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### Adapting the Work

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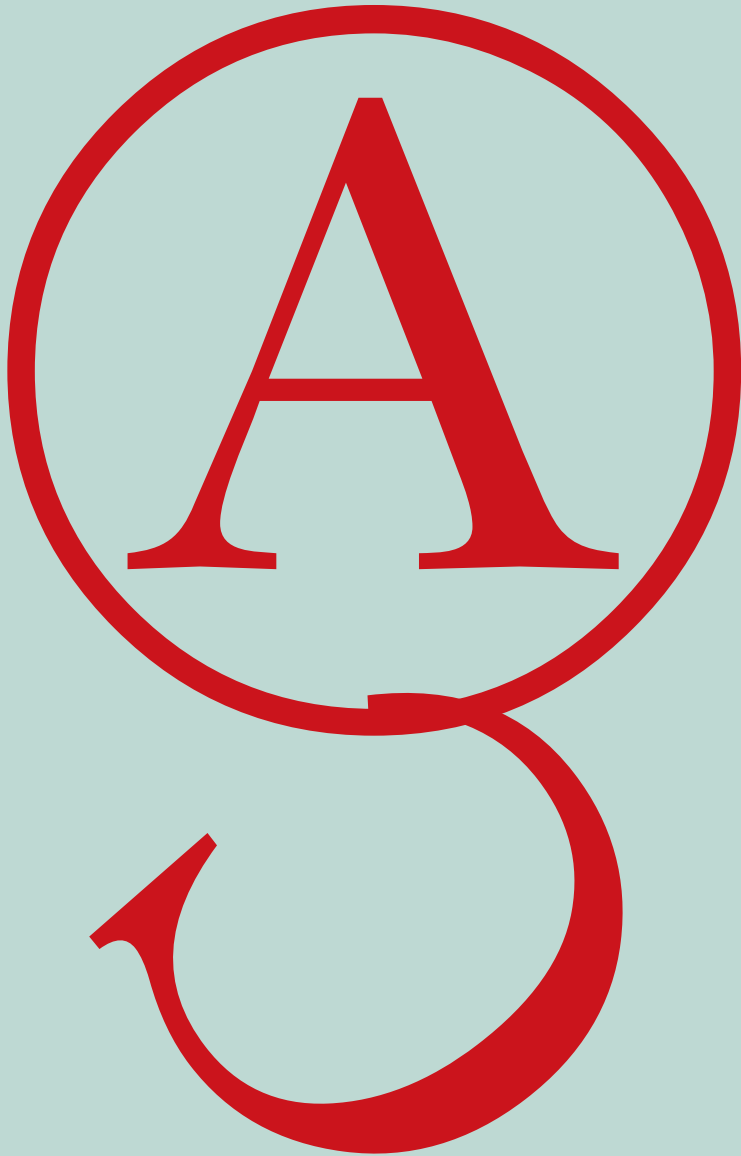
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Edited by Mireille van Eechoud

# The Work of Authorship



Amsterdam  
University  
Press

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*Edited by*  
*Mireille van Eechoud*

Amsterdam University Press

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# Adapting the work

*Mireille van Eechoud*

When the Dutch government commissioned official portraits in the run-up to the investiture of Willem-Alexander as king of The Netherlands in 2013, artist Iris van Dongen was among the twelve artists asked to make a study. She based her work on a photograph she had found on the internet, without informing artist-photographer Koos Breukel, let alone asking him permission. To the average observer the similarities are striking. Van Dongen and two other artists went on to win the competition to make a state portrait of the new king. Breukel was not amused to see Van Dongen's study exhibited in the Rijksmuseum in Amsterdam. A public row ensued (Ribbens, 2014), which ended not in court but with apologies and a settlement: Van Dongen gave Breukel the study on loan (Mondriaanfonds, 2014).

More famous examples that did make it to the court room are controversies over art in the US. The high visibility legal actions against Jeff Koons and appropriation artist Richard Prince come to mind. Both were sued for taking pre-existing photographs and then turning them into different artworks – Koons created the *String of puppies* sculpture, Prince produced the collages and paintings in the Canal Zone exhibition using Cariou's Rasta images. Koons was held to have infringed Art Rogers' copyright in the photo (*Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992)). In the Prince case the district court found copyright infringement, but on appeal Prince's fair use defense was honoured. The appeals court found that under applicable US copyright law standards most of the collages are sufficiently transformative and therefore not infringing.<sup>1</sup> The works give 'Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's' (*Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), p. 15). Of the five works which only show minimal alterations compared to the source photographs, the appeals court remanded for the district court to make the call on fair use (see Allen 2013 for a compilation of all court documents). The court never had to because Prince and Cariou agreed a settlement, the details of which remain undisclosed (Boucher, 2014).

These are US cases, and the European legal traditions that I will focus on here recognise certain free uses that under US law would constitute 'fair use', such as parody and quoting for purposes of criticism or review. But generally speaking, the copyright laws of European countries know only a limited number of exempt uses, setting out exactly which acts do

not require authorisation from the copyright owner. What this implies for the legality of various kinds of borrowings, adaptations and appropriations will be taken up later.

Most copyright lawyers in Europe would probably have little trouble arguing that takings of the kinds described above constitute an infringement of the copyrights in the source works. Artists themselves obviously hold a range of different beliefs about the freedom they have (or ought to have) to borrow. Richard Prince challenges the notion of intellectual property outright. That was never more obvious than from his recent piece, a faithful copy of the first edition of J.D. Salinger's *Catcher in the Rye* in all respects but authorship credit: Prince substituted his name as author (Gordon, 2012).

Marlene Dumas based her painting *Nuclear Family* on a photograph by (friend) Van Noord, who incidentally was rather pleased to find his work had inspired hers. When asked whether this was not plagiarism Dumas responded: 'In my view plagiarism is a literary term. You can copy a text literally, it stays the same medium, but my painting is built out of strokes of paint, it is such a different "thing". You can see this best when you show a detail of the painting next to a detail of the photograph. Then the differences appear instead of the resemblances. They are two worlds.'<sup>2</sup> (quoted in Cohen, 2014). From the perspective of art this might be true. The medium and genre in which a work is expressed matter to artists when it comes to the acceptability of borrowing.

Copyright laws have much less nuance. The author has the exclusive right of copying and adaptation, to which there are limited exceptions. In popular culture too, the rigidity of copyright notions is at odds with social practices of borrowing. The rise of 'user generated content' such as fan fiction, video parodies, artifacts in virtual games, blogs and music remixes has led to intense debate on the need for more flexible copyright law, a cause for which Stanford law professor Lessig is a celebrity champion, authoring influential books such as *The Culture of Ideas* (2002) and *Remix* (2008). The rise of social media platforms shows it is now common for individuals to construct and communicate online identities. We do this not just by producing our own texts. The copy/pasting and forwarding of image, text and audio is an integral part of it too. The distinction between writing and rewriting blurs. Continual processes of writing and rewriting are key features too of what in recent years has become mainstream social production: large-scale networked collaboration to create information resources (Wikipedia is a prime example of course) and software. Copyright laws have not kept pace with these developments.

My focus in this piece is on the interplay between the legal concepts of work, copy and adaptation in light of the now ubiquitous 'new' forms or genres of works that online networks enabled. Can European copyright law accommodate the increased fluidity of some of these work genres? What avenues might be taken to attenuate the gap between legal and social practices? Is a more flexible system of limitations enough? Or do we need a wholesale rethink of the work concept? Might a more relaxed notion of copying and especially of adapting suffice? What would that mean for the kind of copyright infringement analysis courts engage in? My ambition is to explore potential avenues for reform, and in doing so take on board some insights from non-legal disciplines, notably genre and adaptations studies.

In the first part of this chapter I highlight the relationships that exist in most laws between the status of copies and adaptations, and discuss some challenges with the notion of adaptation when it comes to fluid works. In the second part, the focus is on how precisely the relationship work, copy, adaptation is encoded in copyright law. As all EU Member States share the norms of the Berne Convention for the Protection of Literary and Artistic Property of 1886, I start there. But the Berne Convention and its satellite WIPO Copyright Treaty of 1996 show the signs of being the product of more than a century of multiple rounds of drafting and political compromise: its treatment of adaptations is patchy.

