# BORROWED PLUMES: TAKING ARTISTS' INTERESTS SERIOUSLY IN ARTIFICIAL INTELLIGENCE REGULATION

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## I. INTRODUCTION

Creators fear generative AI.[1] And so should society, by and large. The appropriation and recombination of creative elements, properties, and features by callous machines inescapably will hurt creators' feelings—and yet appears to be permitted under both Article 5 (3) (k) EUCD[2] and Article 17 (7) DSMD[3] (caricature, parody and pastiche) that now reflect the fundamental right to freedom of expression and art.[4] The AI Act similarly permits an understanding that AI can rely on copyright exceptions.[5] It is an open matter whether, as such, only humans may rely on the relevant exceptions. In any case, and in turn, ascribing legal personhood to AI is the key to eschewing any cause of action potentially applicable to oppose AI uses. In academic literature, and as will be explained throughout here, broad proposals are being made. AI should, accordingly, be considered an entity to be ascribed personhood, ranging from areas such as liability in tort law to fundamental rights. The central assertion here holds that AI[6] by its very definition, can do things that humans do—such as

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[1] Currently pending lawsuits include (in the UK) Getty Images (US) Inc. et al v. Stability AI Ltd. [2023] EWHC 3090 (Ch). In the US: Getty Images (US), Inc. v. Stability AI, Inc., No. 1:23-cv-00135 (D. Del. Feb. 3, 2023); DOE1 v. GitHub, Inc. et al, No. 4:22-cv-06823 (N.D. Cal. May 11, 2023); Kadrey et al v. Meta Platforms, Inc., No. 3:23-cv-03417 (N.D. Cal. July 7, 2023); Silverman et al. v. OpenAI, Inc., No. 3:23-cv-03416 (N.D. Cal. July 7, 2023). *See also* Artists Rts. All., 200+ Artists Urge Tech Platforms: Stop Devaluing Music, Medium (Apr. 1, 2024), https://artistrightsnow.medium.com/200-artists-urge-tech-platforms-stop-devaluing-music-559fb109bbac.

[2] 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, O.J. (L 167), 10-19.

[3] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, O.J. (L 130), 92.; Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, COM (2016) 593 final (Sept. 14, 2016).

[4] Charter of Fundamental Rights of the European Union, O.J. (C 326), 391-407 (Oct. 26, 2012).

[5] *See* Artificial Intelligence Act Regulation (EU), O.J. (L 106), Recital 107 ("…unless relevant copyright exceptions and limitations apply…"), though this only relates to data mining.

[6] The article exclusively considers fully automated AI creations. The complexities that arise where AI is employed as a mere tool for creativity - for example, whether the "deployer" of AI would then become a joint author - are not discussed herein.

participating in public discourse or indeed "creating" something that would fit any definition of art—and that therefore it is capable of holding subjective rights.[7] Such a line of argument easily allows AI developers a convenient pattern of argument: pastiche, or freedom of expression, can be exercised by AI, and consequently such as in the context of copyright law[8], no further restrictions on the AI industry should be imposed so as not to prevent technological development and innovation. In turn, any transformative or referential use of copyright-protected works on platforms can constitute the exercise of freedom of art, opinion, or expression. Any shift from one context, genre, or mode of presentation to another suffices, potentially, to constitute pastiche. However, ascribing personhood—a central tenet discussed across virtually all fields of law in the current debate on AI—in the absence of clarity on the function of the legal norm in question and the interests that the norm and system in question reflect is a fallacious position to take.[9] AI, ultimately, has the capacity to hurt feelings because it is made out, subjectively, as an attack on artistic self-perceptions. It can and will substitute creative endeavors. Nevertheless, copyright exceptions such as those for data mining and pastiche exist. In particular, as will be argued here, the extensive notion of pastiche as it especially applies in the context of platform liability and user freedoms must be strictly distinguished from the use of AI. In short, the effects of AI probably require nothing short of a deconstruction of the law and

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[7] *See* Stefan Neuhöfer, *Grundrechtsfähigkeit Künstlicher Intelligenz* [*Fundamental Rights of Artificial Intelligence*], 203 (2023) (Ger.); Jens Kersten, *KI-Kunst- Künstliche Intelligenz und Künstlerische Freiheit*, *in* Territorialität und Personalität, Festschrift für Moris Lehner [*AI Art - Artificial Intelligence and Artistic Freedom*, *in* Territoriality and Personality, Commemorative Publication for Moris Lehner],437 (Roland Ismer et al., 2019); for copyright law, *see* Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author* 5 Stan. Tech. L. Rev. 49, 49 (2012).

[8] The US publicity right can be seen as a complementary or parallel form of protecting artists' interests. Tennessee, for example, extended their publicity rights law so as to give artists such as actors or singers a dedicated right to oppose the use of AI under certain conditions in the Ensuring Likeness Voice and Image Security (ELVIS) Act, *see PHOTOS: Gov. Lee Signs ELVIS Act Into Law: Tennessee First in the Nation to Address AI Impact on Music Industry*, Tenn. Gov. (Mar. 21 2024), https://www.tn.gov/governor/news/2024/3/21/photos--gov--lee-signs-elvis-act-into-law/.

[9] For a much more refined approach to personhood as a functional concept *see* Anna Beckers & Gunther Teubner, Three Liability Regimes for Artificial Intelligence, *passim* 12-16, 163-65 (2021).

how it relates to personality interests. The notion of an artist's personality rights—including the libertarian "negative" dimension of such rights—can, it is proposed, provide a "basic norm" for a future evolution of the law.

The exploitation of copyrightable subject matter (or other features such as an artist's voice or likeness) begins with using content for purposes of data mining to train AI systems, to the use of AI-generated output on social media. The AI industry sees much commercial potential and unsurprisingly demands unrestricted access and use rights for the purpose of fostering innovation; any right to oppose AI is considered as an obstacle standing in the way of a brave new world of AI creativity—most conspicuously, of course, copyright.[10] Commercial logic dictates that a favourable outcome is to replace human creativity in large sectors, such as in music and art, and to control the use of AI-created Artifacts based on extended copyright claims, or a novel "sui generis" right to protect AI creations. In the academic debate, across the various fields of law affected, virtually any conceivable position is reflected. In the UK particularly, it is an open issue whether training an AI model could qualify as an infringing copy of its training data, and whether the subsequent act of making available (such as on social media platforms) can qualify—if the training is undertaken abroad—as secondary infringement (importing, possessing or dealing with an infringing copy) because the types usually only pertain to tangible copies.[11]

The debate, as it stands, neglects potential claims by creators—demands that are ultimately rooted in a sense of unease and a need to defend positions that are only partially covered by copyright. Instead, the debate appears to plainly focus on disagreements between the AI industry on the one hand and copyright exploiters, and their property rights (Article 17 EU-Ch.) on the other.

This article argues for rediscovering personality rights as a basis for objecting to AI uses. It presents an artistic personality right that complements copyright protection and derives from the negative dimension of libertarian fundamental rights. More specifically, it frames this right as a negative right to art, enforceable against AI. This right allows creators both to prohibit

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[10] Brad Smith, *Microsoft Announces New Copilot Copyright Commitment for Customers*, Microsoft (Sept. 7, 2023), https://blogs.microsoft.com/on-the-issues/2023/09/07/copilot-copyright-commitment-ai-legal-concerns/.

[11] As raised by the court in Getty Images (US) Inc. et al v Stability AI Ltd. [2023] EWHC 3090 (Ch)

AI uses and which includes both a right to prohibit whilst concurrently allowing creators to claim remuneration[12] at their discretion.[13] Such subjective right—or at least some discourse concerning the possibility of such right—appears necessary considering the current state of the AI debate, which intensively focuses on the commercial interests of the AI industry and, concurrently, on collective expectations of AI users. Conversely, the concept of an artistic personality right, which can function as a countermeasure in any proportionality assessment vis-à-vis the permissibility of appropriating and using creative output, encompasses any imaginable use and permits further differentiations.

From the perspective of creators, however, there is a threefold problem that this article will consider in turn. The AI industry is lobbying for a much more generous, and indeed unrestrained, exception for data mining purposes, ostensibly relying on freedom of research. Second, and much more devious from the perspective of artists, the AI industry may effortlessly rely on the existing pastiche exception under Article 5(3)(k) EUCD,[14] specifically so in the context of the new German Authors Rights Service Provider Act (UrhDAG),[15] in force since 2022 and transposing Article 17 DSMD—as a separate piece of legislation —in a manner that appropriately emphasises communicative freedom rather than the interests of copyright owners.[16]

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[12] *See* Cristopher Geiger & Vincenzo Iaia, *The Forgotten Creator: Towards a Statutory Remuneration Right for Machine Learning of Generative AI*, 52 Comput. L. & Sec. Rev. (2023) (in relation to machine learning).

[13] *See* Martin Senftleben, *Generative AI and Author Remuneration*, 54 Int'l Rev. of Intell. Prop. and Competition L. 1535, (2023).

[14] 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, O.J. (L 167) (hereinafter EUCD).

[15] Act on the Copyright Liability of Online Content Sharing Service Providers [Urheberrechts-Diensteanbieter-Gesetz] [UrhDaG], May, 31 2021, BGBl I, 1204, 1215(Ger.), https://www.gesetze-im-internet.de/englisch_urhdag/englisch_urhdag.html#:~:text=Act%20on%20the%20Copyright%20Liability,%2DDiensteanbieter%2DGesetz%20–%20UrhDaG).

[16] Article 17 DSMD leaves two basic options as regards the "value gap": either a general licensing solution or the adoption of a more right holder-friendly approach based on deterring platforms from permitting uploads so as to secure existing markets, as is preferred in France and Spain. For criticism on the approach adopted in Germany, *see* Axel Nordemann, *Upload Filters and the EU Copyright Reform*, 50 Int'l Rev. of Intell. Prop. and Competition L. 275, (2019).

That exertion is exacerbated when considering the function of the pastiche exception in the context of salient uses on social media platforms—as a right that, in and of itself, must be understood as a direct reflection of *subjective* user rights[17] under the EU Charter on Fundamental Rights that broadly safeguards communicative freedoms for the very purpose of sustaining transformative or referential user creativity, a right with the capacity to allow any recombinant use of works—without *expressly* clarifying that such creative reuse requires any human input at all.[18] Claims to more freedom in the commercial use of copyright works for AI purposes can rely on a whole range of fundamental rights, from freedom to research and the right to conduct a business (Article 16 EU-Ch.) to any communicative freedom embracing freedom of art as such (Articles 11 and 13 EU-Ch.). A line of reasoning that can conveniently refer back to and inform questions of AI authorship and ownership; and, in that case, the view is maintained that copyright requires human input indeed, such perceptions of romantic authorship should at least be overcome via a new sui generis or neighbouring right that would provide a much-needed incentive for the AI industry[19] to innovate and create ever more creative systems to replace any need for human creativity over time. However, creators would also need to defend their position vis-à-vis exploiters, who may seek to profit from, especially, using licensed content for data mining purposes by way of a new set of licensing agreements.

Countering these patterns of argument is arduous. A first issue that arises concerns the insufficient scope of copyright law. If "hurt feelings" are taken seriously, it soon becomes clear that any notion of a personality right must, initially and subject to defining and formulating re-exceptions, take into account the potential ability of the law to protect aspects that are not part and parcel of traditional copyright law. The idea that a right may exist

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[17] See Case 469/17, Funke Medien NRW GmbH v Bundesrepublik Deutschland, ECLI:EU:C:2019:623, (Jul. 29, 2019); Case 516/17, Spiegel Online GmbH v Volker Beck, ECLI:EU:C:2019:625, (Jul. 29, 2019).

