IIC (2024) 55:495–498
https://doi.org/10.1007/s40319-024-01459-3

EDITORIAL

Knock, Knock, Knockin' on Tranformativeness' Doors

Péter Mezei

Published online: 28 March 2024

Participatory, reference or remix culture, intertextuality and recontextualisation are just a few of the terms that refer to the transformative recreation, adaptation and dissemination of expressions protected by copyright and related rights. The legal classification of these acts has become a dogmatic nightmare with the spread of digital technologies and in the wake of the global environmental crisis, as well as the push towards a circular economy. These phenomena necessitate the reconsideration of the policies and conceptual skeleton of copyright law, from subject matter, scope of protection, limitations and exceptions, to balancing mechanisms (including remuneration, the three-step test, proportionality or fundamental rights). They have also triggered a "comparative-law gold rush", projecting foreign legal concepts on domestic – though globally relevant – activities, and ultimately urging to find global legal answers in diverging national legal systems.

These trends serve as the perfect food for thought for copyright enthusiasts. Lamenting on the fate of transformativeness is not only a nice training exercise (filling up shelves with a massive amount of academic literature), but it is truly practical (fact-sensitive) and deeply politicised as well. Corporations, research organisations and private individuals are constantly developing new business models and carry out novel cultural activities based on transformative self-expression. Unsurprisingly, judges endlessly face cases focussing on the balancing of right holders', intermediaries' and end-users' interests. European Union (EU) legislation has not remained silent, launching new rules (e.g. directives and regulations related to the Digital Single Market Strategy or the New Green Deal) that take into consideration recent social and technological realities, the need for a

Péter Mezei is Professor of Law at the University of Szeged, Hungary; Chief Researcher, Vytautas Kavolis Transdisciplinary Research Institute, Vytautas Magnus University, Lithuania; and dosentti, University of Turku, Finland.

P. Mezei (✉)
Dr. Professor of Law, University of Szeged, Szeged, Hungary
e-mail: mezei.peter@szte.hu

more sustainable living environment, and the interests of future generations. All these outputs (legislation, case law and academic research) form a delicate *pasticcio* of issues that might be approached in a holistic manner.

But is it possible and necessary to provide a generalised answer to the multiple forms of transformative reuses? If we take a closer look at the various forms of such activities, we might automatically see the limits of that idea. Transformative reuses might be differentiated in the light of their purposes, forms, venues or means, leading to partially overlapping and partially distinct types of secondary expressions.

There are "*expression-based*" types of transformative reuses, e.g. remixes, memes, gifs, parodies, caricatures, or pastiche, which predominantly aim to put fundamental rights, like freedom of speech, education or art, into practice by reinterpreting existing cultural expressions. Many such activities are inherently digital and therefore overlap with "*spatial*" transformative reuses, where the venue and the means to reach others matter more than the expression itself. Social media platforms have made it a casual event to communicate via the mere upload or the recontextualisation of protected audio, visual and audio-visual contents. Quite recently, due to the exponential growth and unprecedented success of generative artificial intelligence (GenAI), algorithmic ("*technology-based*") generation and sharing of outputs – trained on collections of predominantly copyright-protected third-party data – have gained momentum and now dominate the public discourse on the future of copyright. Finally, with the move toward a circular economy, "*sustainability-oriented*" transformative reuses, including repair and upcycling, could minimise the harmful consequences of, among other things, fast fashion, ultra-short product lifecycles, or difficulties in finding replacements/spare parts due to production shortages or trade wars. They could support the reinjection of "usable waste" into the circles of consumption.

Some of these issues involve classic problems dressed in new clothes, while others raise fascinating novel questions. There is a growing trend that argues for the introduction of a catch-all, or general flexibility, or balancing mechanism in the EU copyright regime. The most well-known example is the oft-recurring reference to the streamlined transplantation of the US fair use doctrine in the EU copyright regime. Such an idea is problematic for various reasons, including but not limited to the fact that it works as an affirmative defence in the US, unlike exceptions and limitations in the EU, which are held to be user rights. Fair use is based on the counterbalancing of four organically developed factors that encapsulate quintessential US case law. Quite differently, the legislation of the EU and of most of the Member States is historically more dogmatic than practical, favouring doctrinal clarity over contingency. Finally, fair use is applied in a country with common law traits, which is far removed from most of the EU Member States' legal systems. In short, finding a holistic, fair-use-like catch-all flexibility might be complicated, if not a mission impossible in the current EU copyright system.

This does not, however, make it impossible to follow a more flexible – though not uniform – copyright framework for transformative reuses. Indeed, there are already certain provisions in place that offer a more liberal environment for transformative reusers. First, the Directive on Copyright in the Digital Single

Market's (CDSM) (in)famous Art. 17 clearly differentiates between mere user-uploaded and more creative user-generated contents. Article 17(1) and (4) make it obligatory for platforms to license user uploads and make it compulsory to remove these contents in the absence of such authorisation.[1] To the contrary, Art. 17(7) obliges platforms to secure the availability of user-generated contents that are based on quotation, criticism, review, caricature, parody and pastiche.[2]

Indeed, and secondly, pastiche has been implemented in multiple Member States (e.g. Germany and Hungary) only because of the CDSM Directive, but with a general scope in line with Art. 5(3)(k) InfoSoc Directive (thus, covering offline uses as well). This implementation has opened Pandora's box. The German explanatory memorandum to the copyright reform bill in 2021 called for remix, meme, gif (animations), mash-up, fan art, fan fiction and sampling to be subsumed withing the pastiche exception. Instantly, various courts tested the validity of the pastiche exception under German law, also sending the *Pelham* or *Metall auf Metall* cases[3] back to Luxembourg for a second procedure for a preliminary ruling to check whether pastiche is a "catch-all" exception under EU copyright law. The Court of Justice of the European Union (CJEU) has a great chance to revisit its own partially conflicting judgments in *Pelham*[4] (on sampling as a quotation) and *Deckmyn*[5] (on parody) to delineate a gold standard for transformative reuses.

