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## **The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting?**

Emily Hudson\*

### ABSTRACT

This article argues that the introduction of section 30A into the CDPA, covering fair dealing for the purposes of caricature, parody or pastiche, is far more significant than appreciated thus far due to the far-reaching scope of the pastiche limb of the exception. It argues that pastiche is not a variant of parody, instead referring to a range of imitative conduct, notably imitation of the style of pre-existing works, incorporation of elements or features of those works, and the production of compilations and medleys. As such, section 30A can extend to mash-ups, fan fiction, music sampling, collage, appropriation art and other forms of homage and compilation, albeit within the infrastructure of a *fair* dealing. To make out these claims, it analyses the ordinary meaning of the term pastiche, its interpretation as a copyright concept, and the interpretative cues to come from the Court of Justice decision in *Deckmyn v Vandersteen*.

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## I. INTRODUCTION

*“To write a discourse history of the terms ‘pasticcio’ and ‘pastiche’ is nothing short of adventurous.”<sup>1</sup>*

In October 2014, new copyright exceptions came into force in the UK, including section 30A of the Copyright, Designs and Patents Act 1988 covering fair dealing for the purposes of caricature, parody or pastiche. These reforms were the culmination of a lengthy campaign for the introduction of new exceptions into the CDPA, including in relation to parody.<sup>2</sup> The UK drafters of section 30A took the language of “caricature, parody or pastiche” from Article 5(3)(k) of the Information Society Directive,<sup>3</sup> placing that text in the context of the UK’s existing fair dealing machinery. Significantly, whilst much attention has been directed to the meaning of parody and justifications for a parody exception,<sup>4</sup> there has been far less analysis of its legislative bunkmate, pastiche. This raises the question of what additional work, if any, is done by the inclusion of this word in section 30A: is “pastiche” merely a synonym for “parody” or does it refer to imitation of a different type?

This article will argue that despite variation in the use of the word “pastiche” in different artistic fields, there is consensus that it refers to laudatory and non-critical imitation, such as creating a new work in the style of another artist or genre, and making a new work from a compilation or assembly of pre-existing works. Pastiche therefore includes “anti-twist” uses, ie, those where there is no attempt to ridicule, lampoon or satirise that work, or comment critically on that work or other themes.

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<sup>1</sup> Ingeborg Hoesterey, *Pastiche: Cultural Memory in Art, Film and Literature* (Indiana University Press 2001) 1.

<sup>2</sup> Eg, *Gowers Review of Intellectual Property* (HM Treasury 2006), Recommendation 12; Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011) 51. For a discussion of this process, see Sir Robin Jacob, “Parody and IP claims: a defence? – a right to parody?” in Rochelle Cooper Dreyfuss and Jane C Ginsburg (eds), *Intellectual Property at the Edge: The Contested Contours of IP* (CUP 2014).

<sup>3</sup> 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.

<sup>4</sup> Eg, Richard Posner, “When is Parody Fair Use?” (1992) 21 J Legal Stud 67; Robert P. Merges, “Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright” (1993) 21 AIPLA QJ 305; Sherri L Burr, “Artistic Parody: A Theoretical Construct” (1996) 14 Cardozo Arts & Ent LJ 65; Michael Spence, “Intellectual Property and the Problem of Parody” (1998) 114 LQR 594; David J Brennan, “Copyright and Parody in Australia: Some Thoughts on Suntrust Bank v Houghton Mifflin Company” (2002) 13 AIPJ 161; Ronan Deazley, “Copyright and Parody: Taking Backward the Gowers Review?” (2010) 73 MLR 785; Jonathan Griffiths, “Fair Dealing after *Deckmyn* – the United Kingdom’s Defence for Caricature, Parody or Pastiche” in Megan Richardson and Sam Ricketson (eds), *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar 2017).

This can be contrasted with the “expectation-defying alterations”<sup>5</sup> of parody and the exaggeration of caricature.<sup>6</sup> This raises serious doubts about assertions that the three terms are “too similar for it to be possible to distinguish between them.”<sup>7</sup>

That said, any analysis of the meaning of pastiche must be undertaken in light of principles of statutory interpretation and of judicial interpretative practices, which demonstrate that *copyright* understandings of statutory language may depart from ordinary meanings.<sup>8</sup> This article will pay particular attention to the judgment of the CJEU in *Deckmyn v Vandersteen*.<sup>9</sup> That judgment included a number of observations regarding the legal interpretations of the term parody under Article 5(3)(k), including that parody is an autonomous European concept and that courts must undertake a human rights balancing exercise when applying the parody exception. Logic dictates that these factors would apply equally to the other elements of Article 5(3)(k), making it necessary to consider whether, and how, they might impact on the ambit of the pastiche defence.

The key message of this article is that the introduction of section 30A into the CDPA is far more significant than has been appreciated thus far,<sup>10</sup> as the term pastiche can clearly extend to mash-ups, fan fiction, music sampling, appropriation art and other forms of homage and compilation. To illustrate, the defendant’s artworks in the US case of *Cariou v Prince*,<sup>11</sup> understood as examples of transformative use by the Second Circuit, could reasonably be classified as instances of pastiche in the UK. Whether they would also constitute a *fair* dealing is another matter – and here we will

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<sup>5</sup> Brennan (n 4) 166.

<sup>6</sup> For an analysis of the meaning of caricature, albeit not in the copyright context, see *Attorney-General v Trustees of the Art Gallery of NSW* (1944) 62 WN (NSW) 212 (eligibility of a painting that exaggerated and distorted the features of the sitter to win the Archibald Prize for portraiture).

<sup>7</sup> Description of the oral argument of Belgium by Advocate General Villalón in *Deckmyn v Vandersteen* (C-201/13) ECR I-0000 at [42]; see, also, the French approach to caricature, parody and pastiche described below n 62 to n 70 and surrounding text. As noted by Griffiths (n 4), the Advocate General’s own statements on this question (at [46] of his opinion) are unclear, and could be understood to suggest that the three categories are distinct but overlap or, alternatively, that the three concepts “cannot usefully be disaggregated”. This matter was not dealt with by the Grand Chamber.

<sup>8</sup> See Graeme W Austin, “EU and US Perspectives on Fair Dealing for the Purpose of Parody or Satire” (2016) 39 UNSWLJ 684, especially 684-685.

<sup>9</sup> *Deckmyn v Vandersteen* (C-201/13) [2014] ECDR 21 (Grand Chamber).

<sup>10</sup> For instance, in her analysis of the status of remixes and sampling after the 2014 copyright reforms, Sabine Jacques uses the word “pastiche” only once, instead focusing her fair dealing analysis on the quotation and parody, with the latter said to require humour (which she says could be defined broadly to include unexpected, playful or rule-breaking combinations): Sabine Jacques, “Mash-ups and mixes: what impact have the recent copyright reforms had on the legality of sampling?” (2016) 27 Ent LR 3, 5-7.

<sup>11</sup> *Cariou v Prince*, 784 F Supp 2d 337 (SDNY 2011); 714 F 3d 694 (2<sup>nd</sup> circuit, 2013).

need to consider normative questions regarding the circumstances in which pastiche ought to be permitted under a free exception. This point is significant as it indicates why we can be sanguine about giving pastiche a robust, standalone definition: in the UK, much intellectual heavy lifting can be done by the fairness factors; and indeed elsewhere in Europe, such considerations can inform the human rights balancing exercise required by the Court of Justice when applying Article 5(3)(k).

This article commences by providing an overview of the artistic meanings of pastiche, emphasising its relevance to anti-twist uses. In Section III the analysis turns to pastiche as a copyright concept, focusing in particular on the extent (if at all) that the term's legal definition departs from ordinary usage. This includes consideration of the history of pastiche in French and European law, and the interpretative lessons that can be drawn from *Deckmyn*. Section IV draws this analysis together by urging a liberal understanding of pastiche in copyright law. It resists any suggestion that caricature, parody and pastiche are functionally equivalent, arguing that whilst there may be overlaps in their coverage, the technical meanings of pastiche takes it far outside the realms of parody and caricature. It argues further that pastiche should not be narrowed by arguments said to derive from *Deckmyn*; on the contrary, there are strong normative arguments in favour of liberal exceptions, and aspects of *Deckmyn* (notably its emphasis on freedom of speech) are consistent with a broad definition of pastiche in copyright law.

## II. WHAT IS PASTICHE?

In order to develop the propositions in this article, it is necessary to start with an examination of pastiche as a non-legal concept. Compared with parody and caricature, the term pastiche is used less frequently in the English language. For instance, the *Oxford English Dictionary* places parody and caricature in Frequency Band 5, whilst pastiche is in the less well-utilised Band 4.<sup>12</sup> Similarly, a Google Books Ngram search of pastiche, parody and caricature<sup>13</sup> suggests that it was not until the 1920s that use of

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<sup>12</sup> See *Oxford English Dictionary* (OUP online version 2016). The Bands are based on frequency of usage, based primarily on Google Books Ngrams data, and run from Band 1 (least common) to Band 8 (most common). Words in Band 5 (used “between 1 and 10 times per million words in typical modern English usage”) are therefore more frequent than Band 4 (used “between 0.1 and 1.0 times”), although neither are everyday words and are associated with “educated discourse” (Band 5) and “much greater specificity” (Band 4). See <http://public.oed.com/how-to-use-the-oed/key-to-frequency/>.

<sup>13</sup> The Google Books Ngram Viewer, available at <https://books.google.com/ngrams>, allows searches across the books digitised by Google as part of the Google Books Project. In this instance, the relevant search was for the words “pastiche”, “caricature” and “parody” (case insensitive) from 1700 to 2008 from the corpus of English books. Care must be taken in the interpretation of this data, for instance due to large numbers of scientific texts that can skew results, mistakes in OCR versions, and so forth. However, the Ngram search is used here for a more limited claim about the respective frequency of parody, caricature and pastiche.

the word pastiche began to trend upwards from a baseline of negligible (and often zero) use. In contrast, the words parody and caricature enjoyed far greater usage from 1700 to 2008, with caricature used more frequently than parody from 1812 to 1965, and parody overtaking caricature from that point. Looking at the 2008 dataset, parody was used over five times more often than pastiche, and around 1.5 times more often than caricature. This may help explain the impression (obviously anecdotal) that pastiche is less accessible to potential users as a fair dealing purpose because of lack of familiarity with its non-legal meaning. Against such a background, it may be easy to assume that, because it appears alongside parody and caricature, pastiche must be synonymous with or a close variant of these acts.

An indication that pastiche describes quite different forms of endeavour comes from the definition in the *OED*. The entry for pastiche as a noun reads:

*1. a. A novel, poem, painting, etc., incorporating several different styles, or made up of parts drawn from a variety of sources. b. A musical composition incorporating different styles; a medley.*

*2. a. A work, esp. of literature, created in the style of someone or something else; a work that humorously exaggerates or parodies a particular style. b. The technique of incorporating distinctive elements of other works or styles in a literary composition, design, etc.*

The definitions in paragraph 1 are cross-referenced to elements of the entry for “pasticcio”, a term of Italian origin covering similar ground in relation to mixing and imitation, and used regularly in discussions of pastiche:

*1. a. Music. An opera or other work consisting of a medley of pieces from different compositions or by different composers. b. A work of art or architecture imitating an antique or older style; esp. one incorporating elements taken or copied from antique or classical works; this style in art or architecture. ...<sup>14</sup>*

The definitions in the *OED* accord with descriptions in specialist texts, although the former do not capture the nuance that comes from a detailed examination of the history and meaning of pastiche (and pasticcio) in the visual arts, literature and music. It is not possible to attempt such a project here, but some key ideas about pastiche as a technical term can be noted. It is clear that pastiche has a dual identity, referring to both a “combination of aesthetic elements” and “a kind of aesthetic imitation”,<sup>15</sup>

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<sup>14</sup> The *OED* (n 12) places pasticcio in Frequency Band 3 for words that “occur between 0.01 and 0.1 times per million words in typical modern English usage”. Such words are “not commonly found in general text types” but “are not overly opaque or obscure”.

