Uniformity vs Cultural Diversity: Should the copyright concept of "pastiche" be regarded as an autonomous concept of EU law?

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UNIFORMITY vs. CULTURAL DIVERSITY:
Should the copyright concept of 'pastiche' be regarded as an autonomous concept of EU law?

Master Thesis

Mentor: dr. sc. Antonija Ivančan

Zagreb, July 2024

Izjava o izvornosti

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Filipa Ledić, v.r.

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1. Introduction

The Court of Justice of the European Union (hereinafter: CJEU) is for the first time called upon to interpret and define the copyright concept of 'pastiche', enshrined in Article 5(3)(k) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter: InfoSoc Directive).[1] This request stems from a preliminary reference submitted by the German Federal Supreme Court (hereinafter: BGH) in the ongoing *Pelham* saga.[2] In its initial *Pelham* judgment, the CJEU declared that any reproduction of a sound sample infringes the reproduction right of the phonogram producer unless the sample is modified to the extent that it becomes 'unrecognisable by the ear' in the new work.[3] Now, the CJEU is faced with following questions:

'1. Is the provision limiting use for the purpose of pastiche within the meaning of Article 5(3)(k) of Directive 2001/29/EC a catch-all clause at least for artistic engagement with a pre-existing work or other object of reference, including sampling? Is the concept of pastiche subject to limiting criteria, such as the requirement of humour, stylistic imitation or tribute?'[4]
'2. Does use 'for the purpose of' pastiche within the meaning of Article 5(3)(k) of Directive 2001/29/EC require the determination of an intention on the part of the user to use copyright subject matter for the purpose of a pastiche, or is it sufficient for the pastiche character to be recognisable for a person familiar with the copyright subject matter who has the intellectual understanding required to perceive the pastiche?'[5]

The framing of these questions suggests that BGH presumes 'pastiche' to be an autonomous concept of EU law and seeks the CJEU to define it accordingly. This is not unexpected, given that in 2014, in its famous *Deckmyn* judgment, the CJEU declared 'parody', the concept enshrined in the same provision as 'pastiche', to be an autonomous concept of EU law.[6] In *Deckmyn*, the CJEU justified its decision on the grounds that Article 5(3)(k) of the InfoSoc

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[1] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, 10-19.
[2] Casanova, P., *Permissible Pastiche in Pelham II: A proposed response*, https://copyrightblog.kluweriplaw.com/2024/04/11/permissible-pastiche-in-pelham-ii-a-proposed-response/ (04.06.2024.).
[3] Case C- 476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben*, ECLI:EU:C:2019:624, paras 30 and 31.
[4] Referral C-590/23, *Pelham*, 25 Sep 2023, https://ipcuria.eu/case?reference=C-590/23 (08.06.2024.).
[5] Ibid.
[6] Case C-201/13 *Johan Deckmyn* and *Vrijheidsfonds VZW v Helena Vandersteen and Others*, ECLI:EU:C:2014:2132, paras 14-17.

Directive does not explicitly refer to the laws of the Member States for determining the meaning of 'parody'. Consequently, the CJEU deemed this lack of reference sufficient to assume jurisdiction in autonomously defining 'parody'.[7]

However, the CJEU's understanding of autonomous concepts in *Deckmyn* does not strictly follow the original formula on the determination if the concept should be regarded as an autonomous concept of EU law established by the CJEU in its 1984 *Ekro* judgment (hereinafter: *Ekro* formula).[8] *Ekro* formula stipulates that terms in EU law provisions that do not explicitly reference the laws of Member States for determining their meaning and scope should be defined autonomously and uniformly by the CJEU itself. However, before deciding if it has the authority to define such term, the CJEU must consider the legislative context of the provision and the objectives pursued by the regulations in question.[9] In other words, aim, objective, and legislative context constitute the *Ekro* formula for determining if the term should be regarded as an autonomous concept of EU law.[10]

Unfortunately, *Deckmyn* is not the first judgment in which the CJEU has deviated from the *Ekro* formula. Critics have noted the lack of justification in its reasoning on autonomous concepts, warning that the CJEU uses this interpretative tool to pursue judicial harmonisation in areas which the EU legislature intended to preserve for Member States.[11] Hence, the BGH's preliminary reference on the interpretation of the concept of 'pastiche' presents an opportunity for the CJEU to reconsider its under-explained and potentially arbitrary approach applied in *Deckmyn*. Namely, before interpreting 'pastiche', the CJEU should thoroughly examine the concept's contextual nuances and objectives as mandated by the *Ekro* formula to determine whether it is competent to define it autonomously or if its regulation should remain within the jurisdiction of Member States.

Therefore, in this paper, I will first explain the CJEU's use of its interpretative method of autonomous concepts of EU law. By analysing selected cases where the CJEU has used this method, I will assess whether the criticism of the CJEU's arbitrariness in applying this

[7] *Deckmyn* (n 6) paras 14-17.
[8] Case 327/82 *Ekro BV Vee- en Vleeshandel v Produktschap voor Vee en Vlees*, ECLI:EU:C:1984:11 para 11.
[9] Gotzen, F., *Autonomous concepts in the Case Law of the Court of Justice of the European Union on Copyright* (Lirias, KU Leuven 2020) 3.
[10] Mancano, L., *Judicial harmonisation through autonomous concepts of European Union Law: The example of the European Arrest Warrant Framework decision* (European Law Review vol. 43, no. 1, 2018) 71.
[11] Ibid.

interpretative approach is justified. After this assessment, the focus will shift to the CJEU's interpretation of selected exceptions and limitations to copyright enshrined in Article 5 of the InfoSoc Directive, considering that these judgments might influence the CJEU's decision on 'pastiche' exception. Finally, a detailed analysis of the concept of 'pastiche' will be conducted to determine whether it should be regarded as an autonomous concept of EU law.

2. Autonomous Concepts of EU Law

2.1. The Rationale behind Autonomous Concepts of EU Law

The CJEU is a 'key player' in advancing 'integration through law'[12] within the EU, primarily through its interpretation of EU law via the preliminary ruling procedure, as stipulated in Article 267 of the Treaty on the Functioning of the European Union (TFEU).[13] Through this mechanism, the CJEU has established a supranational legal order,[14] striving for uniformity and equality in the application of EU law across all Member States. In this context, a key interpretative tool employed by the CJEU is that of autonomous concepts of EU law, referred by Gotzen as the 'doctrine of autonomous concepts.'[15] By declaring certain terms and concepts as autonomous concepts of EU law, the CJEU centrally defines their substantive content, which restricts or even eliminates national discretion in their regulation.[16] This approach is particularly effective and welcomed in areas where EU-level regulation is crucial for achieving uniformity, as it serves as an additional reinforcement for reaching that goal. Such areas are generally governed by regulations, secondary EU acts envisaged to achieve uniformity as they automatically apply to all Member States upon enactment, without requiring transposition into national law.[17] In contrast, in some areas of EU law which do not seek complete uniformity, the 'doctrine of autonomous concepts' can be problematic if not used appropriately. For instance, these problems can potentially materialise in certain areas regulated by directives, where achieving uniformity is not the inherent and only aim of the EU legislator. Namely, directives require Member States to achieve the objectives set by them but allow flexibility to each Member State in how these objectives are met. Directives can involve minimum harmonisation, setting minimum standards and allowing Member States to exceed

[12] Mancano (n 10) 71.
[13] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Article 267.
[14] Mancano (n 10) 71.
[15] Gotzen (n 9) 2.
[16] Rendas, T., *Exceptions in EU Copyright Law In Search of a Balance Between Flexibility and Legal Certainty*, vol 45 (Kluwer Law International 2021) 205.
[17] European Commission, *Types of EU Law*, https://commission.europa.eu/law/law-making-process/types-eu-law_en (03.06.2024.).

these standards, or maximum harmonisation, which mandates strict adherence to the Directive's standards. [18]

Despite these distinctions, the CJEU consistently employs the already mentioned *Ekro* formula in interpreting autonomous concepts of EU law. Nonetheless, the CJEU shows a tendency not to always undertake a comprehensive analysis of the legislative context and objectives as mandated by this formula. Mancano argues that this approach grants the CJEU substantial potential for judicial harmonisation in areas where the EU legislature did not intend for the CJEU to intervene, potentially encroaching on Member States' sovereignty.[19] Therefore, it is crucial to scrutinise the CJEU's use of this interpretative method to determine whether the criticisms of arbitrariness and the encroachment on Member States' competences are justified.

2.2. Autonomous Concepts in CJEU's Case Law

In this section, I will first analyse the initial judgment in which the CJEU reiterated the *Ekro* formula, aiming to understand the initial framework envisioned by the CJEU for this interpretative method. Following this, I will examine several judgments where the CJEU deliberated on whether certain terms or concepts were autonomous concepts of EU law in areas governed by both regulations and directives. Given that, on the date of selection, EUR-LEX listed 350 CJEU's judgments mentioning autonomous concepts of EU law,[20] the judgments for analysis were filtered and chosen randomly to include cases in which the CJEU interpreted both regulations and directives. Considering that these two types of secondary legislation serve different purposes and provide varying levels of uniformity within the EU, this comparison will assess if there are any differences in the CJEU's approach to declaring terms and concepts enshrined therein as autonomous concepts of EU law. Finally, the analysis will evaluate whether the CJEU adequately justifies its decisions on autonomous concepts of EU law by adhering to all steps mandated by the *Ekro* formula.