The making of copyright policy is a thoroughly European affair because of the effect diverging national intellectual property laws have on the common market. Still, twenty-five years of piecemeal harmonisation has resulted in a corpus of directives that leave plenty of uncertainty about the scope of the right to control adaptations. I will therefore consider how a number of laws of EU Member States shape the relationship between work, adaptation and copies and how this affects infringement analysis. In the final third part, I will examine some roads that might be taken to effectuate changes to the law.

### **Fluid works, discrete adaptations**

Transformative, derivative, secondary, reworked, reproduced, translated, recast, altered, arranged works: these are but a few (translations) of the terms used in law and beyond to describe what I shall denote as 'adaptations'. For students of literature and film, the latter term might have a strong connotation with the practice of creating a film on the basis of a novel or play (or vice versa). But I use adaptation as the more general term



that covers the realm beyond mere direct copying, that of the reworking of works whether in text, image or sound. When I speak of 'copying' it refers to taking verbatim or literal parts.

Traditionally, a distinction is made in law between copying a work and adapting it. The exclusive right to copy (reproduction) essentially pertains to the fixation of a work in a tangible form (Spoor, 2012, p. 206). Copying then is the more straightforward act that requires the author's permission. It is the production of 'mechanical' copies of the work in the analogue world, as well as digital ones. It might be a complete copy or a partial one. It might involve a 'technical' kind of format shifting, like encoding a music file in a different file-type, or resizing an image to make it fit a certain layout.

If the work is modified in other ways, as was done in by artists Koons, Dumas, Prince and Van Dongen, the relationship between the earlier and later work is more complex. The right of adaptation is about changing the work as an immaterial object, that is the original intellectual creation that is taken to exist separately from the (physical) form. Whether modification without permission infringes depends on the treatment of elements or features that give the source work its original character. In a nutshell, if on comparison enough characteristic elements of the source are recognisable in the later work, the latter is infringing. A change of medium, or reworking in the same medium offers no escape. Unless of course the source work is no longer in copyright, or a defense is available under the limitations recognised by the applicable law, for example on copying for private study, on free use for parody purposes or incidental uses.

The distinction between copies and modification matters for two reasons. The first is that copying does not give rise to new rights, whereas the making of an adaptation often will. Standards of originality required for copyright protection are low, so the adaptation will qualify as a protected work itself. The second reason is that copying without permission – in whole or in part – will normally infringe whereas creating something on the basis of another work without literal copying might not.

A modification might qualify as a protected work in its own right, the second author being the copyright owner. A layering effect then arises, because with each exploitation of the second work the rights in the source work are at play as well. In principle this layering can build up over subsequent adaptations, of adaptations, of adaptations, until such time when the resemblance between earlier and later works are so remote as to not be legally relevant anymore. The notion of adaptation makes sense in situations where there is one source work, and a follow-on creation that comes distinctly later in time. The concept becomes difficult to operationalise

if there are multiple source works involved, or if a 'work' is continually updated or consists of versions that are created simultaneously or in quick succession. Think of the edits to Wikipedia entries, or daily updates of many software programmes. Does it make sense to view each version as a subsequent adaptation of the first version, or is there a web of adaptations?

In the sphere of the arts, collages are a good example. If a collage contains bits of different pre-existing works, does that make the collage an adaptation of each source work? And what to make of interactive works, like 'database documentaries' that consist of a series of tracks or guided paths through one or a number of (virtual) databases containing various types of items (e.g. static text, image, sound, live feeds) that allow the reader/viewer to 'create' his own documentary (Burdick et al., 2012)? Is each 'path' a copy or adaptation, and of what exactly? What constitutes the work in such cases, all of the potential instantiations combined? Copyright laws provide no clear answers because of its traditional orientation on materially distinct forms. Although what copyright ultimately protects is the (immaterial) intellectual creation, for assessing the work's boundaries it is still easiest to consider a distinct material form.

In the history of copyright, technological developments have always caused debate about how (and if) copyright laws should accommodate new kinds of cultural production. But the problem was never really so much with the form, the boundaries of new works. Notable instances are the debates on photography in the 19<sup>th</sup> century, film in the early 20<sup>th</sup> century and computer programmes from the 1970s onwards. In all these cases, there was initial hesitation about bringing them into the copyright domain because of their perceived 'functional' or 'technical' character – as opposed to aesthetic qualities. Ultimately all were accepted into the fold. Reasoning by analogy proved a powerful tool: Photography is similar to graphic art, painting, and other types of imagery that copyright already protected. Once photographs were accorded work status, then surely films – sequences of images – must benefit too.<sup>3</sup> Computer programmes are forms of text, and copyright protected all kinds of writings, so authors of this new form should not be discriminated against, the argument runs.

What of the transition from analogue to digital then? Confronted with new work forms spawned by digital technologies, copyright scholars in the 1980-1990s considered how 'multimedia' works consisting of image, text, sound and software fitted in the copyright system, and whether computer-generated productions posed particular problems of authorship and originality. In the main, again through reasoning by analogy, the conclusion was that there was no fundamental problem with work status. There might be

difficulties with the application of national rules written for specific genres of works, e.g. how to apply specific national rules for co-ownership in film to multimedia productions, but no fundamental problems were foreseen.

What the transition from analogue to digital meant for the concept of a work as a stable, clearly identifiable entity seems to have remained below the radar of mainstream legal scholarship for quite some time. Although in most instances, it will remain easy to identify a 'discrete work in reality' (*Hyperion Records v Warner Music*, cited in Griffiths, 2013), there seems to be a growing number of situations in which it becomes difficult to do so. Works become dynamic rather than static. The modular production of works, constant updating and revising, and open-ended nature of creations pose challenges to the concepts of work, copy and adaptation. David Sewell (2009) recounts how since the 1990s the openendedness and incompleteness of digital work(s) is often celebrated in literary studies and new media studies. Academic publishers of course struggle to deal with these digital born objects. The prevailing expectation among authors and readers alike still is that a publication has to be 'done' before being published.

Especially in networked collaborative environments, the notion of a stable, finished work is problematic. Legal notions of work and adaptation might not have changed yet, but practice has adapted to the new realities of networked digital production already, as is evident from succesful peer production projects. The open-ended collaborative creation that characterises the famous encyclopedia Wikipedia and open source software projects like Linux, but also modular e-learning resources like Openstax<sup>4</sup> is only possible because of 'copyleft' collective management schemes: the inventive use of copyright to impose standardised terms of use across communities or contributors and users that foster follow-on creation and prevent contributors from making legal claims to control adaptation of their contributions. These strategies make the identification of discrete intellectual properties of less importance – although attribution of (author) credit is an important element in open source and open content communities. Another view is that the recourse co-creating communities have had to take to 'anti-copyright' models shows just how inapt core concepts of copyright have become for these new forms of creation. Kelty (2008), Berdou (2010) and Reagle (2010) all analyzed the role of 'copyleft' models in collaborative communities. Many members have an extraordinary level of copyright knowledge, and need to have this to sustain collaborative production.

The examples above illustrate that in today's digitally connected world we see large-scale open-ended intellectual creations that are perhaps more accurately understood as processes, or information services, or libraries,

than as discrete works of authorship. But at the same time, we also witness increasing atomisation: short communications such as tweets, RSS feeds of news headlines, alerts of all kinds. Short as they may be, these snippets represent economic value and their use is increasingly the subject of dispute, hence the tendency to accord them work status. Newsmedia in particular claim protection against copying (or at least compensation), the *Infopaq* case before the Court of Justice EU being a well known example. Copyright laws generally protect short works, if they are long enough to show original character, but a pertinent question is what constitutes an independent work, and what is merely part of a larger work. As we shall see later, for the assessment of whether copying constitutes infringement this is a highly relevant question. I turn now first to the question how the right to control adaptations is expressed in international norms and national copyright laws.

### **The adaptation right in (inter)national law**

On a conceptual level, a distinction between ‘mere’ copies, ‘adaptations’ and free uses shows up in many national copyright laws. But the way in which these are given shape in concrete legal provisions, the terminology used, and the level of judicial interpretation required to make sense of them – especially in times of rapid changes in information markets and technologies we might add – is quite diverse, as we shall see throughout this chapter.

