format" can overlap in their meaning, the main difference between the two lies in the simple fact that formats most commonly standardise objects and processes that deal with and display symbolic or aesthetic content. Formats can thus be thought of as *media standards*, specific configurations that make both the form of media artefacts and the processes and practices

connected to them more consistent, predictable, and accountable—especially in terms of cost and usability but also, as in the case of narrative media formats, in legal form. In this regard, it seems worth noting that formats often come in predefined sets or families of fixed sizes, such as, for instance, the ISO A, B, and C series of paper sizes. In the case of paper, the fixed dimensions channel the sheer infinite possibilities of potential sizes and aspect ratios to a number of fixed choices or grids. This reduction of complexity can result in a greater compatibility and interoperability between devices or software applications (e.g. from different manufacturers), which, in turn, can render complex processes and workflows, such as working with paper, more flexible and predictable.

For the same reason, formats can enable and sustain diverse forms of cooperation and collaboration. Formats act as important interfaces or "boundary objects" for encounters between humans, non-humans, and "heterogeneous social worlds" (Star and Griesemer 1989). Due to their conventional nature, formats can both facilitate and dictate the cooperative practices and transactions, such as, for example, hand-overs between departments or devices. Thereby, formats ensure, on the one hand, that media artefacts are able to travel along the lines of complex production and exploitation chains. On the other hand, preassigned formats can help establish and sustain more efficient and finely grained divisions of labour and facilitate collective work practices. For example, the critical factor that allows for a collective development and an ongoing expansion of Wikipedia through crowdsourcing is less the platform or website as such but rather its formatting specifications, the so-called "Manual of Style," and the established procedures to incentivise and ensure compliance (Wikipedia 2017). Due to this regulating effect, formats often afford or even embody certain workflows. Following Gaston Bachelard, who famously claimed scientific instruments to be reified or "materialized theories" (Bachelard 1984, 13), we could therefore conceptualise formats as *reified practices*. In a similar manner, Bruno Latour

has captured the consolidation of practices into things as processes of "delegations" (Latour 1988).

Drawing from the basic—though by no means exhaustive—features and functions of formats, I want to end by suggesting two general claims regarding the nature of formats and their potential relevance for media studies. Situating formats within a broader history of media illuminates the fact that "media" have never been mere means of symbolic communication or mass distribution but rather, in the words of German media scholar Erhard Schüttpelz, "cooperatively developed conditions of cooperation" (Schüttpelz 2017: 14). In line with Schüttpelz' conception of media, I first want to argue that formats, conceived as media standards, "boundary objects", and materialized practices or "delegations", represent paradigmatic *media of cooperation*. Therefore, the study of formats and their histories can contribute to the question of how cooperation, especially beyond local boundaries, can emerge and unfold. As media standards, formats reduce ambiguity, provide orientation, and facilitate planning, making them a basic condition of possibility for processes of *scaling* or *industrialization*: formats, in other words, are decisive factors that allow media processes, in the sense of physical or chemical processes, such as photographic or phonographic inscriptions, to grow into larger media systems, industries, and infrastructures with national, transnational, or even global commercialisation chains. Portrait photography, for example, only grew into a large-scale system of mass-production after French photographer André-Adolphe-Eugène Disdéri patented and codified his version of the "carte de visite" (*visiting card*), a 6 by 9 cm portrait photo paper format, in 1854 (McCauley 1985; Meyer 2008). Therefore, the study of formats can also be instructive for the historiography of media industries and infrastructures. Since formats embody whole sets of decisions and cultures of decision making, formats can also help us understand the terms and conditions and moreover, the imaginary futures, under which these industries and infrastructures evolved and operate.

IV. Conclusion

This article aimed to think about the "nature" and purpose of formats. In the first section, I briefly introduced some of the recent work on formats to highlight potential common interests in the topic, especially touching upon the relation of objects or artefacts to their surrounding environments and the infrastructures they are connected to or feed into. I also traced various meanings and uses of formats in the course of cultural history with the intention of producing a heuristic, albeit preliminary, typology of formats. Several common features and functions of formats I distilled from this typology helped me to make some suggestions about how to conceptualise them in theoretical terms. More specifically, I argued that due to the specific possibilities and affordances of formats to establish connections, relations, and labour chains, formats not only determine the aesthetic and individual experience of media content but also provide the terms and conditions for individual and distributed media practices and other forms of cooperation. My second argument intended to consider the consequences of this aspect with respect to matters of growth.

I do not intend to go so far as to claim that the notion of format is challenging to the notion of media as a foundational term in media studies. However, the category of the format may help sharpen the notion of media or the medium in a time of unprecedented media conversion, where media, as we knew them, are being dissolved in the universal medium of digital code. Formats render media into a concrete form, often determined by negotiated conventions. What Lisa Gitelman suggested as the need for more concise histories of media is therefore often concretely encapsulated in media formats: "It is better to specify telephones in 1890 in the rural United States, broadcast telephones in Budapest in the 1920s, or cellular, satellite, corded, and cordless landline telephones in North America at the beginning of the twenty-first century. Specificity is the key." (Gitelman 2006, 7 f.) Following Sterne, I would like to argue that a media theory, especially a media theory that

chooses to take infrastructural and media-ecological aspects of mediation into account, should consider the power of formats (Sterne 2012). A future *format theory* will not substitute for media theory, but it will likely prompt us to ask different questions, follow different routes, and write different histories.

The conception and application of formats emphatically reveals media as the arena where artefacts and practices intertwine and reciprocally generate each other. Formats embody practices just as they govern and support them. Therefore, format theory seems to be capable of transcending old debates in media theory regarding the technological or social determinism of media. Formats invite us to think about the specific formations of media (historically and geographically), how they relate to personal and collective work-practices and strategies of "infrastructuring" the everyday. Formats are always, in one way or the other, *mutually made* while, at the same time, their function of communicating potentially universal standards opens connections for new participants and collaborations and thereby affects and conditions *mutual making*. Once again, formats appear to be essential media of cooperation.

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Thematic Focus

Copyright Law

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.

The Concept of "Pastiche" in Directive 2001/29/EC in the Light of the German Case *Metall auf Metall*

Frédéric Döhl

I. Introduction: The Relevance of the *Metall auf Metall* Case

Initiated in 1999, the *Metall auf Metall* case has now become notorious. New court judgments are regularly reported in the leading news media, and everyone seems to have an opinion on this case these days. In the scientific context alone, the published comments have risen to boundless numbers, not to mention the volumes of views expressed online.

After almost 19 years and 7 court judgments[1] , the parties involved still pursue their legal dispute—over two seconds of music. Originally composed and recorded by the German band *Kraftwerk* in 1977, these two seconds formed part of their track *Metall auf Metall*. In 1997, a team around German music producer Moses Pelham used the sequence as a digital extract (sample) from *Kraftwerk*'s recording, incorporating it as a loop to create a background rhythm for the song *Nur mir*, performed by German rapper Sabrina Setlur. They had, however, failed to ask *Kraftwerk* for permission beforehand. *Kraftwerk* pressed charges, among others for damages and omission. An unprecedented odyssey began (Döhl 2016a: 23).

It takes a considerable effort to find another equally trivial matter in dispute—the digital appropriation of a two-second sliver of a relatively unspecific rhythm sequence and its subsequent processing without any discernible economic disadvantage to the copyright holder—that has occupied the judicial system for such a protracted period and resulted in 7 court decisions. Several times the matter was heard before the

highest judicial bodies provided for in German law, most recently the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) in 2016 and in 2017, for the third time, the Federal Court of Justice (Bundesgerichtshof, BGH). And if this was not enough, neither the end nor the outcome of this case, rich in unexpected turns, can currently be foreseen. Most recently, the BGH referred the matter to the European Court of Justice (ECJ: C-476/17 – *Hutter vs. Pelham*). It is this next step in the proceedings I will focus on in this article.

The basic facts and development of the *Metall auf Metall* litigation outlined above are extreme in every way, indicating that its core is a fundamental issue exceeding far beyond the triviality of the original matter in dispute. The issue the courts have to resolve is the appropriate legal approach to a now widespread digital cultural technique—sound sampling. In this protracted legal battle, sound sampling is a proxy for a number of similar participative digital techniques, ranging from fan fiction to mods and memes, in which the traditional dichotomy of producer and recipient blurs and recipients become producers themselves by adapting and processing material (Döhl 2016b). This phenomenon is not new. In the history of music, composing by reference to another piece of work is a fundamental principle (Dahlhaus 2002, 78). Certainly, the quantity and (potential) audience for adaptive products have reached an unprecedented dimension in the digital realm (O'Flynn 2013). The proof is evident in every single YouTube back room production. The landscape has changed fundamentally. Most likely, this is one of the main reasons for the huge public interest in this litigation: the appropriate balance of interests weighed up by the courts here will ultimately be relevant for many users, far beyond the initial parties to this litigation and even the artistic field of music.

II. The Development of the *Metall auf Metall* Case to Date

The procedural steps of the *Metall auf Metall* case until now illustrate how pre-digital copyright legislation struggles to come to terms with the reality of the changing landscape. The courts face the dilemma of finding a ruling that is neither ultimately ineffective due to a lack of acceptance nor sacrifices the interests and rights of stakeholders, that have been established as justified for a valid reason, to factual pressures. A viable ruling is not impossible, but requires an extremely complex compromise between the vast amount of contrasting interests and stakeholders now involved, including positions of parties who frequently change their point of view depending on the stage they are at in the discourse.

This is evident in the *Metall auf Metall* case. The defendant, namely Moses Pelham, is known for having taken legal action against the unlicensed third-party use of own and third-party works, among others via the German company DigiProtect Gesellschaft zum Schutze digitaler Medien mbH (Boie 2010). In the *Metall auf Metall* case, however, he does just the opposite by fighting for the right to use third-party material via sound sampling. His course of action is not shady or even improper, but completely legal. Incidentally, it is also perfectly normal when dealing with copyright law and it reflects a basic social disposition displayed in adaptive practice. Only a few adhere consistently to the same standard when dealing with their own and other people's work. Instead, it is not unusual for artists who unashamedly use third-party works in their own production to react extremely sensitively if others treat their work in the same way. This could be qualified as bigotry or double standards, but it is not illegal. Above all, it reflects the diverse positions in this field of discourse and the inherent mobility of all those involved in it.

In this paper, I will focus on the current state of the *Metall auf Metall* litigation and analyse the likely development at EU level. The background leading to the current situation has frequently been covered and commented on; I will therefore refrain from explaining it again.

For the purpose of this paper, I will just summarise the key facts of the case (Döhl 2016a: 23).

The particularity of sound sampling as a contemporary practice of music composing based on third-party works is not contingent on the relation to the techniques used for individual genres such as quotation, analogy, adaptation, allusion, fusion, collage, pastiche or parody; rather it is founded in the act of double reference to third-party works inherent in sound sampling: the adapted or transformed materials are third-party compositions, including lyrics, if available, but at the same time they are snippets of a specific performance taken from an audio recording of this composition which is also performed and recorded by third parties — whether the performance is documented by the recording medium or, more typically, simulated (and experienced) as a coherent performance although actually recorded in independent takes and production steps (Döhl 2016b: 14).

The act of sampling therefore affects three different rights: the composer's (and potentially the lyricist's) copyright (Secs. 1 and 2 of the German Copyright Act (Urheberrechtsgesetz, UrhG)), the ancillary copyright of the performers recorded (Sec. 73 UrhG) and the phonogram producer's right to the recording that is owed to the economic and organisational investment in the production (Sec. 83 UrhG).

Irrespective of the quantity or significance of the sequence taken from the original piece via sound sampling and of the process used in the adaptation, a zero tolerance approach was applied in Germany to protect the rights related to the phonogram producer's investment according to Sec. 85 UrhG, even in the case of micro-sampling, until the BGH's first judgment in the *Metall auf Metall* case in 2008 (Döhl 2016b: 214). Before that, the legal position on sound sampling (which had taken hold in the market both technically and commercially in the 1980s; Roads 1996: 115–156; Kirk/Hunt 1999: 26–29; Metzer 2003: 160–187; Tschmuck 2012: 163–196) as a practice not subjected to consent according to Sec. 24 (1) UrhG was just as rigorously restricted as the adaptation of

melodies had been in Germany for decades (Sec. 24 (2) UrhG). In practice, however, a possibility of free use would be of major importance in sound sampling as there are no compulsory licensing rules and a clearing of sampling rights is routinely virtually unfeasible or impossible to quantify economically (Döhl 2016b: 41–48). While the undifferentiated nature of copyright law in terms of aesthetics and cultural policy at the time offered legal certainty, it was disappointing from the musicological perspective (Döhl 2018a). Those involved in the art discourse had soon agreed that sound sampling can promote significant creativity—it does not have to and often does not, but it can—and is not just a technically simple solution to compensate for a lack of own ideas or effort (Metzer 2003: 160–187; Binas-Preisendörfer 2004: 242–257; Schloss 2004; Großmann 2005: 308–331; Bonz 2006: 333–353; Diederichsen 2006: 390–405). Each case needs to be assessed individually. But this was initially prevented by Sec. 85 UrhG.

The *Metall auf Metall* case, which provoked a change, and the development it triggered are quite complicated from a legal point of view. However, the matter can be broken down to the core issue that an act of sampling affects several rights simultaneously (Döhl 2016a: 23): is it right and legal to apply zero tolerance to the rights of phonogram producers, while the other two rights are subject to a threshold of originality below which users can sample anything without permission (European Copyright Society 2017)? The courts of the first and second instance ruled against Pelham based on the zero-tolerance approach to the infringement of *Kraftwerk*'s phonogram producers' rights. (To date no full decision has been made on the infringement of the two other rights.) In a highly controversial decision, the BGH began to relax the zero-tolerance argument in 2008, but shied away from a clear cut. After a clarification in the two subsequent rulings, the BGH's second ruling in 2012 provided that only short samples without third-party melodies could be used freely and only in cases in which these samples could not be reproduced or recorded by the user—the fictitious benchmark

was an average producer—and "faded" in the new piece of music. Compared to the starting point, a major gain had been achieved in theory, but in practice it was negligible. The zero-tolerance argument had been replaced by a 'de-facto never' standard. Consequently, the court ruled against Pelham on the (new) grounds that he could have produced the two-second sequence himself.

In 2016, the BVerfG overturned the decision and ruled that the constitutional reconciliation of interests should be governed by an "art-specific approach". Eventually, the court formulated a catalogue of practicable solutions to create the necessary balance of interests. In particular, this balance can be achieved based on

1) an assessment of independent use, i.e. an analogue application of Sec. 24 (1) UrhG (BGH 2008: para. 19–25; BGH 2012, para. 15–24; BVerfG 2016, para. 110);
2) an assessment of the adverse economic impact on the original author—a limitation of Sec. 85 UrhG (BVerfG 2016, para. 110);
3) standardised upstream consent and participation systems—corresponding to cover versions (see Sec. 42(a) UrhG, 34 VVG);
4) downstream revenue sharing systems (BVerfG 2016, para. 80);
5) the establishment of privileged purposes of use in application of the principles of Sec. 51 UrhG (BVerfG 2016, para. 110);
6) privileging micro-sampling in analogy to the threshold of originality or a de facto *de minimis* rule (BVerfG 2016, para. 85 f., 99, 104, 108; see also the rationale in the *Goldrapper* case in BGH 2015).

These are all very different and, taken by themselves, perfectly reasonable alternatives. From a musicologist's perspective, however, an "art-specific approach" only allows for the first alternative, as I have discussed in detail elsewhere (Döhl 2016b: 314–344; Döhl 2018a).

Below I will focus on the second request the BVerfG made when referring the case back to the BGH: to verify whether there was a duty to

submit the case to the European Court of Justice (ECJ). The BGH complied with the request and submitted the case, accompanied by a catalogue of questions, to the ECJ in early June 2017.

III. The Likely Future Development of the *Metall auf Metall* Case

This is the case as it stands. While the matter in dispute is trivial and stereotypical from the perspective of the remix and sampling culture, the *Metall auf Metall* litigation is very enlightening for research on adaptation in the arts, which is one of my research focuses (Döhl 2016b; Döhl 2018a). This applies both to the progress of the case to date and the potential future developments I will now focus on. It is obvious that, since the first appeal before the BGH, the *Metall auf Metall* litigation, initiated in 1999, has been focusing primarily on the question to what extent the balance of interests provision under Sec. 24 (1) UrhG is applicable to sound sampling. This means the courts are attempting to clarify whether it is possible for digital adaptations, which by their nature draw from other musical works and media at the same time, to become—at least in a legal sense—something that qualifies as an "independent work" under German copyright law, i.e. an artistic entity in its own right and with its own identity.

A welcome endeavour: in adaptation research, it is commonly acknowledged across all arts that, as a matter of principle, all adaptations can reach such a state of artistic identity in their own right, no matter how prominent the original material is in the new work (Döhl/Wöhrer 2014). The controversial question is how and when they reach this state, rather than whether they can reach it at all (Genette 1993; Hutcheon 2013, Sanders 2016). The number of reference examples is vast, ranging from Richard Wagner's *Ring des Nibelungen* to James Joyce's *Ulysses*, and from Leonard Bernstein's *West Side Story* to Quentin Tarantino's movies. A large proportion of research in the various artistic disciplines is dedicated to studying direct dependencies from older works, ranging from mere inspiration to allusion or appropriation, while ultimately

illustrating the specific quality and independence of the more recent work. In an "art-specific approach", which the BVerfG demanded so vehemently in 2016, the German route of basing decisions on a general clause of independent use as an aesthetical category therefore seems to be absolutely appropriate (Döhl 2016b: 314–344).

From an arts perspective—or music in this case—the concept of independent use as an aesthetic category is an appropriate tool of a free balance of interests (i.e. entirely decided on a case-by-case basis).[2] Besides, an aesthetic differentiation between 'quasi-analogue' and digital appropriation is simply not justifiable (Döhl 2016b: 304). From an aesthetic point of view, a discourse on the potential application of Sec. 24 (1) UrhG to digital appropriations—a route now followed by the *Metall auf Metall* case—is imperative. However, from an economic or moral perspective or in terms of privacy rights or legal policy, this may be an entirely different matter. Accordingly, the discourse on the treatment of sound sampling in copyright law is very controversial, because all these inextricably linked considerations, including aesthetic aspects, will have an effect on and compete for influence in copyright law. In the *Metall auf Metall* case, the aesthetic perspective is clearly supportive of efforts to introduce the concept of independent use as a tool of differentiation to achieve a balance of interests when music has been adapted without prior consent.

The order for reference *Metall auf Metall III* issued by the BGH in early June 2017 shows that the court intends to uphold its decision to introduce the free use provision for digital appropriation practices and prefers to pursue this path, provided it is permissible by European law (Döhl 2018a). If this was the case, both the law and the arts would have to raise the question what exactly is "independent use".[3] In German law, this is a neglected issue for non-humorous, non-critical art that is neither caricature nor parody (Döhl 2013; Döhl 2015). This applies to music in particular, because the question of independent use is examined only in exceptional cases such as the appropriation of a pure rhythm se-

quence in the *Metall auf Metall* case due to the aforementioned particularity of German law for melodies for which a prior consent is imperative (Sec. 24 (2) UrhG).