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[18] *European Union Directives*, EUR-LEX, https://eur-lex.europa.eu/EN/legal-content/summary/european-union-directives.html (03.06.2024.).

[19] Mancano (n 10) 69; Vėlyvytė, V, *Does the Court of Justice of the European Union Respect the Limits of EU Competence?* (EU Law Analysis 2022), https://eulawanalysis.blogspot.com/2022/12/does-court-of-justice-of-european-union.html (08.06.2024.).

[20] EUR-LEX, https://eur-lex.europa.eu/homepage.html (20.06.2024.).

2.2.1. *Ekro* Formula

As previously stated, the CJEU established the *Ekro* formula in the 1984 *Ekro* case. In this case the CJEU was tasked with defining ‘thin flank’, enshrined in Commission Regulation No 2787/81.[21] To establish its jurisdiction, the CJEU formulated the *Ekro* formula, stipulating that terms in EU law that do not explicitly reference national laws should generally be given a uniform interpretation across the EU, considering the legislative context and purpose of the relevant provisions. Before deciding whether ‘thin flank’ should be regarded as an autonomous concept of EU law, the CJEU analysed several factors. Firstly, it recognised significant variations in meat processing across Member States and regions, influenced by local consumer habits and trade practices. Secondly, the CJEU examined the purpose of the regulation in question, which aimed at preventing refunds on low-value meat cuts. However, due to varying consumer habits and trade practices, a precise anatomical definition of ‘thin flank’ could not be derived solely from the regulation’s purpose. Lastly, the CJEU considered the Commission’s intention, which did not intend to harmonise meat processing across Member States. The Commission was aware of the differences in term meanings and considered them minor, not warranting changes to existing practices. Therefore, the CJEU concluded that ‘thin flank’ should not be regarded as an autonomous concept of EU law.[22]

This judgment, where the CJEU first discussed its role in defining autonomous concepts of EU law, highlights that the mere absence of an explicit reference to the laws of the Member States is insufficient to determine whether a term qualifies as an autonomous concept of EU law. Instead, the CJEU mandates that the legislative context, social context and purpose of the legislation in which the concept is enshrined must genuinely justify a uniform definition by the CJEU, considering factors such as practical implications of various national practices, the legislation’s purpose and the legislator’s intention.

2.2.2. Autonomous concepts in Regulations and Directives

Following the examination of the CJEU’s initial approach to interpreting autonomous concepts of EU law in *Ekro,* this section delves into the interpretation of such concepts within

[21] *Ekro* (n 8) para 10.
[22] *Ekro* (n 8) paras 10-16.

regulations and directives to evaluate whether the CJEU consistently adheres to the *Ekro* formula when justifying autonomous concepts enshrined therein. The selected cases were sourced from EUR-LEX.[23] Table 1 provides a systematic overview of selected cases that illustrate the CJEU's approach to interpreting autonomous concepts within regulations, while Table 2 offers a similar analysis for directives. The tables are organised to highlight the specific concept under review, the relevant regulation/directive, whether the CJEU adhered to the *Ekro* formula, and key points from each case.

Table 1. Autonomous concepts in regulations

Case	**Concept**	**Regulation**	**Adherence to *Ekro* formula**	**Key points**	**Autonomous concept**
EuroNorm[24]	Public body	Regulation 651/2014	No	No analysis of legislative context/objectives	Yes
Staatssecretaris van Justitie en Veiligheid[25]	Exit	Schengen Borders Code	No	No analysis of legislative context/objectives	Yes
Axa Belgium[26]	Third party	Staff Regulations	Yes	Thorough analysis of legislative context/objectives	Yes
Nokia[27]	Special Reasons	Regulation 40/94	Yes	Thorough analysis of legislative context/objectives	Yes
Askos Properties	Expropriation of the holding	Regulation 1974/2006	Yes	Thorough analysis of legislative context/objectives	Yes

[23] EUR-LEX, https://eur-lex.europa.eu/homepage.html (20.06.2024.).
[24] Case C-516/19 *NMI Technologietransfer GmbH v EuroNorm GmbH*, ECLI:EU:C:2020:754, paras 44-46.
[25] Case C-341/18 *Staatssecretaris van Justitie en Veiligheid v J. and Others*, ECLI:EU:C:2020:76, paras 40-41.
[26] Case C-494/14 *European Union v Axa Belgium SA*, ECLI:EU:C:2015:692, paras 21-28.
[27] Case C-316/05 *Nokia Corp. v Joacim Wärdell*, ECLI:EU:C:2006:789, paras 20-28.

EOOD[28]					
Feron[29]	Possession	Regulation 918/83	No	No analysis of legislative context/objectives	Yes
Agrarmarkt Austria[30]	Investments on the holdings/ premises	Implementing Regulation 543/2011	No	No analysis of legislative context/objectives	Yes
AT and BT[31]	Non-material damage	GDPR	No	No analysis of legislative context/objectives	Yes
MediaMarktSaturn Hagen-Iserlohn[32]	Non-material damage	GDPR	No	No analysis of legislative context/objectives	Yes
AFMB[33]	Employer	Regulation 883/2004	No	No analysis of legislative context/objectives	Yes

Table 2. Autonomous concepts in directives

Case	Concept	Directive	Adherence to *Ekro* formula	Key points	Autonomous concept
NCC Construction Danmark[34]	Incidental real estate	Sixth VAT Directive	Yes	Thorough analysis of legislative	Yes

[28] Case C-656/22 *Askos Properties EOOD v Zamestnik izpalnitelen direktor na Darzhaven fond 'Zemedelie'*, ECLI:EU:C:2024:56, paras 50-56.
[29] Case C-170/03 *Staatssecretaris van Financiën v J. H. M. Feron*, ECLI:EU:C:2005:176, paras 26-27.
[30] Case C-516/*16 Erzeugerorganisation Tiefkühlgemüse eGen v Agrarmarkt Austria*, ECLI:EU:C:2017:1011, paras 48-49.
[31] Case C-590/22 *AT and BT v PS GbR and Others*, ECLI:EU:C:2024:536, para 31.
[32] Case C-687/21 *BL v MediaMarktSaturn Hagen-Iserlohn GmbH*, ECLI:EU:C:2024:72, para 64.
[33] Case C-610/18 *AFMB e.a. Ltd v Raad van bestuur van de Sociale verzekeringsbank*, ECLI:EU:C:2020:565, paras 50-51.
[34] Case C-174/08 *NCC Construction Danmark A/S v Skatteministeriet*, ECLI:EU:C:2009:669, paras 24-32.

	transaction			context/objectives	
BMW Bank[35]	Leasing Agreement	Directive 2008/48	No	No analysis of legislative context/objectives	Yes
Brüstle[36]	Human embryo	Directive 98/44/EC	Yes	Thorough analysis of legislative context/objectives	Yes
Linster[37]	Specific act of national legislation, project	Directive 85/337/EEC	No	No analysis of legislative context/objectives	Yes
Gmina Wrocław[38]	Taxable persons	VAT Directive	No	No analysis of legislative context/objectives	Yes
Ministerio Fiscal[39]	Other authorities	Directive 2013/32/EU	No	No analysis of legislative context/objectives	Yes
Gewestelijke stedenbouwkundige ambtenaar[40] .	Framework for future development consent	Directive 2001/42	No	No analysis of legislative context/objectives	Yes
Deckmyn[41]	Parody	InfoSoc Directive	No	No analysis of legislative context/objectives	Yes

[35] Joined Cases C-38/21, C-47/21, and C-232/21, *VK and Others v BMW Bank GmbH and Others*, ECLI:EU:C:2023:1014, para 133.
[36] Case C-34/10 *Oliver Brüstle v Greenpeace eV*, ECLI:EU:C:2011:669, paras 25-29.
[37] Case C-287/98 *Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster*, ECLI:EU:C:2000:468, paras 43-44.
[38] Case C-604/19 *Gmina Wrocław v Dyrektor Krajowej Informacji Skarbowej*, ECLI:EU:C:2021:132, para 58.
[39] Case C-36/20 *PPU Ministerio Fiscal v VL*, ECLI:EU:C:2020:495, paras 53-58.
[40] Case C-24/19 *A and Others v Gewestelijke stedenbouwkundige ambtenaar van het departement Ruimte Vlaanderen, afdeling Oost-Vlaanderen*, ECLI:EU:C:2020:503, para 75.
[41] *Deckmyn* (n 6).

Marktgemeinde Straßwalchen[42]	Deep drillings	Directive 85/337	Yes	Thorough analysis of legislative context/objectives	Yes
Saudaçor[43]	Other bodies governed by public law	Directive 2006/112	No	No analysis of legislative context/objectives	Yes

Given that the analysis was based on a sample of only 21 out of 350 relevant judgments available on EUR-LEX at the time of writing, it is insufficient to draw precise conclusions. Nonetheless, the examination of selected case law highlights several inconsistencies and potential issues.

Firstly, while the CJEU frequently references and reiterates the *Ekro* formula, its application is neither thorough nor consistent. This inconsistency is apparent in both regulations and directives. Secondly, there is no clear correlation between the type of legal act (regulations or directives) and the CJEU's approach to interpreting autonomous concepts of EU law. The CJEU delivers inconsistent judgments when interpreting provisions of both types of legal acts. Thirdly, in 14 out of 21 judgments (7 concerning regulations and 7 concerning directives), the CJEU did not consider the legislative context and objectives as mandated by the *Ekro* formula. Lastly, and most notably, in all examined judgments except for the initial *Ekro* case, the CJEU consistently found the concepts under consideration to be autonomous concepts of EU law. This, combined with the CJEU's inconsistent application of the *Ekro* formula, confirms concerns about potential encroachment on Member States' competences.