#### **The Berne Convention**

The 1886 Berne Convention obliges its signatories to protect foreign authors by granting them a number of communication rights (public recitation, broadcasting and the like, articles 10bis through 11ter) as well as the right to authorise reproductions (article 9). The current general right of reproduction was not introduced until the Stockholm revision of 1967 (Ricketson & Ginsburg 2005, at 8.104). From the beginning, the Berne Convention contained provisions that dealt with certain kinds of adaptations, over time the rights were expanded. Unlike the national laws of countries such as France, Belgium and The Netherlands, the BC does not classify adaptation rights as a subcategory of the reproduction right.

In its current wording, article 2 (1) of the Berne Convention for the protection of literary and artistic property, lists as protected

'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science'.

What the boundaries are of the domains of art, literature and science was not an issue debated in the context of the negotiations on the Berne Convention and subsequent revisions. The domains were copied from earlier bilateral treaties. Ricketson & Ginsburg (2005, p. 406-7) suggest they might be taken to refer to creations expressed as text ('literary') or image ('artistic'), while 'scientific' has no special significance but covers written expression about scientific matters in a broad sense, since copyright does not aim to protect scientific findings as such.

The list maps the kinds of works that many national copyright laws already protected (Ricketson & Ginsburg, 2005, at 8.08). The initial list was expanded in 1908 at the Berlin revision conference to include lectures and other oral works as well as choreographic works. Cinematographic works and photographic works, which were protected in some form already from the beginning, were included in the work list following the 1948 Brussels revision, as were works of architecture and applied art.

The text of the Convention shows the marks of the drawn-out battle over adaptation rights. Five provisions in the current text deal with adaptations (as works in their own right) and the right to control adaptations: articles 2(3), 2(5), 8, 12 and 14bis. They have been rephrased, renumbered and reclassified various times, as often the debate over what rights the author should have to control the creation of derivative works went hand in hand with discussion on the status of adaptations as protected works themselves. The birth of new genres and their subsequent development into independent art forms is reflected in the convention. The treatment of film is a good example. Initially, film was regarded as an adaptation of a dramatic work (i.e. play), and the making of a film an act that required permission from the owner of the copyright in the play. But such films were also seen as

a particular genre of dramatic work and were protected. Only later was film considered a 'stand-alone' genre of work, to be protected regardless of whether pre-existing works used in its creation (see Ricketson & Ginsburg who discuss the development in the history of the Berne Convention, at 8.31–8.41).

The earliest and most pronounced disagreements over adaptations concerned the proposed inclusion of a right of authors or their publishers to control any translation of books and plays into another language. In *Cosmopolitan Copyright* (2011), Eva Hemmungs Wirtén 'excavates' the debate over freedom of translation and shows how it is also linked to shifting linguistic power relations in the 19th and early 20th century. Countries such as France and the UK were net 'exporters' of literary works and supported broad translation rights. Importing countries on the other hand were interested in freedom of translation and wanted very limited translation rights if any. In Europe opponents of broad rights included Scandinavian countries and the lowlands (Belgium, The Netherlands). The idea that it was important for authors to control the quality of translations, and that this justified the extension of copyright played a substantial role in the debate. The French delegations to the various diplomatic conferences in particular fervently pushed this idea.

The Convention recognises that a 'derivative' production enjoys copyright on condition that it meets the requirements for protection: it must be an original intellectual creation in the domain of literature, science or art (Ricketson & Ginsburg, 2005). The present Article 2(3), which dates back to 1908, confirms the status of adaptations: 'Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.'

From this wording no test can be readily derived for establishing when authorisation is required for borrowings. As for translations, all that is clear from the legislative historical record is that the term denotes the recreation of a work in another human language (whether this also includes spoken to sign translation is uncertain, Ricketson & Ginsburg, 2005 at 8.78). Article 8 stipulates that authors have the exclusive right to authorise translations. In addition, article 12 covers the right to authorise 'adaptations, arrangements and other alterations.' The original provision in the 1886 Convention was much narrower than the current text. Subsequent changes to it made for confusing reading, and included enumerations of e.g. the dramatisation of novels into plays as indirect unauthorised reproductions. Nonetheless, it is common opinion that 'adaptations' should be constructed as a broad category (*ibid.*, at 8.79).

Not specifically named as adaptations are collections of works. Article 2(5) accords work status to 'Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations'. Article 14bis recognises films as works, regardless of whether they are based on pre-existing literary or dramatic works (and thus are adaptations).

The treaty further provides on the term of protection that 'Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works' (Art. 8 Berne Convention, introduced in 1908). Authors of plays, operas and other dramatic works enjoy '...during the full term of their rights in the original works, the same rights with respect to translations thereof.' (art. 11(2)).

As to the limits of adaptation and translation rights, the Berne Convention itself contains few permitted uses. The only mandatory limitation is the right to quote of article 10(1) BC. It does not contain more general defences that allow for free use or transformative use of the kind known in e.g. Germany and the US. But article 9(2) BC provides that contracting states are free to have exceptions to the reproduction right on condition that they conform to the three-step-test (special cases only, not to conflict with a normal exploitation of the work, not to unreasonably prejudice the legitimate interests of the author).

## European laws

Despite a quarter century of harmonisation efforts by the EU, there still are differences among national copyright laws in the European Union on a number of aspects. One of the most striking is that the right to authorise adaptations remains unharmonised for most types of works, computer programmes and databases being the notable exceptions (Van Eechoud et al 2009, p. 84). The author's exclusive right to authorise or prohibit copying ('reproduction') is subject to the common standard of article 2 of the 2001 Information Society Directive. But many do not regard that provision as covering the right to authorise adaptations (Bently, 2011; Hugenholtz & Sentleben, 2011, p. 26; Walter & Von Lewinski, 2010, p. 964; different: Griffiths 2013). While it is indeed difficult to find support in the legislative record for the position that the EU lawmaker sought to harmonise adaptations rights in the Information Society Directive, the recent line of judgments by the Europe Court of Justice on the reproduction right (Van Eechoud, 2012) suggests that it might in the coming years construct a pan-European notion anyway.



As noted above, the legal terms used in national laws to capture instances of borrowing that require the consent of the owners of rights in the source remain quite diverse and tied up with the particular act's structure. Historically, in France the adaptation right is seen as part and parcel of the right to reproduce a work. The copyright acts of Belgium and The Netherlands follow a similar approach, although in all countries a conceptual difference is recognised between copying and adapting a work. The German copyright act has a more elaborate system of rules, including a provision on adaptations that can be freely made. The Copyright act of the United Kingdom has yet another structure. A separate provision governs common types of adaptations, but since the right to prevent copying is interpreted broadly alterations can also be prohibited on that basis.

### *The Netherlands*

Article 1 of the Dutch copyright act (*Auteurswet*) defines copyright as the right of the author to make the work public and to reproduce it. The right to authorise adaptations or 'bewerkingen' is a sub-category of the broader right to authorise reproductions laid down in article 13 ('verveelvoudiging', literally: multiplication, see Spoor, 2012). The article stipulates that 'The reproduction of a literary, scientific or artistic work includes the translation, musical arrangement, film adaptation or dramatisation and generally any partial or full adaptation or imitation in a modified form, which cannot be regarded as a new, original work.' When is something a *new*, original work, so that no permission of the copyright owner in the source work is required?

The standard is not easily met, but has in the past been successfully invoked for parodies. The extent of copying allowed is determined by the need to identify the work that is parodied and signal that the adaptation is a parody. In contrast to the German Supreme Court (see discussion below), the Dutch Supreme Court has held that in case of famous works, less is needed to make clear which source is parodied; so for famous works the level of copying allowed is lower. It can also be argued that works with canonical status should if anything be protected less, precisely because of their status. In response to the inclusion of a parody exception in the Information Society Directive, the Dutch legislator enacted an explicit exception that is somewhat broader than the one developed by the Courts on the basis of the adaptation right (Senftleben, 2012). Another exception of particular relevance to adaptations is the right to quote for the purposes of 'announcement, review, polemic or scientific treatise or a piece with a comparable purpose' (article 15a). Article 14 clarifies that any (additional) fixation of a work or part of it constitutes reproduction as well.