<sup>15</sup> Richard Dyer, *Pastiche* (Routledge 2007) 1.

giving the term a “slippery quality”.<sup>16</sup> Its use in the artistic context can be traced back to sixteenth century Italy, and in particular the “pasticcio” painting: “eclectically blended” works that combined themes and motifs from Renaissance art sources.<sup>17</sup> The resulting works exhibited a “sort of generic High Renaissance style”, although they were also viewed dimly because of their composition and, in many cases, fraudulent presentation as authentic works.<sup>18</sup> It seems that the concept of pasticcio emerged in France some time in the seventeenth century under the name pastiche, although the historical narrative is incomplete.<sup>19</sup> The genre then continued to evolve, for instance through greater recognition of the ingenuity and lineage of artistic imitation, and through the term’s use for literary composition.<sup>20</sup>

In musical realms, it has been said that the pasticcio operas of the eighteenth century also represented “a new positive value” of the genre of pastiche.<sup>21</sup> These productions typically involved the performance of a series of popular arias from different composers, often held together with a tenuous plot. The pasticcio format was attractive for a number of reasons. For the travelling opera group with a limited catalogue of works, remixing permitted novel productions. The pasticcio offered an opportunity for repeat listening in an age without sound recordings, and shared parallels with the “suitcase” aria: the phenomenon of star singers inserting their own favourite songs into any production. It has also been observed that for composers, writing music was often “like crafting a piece of handmade furniture, far-removed from the Romantic notion of creating an original masterpiece.”<sup>22</sup> Their purpose, it is said, was often “functional”: to create something “in circulation for a few weeks or months, before being relegated to the archives in favour of something more current.”<sup>23</sup> This meant there was not the same sort of moral or commercial concern with copying; as one opera blogger jokingly notes, “[p]art laxity with copyright, part

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<sup>16</sup> Hoesterey (n 1) 9.

<sup>17</sup> The term “pasticcio” is also Italian for pie, and this mixing of artistic elements was akin to the combination of ingredients in such a dish: Dyer (n 15) 8-9.

<sup>18</sup> Hoesterey (n 1) 1-4.

<sup>19</sup> Ibid., 4-5.

<sup>20</sup> Ibid., 5-7. To illustrate, John Fowles’s novel *The French Lieutenant’s Woman* has been described as a “well-known modern example” of the genre, being “partly a pastiche of the great Victorian novelists”: Chris Baldick, *Oxford Dictionary of Literary Terms* (OUP online version 2015).

<sup>21</sup> Hoesterey (n 1) 8.

<sup>22</sup> Julian Perkins, “Musical Pies: An Introduction to the Pasticcio” (April 2015), <http://julianperkins.com/julians-jottings/programme-notes/musical-pies.html>.

<sup>23</sup> Ibid.

free advertising, then 18th century folk had different ideas about intellectual property.”<sup>24</sup> Another explains:

*“Pastiche” carries negative connotations now, but didn’t in baroque times when recycling was part of what went into theatre. Recordings didn’t exist then, so composers were expected to re-use popular melodies so people could enjoy them again. That’s also partly why baroque operas adapt similar ideas over and over. Audiences delighted in new ways of hearing old. How many of Vivaldi’s operas were all “new” or even all Vivaldi? And how many adaptations of Ariosto and Tasso? The baroque aesthetic blended characters from ancient antiquity and medieval myth in joyous riot. Even Mozart had no qualms about recycling a good tune. So snobbery about this kind of pastiche is misguided.*<sup>25</sup>

As indicated in this quote, the pasticcio opera was not confined to small-fry or amateur productions, and a number of leading composers embraced the format.<sup>26</sup> During the nineteenth century, pasticcio fell out of fashion for being gauche and lacking the musical integrity and genius of the original.<sup>27</sup> Despite this, pasticcio has remained a part of operatic composition, and there are contemporary examples.<sup>28</sup>

Against this backdrop, musicologists draw a distinction between pastiche and pasticcio, with the former referring to works that deliberately imitate the style of another, and pasticcio to operas and other performances drawing from the works of different composers.<sup>29</sup> It is clear, however, that different iterations of anti-twist

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<sup>24</sup> opera, innit?, “Half baked thoughts on pasticcio (should opera be \*gasp\* tasty?)”, 15 March 2015, <https://dehggial.wordpress.com/2015/03/15/pasticcio-baroque-opera/>.

<sup>25</sup> Classical Iconoclast, “The Enchanted Island at the Met – deeper than expected”, 23 January 2012, <http://classical-iconoclast.blogspot.co.uk/2012/01/enchanted-island-at-met-deeper-than.html>.

<sup>26</sup> Handel stands out in this regard: for a comprehensive history, see Donald Burrows, *The Master Musicians: Handel* (OUP 2<sup>nd</sup> ed, 2012).

<sup>27</sup> This is illustrated by the entry for “pasticcio” in the 1880 edition of *Grove’s*, which said that despite its prominence in the eighteenth century and its utilisation by master composers, the style “never inspired any real respect, even in its brightest days”. Like the pastiche in the world of painting, it appears one issue was the fraudulent manner in which some pasticcios were presented, including the lack of proper attribution of the music to the relevant composer. The aesthetic merit of the production was also questioned, given the perceived lack of unity between the individual selections. See George Grove (ed), *A Dictionary of Music and Musicians, Vol II* (Macmillan, 1880) 668-670.

<sup>28</sup> Eg, *The Enchanted Island*, written by Jeremy Sams and premiering at the Metropolitan Opera, New York, on 31 December 2011. For a description of the creative process, see Jeremy Sams, “The Enchanted Island: the isle is full of mash-ups”, *The Guardian*, 10 January 2012, <https://www.theguardian.com/music/2012/jan/10/enchanted-island-met-opera-baroque>.

<sup>29</sup> Alison Latham, *Oxford Companion to Music* (OUP online version 2011); Tim Rutherford-Johnson, Michael Kennedy and Joyce Bourne Kennedy (eds), *Oxford Dictionary of Music* (OUP online version 2016) (although pastiche “has a meaning as ‘medley’, it is invariably applied musically in the sense outlined above [ie, composition in the style of another]”).

imitation – eg, blending different musical influences or styles, and sampling from existing works – remain extremely common in modern musical composition,<sup>30</sup> although the latter is more significant legally because it is far more likely to involve the reproduction of a protected element of a copyright work.

Developing a definition of pastiche is challenging because of the variation in the meaning of the term in different creative circles, and its continued evolution over time. As Richard Dyer observes, “the word pastiche is in practice extremely elastic”, which can result in “generally fruitless discussion about whether such and such really is pastiche.”<sup>31</sup> Dyer’s thesis – which focuses on pastiche as aesthetic imitation rather than pastiche (or in his language, *pasticcio*) as a combination of existing elements – adopts a preliminary definition of pastiche as “a kind of imitation that you are meant to know is an imitation.”<sup>32</sup> As Dyer notes, this generates questions about creator intention, audience knowledge, and the indications and markers of pastiche.<sup>33</sup> Dyer seeks to challenge the pejorative connotations that surround pastiche, arguing that “pastiche can now just mean, and I wish it did just mean, evident recombination and imitation of prior works, but the negative associations persist, mainly now in terms of triviality and pointlessness.”<sup>34</sup> Ingeborg Hoesterey also counters the “vaguely traditional, predominantly negative”<sup>35</sup> interpretation given to pastiche, pressing a postmodern vision of the genre as “about cultural memory and the merging of horizons past and present” – practices that “borrow ostentatiously from the archive of Western culture”, and that seek to “[foster] critical thinking.”<sup>36</sup> She argues that having “for centuries [been] on the fringe of aesthetic canons ... [m]etamorphoses of [pastiche] can be found today in architecture, painting, sculpture/assemblage, in film

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<sup>30</sup> Hoesterey (n 1) 113. For instance, *Joseph and the Amazing Technicolor Dreamcoat*, written by Tim Rice and Andrew Lloyd Webber, is a well-known pastiche musical, with influences including country and western, Calypso and Elvis Presley.

<sup>31</sup> Dyer (n 15) 9.

<sup>32</sup> *Ibid.*, 1.

<sup>33</sup> *Ibid.*, 2-4.

<sup>34</sup> Dyer (n 15) 9. For instance, the definition of pastiche (*pasticcio*) in Ian Chilvers, *Oxford Dictionary of Art and Artists* (OUP online 2016) refers to: “A work of art that imitates the style of another work, artist, or period; more specifically, in the visual arts, a picture or other work that (*often with fraudulent intent*) imitates the style of a particular artist by borrowing and rearranging motifs from his authentic works” (emphasis supplied).

<sup>35</sup> Hoesterey (n 1) ix.

<sup>36</sup> *Ibid.*, xi-xiii; see also Annette Kuhn and Guy Westwell, *Oxford Dictionary of Film Studies* (OUP online version 2015), suggesting that whilst pastiche “is sometimes used pejoratively, implying lack of originality”, when “regarded as a feature of postmodernism it tends to shed such negative overtones.” For a negative stance, see Fredric Jameson, *Postmodernism, or, the Current Logic of Late Capitalism* (Duke 1991), esp 17-25, suggesting that pastiche has come to replace parody, but “without any of parody’s ulterior motives, amputated of the satiric impulse, devoid of laughter.”

and literature, in commercial art, in popular music, and in performance modes range from neo-operatic to MTV idioms.”<sup>37</sup>

Depending on one’s preferred definition, pastiche therefore encompasses or overlaps with other aesthetic categories such as appropriation art, assemblage and collage, capriccio, cento, hip hop, montage and patchwork.<sup>38</sup> In contrast, there seems to be greater consensus that pastiche and parody can be contrasted due to intention and impact. For instance, it has been said that whilst pastiche “borrows closely, openly, appreciatively, and often playfully from the styles of previous works, frequently combining elements of different styles”, the imitation present in parody is one “in a spirit of mockery or ridicule”.<sup>39</sup> Again, though, the degree of divergence – and overlap – depends on one’s preferred definitions. Hoesterey, for example, describes parody as involving “satirical, critical, or polemical intention” – “[c]haracteristic features of the work are retained but are imitated with contrastive intention, whereas in pastiche this relationship is one of similarity.”<sup>40</sup> That said, she also notes that other descriptions of parody which focus on “transposition” and staging a “confrontation” with a “canonical text”, and which may be closer to her postmodern view of pastiche.<sup>41</sup>

Returning to section 30A of the CDPA, there is no statutory definition of caricature, parody and pastiche. Guidance issued by the Intellectual Property Office in 2014 stated that all three terms “have their usual meaning in everyday language”, taking account “of the context and purpose of ... copyright exceptions.”<sup>42</sup> The IPO stated that:

*In broad terms: parody imitates a work for humorous or satirical effect. It evokes an existing work while being noticeably different from it. Pastiche is musical or other composition made up of selections from various sources or one that imitates the style of another artist or period. A caricature portrays its subject in a simplified or exaggerated way, which may be insulting or complimentary and may serve a political purpose or be solely for entertainment.*<sup>43</sup>

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<sup>37</sup> Ibid., xi.

<sup>38</sup> Hoesterey (n 1) 10-15; Dyer (n 15) 11-16.

<sup>39</sup> Kuhn and Westwell (n 34).

<sup>40</sup> Hoesterey (n 1) 14.

<sup>41</sup> Ibid.

<sup>42</sup> Intellectual Property Office, *Exceptions to copyright: Guidance for creators and copyright owners* (IPO 2014) 6.

<sup>43</sup> Ibid.

The IPO included an illustration for each sub-type; for pastiche, this was an artist using “small fragments from a range of films to compose a larger pastiche artwork.”<sup>44</sup>

The wording in the 2014 guidance differed from that used by the IPO in its 2007 report *Taking Forward the Gowers Review*, although the definitions in that report rehearsed similar themes regarding pastiche: “picture or musical composition from or imitating various sources” and “literary or other work composed in the style of a well-known author, etc”.<sup>45</sup> Interestingly, there were indications that in 2007, the IPO did not consider pastiche to have any meaningful standalone effect. The IPO emphasised the similarities between caricature, parody and pastiche, stating that “these terms are all defined in slightly different ways but all can include an element of imitation, and may incorporate, to a greater or lesser extent, elements of the original work.”<sup>46</sup> It also stated that, given the “close relationship between caricature, parody and pastiche”, it would use the word parody “as shorthand for all three” in its consultation.<sup>47</sup>

Whilst the statements regarding imitation and incorporation are clearly correct, any suggestion that the difference between the terms is “slight” would seem to imply an unduly narrow understanding of pastiche as a genre. However, this conflation of caricature, parody and pastiche – or at least, the lack of any meaningful weight given to the three concepts as separate ideas – would seem typical of the field.<sup>48</sup> For instance, despite recommending an exception based on Article 5(3)(k), the Gowers Review used the word pastiche only three times in its 142 page final report, being in the text of the proposed reform.<sup>49</sup> The discussion leading up to this recommendation focused on transformative use in US law, with some reference to parody. Although the report was supportive of an exception of similar operation being permissible in Europe, it also noted criticisms that, in the hip hop scene, a licensing culture had arisen in relation to sampling due to limits in the understanding of transformative use.<sup>50</sup> The report stated:

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<sup>44</sup> *Ibid.*, 5.