Despite the small sample size, the identified issues indicate a need for further academic scrutiny, as Mancano's criticism of the CJEU for its 'competence creep' through the use of autonomous concepts of EU law appears justified. Therefore, to mitigate any inconsistencies and enhance the legitimacy of its judgments in future cases, it is crucial for the CJEU to conduct thorough examinations when determining whether a concept should be regarded as an

[42] Case C-531/13 *Marktgemeinde Straßwalchen and Others v Bundesminister für Wirtschaft, Familie und Jugend*, ECLI:EU:C:2015:79, paras 21-23.
[43] Case C-174/14 *Saudaçor – Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA v Fazenda Pública*, ECLI:EU:C:2015:733, paras 52-54.

autonomous concept of EU law, adhering strictly to the *Ekro* formula, which includes the following elements cumulatively:

1. *Express Reference*: To determine whether the provision makes an express reference to the laws of the Member States.
2. *Legislative Context*: To assess the legislative context of the provision, considering elements such as the placement and nature of the provision.
3. *Objectives*: Consider the objectives pursued by the legislation, ensuring that the interpretation aligns with the legislator's intended purpose by examining the wording of the provisions, recitals, explanatory memorandums, and other relevant elements.

Only by adhering to this approach, the CJEU can provide clearer and more predictable judgments, enhancing legal certainty and uniformity across the EU where necessary, while preserving national competences in areas where the legislative context and objectives do not indicate the need for autonomous definitions.

3. EU Copyright and CJEU's Case Law

3.1. Autonomous Concepts in a Complex EU Copyright Framework

Having examined the CJEU's general approach in determining autonomous concepts of EU law and identifying inconsistencies in its reasoning that can lead to 'competence creep,' it is crucial to elucidate why EU copyright law is particularly susceptible to these issues.

The EU copyright framework is inherently complex and multifaceted, involving both Member States and the EU in its regulation. Currently, copyright law within the EU remains fundamentally national,[44] strongly emphasising the principle of territoriality.[45] Instead of a single EU copyright code, there are 27 distinct national copyright legislations. Some aspects of copyright law, such as moral rights, are entirely under national competence and remain unharmonised.[46] Conversely, certain aspects are harmonised at the EU level through (mostly)

[44] European Parliament, Copyright Law in the EU: *Salient features of copyright law across the EU Member States* (Comparative Law Library Unit 2018) 2.
[45] van Eechoud, M. M. M., *Territoriality and the Quest for a Unitary Copyright Title* (IIC 55 2024) 86.
[46] Nordemann, J. B., Leidl, L., *German BGH: The destruction of the work does not infringe the moral rights of the author (*Kluwer Copyright Blog 2019) https://copyrightblog.kluweriplaw.com/2019/08/19/german-bgh-the-destruction-of-the-work-does-not-infringe-the-moral-rights-of-the-author/ (15.06.2024.).

directives based on Article 114 TFEU, under the rationale that harmonising national copyright laws is essential for the establishment and functioning of the internal market.[47]

The cornerstone of this harmonisation is already mentioned InfoSoc Directive, which is mixed in nature, containing measures of both full and partial harmonisation.[48] For instance, exclusive economic rights, such as reproduction and communication to the public, are subject to full harmonisation. This was clarified by the CJEU in *Funke Medien*, where the CJEU explained that Articles 2 and 3 of the InfoSoc Directive mandate the Member States to provide right holders with exclusive rights to reproduction and communication to the public.[49] These provisions unequivocally define these rights without any conditions or specific implementation measures, aiming to create a harmonised copyright legal framework that ensures a high and uniform level of protection. Consequently, Article 2 and Article 3 are considered measures of full harmonisation.[50]

Conversely, exceptions and limitations to copyright rights exemplify what Rendas refers to as a 'hybrid model' of harmonisation, blending elements of both full and partial harmonisation.[51] Full harmonisation is envisaged through an exhaustive list of exceptions and limitations, allowing only those specified in this closed list to be implemented in national copyright laws. Partial harmonisation arises from two main factors. First, the optional nature of these exceptions and limitations permits Member States to selectively adopt those they wish to incorporate into their national legislation. Second, the degree of harmonisation depends on the impact these exceptions and limitations have on the smooth functioning of the internal market, as emphasised in Recital 31 of the InfoSoc Directive.[52] Moreover, Recital 7 of the InfoSoc Directive indicates that differences in national copyright provisions that do not adversely affect the internal market's functioning do not need to be eliminated or prevented.[53]

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[47] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Article 114.
[48] Rendas (n 16) 34, 155, 164.
[49] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, ECLI:EU:C: 2019:623, paras 35-37.
[50] Ibid.
[51] Rendas (n 16) 166.
[52] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, Recital 31.
[53] Ibid., Recital 7.

Ivančan further elucidates that if the economic impact of exceptions and limitations is 'limited', Member States have greater discretion in their regulation.[54]

Additionally, there is another significant reason why copyright is particularly sensitive. As a field of law, copyright has always been closely tied to the territory and culture in which it develops, making it a major policy area where cultural concerns are paramount.[55] Thus, despite the legal basis of Article 114 TFEU,[56] copyright regulation must also address cultural concerns.[57] This necessity arises because copyright regulation considers another important objective: the EU's obligation to respect cultural diversity, as outlined in Article 167(4) TFEU. This article mandates the EU to consider cultural aspects in all its actions under the Treaties, particularly to respect and promote the diversity of its cultures.[58] As noted by Ivančan, this EU obligation is especially significant in the regulation of exceptions and limitations as 'the limitations and exceptions were given the primary role of tools for the pursuit of non-economic objectives.'[59] Essentially, this means that in order to uphold this obligation, the EU should avoid unnecessary and disproportionate interference with differences that are significant for the local cultures of the Member States, solely under the pretext of expanding the internal market.

All these points confirm the initial statement: current EU copyright regulation is complex and multifaceted. Both EU and national legislators play significant roles in regulating various aspects, with economic and non-economic objectives constantly overlapping. This is particularly evident in the context of exceptions and limitations. Thus, determining whether the EU or national legislators have jurisdiction over these exceptions and limitations requires assessing not only their impact on the internal market but also whether that impact is significant enough to necessitate EU regulation at the expense of fostering diverse local cultures. Given the sensitivity of exceptions and limitations, it is crucial to explore how the CJEU approaches their interpretation, as it will inevitably influence CJEU's interpretation of 'pastiche' exception.

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[54] Ivančan A., *EU Copyright Law Beyond the Internal Market- Critical Analysis of the Limitations and Exceptions for the Education Purposes* (Doctoral Thesis, University of Zagreb 2023) 245.
[55] Psychogiopoulou, E., *Cultural mainstreaming: the European Union's horizontal cultural diversity agenda and its evolution* (39(5) European Law Review 2014) 628.
[56] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Article 114.
[57] Ivančan (n 54) 178.
[58] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Article 167(4).
[59] Ivančan (n 54) 224.

3.2. CJEU's Interpretation of Exceptions and Limitations to Copyright

As previously explained, exceptions and limitations to copyright are not inherently intended by the EU legislator to be fully harmonised across the EU. Therefore, when the question of their interpretation arises before the CJEU, the CJEU must thoroughly assess its competence to decide on their substance. To understand what the CJEU should consider in this assessment, four judgments are of importance – *Painer, Funke Medien, Spiegel Online* and *Pelham.*[60]

3.2.1. *Painer*

The first significant judgment in this context is *Painer*,[61] where the interpretation of the 'public security' exception enshrined in Article 5(3)(e) of the InfoSoc Directive was sought.[62] The Advocate General (hereinafter: AG) Trstenjak's Opinion is a good starting point, as the CJEU closely followed it in its judgment. AG Trstenjak contended that, based on the principle of *qui potest majus, potest et minus*, if Member States possess the authority to impose constraints, they likewise have the prerogative to determine the organisation of these constraints. She further highlighted that Member States have the discretion to decide the specific circumstances under which an exception or limitation to copyright is warranted.[63] The CJEU confirmed the AG's Opinion, noting that the InfoSoc Directive does not explicitly outline the circumstances under which public security interests can justify the use of a protected work, thus granting Member States broad discretion. The CJEU explained that this discretion is appropriate because each Member State is best suited to assess public security requirements based on its distinct national context, including historical, legal, economic, and social factors. Furthermore, the CJEU concluded that this approach aligns with its case law, which holds that in the absence of sufficiently precise criteria in a directive, it is up to Member States to determine the most relevant criteria to ensure compliance within their jurisdiction.[64]

This interpretation, particularly the CJEU's final statement, suggests that when a directive lacks sufficiently precise criteria, it is the responsibility of Member States to regulate the matter.

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[60] Case C-145/10 *Eva-Maria Painer v. Standard VerlagsGmbH and Others,* EU:C:2011:239; Funke Medien (n 49); Pelham (n 3); Case C-516/17 *Spiegel Online GmbH v. Volker Beck*, EU:C:2019:625.
[61] *Painer* (n 60).
[62] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001, Article 5(3)(e).
[63] Opinion of AG Trstenjak in Case C-145/10 *Eva-Maria Painer v. Standard VerlagsGmbH and Others*, EU:C:2011:239, paras 148, 150.
[64] *Painer* (n 60) paras 100-103.