### *Germany*

In Germany, the use of material copies of works is subject to the twin rights of reproduction and of distribution ('Vervielfältigungsrecht' of art. 16 *Urheberrechtsgesetz* and 'Verbreitungsrecht' of art. 17 *UrhG*). Any material fixation that allows the work to be perceived by human senses triggers application of these rights. The rights also extend to material fixations of works in altered form, but adaptations are subject to specific rules (Loewenheim, 2010, p. 375-376). For making direct copies permission is required, but this is not so for most work categories when it comes to adaptations ('Bearbeitungen') or other transformations ('Umgestaltungen'). It is not the production as such, but the communication or exploitation of an adaptation that requires prior permission.<sup>5</sup> Article 23 names a number of exceptions to this rule: dramatisation (to film), the execution of designs of sculptural works, the imitation (by construction) of a building as well as the adaptation of a database all require permission at the reproduction stage. The database provision implements the adaptation right of the EU Database Directive, presumably the other exceptions are the result of successful lobbying.

The distinction between adaptation and other transformations is not clearly established. Adaptations seem to cover instances where the source work is altered only to enable a new form of exploitation while retaining the work's identity, for example by translating a text from one language to another (Schricker, 2010, p. 512). Other alterations are 'umgestaltungen'. Like adaptations, they retain elements of the source that give it its original character, albeit fewer. In both cases, the alteration itself can be a protected work if it is original.

German copyright law recognises free transformative use: either a transformative work is 'dependent' on its source and covered by the adaptation right of article 23, or it has 'independent' status under article 24 ('Freie Benutzung'). In that case the owner of copyright in the source has no claim in controlling its use. Which side of the divide a particular creation is on must be decided on a case by case basis and has never been easy to determine. Some 90 years ago Smoschewer (1926) already observed that the division depends less on logic than on aesthetic feeling.

Landmark cases in which the German Supreme Court interpreted article 24 are *Alcolix-Astérix* (1993) and *Perlentaucher* (2010). The *Alcolix* case concerned a parody on the famous *Astérix* comics. The plaintiffs claimed that the use of the comic characters as such constituted infringement. The use of a number of characteristic features of the *Asterix* stories – such as the situation of the parody in a Gallic village and the use of fish as a weapon in fights – were claimed to infringe as well. It was not contested that the

characters of *Astérix* and *Obelix* are protected as works, separate from the actual graphic representations (drawings).

*Perlentaucher* was an altogether different case: it is an online journal that produced summaries of book reviews. Two newspapers sued for infringement. The Supreme Court held that that courts must assess for each summary individually if it is distinct enough from the review it summarises. Since only the expression of a bookreview is protected and not thoughts expressed, it comes down to the question whether the original wording of the book review is copied.

The free use is allowed when the second work foregrounds its individual and distinct personal character to such a degree that the original characteristics of the source fade – even though some of its original traits might remain identifiable. Of course, the more well-known the source work is, the fewer the hints that are necessary to reference it. That the reference to a (famous) work is clear does not mean that (too many) original elements have been taken, or too little own character is developed in the new work. If the ‘outer’ distance to the source is great (i.e. as regards form), the source is in effect only an inspiration. If the outer distance is not great, e.g. as will be the case in parodies for which the copying of some form aspects is typically required, but the ‘inner’ distance is great because of the independent original nature of the second work, the transformative use is also free. According to the German Supreme Court, the ‘inner distance’ test is a strict one (*Astérix*). Whether there is a case of free use must be judged from the perspective of (a hypothetical) observer who knows the source work but who also has the intellectual capacity to understand the new work.

### *United Kingdom*

Countries like Canada and the UK initially treated rights to control adaptations quite separate from the right to copy. The black letter text of the laws still give the impression that a reproduction right and adaptation rights exist side by side. However, the continuously expanded interpretation of the reproduction right caused it to overlap with the specific adaptation provisions (Fischman, 2007). These retain value mainly as examples of the kind of derivative works that cannot be created without permission, and that themselves will typically qualify as protected works.

Section 16 of the UK Copyright, Designs and Patents Act 1988 (‘CDPA’) reserves to the copyright owner a catalogue of rights, among which are the right to copy (para. a) and the right to make adaptations (para e), both ‘in relation to the work as a whole or any substantial part of it’. The substantiality test has over the past decade or so become a qualitative test.

Griffiths (2013) describes and critically assesses this development in depth, in particular in light of the previous importance attached in UK copyright to material form (see also Ginsburg, 2006: about similar struggles in early French and US copyright to view the object of protection as immaterial). Copying or adapting a 'substantial' part is not so much about the proportion of the source work that is copied or taken (i.e. quantity, like the number of pages in relation to the whole source work), but the quality of what was taken: those elements that define the work's original character, or 'skill and labour' in English copyright language. The distinction between copying and making adaptations fades in the light of this test.

Section 17 of the CDPA considers as an infringement unauthorised copying, that is the act 'of reproducing the work in any material form'. Section 21(1) stipulates that the 'making of an adaptation of the work is an act restricted by the copyright in a literary, dramatic or musical work'. The Act is quite specific in describing what qualifies as an adaptation. For musical works it is an arrangement or transcription. For literary and dramatic works it includes e.g. translations, conversions into non-dramatic works and conveying action or story of a literary work into pictures (section 21 CDPA). Artistic works are not covered. But since section 21 further provides that 'No inference shall be drawn from this section as to what does or does not amount to copying a work', there seems ample room to regard transformative uses of artistic works as acts of the *copying* rather than *adapting* of substantial parts. It is indeed a criticism of UK courts that they only consider what is taken rather than what is added, which leaves little room for genres such as parody. There is only limited room to protect parody, namely under the fair dealing provision for criticism and review (Mendis & Kretschmer, 2013). The planned introduction of a parody exception in the CDPA will remedy this.

### *France and Belgium*

In the French copyright system, a division is made between two broad categories of exploitation rights: the right to make the work public (le droit de représentation) and to reproduce it (art. L 122-1 *Code de la propriété intellectuelle*, CPI). The right of representation includes any form of communication to the public. The Act lists a few, including communication by recitation, stage performance and (as a later addition) broadcasting. Further instances have been elaborated by the courts, e.g. it also covers the exhibition of (art) works (Lucas, 2012, p. 286–287). A reproduction is any 'fixation' of a work in material form. What the minimally required permanence should be was controversial (Lucas, 2012, p. 256–259), but the

2001 Information Society Directive leaves no doubt it includes transient copies (e.g. in cache, RAM).

French doctrine and courts developed the notion of a right of ‘destination’ to capture the copyright owner’s claim to control subsequent uses of copies of a work, such as playing records in a club or broadcasting them (Lucas 2012, pp. 259–277). This *droit de destination* then is wider than the German notion of distribution right, and seems more akin to the Dutch right to communicate to the public. Lucas criticises the French approach and suggests the *droit de destination* be abandoned for a distribution right German style, including an exhaustian rule (ibid.). Belgian copyright law also retains the (implicit) notion of a destination right that was developed as part of the old law’s broad reproduction right. To make matters more confusing, since 2005 the Belgian copyright contains an explicit provision on the distribution right as harmonised by the Information Society Directive (see F. Gotzen, 2012, p. 12–15). The exclusive right to authorise reproductions also covers translations and other adaptations, says article 1 (1) Belgian *Auteurswet*.

Partial reproduction requires the author’s consent in both jurisdictions. Examples from French caselaw include the copying of a few lines of a book and the incorporation of an image in a film (Lucas, 2012, p. 300–302). An exception to the reproduction right exists for parodies (art. L.122–5) and quotations for among other things critical, educational or research purposes. A parody must be humorous and not have the intention to harm the economic or moral interests of the author of the targeted work (Mendis & Kretschmer, 2013).

The copyright owner’s right to control the creation of translations and adaptations are corollary to the rights of reproduction and representation, and thus not distinct. Only for computer programmes is this different due to the harmonised EU rules (Lucas, 2012, p. 251, 303 ff).