It is not unlikely, however, that the *Metall auf Metall* case will follow a different route, now it has left the German jurisdiction—and that the recently changed rules allowing free use in digital appropriation practices will be de facto reversed, before the discourse around the potential of the independent use concept for achieving a balance of interests in the case of adaptations that are neither caricature nor parody can gain momentum. To argue the adequacy of the independent use concept and to include it into the forthcoming proceedings of the *Metall auf Metall* case, before a decision is taken that may set the scene for a long time, we need to understand the alternative that "threatens" to take shape. Explaining this alternative scenario is my focus in the following.

The main legal basis for the BGH's order of reference in terms of copyright law is the European Directive 2001/29/EC.[4] The rights of reproduction (Sec. 2), communication (Sec. 3) and distribution (Sec. 4) laid down in the Directive are fully harmonised (Grünberger 2015: 276, 284). Exceptions and limitations to these rights in favour of third-party use or processing similar to the *Metall auf Metall* case may only be provided in the cases listed in Sec. 5 (Grünberger 2015: 284). Sec. 5 (3)(k) is the only one that applies directly in this case. For the purposes of this paper, I will assume that the ECJ's upcoming *Metall auf Metall* decision will ultimately focus on this norm, that its content will need to be analysed—and that none of the theoretically possible alternative scenarios will apply (Jütte/Maier 2017).

Rather than a general clause for free use as stipulated by German copyright law, Sec. 5 (3)(k) only includes a provision similar to, but more restrictive than Sec. 24 (1) UrhG. The Directive includes a list of case groups rather a general clause, which in principle should be narrowly construed (Haberstumpf 2015: 449): Member states may only provide for exceptions to the rights granted by Directive 2001/29/EC for appro-

priation without consent in case of a "use for the purpose of caricature, parody or pastiche".[5]

As to the European legal provisions for the partial use of third-party works of art for purposes that are not anti-thematic but like in the *Metall auf Metall* case primarily for purposes other than expressing critique, humour and/or mockery (Grünberger 2017: 332), many dogmatic and conceptual questions remain to be answered, in particular because of a lack of rulings (Grünberger 2017: 331 f.). Yet, one of the major issues likely to emerge during the course of the proceedings here is obvious and crucial, at least for the various sciences of the arts: the currently most likely and—at least for adaptive creative practices—potentially most momentous scenario seems to be an outcome in which "'free use' [...] will be broken down into a 'provision for a scope of protection' and a 'statutory exception for parody, caricature and pastiche'" (Ohly 2017: 969). For this scenario to arise, further preliminary assumptions have to be made for the purposes of this article, which include:

1) the scope of protection for all copyrights and ancillary copyrights affected by an act of sampling would ultimately have to be measured in the same way against Sec. 5 of Directive 2001/29/EG (similar to the legal situation in Germany after the BGH's conclusion by analogy in *Metall auf Metall I*) (Grünberger 2015: 284; Ohly 2017: 965);
2) the scope of protection of Directive 2001/29/EC would also apply for a partial use of third-party works in a modified form, provided they are still recognisable (Leistner 2014: 1148; Stieper 2015: 302; von Ungern-Sternberg 2015: 537; Ohly 2017: 966);
3) the case of micro-sampling to be decided here is not exceptionally classed as too small or insignificant, or as not invoking the original work's aesthetic identity, which would mean that the scope of protection provided for in Directive 2001/29/EC would not apply;[6]
4) the case will be classed as not having an adverse impact on the value and use of *Kraftwerk*'s original according to the three-step test and

> that the rights holders' justified interests in the original will not be considered as unduly infringed (von Ungern-Sternberg 2015: 538 – this is the BGH's assumption [BVerfG 2016: para. 102], contrary view for instance Dreier/Leistner 2014: 16).

Assuming that this is the outcome, in the end this will lead the process of decision making to the statutory exception for a "use for the purpose of caricature, parody or pastiche". This is, however, clearly different from evaluating the aesthetic independence of an adaptation without any preliminary decision. What would be the consequence? Would the German provision of free use in accordance with European law ultimately have to be interpreted (Grünberger 2017: 332; Ohly 2017: 969) – i.e. narrowed down[7] – to the effect that, in the future, the question of an adaptation's independence should generally only be examined within the case groups of caricature, parody and pastiche? Would it mean that, beyond these groups, a privileged treatment of individual cases as opposed to the comprehensive protection of usage rights stipulated in Secs. 2 to 4 of Directive 2001/29/EC would no longer be possible?

This is the hypothetical outcome of the *Metall auf Metall* litigation on which the following considerations will be based.

For humorous and critical appropriations such as caricatures and parodies, this hypothetical legal situation appears to be fairly uncomplicated, as the BGH explains in the context of *Metall auf Metall III* (BGH 2017: para. 39) and has already demonstrated, for instance in its decision in the *Auf fett getrimmt* case (BGH 2016). Fine-tuned for decades, the instruments used in treating these anti-thematic appropriations in the context of Sec. 24 (1) UrhG can be maintained without major difficulties, as they essentially correspond to the current European regulatory content (Haberstumpf 2015; 458) and would only be extended and possibly modified with relevant EU law in the future (BGH 2017: para. 39).

In the *Metall auf Metall* case, the intended use was obviously not a caricature or parody, as the BGH rightly points out (BGH 2017: para. 40).

This is quite typical for the musical adaptation of sounds, not least in the context of the sampling culture—an artistic practice of appropriation in which humorous and critical intentions are negligible or subordinated factors (an example can be found in Mashup, Döhl 2016b: 199 f.). Consequently, the only possible category left in the relevant scenario for music of this type would be the pastiche. In accordance with EU law, the German provision of free use would have to be interpreted in the light of this category.

In the case of the *Metall auf Metall* adaptation, the courts would have to take a step back and clarify the legal definition of pastiche. In the hypothetical scenario assumed here, a classification of the adaptation as a pastiche would be the only substantive exit option for the defendants that would avoid a guilty verdict. It is a scenario which assumes that, besides Sec. 5 (3)(k), no other scope of application is available for Sec. 24 (1) UrhG (Haberstumpf 2015: 449; Ohly 2017: 967). The concept of pastiche is therefore the crucial point.

So even if this question will not be addressed by the ECJ in the end due to the considerations listed before, it is likely that another case will follow soon with a larger sample than the two seconds used in the *Metall auf Metall* case. At some point, we will end up being forced to address the question of pastiche in the fields of non-critical/-humorous digital adaptation practices. And it is important to address this question because: "Sampling for the purpose of music composition is protected by artistic freedom in such cases just as fully as if the sampling were done for purposes of engaging in a critical dialogue with the original" (BVerfG 2017: para 96).

But what could pastiche mean?

IV. The Concept of Pastiche

To establish this, it is common practice to consult the law first. However, this is not very helpful in this case as there is no legal definition of pastiche. Neither are there any rulings established on a national level

in analogy to European regulations, which exist in the case of caricatures and parodies. Consequently, to date, there has been no discourse on the concept of pastiche, or even an established and unequivocal definition in legal literature that could be used as a foundation (Stieper 2015: 304 f.). The few sentences attempting a definition of the term even provide varying answers to the question whether a pastiche is a purely imitative practice or a practice which allows specific adaptations (Mullin 2009: 105 f.; Bently/Sherman: 241–244; Lavik 2015: 83–85; Peukert 2014: 89; Mendis/Kretschmer 2013: 3; Haberstumpf 2015: 451; Stieper 2015: 304 f.; Ohly 2017: 968). It is therefore impossible to find a quick and simple resolution.

Consulting the relevant decisions on Sec. 5 (3)(k) of Directive 2001/29/EC at EU level is equally futile, because so far, like the legal literature, they only focus on caricatures and parodies.[8] The Advocate-General of the European Court of Justice mentions the European Commission's opinion that a pastiche is "an imitation of a work protected by the Directive, which is not a caricature or a pastiche and which denotes a humorous or mocking intention" (ECJ 2014: para. 41). While this statement also lacks the substance to gain clarity, at least the European Commission seems to see a difference between caricature, parody and pastiche.

Of course these are only the first vague attempts of a definition; in addition, these positions cannot be taken for granted within the EU member states. This is where the challenges begin. The Kingdom of Belgium, for instance, declared in connection with the *Deckmyn* case that "the distinction between 'parody', 'caricature' and 'pastiche' must not play a role in the definition of parody, because the three concepts are too similar for it to be possible to distinguish between them" (ECJ 2014: para. 42). A look at French legislation may illustrate why the Belgian government makes this assessment. The legal situations of France and Belgium are very similar (Vanbrabant/Strowel 2012: 140). The French legal system only allows imitative appropriation and a largely transformative use, and parody, pastiche and caricature are all considered

varieties of humorous and critical appropriation. Consequently, it is assumed that all three have a humorous and critical intention. The distinction is made in the first instance based on the type of arts, with pastiche primarily being used for literature and the visual arts (Sundara Rajan 2011: 72 f.; Carre 2012: 408; Mendis/Kretschmer 2013: 18). It is essential to be aware of this legal position on the concept of pastiche, because EU regulation was aligned to the French provisions in art. L 122–5 of the Code de la Propriété Intellectuelle when it was drafted.

If this legal position was made imperative for the concept of pastiche in general and therefore applicable in Germany after a corresponding decision of the ECJ in the *Metall auf Metall* case (or some other future case), there would no longer be any scope for non-humorous and non-critical appropriations to be published in Germany without the rights holder's prior consent. This would affect the majority of typical applications of sound sampling that are not 'anti-thematic', i. e. directed against another content, as in the *Metall auf Metall* case. 'Anti-thematic' refers to what Richard Dyer, in his study on pastiche, calls an "evaluative attitude towards their object of reference" (2007: 22), and regularly appears as "inner distance" in court decisions on parody in the form of a deliberate and intentional (Förster 2014: 59) humorous and critical comment on the material used. This requires the adaptation to develop a semantically targeted "independent conceptual content" (Summerer 2015: 175). For a long time, it was assumed that the humorous and critical content had to target the material used itself. However, the BGH (BGH 2016) abandoned this position recently following the ECJ's decision in the *Deckmyn* case (ECJ 2014) (Specht/Koppermann 2016: 23) – likewise the requirement that the adaptation itself has to attain the quality of a work (Jongsma 2017: 665). The intention to create humorous and critical conceptual content is now sufficient (BGH 2016: para. 35). This means that the humorous and critical conceptual content can now be directed against a third medium and that the use of the original work becomes a means to an end. Yet, a humorous and critical intention is a require-

ment in any case (Nordemann/Kraetzig 2016). This recent change of position is therefore of little use to musical production: a typical case of sound sampling rarely has its main motivation in a humorous and critical intention[9] , as the users tend to engage primarily in sampling to reuse specific sound aspects of the original for its own sake as for instance in the *Metall auf Metall* case.

In the case of sound sampling, the intention is also not the crucial point, because sound sampling can never be just an imitation. "Imitation is not the same as reproduction" (Dyer 2007: 22), but reproduction is imperative in sound sampling. Certainly, sound sampling can be used to imitate a third aspect, for instance a specific style. However, the sampled material can by definition only serve as an imitation, but not be an imitation itself. It is always something that has been extracted and adopted. It might not be a "substantial reproduction" in legal terms in any case which might lead to the situation that cases of micro-sampling are excluded from the field covered by Directive 2001/29/EC (European Copyright Society 2017). If, however, pastiche would be understood as an exclusively imitative practice, matters in dispute similar to the *Metall auf Metall* case would always, from the outset and without considering the individual case, be excluded from the privileged treatment of being qualified as free use, no matter how substantial the act of sampling is.

But the Franco-Belgian take on pastiche is not the only interpretation. Other jurisdictions have also adopted Sec. 5 (3)(k) of Directive 2001/29/EC into national law, but apply a concept of pastiche with a different emphasis. It is therefore not certain that the Franco-Belgian approach will be adopted by European law. The United Kingdom is one of the countries that apply a different concept of pastiche. Sec. F97 30A of the Copyright, Designs and Patents Act 1988, as amended, stipulates: "Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work."[10] Here again, a legal definition of pastiche has yet to be provided. However, in 2014, the In-

tellectual Property Office of the United Kingdom published a guidance document that includes a sentence illustrating the opinion of the UK administration on what constitutes a pastiche: "[...] an artist may use small fragments from a range of films to compose a larger pastiche artwork."[11] While this is not a definition of pastiche, it is evidently a permission to adopt fragments. This concept of pastiche is closer to a collage and not limited to imitations.[12] Even so, the UK administration clearly intends to restrict this blanket privilege to micro-sampling, which does not meet the needs of many sampling cultures such as the mashup (Döhl 2016b) – and consequently does not comply with the imperative of an "art-specific approach", in particular when "genre-defining aspects" (BVerfG 2017: para 99) are to be taken into account. What proportion of the pastiche can or must be original material and how it is handled in the adaptation to legally qualify as a pastiche are also questions still unanswered.

It is certainly important to recognise that even at EU level different member states approach the concept of pastiche differently, albeit very tentatively. The interpretations offered so far are all very restrictive. If the jurisdiction required the appropriation to be purely imitative, sound sampling would *per se* be excluded. If, alternatively, it allowed an adoption of material, albeit restricted to fragments, as is permissible in UK law, it may make a difference in the *Metall auf Metall* case. On the whole, however, this would only apply to a small proportion of the sampling culture and result in a far-reaching preliminary artistic decision (privileging micro-sampling just for the minor size of the sample and not with regard to its aesthetic relevance for original and adaptation). The same—a far-reaching preliminary artistic decision—would apply if the definition of a pastiche was based on a humorous and critical intention as in France or Belgium.

In all these cases, with this new European version of the 'right of free use without consent', sound sampling as a cultural practice would only be left with one option to achieve legality without obtaining a li-

cence: a "*de minimis* rule" similar to the USA or at least a corresponding ruling, for instance by applying the "threshold of originality" model to cases of sound sampling[13] or by asking for a "substantial" part of the original recording to be sampled (European Copyright Society 2017). In the USA, micro-sampling was recently repeatedly classed as fair use (without any corresponding decision of the higher and supreme courts) (Kocatepe 2018). The argument also arose several times in comments on the *Metall auf Metall* case, which is, with its two-second sample, a textbook example for these "musical snippets" targeted by a "*de minimis* rule". Consequently, all that remains would be the hope that an evolving copyright law would conclude that, at least in cases of micro-sampling, the scope of protection stipulated in Directive 2001/29/EC is not applicable (as in the above scenario described by Ohly 2017) – and that, therefore, any further discussions would be futile. All other cases of sound sampling, however, would offer no scope for a privileged treatment under the law, no matter what happened to the sampled material in the adaptation, i.e. irrespective of its artistic quality and cultural relevance.

From an artistic perspective, this is the crucial point (Döhl 2016b). If one of the aforementioned current legal concepts of pastiche would be applied as a guideline for the future interpretation of Sec. 24 (1) UrhG, with the exception of the artistically very specific practice of micro-sampling and the relatively rare cases of sound sampling with a humorous and critical intention, artists would be left with the choice to either license, refrain or sample illegally. However, the BVerfG has already flagged up that the possibility of licensing (which is only theoretically available in practice) is incompatible with the constitutionally legitimised imperative of an "art-specific approach" (BVerfG 2016: para. 98). This objection would a fortiori apply to the options of 'refrain' or 'sample illegally' that de facto are still open to the majority of the sampling culture, because, with its general nature, such a legal interpretation would not satisfy the imperative of an "art-specific approach". This is immediately obvious when looking at sampling cultures such as

the mashup. While both micro-sampling and the humorous and critical intention only play a very limited role in this genre, users here create works of high originality composed from 100% third-party material which are then widely recognised as pivotal musical testaments of our time, such as Brian Burton aka DJ Danger Mouse's *Grey Album* (Döhl 2016b).

This raises the question whether a critical engagement with the artistic practices and the related discourses could help establish a concept of pastiche that may be a better fit also in the realms of copyright law.

As surprising as it might be, the sciences of the arts, however, also have yet to come up with a more detailed concept of pastiche. In the relevant literature, particularly in interdisciplinary arts research on pastiche (Hoesterey 2001; Dyer 2007), the concept remains equally vague compared to the aforementioned legal discourse. The status of the humorous and critical intention and impact as a necessary and sufficient condition for a pastiche is also controversial here (Jameson 1991: 17 f.; Dyer 2007: 7, 22; Gloag 2012: 61; Austin 2013: 3 f.). It is also not clear whether pastiche imperatively has to be a purely imitative practice, which may reference specific personal styles and works—but only in an imitative and not integrative form, i.e. a specific transfer from the original work as in the case of sound sampling (Dyer 2007: 1; Sanders 2016: 5). In some cases, the pastiche therefore seems to be closer to the collage or both terms are even used synonymously (Hyde 2003: 135). In other cases, it seems closer to an allusion, for instance in Kenneth Gloags' comments on George Rochberg's *Third String Quartet*, a classic piece of post-modern avantgarde music:

> The five-movement quartet is based around newly composed music that intentionally sounds old. [...] However, in keeping with the pastiche nature of the music, in contrast to the specificity of intertextual relationships in the collage works, these are only suggestive, being at most allusions than direct quotations" (Gloag 2012: 91 f.).

The concept of pastiche described here is obviously about a more general play on "cultural memory" (Hoesterey 2001: xi) rather than about a direct adoption from an older piece of music which is often subject of copyright issues in music. "Speaking in a dead language" (Jameson 1991: 17), as Fredric Jameson calls it metaphorically, is at the centre of how this concept of pastiche is understood, i.e. the appropriation and use of cultural forms and practices which are not originally the user's own, irrespective of whether they belong to an era, a genre or a personal style. Sometimes the way the boundary between high and popular culture is handled (challenging or even dissolving it) constitutes a pastiche, another time pastiche is understood as the opposite of high culture (a 'purely' negative judgement on quality) (Hoesterey 2001: xi,1). Another controversial question is whether a pastiche has to be recognised as such in its reference to other works or whether there needs to be an intention of a potential recognition (Dyer 2007: 9 f., 22 f.).

Two lists illustrate how complex, inconsistent and imprecise the discourse on the concept of pastiche is in the arts, too: over several pages, Ingeborg Hoesterey (2001: 10–15; see also Dyer 2007: 9, 11–16, 22 f., 25–47) defines a multitude of related terms from A for adaptation and appropriation to T for travesty, all of which are used more or less differently from pastiche. Richard Dyer (2007: 7 f.) lists more than a dozen frequently used definitions of pastiche, including supporting evidence for how they have been used. The term "pastiche" therefore invokes a large number of frequently related, but aesthetically distinct concepts (Austin 2013: 3). Hence, there is no binding definition used in the history of the arts (Fletcher 2017: 48). This is particularly evident in interdisciplinary studies which focus specifically on the concept of pastiche, providing numerous examples, namely those published by Hoesterey and Dyer:

> "Pastiche is a widely used critical term: it is used a lot and loosely. [...] All of these usages are proper. One sees what they all mean, even

> though they do not all mean the same thing. [...] In both its shifting history and current multiplicitous use, the word pastiche is in practice extremely elastic" (Dyer 2007: 7–9).

To sum up: In no way is the concept of pastiche narrower and therefore more precise and legally certain than the old German concept of "independent use". Whereas the latter is aesthetically neutral, the concept of pastiche is linked to a multitude of traditional, partially contradicting usages in past and present artistic practices which are sometimes centuries old.[14] So the question arises: what would be the gain compared to the old German category of "independent use" in terms of legal certainty, for the legal system, but above all for the artists if cultural practices such as sound sampling would be forced to contort themselves into the concept of pastiche? In exchange, certain variants and usages of the term would have to be declared as 'correct' which would be completely ahistorical.