Although this may initially seem to contradict the first part of the *Ekro* formula, which states that in the absence of explicit references to Member States' laws, it is usually within the CJEU's remit to designate such concept as an autonomous concept of EU law, it actually underscores the importance of considering the legislative context and objectives. By taking these factors into account, the absence of an express reference can indeed affirm that the regulation of a concept falls within national competence.

3.2.2. *Funke Medien, Spiegel Online* and *Pelham*

The CJEU's recognition of the true intent envisioned by the EU legislator for exceptions and limitations is evident in *Funke Medien, Spiegel Online,* and *Pelham*. In these judgments, the CJEU explicitly acknowledged that the objective of the InfoSoc Directive is to harmonise only some aspects of copyright and related rights. Furthermore, the CJEU emphasised that certain provisions of the InfoSoc Directive demonstrate the EU legislature's intention to allow Member States a degree of discretion in its implementation, particularly regarding exceptions and limitations. Consequently, the CJEU determined that the extent of Member States' discretion in transposing exceptions or limitations referred to in Article 5(2)-(3) of the InfoSoc Directive must be assessed on a case-by-case basis. This assessment should consider the wording of the specific provision and the degree of harmonisation intended by the EU legislature, based on their impact on the smooth functioning of the internal market.[65]

This approach aligns closely, though not entirely, with the *Ekro* formula, which mandates the assessment of three elements: express reference, legislative context, and objectives. In *Funke Medien, Spiegel Online,* and *Pelham,* the CJEU examined the wording (similar to the express reference in the *Ekro* formula) and the degree of harmonisation intended by the EU legislature based on their impact on the internal market (addressing the objectives as required by the *Ekro* formula). However, the CJEU did not consider the legislative context in these judgments. The legislative context should not be overlooked by the CJEU, as the optional nature of exceptions and limitations further supports the argument that Member States may be better suited for their regulation. This will be elaborated in detail in the following part of this paper. Additionally, the assessment should include the EU's obligation to respect and promote

[65] *Funke Medien* (n 49) paras 39–44; *Pelham (*n 3) paras 78–85; *Spiegel Online* (n 60) paras 23–38.

cultural diversity, ensuring that market harmonisation does not disproportionately hinder the flourishing of diverse local cultures.

4. The Autonomous Concept of Parody

Having explained the elements the CJEU must assess when determining its competence to define a particular exception or limitation, it is instructive to analyse its judgment in *Deckmyn*[66] regarding the 'parody' exception, as this exception is enshrined in the same provision as the 'pastiche' exception. By examining *Deckmyn*, it can be determined whether the CJEU adhered to the approach mandated by the *Ekro* formula and, by extension, consider how this approach might apply to the 'pastiche' exception.

At first glance, it is evident that in *Deckmyn*, the CJEU did not adequately adhere to the *Ekro* formula. The CJEU concluded that 'parody' is an autonomous concept of EU law solely on the grounds that Article 5(3)(k) of the InfoSoc Directive does not reference national laws, justifying its decision with the 'need for uniform application of EU law and the principle of equality.'[67] Furthermore, the CJEU highlighted that the optional nature of the 'parody' exception does not undermine this interpretation, as a non-harmonised approach would conflict with the InfoSoc Directive's primary goal of ensuring the smooth functioning of the internal market.[68]

The CJEU's decision in Deckmyn is not unexpected, considering the general inconsistencies and arbitrary application of the *Ekro* formula by the CJEU, as previously discussed. This approach aligns with Griffiths' and Rosati's observations that the CJEU increasingly interprets copyright law to build a comprehensive EU copyright framework,[69] often circumventing the legislator to further expand the market for copyright goods.[70] Rosati pointed out that *Deckmyn* reveals a much narrower scope for Member States to 'fine-tune' the breadth of national exceptions and limitations than previously assumed.[71] Rendas adds that if the CJEU continues

[66] *Deckmyn* (n 6).
[67] Ibid.
[68] Ibid.
[69] Griffiths, J., *The Role of the Court of Justice in The Development of European Union Copyright Law*, in Irini Stamatoudi & Paul Torremas (eds.), *EU Copyright Law: A Commentary 1098* (Edward Elgar 2014) 1099.
[70] Rosati, *Just a Laughing Matter? Why the CJEU Decision in Deckmyn is Broader than Parody* (52(2) Common Market Law Review 2015) 522-523.
[71] Rosati (n 70) 521.

to apply *Deckmyn* reasoning to future interpretations of exceptions and limitations in Article 5, this rationale will likely extend to other exceptions in Article 5, as most do not reference national law[72] Given the risks associated with this declaratory and unjustified approach, it is crucial to highlight the shortcomings of the *Deckmyn* decision.

Firstly, the CJEU failed to consider the contextual nuances surrounding the 'parody' exception and its optional nature under the InfoSoc Directive. Contrary to the CJEU's conclusion, the optional nature of provisions on exceptions and limitations weakens the argument for considering these provisions as autonomous concepts of EU law. Namely, when each of the 27 Member States has the flexibility to choose from a range of exceptions and limitations to incorporate into their national legal frameworks, achieving full harmonisation becomes inherently unfeasible.[73] At best, this approach may promote uniformity and equality only among Member States that have chosen to implement these exceptions, but it falls short of achieving uniformity across the entire EU. As Silke von Lewinski rightly points out, even if these provisions are uniformly defined by the CJEU, true uniformity cannot be achieved as long as Member States have the option to implement them in their legislation.[74] Therefore, the CJEU's argument that such an interpretation would contribute to uniformity and ensure the smooth functioning of the internal market is hardly convincing.

Regarding objectives, two crucial aspects must be assessed when interpreting exceptions and limitations to copyright. The first is the economic objective, which posits that the degree of harmonisation of exceptions and limitations depends on their impact on the smooth functioning of the internal market.[75] As per Recital 7 of the InfoSoc Directive, if the impact is not significant, full harmonisation is unnecessary, and differences in interpretation across the Member State can remain.[76] The second is the non-economic objective, which is the EU's obligation to respect and promote cultural diversity. This ensures that the economic objective does not disproportionately prevail at the expense of cultural diversity. In terms of the economic objective, the CJEU completely neglected to address whether varying interpretations of 'parody' indeed have any negative impact on the smooth functioning of the internal market.

[72] Rendas (n 16) 206.
[73] Ibid 166.
[74] von Lewinski, S., *The Future of EU Copyright Legislation - Certain Issues* (2015) 4 in Rendas (n 6).
[75] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, Recital 31.
[76] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, Recital 7.

Similarly, regarding the non-economic, the CJEU failed to evaluate whether the potential economic impact of the 'parody' exception justifies its regulation at the expense of cultural diversity.

Considering all the above, the CJEU should have exercised greater caution in determining whether 'parody' represents an autonomous concept of EU law by conducting a thorough *Ekro* formula analysis. This approach would not only legitimise its decision but also establish a strong and justified precedent for future cases, such as the case at issue on the interpretation of the 'pastiche' exception. Consequently, the *Deckmyn* approach should be disregarded and not applied to the interpretation of 'pastiche'. Instead, the CJEU should adhere to the *Ekro* formula, supplemented by the reasoning in *Funke Medien*, *Spiegel Online*, and *Pelham*, which requires that the wording, economic and non-economic objectives and the legislative context are taken into account.

5. Pastiche vs. Parody: Distinct or Analogous Concepts?

Having examined how the CJEU uses its interpretative method of autonomous concepts of EU law, explained the current copyright framework, and analysed the CJEU's interpretation of exceptions to copyright with a particular focus on the 'parody' exception, it is now appropriate to address the central question of this paper: should 'pastiche' be regarded as an autonomous concept of EU law?

Before answering this question, it is essential to consider the critics who have commented on pastiche from a legal perspective so far. Namely, most critics do not question the determination of 'pastiche' as an autonomous concept of EU law, presuming it should be regarded as such based on the *Deckmyn* judgment. For instance, Mittal argues that since the CJEU recognised 'parody' as an autonomous concept of EU law, the same should apply to 'pastiche' because the objectives of the InfoSoc Directive necessitate the autonomous meaning of all terms in Article 5(3)(k) of the InfoSoc Directive, including 'pastiche'.[77] Similarly, Mezei, Jütte, Sganga, and Pascault assert that, since Article 5(3)(k) of the InfoSoc Directive does not define 'pastiche' and makes no express reference to Member States' laws, the CJEU has the

[77] Mittal, A., *Parody vs. Pastiche in the Pelham Saga: Copyright Boundaries Explored in European and Indian Contexts* (IP Press 2023), https://www.theippress.com/2023/10/19/parody-vs-pastiche-in-the-pelham-saga-copyright-boundaries-explored-in-european-and-indian-contexts/ (17.06.2024.).

competence to define it as an autonomous concept of EU law. They further support their argument with the CJEU's decision in *Deckmyn* regarding 'parody', as it is enshrined in the same provision as 'pastiche'.[78] Hudson shares a similar view.[79]

These conclusions suggest that these academics assume 'pastiche' and 'parody' to be analogous concepts, which contradicts their further arguments. For example, Mittal highlights the importance of distinguishing between these concepts, as they represent different ways individuals exercise their freedom of expression and engagement with existing works. She argues that not making distinction between them would oversimplify the complex landscape of artistic creativity and potentially limit their legal protection.[80] Hudson contrasts 'pastiche' and 'parody' based on their intention and impact,[81] citing Hoesterey's description of parody as involving satirical, critical, or polemical intent, while pastiche borrows appreciatively and playfully from previous works.[82] Similarly, Mezei, Jütte, Sganga, and Pascault conduct separate analyses of the development of the concept of 'pastiche' and advocate for its distinct treatment from 'parody' within copyright law. [83]

Given that these academics acknowledge the differences between 'parody' and 'pastiche', it is unclear why they automatically accept the stance that 'pastiche' should be regarded as an autonomous concept of EU law simply because the CJEU determined 'parody' as such. In fact, they seem to overlook the crucial CJEU reasonings in *Funke Medien*, *Spiegel Online*, and *Pelham*, which confirm that determination of who has a competence to regulate an exception should be assessed on a case-by-case basis, following criteria such as wording, economic and non-economic objectives, and legislative context. Given all the above, regardless of the determination of 'parody' in *Deckmyn* as an autonomous concept of EU law, the CJEU must assess its authority to define 'pastiche' separately, considering the aforementioned factors. Hence, this analysis will be conducted in the following sections of this paper.