Thirdly, the majority of the relevant court proceedings in the GenAI area are pending in the US (with exceptional cases in the United Kingdom and Germany). The relevance of the commercial text and data mining provisions of the CDSM Directive, its carve-out for rights reservation (opt-out), the possibility to introduce any remuneration regime to counter the possible negative consequences of GenAI,[6] and the new transparency requirements proposed by the AI Act have only recently

[1] Probably the first judgment on the obligation to authorise such user uploads by an online content-sharing service provider was handed down on 9 February 2024. *See* LG München I – 42 O 10792/22 https://openjur.de/u/2481878.html.

[2] The flexibilities under the CDSM Directive formed the basis of various work packages of the grandiose reCreating Europe project. The key findings of these research activities were recently published in various articles in IIC: *see* Caterina Sganga (2024) "The Past, Present and Future of EU Copyright Flexibilities" IIC 55:5–36, https://doi.org/10.1007/s40319-023-01413-9; Sebastian Felix Schwemer (2024) "Decision Quality and Errors in Content Moderation" IIC 55:139–156, https://doi.org/10.1007/s40319-023-01418-4; João Pedro Quintais, Christian Katzenbach, Sebastian Felix Schwemer, Daria Dergacheva, Thomas Riis, Péter Mezei, István Harkai and João Carlos Magalhães (2024) "Copyright Content Moderation in the European Union: State of the Art, Ways Forward and Policy Recommendations" IIC 55:157–177, https://doi.org/10.1007/s40319-023-01409-5.

[3] (C-590/23).

[4] (C-476/17) IIC 50:1156–1157 (2019), https://doi.org/10.1007/s40319-019-00876-z.

[5] (C-201/13) IIC 46:135–136 (2015), https://doi.org/10.1007/s40319-014-0276-x.

[6] *See e.g.* Benjamin Sobel (2021) "A Taxonomy of Training Data Disentangling the Mismatched Rights, Remedies, and Rationales for Restricting Machine Learning" in: Jyh-An Lee, Reto Hilty and Kung-Chung Liu (eds) *Artificial Intelligence and Intellectual Property*, Oxford University Press, pp. 236–241; Martin Senftleben (2023) "Generative AI and Author Remuneration" IIC 54:1535–1560, https://doi.org/10.1007/s40319-023-01399-4; Christophe Geiger and Vincenzo Iaia (2023) "The Forgotten Creator: Towards a Statutory Remuneration Right for Machine Learning of Generative AI" forthcoming in Computer Law & Security Review, pp. 1–15.

entered the stage. Still, there is no doubt that GenAI has the potential to act as an engine for generative and any other type of digital transformativeness.[7]

Finally, the EU has begun to signal an interest in IP-related aspects of the circular economy,[8] such as the right to repair (more akin to a consumer rights issue) or its textiles strategy. More importantly for the purposes of this editorial, a new trend or even philosophy has started to develop – namely, upcycling. Such transformative reuses of clothing, accessories and many more goods might require the review of copyright doctrine[9] (and other forms of IP, e.g. trade marks[10]) to effectively support the EU's goals to minimise the carbon footprint of European societies.

Again, the question at hand might not be whether we need any universal or holistic flexibility standard in the EU. That seems to be a rather illusory expectation. The task for us remains to recalibrate copyright flexibilities to create an environment that supports the quantitative or qualitative reliance on protected subject matter for socially desirable goals.

Funding Open access funding provided by University of Szeged.

[7] Alain Strowel (2023) "ChatGPT and Generative AI Tools: Theft of Intellectual Labor?" IIC 54:491–494, https://doi.org/10.1007/s40319-023-01321-y.

[8] Which – together with other issues listed in this editorial, too – is perfectly reflected by two editorials published in IIC recently. *See* Maria Lillà Montagnani (2023) "(Digital) Circular Economy and IPRs: A Story of Challenges and Opportunities" IIC 54:1009–1012, https://doi.org/10.1007/s40319-023-01359-y; and Bernd Justin Jütte (2023) "What Is Sust[AI]nable Intellectual Property?" IIC 54:1311–1315, https://doi.org/10.1007/s40319-023-01368-x.

[9] Péter Mezei and Heidi Härkönen (2023) "Monopolising Trash: The Critical Analysis of Upcycling under Finnish and EU Copyright Law" 18(5) Journal of Intellectual Property Law & Practice, pp. 360–366.

[10] Martin Senftleben (2024) "Developing Defences for Fashion Upcycling in EU Trademark Law" 73(2) GRUR International, pp. 99–110.