[18] In other words, essentially the same argument put forward in favour of ascribing authorship to AI, see Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, 5 Stanford Tech. L. Rev. 1, 20 (2012).

[19] Tim W. Dornis, *Artificial Creativity: Emergent Works and the Void in Current Copyright Doctrine*, 22 Yale J. L. & Tech. 1, 21-22 (2020); Kalin Hristov, *Artificial Intelligence and the Copyright Dilemma*, 57 IDEA 431 (2017); for the opposite view under US law - creativity, under copyright law, means human creativity - see only Daniel J. Gervais, *The Machine as Author*, 105 Iowa L. Rev. 2053, 2069 (2020).

that, on balance, encapsulates to a certain degree of control over a specific artistic oeuvre (or representative properties or elements thereof)[20] by and large, and which inadvertently must encompass what is, in some contemporary academic literature, usually dismissed as irrelevant: training the systems[21] to eventually emulate a particular distinctive artistic style, which in turn reflects the most restricted notion of pastiche.[22]

A much more complex issue arises when considering the idea that AI output should be treated as a general blueprint and/or as a consequence of exercising a fundamental right ascribed to the AI system itself. The relevance of pastiche in the context of platform liability[23] is not simply a matter of overcoming the rigidity of the EUCD as a piece of legislation that, first and foremost, is based on a high level of protection[24] for the benefit of exploiters; it is also not a mere aspect of rendering copyright law more flexible by way of introducing a "disguised" general fairness clause for courts to handle flexibly. The magnitude of the exception lies in its function as a mediator of fundamental rights as regards new media in a very general sense, to be perceived as—as will be analysed in more detail herein—supra-individual fundamental rights,[25] against which individual and negative dimensions of freedom of art will be

[20] See Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 9, 2023, I ZR 203/22, (Ger.) (rejecting such extensive scope of copyright towards a creators' oeuvre).

[21] See also Andrés Guadamuz, *A Scanner Darkly: Copyright Liability and Exceptions in Artificial Intelligence Inputs and Outputs*, SSRN (2023), http://dx.doi.org/10.2139/ssrn.4371204.

[22] Frédéric Döhl, *The concept of "pastiche" in Directive 2001/29/EC in the light of the German case Metall auf Metall*, 2 Media in Action: Interdisc. J. on Coop. Media 37 (2017).

[23] The intricacies raised by platform liability for copyright cannot be covered here in detail. Fundamentally, these arise because of various interests that the legislator must recognize and which often cancel each other out, including those of (established) authors, copyright exploiters, platform users and the operator of the platform itself. See Martin Husovec, *Remedies first, liability second. Or why we fail to agree on optimal design on intermediary liability*, The Oxford Handbook of Online Intermediary Liab. 92 (Oxford Univ. Press 2018).

[24] See EUCD, Recital 9.

[25] See generally Andreas Fischer-Lescano, *Der Kampf um die Internetverfassung* (2014) Juristenzeitung (JZ) 965 (discussing the complexities associated with constitutionalizing "user rights" as rights without a subject, as reflections of claims to freedom in relation to internet governance).

much more difficult to enforce in any sense of proportionality.[26] Overall, those advocating AI—and thus marginalizing the interests of human creators—can rely on a convenient pattern of arguments that can be made: AI represents a medium of communication, and so should be ascribed personhood. If so, it can rely on freedom of art, as reflected specifically in the pastiche exception. In turn, AI applications can be characterised as mediators of freedom of communication altogether, just as platforms. From here, it is only a small step to persuasively advocate for greater freedom in the context of data mining (and other copyright exceptions that may become necessary to safeguard any preparatory input of protected content).

The article will address the most imperative concerns in turn, in a dialectic manner. After a brief discussion on the new transparency rule in the (proposed) AI Act and the potential scope of a new data mining exception, a more detailed exegesis of the pastiche exception and related notion of AI as a medium exercising fundamental rights will be undertaken. These references to fundamental rights are of crucial importance because, obviously, a general permission to use artistic works and to appropriate qualities of an artist's legacy immediately reinforces claims for a far-reaching autonomy to use such material for training data. The pastiche exception will be analyzed by reference to, first and foremost, the recent decision rendered by a German Higher Regional Court[27] in the ongoing litigation between members of the German electronic music pioneers *Kraftwerk* and hip hop producer *Pelham*. In that decision, the court considered the reproduction of a sound sample as covered under the pastiche exception. The sample taken was, according to the court, protected both as a work of music and as a phonogram.

The chief line of argument presented here is: the threats of AI vis-à-vis human creativity require a specific approach and calibration of legal rules and principles, and that the function of freedom of art vis-à-vis AI is therefore contingent upon other factors that do not apply as such in dissimilar constellations: in short, the construction of liberties can differ because it is

[26] On the EU proportionality requirement see generally Jonas Christoffersen, in: Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham, 2017), pp. 19 et seq.; Caterina Sganga, *The Research Handbook on Human Rights and Intellectual Property Fundamental Rights Saga in EU Copyright Law: Time for the Boundary-Setting Season?* (2019) Medien und Recht International (MuR Int.) 56.
[27] OLG Hamburg (2022), GRUR-RS 27172.

contingent upon the environment in which, for example, exceptions such as pastiche apply—in "ordinary" copyright disputes, as a matter of platform regulation, or indeed vis-à-vis AI.

The concept of negative freedom[28] of art permits a differentiated approach that can result in affording creators, ultimately, a right to either object or ask for payment (as a right to elect); from a legislative point of view, the scope of such right applied vis-à-vis generative AI necessarily depends on the preliminary question whether AI itself can, and if so, for what reasons, can be understood to be a bearer of fundamental rights at all.

The central argument pursued herein is: the functions of freedom of art and expression, as reflected particularly in pastiche, must be further differentiated according to whether the use in question is made by a human (even partially, such as in cases where AI is used as an artistic tool) or whether human creativity is appropriated by the machine exclusively. Accordingly, the regulatory environments demand a more differentiated and nuanced treatment—the expansion of user freedoms as a means to sustain and promote freedom of expression on platforms cannot simply be applied to a general freedom to use AI for the same purpose.

### *A. MACHINE OWNERSHIP, TRANSPARENCY RULES, AND DATA MINING: THE STATE OF PLAY*

[28] On the negative dimension of fundamental rights as rights to object see generally Isaiah Berlin, *Two Concepts of Liberty*, in: Isaiah Berlin, Four Essays on Liberty, 1-54 (Oxford 1969); Johannes Hellermann, *Die sogenannte negative Seite der Freiheitsrechte* (Berlin 1993); Karl-Heinz Ladeur, *Negative Freiheitsrechte und gesellschaftliche Selbstorganisation* (Berlin 2000); Karl-Heinz Ladeur, *Die Beobachtung der Grundrechte durch eine liberale Grundrechtstheorie* 50 (4) Der Staat, 493 (2011); Hugh T. Miller, *Negative Freedom* 25 (4) Administrative Law & Theory 571(2003); Stuart Doyle, *A Defense Against Attacks on Negative Liberty* 24 Journal of Libertarian Studies 317 (2020).

The present debate on AI orbits around rather disjointed issues. As regards copyright law, much of the debate is informed by essentially contrasting positions. On the other hand, positions highlight the need for retaining notions of romantic authorship,[29] thus positing that copyright law cannot, for being anthropocentric, incorporate new forms of "machine creativity"—or, and because of that, new neighbouring or sui generis rights tailored to the needs of the AI industry must be adopted to close that gap. UK copyright law, as will be seen, stands somewhere in between. Concurrently, there is much debate that considers whether, and if so why, AI should be ascribed personhood as a matter of fundamental rights law,[30] or for purposes of reconstructing liability rules, or whether —much in the same vein—AI can "own" works or inventions to achieve a complete equilibrium between humans and machines, barely disguised as mechanisms to foster innovation as highlighted not only by the industry but also policy makers.[31]

Oftentimes, assessments in both academic and policy debates, if analyzed more closely, convey the impression that the central tenet—ascribing personhood—is simply a matter of comparing the output generated by AI with what could have been created by human artists. Personhood is thus implied by "reading" legal rules into the machines' behavior,[32] a view that, by extension,

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[29] See only Jane C. Ginsburg & Luke A. Budiarjo, *Authors and Machines* 34 (2) Berkeley Tech. LJ 343 (2019); Enrico Bonadio & Luke McDonagh, *Artificial Intelligence as Producer and Consumer of Copyright Works: Evaluating the Consequences of Algorithmic Creativity* IPQ 112 (2020); for German law see Karl-Nikolaus Peifer, *Roboter als Schöpfer – Wird das Urheberrecht im Zeitalter der künstlichen Intelligenz noch gebraucht?*, in: Silke von Lewisnki & Heinz Wittmann, Urheberrecht! Festschrift für Michel M. Walter zum 80. Geburtstag, 222 (Vienna 2021).

[30] See discussion infra, Section [correct section label].

[31] For the debate in the UK, see *Artificial Intelligence and Intellectual Property: copyright and patents. Government response to consultation* (London, June 22, 2022), at 3 ("Intellectual property (IP) gives researchers, inventors, creators, and businesses the confidence to invest their time, energy and money in doing something new").

[32] This – ostensibly superficial – view has been seemingly adopted by the European Parliament, see European Parliament, Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics, 2015/2103(INL); European Commission, *Artificial Intelligence for Europe* COM (2018) 237 final. This was not pursued further. Instead the EP then highlighted human liability, see European Commission, *Report on the Safety and Liability Implications of Artificial Intelligence, The Internet of Things and Robotics*, COM (2020) 64 final. On the role of intellectual property rights as means to foster AI innovation see European Parliament Resolution of 20 October 2020 on intellectual property rights for the development of artificial

looks at the resulting artifact rather than the process of creating it.[33] From that perspective, AI *is*, simply, an author. It can then, without much contradiction and by easy extension, be considered as a bearer of fundamental rights, and hence—and here the different strands in the otherwise disenfranchised debates conflate—fully exercise any exceptions under copyright law (including, notably, the central pastiche exception discussed below) made for incentivising human creative reuses. The relevant exception, in addition, constitutes a subjective right,[34] which in turn can be ascribed to the machine as an autonomous creative decision maker.

### *B. TRANSPARENCY RULES UNDER THE AI ACT: TRANSPARENCY FOR WHOSE BENEFIT?*

The most recent legislative installment concerning AI and copyright is the new transparency clause in the (proposed) EU Artificial Intelligence Act (AI Act).[35] Until recently, the efforts in

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intelligence technologies (2020/2015/(INI)). The U.S. Copyright Office, following the decision in *Stephen Thaler v. Shira Perlmutter, Register of Copyrights and Director of the United States Copyright Office, et al.*, No. 22-1564 (BAH), has asserted, from a more or less identical perspective as the UK, that "generative AI systems have the ability to produce material that would be copyright protectable if it were created by a human author," see United States Copyright Office, *Artificial Intelligence and Copyright* (Washington DC 2023), https://www.copyright.gov/ai/docs/Federal-Register-Document-Artificial-Intelligence-and-Copyright-NOI.pdf. For a similar approach see Amir H. Khoury, *Intellectual Property Rights for 'Hubots': On the Legal Implications of Human-Like Robots as Innovators and Creators*, 35 (3) Cardozo Arts & Ent. LJ 635 (2017). See further (on issues of liability) *Software Solutions Partners Ltd. v. HM Customs & Excise*, EWHC (Admin.) 971, paras. 66-67 (2007).

[33] See, related to this point, the reference for preliminary ruling to the Court of Justice in *BGH*, Dec. 21, 2023, I ZR 96/22, *USM Haller*, which raises the question whether the notion of creation is a matter of the process and subjective intentions of the author or whether subsequent appreciation of the object by the public is decisive in establishing originality.