The short overview of the rights of reproduction/copying, of adaptation and the exemptions for parody and quotation given above make clear that even within the harmonised landscape of the EU, adaptations are dealt with differently. In Germany and the Netherlands, the assessment of free adaptations not only considers what is taken from the source, but also what is added. UK courts on the other hand tend to focus on what is taken and thus seem more likely to find infringement. This takes us to the topic of infringement analysis. How do courts go about establishing infringement, and what are the particular challenges they face when they have to consider source works that are not fixed and stable?

## Infringement analysis

Sanders (2006, p. 12) argues that the relationship between adaptation and source text is 'often viewed as linear and reductive; the appropriation is always in the secondary, belated position, and the discussion will therefore always be, to a certain extent, about difference, lack or loss.' For students of adaptation in film, literature and other arts it is better 'to think in complex processes of filtration, and in terms of intertextual fields of signifying fields, rather than simplistic one-way lines of influence from source to adaptation (ibid., p. 24). These observations are interesting because they stand in sharp contrast to how lawyers approach this relationship.

To lawyers, adaptations are not about what is lost, but about what is *not* lost. Having to work with existing legal constructions, lawyers need to be precise about identifying the 'one-way lines of influence'. The predominant view in law is that what matters is how much has been taken, not how much has been added. As Stef van Gompel in this book elaborates: when courts are called upon to decide whether a work is original, they tend to consider the creative space that was available to the author in the case at hand. If such space existed, the work is judged to be original. No particular comparison is made with other creations to ascertain originality, the existence of creative space suffices. If on the other hand courts are asked to judge whether a work infringes, they will compare the later with one very specific earlier work (Spoor, 2012, p. 207).

Any amount of direct copying will normally constitute infringement, for example copying part of a text, or a few bars of a song. The lower threshold is – according to the Court of Justice EU in *Infopaq* – where the material presumably taken does not show the original expression by the author of the source. With a low originality threshold, virtually any amount of literal copying would infringe. The case is somewhat different in case of adaptations, i.e. if not the wording but themes, plot or characters are borrowed, or when the alleged adaptation is in another medium or genre.

Some have taken the Court of Justice's reasoning in *Infopaq* as saying that copyright exists in snippets of text, that is: a snippet can be a work (I have discussed the reception of *Infopaq* and later judgments extensively elsewhere, see Van Eechoud 2012). Such a reading would allow copyright owners to carve up their work in ever smaller units, with the result that if such units were copied there would always be infringement. Laddie J., when confronted with such an attempt (before *Infopaq*) by a publisher who argued various elements of a magazine cover were independent works

judged that the cover could not be treated as a ‘millefeuilles’ with layers of different copyrights (*IPC Media Ltd v Highbury-Leisure Publishing Ltd*). In many ‘analogue’ cases there can be little doubt about what is the ‘unit’ of work, namely a focussed whole that the relevant public recognises as a discrete entity.

Dutch courts increasingly apply an ‘overall similar impression’ test. This test is in a sense a reverse test. The focus is not on first establishing what makes a work original and then looking for those elements in the derivative work. Rather, the court compares the source and alleged infringing work to determine how similar they are. If the impression is one of overall similarity and difference on minor points only, the later work is judged infringing. A major critique of this approach is that features of the work that do not contribute to its original character – because they are dictated by function, or style – should be ‘discounted’. They are not protected thus copying them is free. If the courts are not diligent in doing this, the test favours plaintiffs. Initially the overall-impression test was applied in cases involving industrial design, but increasingly it is also used to decide cases on copying of e.g. TV formats and musical works (Spoor, 2012, pp. 210–12).

The French courts approach to assessing infringement is to only consider the taking of characteristic elements by which the (initial) author has personalised the theme/idea (Lucas, 2012, p. 309). Under Dutch copyright law, the fact that only little is copied and much added is regarded as not relevant for a finding of infringement (Spoor, 2012, pp. 208–209), although one might speculate that in such cases the courts are more likely to moderate remedies sought. Likewise, UK courts also stress that to find infringement what matters is to what extent protected elements have been copied and not how (dis)similar the works are (Griffiths, 2013).

## Roads that might be taken

In this section I consider in a bit more detail what we might want copyright law to do in light of the problems outlined above, and possible ways in which change could be achieved, notably by looking to transplant certain national solutions to the European level. For some questions solutions are relatively easy to design within the current copyright system, even though achieving reform might be a substantial political challenge. Others would require more profound changes and as a first step will need to be researched more in depth in a multi-disciplinary setting.

## Limits of the work concept

The recent line of cases by the Court of Justice of the EU has made clear that the notion of 'work' is an autonomous concept of European law that must be interpreted and applied in a uniform manner in all Member States of the EU. As Stef van Gompel details in his contribution, the originality test that the Court elaborated is that copyright protects the author's own intellectual creation, that is: the author must give the work a personal stamp through the exercise of free and creative choices (*Infopaq* 2009, *BSA* 2011, *Football Association Premier League* 2011, *Painer* 2011, *Football Dataco* 2012, and *SAS* 2012). This focus on originality does not give us a comprehensive definition of what a work is.

What are the boundaries of a 'creation'? What defines the domain of intellectual creations that copyright covers in the first place? In *Football Dataco* for example, the Court observed that football matches as such cannot be copyrighted because players must follow the rules of the game so the requisite creative freedom is not present. By grasping at the straws of creativity the court in my view dodged the more difficult questions of what productions count as being in the 'literary, artistic or scientific' domain and whether speech of any genre could be a 'work' (Van Eechoud, 2012).

As we have seen, the Berne Convention gives us examples of the kinds of creations copyright protects, but not much guidance beyond. The domains of art, literature and science are commonly understood in copyright to be extremely broad and not (or no longer) tied to more limited meanings they might have in everyday language. Some have argued the domain is all things 'cultural' (Grosheide, 1986), or simply 'information' (Hugenholtz, 1989) but courts seem to stay away from pronouncing on the domain. In the UK, the challenge for the courts was to fit new genres into one of the work categories of the closed list of the Copyright act, which is why broader domain questions probably did not arise. Anyway, for our purposes the domain question is not the most problematic.

What is relevant is whether new forms of cultural production lead to genres that can always be fitted into the work concept. Or must we recognise more readily the limits of the work concept and not always seek to make new genres fit through reasoning by analogy? For open-ended creations I suggest just that. We might ask: Are open-ended ventures like Wikipedia just enormous draft databases? Conceptually, the problem is not that the first version created is not the 'definitive' one. After all, copyright laws have long recognised that works need not be finished to be protected. No-one



would deny the studies that the artists made for the Dutch King's portrait of state are works. The Computer Programme Directive states explicitly that preparatory works are protected under copyright. If 'drafts' are denied work status it is because the level of elaboration from idea(s) to expression is too low, not because they are not the 'finished' work. The problem with open-ended works is that they really are not like drafts – the notion itself already implies that at some later stage there will be a finished work – but a continuing work-in-progress.

We might more accurately conceive of open-ended 'works' as processes or practices. What is interesting is that in (popular) music studies and musicology the work concept – or to paraphrase Goehr, the objectified result of a special creative activity that did not exist prior to compositional activity – has come under fundamental and prolonged attack. In her influential book *The Imaginary Museum of Musical Works*, Goehr (1992) unpacked the specific historical, social and aesthetic conditions that gave rise to the work concept in what we now categorise as classical musical works.<sup>6</sup> She argues it is neither necessary nor obvious to speak of classical music – let alone all types of music – in terms of 'works', despite 'the lack of ability we presently seem to have to speak about music in any other way' (*ibid.*, p. 243).

Discussing the validity of the musical work concept in popular music, Middleton (2000) argues that the focus in music copyright on the (written) composition does not do justice to the process by which music is created. Making music involves multiple creative contributors, who rely on common stock models, tune families and riffs. A score is seldom used to transmit pieces; rather this happens through oral/aural channels. The work concept, it is argued, causes law to favour scored music over improvisation, melody over harmony and rhythm, to give author-composers more power than performers. It also throws up barriers to genres that rely on sampling. To make a distinction between performance and composition is often artificial. Similar criticisms are made by Horn (2000), Lacasse (2000) and Théberge (1997).