Not only would this approach be wrong from the perspective of the concept's history, it would also not hold up if the genre category was used as a point of entry into the relevant artistic practices as requested by the BVerfG (2016: para. 99) and stipulated in art. L 122–5 of the French Code de la Propriété Intellectuelle ("La parodie, le pastiche et la caricature, compte tenu des lois du genre"). It is not even necessary to analyse the complexity and heterogeneity of the genre concept here (an introduction in Döhl 2018b) to recognise this. A random spot check in the genre involved in the *Metall auf Metall* case is sufficient enough to illustrate the point: hip-hop.

In hip-hop, pastiche is described as a specific form of reviewing third-party works largely without modifications, a method of securing an intentional intertextuality that the audience can recognise, and that had only a particular relevance for the genre in a specific phase, i.e. until the 1990s (Schur 2009: 31 f.). Other researchers see the imitation and integration of third-party texts and music as equally relevant forms of

pastiche in hip-hop, but they question whether the element of intertextuality that is recognisable for the audience is the major motivation for using this artistic method and therefore the prerequisite for applying the concept of pastiche in hip-hop (Williams 2013: 7 f., 177 f.). Others again demand specific aesthetic outcomes such as a "juxtaposition of disparate aesthetic systems, blank parody, fragmentation, lack of historicity, and so forth" (Schoss 2014: 65) as a condition for including sound sampling in hip-hop in the concept of pastiche. There are also many who discuss sound sampling in hip-hop without making any connection to pastiche—and thereby provoke the question whether this category is appropriate for the issue at hand or whether it has been taken from other artistic contexts and imposed on hip-hop (Klein/Friedrich 2003; Pelleter/Lepa 2007; Katz 2012; Sewell 2013; Edwards 2015; Williams 2015). For this overview of the obviously diverse opinions on the use of the concept of pastiche in hip-hop, I have only consulted a number of well-recognised scientific books without delving too deeply into the academic literatur on hip-hop. Not only are these opinions diverse and will fan out even further the more they are analysed, but theory and practice of the concept of pastiche are also not necessarily identical (Hoesterey 2001: ix). This suggests that an in-depth ethnography within a genre like hip-hop here may produce an even more complex view of the significance—or possibly insignificance—of the concept of pastiche for the genre in question.

All this is an argument in favour of fighting for the general clause of "independent use" which would allow for a more flexible approach to the balance of interests and would be better suited to the aesthetic objects and closer to each individual case, without requiring a large number of preliminary decisions (Döhl 2016b). It is to be expected (or at least hoped) that the further proceedings in the *Metall auf Metall* case will make this necessity abundantly clear—and turn the attention of the discourse away from the question of the mere size of a sample towards the question what "independent use" shall mean in the context

of contemporary digital appropriation practices in all arts that do not primarily focus humorous and/or critical intentions.[15] Like the *Metall auf Metall* case.

Notes

1 Regional Court Hamburg (Landgericht (LG) Hamburg), 308 O 90/99 [08/10/2004] – *Metall auf Metall*, in: *BeckRS* (2013), no. 07726; Higher Regional Court Hamburg (Oberlandesgericht (OLG) Hamburg): 5 U 48/05 [07/06/2006] (*Metall auf Metall I*), https://openjur.de/u/172802.html; Federal Court of Justice (Bundesgerichtshof(BGH)):IZR112/06[20/11/2008] (*Metall auf Metall I*), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=de95cc84c2ce749f20ccca0093c4992e&nr=46823&pos=8&anz=9; Higher Regional Court Hamburg (Oberlandesgericht(OLG)Hamburg):5U48/05 [17/08/2011] (*Metall auf Metall II*), https://openjur.de/u/172802.html; Federal Court of Justice (Bundesgerichtshof (BGH)): I ZR 112/06 [20/11/2008] (*Metall auf Metall I*), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=de95cc84c2ce749f20ccca0093c4992e&nr=46823&pos=8&anz=9; Federal Court of Justice (Bundesgerichtshof (BGH)): I ZR 182/11 [13/12/2012] (*Metall auf Metall II*), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=8d7c7a778781154a3db48d225d6a88f5&nr=64004&pos=6&anz=9; Federal Constitutional Court (Bundesverfassungsgericht (BVerfG)): 1 BvR 1585/13 [31/05/2016] (*Metall auf Metall*), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/05/rs20160531_1bvr158513.html;jsessionid=E2B9A1BB65BD723D88D203FCC11FE8F3.1_cid361; Federal Court of Justice (Bundesgerichtshof (BGH)): I ZR 115/16 [01.06.2017] (*Metall auf Metall III*), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=c061a07212bff4ca7b0cded8d6c2daa0&nr=78870&pos=0&anz=9 [all 24/01/2018].

2 The legal discourse takes an entirely different view (Ohly 2017: 967).

3 The author is currently studying for a doctorate at the University of Hamburg, focussing on this topic.

4 Directive 2006/115/EC might also come into play (European Copyright Society 2017) but for the purpose of the questions I am interested in the following it can be left aside.

5 See Directive 2001/29/EC, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001L0029 [24/01/2018].

6 This is suggested by Ohly (2017: 969) and the European Copyright Society (2017). As the Higher Regional Court

Hamburg (Oberlandesgericht (OLG) Hamburg) had already reached a verdict of independent use, which presumes that the German scope of protection stipulated in Secs. 1 and 2 UrhG applies, it seems reasonable to expect and to justify that, despite the brevity of the *Metall auf Metall* sample, the European Court of Justice will also consider the scope of protection of Sec. 2 to 4 of Directive 2001/29/EC as applicable.

7 This means narrowing down to the three case groups I am focusing on here; at the same time the provisions are expanded because the German 'fading' threshold is not readily transferable (Ungern-Sternberg 2015: 539).

8 See ECJ: *InfoCuria – Case-law of the Court of Justice*, http://curia.europa.eu/juris/recherche.jsf?language=en [24/01/2018].

9 The most famous example for this in terms of copyright law is the US *Campbell v. Acuff-Rose Music* case, 510 U.S. 569 (1994), https://www.law.cornell.edu//supct/html/92-1292.ZS.html [24/01/2018].

10 The National Archives: *Copyright, Design and Patents Act 1988*, http://www.legislation.gov.uk/ukpga/1988/48 [24/01/2018].

11 Intellectual Property Office: *Guidance. Exceptions to Copyright*, 2014, https://www.gov.uk/guidance/exceptions-to-copyright [24/01/2018].

12 The definition and use of the concept of collage are in no way more precise than for pastiche (Großmann 2005; Czernik 2008; Voigts-Virchow 2008: 514f.; Emons 2009; McLeod/Kuenzli 2011; Banash 2013).

13 In fact, this is the legal situation at EU level at present: "if the individual creative characteristics of the work used are not reflected in the new work […] the original work is not 'exploited' in the sense of Secs. 2–4 of Directive 2001/29/EC" (Stieper 2015: 303). See also Ohly 2017: 969, who supports this as appropriate for the *Metall auf Metall* case of micro-sampling.

14 The history of the term is very old. It dates back to the renaissance and had, for instance in France in the mid-18th century, been scientifically classified as an imitation of another artist's style or of a third-party work (Radisich 2014: 34). For a more detailed early and later history of the term, see Hoesterey 2001: 1–16; Fletcher 2017: 48–62.

15 I would like to thank the sub-project B7 "Media Practices and Copyright Law: Social and Legal Framework for the Cooperative and Derivative Creation of Copyrighted Works in the Digital Environment" within SFB 1187 *Media of Cooperation*, namely Professor Dagmar Hoffmann for the invitation to present my paper at the conference "*Die Referenz als Teil der Kunstform: Zeitenwende im Urheberrecht?*" and now in this special edition of *Media in Action*. The sub-project attempts exactly the kind of interdisciplinary exchange between the law and related disciplines in an institutionalised way as I am proposing here.

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Transformative Works and German Copyright Law as Matters of Boundary Work

Kamila Kempfert, Wolfgang Reißmann

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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Negotiating Legal Knowledge, Community Values, and Entrepreneurship in Fan Cultural Production

Sophie G. Einwächter

1. Introduction

Media fandom incorporates a large number of practices that are either explicitly quoting or implicitly referencing cultural objects. Observers outside fandom often label these practices derivative, appropriative, or transformative, each of these labels conveying a legal or ethical judgment respectively; many question their legitimacy. Among fans, a high level of uncertainty surrounds the legal status of these practices, which are generally assumed to border on copyright infringement.

This paper draws on observations from two ethnographic studies: the first, German, study I undertook between 2009 and 2012 focussed on transformations of fan culture in a digitally networked environment, addressing the economic and organisational changes that digital platforms and software brought into the fan cultural realm. It combined online ethnography of nine Anglo-American and German vampire-themed fan websites (related to True Blood and Twilight), content analyses of four Harry Potter and Twilight themed fan websites, thirteen semi-structured qualitative interviews with active German fantasy fans and four standardised email-interviews with scholars working with fan cultural sources (Einwächter 2014a; smaller parts were published in English, in Einwächter 2014b). One of the findings of this study was that, in digital fandom, copyright was a pressing issue that many fans addressed as a source of uncertainty and fear as well as a

time-consuming factor, impeding the progress of their projects. In a follow-up study in 2015, I interviewed five very active German and Scandinavian fans during a fan convention at Breuberg Castle, Germany. Again, the interviews were qualitative, semi-structured, and this time they explicitly addressed issues of copyright and the fans' individual strategies of working with what they knew or not about copyright law or its respective legal equivalents in other countries (Einwächter 2015).

Drawing on these studies, this paper addresses fan cultural practices as *transformative*, but also as inherently *innovative* practices in that they produce novel combinations of existing cultural information. Arguing that digitalisation has enabled new aesthetic phenomena leading to new social dynamics and new causes of tension within fan communities, it goes on to discuss the pragmatic implications of fan cultural entrepreneurship.

In a first step, the paper addresses the digital transformation of fan culture leading to the phenomenon of entrepreneurial fans who find a large audience for their media and make money with their initially purely fan cultural practices. The well-publicised case of fan-fiction-turned-bestseller-author E.L. James (Fifty Shades of Grey trilogy) led to much negative response within her former online community, questioning the ethical rather than the legal status of her work. In contrast, the German case of Harry-Potter-fan-turned-comedian Kathrin Fricke, also known as *Coldmirror*, shows that fan cultural practices can find a professional market without causing community backlash.

In the second part of this paper, I will demonstrate how fans respond to copyright uncertainty, using a number of strategies and rules of thumb they circulate via word of mouth both online and offline. These strategies are meant to avert risk, but sometimes manifest misconceptions rather than factual information on the law. Here, I will extensively draw on the works of Fiesler and Bruckman (2014) and Fiesler et al. (2015), adding my observations from the realm of fan culture to their findings concerning "legal uncertainty" (Fiesler et al. 2015: 126)

in creative online communities. I will close with a list of observed fan cultural strategies that are responses to or consequences of copyright uncertainty.

2. Fan Cultural Practices as Transformative Practices

Henry Jenkins' 1992 seminal definition of fandom highlights that the very core of fan cultural practices is the engagement with a cultural object or text, an engagement that implies referential practices to aesthetically independent works. Jenkins stresses that fan cultural practices enrich experiences of the original texts they refer to, as they transform and subvert meaning in a process we can consider semiotically productive. He identifies "five levels of activity" (Jenkins 1992: 277) that encompass a "particular mode of reception" (ibid.), the production of a "meta-text that is larger, richer, more complex and interesting than the original [...]" (ibid: 278), forms of consumer activism (ibid.) and cultural production (ibid: 279) as well as strong social bonds – "an alternative social community" (ibid: 280) bordering on the utopian.

The metaphor Jenkins used for descriptions of fan cultural production at the time, 'textual poaching', goes back to Michel De Certeau's *The Practice of Everyday Life* (1984). Although it is laden with associations of illegitimacy and destruction—after all, a poacher trespasses onto the land of another where he shoots the landowner's game and presumably eats his prey afterwards—Jenkins and De Certeau sought to describe something entirely different. What they meant by 'poaching' was an act of stimulation by and inspiration through another text and thus also a gesture of reverence to that other text by using it in one's own work. In a pre-digital era of predominantly analogue media—Jenkins published *Textual Poachers* in 1992 – the connotations of such archaic imagery may have been slightly more fitting than today, as only corporate producers—like feudal lords—had access to important production means, and far more possibilities to protect their (intellectual) property than today. Fan cultural creativity, on the other hand, was geographically, techno-

logically and, as a result, aesthetically limited. Production happened predominantly offline, and practices using original material such as 'vidding' came at high costs and through cumbersome time-consuming endeavour, contributing to a very visible quality difference between the original created by professional producers and the work of fans. It is important to note, however, that these limits also produced a welcome effect: fans' works received hardly any attention outside their own circles, so they were not considered a threat by copyright holders.

In the digital era, fans' creations—many of which are now professionally produced and circulated via social networks—may reach large audiences and thus also attract more scrutiny by copyright holders. It does not come as a surprise, then, that Henry Jenkins (a supporter of fandom and long-time fan himself) no longer refers to the ambiguous 'poaching' when speaking about fan cultural practices, but rather stresses their "participatory" (Jenkins et al. 2016: 1 f.) and educational qualities.

However, in Anglo-American legal contexts in particular, another term has taken the place of what previously was called 'poaching', namely 'transformative'. Adopted and popularised by the *Organisation of Transformative Works* and its online journal *Transformative Works and Cultures*, there is a political reasoning behind labelling fan fiction, fan art, and other fan cultural practices 'transformative'. It is a direct reference to phrasings used in a number of prominent court decisions dealing with the Fair Use copyright exemption. Here, the transformative nature of a work was cited as one important prerequisite for a Fair Use ruling, implying that the original text or artwork being used in the new creation has undergone a process that has left it significantly changed (see e.g. Tushnet 1997: 662). Labelling fans' works 'transformative' thus conveys legitimacy.

The original cultural object—be it film or series, game or celebrity—is still central to fan cultural practices, however transformative they may be. This is nowhere more apparent than in fan fiction archives,

where fans' stories are predominantly listed by source text rather than by title or fan author. Fan fiction, to quote the fan wiki Fanlore, is "a work of fiction written by fans for other fans, taking a source text or a famous person as a point of departure. It is most commonly produced within the context of a fannish community and can be shared online such as in archives or in print such as in zines [...]" (Fanlore 2017: "Fan Fiction"). Like other fan practices, fan fiction writing has been affected by a number of technologically induced changes that have transformed fandom organisationally and economically.

3. Digital Fandom is Fandom Transformed: Professionalized, Internationalised, More Mainstream

Digitalisation has caused fundamental changes within fan culture, "blurring the lines between producers and consumers, [...] and giving rise to new forms of cultural production" (Pearson 2010: 84). In fan circles, micro-blogging, video and image editing or other forms of content remixing thrive. Online interconnectedness helps fans to communicate and distribute their creative works to larger groups of interested peers. For German fans, digitalisation has also enabled closer contact with Anglo-American fan groups, strengthening cooperation and knowledge exchange. In one of my first interviews with fans, in 2011, a web administrator from German True Blood fandom stressed how vital this connection with international fans and American actors from the TV series proved to be with regard to her unfolding professional career: it had motivated her to significantly improve her English communication and web editing skills which then led to better employment options (see Einwächter 2014a: 301 f.). Internationally, her German website was the second fan site dedicated to True Blood; a lot of effort went into translating American True Blood-related news for her German website's audience.

The task of handling a website and publishing information online has also led to many fans developing an interest in legal issues — mostly

to avert risks that could arise from such activities. Many of the active fans I interviewed between 2010 and 2015 were well-connected and proudly displayed their professionalism: they carried business cards with their web spaces' addresses, they organised a continuous stream of information and online events for their website's followers in order to stay relevant for their audience. There was a market logic driving their endeavours that were no longer purely fan-communal, but also entrepreneurial in that they wanted to offer an entertaining service that they knew was competing with other services of a similar kind (Einwächter 2014a: 148 f.). Some openly stated that they had originally been interested in their fan object of choice, but then developed an interest in a certain form of success that was measurable through website traffic. This commercialisation and its relation to the availability of online statistics is still an under-researched topic. What Reißmann et al. remark in the context of fan fiction platforms equally applies to other online fan spaces: the metrification of fan cultural activities online requires an investigation "of how displaying and interacting with data and statistics (views, likes, rates, amount of comments etc.) shape culture and community ethics" (Reißmann et al. 2017: 23).

Fan cultural media have gained visibility and mainstream appeal through social networks. Practices such as the remix, deeply rooted in fan culture(s), are facilitated through digital software and media platforms, where they have become mainstream sources of entertainment, and it can be hard to tell if uploaded content originates from a professional or amateur source. Online platforms also facilitate contact between fans and celebrities or producers, who sometimes explicitly invite user feedback on their products and possible future developments of brands, products, or narratives. Media producers also actively monitor fan cultural practices and communication, as they are aware that fans' media and online discussion can be analysed for market research.

While digital media make the identical reproduction and large-scale distribution of creative works much easier, at the same time, fan cul-

ture gets more exposed to public and corporate scrutiny in social networks: YouTube's implementation of scanning software, for example, which checks for usage of copyrighted audio or video, resulting in sanctions such as temporarily blocking or closing down user accounts, has caused worries and confusion among fans, whether their practices are legal or not.

4. The Innovative Potential of Cultural Entrepreneurship

In my previous studies, I proposed a cultural economic interpretation of transformative practices as inherently *innovative*.

Early 20th century Austrian economist Joseph Schumpeter was the first to acknowledge that market innovation often stems from recombining existing resources to new ends—an innovative process—and that a person who allocates such resources and finds new purposes for them can be called an entrepreneur (Schumpeter 2006 [1912]: 158 f.). While the application of economic theory is not very common in Fan Studies, sociologist Richard Swedberg offers a more differentiated take on Schumpeter's theory, making it more applicable to the subject of fan cultural production. He claims that although both combine existing resources in innovative ways, an important distinction should be made between economic and cultural entrepreneurship:

> "[...] economic entrepreneurship primarily aims at creating *something new (and profitable)* in the area of the economy, while cultural entrepreneurship aims at creating something *new and appreciated* in the area of culture. While moneymaking is often a crucial component of cultural entrepreneurship, it does not constitute its primary focus" (Swedberg 2006: 269).

The notion of entrepreneurship—both as non-profit 'cultural entrepreneurship' and in its decidedly commercial form—has emerged in several cases I investigated through online ethnography or interviews.

Since fandom went digital, a significant number of successful fans found a wider than fan cultural audience for their 'new and appreciated' media which only later turned profitable when they made money with their initially purely fan cultural practices:

Emerson Spartz, founder of Muggle Net, the leading Harry Potter fan page since 1999 (which is still updated), made first steps towards commercialisation when he co-authored two books that took J. K. Rowling's Harry Potter novels as 'points of departure'. They speculated regarding the series' final instalment (MuggleNet.com's What Will Happen in Harry Potter 7) and provided theories and evaluations of major points in the plot and character developments (MuggleNet.com's Harry Potter Should Have Died: Controversial Views From The #1 Fan Site). Spartz then left active fandom for a career in social media where his early fan page success was a useful reference. In The New Yorker, Spartz, who now specializes in online virality, is quoted as saying: "As I became less motivated by my passion for the books, I got obsessed with the entrepreneurial side of it, the game of maximizing patterns and seeing how big my reach could get" (Marantz 2015: n.pag.).