<sup>45</sup> Intellectual Property Office, *Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions* (IPO 2007) at [188].

<sup>46</sup> *Ibid.* at [189].

<sup>47</sup> *Ibid.* at [190].

<sup>48</sup> Eg, Hargreaves Review (n 2) (containing multiple references to parody, but only including the word pastiche on a single occasion); Deazley (n 4) (focusing on justifications for a parody exception, and stating at p. 786 that “parody is multivalent; it speaks to and embraces a range of different cultural practices such as allusion, burlesque, caricature, irony, mimesis, pastiche, persiflage, satire, skit, spoof, travesty, and so on”).

<sup>49</sup> Gowers Review (n 2) 6, 68.

<sup>50</sup> *Ibid.* 67.

*Hip hop is not the first genre to ‘sample’ music: composers from Beethoven to Mozart to Bartok to Charles Ives have regularly recycled themes, motifs, and segments of prior works. Under the current copyright regime, these creators would need to clear permission and negotiate licences to avoid infringement suits. The barriers that new musicians have to overcome are extremely high, and the homogenisation of hip hop music is, critics argue, a direct response to the costs of clearing rights.<sup>51</sup>*

This discussion of transformative use concluded with two recommendations, one for the UK government to introduce a parody exception styled after Article 5(3)(k), and the other for the government to press for reform of the Information Society Directive “to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three-Step Test.”<sup>52</sup> In presenting these recommendations, it would seem that the Gowers Review did not consider the argument that the pastiche limb of its proposed new exception would cover musical sampling and indeed many other uses that might be considered transformative in US fair use law. As will be argued later in this article, it can even be argued that pastiche enjoys advantages over transformative use, in particular due to its recognition of artistic borrowing that does not seek to convey a new aesthetic or meaning.

In sum, the ordinary meanings of pastiche suggest that it exhibits features that are distinct from, and operate well outside of, the genres of parody and caricature. In evaluating what this means for section 30A, Section III considers how the legal environment impacts on the interpretation of pastiche as a term in the CDPA.

### III. LEGAL FRAMEWORK

#### A. Relevance of exceptions

Prior to 2014 there was no exception in the CDPA expressly covering caricature, parody or pastiche despite imitative genres having a lineage that can be traced back long before the advent of the copyright system. The relevance of copyright to these acts depends, first, on whether the relevant imitation pertains to protected features of a copyright work – if not, for instance because the defendant’s work copies mere ideas, styles or techniques, then copyright will not be implicated.<sup>53</sup> If protected elements

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<sup>51</sup> Ibid 67, at [4.86].

<sup>52</sup> Ibid 68, Recommendation 11.

<sup>53</sup> Eg, *Baigent v The Random House Group Ltd* [2007] EWCA Civ 247 at [145]-[146] (discussing the idea-expression dichotomy); Brennan (n 4) 162 (discussing fan fiction and similar literary forms). There are challenges in applying this concept, particularly in a world where copyright can be infringed without there being any direct copying of the text or expression of the claimant’s work: *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416, 2422-2423 (per Lord Hoffmann).

have been copied, a second question is whether those elements constitute a substantial part of the earlier work. Whilst it was suggested in some English cases that a parody might be non-infringing where the defendant had made changes and contributions that resulted in an original work,<sup>54</sup> by the 1980s this reasoning had been rejected on the basis that it misunderstood the substantial part test, which focuses on the copied elements vis-à-vis the plaintiff's work and not the original contributions of the defendant.<sup>55</sup> Assuming that a prima facie case of infringement is made out, a third key question is whether an exception is applicable. For many years, the most obvious possibility was fair dealing for the purpose of criticism or review.<sup>56</sup> However, with limitations in the language and judicial interpretations of that provision, there was a question mark over its ability to provide a comprehensive answer to the challenges posed by parody and other imitative uses.<sup>57</sup>

Since October 2014 this position has changed with the introduction, in section 30A of the CDPA, of a fair dealing exception directed to caricature, parody or pastiche. As noted above, there is no guidance in the CDPA in relation to the meaning of these terms, which were taken from Article 5(3)(k) of the Information Society Directive, itself also silent regarding their coverage. Looking to the Directive's *travaux*

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<sup>54</sup> See especially *Glyn v Weston Feature Film Co* [1916] 1 Ch 261; *Joy Music v Sunday Pictorial Newspaper* [1960] 2 QB 60. In *Glyn*, Younger J suggested (in obiter) that a burlesque would not infringe copyright where the defendant "has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result." This approach was applied in *Joy Music* to the creation of altered lyrics to the song "Rock-a-Billy", where the only common element came through the words "Rock-a-Philip, Rock-a-Philip, Rock-a-Philip, rock" in the chorus of the defendant's work. It was held that this was not an infringement as the author had produced "a new original work derived from "Rock-a-Billy'."

<sup>55</sup> See, eg, *Schweppes Ltd v Wellingtons Ltd* [1984] FSR 210; *Williamson Music Ltd v Pearson Partnership Ltd* [1987] FSR 97; *Allen v Redshaw* (Patents County Court, 15 May 2013).

<sup>56</sup> CDPA, s 30(1); see, also, *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] FCA 108 at [17] (Conti J discussing possibility that parody and satire can fall within the Australian fair dealing defence covering criticism and review).

<sup>57</sup> One limitation is the requirement in the CDPA that the criticism or review must be of "that or another work or of a performance of a work", a requirement that first appeared in section 6(2) of the Copyright Act 1956. Although there is authority that the relevant review or criticism can relate to the underlying thoughts, ideas and philosophy of a work (eg, *Hubbard v Vosper* [1972] 2 QB 84; *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] FSR 610), there have also been instances where this language has operated to take a criticism outside the defence (eg, *Ashdown v Telegraph Group Ltd* [2002] Ch 149). In the 1980s case *Williamson Music Ltd v Pearson Partnership Ltd* (n 55), Judge Paul Baker QC noted at p. 103 the potential relevance of a fair dealing defence to parody, but stated that it was inapplicable on these facts because there was no element of literary criticism or review in the defendant's work, a television advertisement for a bus company that included a jingle said to parody the Rodgers and Hammerstein song, "There is Nothin' Like a Dame".

*préparatoires*, we see that Article 5(3)(k) was requested by the French delegation.<sup>58</sup> Its first iteration appeared in draft text dated 28 March 2000, with the language seemingly modelled on an existing French exception.<sup>59</sup> Little else is disclosed by the legislative history, suffice for earlier versions of the proposed Directive containing a recital referring to the continued application of national exceptions covering “other cases of minor importance” such as “certain forms of humorous use”.<sup>60</sup> With the French delegation pressing for a specific exception,<sup>61</sup> this text did not find its way into the recitals as implemented. Thus, with no direct guidance in the Directive itself, and minimal explanation in the *travaux*, the legislative framework of the Directive does little to elucidate the reach of Article 5(3)(k).

### B. The French approach

Given its origins in French law, one line of inquiry might be to consider how pastiche is understood in the copyright jurisprudence in that country. The French protection for pastiche is found in Article L122-5 of the Intellectual Property Code, which provides that “once a work has been disclosed, the author may not prohibit ... parody, pastiche and caricature, observing the rules of the genre.”<sup>62</sup> It has been suggested that in France these acts are governed by the same rules but apply to different types of work, with parodies relating to musical works, video and film; caricature to visual or figurative works; and pastiche to literary works.<sup>63</sup> This accords with the (legal) view, mentioned earlier, that caricature, parody and pastiche are essentially interchangeable.<sup>64</sup> For instance, Cabay and Lambrecht suggest that “scholars now

<sup>58</sup> Summary of Proceedings from the Working Group on Intellectual Property (Copyright) dated 29-30 March 1999, doc 7299/99 PI 18 CULTURE 21 CODEC 176, 2 (“several Member States” have requested additional option exceptions be added to draft Article 5(3), including “caricature, parody and pastiche”); Summary of Proceedings from the Working Group on Intellectual Property (Copyright) dated 16-17 December 1999, doc 5377/00 PI 5 CULTURE 3 CODEC 36 at [46] (“The [French] delegation requested an additional exception covering parody, pastiche and caricature”).

<sup>59</sup> Amended proposal dated 28 March 2000, doc 6652/00, PI 14 CULTURE 11 CODEC 154.

<sup>60</sup> Amended proposal dated 30 September 1999, doc 11435/00, PI 49 CULTURE 63 CODEC 520, recital 24ter.

<sup>61</sup> *Ibid.*, footnote 16 (“The [French] delegation requested a specific exception on parody, pastiche and caricature in the main body of the Directive instead of a reference to humorous use in this Recital”).

<sup>62</sup> Code de la propriété intellectuelle, Art L 122-5: “Lorsque l’oeuvre a été divulguée, l’auteur ne peut interdire: ... 4° La parodie, le pastiche et la caricature, compte tenu des lois du genre ...”.

<sup>63</sup> See, eg, Henri Desbois, *Le droit d’auteur en France* (Dalloz, 3<sup>rd</sup> edition, 1978) at [254]; Dinusha Mendis and Martin Kretschmer, *The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles* (Intellectual Property Office 2013), 18; Laetitia Lagarde and Carolyn Ang, “Parody in the UK and France: defined by humour?” (2016) 27 PLC, Internet.

<sup>64</sup> See above n 7.

agree that those three terms must be considered as synonyms, or at least that [any] formal difference between them should bear no legal consequences.”<sup>65</sup>

Looking to the French case law, it would seem that whilst there have been some attempts to distinguish between parody and pastiche,<sup>66</sup> the definitions given to pastiche have been unclear, inconsistent and ultimately irrelevant because courts have identified common considerations that tend to be present in a successful defence under Article L122-5,<sup>67</sup> for instance that the defendant’s work is intended to make people laugh, involves a substantial modification of the earlier work (so that the two works cannot be confused) and does not cause harm to the first author (eg, by alienating the public from the first work).<sup>68</sup> The *Dezandre* decision of 1990 illustrates this point. The publisher of the newspaper *Liberation* brought proceedings in relation to a record sleeve depicting a newspaper front page said to copy elements from *Liberation*’s front page.<sup>69</sup> There were a number of limbs to the complaint; the copyright aspect related to the alleged reproduction of *Liberation*’s layout. Defences of parody and pastiche both failed. The Court of Appeals in Paris described pastiche as imitating “a particular manner” and parody as imitating “a serious work by caricaturing it”,<sup>70</sup> which is somewhat consistent with the distinctions between parody and pastiche discussed in Section II. However, the Court also suggested that for both defences, it was necessary for the defendant to aim to cause laughter; here, whilst there were shocking “course expressions” on the sleeve, they had “no comic virtue whatever”.<sup>71</sup> By analysing parody and pastiche using common considerations – including the presence of comic intent – the distinction between the two aesthetic forms may have been rendered largely irrelevant.

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<sup>65</sup> Julien Cabay and Maxime Lambrecht, “Remix prohibited: how rigid EU copyright laws inhibit creativity” (2015) 10 J Int Prop Law & Practice 359, 371. See also Michel Vivant and Jean-Michel Bruguière, *Droit d’auteur et droits voisins* (Dalloz, 3rd edn, 2015) 648 (in favour of the view that the three terms are interchangeable).

<sup>66</sup> See, eg, Cour de Cassation, 12 January 1988, RIDA July 1988 p. 98; Versailles Court of Appeal, 17 March 1994, RIDA April 1995 p. 350.

<sup>67</sup> I would like to acknowledge the input of Maxence Rivoire, who reviewed and helped translate numerous French language materials, in developing this point.