[78] Mezei, P. and others, *Oops, I Sampled Again … the Meaning of "Pastiche" as an Autonomous Concept Under EU Copyright Law* (55(8) IIC 2024) 20.
[79] Hudson, E., *The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting?* (Intellectual Property Quaterly 2017(4)) 3.
[80] Mittal (n 77).
[81] Hudson (n 79).
[82] Hoesterey, I., *Pastiche: Cultural Memory in Art, Film and Literature* (Indiana University Press 2001) 14.
[83] See further: Mezei (n 78) 6-19 and 22-23.

6. What Is Even 'Pastiche'?

6.1. Complexities in Determining Pastiche's Usual Meaning

Before the assessment of whether 'pastiche' should be regarded as an autonomous concept of EU law, it is necessary to consider whether it has its usual meaning in everyday language. Although the CJEU typically addresses a concept's usual meaning only after determining it as an autonomous concept of EU law, understanding the usual meaning of 'pastiche' is crucial for identifying the objectives behind its regulation. Namely, as observed by Kreutzer, 'pastiche' has a long and varied history in different disciplines and legal traditions but lacks its consistent usual meaning.[84] This inconsistency might indicate that pastiche is not suitable for being defined as an autonomous concept of EU law. The factors that the CJEU considers when assessing the concept's usual meaning are best exemplified in AG Cruz Villalón's *Opinion in Deckmyn* regarding 'parody'. AG Cruz Villalón refers to dictionary definitions of the concept, its understanding in different art and communicative disciplines, and regulation in different legal systems.[85] In that regard, the CJEU draws inspiration from common characteristics of the concept across those different fields in order to establish a usual meaning that encompasses all these common characteristics. Therefore, to determine if 'pastiche' has such a usual meaning, I will examine all these factors in the following sections.

6.2. Dictionary Meaning of 'Pastiche'

Given that 'pastiche' is a relatively obscure term, its definition is not widely available in many dictionaries. The Table 3 references a selection of dictionaries based on both the etymological origin of the term and its cultural and legal contexts. Thus, the Italian origin of the word '*pasticcio*' makes Italian dictionaries a logical starting point to understand its foundational meaning. Additionally, the French dictionary definition of 'pastiche' is relevant because the concept of 'pastiche' as a copyright exception originates from France, who then initiated the inclusion of pastiche in the list of exceptions to exclusive rights in the InfoSoc Directive.[86] Finally, definitions from renowned English-language dictionaries and specialised sources are considered. While these are derived from common law systems, they are recognised

[84] Kreutzer, T., *The Pastiche in Copyright Law* (Gesselschaft für Freiheitsrechte 2022) 4.
[85] Case C-201/13 *Deckmyn*, Opinion of AG Cruz Villalon, para. 57.
[86] Hudson (n 79) 13.

and referenced by EU academics[87] and can provide a general guide to the term's usual meaning in a broader context.

Table 3. Dictionary definitions of pastiche

Country	Term	Dictionary	Definition
Italy	pasticcio	Corriere della Serra[88]	1. Dish composed of a pastry base filled with various ingredients and baked in the oven. 2. An opera composed of pieces from various composers, popular in the 18th century.
Italy	pastiche	Treccani[89]	1. Literary, artistic, or musical work in which the author deliberately imitates the style of another author (or multiple authors). 2. A composition, mainly literary or musical, resulting from the juxtaposition of fragments of different works by one or more authors using different styles and languages.
France	pastiche	Larousse[90]	Literary or artistic work in which the style or manner of a writer or artist is imitated, either to deceive or for satirical purposes.
UK	pastiche	Merriam-Webster[91]	1. A literary, artistic, musical, or architectural work that imitates the style of previous work. 2. A musical, literary, or artistic composition made up of selections from different works.
UK	pastiche	Oxford Dictionary[92]	An artistic work in a style that deliberately imitates that of another work, artist, or period.
UK	pastiche	Oxford Dictionary of Art	1. A work of art that imitates the style of another work, artist, or period: more specifically, in the visual arts.

[87] For example: Mezei (n 78) 6.
[88] Corriere Della Serra Dictionary, https://dizionari.corriere.it/dizionario_italiano/P/pasticcio.shtml (14.06.2024.).
[89] Treccani Dictionary, https://www.treccani.it/vocabolario/pastiche/ (14.06.2024.).
[90] Larousse Dictionary, https://www.larousse.fr/dictionnaires/francais/pastiche/58555 (14.06.2024.).
[91] Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/pastiche (20.04.2024.).
[92] Oxford Dictionary, https://www.oxfordlearnersdictionaries.com/definition/english/pastiche (21.06.2024.).

		and Artists[93]	2. A picture or other work that (often with fraudulent intent) imitates the style of a particular artist by borrowing and rearranging motifs from their authentic works.

From these definitions, it is evident that the usual dictionary meaning of 'pastiche' primarily focuses on the imitation of a style. However, this is not particularly useful from the perspective of copyright law. Namely, style is typically excluded from the concept of protected copyright subject matter, as it has been recognised by the academics as an subjective concept in the scope of ideas rather than an expression.[94] This is why Silke von Lewinski and Michel Walter rightly argue that the reference to 'pastiche' in the InfoSoc Directive was not strictly necessary since copyright protection does not extend to mere styles.[95] Thus, while dictionary definitions provide a foundational understanding of the term, they fall short of offering a comprehensive legal interpretation needed for potential copyright definition.

6.3. The Evolution of Pastiche's Meaning Over the Centuries

Döhl argues that the concept of 'pastiche' has a long and diverse history in aesthetics, criticism, and artistic practice, going beyond simple stylistic imitation.[96] Ortland and Dyer point out that historically, there have been at least eight distinct interpretations of pastiche within the art field.[97] Therefore, while the dictionary definition of 'pastiche' may not be particularly relevant from a copyright perspective, it is crucial to explore its historical development. Table 4 systematically summarises the historical meanings of pastiche.

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[93] Oxford Dictionary of Arts and Artists, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100309628 (22.06.2024.).
[94] Hudson (n 79) 11; Mezei (n 78) 21; Kreutzer (n 84) 4.
[95] Walter, M. M., von Lewinski, S., *European Copyright Law: A Commentary (OUP* 2010) 1055.
[96] Döhl, F., *On the New Significance of the Pastiche in Copyright Law* in book: *Operatic Pasticcios in 18th-Century Europe* (2021) 1.
[97] Ortland, E., *Pastiche im europäischen Sprachgebrauch und im Urheberrecht* (Intellectual Property Journal 2022) 3, 17-19; Dyer, R., *Pastiche* (Routledge 2006) 7-9.

Table 4. Historical meanings of pastiche in different (art) disciplines[98]

PERIOD	Meaning of 'pastiche'
16th century	(1) Artistic production of artificial stones (2) Recombinative and decorative use of old/antique building materials
17th century	(3) Ironic/pejorative imitation of characteristic motifs and stylistic elements, predominantly of paintings (occasionally counterfeiting or plagiarizing)
18th century	(4) Mixed compositions ('mélange' or 'composition mêlée') of paintings, and later also of musical, literary, and architectural works (5) Theatre/opera in a recombinative manner ('Pasticcio Opera') (6) Imitations of the style of literary works
19th century	7) Satirical/critical exaggeration (moving pastiche closer to parody and caricature) (8) Anachronistic recreation of works of faded ages

These varied meanings confirm that 'pastiche', throughout its historical development, has been far more than mere stylistic imitation. However, the concept's evolution has been so diverse and dynamic that it is impossible to derive any common characteristics, rather than that it is ambiguous and multifaceted concept. Mezei, Jütte, Sganga, and Pascault correctly note that 'pastiche' in art does not have a set of common characteristics; instead, it includes diverse understandings and manifestations that frequently contradict one another. [99]

[98] Table made in accordance with Ortland (n 97); Dyer (n 97).
[99] Mezei (n 79) 6.