Two important cases of fans-turned-entrepreneurs are E.L. James (author of the Fifty Shades of Grey trilogy) and Clarissa Clare (author of The Mortal Instruments saga, now Netflix series Shadowhunters). Both attracted much negative response within their respective fandoms. James had published her Twilight fan fiction 'Master of the Universe' on Fanfiction.net. On this site, the new combination (of basically the same protagonist couple and power relation, in a slightly different surrounding, replacing Twilight's fantasy elements with explicit BDSM[1]-inspired sex scenes) was read by several thousand users (estimations go up to 100,000) who provided 2, 000 reviews of it online (Jones 2014: 3.2). When she published a slightly altered version of her fan fiction as the Fifty Shades trilogy and pulled her fan fiction from the platform, she was heavily criticised by her former peers. While many fans and fan scholars stressed that this was against the values of the

community in which gift culture was deeply rooted (see e.g. Hellekson 2015), users took offence by James not acknowledging the contribution of her peers. They had unknowingly delivered unpaid editing services for work that was going to be an all-time bestseller with millions in revenue. Textual analysis with the plagiarism tool Turnitin had shown that 89% of the published books were identical with the fan fiction (Litte, quoted in Jones 2014: 3.3). In her analysis of the case, Bethan Jones quotes a fan who complained that the creative work was a collaborative effort: "As much as she fed us, we fed her with our comments AND suggestions in how far she could or couldn't take the story" (AlwaysLucky1 in Jones: 3.12).

With Cassandra Clare's writing, the criticism lay somewhere else: fans had discovered that, apparently, Clare had "reproduced concepts, rough scenes, descriptive phrases and dialogue from several fantasy novels" (Fanlore 2017: "The Cassandra Claire Plagiarism Debacle") in her fan fiction online, without crediting them. This was considered too transgressive by some, even within the context of 'appropriative' fan fiction.

Both Clare and James left their former fan communities when beginning their professional careers in writing, as Spartz left fandom to become a social media entrepreneur. This seems a necessary step considering that cultural and economic entrepreneurship calculate their gains and losses differently. As German sociologists Schmidt-Lux, Schäfer, and Roose (2010: 12) have noted, fandom can be regarded as "investments of both time and money into a passionate long-term relationship with an object" (my translation). Thus, from a pragmatic point of view, a bestselling author may simply no longer have the time to invest in such a relationship with a fan object because he or she is busy producing, promoting, and selling texts that become fan objects in their own right. However, leaving the bestselling type aside, we may also have to adapt our ideas of gift culture vs. commercial culture, and fan vs. professional author/celebrity, because as Reißmann et al. (2017: 23) note, in

the digitally networked sphere "boundaries between an ostentatiously non-commercial habitus and 'quasi-commercial' acting are fuzzy".

While Fifty Shades and Shadowhunters are cultural products that left an international impact, German Harry Potter fandom produced an interesting video phenomenon that made it to national TV and attests to an interesting blurring of mainstream and niche culture. Starting

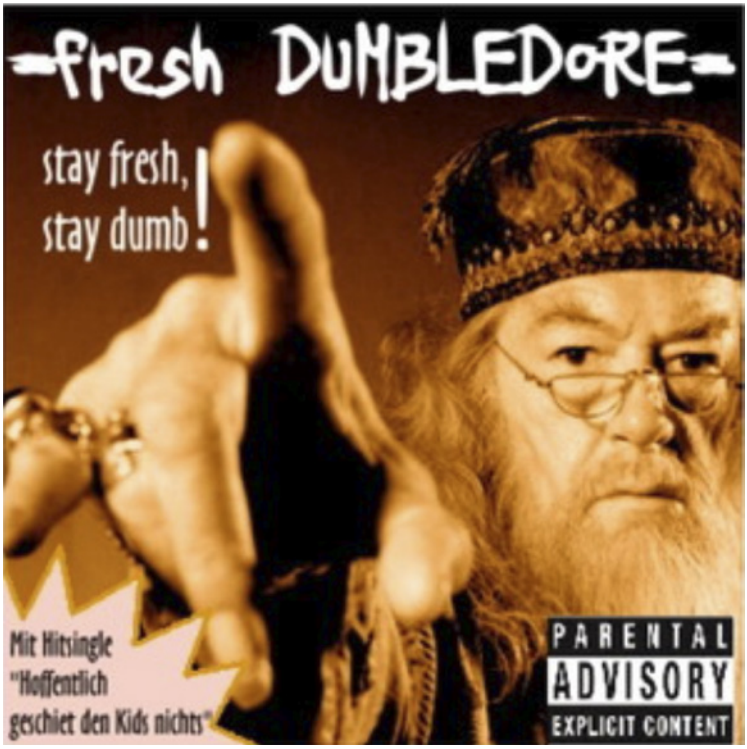

Fig. 1: Coldmirror (2008): "Fresh Dumbledore: Stay fresh, stay dumb!" [Album cover artwork]. Source: Coldmirror Wiki, http://wiki.coldmirror.net/w/images/DISTURBIA COVEROFFICAL.jpg [5.1.2018]

with a number of videos that presented a fan-dubbed, parodied version of Warner Bros.' Harry Potter movies, the YouTube channel of German fan Kathrin Fricke (aka Coldmirror) soon became one of the most subscribed German channels in the years 2006–2010 (Einwächter 2014a: 91 f.). While she made only minor changes in video editing, her fan dubs gave the films' visuals a completely different meaning. Coldmirror retold the story as an unfortunate, non-pc tale of mishaps that occur to young Harry at a boarding school led by 'Fresh D.', a self-proclaimed rapper with a shady criminal past and paedophile record. She completed her 'franchise' with a large number of audio remix tracks, rap songs featuring characters from her fan dubs (with most vocals performed by 'Fresh D.', i.e. K. Fricke, see fig. 1). The attention her YouTube account attracted during her fan cultural heyday was vital for Kathrin Fricke's first professional engagements. First she reviewed computer games for the Online Radio station YouFM, publishing the videos on her channel, where they reached their ideal audience—a young crowd of predominantly male 'nerds'. Later she got her own entertainment format on the digital national television channel Einsfestival, Coldmirror TV, which featured a number of shorter clips in her typical style that her fans recognised from her Harry Potter works. Transformative dubbing and lip-syncing still play an important role within her creative repertoire. She has dubbed a number of videos that visually consist of media material with a political context, featuring Angela Merkel (who in her interpretation also pursues a career in Hip Hop), Barack Obama, and Vladimir Putin. It is very likely that the decision to dub politicians was simply made because the national public broadcaster ARD that commissioned her has easier access to the rights of news material than to feature films from foreign countries.

The Coldmirror case shows that fan cultural practices can find a professional market without causing community backlash. It should be noted in this context that Kathrin Fricke received many positive comments on her YouTube channel, but no detailed reviews or other rel-

Fig. 2: Coldmirror TV (2012): "Episode 21" [appearance of 'Fresh D']. Source: Screenshot from ARD/YouTube.com, 2.8.2012, https://www.youtube.com/watch?v=GzKFr-Tdza8 [5.1.2018]

Fig. 3: Coldmirror (2011): "Misheard Lyrics 'Ismail YK'". Source: Screenshot from coldmirror/YouTube.com, 3.2.2011, https://www.youtube.com/watch?v=wb3MT3W6_aU [5.1.2017]

evant creative input from her followers. This makes it much easier to identify her as the sole originator of these transformative works.

However, it seems also important that traces from her former fan cultural activities still show up in her professional work, for example in the form of Coldmirror suddenly speaking with the voice of 'her' Professor McGonagall or 'Fresh D.' in episodes of Coldmirror TV. She sometimes even performs as the latter in her show, wearing a wig and a beard (see fig. 2).

Such hints serve as inside jokes that only her former followers will understand, signs that can be read as gestures of reverence to her early following, but also as proofs of authenticity—signalling that even on national television her humour is still as quirky and niche as ever. References to Harry Potter also appear in her popular 'Misheard Lyrics' videos, another transformative format first produced for Coldmirror TV. In this case, she deliberately misinterprets the lyrics of foreign language songs as German text, while illustrating her nonsensical versions with hyperbolic childlike drawings using a very basic illustration software. Her animated clip for a Turkish love song became a huge success: Fricke misinterpreted its refrain "git hadi git istemiyorsan" (in English "if you don't want to go"), rendering it in nonsensical, but funny German as "Keks, Alter Keks, ist der mit Ohr-Sand?" – which means "Cookie, old Cookie, is it with ear-sand?" in English (Coldmirror 2011a: n.pag.). The illustration for the refrain shows an annoyed-looking stickman holding a decayed cookie with a question mark and a huge ear next to him from which sand is pouring (see fig. 3). The video went viral and became so successful that Coldmirror was asked to make a number of these clips to be shown during the 2011 half-time breaks of the International Women's Football Tournament on German national television. They obviously provided a welcome humorous comment on cultural misunderstandings. When posting her clip for the Canadian team on her YouTube channel, she nonchalantly added the comment "This is Canada, with an Inuit song! Did we clear the rights for that? Not sure … but the headline

'Coldmirror sued by Inuit over copyright' would be cool. I'm taking my chances!" (Coldmirror 2011b: n.pag.).

Comments such as these are also references to her fan cultural past, when her YouTube account was once almost deleted over her fan-dubbed videos. Her demonstratively nonchalant attitude towards copyright laws signals she may still know little about these important matters, thus averting possible accusations of 'selling out' to corporate or mainstream culture that pays a lot of attention to copyright regulations.

5. Navigating Copyright in Fan Cultural Practice(s)

Digital software and social networks may generally foster fandom's creative output. At the same time, they create new obstacles for everyday users, as the tremendous complexity of copyright law causes uncertainty and misconceptions about the overall legality of fan cultural practices.

Through their interviews with remixers who took part in the "shared activity of creating fanworks", Casey Fiesler and Amy Bruckman (2014: 1023 f.) realised that "'Can I do this?' is a question that many online content creators have to ask themselves in the context of using pieces of copyrighted works". In their research, they found that while most of their participants had at least a superficial knowledge of the Fair Use doctrine or "intuitions about an exception to copyright law" (ibid: 1025), they shared a number of misconceptions. One of these misconceptions was the understanding that the non-commercial nature of their activities was "the single most important factor in determining whether a use is fair" (ibid: 1026), which the authors saw as evidence of their acquaintance with the fan cultural norms of gifting rather than an expression of their legal expertise. Here, ethical judgments prevailed over legal rules, an observation that also helps explain the backlash that E.L. James faced from fans for her Fifty Shades novels. Fiesler and Bruckman (2014: 1028) noted that, with regard to the copyright of their own work, users mistakenly thought that there was some kind of "process required to receive a copyright in something (such as registering)".

Users also frequently resorted to disclaimers regarding ownership and attributions to the originators of the works used (ibid: 1029). These factors carry a lot of weight in the fan cultural 'appreciation economy', however, they are of little consequence in determining whether a work falls under the Fair Use doctrine (ibid.).

In a second study, the authors (in collaboration with Jessica Feuston) analysed online discussions in forums of creative online communities, focussing on how users understood or misunderstood the law, and in what way their understanding influenced their "creative activities and online interaction" (Fiesler et al. 2015: 117). According to their findings, users interpreted the law more strictly than necessary and often advised others to refrain from practices that they interpreted as illegal (ibid: 120). Their study stresses that online creative communities often produce stricter regulations than the law. For example, the authors quote a discussion about community-based rules in fan fiction writing that went beyond the letter of the law by requiring writers to ask other authors' permission before using their stories, to attribute the works used in their writing, *and* to accept that an author could at a later point still decide against his or her work being used in another person's work (ibid.: 124). They also found evidence of users being overcautious and refraining from certain creative practices, either to avoid copyright violations or in fear of other users illegitimately copying their work. The authors conclude that uncertainty over copyright ultimately leads to limiting creativity (or more specific: less creative content to be produced or shared online), which they address as a copyright-related *chilling effect*—the legal term for a discouragement of a lawful activity out of fear of legal consequences (ibid: 125).

Comparing the findings of Fiesler et al. (2015) and Fiesler and Bruckman (2014) with the results of my own ethnographic work with German and Scandinavian fantasy fans (Einwächter 2014a, 2014b, 2015), I can confirm some of their findings—in particular the widespread use of legally ineffective disclaimers, and self-regulative caution as a com-

monly adopted strategy of averting risk. I would also like to add a few more observations.

My findings cover the following fan cultural strategies for dealing with copyright uncertainty. While I found them to be commonly used strategies, they are evidenced by quotes from the aforementioned studies, obtained from interviews with two fan site administrators, two fan event organisers, and a fan fiction editor and writer.

1. Production and distribution of fans' creative works with a disclaimer stating no intended commerciality and the name of the (assumed) copyright holder.

Many fans hope these declarations would be held in their favour, should a lawsuit occur, e.g. interviewee Emil, owner and administrator of a top-ranked fan site: "So I have written a special note there, [...] I hope, if there is a problem, then the fact that I have so publicly said what my view is, it might be in my favour" (in Einwächter 2015: 13).

2. Contacting the copyright holder and reaching an agreement regarding the use of copyrighted content or omission thereof.

Interviewee Tobias, co-organiser of one of the biggest German fantasy fan clubs, follows the rule: "better ask one time too often, than one time too little" (translated from ibid.). He admits, however, that this may lead to hearing "answers you do not want to hear" (ibid.), a case that fan fiction editor Anette knows too well. She inquired about the possibility to name a fan convention she was organising after J.R.R. Tolkien's Silmarillion ('SilmarilliCon' would have been her favourite choice, and she had already ruled out 'TolkienCon' as too daring, when asking the Tolkien Estate). However, as she did not get permission, she had to change the name mid-planning and to hand over a web domain she had already acquired for the purpose.

3. Research of available/comprehensible legal literature and self-regulatory caution.

A group of German Twilight fans told me in 2010 that they had spent many days reading about copyright and its German equivalent, the

'Urheberrecht', and were very careful about handling original content responsibly. They also preferred exchanging data in a password-protected web space to be able to control the content their users spread (Einwächter 2014: 258). Another fan reported that his fan club distributed copyright information and legal guidelines for events and activities to its members (2015: 19), while his peer stated that any fan-organised event required 4–5 hours of legal preparation (ibid: 16).

4. Deviant practices: risk distribution among members of a fan group.

Well-known from any file sharing platforms, I also encountered this strategy among loyal followers of Coldmirror's YouTube channel. While she has taken her early Harry Potter fan dubs off her channel, there are a number of channels by anonymous YouTube users that still feature these videos—never forgetting to mention her name, as fans would criticise a lack of attribution harshly. On her own channel, Coldmirror created a playlist of these anonymously published copies of her works, ensuring her access to all the comments and her association with the material. Fan cultural logics of attribution are therefore fully in place, while many accounts featuring her material have been deleted and replaced over the years (ibid: 20).

5. Pragmatic productivity: encouragement and conscious production of original content.

Interviewee Anette, who publishes a print-based fan fiction zine, reports that the publication is very wary of possible transgressions: "We have to be careful. We are using pictures taken by us, drawings made by my co-organisers, drawings made by the artists I know. […] And all the imagery or the designs have to be original, of course we cannot use anything from the movies or anything close to it" (ibid: 21). The abovementioned fan club that offers legal guidelines to its members also maintains a database of photographs from every fan event organised by members, offering the pictures as free material.

My own research confirms Fiesler et al.'s findings that misconceptions and confusion over the applicability of legal regulations are in-

deed common. My interviews with German and Scandinavian fans furthermore revealed that American Fair Use legislation is well-known among these fans despite not being applicable to most of their works shared online in German or Norwegian web spaces. As fandom becomes increasingly international and transcends national border and legislation through digital networks, confusion and misconceptions are bound to increase.

6. Conclusion

"Some fans revel in the new opportunities presented by digital technologies, while others lament the digitally enabled encroachment of corporate power into every space of fandom", Roberta Pearson (2010: 84) notes. The new entrepreneurial possibilities that digital fandom holds are highly controversial in fan communities. Even in academic Fan Studies there are opposing views on whether anyone should ever be allowed to earn money with fan fiction. Those who oppose it, quote the gift culture inherent in fan fiction communities (Hellekson 2015), while those in favour stress that if fans do not allow their peers to make a profit from their work, they leave it to community-outsiders such as Amazon's Kindle Worlds to discover these markets, and thus miss a chance of being represented in the business (DeKosnik 2015).

Copyright need not be an obstacle to fan cultural entrepreneurship, as successful cases in Harry Potter and Twilight fandom have shown. Through their extensive self-regulatory measures, however, fans show how much they are still afraid of 'the powers that be'[2]. For researchers and legal experts, their everyday strategies to avoid legal consequences are of interest, because they show how users not professionally acquainted with the law navigate its possible implications by adhering to vicarious experiences, communal rules and advice from their peers.

In their different interpretations of copyright and fair use, clashes between fan and corporate cultures become apparent, while successful careers from fan to professional are often accompanied by a considera-

ble backlash from the community, which then again confirms and manifests the rift between the two spheres.

Notes

1 Abbreviation of: Bondage and Discipline, Dominance (and submission), and Sadism/Masochism.

2 A common term for people and institutions holding authority—in fan circles used for 'official' producers and copyright holders.

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Referencing in Academia: Video Essay, Mashup, Copyright

Eckart Voigts, Katerina Marshfield

1. Introduction: Producing and Podcasting Videographic Material

Digital media have established a remix and mashup machine that has generated a rich range of recombinant appropriations (Voigts 2017)—compiled videos, samplings, remixes, reboots, mashups, short clips, and other material involving text, sound, and image—typically found (and lost) on web-based video databases. These remix practices raise questions about referencing and copyright in academic teaching, learning and researching environments that have yet to be fully addressed. Five years ago, in their introduction to *Transgression 2.0,* Ted Gournelos and David Gunkel pointed out that mashup culture tends to operate in a murky, transgressive legal situation:

> [...] mashup and remixing are patently and unapologetically illegal. Produced by appropriating, decontextualizing, and recombining the creative material of others, the mashup is a derivative 'composition' that violates the metaphysical concept of originality, the cultural status of the author and the authority of authorship, and every aspect of intellectual property law and copyright (Gunkel/Gournelos 2012: 11).

In this paper, we will provide a tentative view of the current situation that has grown from a teaching project entitled 'Producing and Podcasting Film Analytical Audio Commentaries'. We will proceed by providing

a short portrait of the project, before focussing on the issues of evaluating and referencing videographic material, remixes and mashups.

The aim of the 'Audio Commentaries' project was to develop student cultural techniques (in German 'Kulturtechniken'). Having received input on the paratexts of films and on how to systematically analyse them, students were instructed on researching, writing and producing their own audio commentaries for movies of their choice (i. e. well-known Hollywood productions). They learned about and applied the techniques of analysing films and assessing, encoding, annotating and producing digital media files. The group reaped the fruits of the teaching project 'Producing and Podcasting Film Audio Commentaries', conducted by Katerina Marshfield and Eckart Voigts, and funded under the umbrella of the 'In Medias Res' programme at TU Braunschweig in 2016. Based on a foundation in film analysis, students assessed a number of trenchant DVD audio commentaries (for instance from the cinephilic Criterion and BFI Collections).

The students then proceeded to script, analyse and produce audio commentaries of their own, following five steps:

I: Listening/Reading: During the first three in-class sessions, students were given various samples of audio commentaries that are part of an audio commentary collection. They were also asked to read a number of articles related to the subject of 'audio commentaries' as ancillary texts. As an outcome, they produced a typology of several audio commentaries.