<sup>68</sup> See, eg, *SA Les Editions Salabert v Le Luron* (Cour D’Appel, Paris, 15 October 1985) [1987] ECC 48 at [3]; *SA Jacobs Suchard France v Antenne 2* (Cour D’Appel, Paris, 27 November 1990) [1992] ECC 344 at [1]; Mendis and Kretschmer (n 63), 18-19.

<sup>69</sup> *Jacques Dezandre v SA Musidisc and Societe Nouvelle de Presse et de Communication* (Cour D’Appel, Paris, 25 October 1990) [1992] ECC 495.

<sup>70</sup> *Ibid.* at [4].

<sup>71</sup> *Ibid.*

*C. Deckmyn v Vandersteen*

Whilst the French authorities provide a sense of the interpretative approaches in that country, they must be read subject to the judgment of the Court of Justice in *Deckmyn v Vandersteen*.<sup>72</sup> The facts of *Deckmyn* are well-known, and involved a member of a far-right political party distributing calendars containing an image that resembled a drawing from the comic strip *Suske en Wiske*. The purpose of the defendant's work was to criticise the spending priorities of the mayor of Ghent, who was shown distributing money to a group of people, some of whom had brown skin and others of whom wore veils. In a copyright action brought by the creator's heirs and other rightsholders in Belgium, the defendants argued that the calendar fell within that country's parody defence.<sup>73</sup> The Court of Appeal of Brussels stayed proceedings pending a referral to the Court of Justice regarding the meaning of parody in Article 5(3)(k) of the Information Society Directive.

Although *Deckmyn* focused on parody, its reasoning is significant to pastiche for a number of reasons. First, it teaches us that we cannot simply transplant French understandings of pastiche across Europe. This is because the Grand Chamber held that parody is an "autonomous European concept" – ie, one that must be interpreted uniformly across EU Member States<sup>74</sup> – and provided guidance (discussed next) regarding the meaning of that term. If this is correct, then logic demands that pastiche follow suit given its shared legislative history and doctrinal context. At most, the French jurisprudence reflects a possible approach to construing pastiche.

Secondly, *Deckmyn* suggests that the plain meaning of statutory language is relevant to, but not solely constitutive of, its legal definition. The Grand Chamber noted that parody, which is not defined in the Information Society Directive, should be construed by considering its "usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part".<sup>75</sup> This approach, which for the reasons given above must apply to pastiche, might be described as a purposive semantic assessment: one looks not only at the plain language of a provision but also its goals and surrounding infrastructure. Using this methodology, the Grand Chamber said that there are two essential characteristics of parody: that it evokes, but is noticeably different from, an existing work; and that it

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<sup>72</sup> *Deckmyn* (n 9); for a comprehensive analysis of this case, see Griffiths (n 4).

<sup>73</sup> Law on Copyright and Related Rights, Art 22(1) (applying to caricature, parody or pastiche that observes fair practice).

<sup>74</sup> *Deckmyn* (n 9) at [14]-[17], citing *Padawan SL v Sociedad General de Autores y Editores de España* (C-467/08) [2010] ECR I-10055 at [32].

<sup>75</sup> *Ibid.* at [19], citing *Diakité v Commissaire General aux Refugies et aux Apatrides* (C-285/12) [2014] 1 WLR 2477 at [27] (discussing the meaning of "internal armed conflict" for the purposes of the Qualification Directive).

involves humour or mockery.<sup>76</sup> For the Grand Chamber, this definition accorded with the relevant legal context, namely that exceptions be interpreted strictly but in a way that enables their effectiveness;<sup>77</sup> and reflected the objective of Art 5(3)(k) in supporting free speech and the public interest.<sup>78</sup> Similarly, Advocate-General Villalón, whose interpretative efforts were aided by dictionary definitions of parody in the Spanish, French, German, Dutch and English languages,<sup>79</sup> saw his task as developing a *copyright* understanding of parody. As he noted at one point, in talking about the “decidedly troubled field” created by parody, he was referring “not ... to the field of art theory, into which it is clearly not for me to enter, but rather the field of copyright.”<sup>80</sup>

However, the Grand Chamber went further, stating that in applying Article 5(3)(k), a “fair balance” must be maintained between the rights and interests of rightsholders and the freedom of expression of users.<sup>81</sup> The idea of fair balance is mentioned explicitly in Recital 31 of the Information Society Directive,<sup>82</sup> and has been cited in other copyright case law in the Court of Justice.<sup>83</sup> The Grand Chamber stated that in determining how to preserve such a balance, “all the circumstances of the case must be taken into account,”<sup>84</sup> which in this instance might include any discriminatory message conveyed by the defendants’ work.<sup>85</sup> This latter aspect, which would seem to countenance a compelled speech argument, will be discussed in more detail later. For now it is relevant to note that this fair balance assessment seems to be a very different beast from the purposive semantic analysis, operating more in the nature of a human rights balancing or proportionality exercise.

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<sup>76</sup> *Ibid.* at [20], citing AG Villalón (n 7) at [48]. For a discussion of these limbs and their application, see Griffiths (n 4).

<sup>77</sup> *Ibid.* at [22]-[24], citing *ACI Adam BV v Stichting de ThuisKopie* [2014] ECDR 13 at [23] and *Football Association Premier League Ltd v QC Leisure (C-403/08 & C-429/08)* [2012] ECDR 8 at [163].

<sup>78</sup> *Ibid.* at [25].

<sup>79</sup> AG Villalón (n 7) at [47].

<sup>80</sup> *Ibid.* at [52].

<sup>81</sup> *Deckmyn* (n 9) at [26]-[27].

<sup>82</sup> Recital 31 states: “A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. ...”

<sup>83</sup> Eg, *Padawan SL v Sociedad General de Autores y Editores de Espana (SGAE) (C-467/08)* [2011] ECDR 1 at [38]-[50]; *Painer v Standard Verlags GmbH (C-145/10)* [2012] ECDR 6 at [132]-[136].

<sup>84</sup> *Deckmyn* (n 9) at [28].

<sup>85</sup> *Ibid.* at [31].

That *Deckmyn* might have an influence on the French approach is suggested by the recent “Glamour” decision of the Cour De Cassation.<sup>86</sup> That case concerned photographs by a fashion photographer that had been incorporated into paintings by an artist intending to create “a parodic perspective of the consumerist society”.<sup>87</sup> Although *Deckmyn* was not cited by the Cour De Cassation, the decision of the Paris Court of Appeal – which had held that there was an infringement – was quashed on the basis that the lower court had failed to explain in a “concrete way” how a “fair balance” between the freedom of expression of the alleged infringer and the economic and moral rights of the author had been analysed.<sup>88</sup> The case was remanded to the Court of Appeal of Versailles for further consideration. Elsewhere, *Deckmyn* has been cited by the German Federal Court of Justice, also in relation to the reproduction of photographs.<sup>89</sup> In that case, a news website ran a competition in which entrants were asked to manipulate photographs of celebrities to make them look overweight, and an action was brought by the photographer of a photograph so altered. In considering the impact of *Deckmyn*, the Federal Court of Justice held that the definition of parody used in earlier German cases needed to be updated to accord with *Deckmyn*, for instance by omitting the need for the parody to comment on the original work. That said, it has also been observed that when discussing fair balance, the Court revived some of these requirements, for instance in finding that a defendant’s free speech arguments will be stronger if her work comments on the original.<sup>90</sup> The case was remitted to the Higher Regional Court of Hamburg so that a *Deckmyn*-informed standard could be applied. It therefore remains to be seen how *Deckmyn* will influence the reasoning of domestic judges across Europe, and how such judges will undertake the proportionality exercise countenanced by the Court of Justice.

#### D. *Deckmyn* and Parody

Numerous questions arise in relation to the reasoning in *Deckmyn*. One is the relationship between the Grand Chamber’s two interpretative canons: purposive semantic assessment and human rights balancing. Take the statement that parody requires the presence of “humour or mockery”, a proposition that, in the UK at least,

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<sup>86</sup> *X v Y* (Cour De Cassation, chambre civile 1, 15 May 2015) [2016] ECDR 4; see, also, Largarde and Ang (n 63).

<sup>87</sup> *Ibid.* at [19] (reproducing the plea of counsel for the artist).

<sup>88</sup> *Ibid.* at [7]-[8].

<sup>89</sup> Noted in Henrike Maier, “German Federal Court of Justice rules on parody and free use” (2017) 12 *Journal of Intellectual Property Law & Practice* 16 (discussing Bundesgerichtshof judgment of 28 July 2016). In Germany, parody is protected via the free use in Article 24 of the German Copyright Act rather than a specific exception.

<sup>90</sup> *Ibid.*, 17.

might not capture the field.<sup>91</sup> With the emphasis on fundamental freedoms later in the Grand Chamber's judgment, should free speech ideas also affect the definition of parody (and, logically, pastiche), for instance through defendant-preferring interpretations? Another is how to deal with statutes that use industry language or terms of art: should the understandings of experts or creative constituencies (and not just the dictionary) inform the statute's interpretation? As seen above, Advocate General Villalón was keen to avoid art theory when examining parody in *Deckmyn*,<sup>92</sup> but can Article 5(3)(k) be properly understood without any such analysis? Still another question is how to undertake the proportionality exercise contemplated by the General Chamber, a matter about which little guidance was rendered.

In answering these questions, we might start with a logically antecedent matter: are we taking an existing artistic or literary concept and inserting it into copyright law, or are we developing a legal concept that may depart – perhaps radically – from non-legal understandings?<sup>93</sup> To illustrate, “originality” is a term with a special meaning in copyright law, referring in essence to whether a person used the right type of effort in creating – ie, originating – a work.<sup>94</sup> “Authorship” is closely related to originality, but is perhaps a more troublesome concept to the extent that different creator groups have different conceptions of an authorial contribution, such ideas not necessarily being coterminous with the relevant legal tests.<sup>95</sup> Some inconsistency between legal and non-legal understandings may nevertheless need to be tolerated given that authorship reflects normative, doctrinal and pragmatic decisions about who should receive copyright law's bounty. There may therefore be good reasons to resist private ordering of authorship, for instance to do with manipulating rules regarding first

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<sup>91</sup> English definitions often refer to satirising the relevant target, which may include but go beyond the use of humour or mockery: see, eg, OED (n 12) (“n.2 A literary composition modelled on and imitating another work, esp. a composition in which the characteristic style and themes of a particular author or genre are satirized by being applied to inappropriate or unlikely subjects, or are otherwise exaggerated for comic effect. In later use extended to similar imitations in other artistic fields, as music, painting, film, etc.”).

<sup>92</sup> See above n 80 and surrounding text.

<sup>93</sup> Graeme Austin describes a similar idea when he says that “determining the ordinary and natural meanings” of the words of copyright legislation is “only the beginning of the analysis” as “courts often seem to be reaching ‘through’ the statutory text and engaging with deeper questions of copyright policy”: Austin (n 8) 684-685.

<sup>94</sup> See generally Lionel Bently and Brad Sherman, *Intellectual Property Law* (OUP, 4<sup>th</sup> edition, 2014) 93-95.

<sup>95</sup> Eg, Daniela Simone, “Recalibrating the Joint Authorship Test: Insights from Scientific Collaborations” (2013) 26 IPJ 111.

ownership and duration, and defining people out of authorship and hence protections such as moral rights.<sup>96</sup>

Returning to parody, one example of the “legal concept” approach is the *Michelin* decision of the Federal Court of Canada.<sup>97</sup> This case related to the reproduction of the image of “Bibendum”, the marshmallow-like corporate logo of Michelin, on campaign materials produced by a trade union.<sup>98</sup> One argument of the union was that their use fell within fair dealing. Given that there was no explicit reference to parody in the Canadian statute at the time, the relevant purpose was said to be criticism.<sup>99</sup> This defence failed for a number of reasons, including that criticism did not extend to parody: to give “such a large meaning” to criticism would be to create “a new exception to the copyright infringement, a step that only Parliament would have the jurisdiction to do.”<sup>100</sup> Teitelbaum J stated:

*I do accept that parody in a generic sense can be a form of criticism; however, it is not ‘criticism’ for the purposes of the Copyright Act as an exception under the fair dealing heading.*<sup>101</sup>

This decision therefore countenanced a division between “criticism” as a fair dealing purpose and the ordinary meanings of the word,<sup>102</sup> the latter of which would seem to include acts of evaluation and judgment that inhere in many parodies. In drawing this distinction, Teitelbaum J was swayed by the absence of Canadian or Commonwealth case law in which parody had amounted to criticism,<sup>103</sup> and the view that exceptions should be interpreted strictly.<sup>104</sup> Whilst this article would challenge the reasoning that led the judge to this particular conclusion, *Michelin* demonstrates that interpretations of fair dealing purposes cannot be judged solely by reference to non-legal meanings.