6.4. Perception of Pastiche in Contemporary Practices

The fluidity and diversity of 'pastiche' has persisted even in contemporary times. According to Hoestrey, 'pastiches' are now prevalent in various traditional and modern art and communicative fields.[100] For example, in 'classic' art forms such as painting, sculpture, and film, 'pastiche' manifests through the use of distinct imagery or elements from other artworks while infusing the 'pastiche' artist's unique style.[101] Quentin Tarantino's films exemplify 'pastiche' in the film industry, as he frequently incorporates plots, characteristics, and themes from other films to create his movies.[102] The rise of user-generated content (hereinafter: UGC) on platforms like YouTube and TikTok has introduced new forms of 'pastiche'.[103] For example, a 'pastiche meme' combines someone else's image with new text to create a new work. 'Pastiche mashups' represent video or music collages composed of multiple sources. 'Pastiche fan art' involves using recognisable elements from pre-existing works to pay tribute to those works. 'Fan fiction' is created when amateur writers use established characters and settings to tell new stories, openly acknowledging their use of existing creations for the pleasure of storytelling. [104]

These examples illustrate a fraction of the wide array of uses where 'pastiche' is present today. Given their diversity and constant evolution, deriving common characteristics of the concept in today's art and communicative fields is exceedingly difficult. Richard Dyer aptly notes that 'the word pastiche is in practice extremely elastic,'[105] leading to 'generally fruitless discussion about whether such and such really is pastiche.'[106] Such debates are further complicated by inevitable technological developments that will give rise to new forms of pastiche. Hence, even if a consensus on the concept's meaning is achieved today, it is highly likely that this definition would soon become outdated and ineffective.[107]

[100] Hoesterey, I. (n 82) 9.
[101] Castles, S., *What is pastiche art?* (2022), https://bluethumb.com.au/blog/art-styles/what-is-pastiche-art/ (21.05.2024.).
[102] Hellerman, J., *What is the Pastiche Definition? (*2024), https://nofilmschool.com/pastiche-definition (21.05.2024.).
[103] Kreutzer (n 84) 5.
[104] Pastiche, *Poem Analyisis*, https://poemanalysis.com/genre/pastiche/ (19.06.2024.).
[105] Dyer, R., *Pastiche* (Routledge 2007) 17.
[106] Ibid.
[107] Jacques, S., *The Parody Exception: Revisiting the Case for a Distinct Pastiche Exception* (Kluwer Copyright Blog 2023) https://copyrightblog.kluweriplaw.com/2023/10/05/the-parody-exception-revisiting-the-case-for-a-distinct-pastiche-exception/ (11.05.2025.).

6.5. Copyright significance of 'Pastiche' in Legal Systems of Member States

Finally, it is crucial to examine the legal frameworks and judicial practices of Member States that have implemented the 'pastiche' exception. However, this analysis is challenging for several reasons. Firstly, in the two decades following the implementation of the InfoSoc Directive, only one in four Member States adopted a general 'pastiche' exception as outlined in Article 5(3)(k) of the InfoSoc Directive in their national laws, resulting in limited adoption and significant fragmentation.[108] For example, some Member States, such as Latvia, Germany, Ireland, Malta, and Czechia, chose to directly transpose Article 5(3)(k).[109] In contrast, Belgium, Croatia, France, and Poland introduced additional specific elements.[110] Luxembourg, Estonia, and Lithuania included exceptions for 'parody' and 'caricature' but excluded 'pastiche.'[111] Member States that have not implemented the general Art. 5(3)(k) exception include Denmark, Austria, Bulgaria, Greece, Finland, Italy, Sweden, and Portugal.[112] Secondly, the enactment of Directive 2019/790 on copyright and related rights in the Digital Single Market (hereinafter: DSM Directive), particularly Article 17(7), made the 'pastiche' exception mandatory only for users uploading content on online content sharing service providers (hereinafter: OCSSPs).[113] Beyond this provision, Member States still have the discretion to implement the general optional 'pastiche' exception from the InfoSoc Directive. To date, Member States that did not transpose the 'pastiche' exception from the InfoSoc Directive, with the exception of Germany, have only literally transposed Article 17(7) of the DSM Directive.[114] Thirdly, neither the EU legislator nor the Member States that have implemented the 'pastiche' exception have provided a definition for this exception. [115] Lastly, unlike 'parody', 'pastiche' has not been extensively addressed in national judicial decisions, with only a few cases arising from France and Germany.[116]

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[108] Bischoff, S., *The dawn of pastiche: First decision on new German copyright exception* (Kluwer Copyright Blog, 2023) https://copyrightblog.kluweriplaw.com/2023/06/07/the-dawn-of-pastiche-first-decision-on-new-german-copyright-exception/ (17.06.2024.).
[109] Copyright Exceptions, *Use for the purpose of caricature, parody or pastiche (Art. 5.3(k) InfoSoc)*, https://www.copyrightexceptions.eu/exceptions/info53k/ (19.06.2024.).
[110] Ibid.
[111] Ibid.
[112] Mezei (n 79) 15.
[113] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance) PE/51/2019/REV/1 OJ L 130, 17.5.2019, Article 17(7).
[114] Bischoff (n 108).
[115] Mezei (n 79) 20.
[116] Ibid 15.

These factors indicate that there is currently insufficient information to understand the perception of 'pastiche' from a copyright perspective across Member States' legal systems, making it difficult to identify a consistent interpretation pattern. However, it remains necessary to analyse the available information from Member States that have implemented the 'pastiche' exception and have relevant judicial practice on this matter, namely France and Germany.

6.5.1. 'Pastiche' in French Copyright Law

As previously mentioned, the 'pastiche' exception originates from French copyright law, and France initiated its inclusion in the InfoSoc Directive. This exception was incorporated into French law in 1957[117] via Article L. 122-5-4° of the French Intellectual Property Code (hereinafter: CPI), which states: 'Once a work has been disclosed, the author may not prohibit: […] 4° parody, pastiche, and caricature, observing the rules of the genre.'[118] This provision remained unchanged after the enactment of both the InfoSoc and DSM Directives. French law does not distinguish between parody, pastiche, and caricature. Vivant and Bruguière assert that the distinction lacks significant practical importance, often referring to the 'parody exception' in a generic sense.[119] Similarly, Sabine Jacques considers 'parody' to include 'caricature', 'pastiche', and even 'satire'.[120] French case law reinforces this perspective. For instance, in its case *SAS Arconsil v. Sté de droit belge Moulinsart SA*, the Paris Court of Appeal referred to Art. L. 122-5-4° CPI generically as the 'parody exception,' stating it 'benefits all forms of work, without distinction for the genre to which they belong.'[121] Caron commented on this decision, reaffirming that 'parody, caricature, and pastiche are all subject to the same legal regime.'[122]

6.5.2. 'Pastiche' in German Copyright Law

Before the DSM Directive, the 'pastiche' exception was not included in German copyright law. It was introduced into German Copyright Act following the requirement from Article 17(7) of the DSM Directive. In response, the German legislator not only incorporated the 'pastiche' exception as required by the DSM Directive but also established a general 'pastiche' exception

[117] Mezei (n 79) 8.
[118] Art. L. 122-5-4° CPI- French Intellectual Property Code.
[119] Vivant M, Bruigiere JM, *Droits d'auteur et droits voisins* (Dalloz, Précis, 4th ed. 2019) 666.
[120] Jacques S, *The parody exception in copyright law*, (Oxford University Press 2019) 22.
[121] CA Paris, 18 February 2011, No. 09/19272, *SAS Arconsil v. Sté de droit belge Moulinsart SA.*
[122] Caron C, *Exception de parodie: qui novi? Communication Commerce électronique* (2012) 1–3.

as specified in Article 5(3)(k) of the InfoSoc Directive.[123] The German legislator highlighted the significance of 'pastiche' for freedom of arts and its role as an essential part of culture, applicable to both traditional and modern transformative uses, such as memes, GIFs, fan art, sampling, remixes, mashups and fan fiction.[124]

Following the introduction of the 'pastiche' exception in Germany, German courts have begun to interpret it. There are two key cases on this matter, one in transformative fine arts[125] and other regarding music sampling,[126] the latter leading to a preliminary reference on the interpretation of 'pastiche' to the CJEU in *Pelham 2*. These cases demonstrate that the German courts recognise 'pastiche' as encompassing more than mere stylistic imitation. Instead, they recognise it as the use of recognisable elements from pre-existing works in a new work, provided the new work engages in a dialogue with the original.[127] They justify this open approach by stating that 'No artist starts from scratch in a vacuum.'[128] This indicates a broad interpretation of 'pastiche' by German courts, a stance that is particularly notable given the generally narrow interpretation of exceptions within EU law.

Given the aforementioned points, although the 'pastiche' exception is a recent addition to German copyright law, its development in German courts and referral to the CJEU highlight Germany's strong commitment to effectively utilising this exception. This could potentially alter the strict interpretation of exceptions and limitations to copyright within the EU. Further support for this shift comes from Kreutzer, who was commissioned by the German NGO Gesellschaft für Freiheitsrechte e.V. (hereinafter: GFF) to propose a copyright-specific definition of 'pastiche'.[129] Kreutzer suggested defining 'pastiche' as 'a distinct cultural and/or communicative artifact that borrows from and recognisably adopts the individual creative elements of published third-party works,'[130] a definition he believes is sufficiently broad for dynamic application yet precise enough to distinguish 'pastiche' from mere copying. This

[123] Mezei (n 79) 4.
[124] Explanatory Memorandum, BT-Drs. 17/27426, p. 91. (https://dserver.bundestag.de/btd/19/274/1927426.pdf).
[125] LG Berlin, 2.11.2021 (15 O 551/17) – *Zulässige künstlerische Auseinandersetzung mit einem übernommenen Werk–The Unknowable,* 22(5) (Gewerblicher Rechtsschutz und Urheberecht Rechtsprechungs-Report 2022) 216.
[126] OLG Hamburg, 28 April 2022 (5 U 48/05) – *Erlaubtes Tonträger-Sampling bei Überführung in selbstständiges Werk – Metall auf Metall III*, (124(16) Gewerblicher Rechtsschutz und Urheberecht 2022) 1217.
[127] Ibid 1217, para. 70; LG Berlin (n 125) 216, para. 28.
[128] Bischoff (n 108).
[129] Kreutzer, T., Reda, F., *The Pastiche in Copyright Law – Towards a European Right to Remix* (Kluwer Copyright Blog 2023) https://copyrightblog.kluweriplaw.com/2023/03/13/the-pastiche-in-copyright-law-towards-a-european-right-to-remix/ (18.06.2024.).
[130] Kreutzer (n 84).

definition could potentially influence all Member States and even be adopted by the CJEU as an autonomous definition of ‘pastiche’ under EU law.[131]

6.5.3. Concluding Remarks on the Copyright Meaning of ‘Pastiche’ in Different Member States

From the analysis of the copyright systems of Member States and their regulation of ‘pastiche’, it is clear that the treatment of ‘pastiche’ is fragmented and not extensively developed, which makes it challenging to draw general conclusions about its status as a ‘living concept’ in different national courts, yet alone to distill its common characteristics. The majority of Member States who implemented this exception have little to no practice on this issue, and those that do, namely France and Germany, differ significantly. France tends to equate ‘pastiche’ with ‘parody’, requiring a humorous element, while Germany adopts a more open interpretation to ensure the ‘pastiche’ remains relevant.