II: Analysing/Interpreting: Students were asked to encode and analyse films systematically based on the standard texts on film analysis (Bordwell & Thompson 2012, Korte 2003, Monaco 2009). The use of annotation apps and *Interact*, a more complex CAQDA (Computer Assisted/Aided Qualitative Data Analysis) software, allowed students to digitally annotate or even code film sequences for aspects they had isolated as targets in their film analysis. Students created digital notes and anno-

tations, and generated supercuts of selected and coded scenes. It was at this stage that the copyright issues outlined below emerged.

III: Researching and Writing: Students were then asked to research and write their commentaries. In order to prepare them for this task, we arranged a number of expert interviews and talks. A workshop with Marie-Laure Ryan on transmedia narration (18/102016) was recorded, and five experienced audio commentators shared their experience with the students in recorded Q & A sessions: Professor Robert Gordon, PhD (University of Cambridge, UK), Professor John R. Cook, PhD (Glasgow Caledonian University, UK), Professor Dr. Marcus Stiglegger (DEKRA Hochschule für Medien, Berlin), Adrian Martin, PhD (Monash University, Australia, a real time webinar), and Professor Catherine Grant, PhD (University of London).

IV: Producing: During the last production phase, students recorded their film audio commentaries. To ensure high-quality soundtracks, we demonstrated the use of sound recording equipment in one of our in-class sessions. We also produced an explanatory clip on sound quality and working with sound editing software *Audacity*, which was at the students' disposal round the clock on our learning platform.

V: Presenting: Finally, students were asked to introduce and play their commentary to their peers at a 'Student Commentary Day'. Two students, for instance, produced an engaging video essay for Walt Disney's *Frozen*, which we cannot include here for copyright reasons. Although the students created interesting audio commentaries, we never made those podcasts publicly available, because the clips used copyrighted material from the films on which they commented.

The following discussion of referencing in this teaching context is inspired by the two key questions that emerged as major stumbling blocks in this practice-oriented seminar: (a) the lack of established criteria for audiovisual student work, and (b) unclear copyright issues when referencing audiovisual material.

Even though we were aware of the fact that we would be navigating through formally and legally uncharted territories, we were keen to go through with the project for the following reasons: despite the fact that convergence culture (Jenkins 2006, Ryan 2015, Schültzke 2015) increasingly exposes students to multi-modal textuality both in their day-to-day lives and during their studies, there is an ongoing shortage of practice-oriented classes within literary, cultural and media degree programmes in Germany. While researching and teaching how to analyse and interpret diversified semiotic compositions is the primary goal of such programmes, the media used for tuition and the examination formats available at the end of courses overwhelmingly rely on the written or spoken word. Other semiotic modes are used as objects of study, but not as a means of research or teaching and learning.

Meanwhile the linearity of traditional writing focussing on online distribution has been transformed through hypertextual and hypermedial networks becoming increasingly interwoven. Its production requires a new kind of "multiliteracy" (Hallet 2014), which is rarely part of the creative arsenal of students and tutors of literary, cultural and media studies.

However, *mashups* present an alternative that allows for mixing texts, footage, images and sounds without having to produce substantial semiotic expressions from scratch. For this reason, the mashup has become increasingly important as a multi-channel cultural technique for constituting, exchanging and presenting meanings, ideas and materials (Schültzke 2015: 153) both in amateur media studies and in the emerging professional academic approach to media.

What is fascinating for our work about the current state of the *mashup* genre, is that, while a plethora of material is already available online, it is by and large unhampered by established criteria and norms of production, form or content.

For the reasons outlined above, we decided to support Schültzke's appeal to turn the media mashup into a "means for analysis and pres-

entation of results" in teaching media studies in an effort to join theory and practice—a kind of criticism in action (2015: 153)

A key inspiration for us was Catherine Grant's presentation at the Audiovisual Essay Conference organised by the Deutsches Filmmuseum in Frankfurt and Goethe University in November 23–24, 2013, where she argued that mashup videography is creative, critical and performative:

> For me, videographic film studies, including audiovisual essays, is creative; I'd say primarily these are creative [forms]. But they are *creative critical* (sometimes I don't even use a comma to separate those two terms!). Creative, critical, and *performative* film studies practices. Performative because they use the object themselves. They use reframing techniques, remixing techniques, applied to film and moving image excerpts. (Grant 2014)

Our seminar followed the basic tenets of action-oriented media pedagogy with clearly structured hands-on production activities and acts as a building block in the ongoing curricular transformation of teaching media and cultural studies: our methods included opportunities to work in small, independent groups and student-focused learning environments in order to (inductively) develop student competence in digital media. Experiences in hands-on, production-oriented work resulted in 'authentic' student communication, while enhancing student knowledge and practical applications of traditional film analysis of visual communication. The focus on products in the context of an aesthetically and culturally minded media pedagogy and the clear emphasis on students' actions address the four central dimensions of media literacy as outlined by Dieter Baacke since the 1990s: (1) media critique (*Medienkritik*), (2) media knowledge (*Medienkunde*) (3) media usage (*aktive Mediennutzung*) and (4) the creative and innovative production of media formats (*Mediengestaltung*, see Moser 2010: 242).

2. Publishing Videographic Criticism: Handling Hypermodality

Having mentioned the lack of formal criteria for the production of mashups, it is now worth analysing how the existing journals and practitioners handle the two key problems of hypermodal academic text production. In the following sections, we will examine the criteria that do exist for assessing videographic work and the current state of academic referencing in video essays.

On the one hand, there are key video essay sites that offer little more than a meta-index to relevant work in a field that is rapidly evolving. The cinephilic subscription-based viewing service Fandor, for example, offers a blog that links to relevant videographic mashups: https://www.fandor.com/keyframe/best-video-essays-2016

On the other hand, there are curated online journals modelled on the practice of academic publishing. Pioneers of video essay compositions, who characteristically transcend the divide between academic and non-academic expert cultures, have created channels showcasing their work, where they also reflect on production aspects. This practice makes the production processes transparent to scholars. One of the most recognised YouTubers in this respect is Evan Pushak and his channel, The Nerdwriter1: https://www.youtube.com/channel/UCJkMlOu7faDgqh4PfzbpLdg

Academic film scholars such as Catherine Grant and Jason Mittell have provided excellent videographic clips that blur the lines between research in film studies and creative, poetic work in the case of Catherine Grant, and between scholarship and meta-scholarship.

For instance, Catherine Grant has juxtaposed the David Bowie video for the song "Lazarus" with a clip from Luis Buñuel's *Los Olvidados*. Grant explains that she made the video as a homage on the day she learnt of David Bowie's death, clearly taking copyright risks. As she works between the poetic and the scholarly, this homage clip can hardly be called primarily scholarly (and Grant does not make this claim). In the Vimeo paratext, she comments:

> I was struck by how the music video LAZARUS (Bowie/Johan Renck, 2016) made me recall the dream sequence in LOS OLVIDADOS (Luis Buñuel, 1950), a film in part about the fragility of flesh, and which constantly foreshadows death as the ineluctable fate of its characters. (Grant 2016)

Jason Mittell's longer video essay discusses a conspiracy theory about meanings hidden in the Spike Jonze/Charlie Kaufman movie *Adaptation*. He comments that his own search for meaning, expressed largely in voiceover, is only half-serious:

> My own voiceover takes inspiration from the film, purposely leaving it unclear exactly how much I mean what I'm saying—if Kaufman serves, at least in part, as an unreliable narrator, perhaps I stand as an unreliable critic. That being said, this video is not offered as a "fake" analysis. I believe it provides real insights into the film, albeit in unconventional ways. And as analysis, it speaks for itself. (Mittell 2016a)

The cases of Catherine Grant, Jason Mittell and others such as Adrian Martin illustrate that, frequently, authors, curators, editors and disseminators of videographic works come from a circle of media-savvy experts—but this, we predict, is going to change with the wider dissemination of these compositions and the documentation of best practice regarding their production. In the following section, we will outline some current attempts at defining criteria for producing academic video essays in the widest sense of the word.

Academic sites such as the *Journal of Embodied Research*, an open access journal launched February 8, 2017 on the Open Library of the Humanities (Birkbeck, London, 2013), have gone some way towards establishing criteria for videographic content. Their set of three minimal

requirements includes the dimension of citation and referencing (described in the author guidelines):

1) A clearly identified title to distinguish the article within the journal;
2) A clearly identified author or list of authors; and
3) Continuous time code to allow for stable and accurate citation.

The *Journal of Embodied Research* names the broad multimodal nature of its contents: "video and audio recordings, still images, graphics and animation, voiceovers, textual material and other multimedia forms". It establishes a number of useful criteria for evaluating videographic material, such as "a clear multimedia design that is appropriate to its content", and warns against 'trailer style': "marked by rapid editing and musical soundtracks to create an effect of intensity". It also specifies length, both in terms of words and running time: "Research articles should be no more than 20:00 in duration and transcripts should not overrun 8000 words."

The case of *[in]Transition*, the *Journal of Videographic Film & Moving Image Studies*, raises the problem related to the idea of a 'journal' with stable textual boundaries even more, as it collaborates with the video hosting site Vimeo: it is a journal without data. Publication consists in making a password-protected video public:

> Contributors should upload their video to Vimeo, preferably to a password protected page, or to Critical Commons, then email the [in]Transition editors the relevant URL and password, plus a 25–50-word abstract, a 150-word bio, and a 300–1000-word supporting statement that articulates the research aims and process of the work as well as the ways in which those aims are achieved in the audiovisual form. ("Contribute to [in]Transition")

Interestingly, contributions to this journal are accompanied by two open peer reviews. *[in]Transition* has adapted this unusually open editorial policy from the British journal *Screenworks*. The editorial policies can be explained in a variety of ways: establishing academic recognition through deliberately open review processes, solving technical and financial problems via exterior hosting, accepting a diversity of audiovisual material while contributing to universally accepted norms (according to the emerging sub-fields and disciplinary differentiation).

List of significant sites for video essays in film studies, media studies, anthropology/theatre/dance (in alphabetical order):

- AudioVisual Thinking
  http://www.audiovisualthinking.org/
- Audiovisualcy: Videographic Film and Moving Image Studies
  https://vimeo.com/groups/audiovisualcy
- Fandor Best Video Essays
  https://www.fandor.com/video-essays
  and the yearly selections:
- Fandor Best Video Essays 2014 ff.
  https://www.fandor.com/keyframe/the-best-video-essays-of-2014
- Granada Centre for Visual Anthropology
  http://granadacentre.co.uk/
- [in]Transition Journal of Videographic Film & Moving Image Studies
  http://mediacommons.futureofthebook.org/intransition/
- Journal of Embodied Research (hosted by the Open Library of Humanities).
  http://jer.openlibhums.org/Journal of Visualized Experiments (JoVE)
  http://www.jove.com/
- Screenworks
  http://screenworks.org.uk/

3. Teaching, Researching, and Copyright

The first problem that arose in the context of our teaching project was accessing non-copyrighted film material. In general, all users have to consider whether national and transnational laws are applicable. The principle of national protection determines the scope of applicability of national law (i.e. the law of the country in which the lawsuit is filed). The very terms—copyright law in the USA and 'Urheberrecht' (UrhR) in Germany (i.e. law protecting the rights of the originator/author) – illustrate the difference in perspective. In the American context, since the Sonny Bono Copyright Term Extension Act (1998), works made in 1923 or afterwards still protected by copyright in 1998 remain under copyright for 75 years (as opposed to 50 years for works created before 1923). In Germany, § 64 of the copyright law (UrhG) specifies that works remain under copyright protection for 70 years after the author's death (*post mortem auctoris, pma*). In the case of film this means that post-mortem copyright protection includes the director, screenwriter and composer. There are some well-documented copyright disputes that illustrate the differing interests of academics, fans and copyright holders. A blatant case of copyright holders seeking to profit rather than protect the author's interests is Leslie Klinger vs. Conan Doyle Estate, a case in which the estate unsuccessfully sought to extend copyright on a 'complex' literary character (Klinger vs. CDE 2014). In this case, fans and enthusiasts profited from a long tradition of high-profile, well-organised fandom that came from high social ranks (Baker Street Irregulars, Baker Street Babes) rather than marginalised and isolated groups. They were also supported by legal advice from the Organization for Transformative Works and Cultures. Activist-author Betsy Rosenblatt argued in 2017 that—contrary to the better founded claims of author Anne Rice to her own work in her well-documented argument against fan fiction—the Conan Doyle Estate had a rather tenuous case: "It is one thing for a fan to heed Anne Rice herself when she asks her fans not to create fan

works and quite another to heed a third cousin once removed who purchased the rights rather than inheriting them" (Rosenblatt 2017).

Another classic case is the copyright status of Alfred Hitchcock films, which were removed from the public domain when they fell under the EU extension to the 70-year-rule. A wiki devoted to the complex legal status of Hitchcock movies illustrates the situation: "Once Directive 93/98/EEC was adopted by the United Kingdom, all of Hitchcock's British films had their copyright restored and were no longer in the Public Domain. As Hitchcock died in 1980, the copyright term of the films is until at least 2050 (being 70 years after his death). Six of the British films were written by Charles Bennett, so their copyright term is until at least 2065 (being 70 years after Bennett's death in 1995)" ("Copyright status").

Maybe the most famous case is the forgotten copyright notice for George Romero's *Night of the Living Dead*, which can be freely used for academic and other purposes: "copyright, or the lack of it, helped define the zombie genre for what it is and ensure that there were plenty of movies to go around" (Bailey 2011).

The first task for us as university lecturers involved in a videographic essay project based in Germany would be to locate audiovisual material that is out of copyright and in the public domain on sites such as www.publicdomainmovies.net or www.pond5.com/free. According to Jessica Litman, the public domain is a sphere not only limited to items undeserving of protection, but, on the contrary, it provides the essential raw material for the creative process (Litman 1990: 968).

Open Access is the preferred condition for the exchange of information in academic contexts. Many journals that publish mashed-up videographic material observe one among a choice of Creative Commons licenses. The *Journal of Embodied Research*, for instance, uses the most open version CC-BY (i.e. Creative Commons plus author attribution, 'by') that "lets others distribute, remix, tweak, and build upon

your work, even commercially, as long as they credit you for the original creation" (Creative Commons).

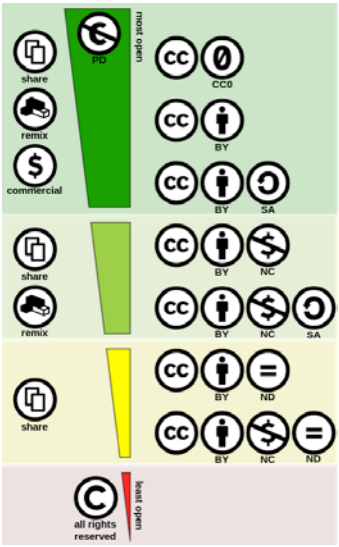

Fig. 1: By Shaddim; original CC license symbols by Creative Commons[1]

The Creative Commons license, however, is only of limited use when an academic video essay uses commercially produced material. As German pressure group Rechtaufremix.org comments: "A core characteristic of remix culture is the transformative and creative usage of mainstream cultural artifacts—these in particular are usually not released under a Creative Commons license" (right2remix.org—the English language version of the site). German copyright laws prevent unlicensed remixes, unless the original material becomes indiscernible. According to the highest German court, the Bundesgerichtshof (BGH), the 'fading' (*Verblassen*) of the original material, for instance in distorting parodies or in other kinds of transformation, is the key criterion in deciding copyright cases.[2] This criterion was applied to summaries of literary

texts (in a case involving the literary online magazine *Perlentaucher*) or distortions of celebrity photographs. If we return, for instance, to the case of Catherine Grant's 'homage' "Lazarus/Los Olvidados" the Creative Commons license would by no means cover what she is doing. Grant admits to treading a fine line between an appropriate academic reference and a breach of copyright complicated by (a) the diversity of copyright legislation, and (b) her use of music. Key criteria are the length and appropriateness of the reference as well as the degree of transformation or distortion discernible in the 'citation':

Fig. 2; available at: https://www001.zimt.uni-siegen.de/ojs/index.php/mia/

While being aware that the use of music raises particularly tricky copyright questions, Grant points out that the Bowie track was publicly disseminated for promotional purposes and explains that in addition to juxtaposing the clips in split screen she also mixed the soundtracks. This, she argues, is transformative referencing.

Fig. 3; available at: https://www001.zimt.uni-siegen.de/ojs/index.php/mia/

Transformation is thus a key criterion in deciding copyright cases. This applies both to German copyright laws, which seek first and foremost to ascertain the rights of an originator, and to the Anglo-American norms of fair use (USA) and fair dealing (e.g. UK, Canada, Australia).[3] The emphasis put on the question to what extent a work is transformative raises a peculiar challenge, because, in a stark contrast to that, an academic citation is required to observe the norms of zero transformation. The different norms may be explained by the signposting of origins: in the audiovisual essay, it will be clear that the Bowie video and sound is a consistent quote. This, however, does not apply to all available material. Again, it is elucidating to consult the guidelines in the *Journal of Embodied Research*; they require references both within the video and in an accompanying text document, which must include an abstract, keywords and bibliography:

> References and citations must be included within the video article as well as in the required accompanying document described below. The Harvard system of referencing should be used and a complete

> bibliography should appear at the end of the video. Additionally, authors can choose to make reference to that list using author/date citations or to include 'footnotes' with citation information throughout the video. ("Author Guidelines")

In addition, the editors welcome a transcript and/or detailed description of the video—thus, compared to a text-only essay, a videographic essay clearly requires more time and care.

Copyright laws in Germany, the UK and the USA differ widely, for instance with respect to the previously mentioned norms of fair use and fair dealing. In a legal expertise prepared for the German Associations of Historians and Media Studies (Verband der Historiker und Historikerinnen Deutschlands, VHD; Gesellschaft für Medienwissenschaft, GfM), the authors explain that, as a rule, mashups and remixes are unequivocally illegal in Germany (Klimpel/König 2015: 24–25, see also Klimpel/Weitzmann 2015). On the other hand, in the ongoing legal battle between the band Kraftwerk and music producer Moses Pelham, the German Federal Constitutional Court (Bundesverfassungsgericht) decided that the specific situation within the art form has to be considered. The court argued that, as the practice of sampling has been long established in Hip Hop, it should be protected as artistic expression.[4]

What is the current legal situation with respect to the 'ripping' of a DVD for purposes of research and education? Legal norms seem to vary from country to country. Some provide for the legal preparation of private back-up copies. In Germany, however, the ripping of a DVD even without the intention to ever re-publish material is illegal, and thus raises doubts about practices that might be essential in the context of our project outlined above. The reason for 'ripping' is irrelevant, even if it is to quote from a movie.[5] It does not matter if the DVD was purchased and just copied to back it up, or if the audiovisual material is not intended for further use or redistribution. It is forbidden for students or staff alike to circumvent the copy protection on the medium it-

self for any reason. The right to prepare a 'back-up copy' for private use, which exists in some countries, does not necessarily imply that a copy protection (DRM: Digital Rights Management) can be circumvented. This is why we required the students to prepare their commentaries in our project as audio files only (without the vision track of the original source film).

The situation is different in the USA, where, according to Jason Mittell, ripping is legal (albeit discouraged by university administration for fear of litigation) after the Library of Congress allowed exemptions from the Digital Millennium Copyright Act (DMCA): "it is no longer illegal to 'rip' a DVD or Blu-ray in order to create videographic criticism, regardless of fair use ruling" (Mittell 2016b).