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<sup>96</sup> Eg, *Beggars Banquet v Carlton* [1993] EMLR 349 (Ch) (company not able to rely on a term of a contract that they were the authors of footage); cf *Heptulla v Orient Longman* [1989] FSR 598 (subjective intentions and conduct of the parties relevant to the conclusion that there was joint authorship of the relevant literary work).

<sup>97</sup> *Compagnie Générale des Établissements Michelin-Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* [1997] 2 FC 306 (Federal Court of Canada).

<sup>98</sup> For instance, one leaflet included a cartoon depicting “a broadly smiling ‘Bibendum’, arms crossed, with his foot raised, seemingly ready to crush underfoot an unsuspecting Michelin worker”: *ibid.*, 354.

<sup>99</sup> *Ibid.*, 377-378, citing Copyright Act (RSC 1985, c C-42) s 27(2)(a.1).

<sup>100</sup> *Ibid.*, 381.

<sup>101</sup> *Ibid.*

<sup>102</sup> See OED (n 91) (“1. The action of criticizing, or passing judgement upon the qualities or merits of anything; esp. the passing of unfavourable judgement; fault-finding, censure.”).

<sup>103</sup> *Michelin* (n 97) 379.

<sup>104</sup> *Ibid.* This was the prevailing view in Canada at the time: eg, Normand Tamaro, *The 1997 Annotated Copyright Act* (Carswell, 1996) 330.

If a case with similar facts were heard in Canada today, it is possible that the opposite outcome would be reached given the legislative expansion of Canadian fair dealing to include parody and satire, and the forward-leaning understanding of exceptions preferred in *CCH v Law Society of Upper Canada* and later cases.<sup>105</sup>

In Europe, the conclusion in *Deckmyn* that parody is an autonomous European concept is consistent with a separate copyright understanding of the term, as it suggests a definition that transcends national boundaries and cultural norms. In a similar vein, Graeme Austin states that:

*this part of the CJEU's holding gives support to the claim that, in the copyright context, legislative terminology might sometimes be less important than the fundamental principles that the statutory language is attempting to capture. ... By characterising 'parody' as an autonomous European concept, the CJEU seems to be reaching beyond whatever textual variations might appear in domestic law iterations of the defence and insisting that the scope of the defence be construed in the light of copyright's deeper systemic commitments.*<sup>106</sup>

The human rights balancing exercise bolsters this viewpoint, as it suggests the existence of universal factors that may influence the reach of Article 5(3)(k). That said – and as noted above – a key issue about *Deckmyn* is the lack of guidance regarding the relationship between the definition of parody and the need for proportionality. If parody is a vehicle for free speech, then should we interpret the Grand Chamber's conditions for parody in ways that prefer the defendant? The discussion of fair balance by the Advocate-General contained some suggestion that this concept was relevant to the classification of a work as a parody:

*Taking into account the 'presence' that fundamental rights must be acknowledged to have in the legal system as a whole, I believe that, in principle*

<sup>105</sup> Copyright Act (RSC 1985, c C-42) s 29; *CCH v Law Society of Upper Canada*, 2004 SCC 13; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36; see also Laura J. Murray and Samuel E. Trosow, *Canadian Copyright: A Citizen's Guide* (Between the Lines 2007), 78. In *United Airlines, Inc v Cooperstock*, 2017 FC 616, Phelan J cited these decisions when considering whether fair dealing in s 29 applied to the website UNTIED.com. This website presented negative information and complaints about the airline United, and was designed in such a way that it resembled United's actual website. In addition to claims grounded in trade mark law, United argued that the UNTIED website infringed copyright in United's website and various logos. In concluding that fair dealing did not apply, Phelan J accepted that the defendant's use was for an allowable purpose – parody – as it evoked existing works whilst showing differences from those works, and was an expression of mockery: at [109]-[120], including endorsement of the definition of parody in *Deckmyn* (n 9). However, the defendant failed because his dealing was not fair: his motive was to embarrass and punish United; his website reproduced closely the home page of United's website; and the confusion brought about by that similarity could lead users of the defendant's website to believe they were interacting with United: at [121]-[141].

<sup>106</sup> Austin (n 8) 698-699.

*and strictly from the perspective of the concept of parody, a particular image cannot be excluded from that concept solely because the author of the original work does not agree with the message or because the latter may deserve to be rejected by a large section of public opinion. However, distortions of the original work which, in form or substance, convey a message radically opposed to society's most deeply held beliefs, on which the European public space is constructed and exists, should not be accepted as a parody and the authors of the work with whose assistance the parody is created are authorised to assert as much.*<sup>107</sup>

In contrast, the Grand Chamber's judgment seemed to treat fair balance differently, going to "the *application*, in a particular case, of the exception for parody".<sup>108</sup> It therefore countenanced a two-stage approach in which the defendant's work was initially classified as a parody (or not) by reference to the "essential requirements" of parody, and then a determination made as to whether, "in the light of all the circumstances of the case", a fair balance between different stakeholders would be preserved if the defence was enlivened.<sup>109</sup> The Grand Chamber did not discuss what, if any, further conditions were provided by the three-step test language in Article 5(5).<sup>110</sup> This may reflect the questions posed by the referring court, which were directed towards the definition of parody.<sup>111</sup> That said, it seems odd to mention proportionality without explaining how this relates to the three-step test. The question therefore remains whether a parody that satisfies the Grand Chamber's two-stage test may fail on the basis that the requirements of Article 5(5) have not also been met.

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<sup>107</sup> *Ibid.* at [85].

<sup>108</sup> *Deckmyn* (n 9) at [27].

<sup>109</sup> *Ibid.* at [32]-[35].

<sup>110</sup> This connects to broader questions about the addressee for Art 5(5), and in particular whether its limbs are to be considered by domestic judges applying exceptions *even if* those limbs have not been transposed directly into the local statute. In Europe, there is authority from the Court of Justice that Art 5(5) is targeted to domestic judges, although the position is not clear-cut: see Richard Arnold and Eleanora Rosati, "Are national courts the addressee of the InfoSoc three-step test?" (2015) 10 JIP Law & Practice 741. In the UK, almost all fair dealing cases have proceeded without any consideration of Art 5(5). For instance, in *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch) at [130], Proudman J quoted from Art 5(5) but did not indicate how its limbs were relevant to fair dealing. In contrast, Arnold J engaged with the effect of Art 5(5) in *England and Wales Cricket Board Limited v Tixdaq Limited* [2016] EWHC 575 (Ch) at [72], [88]-[92], although the discussion was impacted by concessions of counsel (namely that the three-step test must be applied by national courts) and their treatment of Art 5(5) as dovetailing with the factors usually considered in relation to fair dealing.

<sup>111</sup> This point was made by the Advocate General, who stated that consideration of whether the limbs of Art 5(5) were satisfied was outside the reference and a matter to be determined by the national court: AG Villalón (n 7) at [29].

The judgment in *Deckmyn* has received mixed reviews in the commentary. It has been praised for taking harmonisation seriously, for instance through its treatment of parody as an autonomous European concept, and its statement that a fair balance must be struck between the interests of rightsholders and users – a concept that has been referred to in other cases, and which could, it is said, serve as a unifying test to give greater consistency and clarity to the exceptions in Article 5.<sup>112</sup> The definition of parody has also been welcomed for its liberal tenor,<sup>113</sup> although concern has been expressed that “the court’s requirement for a parody to be humorous, without any further explanation of what humour entails, may be too restrictive.”<sup>114</sup> Whilst there is something in the observation that humour is subjective and culturally-specific, one must bear in mind that the Grand Chamber spoke of parody involving an expression of humour *or mockery*, which would seem consistent with the proposition that unfunny parodies can fall within the exception.<sup>115</sup>

Perhaps the most compelling criticism – and one that could, as discussed in Section IV, be significant for pastiche – relates to the Grand Chamber’s statement that in assessing fair balance, attention must be given to any discriminatory message conveyed by the defendant’s work.<sup>116</sup> The rightsholders’ contention was that the defendant’s drawing had Islamophobic overtones and that some recipients believed the calendar to have been produced or endorsed by *Suske en Wiske*.<sup>117</sup> The Grand Chamber agreed that, if there was a discriminatory message, rightsholders have “in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message.”<sup>118</sup> At this point it is worth interpolating that a commitment to free speech must countenance not only the interests of the speaker but of third parties who do not wish to serve as a vehicle for or be (mis)understood as

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<sup>112</sup> Eg, Jonathan Griffiths, Christophe Geiger, Martin Senftleben, Raquel Xalabarder and Lionel Bently, “The European Copyright Society’s ‘Opinion on the judgment of the CJEU in Case C-201/13 *Deckmyn*’” (2015) 37 EIPR 127, 128; Sabine Jacques, “Are national courts required to have an (exceptional) European sense of humour?” (2015) 37 EIPR 134, 135.

<sup>113</sup> Griffiths et al (n 112) 128.

<sup>114</sup> Jacques (n 112) 137; for similar, see Lagarde and Ang (n 63).

<sup>115</sup> The same observation has been made by Austin (n 8) 695. In *United Airlines, Inc v Cooperstock* 2017 FC 616 (facts discussed above at n 105), Phelan J, adopting *Deckmyn* reasoning to inform the meaning of parody in the Canadian Copyright Act, said at one point that “parody requires humour”: at [133]. Elsewhere in his decision, however, Phelan J referred to the requirement for humour or mockery (eg, at [119]), and indeed in holding that the UNTIED website was within an allowable fair dealing purpose, Phelan J concluded that the website “evokes existing works ... while showing some differences ... [and] expresses mockery (and criticism) of the Plaintiff”: at [120].

<sup>116</sup> *Deckmyn* (n 9) at [29]-[30].

<sup>117</sup> Described in AG Villalón (n 7) at [20].

<sup>118</sup> *Ibid.* at [31].

sharing the speaker's message.<sup>119</sup> As such, any confusion about association may need to be weighed against the speech interests of the defendant, a concern that is best thought of in free speech terms as being an objection to "compelled speech".<sup>120</sup> It might also be said that the Grand Chamber, by citing the Race Equality Directive and Article 21(1) of the Charter of Fundamental Rights,<sup>121</sup> gave this compelled speech argument an objective footing, helping to prevent it from operating as a free-floating and self-serving answer to any assertion of a parody defence.

The difficulty is that the Grand Chamber's reasoning on this aspect was brief, under-particularised, and side-stepped questions regarding the use of Article 21 – which covers discrimination on "any ground" including "political or any other opinion" – as a tool for censorship.<sup>122</sup> The Grand Chamber did not engage with the characteristics of a "discriminatory message" and the circumstances in which a claimant's work will be "associated ... with such a message", both questions being left to the national court. One issue is whether the copyright system is the appropriate forum to ventilate complaints about the substantive content of a work. At least in the UK, copyright law is not usually concerned with such qualitative assessments: for instance, the immorality exclusion remains contentious in its policy basis and effect, and is applied infrequently,<sup>123</sup> and as stated by Robert Walker LJ in relation to fair dealing:

*If the fair dealing is for the purpose of criticism that criticism may be strongly expressed and unbalanced without forfeiting the fair dealing defence: an*

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<sup>119</sup> Compelled speech can take different forms, and there is disagreement over which forms result in harm and should be the subject of regulation: eg, Steven H Shiffrin, "What is Wrong with Compelled Speech?" (2014) 29 J L & Pol 499. In the UK, compelled speech arguments were ventilated recently in *Lee v McArthur* [2016] NICA 39 in relation to the refusal by the proprietors of Ashers Bakery to fulfill an order to bake a cake decorated with the slogan "Support Gay Marriage". The decision of the District Judge, who held that the defendants had engaged in direct discrimination against the applicant, was upheld on appeal. In the US, similar arguments regarding the right not to speak were unsuccessful in *Elane Photography, LLC v Willock*, 309 P 3d 53 (NM 2013), which concerned discrimination said to arise from the refusal by a photographer to photograph a same-sex commitment ceremony.