[34] Funke Medien v. Bundesrepublik Deutschland, ECLI:EU:C:2019:623; Spiegel Online v. Beck, ECLI:EU:C:2019:625.

[35] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139, and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797, and (EU) 2020/1828, *Artificial Intelligence Act*, 2024 O.J. (L 146) 1, at Recitals 104-107, (Text with EEA relevance). Transparency obligations are stipulated in Article 53(1)(d) AI Act, formerly Article 28 (4)(c) of the proposed AI Act. The European Parliament adopted Amendments on 14 June 2023 to the proposal for a regulation of the European Parliament and the Council laying down harmonized rules on

the EU on the regulation of AI disregarded any implication of AI on copyright—it was indeed only the emergence of ChatGPT that prompted a closer political discussion. This changed with the proliferation of generative AI and subsequent criticism by rights holders. The final version of the AI Act, in short, contains a specific clause dealing with copyright as a matter of transparency—in keeping with the overall approach that considers AI as a consumer law matter.[36] Transparency thus means that certain policies are put in place, that the use of copyrighted material is documented, and that, in addition, providers of AI systems "generating synthetic audio, image, video or text content, shall ensure the outputs of the AI system are marked in a machine-readable format and detectable as artificially generated or manipulated."[37]

Accordingly, AI developers are obliged to provide information on works and other subject matter used for training AI applications, and that information must be machine-readable. In more detail, the new provision foresees that developers must centrally provide detailed summaries allowing rights holders to identify which works have been used. The Act will also clarify that AI development must be conducted in a manner compatible with copyright law. The inclusion of a copyright-specific clause follows the general "nature" of the AI Act as a piece of legislation concerned with transparency and "product liability".[38] As such, nothing much changes: the AI Act does not extend copyright expressly towards a right to prohibit the use of protected content upfront. The clause would only allow rights holders to enter into licensing negotiations post factum. Specifically, creators will see the transparency clause as insufficient because its central assertion is that copyright infringement must be accepted, and if (licensed) exploiters agree on licensing contracts to be agreed with the AI industry, it is more than doubtful whether such income would benefit authors. Evidently, this is an intended outcome: exercising

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artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206). See further Recitals 104-107, which outline obligations regarding copyright. Other than imposing transparency obligations, the AI Act is "without prejudice" to copyright (Recital 107).

[36] Katharina de la Durantaye, *Garbage In, Garbage Out: Regulating Generative AI Through Copyright Law* (2023), ZUM 645, SSRN 1, http://dx.doi.org/10.2139/ssrn.4572952.//dx.doi.org/10.2139/ssrn.4572952.

[37] See also Article 50(1)(a) Artificial Intelligence Act and Recital 106, concerning the obligation to respect an "opt out" under Article 4(3) of Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (DSMD).

[38] De la Durantaye, *supra* note 36, at 7.

copyright would undermine the incentive to invest in AI systems, and innovation in the AI market (a market dominated by big U.S. and Chinese technology corporations) is at the heart of the AI Act, which overall focuses on AI applications that are deemed as high risk. Predictably, AI developers have pointed out that even the transparency obligations regulated under the AI Act would be too burdensome to implement and would thus hinder innovation. In practice, it also appears difficult to imagine if and how creators would use the transparency clause vis-à-vis technology giants so as to enforce rights. Finally, and predictably, the AI Act remains silent on personality rights—the appropriation of one's voice, to give but one example, has not been considered. In short, the AI Act does not provide protection—indeed, the contrary is true: once transparency obligations are met, it may effortlessly be argued that eschewing substantive copyright or personality rights issues reflects a central legislative objective.

## II. COMMERCIAL DATA MINING: NO OPT-OUT?

Perhaps the most contested issue concerns the potential extension, for the benefit of the AI industry in training their machine applications, of the existing (general) data mining exception. As a matter of copyright, it has always been an open issue whether typical data mining is permissible in both the EU and UK., There are currently two types of copyright exceptions that may apply. First, where existing digitised works are fed into training applications, at least a temporary copy of these works will be created during the process, but such temporary copies are exempt from copyright infringement in the case that such temporary copies are transient and do not conflict with a normal exploitation.[39]

The (mandatory) exemption of such transient copies was introduced in Article 5(1) EUCD. In general, the objective of the exemption is to permit uses where transient copying is unavoidable and cannot be influenced by human users, most importantly with regard to acts such as internet browsing. Whether it applies in the context of data mining remains largely unanswered, and much here depends on whether the transient copies in question are considered

[39] See Article 5(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 167) 10, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0029.

to affect the legitimate interests of the right holder. More importantly, the so-called text and data mining exceptions may apply.

The text and data mining (TDM) exceptions are intended to promote research in general (especially as regards "big data") and were initially not considered to regulate activities in the AI sector as such. At present, EU law recognizes two different concepts relating to text and data mining exceptions. Article 3 of the Digital Single Market Directive (DSMD)[40] exempts acts of reproduction (or extractions from a database) by certain research organisations and cultural heritage institutions, such as a publicly accessible library or museum, or a film or audio archive. This exception is largely based on the pre-existing and non-mandatory general research exception[41] and is limited to non-commercial uses. As such, the research exception (in most member states) allows certain institutions, as the case may be, to make copies for purposes of preservation. Where the data mining exception applies, its benefit must not be overridden by contractual agreements. However, it is also made clear that rights holders may still use technological measures to "ensure the security and integrity of the networks where the works or other subject matter are hosted," but that re-exception should not be misunderstood as providing a right to object for commercial gain; as the DSMD clarifies, the purpose is to allow rights holders only to maintain the integrity of the system. In the UK, a fair dealing data mining exception for non-commercial purposes was introduced in 2014,[42] which essentially covers identical non-commercial uses. The DSMD leaves it to member states to require compensation for such uses. It should be noted that the primary purpose of the data mining exception was not geared towards AI, but to promote non-commercial research in general. The provision would, however, rarely apply to training data given the commercial character of such use outside of relevant institutions.

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[40] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market, 2019 O.J. (L 130) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790 (hereinafter DSMD).

[41] Article 5(3)(a) Article 5(3)(a) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 167) 10, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0029.

[42] *Copyright, Designs and Patents Act 1988* § 29A (Eng.).

In addition, Article 4 (1) DSMD introduces a more generous exception applicable to anyone, this permits data mining for any purpose. The provision—which was not made with AI in mind but reflects freedom of science[43] - not only covers the processing of data (or works) but also allows the user to retain these for (future) data mining. However, in this case, right holders retain the right to—proactively—reserve rights if they opt out. Such an objection must be expressed before the use, and Article 4 (3) DSMD thus refers to "an appropriate manner," which includes machine-readable means, for example, metadata or terms and conditions indicated on websites. The reservation may also be included in a contractual agreement. However, there remains much uncertainty regarding the precise obligations of the TDM user, such as when the existence of an opt-out must be checked (continually?) or who bears the burden of proof in regards to the appropriate manner of declaring an opt-out.

Above and beyond these general problematic issues, opinions are divided regarding the application of data mining for AI purposes in particular: whilst, in general, freedom of research is certainly deemed as a necessary exception to copyright, creators have pointed out the potentially extensive and unknown consequences that AI (and, consequently, the use of creative works for training) may have on human creativity and artists' markets. Conversely, and evidently, large technology corporations consider copyright protection as the most serious threat to the development of the AI industry. The EU opt-out solution, indeed, is much less generous than in the U.S. or Japan, where data mining is considered either a fair use or generally as an activity that does not violate any exclusive economic rights, respectively. In Japan, using works as training data is generally permitted, i.e., data mining is seen as an act of "non-enjoyment" of the work which does not, as a matter of principle, affect any protected rights.[44] Political views also highlight the alleged need for a broader data mining exception so as to promote AI and remove disadvantages in global competition.

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[43] See Christophe Geiger, Giancarlo Frosio & Oleksandr Bulayenko, *Text and Data Mining: Articles 3 and 4 of the Directive 2019/790/EU*, in *Propiedad Intelectual y Mercado Único Digital Europeo* 27,38 (C. Saiz García & R.E. Llorca eds., Tirant lo Blanch 2019), Centre for International Intellectual Property Studies (CEIPI) Research Paper No. 2019-08, http://dx.doi.org/10.2139/ssrn.3470653.

[44] Tatsuhiro Ueno, *The Flexible Copyright Exception for 'Non-Enjoyment' Purposes – Recent Amendment in Japan and Its Implication*, 70 GRUR Int.'l 145, 145 (2021), https://doi.org/10.1093/grurint/ikaa184.

In the UK, the issue of whether an all-embracing data mining exception for anyone should be introduced is now being discussed afresh.[45] That general data mining exception, however, and most importantly, was never intended to deal with AI or to foster the AI industry in particular. Its function is to foster research, and as such, Article 4 DSMD may well be considered as too narrow and misguided as a clause that presupposes, mistakenly, ownership of pure data.[46] The introduction of a statutory remuneration right replacing the opt-out approach may be proposed[47] - albeit, as will be seen, such a solution would not fully embrace the potential threats to artists' personality rights.

## III. AI ARTIFACTS AND COPYRIGHT SUBJECT MATTER IN THE UK: ALLOCATING ECONOMIC PREROGATIVES

In the UK, finally, the debate very much appears to centre around the "old" clause concerning computer-generated works, which essentially presupposes the existence of copyright in such output. The consensus—as regards statutory copyright law as it stands - is that AI Artifacts that have been "created" in a fully automated fashion do not attract copyright protection because such creations cannot be considered a personal or own intellectual creation in accordance with the case law of the Court of Justice concerning originality. In turn, the references to an "own" or

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[45] Patrick Vallance, *Pro-innovation Regulation of Technologies Review*, (Mar. 2023), https://assets.publishing.service.gov.uk/media/64118f0f8fa8f555779ab001/Pro-innovation_Regulation_of_Technologies_Review_-_Digital_Technologies_report.pdf;
UK Gov't, *A pro-innovation approach to AI regulation*, pt. 8, (Mar. 2023), https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach/white-paper. The UK government has back-tracked from its initial policy to introduce a general data mining exception for anyone, see House of Commons Culture, Media and Sport Committee, Connected tech: AI and creative technology: Government Response to the Committee's Eleventh Report of Session 2022–23, Third Special Report of Session 2023–24 , https://committees.parliament.uk/publications/42766/documents/212749/default/. A working group, led by the IPO, was established in May 2023 with the express aim of agreeing on a code of conduct by the summer of 2023. Discussion have continued long past the original target date.

[46] Thomas Margoni & Martin Kretschmer, *A Deeper Look into the EU Text and Data Mining Exceptions: Harmonisation, Data Ownership, and the Future of Technology* 71 GRUR Int. 685,_ (2022).

[47] Martin Senftleben, *Generative AI and Author Remuneration* 54 IIC 1535,_ (2023).

"personal" creation highlight the long-standing consensus that only humans can be owners of copyright. This principle (which is derived mainly from the personality-rights based approach in civil law countries) has also, as regards AI, now been adopted by a U.S. court: in *Thaler,*[48] the court clarified that human contribution is a minimum requirement, and consequently the court upheld a decision by the U.S. Copyright Office to reject an application for registration on behalf of the DABUS system.[49]

For UK copyright law, much depends on how the salient provision in Sec. 9 (3) CDPA 1988 is understood. Therein, the law expressly states that copyright in a work that has been generated by a computer is owned by the person (or entity) that made the "necessary arrangement."[50] This could indeed mean that the law expressly recognizes copyright protectability. However, there are major counterarguments. The provision, first, expressly and solely governs questions of ownership. Secondly, it presupposes the existence of a work, which in turn requires the presence of an "own intellectual creation" following an anthropocentric approach to copyright. However, the consequences of European originality for the general viability of that clause have never been fully considered in the current debate. Nevertheless, these interpretative and doctrinal predicaments can perceptibly be overcome by UK courts in the future.