However, fear of litigation clearly hampers much academic work—not just in the world of videographic criticism. As the following letter—which was sent to Eckart Voigts by a British journal editor in a private e-mail in 2016—suggests, even with written material the question of what constitutes fair use of a 'quotation' or 'citation' can make academics wary, even in the world dominated by 'fair dealing' provisions:[6]

> This relates to the issue of quoting from [X's] play. If you consult the explicit copyright restriction specified in the inside front cover of the published version of her play, you will see that it does not acknowledge any 'fair dealing/fair use', insisting even on permissions being obtained for conducting readings of the play in a classroom environment (!!). You actually cite quite extensively from the play, namely a total of 286 words.
>
> By way of comparison, my own chapter in the collection also cites from a play, though slightly more (just over 350 words), for which the playwright's agents have demanded £250.00—we are still ironing out the details, as that was going to be for a 400 print-run only, with further payments thereafter… So you really don't want to fall foul of copyright law, as the publisher and agents I've spoken to seem

> to hold that, strictly speaking, there are no fair dealing rules with regards to plays (so too in the case of poetry, incidentally) and each case is assessed on an individual basis.
> So I would propose the following. [...], you will find contact details for [X's] agent and publisher, as well as a draft email to request copyright permission. If a) they don't get back to you fairly quickly, i.e. by the time we finalise the rest of the chapter proofs in the coming fortnight, or b) the permission cost proves prohibitive, then we replace the direct quotes from the play with paraphrase. [...] and we'd then add a footnote to the effect that "Regrettably, copyright restrictions and prohibitive permission costs have made it impossible to quote directly from [X's] play."

In contrast to the narrow legal boundaries to video essaying in Germany, in the USA, the publication of videographic criticism is widely covered by the principles of fair use and copyright cases are rare, as Mittell (2016b) clarifies in a useful summary that we have condensed to a set of bullet points:

- "Within the United States, most videographic criticism falls squarely under the provisions of fair use, allowing you to reuse copyrighted materials without permission, with some important exceptions. Fair use is vague by design, requiring a judgment call (by a judge in court) as to whether it violates copyright law based on four interrelated factors: the *nature of the use, the nature of the copyrighted work*, the *extent* of the original being used, and the *impact* the use might have *on the market value* of the original." [my emphasis]
- As of 2015, only one case involving videographic work or video remix has yielded a legal ruling (and it was determined to be fair use).
- Problems may occur on standard video hosting sites and with music (as in the publicised case of prominent videographic critic Kevin B. Lee versus YouTube).

- The risks for posting a video using unauthorised copyrighted material are quite low (takedown request or cease-and-desist letters) due to potentially negative press coverage and reputation damage.
- There are alternatives to YouTube et al.: CriticalCommons.org is a non-profit site designed for academics that advocates fair use and has no automated takedown system (Mittell 2016b).

We have highlighted the most important criteria: audio essays should make clear that the citation is necessary for building knowledge and making an argument rather than for financial gains of the remixer/masher, it should be relevant to the issue at hand and neither be excessive in duration nor interfere with the financial interests of the copyright owner.

Conclusion

In conclusion, the murky legal situation, which is particularly restrictive in the EU and Germany, should lead academics to unequivocally support the activities of organisations such as the Organization for Transformative Works and Cultures, OTW, (in the Anglo-American world) and iRights.info or rechtaufremix.org (in the German-speaking world). Apart from attempts to influence copyright policy, OTW legal advocacy includes help with obtaining an exemption to the U.S. DMCA and filing Amicus Curiae briefs in cases regarding U.S. copyright law, fair use, and online freedom of expression. In Germany, since 2013, rechtaufremix.org has sought to establish an equivalent to the American fair use principle, which would supplant the strict copyright protection with subsequent statutory exceptions (*Schrankenregelungen*). Rechtaufremix.org thus campaigns for changes in the European Copyright Directive, additions of bagatelle clauses, a remix exception, expanded citation rights under German law, and so forth. In the current legal situation, it might be best not to announce screenings in class and never ask how students or colleagues obtained the material they are us-

ing, as an unnamed colleague suggested to us.[7] We as cultural scholars will have to remain vigilant and proactive in representing our interests, as even the new German copyright law with special reference to science and academia (the UrhWissG, which will take effect in March 2018) does not allow for altering original 'cited' content, neither for research nor for teaching purposes. It does, however, provide for the use of 15% of a given 'work' in contexts of scientific teaching and research and allows data mining.

Notes

1 https://creativecommons.org/policies/ Original CC license icons licensed under CC BY 4.0, CC BY 4.0, https://commons.wikimedia.org/w/index.php?curid=47247325

2 "Erst wenn sich der Remix so weit von den verwendeten Ausgangswerken entfernt, dass 'deren individuelle Züge nicht mehr durchschimmern', so die vereinfachte Formel, verlässt man den Bereich der Bearbeitung und befindet sich in der sogenannten freien Benutzung. Erst dann ist der Ersteller des Remix als Urheber allein entscheidungsbefugt und nicht mehr im selben Boot mit den Urhebern verwendeter vorbestehender Werke." (Klimpel/Weitzmann 2015). [Only when the remix is so different from the original works used that 'their individual characteristics no longer shine through', if we want to put it into a simplified formula, the use is no longer considered as editing, but has entered the domain of free use. It is only then that the author of the remix as the originator is solely entitled to decide and is no longer in the same boat with the authors of the pre-existing works used.]

3 Fair use provides for exceptions of copyright protection for area such as teaching, scholarship, or research. Fair dealing, predominantly in countries whose legal system is influenced by the Commonwealth of Nations, is a less general exemption from infringement of copyright, but also applies to education, criticism, scholarship and research.

4 The ruling of the constitutional court relied on pop-musicological research on hip hop, which is commendable for further legislation: "Der Einsatz von Samples ist eines der stilprägenden Elemente des Hip-Hop. Der direkte Zugriff auf das Originaltondokument ist – ähnlich wie bei der Kunstform der Collage – Mittel zur 'ästhetischen

Reformulierung des kollektiven Gedächtnisses kultureller Gemeinschaften' (Großmann, Die Geburt des Pop aus dem Geist der phonographischen Reproduktion, in: Bielefeldt/Dahmen/ders., PopMusicology. Perspektiven der Popmusikwissenschaft, 2008, S. 119 <127>) und wesentliches Element eines experimentell synthetisierenden Schaffensprozesses. Die erforderliche kunstspezifische Betrachtung verlangt, diese genrespezifischen Aspekte nicht unberücksichtigt zu lassen" (BVerfG 2016). [The use of samples is one of the characteristic style elements of hip hop. The direct use of the original audio document is—similar to the art form of collage—a means to 'aesthetically rephrase cultural communities' collective memory' (Großmann) and an essential element of a creative process based on experimental synthesization. An art-specific approach requires these genre-specific aspects to be taken into account.]

5 "DVDs sind meist mit technischen Schutzmaßnahmen, d.h. einem Kopierschutz, versehen. Diese Schutzmaßnahmen dürfen nach der geltenden Rechtslage auch nicht zum Zweck des Zitierens umgangen werden. […] Dies ist problematisch, da damit die vom Zitatrecht bezweckte geistige Auseinandersetzung bei bestimmten Werkformen wie insbesondere Filmen unterminiert wird. […] In der Praxis ist allerdings fraglich, ob eine Rechtsverletzung, bei der technische Schutzmaßnahmen im Rahmen eines Zitats umgangen werden, auch geahndet wird" (Klimpel/König 2015: 56). [DVDs are usually provided with safeguards, i.e. copy protection. Under the current law, it is forbidden to circumvent these safeguards even for the purpose of citations. […] This is a problem, because this provision undermines the intellectual discussion intended by the right of citation in certain forms of works such as film in particular. […] It is doubtful, however, if an infringement that consists in circumventing technical safeguards in the context of a citation, will be prosecuted in practice.]

6 A web page published by the British Library usefully explains that 'fair dealing' provisions are always "matters of degree and interpretation", which goes a long way towards explaining the fears articulated below.

7 "Vielleicht noch ein Praxistipp: bei den Videoessayseminaren hat der Dozent die Quelle immer schon mitgebracht. Ich habe nie daran gedacht ihn zu fragen, wie er daran gelangt ist. Aber soweit ich weiß, hat er auch nie eine Anleitung zum Rippen von DVDs gegeben, wäre ja auch illegal …" [One practical tip: in the video essay courses, our lecturer always provided the source. I never thought of asking him how he had obtained it. As far as I know, he also never provided guidance on how to rip DVDs. That would be illegal anyway…]

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Re-Use under US Copyright Law: Fair Use as a Best Practice or Just a Myth of Balance in Copyright?

Sibel Kocatepe

The Re-Use Practice

In copyright law, the term *Re-Use* describes the creation of new works by using, reconfiguring, rearranging, interpreting or otherwise borrowing elements of existing copyrighted works such as novels, films, pictures, songs or sound sequences (Klass 2016: 801). Therefore, *re-use* functions as a generic term for new media phenomena such as *fanfiction*, *appropriation art*, *mash-up*, *sampling* or *remix*, in which something new is created based on existing material (Klass 2017: 147 f.). With the increasing digitalisation and a higher degree of professionalisation, this reference culture attracted growing attention in the copyright discourse (Summerer 2015: 26). An illustrative example for this is *fanfiction* (Stieper 2015: 301; Knopp 2010: 28): the term *fanfiction* describes a creative writing process, in which fans inspired by popular books, shows, movies, comics, music, and games produce new stories such as prequels or sequels based on the original work, using its story, setting or characters.[1] The early days of this media phenomenon date back to the analogue era and have their origin *inter alia* in the US science fiction series *Star Trek*: based on the programmes and movies, fans wrote their own fictional stories and circulated them among themselves via letter (Tushnet 1997: 651 f.). In the era of digitalisation, the role of letters was superseded by the internet, and this kind of writing practice developed into a mass phenomenon on platforms such as www.fanfiction.net or www.archiveofourown.com.

While this creative practice became increasingly popular among fans, some of the original works' authors were not amused to see new creations based on their own. In the case of *Star Trek*, the authors' disapproval even led to a lawsuit caused by the fan film *Prelude to Axanar*. The film's producers for instance used the fictional language Klingon, created by *Marc Okrand* for *Star Trek*, and also adopted characters similar to the original ones. The original production company took the view that the unauthorised use was an infringement of their copyrights and filed a suit (*Paramount Pictures Corp. v. Axanar Productions, Inc.,* No. 2:15 CV 09938 (2017)).

This poses the question: is it legal to *re-use* an existing copyrighted work in order to create a new one? The answer constantly preoccupies creators of reference culture as well as authors, holders of rights and lawyers. It cannot be just a simple *Yes* or *No*, because this would not accommodate the various constellations within the individual reference cultures and the involved parties' many different interests. Therefore, the right question to ask is: which legal framework allows existing copyrighted material to be used lawfully for the creation of new works? Because of the country-of-origin principle (Klass 2007: 373 f.), which prevails in copyright law, this question cannot be answered globally, but only for individual jurisdictions. For this reason, I will focus on the US Copyright Act (US-CA) with its well-known *fair use* limitation in § 107 US-CA. After explaining when and how the *fair use* provision is applied in US copyright law, I will analyse if the *fair use* limitation is a best practice example worth adopting by other jurisdictions or if there is a need for legal reforms, for example based on the model of the Canadian Copyright Act.

Limitations on Copyright in US Law

New technological methods and the internet in particular have created a space, in which from a technical point of view nearly anything is possible and users have access to various copyrighted works far beyond the

territorial borders of their own countries. However, the extensive exclusive rights of the copyright owners stipulated in § 106 US-CA limit the users' possibilities to adapt and reproduce the original works. In the context of *re-use*, the exclusive right to create derivative works based on copyright-protected material, the right to copy it or to perform and display it publicly are of particular strategic importance. If a copyright-protected work is (re-)used by a third party without the right holder's authorisation, the (re-)use therefore constitutes fundamentally a copyright infringement in accordance with § 501 (a) US-CA.

In order to balance the resulting conflict of interests between the involved parties, limitations on the exclusive rights were introduced (Dreier 2004: 295, 298; Seemann 1995: 31, 63). One of these is the *fair use* doctrine, which allows third parties certain uses that are legally guaranteed to the copyright owners of the original material if the users comply with specific *fair use* provisions (Ballard 2006: 239, 240; Dnes 2013: 418, 424). In legal disputes, users can therefore defend themselves against the alleged copyright infringement by invoking the *fair use* limitation. In the following section, I will explain the statutory requirements the US legislator has laid down for the *fair use* provision.

The Fair Use Doctrine

In the context of copyright limitations, the most frequently discussed provision globally is the *fair use* doctrine. It is used widely, because it is highly flexible and advantageous for fan communities as it can also be applied to new media phenomena such as *fanfiction*, *sampling* or *collages*. Critics of the *fair use* doctrine denounce it as a source of legal uncertainty because of the four criteria that have to be considered when evaluating the fairness of using a copyrighted work. § 107 US-CA stipulates that the unauthorised use of a copyrighted work[2] is not a copyright infringement if the exploitation of the work can be qualified as fair. This judgement is made based on four factors specified in § 107 US-CA (the so-called *Four Factor Test*). These factors are (1) "*the purpose*

and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes", (2) *"the nature of the copyrighted work"*, (3) *"the amount and substantiality of the portion used in relation to the copyrighted work as a whole"*, and (4) *"the effect of the use upon the potential market for or value of the copyrighted work"*. According to the legal wording, these factors are only points of reference to be considered separately by the court on a case-by-case basis, before establishing an overall weighting indicating whether the act of the user is permitted by § 107 US-CA or not.[3] However, the law fails to provide a clear guidance on how the individual factors should be interpreted and how each should be weighted within the overall outcome (Nimmer 2017: 13–160). Historically, the task of interpreting and weighting the criteria was undertaken by the US courts as a part of the judges' freedom of decision (Nimmer 2003: 263, 281). The result is a settled case law for each of the four criteria, which I will explain below.

The Four Factor Test

The statutory factors were developed by the US jurisdiction, then codified by the legislator in § 107 US-CA and over the years continuously interpreted and refined by the courts in the following way.

The first factor[4], which is highly important for the judicial practice (Becker 2014: 133, 148), focuses on whether the use is primarily commercial or non-profit (Chik 2011: 242, 278 f.; Duhl 2004: 665, 682) and whether the new work is transformative (Leval 1990: 1105, 1111; Nimmer 2003: 263, 268). The non-commercial exploitation of a work is in principle acknowledged as a strong indicator of *fair use* by the judiciary, while not every commercial use is *per se* deemed unfair[5], but rather must be considered on a case-by-case basis as one of several factors that determining the outcome of the overall assessment.[6] In addition to the aspect of commercialism, the transformativeness of a work must also be taken into account when establishing fair use, particularly if the original work is used to create a new copyright-protected work (Nimmer

2003: 263, 268). A derivative work can be considered as transformative if the author has created something new, with a changed intention or a different character, and at the same time has modified the expression, meaning or message of the original work.[7] In this case, the original is just used as "raw material" (Leval 1989: 167, 170) that inspired the author of the derivative work to create something new.[8] This means, however, that transformativeness is an element that has to be established individually for each new work. Consequently, there is a risk of court decisions being highly subjective, as the judicial treatment of the cases depends essentially on the judges' individual understanding of transformativeness. New media phenomena may encounter less understanding than traditional forms of art (Lantagne 2015: 263, 300), which should not be underestimated in the case of *re-use*.

As a second factor, the nature of the original work has to be taken into account.[9] A fair use analysis has to consider whether the original work had already been published or not before being used[10], as unpublished works are legally subject to the exclusive right of the author to publish his or her work and therefore in need of greater protection. Consequently, the use of an unpublished work is more likely to be considered an unfair use.[11]

Settled case law also distinguishes between factual and fictional works. A *fair use* is considered more likely if the subject is primarily factual as, ultimately, the creativity of the original work is decisive for its copyright protection.[12] Conversely, this means that it is more difficult for users of primarily fictional works to invoke the *fair use* limitation.[13] Depending on the purpose of the use, the distinction between factual and fictional works may therefore not be expedient. Since the adoption of elements from an existing creative work is an intrinsic feature of the derivative work, the result of this practice is known from the outset. This applies in particular to *re-use* and is clearly apparent in fanfiction, in which the majority of the fan stories are based on fictional works (Tushnet 1997: 651, 676 f.). Therefore, in these cases, the fact that

primarily fictional elements have been adopted by users cannot automatically result in a denial of *fair use*.[14] As the distinction between factual and fictional works does not apply to all forms of use (Nimmer 2017: § 13.05 (A) (2) (a)), the second factor carries least weight within the overall evaluation of the four factors (Beebe 2008: 549, 584).

In applying the third factor, fair use is established by assessing the amount and substantiality of the copyrighted work used in relation to the entire original work, using both qualitative and quantitative aspects.[15] When assessing the quantity of extraction, the following principle is applied: the less the user takes from the original work, the more likely the new work is covered by the *fair use* limitation.[16] Where exactly the line is drawn, however, is ultimately dependent on each individual case, where the quality of the proportion used also plays an important role (Kleinemenke 2013: 106). While the proportion of the extracted elements may be quantitatively small in relation to the whole, the use may nevertheless be considered as inappropriate if the used part is the core or an essential part of the copyrighted original.[17]

As the fourth and most important factor (Nimmer 2003: 263, 267; Beebe 2008: 549, 584)[18], to guarantee the copyright owners of original works the fruits of their labour[19] and to give them an incentive to create new works[20], the courts decided that both the influence of the derivative works on the originals' existing and potential markets and the effect on their value have to be taken into account.[21] In assessing the damage on an original's existing and potential sales markets, the following principle applies: the higher the negative impact on the original work's markets, the less likely it is that the use is judged as fair.[22] Such a negative impact has been assumed in the past in cases where the derivative work targets the audience of the original work and the original's copyright owner loses revenues due to the substitute effect and the direct competition of the derivative work (Goldstein 2005: 10:58).[23] In the context of *re-use*, it is important to note that derivative works in particular may not necessarily compete with the original works and may also

be represented in different markets, so their sales are not affected by each other.[24] Under some circumstances, it is even possible that the *re-use* of original material in derivative works has a positive influence on the original work's market. In the case of *fanfiction* in particular, some argue that derivative works may impact positively on the sales of the original work, because the fan stories keep the interest in the original work alive (Tushnet 1997: 651, 672). This can also apply if the derivative works are distributed commercially, because a commercial use can be an indicator for a market loss of the original author, but is not a necessary consequence.[25] Commerciality *per se* is no indicator of whether the works are competing on the same market or the new work has a substitute character, particularly if the new work includes transformative elements.[26] However, even a non-commercial use cannot be classified categorically as a *fair use* (Neval 1990: 1105, 1124). For instance, it would be considered an unfair use if a commercial market for derivative works already existed, but rather than participating in it a non-commercial user offered the common audience a free alternative, ultimately resulting in a financial loss for the original author (Schuster 2014: 529, 533 f.; Lipton 2015: 425, 446 f.). A vivid example for this is *Amazon Kindle Worlds*, a commercial market for fanfiction. Amazon Publishing has secured licenses from production companies for popular works such as *Gossip Girl*, *Pretty Little Liars*, and *The Vampire Diaries*. Within these worlds, fans can legally create their own stories, which are offered to other fans in return for remuneration. Therefore, fanfiction writers who create stories based on these licensed worlds and publish them outside *Amazon Kindle Worlds* on other fanfiction platforms have an impact on the market for derivative works. This also disadvantages the copyright owners of the original works, who make a profit from these licensing deals (Johnson 2016: 1645, 1671 f.).