<sup>120</sup> For a similar argument in relation to trade mark parodies, see Robert Burrell and Dev Gangjee, "Trade marks and freedom of expression – a call for caution" (2010) 41 IIC 544; and see generally Shiffrin (n 119), esp 512-516.

<sup>121</sup> Article 21 covers non-discrimination, with paragraph (1) prohibiting "[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation".

<sup>122</sup> Jacques (n 112) 134.

<sup>123</sup> For an overview, see Bently and Sherman (n 94) 122-123.

*author's remedy for malicious and unjustified criticism lies (if it lies anywhere) in the law of defamation, not copyright.*<sup>124</sup>

Following *Deckmyn* it has been observed that there are laws directed specifically to racist and hate speech,<sup>125</sup> and that the (unharmonised) moral rights regime permits authors to object to unsavoury associations.<sup>126</sup> However, *Deckmyn* is problematic not only for plugging a gap that may or may not exist, but because “copyright law ought not to apply a more exacting standard than public or criminal law in this context.”<sup>127</sup> Despite the statement of the Grand Chamber that “[i]t is not disputed that parody is an appropriate way to express an opinion”,<sup>128</sup> statements in *Deckmyn* could be relied upon to narrow the messages that can be conveyed through the medium of parody. To illustrate, the impugned drawing in *Deckmyn* may have had racist motivations but its message pertained to the spending priorities of an elected official. Whatever we may think of the merits of these views, there are questions about whether their circulation should be limited, a debate not touched upon by the Grand Chamber.<sup>129</sup> One might also note, in this regard, that political speech is usually given the highest level of protection in Strasbourg jurisprudence, including for ideas that “offend, shock or disturb”.<sup>130</sup>

On the question of whether the claimant’s work was “associated” with any discriminatory message, one possibility is that this relates to confusion, ie, that members of the public believe that the author or rightsholders made or endorsed the defendant’s work.<sup>131</sup> The presence of confusion might indicate that the defendant was

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<sup>124</sup> *Pro Sieben Media AG v Carlton UK Television Ltd* (n 57) 619; for similar comments, see Henry LJ in *Time Warner Entertainments Co v Channel Four Television plc* [1994] EMLR 1, 14.

<sup>125</sup> Jonathan Griffiths, Christophe Geiger, Martin Senftleben, Raquel Xalabarder and Lionel Bently, “Limitations and exceptions as key elements of the legal framework for copyright in the European Union: opinion of the European Copyright Society on the CJEU ruling in Case C-201/13 *Deckmyn*” (2015) 46 IIC 93, 99 (para 30).

<sup>126</sup> Griffith et al (n 112) 129-130.

<sup>127</sup> Agreed statement (n 125), 99 (para 30).

<sup>128</sup> *Deckmyn* (n 9) at [25].

<sup>129</sup> It appears that, at the time of writing, there have been no further developments at the domestic level in relation to *Deckmyn*: Eleanora Rosati, “Parody and free use in Germany: Federal Court of Justice decides first parody case after *Deckmyn*”, *IPKat*, 6 September 2016, <http://ipkitten.blogspot.com.au/2016/09/parody-and-free-use-in-germany-federal.html>.

<sup>130</sup> Eg, *Lingens v Austria* (1986) 8 EHRR 103 at [42]-[43]; *Ceylan v Turkey* (2000) 30 EHRR 73 at [39]-[47]; *PETA Deutschland v Germany* (2013) 56 E.H.R.R. 25 at [46]. For a recent example that has elicited some criticism, see *Annen v Germany* (3690/10) unreported 26 November 2015 (ECHR), criticised in unattributed, “Anti-abortion activism” [2016] EHRLR 211.

<sup>131</sup> In *Elane Photography, LLC v Willock* (n 119), one reason why the photographer’s arguments failed was that reasonable observers would not assume any endorsement of the same-sex commitment ceremony on the part of the photographer, who was paid to provide a

not actually successful in creating a parody, eg, that the work lacked any humour or mockery, or that this aspect was too subtle. That said, the Grand Chamber said that it was not a condition that the work “could reasonably be attributed to a person other than the author of the original work itself”.<sup>132</sup> This could reflect concerns about circular and self-reinforcing licensing arguments, ie, that the more legal rights are thrown around content, the more the public will come to expect that re-use has been authorised. Again, none of these difficult questions were discussed by the Grand Chamber. If the Grand Chamber was suggesting that an “association” arises from the mere evocation of the claimant’s work, this would effect a significant (and arguably unprincipled) enlargement of compelled speech reasoning, and could operate to expand copyright into matters normally the province of (unharmonised) moral rights.

To conclude, there are a number of interpretative lessons that can be derived from *Deckmyn*, notably that parody is a copyright concept influenced not just by the ordinary meaning of the term but by the goals of Article 5(3)(k) and its status as an autonomous European concept. There is also evidence of the Court of Justice continuing its retreat from earlier, unqualified, statements that exceptions must be interpreted strictly, for instance through its statement that its conception of parody was “not called into question” by this principle,<sup>133</sup> its observation that the interpretation of parody must “enable the effectiveness of the exception”,<sup>134</sup> and its emphasis on the freedom of expression of the user.<sup>135</sup> We must be careful not to overstate the pro-user reasoning in this case, as the judgment lacks the unambiguous vision of a case like *CCH*,<sup>136</sup> and did not involve a wholesale renouncement of the proposition that exceptions must be interpreted strictly.<sup>137</sup> The role of compelled speech reasoning remains to be seen, and there are those who doubt whether the emphasis on freedom of expression will translate into any significant change in the

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service. Shiffrin (n 119) 512 contrasts these facts with compelling a person to write speeches or press releases for a political party they do not support, or religions they oppose (he gives the example of Scientology). Shiffrin argues that these scenarios would be distinguishable from *Willock* because they involve public speech at the core of the First Amendment in circumstances more likely to be understood as involving endorsement.

<sup>132</sup> *Deckmyn* (n 9) at [21]. As discussed above, the definition of parody includes that the defendant’s work evokes, but is noticeably different from, the original work: at [20]. This would seem to require that the two *works* not be confused, rather than there being no confusion about the *authorship* of the defendant’s work.

<sup>133</sup> *Deckmyn* (n 9) at [22].

<sup>134</sup> *Ibid.* at [23].

<sup>135</sup> *Ibid.* at [27].

<sup>136</sup> *CCH v Law Society of Upper Canada* (n 105).

<sup>137</sup> See also Jacques (n 112) 135, describing the Grand Chamber’s approach as strict “but not too strict”; cf Griffiths (n 4), stating that the judgment “paid lip-service to the idea that copyright exceptions should be interpreted narrowly”.

operation of exceptions.<sup>138</sup> However, *Deckmyn* does not suggest a narrow role for parody or that we should give the term a limited definition. As discussed in the next section, if we apply similar thinking to pastiche, it is possible and indeed desirable to construe the exception broadly to cover a range of imitative uses.

#### IV. THE LEGAL CONCEPT OF PASTICHE

##### A. Definition

In construing pastiche as a copyright concept, the first task – and the focus of this sub-section – is to develop a definition that responds to the interpretative cues discussed in the foregoing analysis. It is also necessary to explore the relevance of the fair dealing infrastructure used in the pastiche exception in the UK. Having undertaken this analysis, this article will turn in sub-section B to provide illustrations about how a pastiche exception might operate in practice.

An initial point is that neither a purposive semantic interpretation nor a human rights balancing exercise require, or even suggest, that pastiche should be subverted from its ordinary usage and be understood as a synonym for parody or otherwise subject to the same conditions as this genre. This can be contrasted with the position said to exist in France,<sup>139</sup> the oral submissions of Belgium in *Deckmyn*,<sup>140</sup> and the analysis of *Deckmyn* by Sabine Jacques, who states that the Grand Chamber’s judgment:

*implicitly indicates that ‘parody’, ‘pastiche’ and ‘caricature’ are overlapping, rather than impervious terms. While it is possible to highlight characteristics of each genre,<sup>141</sup> it may be impossible to delineate each term completely. Ultimately, parody must be understood as a ‘multivalent’ term which operates at different levels and comprises many genres, such as satire, pastiche and caricature.*

Jacques does not provide any citation to the judgment to explain why this perspective is “implicit” in its words, and there is ambiguity around what, precisely, she is asserting in the quote above. There was no discussion of pastiche or caricature by the Grand Chamber, with these terms only appearing in the judgment in extracts from the relevant EU and Belgian provisions.<sup>142</sup> This contrasts with the brief discussion by the

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<sup>138</sup> See Austin (n 8) 696 (*Deckmyn* is “unlikely to mandate an especially broad approach to the EU parody exception. The true position is likely to prove more complex. When the CJEU has previously considered the relationship between freedom of expression and the rights of copyright owners, it has not countenanced any significant dismantling of the latter”).

<sup>139</sup> Described above n 62 to n 70 and surrounding text.

<sup>140</sup> Described above n 7.

<sup>141</sup> She cites Deazley (n 4) 786 and two other texts on parody.

<sup>142</sup> *Deckmyn* (n 9) at [5], [6].

Advocate General, but even here there was no sustained analysis of the distinction between each term, such a comparison being of “[no] particular relevance [for] present purposes.”<sup>143</sup> The Advocate General’s opinion is clearly consistent with there being overlap between caricature, parody and pastiche, but if anything points towards each term being on the same rung of the hierarchy and doing independent work.<sup>144</sup> Similarly, whilst it can be argued that the Grand Chamber construed parody broadly to cover target and weapon parody,<sup>145</sup> acts that may be classified as “satire” in other jurisdictions,<sup>146</sup> it is quite a leap to say that pastiche is a sub-branch of parody. This is not only because of the absence of any such definitive statement in *Deckmyn*, but because of the risks of overlooking the separate history and operation of pastiche, and subjecting it to the conditions of parody, including the need for humour or mockery.

The contention preferred in this article is that, in accordance with *Deckmyn*, we start with the ordinary meaning of pastiche, which as discussed in Section II covers imitation of the style of pre-existing works, the incorporation of parts of earlier works into new works, and the production of medleys. In ascertaining the copyright meaning of pastiche, we must also consider the “purpose of the rules of which [Article 5(3)(k)] is part”,<sup>147</sup> including that our interpretation “enable the effectiveness of the exception”.<sup>148</sup> This purposive semantic assessment points against unduly narrow definitions, as seen by the Grand Chamber’s interpretation of parody by reference to two essential features – evoking but being noticeably different from the parodied work, and being an expression of humour or mockery – and its rejection of other possible requirements, for instance that the parody relate to the original work.<sup>149</sup>

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<sup>143</sup> AG Villalón (n 7) at [46].

<sup>144</sup> *Ibid.* The Advocate General observed that it “may be difficult in a specific case to assign a particular work to one concept or another” and that “all those concepts have the same effect of derogating from the copyright of the author of the original work which, in one way or another, is present in the – so to speak – derived work.” The tenor of the opinion – whilst brief on this aspect – seems to be that the three purposes in Article 5(3)(k) have distinct operation, with the key common feature (ie, imitation present in the defendant’s work) being at a high level of generality.

<sup>145</sup> The language of target and weapon parody is used by, eg, Spence (n 4) 594-595, observing that target parodies comment on the text or its creator, whereas weapon parodies use the text to comment on something else. In *Deckmyn* (n 9) at [21], the Grand Chamber rejected the condition that the defendant’s work “should relate to the original work itself”.

<sup>146</sup> Eg, Australia and Canada have both extended fair dealing to cover parody and satire: *Copyright Act 1968* (Cth) ss 41A, 103AA; *Copyright Act* (RSC 1985, c C-42) s 29. In the US, there is authority that fair use can apply not only to parody but to satire: see *Blanch v Koons*, 467 F 3d 244 (2<sup>nd</sup> circuit 2006), 254-255 (characterising the defendant’s work as a satire).

<sup>147</sup> *Deckmyn* (n 9) at [19].

<sup>148</sup> *Ibid.* at [23].

<sup>149</sup> *Ibid.* at [20]-[21].