In sum: the debate surrounding AI and copyright—as regards both issues of data mining and ownership of AI output—are a certain reflection of quests towards a purely economic solution, and indeed all concepts and criticisms point towards a monolithic understanding of, on the one hand, copyright as a right protecting investments and a perceived need to also protect AI development as well as any AI output, either by way of tweaking 1copyright law or, failing that, via a new neighbouring right. As regards data mining in particular, the scope of freedom under that

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[48] Stephen Thaler v. Shira Perlmutter, Register of Copyrights and Director of the United States Copyright Office, et al. Case No. 1:22-cv-01564-BAH, (D.D.C.), https://fingfx.thomsonreuters.com/gfx/legaldocs/lbvgooeoqvq/AI%20COPYRIGHT%20LAWSUIT%20thalerdecision.pdf.>.

[49] In a similar fashion, the UK Supreme Court had previously arrived at the same conclusion (and for the same claimant) regarding the notion of inventorship under patent law. Thaler (Appellant) v Comptroller-General of Patents, Designs and Trade Marks (Respondent) [2023] UKSC 49.

[50] The only decision unrelated to AI is Nova Productions v Mazooma Games Ltd. [2006] EWHC 24 (Ch.), which held that the program developer is considered the owner.

exception reflects—as the first step in the chain of exploitation—the most crucial obstacle for artists to retain control. There is an apparent danger for artists for several reasons. First, the data mining exception itself is questionable as such because much depends on the vexed question whether, in fact, the mining process requires the making of copies; second, extending the exception in favour of an entirely free use of works for training AI systems relies on an overbroad notion of freedom of commercial research, disregarding personality interests. An opt-out model would allow licensing solutions, but it seems doubtful whether it would (to say the least) be authors or exploiters who would benefit from such income. The same problem arises in case a statutory remuneration scheme is preferred, though this will be considered in more detail later here. Lastly, tweaking and adjusting individual copyright norms in a piecemeal fashion with a view to fostering generative AI necessarily leads to entirely ignoring the real and essential interests at stake. These interests, above and beyond discrete aspects of modifying copyright doctrine, emerge more clearly only when considering the implications of communicative freedoms as reflected in the notion of pastiche.

## IV. AI AND PASTICHE: A TELEOLOGICAL DEAD END STREET?

Once the Artifact arrives on a platform, questions pertaining to pastiche arise. The pastiche exception was first, as a matter of EU secondary, introduced in Article 5(3)(k) EUCD, which allows member states to maintain or introduce an exception for "caricature, parody and pastiche".[51] The text was lifted from pre-existing French and Belgian statutory models, and apparently inserted into the catalogue of exceptions and limitations (Article 5 EUCD) at a late stage. Implementation of the pastiche exception was left to member states. The exception was then rendered mandatory for the platform used (Article 17 (1) DSMD).[52] A first aftermath was the growing and undisputable insight that the notion

[51] The following is limited to references to pastiche as the most extensive representation of freedom or expression.

[52] Article 17 (7) DSMD, referring to the exceptions for quotations and parodies, pastiches and caricature under Articles 5 (3) (h) and 5 (3) (k) EUCD respectively. See further J Quintais/G Frosio/S van Gompel/PB Hugenholtz/M Husovec/ M Jütte/M Senftleben, "Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics" SSRN (2019), https://ssrn.com/abstract=3484968.

of pastiche applied to any constellation where infringement by way of—technically—reproduction or adaptation had been established, way above and beyond the standard construction of pastiche as describing appropriations of uncopyrightable artistic styles and mannerisms. Obviously, the exception would be obsolete otherwise. In terms of implementation, differences exist. In the UK, the pastiche exception is subject to the traditional fair dealing test.[53] In Germany, no further restrictions apply.

### *A. PASTICHE: EUROPEAN AND DOMESTIC FRAMEWORKS*

In Germany, a dedicated and express reference to pastiche was introduced only following the decision by the Court of Justice in *Pelham,*[54] according to which the existing "free use" clause (§ 24 UrhG) was considered incompatible with secondary EU law. The facts of the case are well known, given that this litigation commenced in 2001. Its implications on copyright law have been deliberated *ad nauseam* but are so forthright that a brief exposé should suffice. In short, the defendant had used a sound snippet (the sound of metal banging on metal) from a recording by the claimants. Whilst the first wave of litigation, up to the German Supreme Court (BGH), considered only the potential protection of the sound snippet under the neighbouring right for sound recordings and concluded that the defendants could have avoided any infringement by recreating the sound (considered not to be a work of authorship then but rather a protected sound recording) themselves. Following a constitutional complaint by the defendant, the German Constitutional Court (BVerfG) referred the matter

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[53] Sec. 30A (2) CDPA 1988. See *Shazam v. Only Fools The Dining Experience,* [2022] EWHC 1379 (IPEC), paras. 150-155. On the notion of fairness in UK copyright law applicable to Article 5(3)(k) EUCD see M Cameron, "Copyright exceptions for the digital age: new rights of private copying, parody and quotation" 9 (2014) JIPLP 1002; J Griffiths, 'Fair dealing after Deckmyn – the United Kingdom's defence for caricature, parody & pastiche' in: Richardson/Ricketson (eds), Research Handbook on intellectual property in media and entertainment (Edward Elgar 2017), 64, 73: A Lay, *The Right to Parody. Comparative Analysis of Copyright and Free Speech* (Cambridge 2019), 130 et seq.; G Westkamp, Licensability as Property, in: G Ghidini & V Falce, Reforming Intellectual Property (Cheltenham 2022), 266 (2021) SSRN http://dx.doi.org/10.2139/ssrn.4061033.

[54] BVerfGE 142, 74; Case 476/17 - Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben, ECLI:EU:C:2019:624. There exist, in total, twelve decisions in this litigation, which commenced in 1999. These will not be discussed here in detail.

back,[55] asserting that the BGH had disregarded the implications of freedom of art and, more precisely, demanded a proportionality assessment that had to take into account an art-specific analysis to be conducted under the (now defunct) free use clause - in particular as regards the shift in context from one musical genre to another. The matter then was presented to the Court of Justice for preliminary ruling, since the "art-specific" approach taken by the BVerfG was inadvertently founded upon fundamental rights considerations that had no immediate reflection in the "closed" list of limitations and exceptions under secondary EU law.

The Court of Justice thus basically eschewed the thorny question—asking how domestic fundamental rights can be applied in a copyright context—and asserted that infringement of the neighbouring right in question was a matter of its recognisability and/or audibility to the human ear. Further, the Court of Justice held that the German "free use" clause under § 24 (1) of the Authors' Right Act was incompatible with the closed enumerations of exceptions and limitations under Article 5 EUCD, and in consequence that rule was repealed.[56] When the case returned to the OLG, that court was tasked with assessing whether such recognisability, as a matter of fact, was present, but instead shifted the focus of the assessment into an entirely different direction: inter alia[57]. The court held that the sounds in question were the result of a creative process, and thus protectable as a musical work, but that the defendant could rely on pastiche. The case is currently pending before the Court of Justice following an order by the BGH.[58]

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[55] See M Mimler, "Metall Auf Metall' – German Federal Constitutional Court Discusses the Permissibility of Sampling of Music Tracks" 7 (2017) 1 Queen Mary Journal of Intellectual Property (QMJIP) 119; for a full portrayal of the saga see JP Quintais & BJ Jütte, "The Pelham Chronicles: sampling, copyright and fundamental rights" 16 (2021) 3 Journal of Intellectual Property Law & Practice, 213.

[56] For a full explanation of the intricate consequences of repealing § 24 UrhG and replacing the free use clause with an exception for caricature, parody and pastiche see T Kreutzer, The Pastiche in Copyright Law: Expert Opinion on a Copyright-Specific Definition of Pastiche in According to Sec. 51a German Copyright Act (Berlin 2022), pp. 33 et seq., https://freiheitsrechte.org/uploads/documents/Englische-Dokumente/Democracy/Pastiche_in_Copyright_Till_Kreutzer_GFF_english.pdf

[57] Federal Supreme Court (BGH), Order of 14.9.2023, I ZR 74/22 - „Metall auf Metall V"; Court of Justice, pending Case C-590/23 (23.9.2023).

[58] Case C-476/17, Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben, ECLI:EU:C:2019:624.

The irritations that ensued from the *Pelham* case, in turn, are a direct consequence and effect of the particular status that is ascribed to (re-)creative uses on social media platforms—the German legislator had made it clear that the implementation of Article 17 DSMD ought not result in decreasing fundamental rights of users, including freedom of art in particular, to sustain creative liberties in accordance with archetypal social media phenomena such as mash-up, memes and similar techniques considered culturally relevant. The recognition of such uses as covered under fundamental rights law was inevitable not only as a consequence of increasing social expectations as regards user freedom—a general tenet in the incremental evolution of copyright towards more generous access rules developed by courts[59] - but also as a matter of primary EU law: the Court of Justice had generally asserted that copyright exceptions must be construed in light of fundamental rights in general, thus turning social expectations into subjective rights. The Court of Justice also clarified that the EU-Ch. demands an implementation of Article 17 DSMD that respects user freedoms as a matter of proportionality, albeit without providing much guidance on how such balancing of interests is to be achieved in detail[60], at which point reliance on economic rights for the benefit of copyright industries vis-à-vis pastiches, etc. was removed from the equation. One particularly significant effect of the pastiche and parody exception, as introduced expressly in Germany, was, consequently, that an anti-thematic treatment of the original work[61] for parody could no longer be upheld—the "new" exception, anchored in fundamental rights law, eradicated reliance on property.

In Germany, accordingly, a two-tier regulatory approach was adopted: for platform uses that fall within the remit of Article 17 DSMD, a dedicated new Copyright Service Provider Act was introduced, under which authors receive statutory remuneration for any use that falls under the caricature, parody, and pastiche exception. Liability for such payments lies only with the platform operator—for traditional disputes outside the platforms covered

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[59] D Wielsch, Zugangsregeln: Die Rechtsverfassung der Wissensteilung (Tübingen 2008), passim.

[60] Case C-401/19 Republic of Poland v European Parliament and Council of the European Union, ECLI:EU:C:2022:297.

[61] BGH, 11.03.1993 - I ZR 264/91, (1994) GRUR 191 – Asterix Persiflage; the requirement of anti-thematic treatment was abandoned, as a consequence of the Court of Justice decision in Deckmyn , in BGH, 28.07.2016 - I ZR 9/15, BGHZ 211, 309 – "Trimmed to Fat".

under the Act, i.e., those which are governed by the new exception in § 51a UrhG, no such payment obligation exists. There is, however, no material distinction between the statutory meaning of pastiche as applied in the context of platform uses and other transformative or recombinant uses. The term pastiche, thus, remains identical. Indeed, the reference to caricature, parody and pastiche describes a single and dedicated metaphor through which fundamental rights are rendered directly applicable in a copyright context; freedom of art, encompassing standard social media uses and techniques, therefore is ascribed a status that is indistinguishable from traditional constitutional notions of art and creativity, and necessarily and concurrently those art forms upon which copyright protection and the notion of creativity that underpins the copyright system by and large rests.