When assessing fair use according to the fourth factor, in addition to the market damage that has already occurred, the courts also need to examine whether an unrestricted exploitation could have a significant

adverse effect on a potential market of the original work in the future.[27] However, copyright holders of original works cannot exclusively secure all imaginable markets, but only those they would in principle pursue (Chung 2013: 367, 385).[28] The decisive factor is the potential relevance of a market rather than an existing intention to enter a specific market.[29] This applies in particular to the markets for works based on an original, transforming or supplementing it (Förster 2008: 68) such as quiz books[30] or lexicons[31].

Evaluation of the Fair Use Doctrine: Best Practice or Just A Myth?

While the legal wording and theoretical content of the *fair use* doctrine are positive steps towards encouraging free creativity, its practical application has many weaknesses and cannot provide the much-needed legal certainty for either original authors or users. The reason is that the legislative authorities drafted the factors as reference points and thus offered the courts a significant margin of discretion, which is often influenced by the subjective preferences of the individual judges (Nimmer 2003: 263, 281; Lantagne 2015: 263, 287). Neither has the legislator laid down any rules regarding the weighting of the four factors. Consequently, the courts take their decisions according to what they consider to be particularly worthwhile in a specific case (Nimmer 2003: 263, 281). The result is a large number of cases with individual outcomes which are neither transferable nor do they offer any direction for future proceedings (Agnetti: 2015: 115, 119; Jefferson 2010: 139, 141). It is therefore not surprising that the judiciary has called the *fair use* doctrine "*the most problematic in the whole history of copyright law*" (*Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (1939)). One reason is that, although the term *fair use* is widely known, only a minority actually realises its full legal meaning (Fiesler/Bruckman 2014). In particular, users' decisions are often guided by ethical ideas and social conventions, which rarely correspond to the legal norms (Fiesler/Bruckmann 2014). In addi-

tion, users often think the law is much stricter than is actually the case (Fiesler/Feuston/Bruckmann 2015).

Copyright owners take advantage of the uncertainty among users by employing the *fair use* limitation as a deterrent, contrary to its original purpose of promoting the progress of the arts (Agnetti 2015: 115, 131, 138). Although the *fair use* doctrine is supposed to be a user-friendly regulation, users are reluctant to rely on it and instead choose to sign license agreements with the rights holders of the original works to protect themselves (Agnetti 2015: 115, 131, 138). These precautions are driven by fear of provoking lengthy and cost-intensive lawsuits with an uncertain outcome (Agnetti 2015: 115, 131, 138). This conclusion is confirmed by an empirical study, which shows that, between 1976 and 2005, the number of court rulings in copyright cases is only in the lower three-digit range, whereas in the same period around 2,000 copyright claims were filed annually. Consequently, it can be assumed that in a large number of cases the parties reached an out-of-court settlement or the claim was withdrawn (Beebe 2008: 549, 565). The low number of court rulings ultimately shows that neither users nor copyright owners can reliably estimate their success. Adding to that is the fear of rising legal costs during long court proceedings. According to the rules of civil procedure, the court costs are calculated as a lump sum and are therefore independent of the amount in dispute (Böhmer 1990: 3049, 3050). Because of that, they are manageable and do not pose a significant financial disadvantage for the unsuccessful party (Neufang 2002: 34). This, however, does not generally apply to lawyers' fees (Schwartz 2011: 113, 116) which are often calculated on an hourly basis (Magratten 2010: 24) and can therefore quickly spiral. This is of particular relevance for the parties, because according to the so-called *American Rule* each party is responsible for all its legal costs irrespective of the outcome of the proceedings.[32] As a result, even the successful party has to bear its own legal fees, because an imposition of costs or a quota of the costs to the unsuccessful party is not provided by law (Magratten/Phillips/Connolly/Feldman/Mamysky

2010: 24; Poppick 1980: 165, 166). However, an exception is made for copyright disputes pursuant to § 505 US-CA, according to which a court has the power to order a party, even if successful, to pay the costs under certain circumstances.[33]

Despite its numerous weaknesses, the *fair use* doctrine has strength in its flexibility. The open formulation of the *fair use* provision enables the applicable law to include both current and future creative needs. Due to the dynamic changes in media practices within the Web 2.0, this aspect should not be underestimated. By opting for a general clause rather than a closed catalogue of individual limitations favoured by many European jurisdictions, the US legislator avoided the need to continuously reform copyright law by adding new individual limitations for the new forms of media use.[34] This is also the reason why other jurisdictions often adopt or at least consider the *fair use* doctrine as a model for their own copyright provisions (Band/Gerafi 2015). However, a high degree of uncertainty in a legal system is generally difficult to accept and, overall, weighs more heavily than flexibility, particularly because the uncertainty is counterproductive to the US legislator's aim of promoting the arts. For this reason, § 107 US-CA requires a reform with a view to the future law, moving from points of reference to precise criteria which clearly specify in which cases a use should be classified as fair in order to solve the problem of subjectivity in court decisions. This can be ensured by a provision that requires the cumulative fulfilment of the criteria prescribed by law.

In 2012, this path was chosen by the Canadian legislator[35] who passed an exception within the Canadian Copyright Act (CAC) for "non-commercial user-generated content" (Sec. 29.21 CAC) after its *fair dealing* exception met similar problems as the US *fair use* limitation.

The Canadian "YouTube Exception" as a Role Model for US Copyright Law?

Section 29 seq. of the Canadian Copyright Act regulates exceptions to copyright, which the judiciary refers to as "user's rights" (CCH Canadian Ltd. v. Law Society of Upper Canada (2004) 1 S.C.R. 339, 350). In this context, the *fair dealing* limitation, which was originally derived from the UK Copyright Act, is of particular importance (D'Agostino 2008: 309, 317; Gendreau 2012/2013: 673, 675 f.). Until the reform of the Canadian Copyright Act in 2012, a case of *fair dealing* was only presumed if the use of the copyrighted work served one of the exhaustively listed purposes (such as research, education, parody, criticism or news reporting) and additionally could be categorised as fair. The Canadian judiciary identified several criteria to determine whether the use fulfilled the fairness requirement.[36] These criteria were very similar to the four *fair use* factors and therefore faced similar challenges of legal uncertainty. [37]

Since the reform of the Canadian Copyright Act, the *fair dealing* limitation contains an additional exception for non-commercial user-generated content, the so-called "*YouTube Exception*".[38] This provision is no longer based on the vague notion of fairness and the related criteria used by the Canadian judiciary, but on objective facts which have to be fulfilled cumulatively (Kocatepe 2017: 400 f.). Thus, the use of a copyrighted work is not an infringement of copyright if user-generated content[39] such as a new copyright-protected work[40] is created by an individual[41] solely for non-commercial purposes[42] and classified with a copyright notice.[43] Furthermore, the use should not infringe the copyright of third persons[44] or have a substantial adverse effect on the existing or potential exploitation of the original work[45].

If these requirements are cumulatively fulfilled, users have the right to authorise even commercial intermediaries such as YouTube to use their work.

By taking into account the challenges posed by the dynamics of new media phenomena, the Canadian legislator has succeeded in creating

a new limitation which is not too rigid, because the term user-generated content was chosen that can include existing media practices as well as potential future ones (Kocatepe 2017: 400, 407). Although this was a step into the right direction, a need has already arisen for further legal reforms with regard to numerous undefined legal terms such as "non-commercial", "individual", "adverse" or "effect"[46]. These still need to be interpreted and clarified by the judiciary in order to avoid inconsistency and legal uncertainty (Kocatepe 2017: 400, 408). While the Canadian exception for non-commercial user-generated content is considered as user-friendly and thus will be interpreted rather broadly,[47] the criteria of the *YouTube Exception* still face a similar kind of legal uncertainty as the four factors of the *fair use* doctrine (Lantagne 2015: 263, 287; Förster 2008: 47). In addition, the legally permitted possibility to authorise intermediaries such as internet platforms to exploit user-generated content in a commercial way also neglects the interests of the original copyright owners, in particular their remuneration interests (Hayes/Jacobs 2013: 1,2). This shows that new remuneration models will have to be considered in the digital age in both the US and Canada.[48]

Despite the need for further legal reforms, the Canadian *YouTube Exception* grants authors and users far more legal certainty than the US *fair use* doctrine (Guzman 2015: 181, 192; Duggan/Ziegel/Girgis 2013: 442) due to a more precise formulation of factual requirements, in particular relating to new media phenomena. This is the determining factor when considering the Canadian reform as a possible model for modifications of the US Copyright Act.

Conclusion and Outlook

The problems arising with the application of the *fair use* factors on the typical characteristics of mass phenomena are as multi-faceted as the *re-use* practice itself. The open-ended general *fair use* clause has the advantage of including various creative processes, but this leads to a high degree of legal uncertainty that inhibits the creative practices of users

who were also pushed into licensing systems. The *fair use* limitation is not suited to achieve the much-needed balance in the conflict of interests between copyright owners and users. Quite the opposite is the case: intended as a limitation in favour of the users, in practice the usually financially better resourced rights holders reap the benefits, who often exploit legal uncertainty by concluding unnecessary license agreements with users and strengthening their bargaining position within the licensing negotiations. Ultimately, it can be concluded that the *fair use* limitation is not a best practice model.

The legal structure of the Canadian *YouTube Exception* is very close to a best practice model and ultimately preferable to a general *fair use* limitation. However, even within this regulation, there are several aspects in need of reform, in particular the vague legal terms and the lack of a remuneration obligation in favour of the original copyright owners. For this reason, this provision cannot be adopted verbatim by other jurisdictions. While the legislator can provide clarifications by introducing legal definitions or presumptive examples, it is important to point out that the more specific the legal terms are, the more the application scope of the norm narrows, which reduces its flexibility. Finding the right balance between flexibility and legal certainty is ultimately a tightrope walk and a challenge for the national legislator, which in case of doubt should favour flexibility. While overly narrow legal terms leave too little room for interpretation by the courts, they are able to interpret legally uncertain terms to achieve the intended balance between the interests of authors and users. For this reason, a legislative reform should not necessarily be the first choice, but at the same time expectations placed on the courts should not be too high. First, the legislator must lay a sufficient legal foundation, on which the courts can effectively interpret the provisions. If this cannot be realised, a legislative reform is inevitable—which applies in the case of the *fair use* doctrine.

Notes

1 For a detailed presentation of this media phenomenon see Reißmann/Klass/Hoffmann, POP. Kultur & Kritik 6 (1), 154ff. and Reißmann/Stock/Kaiser/Isenberg/Nieland, Media and Communication, 2017, 5(3), pp. 15ff. with further extensive references.

2 § 102 US-CA guarantees copyright protection for all types of original works.

3 Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569, 577f. (1994); Wright v. Warner Books, Inc., 953 F.2d 731, 740 (1991).

4 § 107: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes".

5 Another view is expressed by the courts in Sony v. Universal City Studios, 464 U.S. 417, Rn. 30ff. (1984) and Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).

6 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994); Castle Rock Ent. v. Carol Publishing Group, 955 F. Supp. 260, 269 (1997); Robinson v. Random House, Inc., 877 F. Supp. 830, 840 (1995).

7 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 569f. (1994).

8 Blanch v. Koons, 467 F.3d 244, 252 (2006).

9 § 107: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (...) (2) the nature of the copyrighted work".

10 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985); Salinger v. Random House, 811 F.2d 90, 97 (1987); Wright v. Warner Books, Inc., 953 F.2d 731, 737 (1991).

11 Harper & Row v. Nation Enterprises, 471 U.S. 539, 553 (1985).

12 New Era Publications International v. Carol Publishing Group, 904 F.2d 152, 157 (1990).

13 Robinson v. Random House, Inc., 877 F. Supp. 830, 841 (1995).

14 Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569, 586 (1994).

15 § 107: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (...) (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole".

16 Association of American Medical Colleges v. Mikaelian, 571 F. Supp 144, 153 (1983).

17 Harper & Row v. Nation Enterprises, 471 U.S. 539, 564f. (1985); Campbell v. Acuff-Rose Music, 510 U.S. 569, 587f. (1994).

18 Blanch v. Koons, 467 F.3d 244, 258 (2006); Twin Peaks Productions, Inc. v. Publications International, Ltd, 996 F.2d 1366, 1377 (1993); Harper & Row v. Nation Enterprises, 471 U.S. 539, 566 (1985).

19 Davis v. Gap, Inc. 246 F.3d 152, 175f. (2001).

20 Sony v. Universal City Studios, Inc. 464 U.S. 417, 429 (1984); Loren, 69 La. L. Rev. 1, 6 (2008); Schuster, 67 Oklahoma Law Review, 443, 448 (2015); Patry, Patry on Copyright, 09/2016, § 1:18; Mühlenbernd, in: Boesche/Füller/Wolf, Variationen im Recht, p. 248 (2006).

21 § 107: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (...) (4) the effect of the use upon the potential market for or value of the copyrighted work."

22 MCA Inc. v. Wilson (1981) 677 F.2d 180, 183; Meeropol v. Nizer, 560 F.2d 1061, 1070 (1977).

23 Wainwright Sec. Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 96 (1977).

24 New Era Publications International v. Carol Publishing Group, 904 F.2d 152, 159 f. (1990). This concerns in particular critical interpretation of the work as well as parodies, see Förster, Fair Use, pp. 69 f (2008).

25 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994). A different legal view was expressed by the court in the case Sony v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

26 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994).

27 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

28 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994).

29 Blanch v. Koons, 467 F.3d 244, 258 (2006).

30 Castle Rock Ent. v. Carol Publishing Group, 955 F. Supp. 260, 270 (1997).

31 Warner Bros. and J.K. Rowling v. RDR Books, 575 F. Supp. 2d 513 (2008).

32 Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975); Marx v. General Revenue Corp., 133 S.Ct. 1166, 1175 (2013).

33 § 505 US-CA: "In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs."

34 This development can be recognised from time to time, in particular in Europe, most recently within the framework of the codification of limitations for parodies, see also Mendis/Kretschmer, The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles. Project Report. Intellectual Property Office, 2013.

35 Copyright Modernization Act, SC 2012, c 20, which received Royal Assent on 29 June 2012 and came into force on 7 November 2012.

36 The factors which were set out in the case CCH Canadian Ltd. v. Law Society of Upper Canada (2004) 1 S.C.R. 339 and include the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work and the effect of the dealing on the work.

37 For a detailed comparison of the *fair use* limitation and the *fair dealing* ex-

ception see D'Agostino, 53 McGill L. J. 309 (2008); O'Heany, 12 Asper Rev. Int'l Bus. & Trade L. 75 (2012).

38 The term has its origin in the fact that the upload of a home video containing copyrighted material on the platform YouTube is viewed as paradigmatic for this exemption, see House of Commons Debates, 41st Parl, 1st Sess, no 51 (22.11.2011), 1714 (Elizabeth May).

39 See Schabas/Fischer/DiMatteo, MLRC Bulletin 2013 Issue 2 with further references; Katz, 12 Can. J. L. & Tech. 73, 98 (2014).

40 See Braithwaite, Osgoode Hall Law J. 20.2, 191, 195 (1982).

41 See Scassa, in: Geist, The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Copyright Law, University of Ottawa Press, pp. 431, 436 (2013); Chapdelaine, 26 I.P.J. 1, 10 (2013).

42 See Hayes/Jacobs, The Lawyers Weekly, Vol. 33, No. 28 (2013).

43 See Turnbull, 26 I.P.J. 217, 218 (2014).

44 See Katz, 12 Can. J. L. & Tech. 73, 100 (2014).

45 See Hayes/Jacobs, The Lawyers Weekly, Vol. 33, No. 28 (2013).

46 This applies in addition to the terms "user-generated content", "potential exploitation", "potential markets" and "substitute", see also McKeown, Fox on Canadian Law of Copyright and Industrial Design, 23:3.

47 Entertainment Software Association v. SOCAN, (2012) 2 R.C.S. 231; Rogers Communications Inc. v. SOCAN, (2012) 2 R.C.S. 283; Re:Sound v. Motion Picture Theatre Associations of Canada, (2012) 2 S.C.R. 376; SOCAN v. Bell Canada, (2012) 2 S.C.R. 326, 339; Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), (2012) 2 S.C.R. 345, 357.

48 Leistner, ZUM 2016, 580, 590ff. endorses an intermediate lump sum in favour of the copyright owners.

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Reports

Grounded Design in a Value Sensitive Context

Volker Wulf in conversation with Batya Friedman

Preface

Since the 1990s, Batya Friedman and colleagues have been developing Value Sensitive Design—a theoretically grounded approach to engaging with human values—such as autonomy, sustainability, and privacy—in a principled and systematic manner throughout the design process for technology.[1] To discuss experiences with and explore future directions for this design approach, a workshop entitled "Charting the Next Decade for Value Sensitive Design" was held at the Lorentz Centre in Leiden, The Netherlands, from 14—18 November, 2016. The workshop brought together some 40 researchers and designers from diverse fields, including computer science, design, ethics, human-computer interaction, information, law, philosophy, and the social sciences.

Four conversations held throughout the week provided a range of perspectives on value sensitive design and stimulated discussion for the workshop. The series began with Lisa Nathan, University of British Colombia, who spoke about her long-term work with First Nations people and some of her insights and perspectives gained from having employed aspects of value sensitive design in that context. Then, Sarah Spiekermann, Vienna University of Economics and Business, discussed how she and her colleagues have been applying value sensitive design in their engineering work with management information systems, with a focus on integrating value sensitive design into waterfall models. Next, Alan Borning, University of Washington, who has been a key developer of value-sensitive design for close to two decades, reflected on some of

the ways in which he moved work forward and also demonstrated how to stay productively self-critical from within.

In the fourth and final conversation, Batya Friedman engaged in an exchange with Volker Wulf about his experiences with the Siegen approach of Grounded Design[2] and the intersection with value sensitive design. Volker began by presenting the core elements of Grounded Design, placing them within a historical context of user-centered computing. In discussing the various domains in which the Siegen group has applied Grounded Design, Volker reflected on key research practices such as collaborations between industry and academia, navigating organizational hierarchies, and managing potential conflict within research teams. During the course of the conversation, Volker also elaborated on the acquisition of research funding, the impact of funding schemes on research practice, and interplay between politics and research. When asked about how Grounded Design, which is primarily a bottom-up approach, might be used to complement something like Sarah Spiekermann's primarily top-down approach, Volker clarified his epistemological stance. We provide a transcript of that conversation here, including questions and comments from the workshop participants.