Admittedly the idea of a work does not map onto all types of creative practices equally well. Testing legal norms against creative practices should be done more commonly, and the knowledge from disciplines outside law can be immensely helpful. A problem with much of the criticism voiced in humanities disciplines – be it music studies, literary studies, film studies or another field – is that it only helps to *deconstruct* legal concepts. Replacing them with a better alternative is another matter. What would it mean for the law for instance, to treat music production (and consumption) or open-ended peer production as a practice, or process? What is the implication of



resisting the urge to fit them into the work of authorship concept? Possibly it means that rather than having the author-work relationship at its core, the focus of law would be on regulating the information relationships involved more directly: between contributors, editors, users, and competitors. For some of these relationships we might look to special areas of law, notably consumer law and unfair competition law. But I must admit I have trouble conceiving of alternatives that still fulfil the primary function of copyright today: safeguarding exploitation rights to foster creation. I have fewer problems imagining how moral rights might be protected separate from the notion of work (but that is material for another article).

### Versioning

Distinct from the open-ended nature of internet-based peer production projects is the frequent updating or versioning aspect, which characterises many other internet-based content as well. Is a continuously refreshed Facebook profile just a sequence of adaptations? Is the rapid versioning of software merely a hugely accelerated type of publishing editions?

Versioning is by no means a recent phenomenon. Musicologists' research on the manuscripts Chopin prepared for publishers shows that he often produced three different versions of the same composition for his German, French and English publishers; he did not regard one as the authentic one (Rink, 2012). In literature, Dickens and Arthur Conan Doyle are famous examples of authors whose work was routinely published in serial form. In broadcasting, the continuous, drawn-out narratives of radio soaps and other long-form narratives were deployed to create a regular and faithful audience (Hilmes, 2012, p. 279).

An important difference between old and new kinds of serialism is the sheer volume (caused by open-endedness), the short interval between versions and the fact that older versions are changed. In the case of the radio-soap and publication in instalments, the later part adds to what came before but is not meant to replace the earlier. There is no adaptation of earlier instalments.

Kelty (2008) argues that different genres are affected differently by the changing ways in which information is created, stored and distributed. In his view music production has not changed much because even with new composition and recording technologies, musicians largely mimic previous practices. Much online publishing also recreates something that looks like traditional print (e.g. e-book, magazines). But for open source and other collaborative projects the change from editions to versioning

and forking – ‘breaking away’ to continue a separate project based on the same source materials – ‘raises troubling questions about the boundaries and status of a copyright work’ (Kelty, 2008, p. 278).

A particular problem is caused by the dominant method lawyers apply to establish infringement, which is as we have seen a one-to-one comparison of works. Furthermore, whether updates or revisions qualify as a copyright work themselves – because relative to the source an original contribution has been made – will depend on how frequent updates or edits are. If updates are very frequent, changes are more likely to be minor and the latest version as not original. Obviously, ‘saving up’ modifications over a longer period (as is done in traditional book publishing) leads to a more substantial change from one version to the next. Therefore each new version is more likely to be protected as a separate work. Current copyright law favours slow change over rapid change. It is obvious why this is so, but not so obviously justifiable. Particularly when it comes to establishing authorship, a contributor that makes frequent but small contributions is less likely to be recognised as author than someone who ‘saves up’, for example. Also, it becomes more difficult to establish the point in time at which the new version is not just a copy but an adaptation protected in its own right. What, in other words, is the cut-off point for determining originality?

How might copyright better recognise the incremental nature of new forms of production? One possibility is that the one-to-one comparison of the penultimate version (source work) and the latest version (derivative work) to establish work status is replaced by comparison across a range of editions. This might sound harder to do than it is. Version control is a key feature of collaborative production platforms. All modifications can be tracked and archived. In principle then, it should be possible to compare versions and establishing which changes were made by whom over time.

Another possibility is to consider a more nuanced system of rights of attribution, a system that reflects the social norms in communities rather than the rather myopic view of authorship that traditionally characterises copyright laws. Bently and Biron suggest just that in their contribution to this book. But also beyond authorship status norms there might be more that could be done to ensure copyright law supports modern forms of collaboration. Society has an interest in fostering collaborative continuous creation of knowledge and tools, so has an interest in a legal system that enables collaboration. The development of copyleft systems for the management of collaborations in a way shows that copyright seems to do this quite well. The fact that rights can be licensed allowed copyleft models to be developed. As the use of such collective licensing schemes continues to

expand – from open source software to education, research and the arts – it is time for lawyers and field experts to consider whether there are legal norms need fine-tuning (or a radical overhaul for that matter) to safeguard the continuity of copyleft systems of copyright management.

### **A reigned in reproduction right**

Although as was noted above, the general opinion among scholars still seems to be that the adaptation right is not harmonised, there are clear signs that the reproduction right of article 2 Information Society Directive lends itself to such broad interpretation that it usurps all types of copying, borrowing and reworking. Recall that the provision says that it is ‘the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part’ of a work of authorship. The provision has no internal normative brake so to speak, that prevents it from applying to uses of minor economic significance. Especially if the reproduction right will be constructed as including the adaptation right by the Court of Justice, its lack of normative meaning is troubling. We have seen that in a number of countries (Netherlands, Belgium, France) the right of adaptation is regarded as part of the exclusive right of reproduction, whereas in other countries it is viewed as slightly more separate (Germany, UK).

The reason why in the end adaptation and copying might be judged as being essentially similar acts by the ECJ is best illustrated by the Advocate General’s approach in the *Painer* case. The Advocate General’s opinion in *Painer* implies that the reproduction right of article 2 Information Society Directive does include the exclusive right to authorise adaptations. In *Painer*, one of the questions (in the end not directly addressed by the Court) was whether a photo-fit made on the basis of a simple portrait photo infringed the copyright in the portrait photo. The Advocate General observes (para 129): ‘The publication of a photo-fit thus constitutes a reproduction of the portrait photo used as a template only if the personal intellectual creation which justifies the copyright protection of the photographic template is still embodied in the photo-fit. In a case where the photo-fit was based on a scan of the photographic template, this as a rule can be assumed.’ Clearly the thinking here is that reproduction covers both direct copying and transformative ‘copying’. In *Infopaq*, the first case on article 2 Information Society Directive, the court had ruled that the reproduction right protects against the copying of parts of a text (potentially even parts of sentences in the text in question) if such parts ‘convey[ing] to the reader the originality of

a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article.' In Infopaq the dispute was about the taking of 11-word long snippets of newspaper articles. The copying was literal.

If the test for infringement of both the reproduction right and the adaptation right is: were characteristic elements of the source taken, then it seems to make sense to view the reproduction right as overarching. However, this leaves no room in the infringement analysis to have regard for what has been added in the adaptation. In my view, if the adaptation in its overall impression is so different from the source(s) that the source works only play a minor part in the whole, the adaptation should be a free use.

We have seen above that the German concept of 'Freie Benutzung' allows transformative uses but the test is also quite strict. If original elements of the source work are recognisable, the derived work must have a great distance in terms of genre and purpose in order to be free (e.g. a parody). The test I suggest is less strict. It is more akin to the free adaptation Lionel Bently (2011) proposes, namely 'where as a result of the adaptation or arrangement, a new work with a substantially different meaning, or of a significantly different genre, is thereby created.' Perhaps combined with the added test that the exploitation of the new work does not significantly harm the commercial interests of the original creator or copyright owner, this seems a good alternative. One thorny question is how such a free adaptive use limitation plays out in entertainment industries where trans-media storytelling is an increasingly important business model. The strategy is to take intellectual properties (such as comic characters, or a story, a toy) to multiple markets, rather than bringing a work developed for one market (say fiction books) to another market once it is successful. Examples are toymaker Mattel (Bulik, 2010) and comic publisher Marvel's ventures in filmed entertainment (Johnson, 2006). Obviously, the more trans media a company is, the less room there would be for free transformative use.