6.6. Pastiche: A Concept with No Usual Meaning

After an extensive analysis across various fields where the concept of ‘pastiche’ is present, it is evident that it lacks a consistent, usual meaning. In each context in appears, ‘pastiche’ is a fluid concept that evolves, expands, and even changes its meaning entirely. Given this fluidity, Mezei, Jütte, Sganga, and Pascault argue that the CJEU should define the concept of ‘pastiche’ autonomously. They propose that in defining this concept, the CJEU omits the ‘usual meaning’ element and instead focus solely on the legislative context and objectives of Article 5(3)(k) of the InfoSoc Directive. Interestingly, they acknowledge the difficulty of defining ‘pastiche’ due to its varying interpretations and the unpredictability of its evolution and emphasise that this variability makes it challenging to establish a single EU-wide definition, suggesting that such an endeavor might be impractical.[132] Kreutzer shares this view, emphasising the need for a definition that accommodates the term’s dynamic and evolving nature.[133] However, these opinions overlook a critical point: precisely the lack of a usual meaning indicates that the concept may not be suitable for any definition, let alone a uniform one by the CJEU. To determine if this is indeed the case, it is crucial to examine the concept of ‘pastiche’ through the *Ekro* formula.

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[131] Kreutzer (n 123).
[132] Mezei (n 79) 19.
[133] Kreutzer (n 84) 4.

7. SHOULD PASTICHE BE REGARDED AS AN AUTONOMOUS CONCEPT OF EU LAW?

7.1. *Ekro* Formula and 'Pastiche'

As already elaborated in this paper, applying the *Ekro* formula to exceptions and limitations in copyright involves the assessment of several elements: wording, legislative context, and economic and non-economic objectives. Therefore, in this section, I will analyse 'pastiche' through each of these elements to determine if the CJEU should regard 'pastiche' as an autonomous concept of EU law.

7.1.1. *Ekro* formula: WORDING

'Pastiche' is enshrined as an exception in Article 5(3)(k) of the InfoSoc Directive and Article 17(7) of the DSM Directive. Neither of these provisions, nor the recitals of these directives, define the concept of 'pastiche' or contain an express reference to the laws of the Member States for its definition. Additionally, the Explanatory Memorandums of both directives remain silent on its meaning. Therefore, to determine if 'pastiche' should be regarded as an autonomous concept of EU law, other elements of the *Ekro* formula must be assessed.

7.1.2. *Ekro* formula: OBJECTIVES AND LEGISLATIVE CONTEXT

As already detailed, when interpreting exceptions and limitations to copyright, two crucial objectives must be assessed: the economic objective and the non-economic objective. The economic objective concerns the impact of exceptions and limitations on the smooth functioning of the internal market – the degree of harmonisation required for these exceptions and limitations depends on whether they (significantly) impede internal market functioning. If an exception does not disrupt the internal market or fails to meet the threshold necessitating the CJEU's intervention, full harmonisation is unnecessary. Consequently, variations in interpretation across Member States can be tolerated. On the other hand, the non-economic objective emphasises the EU's obligation to respect and promote cultural diversity. According to Article 167(4) TFEU, the EU must consider cultural aspects in all its actions under the Treaties, ensuring that the economic objective does not 'overshadow' cultural diversity. Hence, in this part of the analysis, it is crucial to elaborate on of both of these opposing objectives to determine which interest should prevail in regulating 'pastiche'.

Regarding the assessment of the economic objective, two already detailed recitals of the InfoSoc Directive are relevant: Recital 7 and Recital 31. Recital 7 states that differences that do not adversely affect the functioning of the internal market need not be removed or prevented. Recital 31 emphasises that the degree of harmonisation of certain exceptions and limitations depends on their impact on the smooth functioning of the internal market. The CJEU has not yet explicitly defined the threshold of impact that necessitates its intervention in the regulation of exceptions and limitations to copyright. However, a useful guide can be found in the CJEU's reasoning in *Vodafone*, where it explained a three-part test for the validity of harmonisation measures under Article 114 TFEU. This test includes:

1. Measures necessitating EU action must *genuinely aim* to enhance conditions for the internal market's establishment and functioning.[134]
2. Abstract risks of infringing fundamental freedoms or distorting competition are insufficient; differences must *directly affect* the internal market or cause *significant competition distortion.*[135]
3. Preventive harmonisation targeting potential trade obstacles from divergent national laws is permissible, provided such *obstacles are likely to emerge*.[136]

Applying this test to determine whether the CJEU should define 'pastiche', the analysis would proceed as follows:

1. Examination whether a CJEU's autonomous definition of 'pastiche' would *genuinely aim* to enhance conditions for the internal market's establishment and functioning.
2. Determination whether national differences regarding 'pastiche' *directly affect* the internal market or cause *significant competition distortion*.
3. The assessment if those differences represent *potential trade obstacles likely* to emerge.

Although Weatherill observes that this threshold is relatively low, especially regarding preventive harmonisation, implying that almost any divergence could likely disrupt the internal

[134] Case C-58/08 *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform*, ECLI:EU:C:2010:321, para 32.
[135] Ibid.
[136] Ibid para 33.

market,[137] there are compelling arguments that suggest ‘pastiche’ does not meet even this low threshold.

In regards the first condition, the optional legislative context behind ‘pastiche’ exception is of importance, as it proves that CJEU’s action would not genuinely improve the internal market’s establishment and functioning. Namely, although ‘pastiche’ became mandatory for uses under Article 17(7) of the DSM Directive, it still remains optional under the InfoSoc Directive for all other uses. Thus, even if ‘pastiche’ was defined autonomously by the CJEU, the conditions on the internal market would hardly be improved. To repeat what was already detailed in this paper – as long as each Member State can choose from various exceptions and limitations to implement into their own national laws, the establishment of the complete and functioning internal market is unfeasible. Therefore, with the CJEU’s determination of ‘pastiche’ as an autonomous concept of EU law, the first condition of this test would not be met.

The second and third condition are examined together as they both concern the impact of national divergences on the internal market. When it comes to art and communicative practices, including the use of ‘pastiche,’ it is challenging to establish how their different interpretations might hinder the smooth functioning of the internal market. Even the mandatory application of this exception for uses on OCSSPs under Article 17(7) of the DSM Directive does not change this stance. Ivančan’s observation about creative works is relevant here: ‘… while it is true that creative works have commercial value and could be seen as commodities on the market, it must not be forgotten that those works are in fact a medium through which knowledge, information, and culture are transmitted.’[138] The latter is particularly evident in ‘pastiche’ works. As emphasised by Kreutzer, even though ‘pastiche’ works are widespread, especially on the internet and OCSSPs, their primary purpose is not to generate revenue but to tribute, appreciate, criticise, or comment on previous works, society, and culture.[139] This implies that the concept of ‘pastiche’ has minimal, if any, economic impact. Consequently, differences in its interpretation should not be seen as directly creating, or likely to create, obstacles to cross-border trade and the smooth functioning of the internal market. However, since the EU often

[137] Weatherill, S., *The Limits of Legislative Harmonisation Ten Years after Tobacco Advertising: How the Court’s Case Law has become a “Drafting Guide”* (Cambridge University Press 2019) 833.
[138] Ivančan (n 54) 102.
[139] Kreutzer (n 84).

tends to extend its competence beyond the legal basis of Article 114 TFEU,[140] it is crucial to also consider non-economic objectives, as they further support this stance.

Namely, the fluidity and variability of 'pastiche' across different legal traditions and art fields underscore its creative significance and the importance of diverse local cultures, which the EU is obligated to promote and respect in all its actions under the Treaties. As observed by Mezei, Jütte, Sganga, and Pascault: 'pastiche is significantly shaped by its geographical, cultural and social "home".'[141] Thus, considering that the EU consists of 27 Member States with different cultural traditions, it is to be expected that different understandings of pastiche and its scope have been developed in their artistic milieus. Defining pastiche as an autonomous concept of EU law would, thus, result in certain uses being recognised as pastiche on a national level, left outside of the scope of pastiche on EU level. This would, given the minimal economic impact of divergences regarding the 'pastiche' exception, disproportionately hinder the development of diverse local cultures. Frosio's observations aptly summarise this perspective: 'while some degree of copyright regulation is necessary, excessive regulation'[142] (in this instance, through uniform interpretation by the CJEU) 'can be detrimental to cultural diversity.'[143] Therefore, in the regulation of 'pastiche' exception, it is essential to prioritise the protection of cultural diversity over economic objectives, as the pastiche's significance for flourishing cultural diversity far outweighs its impact on the smooth functioning of the internal market.