### *B. Over-spilling Effects and the Void in the Proportionality Test: An All-embracing Freedom of Re-Use?*

The effect of the legislative recognition of an absolute equilibrium between social media uses and traditional expressions of artistic creativity is twofold. As regards platform uses, the potency now attributed to freedom of art has led to a complex regulatory scheme, under which users may flag any content uploaded as falling within the remit of pastiche, and it is up to right holders to instigate proceedings should they disagree, which drastically reduces the threats to fundamental communicative rights that otherwise arise where content can be immediately removed by way of applying filtering software. Yet authors, who can expect financial income in case their works are used for the purpose of pastiche, would manifestly have very little interest in having such content removed, as in such a case no payment is due. Notably, such a claim to remuneration applies irrespective of whether the uploaded Artifact had been created by autonomous AI or by a human, and creators still have the opportunity to instigate proceedings should they wish to have AI-created content on platforms removed. At this stage, however, the potential knock-on effects of a novel understanding of freedom of art exercisable via the pastiche notion become apparent—from the perspective of any creator who feels his or her identity and personality has been unduly appropriated by an AI application relying on pastiche as a

subjective right.[62] It will rapidly be noticed that attempts to exercise rights under copyright may well be a futile struggle. In short, the notion of freedom of art as applicable to pastiche leaves very little room for manoeuvre. Once a recombinant, transformative, or referential purpose is established, freedom of art or communication will usually prevail, and thus the artist has no further redress.

Claims to such redress appear, however, relevant specifically as regards AI.[63] The OLG Hamburg considered that the use of sounds protected as musical *works* by the defendant constitutes pastiche, and thus no further proportionality assessments had to be undertaken. The decision rests particularly on the shift in context and genre (from electronic music to hip hop), the self-perception of the hip hop community as regards sampling and the previous guidance in that matter as asserted by the Constitutional Court, according to which the "genre" (or art)-specific use had to be considered in light of the freedom of art enjoyed by the defendant. This leaves a void as regards the hypothetical interests. Evidently, the litigation is not motivated by the prospect of receiving licensing fees but by the desire to prevent precisely the use of their sounds not as an element of a sound recording but as a reflection of their artistic oeuvre by and large. In other words, the true aspiration of the claimants was to be given protection as a reflection of artistic self-perception, precisely as a right to oppose the act of appropriation of the sounds which represent that self-perception.

Can, then, an overbroad notion of pastiche be barricaded in some way? Technically, a range of potential rights to object may be distilled from copyright law and, more so, beyond. These can be further segregated between teleological approaches and the applicability of extrinsic parameters, most importantly as regards aspects of fairness, especially where the AI Artifact interferes with the authors' market. The first would require a strenuous exegesis

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[62] See further below, C. I.

[63] OLG Hamburg (2022) GRUR-RS 27172 paras. 43 et seq. – "Metal on Metal III". The decision is now pending before the Court of Justice after it was referred to the BGH. The BGH asked, most importantly, whether the pastiche exception can be considered as a general clause for any engagement with pre-existing subject-matter and whether there must be an intention of the user to engage in pastiche. See also LG Berlin, 2.11.2021 - 15 O 551/19 (any recombinant use and representation in a different context constitutes a pastiche).

as regards an ontological meaning (what *is* pastiche?)[64]—such as to restrict the term to acts of appropriations of non-protectable subject matter - which would cause inconsistencies with the legislative objective. The second requires detecting potential extrinsic constraints, which in turn can be classified as pertaining to either ideational or commercial expectations. Technically, this results in a proportionality test, though it remains unclear how precisely such a "practical concordance" test can or should be framed.

The current debate on pastiche thus refers broadly to different legal principles: that the applicability of pastiche depends on a balancing exercise as regards the author's "legitimate interests" as technically required by the three-step test,[65] or—as in UK copyright law—on fairness, a tenet that, in turn, rather loosely refers to commercial expectations. Accordingly, the proportionality test must be conducted between the interest of users and the economic interests of right holders—authors and exploiters alike, rooted in the property clause under Article 17 EU-Charta.

There are objections against an approach focusing on allegedly detrimental economic or commercial effects only, both as regards the express legislative objective underpinning the German UrhDAG and the assertions by the Court of Justice that freedom of art, via the caricature, parody and pastiche exception, must be maintained in the context of platform liability and beyond[66], that is, as a generally broad exception through which expectations of user creativity, whether as a matter of platform uses or as a matter of an ordinary copyright dispute. Generally, one obvious consequence of any proportionality deliberation based on commercial fairness is that it leads to a prevalence of extensive property notions, much in the sense that any potential licensability of a transformative or recombinant use may be considered as infringing.[67] That insight also disqualifies a broad application of

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[64] See, for such approach, E Ortland, „Pastiche im europäischen Sprachgebrauch und im Urheberrecht" 14 (2022) 1 Zeitschrift für Geistiges Eigentum (ZGE) 3, 27 et seq.

[65] Article 5(5) EUCD.

[66] Republic of Poland v. European Parliament, Case C-401/19, Ilešič, Action for Annulment, [Ct. of Just.](May 24, 2019).

[67] See Manfred Rehbinder & Alexander Peukert, Urheberrecht, para. 525 (Munich 2018), (restricting the scope of the exception in case the use has serious effects on the marketability of the original); see also, on the problematic issue as to what may amount to such "commercial" effect Guido Westkamp, *Licensability as Property*, in Reforming Intellectual Property 266 (G Ghidini & V Falce, eds. 2022).

the "legitimate interest" tenet under the three-step test, which is generally perceived to apply predominantly vis-à-vis market-based intrusions.[68]

The same objection applies to the rather more appealing idea of applying a notion of confusion as a constraint to pastiche uses. Such re-exception applies in some member states as well as under the potentially applicable action for passing off in the UK.[69] However, confusion can effortlessly be prevented and avoided once an AI-generated artifact is labelled as such. In addition, and more substantively, the notion of confusion is an entirely opaque concept where it is applied to transformative or recombinant uses as a matter of copyright law. Confusion, as the case may be, may relate to the original work or to authorship (i.e., confusion as to artistic origin), but it may also relate to—again—constellations where the audience concludes that the use had been licensed, a supposition that in turn leads back to a predominance of property considerations.

The crucial objection is, however, that emphasising "property" (or relying on economic considerations derived from unfair competition law)[70] does not allow for properly distinguishing between authors' and exploiters' interests, and results in a false framing of the proportionality exercise by and large. Exploiters, as noted, may well wish to license any use for AI purposes (thus including both the use for training data, and any subsequent use such as for pastiche), preferably, of course, without any intercession from creators; an immovable and partial reliance

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[68] Ansgar Ohly, Urheberrecht im digitalen Binnenmarkt – Die Urheberrechtsnovelle 2021 im Überblick" (2021) Zeitschrift für Urheber- und Medienrecht (ZUM) 745, 748.

[69] The application of the action for passing off as a means to protect personality interests raises divergent issues so as to accommodate Article 8 ECHR under UK law; see *Fenty v Arcadia Group Brands Ltd.*, EWHC 2310 (U.K. 2013); Irvine v. Talksport [2002] 1 WLR 2355 (Ch), pp. 2361 – 2363, paras. 18 – 21; Guido Westkamp, "Sui Generis Rights, Unfair Competition and Extended Causes of Action", in *Intellectual Property, Unfair Competition and Publicity – Convergences and Development,* 61-96 (Nari Lee, Guido Westkamp, Annette Kur, Ansgar Ohly, eds. 2013): Hazel Carty, "The Common Law and the Quest for the IP Effect" 3 IPQ 237 (2007); CN Ng, "The Law of Passing Off – Goodwill beyond Goods", 47 IIC 814, 817–842, (2016).

[70] See also Stefan Scheurer, "Artificial Intelligence and Unfair Competition – Unveiling an Underestimated Building Block of the AI Regulation Landscape" GRUR Int. 834, 836 (2021); for related issues of market considerations under the US fair use clause Gary Rinkerman, "Artificial Intelligence and Evolving Issues under US Copyright and Patent Law" 6 (2) Interactive Entertainment Law Review 48. 56 (2023).

on commercial prerogatives thus neglects ideational interests. Finally, evidently defamatory, discriminatory[71] or pejorative[72] uses may be excluded from the application of the pastiche exception anyway as a matter of proportionality- but again, this is not the concern deliberated here.

To be sure, it is not the intention here to slate the decision by the OLG Hamburg in *Pelham*. Evidently, social expectations as regards platform uses require a broader recognition of freedom of art.[73] Certainly not all expressions by average users found on platforms or social media today align with a more orthodox and bourgeois perception of "art". Indeed, "pastiche" is a metaphor: not for a contemporary understanding of fundamental rights applicable in copyright, but for the need to reduce complexity as regards diverse interests in the context of platform regulation—noticeably with repercussions on how pastiche, or freedom of art, is understood in an "ordinary" copyright context where that freedom may easily tip the scale in favour of the defendant and thus outweigh the interests of authors.

That distinction—between scenarios where, on one hand, freedom of art is a matter of judicial decision making and, on the other, where it is a matter of an all-encompassing platform regulation– is of utmost importance in an AI context. Where users flag, the legal "meaning" of pastiche and freedom of art as an issue of construction becomes mostly immaterial; instead, the law reacts to specific interests through a dedicated technological solution without a need or even a possibility for any nuanced proportionality considerations. Any perception of a qualitative imbalance between original and dependent creation is effectively evened out in return for payment, and likewise any economic interests of commercial

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[71] Deckmyn v. Vandersteen, Case C-201/13, RDI 581-594, Reference for a preliminary ruling [Ct. of Just.] (Apr. 17, 2013).

[72] See Christophe Geiger, "Elaborating a Human Rights friendly Copyright Framework for Generative AI" 55 Int'l Rev. for Intell. Prop. and Competition L. 1129 (2024) SSRN https://ssrn.com/abstract=4634992. Similarly, and much more relevant to the AI debate, a number of decisions in various jurisdictions have addressed the Google auto-complete function where that technology automatically added a pejorative message violating dignitarian personality rights. See Bundesgerichtshof [BGH] [Federal Court of Justice] May 14, 2013, BHGZ 197, 213 (2013)(Ger.); see Anna Beckers & Gunther Teubner, Three Liability Regimes for Artificial Intelligence, 163 (Oxford and New York, 1st ed. 2021).

[73] See discussion infra, D. II., especially as to whether the "extension" of the pastiche exception as a matter of user freedom on platform can sustain the argument that AI creations on platforms should be treated in an identical manner.

copyright exploiters are taken out of the equation—again, to predominantly avoid complex convolutions in law making, and thereby as a corollary to novel perceptions of creativity. In contrast, in ordinary copyright disputes, "pastiche" remains a metaphor for measuring out spheres of artistic freedom compelling the customary degree of judicial meticulousness, as the various conceivable outcomes of the *Pelham* dispute amply attest.

Yet what appears a persuasive approach in the context of platform regulation—a supra-individual right to freedom of expression - is not necessarily a convincing solution with a view to intrusions by AI applications upon the artistic self-perception of artists. In short, distinctions must be made according to dissimilar functions of fundamental rights, both in their positive and, crucially, negative libertarian dimension. Thus, the following section briefly outlines what may be categorised as the missing link in the debate.

### *C. THE ARTIST'S PERSONALITY RIGHTS AS A NEGATIVE LIBERTY: MORAL AND PERSONALITY RIGHTS TO OPPOSE*

It is undisputed in constitutional theory that positive libertarian rights inherently include a negative dimension:[74] the bearer of the right may object against certain impositions of freedom of art as exercised by a third party. In constitutional literature, the existence of a negative freedom of art is sometimes referred to[75], though never as a right to object to any established "free" use under copyright law. That omission is predictable given that copyright law—the interplay between economic and moral rights on the one hand and exceptions on the other—determines that relationship as a matter of ordinary law.