### *Limitations*

The continued expansion of the exploitation rights of authors in European law has not been accompanied by equally robust claims to fair uses. The call for a stronger and more flexible system of limitations has become louder over recent years (Van Eechoud et al., 2009, Geiger et al, 2010, Guibault, 2010, Senftleben, 2012). In terms of feasibility, it is much more likely that more room for 'borrowing' will be effectuated through broader limitations, rather than through a narrower right of reproduction. Law professors united in the European Copyright Society have called for making limitations manda-

tory and more flexible, by giving courts the ability to develop tailor-made solutions (European Copyright Society, 2014).

In the field of limitations and exceptions, the introduction of a defence for user generated content might go some way to accommodate the by now common practice of individuals to create their own text, video and music through remixing and adapting existing works. It stands to reason that the limitation would only apply for non-commercial uses and only if there has been a substantial adaptation of the source works. Otherwise user generated content could compete with the source work. Legal scholarship could benefit from media studies to get a fuller understanding of the role user generated content plays in entertainment industry commercial strategies because the dynamics are largely unknown to students of the law. Scolari (2013) for example analysed UGC surrounding the successful TV-series 'Lost'. He found boundaries between commercial industry and non-commercial user generated content to be porous; some UGC can be acquired and elaborated by industry.

The limitations for parody and pastiche and on quotation are other obvious candidates that can be propped up so as to enable more liberal transformative uses. The European Court of Justice could take a broad reading of the exception for parody of article 5(3)(k) Information Society Directive, which leaves Member States the freedom to allow free 'use for the purpose of caricature, parody or pastiche'. National courts so far have tended to demand that the parody or pastiche target the source work. But as Dyer argues in his in-depth examination of pastiche, it is an artistic imitation of other art, not necessarily of one particular work of art, and not necessarily critical (Dyer, 2007, p. 2, 157). Erlend Lavik observes in his contribution to this book: 'Courts should be open to the possibility that a range of cultural appropriations – including parody *and* pastiche – can be transformative and culturally and artistically valuable. This is where aesthetics can be of service. It can help fill the concept of transformative use with meaningful content.' Likewise, Julie Sanders invites us to bring (literary) adaptation and appropriation 'out of the shadows', not to view them as merely 'belated practices and processes; they are creative and influential in their own right. And they acknowledge something fundamental about literature: that its impulse is to spark related thoughts, responses and readings' (Sanders, 2006, p. 160).

Lastly, there is the exception 'for incidental inclusion of a work or other subject-matter in other material' (art. 5(3) sub i Information Society Directive) that might be expanded. How likely the Court of Justice is to take the lead is uncertain however, since it has repeatedly stated that the exceptions

laid down in article 5 Information Society Directive are to be given a narrow interpretation.

There are we have seen, several potential routes. Some can be taken by courts; others would need to be taken by the EU legislator. Whatever the route to be taken, a less all-encompassing right to control copying and adaptation is called for, if the law is to keep at least remotely in step with today's practices of cultural production.

## Notes

1. For my purposes, I shall not go into the details of the US fair use defense. The *Cariou v. Prince* case has drawn much attention among copyright scholars and in art circles because the district court gave a narrow reading of fair use. It held that no defense is available if the secondary work does not somehow comment on the source work, its author or popular culture. The appeals court ruled that the law does not require such comment. The four factors that must be considered when assessing whether a use infringes or is fair are (1) the purpose and character of the use (including commercial nature); (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 (Section 107, 17 U.S.C.).
2. Dumas gave the interview in Dutch. She said: 'Plagiaat is mijns inziens een literaire term. Een tekst kun je letterlijk overnemen, het blijft in hetzelfde medium, maar mijn schilderij is opgebouwd uit verfstrepen, het is zo'n ander "ding". Dat zie je het beste als je een detail van het schilderij laat zien naast een detail van de foto. Dan verschijnen de verschillen in plaats van de overeenkomsten. Het zijn twee werelden.' *Vrij Nederland*, 13 February 2014.
3. At the international level, the protection of computer programmes and databases was secured through the TRIPs Agreement (1992) and the WIPO Copyright Treaty (1996), which essentially oblige contracting states to them as literary works and collections within the meaning of the Berne Convention.
4. Openstax (formerly: Connexions) is an example of an online collaborative system designed to promote the sharing and reuse of educational content: teachers/authors can contribute 'pages' (learning modules) that can be adapted and combined into collections (text books, readers). Content is licensed under a Creative Commons Attribution license, making it freely reusable on condition that the author(s) are credited. See <http://cnx.org/>.
5. The German Copyright lists exceptions to this rule that the creation of an adaptation does not require permission, but only its subsequent communication or trade (art. 23 UrhG), e.g. turning a work into a film does require

- prior authorisation, as does executing a work or art (after a plan), or copying a work of architecture through building, or adapting a database (as the EU Database directive imposes such a rule).
6. Looking to the historic development of UK music copyright and the influence some scholars attribute to Romanticism on notions of work, Barron (2006) concludes that changes in thinking about property, notably the inclusion of intangibles is what caused the musical work concept (as score-based) to develop. The rise of a 'middle class' with an appetite for buying sheet music is the more likely cause. About the difficulty of establishing causal links between Romantic ideas in the arts and the development of legal concepts, see Erlend Lavik's contribution to this volume.

## References

### Books and articles

- Barron, A. 2006. 'Copyright Law's Musical Work', 15 *Social & Legal Studies* 101–27.
- Bently, L. 2011. *Exploring the Flexibilities Available to UK Law*. Submission to call for evidence, independent review of intellectual property and growth'. London: IPO 2011. Available at: <<http://www.ipo.gov.uk/ippreview.htm>>.
- Berdou, Evangelia, 2010. *Organization in Open Source Communities: At the Crossroads of the Gift and Market Economies*. London: Routledge.
- Boucher, Brian, 2014. 'Landmark Copyright Lawsuit Cariou v. Prince is Settled', *ArtinAmerica Magazine* 14 March 2014. Available at: <<http://www.artinamericamagazine.com/news-features/news/landmark-copyright-lawsuit-cariou-v-prince-is-settled/>>.
- Bulik, Beth Snyder, 2010. 'Mattel's got a monster holiday hit, but will franchise have staying power?' *Advertising Age*, Vol. 81, Issue 43.
- Burdick, Anne, Peter Lunenfeld, Johanna Drucker, Todd Presner and Jeffrey Schnapp, 2012. *Digital\_humanities*. Cambridge: MIT press.
- Cohen, M., 2014. 'Foto's schilderen: plagiaat of "fair use"?' *Vrij Nederland*, 13 February 2014. Available at: <<http://www.vn.nl/Archief/Media/Artikel-Media/Fotos-schilderen-plagiaat-of-fair-use.htm>>.
- Dyer, Richard, 2007. *Pastiche*. London/New York: Routledge.
- European Copyright Society, 2014. *European Copyright Society Answer to the EC Consultation on the review of the EU copyright rules*. Available at: <[http://www.ivir.nl/nieuws/ECS\\_EC\\_consultation\\_copyright.pdf](http://www.ivir.nl/nieuws/ECS_EC_consultation_copyright.pdf)>.
- Fischman Afori, O., 2007. 'Copyright Infringement without Copying - Reflections on the Theberge Case. 39 *Ottawa L. Rev.* 23 (2007-2008).
- Geiger, C., Hilty, R, J. Griffiths, & U. Suthersanen, 2010. 'Declaration A Balanced Interpretation Of The "Three-Step Test" In Copyright Law'. *JIPITEC*, 1 (2) 2010. Available at: <<https://www.jipitec.eu/issues/jipitec-1-2-2010/2614>> (urn:nbn:de:0009-29-26212).
- Ginsburg, Jane C., 2006. 'Une Chose Publique: The Author's Domain and the Public Domain in Early British, French and US Copyright Law'. 65 *Cambridge L.J.* 636.
- Goehr, Lydia, 1992. *The Imaginary Museum of Musical Works : An Essay in the Philosophy of Music*. London: Clarendon Press.