Applying this approach to pastiche, it is not problematic that experts in art theory may adopt nuanced and competing definitions of pastiche; whilst these perspectives are useful to build a picture of pastiche, we are ultimately developing a copyright term rather than seeking to mediate a specialist debate. To illustrate, Dyer describes pastiche as “unconcealed”, “textually signalled” (ie, there are markers within or alongside the work to indicate the imitation) and “evaluatively open” (ie, the work does not imply any evaluation of the referent).<sup>150</sup> He uses this schema to draw a distinction between pastiche and other practices; for instance, he contrasts pastiche with homage and parody on the basis that the latter are “evaluatively predetermined”, either implying a positive evaluation (homage) or a negative one (parody). Leaving aside the fact that this is but one expert opinion, imbuing pastiche with too many characteristics may not only depart from its “essential characteristics” arising from everyday language,<sup>151</sup> but import into copyright law various imponderable aesthetic matters that judges are usually keen to avoid,<sup>152</sup> and effect a narrowing of pastiche that is contrary to the rights of users and the public interest.<sup>153</sup>

In this regard, the call in this article for a broad definition of pastiche comes not only from statements in *Deckmyn* but from underlying normative perspectives on the role of exceptions in copyright law. First, it reflects the proposition that much balance is achieved in copyright law through exceptions, and that exceptions should be given a robust interpretation.<sup>154</sup> Secondly, it responds to lessons from the legal rulemaking literature in relation to the drafting of exceptions,<sup>155</sup> including the inefficiency and impossibility of government drafting a series of detailed rules to deal with every possible contingency.<sup>156</sup> For instance, the use of fine-textured labels risks generating uncertain, inconsistent and unprincipled results if applied to Article 5(3)(k), especially

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<sup>150</sup> Dyer (n 15) 22-25.

<sup>151</sup> *Deckmyn* (n 9) at [20].

<sup>152</sup> One might question whether judges are deluding themselves with statements that they are avoiding aesthetic considerations, and indeed certain analytical techniques show clear parallels with different strands of aesthetic theory: see, eg, Alfred C. Yen, “Copyright Opinions and Aesthetic Theory” (1998) 71 *Southern California Law Review* 247. See also Barton Beebe, “*Bleistein*, the Problem of Aesthetic Progress, and the Making of American Copyright Law” (2017) 117 *Columbia Law Review* 319.

<sup>153</sup> *Deckmyn* (n 9) at [25]-[26], citing recitals 3 and 31 of the Information Society Directive.

<sup>154</sup> Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall, *ALRC Inquiry into Copyright and the Digital Economy: Submission in response to Issues Paper No. 42* (14 December 2012) esp 3-8; see also *CCH v Law Society of Upper Canada* (n 105) at [48] (describing exceptions as user rights, and calling for a “proper balance” to be maintained between copyright owner and user interests through non-restrictive interpretations).

<sup>155</sup> Emily Hudson, “Implementing Fair Use in Copyright Law: Lessons from Australia” (2013) 25 *IPJ* 201, esp 218-221.

<sup>156</sup> See also Justice Laddie, “Copyright: over-strength, over-regulated, over-rated?” (1996) 18 *EIPR* 253, 258.

given that this provision speaks of only three practices (caricature, parody and pastiche) whilst aesthetic theory recognises many closely-related variants and overlapping categories.<sup>157</sup> In addition, one of the attractions of a broad-acting pastiche defence is that it obviates the need for government to draft specific exceptions to deal with each possible sub-category, eg, mash-ups, music sampling, appropriation art, and so forth.<sup>158</sup> This connects to a third benefit of giving pastiche a broad interpretation: that in the UK, Article 5 of the Information Society Directive places limits on the ability of government to draft new exceptions.<sup>159</sup> Finally, the approach preferred in this article aligns with that adopted in cases like *CCH v Law Society of Upper Canada*, where fair dealing purposes were given a “large and liberal”<sup>160</sup> interpretation and the intellectual heavy lifting done mainly through fairness factors. This point will be addressed in further detail soon.

Returning to section 30A, the copyright definition of pastiche should reflect the term’s essential meaning, which covers two key activities: imitation of the style of pre-existing works, and the utilisation or assemblage of pre-existing works in new works. It is not necessary for this definition to be narrowed to reflect distinctions drawn by musicologists and others between pastiche and pasticcio – the word “pastiche” as a copyright concept should cover all dimensions. Nor is it necessary for pastiche to involve some sort of humour, critical commentary or element of surprise, such requirements being inapt for an anti-twist genre – in contrast with caricature and parody, pastiche includes uses that are neutral towards, or celebrate, the referent. Acknowledgement of the imitated work should not be required for a work to be a pastiche, although this may be relevant to whether there has been a *fair* dealing, for instance for fakes that are presented as authentic works.<sup>161</sup> Similarly, whilst some

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<sup>157</sup> For instance, Dyer’s schema compares fourteen practices: plagiarism, fake, forgery, hoax, copies, version, genre, pastiche, emulation, homage, travesty, burlesque, mock epic and parody: Dyer (n 15) 24. As noted above at n 38 and surrounding text, pastiche can overlap with aesthetic categories such as appropriation art, collage, hip hop, montage, etc.

<sup>158</sup> Some of these acts might conceivably fall within a quotation exception, if such an exception is interpreted broadly and as applying beyond quotations from literary works. This is the thesis being pursued by Tanya Aplin and Lionel Bently. For a summary of the quotation exception in the CDPA, see Bently and Sherman (n 94) 238-241.

<sup>159</sup> Article 5 of the Information Society Directive contains a list of exceptions that may be introduced by Member States in relation to rights harmonised by that Directive (ie, reproduction, communication to the public and distribution). This has been read as a closed list that does not permit, for example, broader fair use-style exceptions: Hargreaves Review (n 2) [5.6], [5.18]-[5.19].

<sup>160</sup> *CCH v Law Society of Upper Canada* (n 105) at [51]; similar at [54].

<sup>161</sup> It must also be remembered that if the relevant complaint relates to misrepresentation of authorship, there are other causes of action that can be pressed, such as consumer protection regimes, moral rights, and criminal actions for fraud. Indeed, it has been argued that for the visual arts, where consumers place a high value on authenticity such that a copy, however perfect, does not generally substitute for the original, the market will often operate to render a

specialist definitions of pastiche refer to “*evident* recombination”,<sup>162</sup> we should be reluctant to import this requirement into the copyright definition, because of the potential for it to necessitate inquiry into subjective and contested matters regarding creator intention, audience knowledge, and the like.

Applying this approach, pastiche in section 30A could apply to mash-ups, fan fiction, music sampling, collage, appropriation art, medleys, and many other forms of homage and compilation. This approach takes seriously the speech interests of the defendant, and embodies the proposition that imitation is an important and legitimate part of artistic creation. Lest this definition seem too broad, it must be remembered, first, that many instances of pastiche will not implicate copyright (being in the *style* of a work or author, rather than reproducing protectable expression), and secondly, that this act of classification is not the end of the story. Under *Deckmyn*, a proportionately exercise will also be necessary, and there may be additional work by virtue of the three-step test language of Article 5(5). In the UK, it is likely that, in the absence of statutory reform, courts will integrate these requirements through the fairness component of fair dealing.<sup>163</sup> This would make sense, and as discussed above is the logical place for narrowing to take place. In short, there is no need to read down the definition of “pastiche” when we can use fairness to ensure to provide limits to the application of the exception.

In the next sub-section, this article will use two US cases to illustrate its approach to pastiche, and some of the potential dangers of the compelled speech arguments in *Deckmyn*. Before turning to these illustrations, it must be acknowledged that the foregoing analysis is based on the current relationship between the UK and EU. Given the June 2016 referendum result, there may be a change in the status of EU law in the UK in the future. However, even if there is a “hard” Brexit in which European directives and case law cease to have binding effect, the interpretation of pastiche called for in this article can stand on its own two feet, given its normative grounding and its utilisation of fairness factors to create a nuanced application of the exception. A broad approach to pastiche does not, therefore, depend on European infrastructure.

## B. Illustration

Two examples – both taken from the fair use jurisprudence of the US – will be used to help explain the conception of pastiche called for in this article.

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copyright complaint unnecessary: see Amy Adler, “Fair Use and the Future of Art” (2016) 91 NYU L Rev 559, 618-625.

<sup>162</sup> Dyer (n 15) 9.

<sup>163</sup> See especially *England and Wales Cricket Board Limited v Tixdaq Limited* [2016] EWHC 575 (Ch). The degree to which this will allow courts to apply the existing fair dealing case law has been questioned: eg, Griffiths (n 4).

The first example is the Second Circuit decision in *Cariou v Prince*. The plaintiff, Patrick Cariou, was a professional photographer who had taken photographs of the Rastafarian population in Jamaica and published them in a book titled *Yes, Rasta*. These photographs were used by the defendant, well-known appropriation artist Richard Prince, in paintings forming part of his “Canal Zone” series. These works utilised Cariou’s photographs (along with others) with various techniques applied, eg, cropping, collage, tinting and over-painting. Both sides applied for summary judgment, with the defendants arguing that the paintings fell within fair use. At first instance the plaintiff’s motion was granted in relation to copyright infringement, fair use and liability.<sup>164</sup> Judge Batts held that none of the fair use factors favoured the defendants, observing that any transformation was minimal and did not involve comment, that there was a large commercial element to exhibition and sale of Prince’s works, and that there was evidence of actual market harm.

On appeal, the findings on fair use were reversed for twenty-five of the works and remanded in relation to the remaining five.<sup>165</sup> The Court of Appeals held that it was wrong for the District Court to read into fair use a requirement that the defendant comment on or critically refer back to the original works; all that was required was that the new work “alter the original with ‘new expression, meaning, or message.’”<sup>166</sup> The Court was prepared to hold that most of the works were transformative: when viewed side-by-side they manifested an entirely different aesthetic (“hectic and provocative” rather than “serene and deliberately composed”) and added something new.<sup>167</sup> They were of any entirely different scale, and used collage and other techniques to change the underlying images. This conclusion was reinforced by Prince’s intention: to create something “completely different ... a kind of fantastic, absolutely hip, up to date, contemporary take on the music scene.”<sup>168</sup> A decision of the remaining five artworks was never handed down as the case settled.<sup>169</sup>

It is beyond the scope of this article to engage in a lengthy critique of this case, which has received a mixed reception in the US.<sup>170</sup> Relevant for this article is the proposition

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<sup>164</sup> *Cariou v Prince*, 784 F Supp 2d 337 (SDNY 2011)

<sup>165</sup> *Cariou v Prince*, 714 F 3d 694 (2<sup>nd</sup> circuit 2013).

<sup>166</sup> *Ibid.* 706, citing *Campbell v Acuff-Rose Music, Inc*, 510 US 569, 579 (1994).

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.* 707.

<sup>169</sup> Brian Boucher, “Landmark Copyright Lawsuit Cariou v. Prince is settled”, *Art in America*, 18 March 2014, at <http://www.artinamericamagazine.com/news-features/news/landmark-copyright-lawsuit-cariou-v-prince-is-settled/>.

<sup>170</sup> Eg, Caroline L McEneaney, “Transformative Use and Comment on the Original: Threats to Appropriation in Contemporary Visual Art” (2013) 78 Brooklyn LR 1521; Jacey Norris, “Art or Artifice: The Second Circuit’s Misapplication of the Fair Use Factors in *Cariou v. Prince* in light of *Kienitz v Sconnie Nation*” (2015) 25 DePaul J Art Tech & IP Law 429;

that Prince's artworks, if they were the subject of similar litigation in the UK, could reasonably be classified as instances of pastiche under section 30A, given the artistic techniques employed. Because parodic or critical overtone is not required, it would not be fatal that Prince himself denied that he was "commenting on any aspects of culture" or "trying to create anything with a new meaning or a new message", his goal simply being to "try to change [the original image] into something that's completely different", being "great art that makes people feel good."<sup>171</sup> The analysis would instead focus on whether the works were *fair* dealings. Here a number of the traditional factors might be relevant, including the extent of copying, what new material or context has been added by the defendant, and whether the defendant's purpose could have been achieved with a less intrusive amount of copying.<sup>172</sup> One could also envisage a parallel complaint under the integrity right,<sup>173</sup> for instance due to the level of nudity in Prince's works, and – potentially – the re-use of images for purposes well outside the use for which subject consents were originally obtained.