A number of discrete patterns of argument already point towards such a negative freedom of art concept, more accurately understood as a general artistic personality right that ultimately emanates from notions of artistic self-autonomy. The moral right to object to a derogatory treatment under copyright law comes close, in that it can conceptually be calibrated as a right to indirectly apply in cases where—even in the absence of any modification or treatment— the author or performer can successfully object to uses that convey an undesirable message that the owner of the right had

[74] Johannes Hellermann, Die sogenannte negative Seite der Freiheitsrecte, 92 (Dunckler & Humblot, 1993).
[75] For German constitutional law, see Johannes Hellermann, Die sogenannte negative Seite der Freiheitsrecte, 92 (Dunckler & Humblot, 1993).

consented to the use for political purposes. Likewise, freedom of art, where it conflicts with personality rights, can be severely limited: an intrusion into the defendants' intimate sphere limits the exercise of a novelist's liberty—even where the defendant, as a real person, is disguised as a fictional character, such as in a *roman à clef*.[76]

The recognition of an artist's personality right should, however, not be misunderstood as simply extending or modifying existing substantive copyright law towards a general and opaque personality right. The function of such a right lies predominantly in allowing a clearer perception of how personality interests in relation to human creativity can frame any future legislative regulation of the inherent collisions between machine and human creativity. The notion of a negative right to object based on artistic self-perception also has the advantage of permitting the inclusion precisely of aspects such as appropriations of style, or emulations of a performer's distinctive voice, or any other characteristic that pertains to an artist's individuality. It does not mean, likewise, that a right to object on such a basis must inadvertently result in limiting the freedom to engage with art by and large. As personality rights law amply demonstrates, it has the capacity to develop re-exceptions—for example, the general prohibition to use the image of a person for commercial gain by way of advertising is permitted provided that the message conveyed can be characterised as political comment.[77]

There is an obvious void from the claimants' perspective. Evidently, the litigation is not motivated by the prospect of acquiring licensing fees, but to prevent the use of their sounds not as an element of a sound recording but as a reflection of their artistic oeuvre. In other words, the true desire is to be given protection as a reflection of artistic self-perception, thus the very act of appropriation by certain representatives of a different genre (hip hop). Copyright law cannot (and indeed should not) accommodate such a claim that would encompass an entire artist's

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[76] Order of the First Senate [Federal Constitutional Court] June 13, 2007, BVerfGE 119, 1-59 (102)(Ger.).

[77] Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 10, 2006, BHGZ 169, 340 (2006)(Ger.). See further Franz Hofmann, The economic part of the right to personality as an intellectual property right? A comparison between English and German Law, 2 ZGE / IPJ , 1, 8 et seq. (2010) ; Guido Westkamp, "Personality Rights, Unfair Competition and Extended Causes of Action," in Intellectual Property, Unfair Competition and Publicity 61 (Nari Lee, Guido Westkamp, Annette Kur & Ansgar Ohly eds., 2014).

opus, and this is not what is suggested here. But if that personality-based assertion (which was not argued during the various stages of the dispute decided by the OLG Hamburg in *Pelham*) is taken seriously, a broader notion of legal protection for such claims to artistic self-autonomy and respect is obvious that brings such claims into the proximity of general personal rights—resulting in a need to formulate parameters and criteria for a hypothetically open-ended balancing of rights test conducted between two claims to divergent artistic spheres and liberties.

Necessarily, that position requires further differentiation as a matter of framing the balancing exercise and to avoid situations where the two claims to freedom of art cancel each other out. Criteria that may speak in favor of artistic self-autonomy—and that would go beyond uses that have a "detrimental" dimension[78]—may include the recognition of the artistic influence and power to innovate, the pioneering work in the establishment of electronic music as a new genre, and indeed *Kraftwerk's* general artistic self-perception that has transported the idea of machines into the realm of human creativity—thus, the very recreation and emulation of "robots" that transcends *Kraftwerk's* musical legacy (from machines into the human realm) is the opposite of what AI does.

In sum, integrating broader notions of personality rights would have forced the court to the rather different considerations whether—as a matter of constitutional law—the desire to object to an appropriation and potentially an unwanted association with the offending genre would have altered the outcome of the case, much in the sense of establishing a re-exception to the otherwise prevailing positive freedom of art as exercised by the defendant. The proximity to claims for the protection of how one's life is represented in art or media is obvious. Conceptually, such a right can operate as a basic principle that can encompass economic considerations. Indeed, the definition given to freedom of art under the German constitution highlights that the—as such, unrestricted—liberty encompasses both the creative process, i.e. the making of a work of art, ("*Werkbereich*") since the exploitation, marketing and any other relevant subsequent uses in the system of art ("*Wirkbereich*").[79]

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[78] In its "Esra" decision, the Constitutional Court asserted that personality rights can be exercised against the otherwise unrestricted right to freedom of art at least where the "intimate sphere" is affected, see Order of the First Senate [Federal Constitutional Court] June 13, 2007, BVerfGE 119, 1-59 (102)(Ger.).

[79] See generally S Whyatt, Free to Create: Artistic Freedom in Europe, Council of Europe report on the freedom of artistic expression, Strasbourg 2023; for

Necessarily, that suggestion requires further differentiation as a matter of framing the balancing exercise as regards a future regulation of generative AI - and so to avoid situations where the two claims to freedom of art cancel each other out. The *Pelham* facts, again, offer copious hypothetical arguments and permit the elaboration of criteria that would tip the scale back in in favour of artistic self-autonomy and self-determination—and that would therefore exceed requirements of a "detrimental" facet[80]—may effortlessly include the recognition of artistic influence and power to innovate, their pioneering work in the establishment of electronic music as a new genre, and indeed *Kraftwerk's* artistic self-perception: the recreation, mimicking and emulating of "robots" and the inversion of the machine into the human realm that transcends *Kraftwerk's* entire work is, precisely, the opposite of what AI does. Re-detecting such negative liberty more meticulously thus reintroduces a vital modification to the standard copyright assessment - consequently, any appropriation of feature, style, or characteristic properties by AI must be assessed in light of whether such dealing resembles, more metaphorically, the distinctive features of the oeuvre and is therefore likely to affect the claim to artistic self-perception and self-autonomy.

Once that claim is recognized, the analysis needs to turn to the probably most contested issue addressed herein—can AI be the bearer of fundamental rights? Can, or should, AI be ascribed personhood? And if so, should personhood be ascribed as a general principle, or should such an approach be tailored functionally to the specific legal and regulatory environment in question? Should the new understanding of freedom of art, and the arguments that support an extensive construction of pastiche, etc., on social media platforms equally apply where the artifact is made by a machine rather than a human?

## V. AI PERSONHOOD: THE ROBOT AS BEARER OF FREEDOM OF ART?

Inescapably, the debate concerning AI and fundamental rights today is so multi-layered and nuanced that a first cursory

German constitutional law, see Ino Augsberg, "Ver-Gegenständlichung. Zum Kunstbegriff des Grundgesetzes", in *Literatur und Recht: Materialität* 211 (Berlin 2021).

[80] Order of the First Senate [Federal Constitutional Court] June 13, 2007, BVerfGE 119, 1-59 (102)(Ger.) – Esra.

outline should be given before considering the notion of freedom as exercisable by algorithms in more detail. In broad terms, two extreme positions can be distinguished. A first pattern of argument as regards liability of AI systems—understood generally as an algorithm-based decision maker - posits that the use of AI should be treated as illegal unless, on a case-by-case basis, the law would permit its application incrementally because only the legislator can make effective risk provisioning.[81] At the other end of the spectrum, and more relevant in the context of robotic creativity, are assertions according to which no distinction whatsoever should be made between machine and human creativity[82] because, ultimately, any type of creativity can enhance culture.

This latter observation—dissected in more detail below[83] - has further consequences. It evidently permits the assertion that when relying on the pastiche exception, either no human input whatsoever is required or that personhood should be ascribed to the autonomous system to eradicate any legitimate objection by the original author. Necessarily, this also paves the way towards recognising subjective rights for the AI system—this would enable either copyright protection or a new absolute right[84] which would protect the investment in AI creations—possibly with a view to replace human creativity over time for the benefit of the AI industry, a development that can find much support in the function ascribed to the pastiche etc. exceptions as applicable on social media.

Asserting a complete equilibrium between human and robotic creativity to fill perceived gaps in copyright law presupposes that creativity without constraints is a monolithic entity that the law must safeguard. In addition, there is an enormous risk in the copyright/AI debate because it obscures relevant non-commercial interests. It effectively categorizes uses by an AI system as either an original work or subsumes such use under a new property right, thus, to be allocated to the relevant industries via a notion of digital agency. Conveniently, no

[81] Herbert Zech, "Liability for Autonomous Systems: Tackling Specific Risks of Modern IT," in Liability for Robotics and the Internet of Things 192 (Reiner Schulze ed., 2020).; Susanne Beck, "The Problem of Ascribing Legal Responsibility in the Case of Robotics," 31 AI & Soc'y 473, 477 (2016).
[82] Madeline de Cock Buning, "Autonomous Intelligent Systems as Creative Agents under the EU Framework for Intellectual Property," Eur. J. of Risk Regul. 310, 313 (2016).
[83] See below, E. II.
[84] T Dornis, "Artificial Creativity: Emergent Works and the Void in Current Copyright Doctrine" 22 (2020) Yale J. L. & Tech. 1, 16- 17.

problems arise with regard to the permissibility of data mining because freedom of research would be geared towards a socially desirable aim, a tenet that points precisely—as will be seen later—to the central problem of uncertainty as it may soon become apparent that it is premature to conclude that such future is desirable at all.

### *A. The Function of AI Personhood and the Digital Eco-System*

If the collision of interests is framed - in contrast to the copyright debate that, in a siloed fashion, orbits around a potential allocation of rights - as a matter of positive versus negative dimensions of freedom of art, it may soon become more obvious that the problem of AI creativity requires an analysis through the lens of the function of fundamental rights as well as a more precise and discerned categorisation of notions of AI agency. As regards freedom of art, an understanding of that fundamental right as a classical libertarian right[85] would immediately end the debate. Individuality, like the perception of copyright, can only be perceived as a property of humans. The question of whether an Artifact produced by generative AI can be characterised as creative would simply not arise. However, current debates on fundamental rights go beyond a strict individuality-based notion[86] and ask different and more nuanced questions.

Both strands of the debate—fundamental rights and liability—must ask for the specific functions that AI is said to accomplish therein. The most advanced approach considers that the function of AI and its regulation by law must depend on the socio-digital institution in which they operate.[87] For the purpose of allocating liability rules, a division has been proposed, which distinguishes between assisted AI uses, human-machine associations and interconnected AI systems.[88] The latter describes what is relevant here—that generative AI is a system making autonomous decisions, including risks to violate the legitimate

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[85] KN Peifer, „Roboter als Schöpfer – Wird das Urheberrecht im Zeitalter der künstlichen Intelligenz noch gebraucht?“, in: S von Lewisnki & H Wittmann, Urheberrecht! Festschrift für Michel M. Walter zum 80. Geburtstag (Vienna 2021), 222, 227; JE Schirmer, „Rechtsfähige Roboter?“ (2016) Juristenzeitung (JZ) 660, 662.

[86] A Beckers/G Teubner, Three Liability Regimes for Artificial Intelligence (Oxford, New York 2021), 12-15.

[87] Ibid., p. 13.