- Gordon, Kim (2012). 'Band Paintings: Kim Gordon Interviews Richard Prince.' *Interview Magazine* 21 June 2012. Available at: <<http://www.interviewmagazine.com/art/kim-gordon-richard-prince>>.
- Gotzen, F., 2012. 'Basisbegrippen'. In: Brison, Fabienne, Hendrik Vanhees, *De Belgische auteurs-wet. Artikelsgewijze commentaar (Hommage à Jan Corbet)*. Larcier, Brussels.
- Griffiths, J., 2013. 'Dematerialization, Pragmatism and the European Copyright Revolution'. *Oxford Journal of Legal Studies*, Vol. 33, No. 4, pp. 767–790. doi:10.1093/ojls/gqt017
- Grosheide, F.W., 1986. *Auteursrecht op maat*. Deventer: Kluwer.
- Guibault, Lucie, 2010. 'Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC.' *JIPITEC* 1 (2) 2010. Available at: <<http://www.jipitec.eu/issues/jipitec-1-2-2010/2603>> (urn:nbn:de:0009-29-26036).
- Hemmungs Wirtén, Eva, 2011. *Cosmopolitan Copyright. Law and Language in the Translation Zone*. Uppsala: Uppsala Universitet.
- Hilmes, Michele, Horace Newcomb, and Eileen Meehan, 2012. 'Legacies From the Past Histories of Television'. *Journal of Communication Inquiry* 36, no. 4, pp. 276–87. doi:10.1177/0196859912459749.
- Horn, David, 2000. 'Some Thoughts on the Work in Popular Music.' In: Talbot, Michael, *The Musical Work: Reality Or Invention?* Liverpool: Liverpool University Press.
- Hughenoltz, P.B., 1989. *Auteursrecht op informatie*. Deventer: Kluwer.
- Hughenoltz, P.B. and Senftleben, M., 2011. *Fair use in Europe. In search of flexibilities* (report). University of Amsterdam / Free University Amsterdam.
- Mendis, Dinusha and Martin Kretschmer, 2013. *The Treatment of Parodies under Copyright Law in Seven Jurisdictions A Comparative Review of the Underlying Principles*. IPO report 2013/23. London: IPO
- Johnson, Derek, 2012. 'Cinematic Destiny: Marvel Studios and the Trade Stories of Industrial Convergence'. *Cinema Journal* Volume 52, Number 1, Fall 2012.
- Kelty, C.M., 2008. *Two Bits: The Cultural Significance of Free Software*. Durham [etc.]: Duke University Press.
- Lacasse, Serge, 2000. 'Intertextuality and Hypertextuality in Recorded Popular Music.' In: Talbot, Michael. *The Musical Work: Reality Or Invention?* Liverpool: Liverpool University Press.
- Lessig, Lawrence, 2002. *The Future of Ideas: The Fate of the Commons in a Connected World*. New York: Vintage.
- Lessig, Lawrence, 2008. *Remix: Making Art and Commerce Thrive in the Hybrid Economy*. New York: Penguin Press.
- Loewenheim, U., 2010. In: Schricker, G., and Dietz, A., *Urheberrecht: Kommentar*. Munich: Beck.
- Lucas, A. et al., 2012. *Traité de la propriété littéraire et artistique*. Paris: Litec.
- Middleton, Richard, 2000. 'Work-in(g)-Practice. Configurations of the popular music intertext'. In: Talbot, Michael, *The Musical Work: Reality Or Invention?* Liverpool: Liverpool University Press.
- Mondriaanfonds. 'Afspraak Van Dongen, Breukel en Mondriaan Fonds.' 14 February 2014. Available at: <[http://www.mondriaanfonds.nl/Nieuws/item/Afspraak\\_vanDongen\\_Breukel/](http://www.mondriaanfonds.nl/Nieuws/item/Afspraak_vanDongen_Breukel/)>.
- Reagle, Joseph, 2010. *Good Faith Collaboration: The Culture of Wikipedia*. Cambridge, Mass: MIT Press.
- Ribbens, Arjen, 2014. 'Fotograaf: Kunstenaars pleegt plagiaat met statieportret', *NRC* 20 January 2014.
- Ricketson, S. & Ginsburg, J., 2005. *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*. Oxford: Oxford University Press.



- Rink, John, 2012. 'The distinction between "work" and "performance" in music history and theory'. Presentation given at HERA workshop Authorship Dynamics and the Dynamic Work. University of Cambridge, 15 December. See <<http://www.ocve.org.uk>> for the Online Chopin Variorum Edition.
- Sanders, Julie, 2006. *Adaptation and appropriation*. London and New York: Routledge.
- Schricker, G., Loewenheim, U. and Dietz, A., 2010. *Urheberrecht: Kommentar*. Munich: Beck.
- Scolari, Carlos A., 2013. 'Lostology: Transmedia storytelling and expansion/compression strategies'. *Semiotica*. Issue 195, pp. 45–68.
- Smoschewer, Fritz, 1926. 'The Law of Moving Pictures in Germany'. *8J. Comp. Legis. & Int'lL*. 3d ser. 250 (1926), pp. 250–254.
- Senftleben Martin, 2010. 'The International Three-Step Test. A Model Provision for EC Fair Use Legislation'. *JIPITEC*, 1 (2) 2010. Available at: <<https://www.jipitec.eu/issues/jipitec-1-2-2010/2605>> (urn:nbn:de:0009-29-26057).
- Senftleben Martin, 2012. 'Quotations, Parody and Fair Use'. In: P.B. Hugenholtz, A.A. Quaadvlieg and D.J.G. Visser (eds), *A Century of Dutch Copyright Law: Auteurswet 1912-2012*. Amsterdam: Delex.
- Sewell, David, 2009. 'It's For Sale, So It Must Be Finished: Digital Projects in the Scholarly Publishing World.' *Digital Humanities Quarterly* 003, no. 2.
- Spoor, Jaap, 2012. 'Verveelvoudigen: Reproduction and Adaptation under the 1912 Copyright Act'. In: P.B. Hugenholtz, A.A. Quaadvlieg and D.J.G. Visser, eds. 2012. *A Century of Dutch Copyright Law: Auteurswet 1912-2012*. Amsterdam: Delex.
- Théberge, Paul, 1997. *Any Sound You Can Imagine: Making Music / Consuming Technology*. Hanover, NH: Wesleyan University Press.
- Van Eecloud, Mireille, 2012. 'Along the Road to Uniformity - Diverse Readings of the Court of Justice Judgments on Copyright Work', *JIPITEC*, 3(1), p. 60-80.
- Van Eecloud, M.M.M., S.J. van Gompel, L. Guibault, B. van der Sloot and P.B. Hugenholtz, 2011. *Report of the Netherlands for ALAI 2011 Study Days (Dublin)*. Available at: <<http://www.alaidublin2011.org/wp-content/uploads/2011/05/Netherlands.pdf>>
- Van Eecloud, M.M.M., P.B. Hugenholtz, S.J. van Gompel, L. Guibault and N. Helberger, 2009. *Harmonizing European copyright law: the challenges of better lawmaking*. Alphen aan den Rijn: Kluwer Law International.
- Walter, M. and Von Lewinski, S., 2010. *European copyright law: A commentary*. Oxford: OUP.

## Legislation

Auteurswet (Dutch copyright act)

Code de la propriété intellectuelle, Loi no 92-597 du 1er juillet 1992 (French copyright act).

Copyright, Designs and Patents Act 1988 (UK copyright act)

Wet betreffende het auteursrecht en de naburige rechten, 30 June 1994 (Belgian copyright act).

## Cases

### EU

Case C-393/09 *Bezpečnostní softwarová asociace v Ministerstvo kultury* [2010] ECR I-13971.

Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH* (CJEU, Third Chamber, 1 December 2011).

Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd v Karen Murphy* (CJEU, Grand Chamber, 4 October 2011).

Case C-604/10 *Football Dataco & others v Yahoo! UK & others* (CJEU, Third Chamber, 1 March 2012).

Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569.

Case C-406/10 *SAS Institute Inc. v World Programming Ltd.* (CJEU, Grand Chamber, 2 May 2012).

### National cases

*Astérix*. BGH 11 March 1993 (*Astérix Alcolix*), case I ZR 263/91, BGHZ 122,53.

*IPC Media Ltd v Highbury-Leisure Publishing Ltd* [2005] FSR 20, [23].

*Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

*Perlentaucher*. Bundesgerichtshof (German Supreme Court) 1 December 2010, case I ZR 12/08, *Zeitschrift für Urheber- und Medienrecht* 2011, 151.

*Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).