Conversation

Batya: For our closing conversation, we have Volker Wulf from Siegen University. Volker's background is academic, mainly in computer science and business administration. I have known Volker for about ten years probably, close to a decade, and we've been having conversations—many, many conversations—over the years, about various projects. Volker has worked very much in situated practice and in industrial settings—working with firefighters[3] or in steel-producing organizations[4]—bringing academia out of the university and into these organizations. He has also done a series of projects in communities, especially communities with immigrant populations, and I think that work is becoming more and more important as the global situation has

changed; looking at how you can use computing as a catalyst for people with very different world views and cultural life experiences to come together and create things together and perhaps work on dissipating the experience of being "other". He has done this in Germany with German and Turkish communities[5] as well as taking the model to places like Palestine.[6]

A large part of his work is also dedicated to what we might call the Arab Spring, or Uprising, or what might more generally be considered global situations of conflict and uprising. There, he has examined the role of information technology and social media.[7]

Volker: Before we start being more interactive, let me elaborate a little on what we are doing at the University of Siegen. We have been working together with a core group of researchers for almost 20 years now, and over this time we have developed a certain type of research mode. Since you always need to label things and you need to position yourself in academia, we have started to refer to this research mode as "Grounded Design".[8] The key idea is to understand design as an activity which takes place in social practice. It happens outside design labs, in the real world. [...] Grounded Design is where we can engage with an application domain in a designer-ish manner by conducting design-case studies. These design-case studies typically have three steps or perspectives for looking at our engagement. The first perspective is what we call the 'context analysis perspective', where we try to understand the social practices of a domain. Typically, this means we carry out ethnographical work, so we hang out with the people, but what distinguishes us from traditional science actors (who do very similar things) is that we do it in relation to a design idea. This means that we are interested in the technological opportunities which could be relevant for potential interventions in the field of application we are investigating. Sometimes we call them pre-studies, a sort of sequential way of thinking. The second step is one which is very common to most of you here: participatory de-

sign. That means we work with people in the fields of application. We do prototyping, developing ideas with them in order to arrive at a running system. So, the goal of the second phase or perspective is really something which can be rolled out, and this happens in the third step, the third perspective. What we have designed together with other people, we roll out in practice and see how practice changes when the practitioners appropriate our innovative IT artifacts. So, this three perspective or phase thinking we call "Design Case Study".[9] We have positioned these Design Case Studies academically in the Computer Support Cooperative Work community. As Batya has outlined, we started with very traditional workspace studies, like in steel mills or in government offices, and then we became interested in new types of cooperative work, like global software engineering. In that domain, we specifically looked at small-scale German companies who were searching for cooperative partners in Russia.[10] We investigated how these small companies were different from SAP or IBM in the way that they thought about offshoring their development, and we were very much interested in how that would work in practice.

Maybe I should add one more issue: Our research and design endeavors are shaping up quite a bit. I think what is true for everybody in the room but what is very often not spoken about is the way our group is funded. The projects and engagements we are involved in typically always need some sort of funding scheme. In the German or Central European sense, this is typically state funding awarded by ministries or the EU commission. So, in a way, the domains in which we act are also defined to a certain extent by research funding schemes which afford us the resources to become engaged with communities.

Sometimes we also have projects, where [...] the fields of application—often companies—pay us to do our job with them. But a lot of our work is really done in cooperation with, and with the funding of, government institutions. So, we also partly follow, although not in an opportunistic way, fashions in public funding. I say that because the sec-

ond area where we have done a lot of work is in civil security following September 11. Even in Europe and Germany quite a lot of money was spent on making people like firefighters or other aid agencies more efficient in dealing with disasters.

Over eight years, we worked with different firefighting institutions and we were interested in how we could help firefighters. Not so much regarding the command centers etc., but really the firefighters themselves, who move around in the burning buildings. We tried to understand what they did, how they did it and whether there was room for technology to make them more effective in finding victims or in getting out of the fire. That was quite a challenge for us since this area was very much loaded with visions of artificial map making and all other kinds of techno-centric design ideas. Working with the firefighters and understanding how sophisticated their practices were in navigating, in communicating under those very adverse conditions, we developed a variety of ideas of how to support their work. As some of you know, we developed what we call "landmarks": small devices in the shape of door stoppers. Since the firefighters have door stoppers with them anyway, they could use the digitalized door stoppers to mark parts of the building which they had already explored when moving on towards the fire. It also helped them to find their way back when they had to retreat from the fire due to lack of oxygen or other hazards. We also used this network of landmarks in a second design attempt to build a local communication network between the command post outside and the troop of fire fighters inside the burning building. Along these lines, we arrived at our first design idea which contributed to the building of an infrastructure and then we proposed our second idea, to add to this design.[11]

A third area of design interest deals with aging people who are themselves dealing with the challenges of an aging society. We very much work in local areas *around* our university because our approach to research is one rooted in practice. So, it is much easier for us to work in practice around the areas of our university than in practice somewhere

else. We looked specifically at a rural area and at the particular needs of the elderly people living there, to support them in continuing to live by themselves, maintaining their autonomy. We investigated their mobility and we developed a platform which linked public transportation, taxis, and ride-sharing opportunities.[12] We also looked at supporting their fitness by creating applications which encouraged them to do exercises which prevent falling, as falling is one of the biggest risks. Elderly people fall and break their bones and often need to move from their homes into care institutions etc.. So, this is a third, larger area of projects we have been working on for ten years. [13]

The last aspect I would like to mention here, as another larger cluster of activity, is the issue of migration and how to help migrants integrate when they arrive somewhere. That means finding a decent quality of life in their hosting communities but also covers how migrants refer back to the countries and cultures from which they come. 12 years ago, we started working in my neighborhood. I don't live in Siegen, I live in Bonn, where we saw the 3rd generation of Turkish kids start school at the same time as my kids. They spoke worse German than the 2nd generation, their parents' generation. Together with a school in this neighborhood, we started to think of what we could do, and since I was in Mitchel Resnick's group at MIT that summer, we thought of modifying his computer club approach to somehow fit to these specific German conditions.[14] We extended the idea to a couple more neighborhoods in Germany, and over the last couple of years, we have also explored whether dealing with migration makes sense in other settings. One of the domains which we have looked into are the Palestinian refugees who had to leave what today is Israel and who have been living in refugee camps for 50 or 60 years under very particular conditions. We were interested in how we could potentially help integrate them [into Palestinian mainstream society]. Like in Germany [to help the labour migrants interact better with German society], it is about bringing these outsiders into

Palestinian society; encouraging the people living in the refugee camps to interact with mainstream Palestinian society.[15]

I'll stop describing our activities at this point. What I should say is that it is really important to understand that our research approach only works in teams. Our group consists of something like 25–30 researchers, but the most senior and those with whom I have worked with the longest are Volkmar Pipek, Gunnar Stevens, Claudia Müller, and Markus Rohde. [...] It really is a collaborative approach. There is so much intensity in the work, to undertake the 'design in practice' part but also to develop the academic reasoning.

Batya: Great, thank you so much, Volker. I'd like to make the observation that [...] value sensitive design has always, from the beginning, been conceptualized as an approach to be used alongside of and integrated with other approaches that work well. So, for work that is largely technical, the idea is not that you throw out your existing technical approaches and replace them with value sensitive design but rather that you continue with the methods that you are already using, that you work well with, and then integrate value sensitive design as a complement to what you have been doing. And I think when we heard from Sarah, when she was talking about her work—about the waterfall model that is used in business areas—she spoke of taking elements of value sensitive design and inserting them into that waterfall model.

So, my question to you, Volker, is this: In this grounded design process that you are engaged in, where and how do you see value sensitive design being inserted and able to make a contribution that goes hand-in-hand with your approach?

Volker: If you design, if you intervene in practice, you always act normatively in the way that you help. I mean, even if you do it in a participatory manner, you bring in your stances and already by selecting certain design projects and certain design challenges you set a norma-

tive agenda. So, I think if I speak about values and value sensitivity, for me the first step is to choose design problems and a field of application with which I really want to engage. That is a valuable decision. As I said, sometimes we are a little bit opportunistic towards funding opportunities because we have to pay a rather large group every month, but we have not yet taken on design projects of which we were not normatively very convinced. You know—projects where we would agree to perhaps improve or help a practice which ordinarily we do not really want to support in this way. That is the first issue. Secondly, of course, normativity comes into play as soon as we start doing participatory design [...] If we are designing together with the people in the fields of application, of course we reflect on values—on their values, on our values, on value gaps and all these things. We do not do this as explicitly as you would in a value sensitive design framework but of course it is a given. [...] Finally, if you write things up and reflect about what you have done, you certainly judge some things as being important to document and others as less important. Again, that is also a kind of normatively-driven activity, in the sense that you have to decide which parts of what you have achieved you want to highlight versus what you do not want to show and how you finally describe it.

Batya: Thank you. I have just two more questions and then we will open the discussion to the audience. I'd like to ask about the diffusion of value sensitive design in industrial practice. You have a lot of experience with various kinds of industries, not only the computing industry, but a whole range of other types of industry. Could you please give this community some advice about how to do, or stimulate, or catalyze, this kind of diffusion? What are your thoughts on that?

Volker: In order to work together fruitfully with other organizations—and there is not much difference between industry and other organizations—what you really need is to gain trust. Often, when we begin

working with a company, they start with a problem which is not really important to them, just to see what we do. To really enter into an interesting engagement with your cooperation partners, you need to build up trust with them. It helps to do this over a longer period of time, maybe in a follow-up of different Design Case Studies, if you want to follow our terminology. So, I think building trust is a very important element. And this is sometimes not easy because of the values. Siegen is a region of traditional industries. Quite a number of our industrial engagements right now are with small and medium size steel or investment goods companies, family owned, and sometimes there is also a considerable value clash between what we find appropriate (interesting visions) and what the organizations think. Sometimes this means it is not easy to come to an agreement on projects.

Batya: Yes, as you were talking, I thought … I really wished that Sarah [Spiekermann] was here because I'd really like to know whether these are two entirely different ways of approaching things. You have those grounded design approaches for any given project where you go in and spend a lot of time. It is very much in place, very slow moving and very much from the bottom up. I would like to ask Sarah—I know she is not here—on the nature of her approach, which is fundamentally and overarchingly top-down.[16] And it would be really interesting to examine the ways in which we might be able to change our practices, and to think about how they can be brought together.

Volker: For a community like mine, if we have done a Design Case Study, our understanding is that its results are first of all only valid for the setting in which we conducted the study. So that is all we can say. Only in those circumstances have we really understood the practices for which we have made our designs, and only there were we able to understand how appropriation has changed or is changing social practices. That is the challenge we face. So really, we can only say something about the

first step of any of our cases, all of which are very, very particular and highly dependent on their contexts.

What we are trying to explore right now is to compare these cases. If we have cases which are, from their basic architecture, from these three perspectives, somehow performed in a similar mode, then we can compare them; and if we find similarities or differences between these cases, design-relevant similarities and differences, then we can start building tentative concepts in a sensitizing sense.

Can we create concepts which we would claim need not be transferable to any other field, but which could be of help to people who are challenged with a similar design problem? We are also thinking of somehow linking these mid-level concepts more closely than so far mentioned in literature to the sources from which the concepts arose, in the sense of linking back to the raw data from which we have abstracted these concepts. We are thinking of doing this but have not as yet designed any technical solutions to support such linkages. The designs we are thinking of are, for example, that you click on a mid-level concept and then you go down to the design case study at a deeper level, and to the data in the study from which the concept was derived. So, in a way we are looking at finding stronger links between conceptual thinking and the cases it came from.

Batya: Yes, this is similar to what Jason [Millar] was talking about. You will certainly have a privacy concept concerning these papers but can you still link them? Maybe this would be a good time to open things up. Are there any questions [from the audience]?

Audience: [...] On the board level, we have people who think about designing and who help out the Chief Excecutive Officer, Chief Technological Officer [...] but on a very different [operational] level, we have those great user and customer experiences [people] ... They look like separate levels but actually they are from the same source, what design is

all about. But there are essentially still two levels: a strategic level and an operational level. And I think it is interesting to see [...] that they enforce each other.

Volker: That's completely true. I have seen cases where the decision of the upper management strongly influenced what we could do on an operational level. [...] It is an old case. We had been asked to work with them [a steel mill] in our way. The task concerned maintenance engineering. We were asked to improve the co-operational relationship between external maintenance engineering offices and the internal maintenance people. It was in the late 90s, so it was about 3D-CAD systems and video conferencing—trying to explore what they needed to look like. [...] When we were half way through, along came the steel crisis. This particular steel company got into problems and the top management decided that there wouldn't be any more outsourcing of maintenance engineering. Maintenance was reduced in the budget anyway... So the basis of our project was suddenly gone.

Maybe this is an extreme case but working by means of participatory design happens, of course, in the social structure of organizations [...] and there are power differences all the time which affect you, and somehow you need to navigate your way through them. Not only that, but you need to navigate through them in a way that lets you keep your integrity as a designer.

Audience: [...] I would be interested to hear from you where to turn for the kind of funding opportunities that we are all after to enable the research projects we like to engage in. Oftentimes the way the model for the funding works—from how you apply to the kind of outcomes they are looking for—does not match very well to the kind of research that we would like to do in an ideal world. Do you have a long wish list of things that you wish that could be better supported? I think one of the things would be the idea of how to create a system for sharing. Link-

ing the outcomes and the findings of the case studies with raw data because if you developed something like that, who would post into it [...] over time? So, you could imagine research-funding institutions playing a role there. Are there other things that you wish for? And do you have a mechanism for providing feedback for funding, like how they can better support our research?

Volker: [...] We do not have much experience with this either, but what we have started is to try to do meta research. This means we try to have one member of our team who investigates our own research practices in the sense of better understanding how we are driven by how we are funded; how we are institutionalized; how we have personal backgrounds, and how our projects have emerged. All these issues play into that. For research projects like ours, I think it is very helpful to have a meta research layer on top of it—also to help us self-reflect.[17] And I can tell you that this was a very painful process even for me personally, because you are really confronted with all the problems which you prefer to push away and which you don't like to see. This meta research has brought forth strong conflicts in our group, but I still believe it was helpful. I hope so, at least. It also helps us to better reflect on what we do and what we have achieved.

Globally, I think the funding schemes are quite different. In the US, most people are on NSF grants which have the advantage of being rather freely definable. On the other hand, I don't think the funding scheme encourages you as much to engage with the domains of practice. Or you can choose how much you engage. In the central European funding schemes, we are really forced to work with them [the practitioners]. In many funding schemes, I would never get any money if I did not find a company, an IT company, that is interested in the more or less commercialized elements of our projects. So, the schemes are very different.

Honestly, what I would like most is for our funding agencies to also think about self-reflectively evaluating their funding schemes; but as

you can imagine, this is a very political issue. Of course, I am extremely careful saying that in a too public way because, as the saying goes "don't bite the hand that feeds you". But I think this whole applied research domain, speaking from a central European perspective, could do better. I think our research funding schemes are not well enough designed and not evaluated enough in practice.

I'm not sure if you, Jeroen [van den Hoven], would agree, but in my experience, having worked for 25 years in this domain, I think we could do better there, too. On the other hand, I can say my career would be completely impossible without [these funding schemes]. You know I would never have had a chance to survive in academia without this practice-oriented stream of funding; that's very clear, too.

Batya: There is a question, but before we go there, I would like to follow up on something you said. With all these conflicts and sometimes also clashes in values surfacing in your team, it seems like [...] there might be places in our team, too, where there are conflicts. Certainly in the work in Rwanda, where we had to make some really hard decisions, different team members felt very strongly about it. In our workshops, we use only a certain subset of the materials. So, which items do we choose? Whatever we choose represents the collection in a certain way. And we had very contested conversations around that within the design teams. So, what I am wondering is, in your situations, what do some of these contested conversations look like, and also which strategies do you have for working through them? [...] So, when you fight, what do you fight about? And how do you resolve these conflicts?

Volker: There are different types of conflict. As a result of this meta research process and the ensuing internal discussion, the conflict which mainly occupied me within our group throughout the last six months is that doing our type of work is really stressful and challenging for the individual actors [researchers]. They have to do all this work in prac-

tice and on top of that, for their PhD they have to write papers, and the papers need to be good papers; and at the same time, they need to get money. We have to write applications for new funding all the time because the chances of funding being awarded are something like 10–15%. Maybe we are a bit better than average, but we still have to write five applications to get funding for one project. In the case of my groups, there is a huge amount of pressure, specifically on the young and mid-level actors. This leads to friction, and somehow, I may not have been fully aware of this at all times.

Another very interesting issue is that my group is interdisciplinary in the sense that about 50% of the people in the group have backgrounds in computer science, while the other 50% are from very different backgrounds: there are sociologists, journalists, psychologists, political scientists, designers, etc. For those who are not from a traditional [IT] design background, this also causes an identity issue. It is not so clear cut for them—if they [should] deeply engage with us, will/would they find career opportunities with our type of approach, would it make sense for them to follow on with us, and so on. There are also lots of conflicts and issues to discuss.

But with the more senior members, of which I mentioned a few, there is a certain value consensus. So when I talk to Volkmar [Pipek], we do not fight very much about politics or about where to go. We have known each other for a very long time and we know what the other will think … For example, there are many decisions that need to be taken, but this is a bit easier because there is a certain normative consensus in the group—which is, however, always challenged in every specific discussion. But for me personally, the most touching conflicts which evolved during the last year were more about work load, career opportunities, academic identity, etc.

Audience: When you talked about going from the bottom up, starting to collect lessons from design cases that you worked on, building knowl-

edge in meta research, I was reminded of the architect Christopher Alexander and his group who went out and looked for recurrent solutions to former problems [...] and wrote a book on them. And then [this approach] migrated to oriented programming and further [moved] to interaction design. I am really curious if you think that [Alexander's approach] would be a path, a methodology for this [...] research.

Volker: One of my Ph.D students, Sebastian Denef, wrote his thesis exactly on applying design patterns in a socio-technical manner.[18] He worked on this with firefighters ... and by the way, he graduated from Delft University because he had this strange particularity [in his C.V. which excluded him from obtaining a Ph.D easily from a German university as they do not easily award Ph.D degrees to people who studied at a university of applied sciences.] So all the good students leave the country and do their Ph.Ds somewhere abroad, and he did his in Delft.

The issue in our case is as follows: the academic results in our domain are typically socio-technical in nature. Bill Gaver has a really nice way of thinking about how to speak about a portfolio of his artefacts [created by his group]. That way [by means of a comparative portfolio approach] he can discuss them and critically link them to each other.[19] But Gaver is always only concerned with the artefacts themselves. Our design endeavor is socio-technical. We want to observe the IT artefacts in social practice; how they move social practice. Our documentation is even more complex than that of Alexander.

Audience: I would like to point to Tom Erickson who has been writing a whole lot about interaction design. He himself points to Orlikowski who talks about organizational patterns and I find communication patterns would be another way of conceptualizing this. They are not socio-technical, not too close to technology, but closer to how we speak, how we communicate.

Volker: I can say that we are still in search of appropriate levels for conceptualization. We have written two papers where we tried to introduce these concepts in a bottom-up manner.[20] To be honest, I am not perfectly happy yet with the level of concept building which we have achieved. We are actually still exploring how to do it in an appropriate way.

Audience: I have another question with regard to the normativity of your design approach. [...]. I have been accused of being political in my approach, so I wonder how to escape that accusation [...]

Volker: Yes, we do micro-politics, of course. All design interventions are micro-political. You can see them from that perspective and discuss them from the perspective of micro-politics, of course.

[...]

Audience: Maybe one response to that would be to move the discussion initially away from your own work and then raise the more general question if there is something like [...] value-neutral technology at all or whether it always interacts with values and, if so, to challenge the 'accuser' whether he or she would want to ignore that aspect of the discussion [...]

Batya: [...] Fundamentally, it is about intervening. It has that in common with the field of education; education is an intervention. Talking about kindergarten, we can say if you send your kids there for two days a week or five days a week, like full-time—that is political. And what kind of education is provided by the kindergarten programme? Perhaps it is less of a dangerous question and more a business issue. And when it [such an approach] stands in contrast to something like social science [research paradigms in which we are] just trying to describe phenom-

ena, then it is a different kind of knowledge and even world view to the one [we create in our academic community]. So I think maybe this is a nice place for us to end [...] Thank you!

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