[88] Ibid., pp. 138 et seq.

interests of creators. Legal personhood is a flexible "bundle of rights and duties" that can be adapted to different constellations.[89]

However, as regards the function of personhood in the context of communicative freedoms—in contrast to the more refined approaches now taken vis-à-vis liability issues—rather extensive positions are taken that in general refer to alleged favourable effects of AI in the communicative sphere in general.[90] These broad concerns over freedom of communication precisely underpin the German UrhDAG and the prevalence of the pastiche exception. The statutory solutions under the UrhDAG mirror a direct legislative reflection of fundamental rights subtly informed by concepts of collective or supra-individual rights. That concept of collective rights denotes a shift in constitutional theory, away from a perception of subjective rights that can hardly be exercised individually in the digital ecosystem, towards ascribing personhood to the communicative system. Where AI produces Artifacts used on platforms, that line of constitutional thinking links directly back to the legislative objective and, in turn, conceptually permits the ascription of personhood to the machine since it permits the idea of personality to be ascribed to the "stream" of indistinguishable acts of communication—in short, any communication by AI would be treated in the same way as any human communication on, for example, social media platforms.

The effect—if these theoretical approaches were to be transferred to AI to allocate personhood—would be drastic vis-à-vis any exercise of claims to individual rights rooted in artistic self-autonomy—effectively, then, the positive and negative dimensions of freedom of art would cancel each other out. The predominance of communicative freedoms can then result in a seemingly persuasive and consistent pattern of argument in favour of the AI industry. AI may thus be ascribed personhood precisely because it may be posited that generative AI Artifacts would fulfill all the criteria discussed above as regards, for instance, the relevance of freedom of communication on social media in general: AI is as capable as humans to engage in transformative and recombinant uses of pre-existing art, which, of course, is the very purpose of generative AI applications. In that sense, AI contributes to the

[89] S Wojtczak, "Endowing Artificial Intelligence with Legal Subjectivity" [2021] AI & Society 1, 10.
[90] S Neuhöfer, Grundrechtsfähigkeit künstlicher Intelligenz (Berlin 2023), pp. 212, 232, 238 et seq.

communicative sphere and thus to a pluralist society.[91] From here, it is only a short step towards ascribing personhood, and the need for such ascription would effortlessly follow from another consideration—that, in the absence of personhood, the state could censor AI "opinions".[92]

Thus, if personhood was indifferently ascribed to robots interfering with an artists' opus and legacy, the legitimacy of these interests would be severely weakened. To counter that notion of personhood, the following will first provide a closer examination of the issue in the context of the German UrhDAG before considering the implications of a supra-individual right. The UrhDAG is particularly decisive in this context precisely because this legislation is a continuation of notions of collective rights that transposes wider theories into legal rules. The instantaneous line of reasoning is obvious. If any recombinant use is permitted to humans, then why should it not, as a matter of principle, be permitted to machines—and in turn, why should users not be able to upload content generated by AI?

### *B. AI Artifacts on Platforms in the Context of The German UrhDAG*

The UrhDAG is best described as a piece of legislation that reduces complexity, and for that reason, the pastiche exception has a function that differs in statutory copyright law. As mentioned, the legislator was faced with an insurmountable and complex web of interests with regards to platform liability.[93] The prime legislative objective was, as mentioned, to avoid filtering and blocking altogether, which is an inescapable consequence of focusing upon the high relevance the law now ascribes to user creativity.

The pastiche exception, then, has necessarily eradicated property as a monolithic right to object. It is important to note that development is not a consequence of a sudden or rapid legislative turn. It is an outcome of an incremental process, a reaction to

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[91] C Lewke, „…aber das kann ich nicht tun!": Künstliche Intelligenz und ihre Beteiligung am öffentlichen Diskurs" (2017) Zeitschrift für Innovations- und Technikrecht (InTeR) 207, 209.

[92] S Neuhöfer, Grundrechtsfähigkeit künstlicher Intelligenz (Berlin 2023), p. 203; J Kersten, „KI-Kunst – ‚Künstliche Intelligenz und künstlerische Freiheit' ", in: R Ismer, E Reimer, A Rust & C Waldhoff, Territorialität und Personalität, Festschrift für Moris Lehner (Cologne 2019), p, 437.

[93] G Westkamp, "Two Constitutional Cultures, Technological Enforcement and User Creativity: The Impending Collapse of the EU Copyright Regime?" 53 (2022) 1 IIC 62, 85 et seq.

increasing social and collective expectations for access to culture and typical internet and social media uses. The technical solution adopted under the UrhDAG in particular—that users may flag content and that authors receive remuneration, as outlined previously—then necessarily has potentially significant and disruptive repercussions on how the traditional copyright system works and how nuanced the decision-making process becomes. The UrhDAG in particular recognizes, therefore, all applicable fundamental rights concurrently. What is new and inventive about that approach is simply that it translates something that has been observed before into dedicated normative principles: that the autonomy of the medium is linked to broader collective concerns of access to the medium and participation. Thus, rendering the medium liable for copyright infringement by its users cannot solely be considered as an inference on the economic fundamental right to conduct a business, and the potentially serious implications of extended liability on user freedoms cannot be dismissed as mere collateral damage. Indeed, the economic rights in the matrix of interests between authors, users, copyright exploiters and platform operators must be considered as rights that are subservient to the dominant objective to safeguard creativity[94]—an aspect that has already been addressed by the Court of Justice.[95] This—admittedly rather subtle - shift from a rigid towards an open and malleable system is a necessary step and responds to numerous criticisms that have been voiced in the past decades vis-à-vis the general "high level" approach, favouring the copyright industries, that had been taken when the EUCD was adopted some twenty-five years ago.[96]

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[94] The relevant interests safeguarded by the EU-Charter (and applicable, to one degree or other ) to any issue pertaining to aspects of digital copyright include the right to intellectual property (Article 17 EU-Ch), freedom of expression (Art 11 EU-Ch.), freedom of art (Article 13 EU-Charta), freedom to conduct a business (Article 16 EU-Charta), and also protection of personal data (Article 7 EU-Ch.) and privacy (Article 8 EU-Ch). See further C Sganga, 'The fundamental rights saga in EU copyright law: time for the boundary-setting season?' (2019) Medien und Recht Int., 56; T Mylly, 'The constitutionalization of the European legal order: impact of human rights on intellectual property in the EU', in: C Geiger (ed.) Research handbook on human rights and intellectual property (Edward Elgar 2014) 103.

[95] Case C-70/10, Scarlet Extended NV v. Belgische Verenigung van Auteurs, Componisten en Uitgevers CVBA (SABAM), para. 43, 50-53, ECLI:EU:C:2011:771; Case C-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH und Wega Filmproduktionsgesellschaft mbH, ECLI:EU:C:2014:192, para. 46.

[96] Ibid.

That development also marks a change, in a constitutional sense, away from property and towards freedom of art and communication as guiding principles altogether. The status of the pastiche exception in the context of platform liability is, as mentioned, functionally entirely different from that in ordinary copyright law because it represents a legislative reaction to specific social expectations. Consequently, however, it is impossible to distinguish as regards the statutory meaning of pastiche, i.e., between the two provisions now dealing with pastiche—one under the UrhDAG, the other in the Authors' Right Act, resulting in a broad and identical construction. Indeed, the foremost ramification of the pastiche clause upon ordinary copyright law is to remove any thinking in property categories. Predominantly, a closer attachment of copyright and freedom of art, disenfranchised from primarily economic considerations, allows for placing emphasis solely on user rights as regards transformative or recombinant uses. But just as well, appending copyright to freedom of art can similarly underline the negative dimension of that fundamental right as a creator's right to be left unaffected more clearly.[97] From that perspective, the economic rights of both the platform operator and the copyright exploiter become irrelevant—platform operators may rely on the autonomy of the medium through the right to conduct a business (Article 16 EU-Ch) and exploiters may still raise property rights under Article 17 EU-Ch., but the function of exercising such rights is constrained: the right to conduct a business is translated, then, in a right of the intermediary that is exercised for the benefit of supra-individual communicative freedom, and in that sense establishes an agency function (i.e. a subservient fundamental right) between user and platform. [98] The property right, as a right to exert control over the user and through the intermediary, is marginalised (though not, in an abstract sense, eliminated) in the case of pastiche because authors receive payment, which leaves authors a choice to either benefit from that payment or to pursue their rights in court. The dogmatic question

[97] F. Kahl, "Zum Spannungsverhältnis zwischen Kunstfreiheit und Urheberrecht" 196 et seq. (Berline, 2023).

[98] The interdependency between the right to conduct a business, as claimed by platform operators, and any right to freedom of communication has not expressly been recognized by the Court of Justice, see critically H Gersdorf, "EU Charta", in: H Gersdorf/B Paal, Informations- und Medienrecht (2nd ed., Munich 2021), annotation 35, p. 10. See also G Westkamp, "Two Constitutional Cultures, Technological Enforcement and User Creativity: The Impending Collapse of the EU Copyright Regime?" 53 (2022) 1 IIC 62, 73.

as to what may constitute pastiche, in an ontological sense, is entirely irrelevant under such a scheme.

In essence, the perception underpinning the UrhDAG—to provide more freedom to users—cannot indecisively be applied to the constellation where artists oppose AI uses. As a matter of reducing complexity, the UrhDAG is irrelevant for the question of which function personhood should fulfil in that context. In the next step, therefore, the relevance of supra-individual rights will be assessed.

## VI. FALSE RELIANCE: COLLECTIVE FREEDOM OF COMMUNICATION

References to supra-individual rights in general may still justify the allocation of personhood to AI. This view is indeed often taken and requires closer examination. The position taken here, however, is that this understanding, although it seems to rely on a rather consistent chain of arguments, contains various fallacies.

Indeed, this view concocts a range of issues. The first, and perhaps most fundamental error, concerns the confusion over personhood and a resulting communicative freedom. This is evidently based on the idea that any emulation of human behavior—here resulting in an Artifact that can, following an algorithmic process, easily qualify as "expression" under Article 11 EU-Charter, allows the conclusion that personhood should be established. This is not only partially circular but heavily relies on "reading" legal rules on the machine's behavior[99] and outputs rather than considering the function of any legal rule applicable to AI. Thus, would it be sensible to apply notions of personhood or to insinuate an ability to bear communicative fundamental rights in case the AI appears on a platform?

### *A. PERSONHOOD AND LEGAL FUNCTION FOR THE BENEFIT OF PLATFORM USERS*

Ascribing personhood, first, presupposes a particular function;[100] such a function can only be found where there exists a

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[99] Beckers & Teubner, supra, at 16.

[100] There are many variations in the discussion on supra-individual communicative rights, see Claudio Fazius, Das Internet und die Grundrechte,71 Juristenzeitung 630, 635 (2016); Gunther Teubner, *Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law*, 33 Journal of Law and Society 497, 497 (2006); Andreas Fischer-Lescano, *Subjektlose Rechte,* ____(vol#)_____ Juristenzeitung 965, 970

general need to operationalise fundamental rights for the digital ecosystem in question, and such a function can only be derived from a notion of supra-individual or collective fundamental rights. This already shows a first problem: "communicative freedom" is a highly opaque expression that only accidentally also pertains to freedom of art, and thus immediately lacks differentiation. Further, much of the debate as regards the function of supra-individual fundamental rights rests upon various assumptions that, for this contribution, allow additional and more nuanced delineations.