8. 'PASTICHE': Challenging the Current Copyright Framework

The examination of the concept of 'pastiche' through the elements of the *Ekro* formula demonstrates that 'pastiche' should not be regarded as an autonomous concept of EU law. This is because 'pastiche' as an exception has minimal economic impact, as its primary purpose is to convey a certain message, rather than to generate revenue. Consequently, divergent national regulations of pastiche have minimal negative impact on the smooth functioning of the internal market and do not necessitate EU intervention. Given this minimal economic impact, the

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[140] Weatherill, S., The Several Internal Markets, 2017 (Yearbook of European Law, Oxford Legal Studies Research Paper No. 64/2017) 8.
[141] Mezei (n 79) 6.
[142] Frosio, G., *Reconciling Copyright with Cummulative Creativity: The Third Paradigm* (Edward Elgar Publishing 2018) 245.
[143] Ibid.

regulation should prioritise fostering diverse local cultures, which is strongly reflected in the fluid and constantly evolving nature of ‘pastiche’.

However, I am aware that this stance is likely to be disregarded by the CJEU, given its frequent declarations of concepts as autonomous EU law concepts based solely on the absence of express references to Member States’ laws. The underexplained *Deckmyn* acknowledgment of ‘parody’ as an autonomous concept of EU law, and legal scholars who uncritically accept that ‘pastiche’ is an autonomous concept simply because ‘parody’ is regarded as such by the CJEU, further suggest that it is highly unlikely the CJEU will refrain from declaring ‘pastiche’ an autonomous concept of EU law. Nevertheless, if this paper encourages even one legal professional to reconsider this issue, it will have achieved something significant.

I predict that the CJEU may justify its reasoning in determining ‘pastiche’ as an autonomous concept of EU law by arguing that such action is necessary for ensuring the smooth functioning of the internal market, as it did in *Deckmyn* regarding ‘parody’.[144] However, as consistently held in this paper, as long as exceptions and limitations are optional, judicial harmonisation by the CJEU cannot resolve the current fragmentation. Only the EU legislator, by enacting a unified EU copyright code with a list of mandatory exceptions for all Member States for all uses, can achieve this goal. Thus, the German preliminary reference on the interpretation of the concept of ‘pastiche’ not only questions the CJEU’s encroachment into national competences but also challenges the entire EU copyright framework. It urges the EU legislator to acknowledge that the current framework, with its unclear division of competences between the EU and Member States, is problematic. Eventually, the EU legislator must decide whether the aim of copyright is complete uniformity and market expansion or fostering creativity and cultural diversity. If the former, the current framework, where the CJEU patches legislative gaps, is inadequate, and a unified copyright code is indeed necessary.

However, from a common-sense perspective, I question whether market expansion should be the sole aim of copyright. Copyright should promote creativity, which requires freedom, subjectivity, and diversity, not the censorship and objectivity imposed by uniform definitions. Striving for complete uniformity risks creating a ‘corporate-driven culture’ that prioritises

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[144] *Deckmyn* (n 6) para 15.

market expansion over genuine creativity and development.[145] Precisely for this reason scholars and policymakers should reconsider whether rigid legal definitions indeed benefit art or rather hinder its development. Macmillan's statement is pertinent here: 'If copyright is necessary for the promotion of cultural diversity and creativity, then something has gone wrong, and we need to look very carefully again at the shape of copyright law and consider whether there are parts we might want to jettison or change dramatically.'[146] Thus, the German court's reference on the interpretation of 'pastiche' prompts legal professionals to recognise the issue of capitalistically oriented copyright protection and to acknowledge the true essence of art: it is undefinable, subjective, and cumulative, not uniform and objective. As beautifully articulated by Frosio, the essential nature of creativity has always been cumulative and collective.[147] From Mozart to Van Gogh, Tarantino to Warhol, TikToks to sampling, referencing other works has always been integral to artistic development.[148] Hence, legal scholars should not automatically accept that 'pastiche', or any other copyright concept, is an autonomous concept of EU law just because the CJEU said so in its previous judgments. Instead, they should start reminding the CJEU that copyright should serve to reconcile with cumulative creativity,[149] free from disproportionate legal constraints.

Since my perspective may not be widely welcomed by legal copyright professionals, a potential compromise is offered by AG Cruz Villalon in his Opinion in *Deckmyn*. He proposed that in declaring concepts as autonomous concepts of EU law, the CJEU should identify the essential characteristics of these concepts from an EU law perspective, while allowing Member States leeway to regulate specific features according to their national needs.[150] In this context, the CJEU might consider the previously mentioned definition of 'pastiche' offered by Kreutzer – 'a distinct cultural and/or communicative artifact that borrows from and recognizably adopts the individual creative elements of published third-party works.'[151] Although this definition can encompass various artistic and communicative fields, in my view, it is still not open enough to cover all present and future 'pastiche' uses.

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[145] Frosio (n 142) 249.
[146] Macmillan, F., *The Dysfunctional Relationship Between Copyright and Cultural Diversity* (Quaderns del CAC 27 2007) 101.
[147] Frosio (n 142) 1.
[148] Bischoff (n 108).
[149] Frosio (n 142) 1.
[150] AG Opinion in *Deckmyn* (n 85) paras 44, 56-57.
[151] Kreutzer (n 84) 4-5.

Therefore, I propose the following definition: 'a use that incorporates recognisable elements from pre-existing works in a distinct manner.' This definition includes three essential elements from the perspective of EU law:

1. '*Use that incorporates*': This element ensures that the exception covers a wide range of forms, not exclusively from artistic and communicative fields but extending even broader. This would accommodate the rise of new fields and disciplines where, due to its constant evolution, the concept will inevitably emerge.
2. '*Recognisable Elements':* If the elements are not recognisable, they would fall outside the scope of copyright protection, as confirmed in *Pelham*,[152] thus making the exception redundant.
3. *'Distinct Manner':* This element requires that additional artistic value to be added to the recognisable elements. It ensures that the criterion is broad enough to maintain effectiveness yet narrow enough to distinguish between mere copying and genuine pastiche.

Although any uniform definition of pastiche, even the one I proposed, is inherently problematic (as no definition can ever fully encompass all new forms of art), this approach could temporarily reconcile the 'mixed competences' in regulating 'pastiche' within the current EU copyright framework. It would allow the EU to (theoretically) strive for the further development of its internal market of copyright goods, while also grant Member States the discretion to adapt this definition with additional elements in line with their local cultures.

9. Conclusion

This paper identified and discussed three crucial problems: the inconsistent use of autonomous concepts of EU law as an interpretative tool by the CJEU, the standing of 'pastiche' as an exception to copyright within the current EU copyright framework, and the inherent issues with the existing EU copyright framework.

Regarding the first issue, it was observed that the CJEU often declares autonomous concepts of EU law based solely on the absence of express reference to national laws in the relevant EU

[152] *Pelham* (n 3).

legislation. Given that terms and concepts are frequently undefined and the provisions they are enshrined in do not explicitly refer to Member States' laws, this approach could result in nearly every such concept being considered autonomous, even when the EU legislator did not intend so. Therefore, this paper concluded that the CJEU should exercise greater caution in declaring autonomous concepts of EU law by strictly adhering to its previously established *Ekro* formula, which mandates considering legislative context, wording, and objectives. However, given the limited case law sample analysed and the magnitude of the problem, it is advisable for legal academics to further explore and address this issue.

Regarding the second issue, applying the *Ekro* formula to the concept of 'pastiche,' the stance taken is that 'pastiche' should not be regarded as an autonomous concept of EU law. This is because 'pastiche' as an exception has minimal economic impact, as its primary purpose is to convey a certain message rather than to generate revenue. Consequently, divergent national regulations of 'pastiche' have minimal negative impact on the smooth functioning of the internal market and do not necessitate EU intervention. Given this minimal economic impact, regulation should prioritise fostering diverse local cultures, which is strongly reflected in the fluid and constantly evolving nature of 'pastiche'.

In addressing the third issue, it was concluded that the current copyright framework is far from ideal. Three potential solutions were proposed based on the EU legislator's ultimate goals. Firstly, if the goal is to establish a complete internal market and achieve uniformity in copyright law, the only solution is to adopt a unified EU copyright code that harmonises exclusive rights as well as exceptions and limitations. Alternatively, it was emphasised that copyright should not be entirely market-oriented but should allow for the flexibility necessary for the development of art and creativity, the main objects of copyright protection. Lastly, acknowledging the EU's general goal to expand its internal market policy, the proposal by AG Cruz Villalon was highlighted. This approach suggests that only the essential characteristics of a concept should be defined autonomously at the EU level, while specific features should be left to the discretion of Member States.

Recognising that the CJEU is unlikely to follow the proposal to keep the regulation of the 'pastiche' exception within national competences, as evidenced by previous judgments such as *Deckmyn*, the author believes that the only reasonable approach would be the one proposed by

AG Cruz Villalon. Consequently, the author proposes an autonomous definition of ‘pastiche’: ‘a use that incorporates recognisable elements from pre-existing works in a distinct manner.’

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