Comparing UK and US law, it might be argued that a pastiche exception helps avoid some of the difficulties in assessing whether a work is transformative for the purposes of the fair use doctrine.<sup>174</sup> For instance, Amy Adler, who lauds the role of copying in contemporary creative enterprise and self-describes as "unapologetically Team Richard Prince",<sup>175</sup> has said that the transformativeness inquiry in cases such as *Cariou v Prince* is predicated on assumptions that are antithetical to modern art (eg, that there is a stable meaning or message in a work), focuses on whether a work is

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Daniel J Brooks, "Rectifying Fair Use After *Cariou v Prince*: Revising the Forgotten Statutory Text and Requiring that Unauthorized Copying Be Justified, Rather than Merely 'Transformative'" (2016) 15 Chi-Kent J Intell Prop 93; Adler (n 161). The reasoning was also questioned in *Kienitz v Sconnie Nation LLC*, 766 F 3d 757 (7<sup>th</sup> circuit 2014) on a number of bases, including that it served to oust the four fairness factors and to, in effect, extinguish the right to make derivative works under §106(2) of the US *Copyright Act of 1976*.

<sup>171</sup> Oral testimony of Richard Prince, reproduced in Christine Haight Farley, "No Comment: Will *Cariou v Prince* Alter Copyright Judges' Taste in Art" (2015) 5 IP Theory 19, 30-31. To illustrate, on the matter of paintings where guitars were collaged onto portraits of Rastafarian men, Prince explained: "he's playing the guitar now, it looks like he's playing the guitar, it looks as if he's always played the guitar, that's what my message was": *Cariou v Prince* (n 164) 349.

<sup>172</sup> See, eg, *Hubbard v Vosper* (n 57) 94; *Newspaper Licensing Agency Limited v Marks & Spencer Plc* [1999] EMLR 369, 381-383; *Hyde Park Residence v Yelland* [2001] Ch 143, 158-159.

<sup>173</sup> CDPA s. 80.

<sup>174</sup> For discussion of the role of transformativeness in the US case law, see Barton Beebe, 'An Empirical Study of U.S. Copyright Fair Use Options, 1978-2005' (2008) 156 U Pennsylvania LR 549, 603-606, noting that although many cases post-dating *Campbell v Acuff-Rose* (n 166) did not discuss transformativeness, when they did "it exerted nearly dispositive force not simply on the outcome of factor one but on the overall outcome of the fair use test", leading Beebe to describe this consideration as sufficient although not necessary: at 605.

<sup>175</sup> Adler (n 161) 561.

new when much art rejects newness as a goal, and uses inconsistent approaches to deciding aesthetic matters. Adler raises the possibility of using market impact as the primary tool to judge fair use in cases involving the visual arts, on the basis that the value of art derives not just from the expression but the artist's imprimatur, meaning that new works can involve a high degree of copying without any market substitution taking place.<sup>176</sup> In the UK, the presence of pastiche may avoid some of these problems because this practice does not require a new message or meaning. This may permit judges applying section 30A to focus instead on fairness, which could conceivably include some of the market substitution points raised by Adler, given that competition between the works is an accepted component of fair dealing analysis.<sup>177</sup>

The second example to illustrate this article's conception of pastiche is *Salinger v Colting*, another decision of the Second Circuit. The case related to a novel written by the defendant, Fredrik Colting, under the pseudonym John David California, and titled *60 Years Later: Coming Through the Rye*. The novel explored the relationship between JD Salinger and Holden Caulfield, the protagonist of *The Catcher in the Rye*. It utilised two narrators: 76 year old "Mr C", who has experiences and recounts stories similar to those of Holden Caulfield in *Catcher*; and his 90 year old author, who interrupts the story at numerous points and who wishes to write Mr C out of existence. The two characters meet and reconcile at the end of the novel.

In an application for a preliminary injunction restraining publication of the novel, the defendants sought to argue was that *60 Years* was a parody that commented on *Catcher* and Salinger.<sup>178</sup> However, Judge Batts rejected this argument, describing the defendants' contentions as "post-hoc rationalizations employed through vague generalizations about the alleged naivete of the original, rather than reasonably perceivable parody."<sup>179</sup> In her view, themes and ideas in *Catcher* were repeated in *60 Years*, and there was nothing parodic about the new context, eg, the age of the characters and the changes to the world in the intervening years. Judge Batts observed:

... *60 Years*' plain purpose is not to expose Holden Caulfield's disconnectedness, absurdity, and ridiculousness, but rather to satisfy Holden's fans' passion for

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<sup>176</sup> Ibid.

<sup>177</sup> Eg, *Pro Sieben Media AG v Carlton UK Television Ltd* (n 57) 619. Emphasis on market displacement can also be seen in the reasoning of the WTO Panel considering the meaning of "conflict with a normal exploitation" in Report of the Panel, *United States—Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000) at [6.176]-[6.183].

<sup>178</sup> *Salinger v Colting*, 641 F Supp 2d 250, 257 (SDNY 2009).

<sup>179</sup> Ibid. 258.

*Holden Caulfield's disconnectedness, absurdity, and ridiculousness, which Catcher has "elevated into the realm of protectable creative expression."*<sup>180</sup>

These findings were fortified by descriptions of the novel as a sequel to *Catcher*, for instance on the original jacket of the book and in other public statements.<sup>181</sup> With the conclusions regarding the minimally transformative nature of *60 Years* bolstered by other findings in relation to commerciality, the nature of the plaintiff's work and the extent of copying, Judge Batts concluded that any fair use defence was unlikely to succeed, a point with which the appeal judges agreed.<sup>182</sup> Critiquing this conclusion, Kate O'Neill argues that *60 Years* is a "metafiction" (ie, "a fiction about a fiction"),<sup>183</sup> and that by construing it as a sequel, Judge Batts gave inadequate weight to the significance of the dual narrative structure. For instance, it could be argued that this structure was inherently transformative due to its effect on the reader's perceptions of the original work, illuminating the frustration Salinger might have felt about his own fame and notoriety, the popularity of Holden Caulfield, and the continued calls (almost all of which were rejected) for sequels and dramatizations.<sup>184</sup>

O'Neill makes a credible case that Judge Batts mischaracterised the defendant's novel, with the result that the parody arguments never get off the ground. However, even if Judge Batts' analysis was correct, one could imagine a convincing argument in the UK that the defendant's novel was a pastiche, and indeed *60 Years* has been described that way in the literature.<sup>185</sup> Such an approach would reduce the significance of the classification of fan fiction in the UK, because different forms – eg, a sequel that retains the events and vision of the underlying work versus a critical work that changes the focus and experience of the reader – could fall within a fair dealing purpose. It would also help remove the need for defendants to retrofit tortured and self-serving arguments about critical commentary as part of their fair dealing argumentation. Indeed, one of the refreshing aspects of *Cariou v Prince* was the defendant's refusal to invoke some concocted highfalutin explanation of his works. If,

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<sup>180</sup> Ibid. 260, citing *Castle Rock Entertainment, Inc v Carol Pub Group, Inc*, 150 F 3d 132, 143 (2<sup>nd</sup> circuit 1998).

<sup>181</sup> Ibid. 262.

<sup>182</sup> *Salinger v Colting*, 607 F 3d 68 (2<sup>nd</sup> circuit 2010). However, the injunction granted by Judge Batts was vacated and the case remanded on the basis that the standard for granting a preliminary injunction did not accord with that in *eBay, Inc v MercExchange, LLC*, 547 US 388 (2006). The case settled before any new orders were made.

<sup>183</sup> Kate O'Neill, "The Content of Their Characters: J.D. Salinger, Holden Caulfield, Fredrik Colting" (2012) 59 J. Copyright Society USA 291, 296.

<sup>184</sup> Ibid. 307-316.

<sup>185</sup> See Bernard A Drew, *Literary Afterlife: The Posthumous Continuations of 325 Authors' Fictional Characters* (McFarland & Company 2010) 90.

in a UK context, we just accept those works are instances of pastiche, we can turn to the more important question: are they *fair dealings*?

There is one final point to make about *Salinger v Colting*, which relates to compelled speech. In the course of discussing the standard for an injunction, the Court of Appeals for the Second Circuit observed that the “‘loss of First Amendment freedoms,’ and hence infringement of the right not to speak, ‘for even minimal periods of time, unquestionably constitutes irreparable injury.’”<sup>186</sup> Questions arise regarding the source of such a right: does it come from Colting seeking to, say, present *60 Years* as authored or endorsed by Salinger, or merely from Salinger’s refusal to licence derivative works? O’Neill argues that the Court of Appeals “‘invoked this language to deflect attention from a factitious and circular argument that Colting’s work deprived Salinger of a valuable licensing right”, helping bolster “a weak link in his claim for infringement”.<sup>187</sup> She also highlights the dangers of these ideas for fair use reasoning:

*This rhetoric is very powerful ... and I hope that future courts will resist using it to support close judgments in hard cases. Unchecked, the rhetoric implies that Salinger’s copyright claim involves fundamental personal freedoms guaranteed to him by the Bill of Rights and not just a privilege limited by time and fair use. ... With a few short words, the court managed to translate Salinger’s undoubted commercial right to license – and to refuse to license – into a private, constitutional privilege to censor derivative works during the copyright term, unchecked by the doctrine of fair use. I think copyright defendants need to challenge this rhetoric head on because, taken at face value, it eviscerates fair use.*<sup>188</sup>

Recall that one criticism of *Deckmyn*, above, related to its under-particularised analysis of discriminatory message, which raised the risk of compelled speech arguments effecting a significant carve-out from the scope of Art. 5(3)(k).<sup>189</sup> If our concern is confusion – ie, that the public believes that the original author is speaking or has agreed to the speech – then parody may have an in-built protection because the comedic or satirical flavour will help indicate that the speaker is not the original author. Given that pastiche does not require any comment or twist, there is a risk that compelled speech may cut even more deeply if we do not think carefully about the harms we are seeking to prevent. As noted earlier, if our concern relates to the fraudulent presentation of the defendant’s works as having been created by the

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<sup>186</sup> *Salinger v Colting* (n 182) 81, citing *Elrod v Burns*, 427 US 347, 373 (1976).

<sup>187</sup> O’Neill (n 183) 340.

<sup>188</sup> *Ibid.*

<sup>189</sup> See above n 116 to n 132 and surrounding text.

claimant, there are causes of action to deal with this, and the defendant's bad faith could be relevant to fairness. If, on the other hand, members of the public are merely unsure or mistaken about the work's authorship, there are questions as to whether this should be afforded any weight as a compelled speech argument in a fair dealing analysis.

One answer to the above may be that the compelled speech tenor of *Deckmyn* pertained to discriminatory messages, and that many instances of pastiche are neutral or laudatory, and do not involve content that might be inflammatory. The merits of this view will depend on its accuracy as an empirical claim and on the contours of the compelled speech argument, including whether it continues to be linked to Article 21(1) of the Charter or develops as a free-standing speech argument that can be applied to other unpalatable content. As already noted, the Canal Zone series of Richard Prince contained a great deal of nudity, raising the question of whether obscenity could ground a compelled speech argument; and in *Salinger*, it is not clear that problematic content was even necessary for a "right not to speak" to be enlivened. In sum, we need to be careful about compelled speech, and its potential to effect a significant watering down of Article 5(3)(k).

## V. CONCLUSION

This article has argued that the introduction of section 30A into the CDPA is far more significant than has been appreciated thus far due to the inclusion of pastiche as one of the three fair dealing purposes, thereby giving the UK a defence covering mash-ups, fan fiction, music sampling, collage, appropriation art and other forms of homage and compilation. It has argued that as a matter of doctrine and policy, pastiche should be read broadly to include a range of uses, including imitation of the style of pre-existing works, incorporation of elements or features of those works, and the production of compilations and medleys. To the extent this results in an overshoot in permitted conduct, this can be dealt with through the fair dealing machinery, which can effect the proportionality exercise countenanced in *Deckmyn* and deal with any additional requirements arising from Article 5(5). Such an approach may even offer advantages over the concept of transformative use in US law by short-circuiting the need for analysis of the critical commentary, message or newness of a work, and instead allowing judges to place the intellectual heavy lifting where it best belongs: in the assessment of fairness.