The emergence of a protracted understanding of fundamental rights applicable to such media is, first and foremost, a result of a co-evolution of legal norms and user expectations[101] - a process felt particularly in copyright law. The function of fundamental rights in the context of communicative spheres such as the internet has the effect of incrementally establishing new (social) rules through a subtle process of recognizing needs for access and participation. User expectations thus incrementally and subtly enter the legal system and become recognized by courts. Such access rules were formulated most notably in constellations such as those in the Google image search case:[102] here, the otherwise inescapable finding of copyright infringement by the search engine (reproduction of protected artistic works by way of "thumb nail" images and absence of any written exception) was avoided by relying on contract law and the notion of an implied consent as ultimately an expression of the artists' autonomy.[103] That change in direction established a new "escape clause" responding predominantly to the rigidity of secondary copyright law in the EU.[104] The fact that the pastiche exception, as a matter of European secondary law (Article 17 (7) DSMD), in particular, has gained such strength and weight marks the final point in that

(2014); Albert Ingold, *Grundrechtsschutz sozialer Emergenz: Eine Neukonfiguration juristischer Personalität in Art. 19 Abs. 3 GG angesichts webbasierter Kollektivitätsformen*, 53 Der Staat 193, 206 (2014).

[101] Teubner, Supra, at 506 (discussing whether personhood can be ascribed to the "stream of communication" itself).

[102] BGH, 29.4.2010, I ZR 69/08 – Google Image Search I (Germany); see further Birgit Clarke, *BGH: Google's image search is no copyright infringement*, IPKat (2010), https://ipkitten.blogspot.com/2010/04/bgh-googles-image-search-is-no.html.

[103] See further Georgia Jenkins, *An Extended Doctrine of Implied Consent – A Digital Mediator*?, 52 IIC 706, 716 (2021).

[104] Guido Westkamp, *Emerging escape clauses? Online exhaustion, consent and European copyright law*, J Rosén, Intellectual Property at the Crossroads of Trade 38, 47 et seq. (2012).

development. It is enticing that "pastiche" thus symbolizes the conflation of two strands of the debate on more freedom on the internet[105], between extending copyright via exceptions on the one hand and notions of supra-individual rights and the collective exercise of such "subject-less" rights as propositioned in constitutional theories on the other.[106]

The solution under the German UrhDAG—which, again, factually removes the property rights as enjoyed by copyright exploiters[107]—then constitutes the final reorganisation of social expectations in "autonomous societal orders"[108]. Because such pastiche uses on platforms are, as mentioned, paid for on the basis of a technical, "code as code" process (flagging), the effect is to reduce complexity, rather than to establish a new substantive copyright exception. Hence, the UrhDAG itself is a consequence of a shrewd progress recognising such emergent social expectations that had been observed a long time ago. These collective expectations are now statutorily regulated and sanctioned by the Court of Justice after its decision following the *Poland* complaint. Instead, the expectations of traditional artists and those of "prosumers" are morphed into a homogenous meta-rule, establishing a single orientation point, manifested in the term "pastiche". Any constraint imposed upon the connotations of pastiche in the context of Article 17 (7) DSMD would ultimately

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[105] See only P. Bernt Hugenholtz & Ruth Okedidji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright, Study supported by the Open Society Institute (OSI), March 6, 2008*, SSRN Electronic Library Hugenholtz (2012), https://ssrn.com/abstract=2017629; Giancarlo Frosio, *Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity*, 51 IIC 709, 709 (2020).

[106] Erklärung der Bundesrepublik Deutschland zur Richtlinie über das Urheberrecht und verwandten Schutzrechte im Digitalen Binnenmarkt, insbesondere zu Artikel 17 der Richtlinie, https://www.bmjv.de/SharedDocs/Downloads/DE/News/PM/041519_Protokollerklaerung_Richtlinie_Urheberrecht.pdf?__blob=publicationFile&v=1 (declaring that the objective of implementing Artcile 17 DSMD ist to sustain user creativity and freedom in relevant practices on platforms and the internet and to therefore aim for a general licensing solution). The Court of Justice does not consider such protocol declaration as binding, see Case C-292/89, The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen (1991) ECR I-00745 (Germany).

[107] Guido Westkamp, *Digital Copyright Enforcement after Article 17 DSMD: Platform Liability between Privacy, Property and Subjective Access Rights*,14 Zeitschrift für Geistiges Eigentum/Intellectual Property Journal 400, 432 et seq. (2022).

[108] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* 17 et seq. (2012).

compromise the functioning of the communicative infrastructure. The alternative reaction—that which the copyright industry had long lobbied for—would be to remove virtually any content where there is the slightest possibility for infringement, and thus to accept the loss of communicative freedoms as collateral damage in the interest of resuscitating economic rights. Therefore, liability of platform operators for illegal content is limited, because overbroad claims to damages in particular, or impositions on constant monitoring,[109] would interfere with the openness of the infrastructure and would remove the incentive to innovate. This demonstrates that the function of supra-individual rights is to guarantee access and participation in an extremely broad sense. As regards freedom of art, there certainly exists a corollary.

### *B. Non-Transferability of Collective Freedoms to AI Personhood Concerns*

However, as outlined above, such an extensive understanding of the positive dimension of the right to freedom of art requires closer inspection once the negative dimension of that right is put into the equation. In short, the rise of social expectations to access to copyright works, understood (again) as a supra-individual and collective right that informs an extensive pastiche clause, will effectively mutate into a quasi-property right for the AI industry. The underlying line of argument rests plainly on the need to maintain the infrastructure for the benefit of open communication, but it has no bearing upon the question whether the AI industry could be considered an intermediary to be able to rely on pastiche on behalf of users' collective rights—if it is accepted, as is suggested herein, that the AI Artifact is not covered by freedom of art, nothing remains to be mediated for the AI industry via the right to freedom of business, or indeed any claim to economic privileges. The discussion would return to the point of departure, because AI Artifacts are not the result of a creative process. If the opposite view were taken, the notion of pastiche would be transformed, indirectly, into an economic right.

Again, in the context of platform uses of copyright content, any material scope that could be ascribed to pastiche, whether

[109] Hence, "general monitoring" remains prohibited under Article 16 of the E-Commerce Directive (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')), OJ L 178, 17.7.2000, p. 1–16.

extensive or more limited, is largely irrelevant.[110] Of course, that does not mean that attempts to define pastiche (or any other notion of fair or free use) become futile. Rather, it signifies that disputes over whether a particular "flagged" use indeed constitutes a use falling under the exception should, as a matter of legislative objectives, not arise; and if so, disputes will be resolved within the system. Because of that, the legislator could unavoidably not differentiate between diverse aspects of communicative freedoms—such as between freedom of opinion and freedom of art - or indeed maintain the traditional normative hierarchy between work and alleged copy where some recombinant element is present; the notion of supra-individual fundamental rights as represented in the context of the German UrhDAG is an all-encompassing resolution responding to claims for greater communicative freedoms in a copyright context, and that broad function does not immediately permit the conclusion that the pastiche exception is a direct reflection of positive freedom of art that would principally and apathetically outweigh its negative dimension as a right to object. Indeed, it can well be argued that it is precisely an all-encompassing notion of a collective communicative right that, whilst imposing certain restrictions such as on social and economic interests, requires a re-formulation of individual rights in the classic sense as a right to oppose.[111]

### *C. HUMAN ART, AI AND THE INNER STRUGGLE*

Thus, if broad communicative functions of fundamental rights cannot justify AI personhood, could the same not follow from considering AI at least as equal to human creativity, and thereby ascribing personhood for the sake of its "creative" features as a medium of art? The answer is no. Generative AI is, above all, a self-referential system. It depends on pre-existing creative output that is combined and re-combined in an infinite circle, always "looking backwards", and thus renders "authenticity, autonomy and reflection",[112] as pertinent idealistic perceptions of artistic production and as the subject driving creativity, obsolete.[113] This causes anxieties over maintaining the intrinsic motivation to create

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[110] Westkamp, supra, at 82.
[111] Ladeur, supra, at 526.
[112] Hanno Rauterberg, *Die Kunst der Zukunft: Über den Traum von der kreativen Maschine* 160 (2021).
[113] Id. at 161.

and the ensuing forfeiture of public appreciation in a future where AI Artifacts become dominant.

What is most crucial is that AI is not, and will never be, capable of revolutionising or bringing about new directions or genres. There may be, as it seems at present, perhaps a certain sense of momentary fascination when confronting users with AI-generated art, but any such reaction will predictably wane off the more social media is swamped with algorithmic creations. Once the next "next Rembrandt"[114] goes viral, predictably fatigue will set on - the constant emulation of styles, over and over again, can ultimately only refer back to some notion of origin but does not produce frictions for further meaningful public discourse. There will—and this marks a clear demarcation line to instances where AI may be said to express an opinion—be no relevant public discourse. AI Artifacts are perhaps best described as a "flash in the pan", maybe provoking some instantaneous wonderment that may prompt some terse reaction, or perhaps a transient sensation of surprise, but such a phenomenon will rapidly subside and evaporate once the viewer or listener knows that they are confronted with a banal machine creation. To be sure, that does not eradicate freedom of art where an artistic intention lies behind the operation of AI, but this is a matter of assessing the creativity and originality inherent in the *process* and not the resulting Artifact.

The circularity of AI production thus changes public perception and discourse, but—to use the perhaps most central definition of art under (German) constitutional law[115]– the Artifact is *not* open to interpretation, and precisely so for lack of any expression of the artists' feelings, views, and sentiments. AI does not interact with the world but with pre-existing information it has been fed. AI "art" therefore does not meet the standard of even the widest definition of art (as affirmed in German constitutional law) that art is a process that results in the expression of such emotion or judgement, and that the work is *therefore* open to interpretation as an object emanating from a human's free will, which ultimately is the basis and context for any meaningful impression and interpretation.

The AI Artifact, in mimicking the original authors' style or other individuality features, thus appropriates the authors' personality *per se*, which in turn causes the loss of freedom and the

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[114] On the – ubiquitous – "Next Rembrandt" project see https://www.nextrembrandt.com/.

[115] See generally Oliver Jouanjan, *Freedom of Expression in the Federal Republic of Germany*, 84 Indiana LJ 867 (2009).

capacity for self-development.[116] Generative AI thus produces "replications as travesty";[117] it is then precisely the collectivist notion and supra-individual function of libertarian rights that causes a loss of relevance in the public discourse on art. What is decisive, ultimately, is not the Artifact as output, and whether such object shares features with pre-existing human creations, but the fact that art is a result of intricate inner struggles. This is where the central fallacy in the current debates on both fundamental rights and copyright lies: personhood does not arise out of an emulation of human behavior. On the contrary, generative AI deeply affects artistic self-perception as reflected not only in the individual work created but in style and legacy and relevance; it produces feelings of control and surveillance. Therefore, there is no function for any concept of personhood to accomplish in the context of generative AI. AI can never defy its technical boundaries. Human art can and does.

In sum, these sketchy considerations already should demonstrate that considering AI as a bearer of fundamental rights may only, if at all, rely on an opaque notion of communicative freedom. Whilst it is certainly true that the notion of collective fundamental rights has considerably advanced the theoretical understanding of emerging user expectations as regards claims to more freedom in the digital ecosystem. This applies not only to copyright law but to freedom of speech in general. However, the persuasiveness of that newly found standard of collective rights finds its limits when the effects on artistic self-autonomy are scrutinised more closely at the point where the positive and negative dimensions of freedom of art collide directly. There is a resounding delusion in the attempt to attribute a libertarian fundamental right to AI-created works if considering that condition. Consequently, supra-individual notions of fundamental rights have limits. Advocating a fundamental rights' status, instead, heavily relies on two misconceptions: first, that the legal rule (protection as "art") can be deduced from the properties of the machine to behave in a manner that (only) emulates human expression, and second, that it is solely the object, or the

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[116] See on this aspect P Drahos, A Philosophy of Intellectual Property (Aldershot etc. 1996), p. 79, (referring to GWF Hegel, Philosophy of Right, (Reprint, Oxford 1967), p. 57.

[117] Thus, singer and songwriter Nick Cave. See "This song sucks': Nick Cave responds to ChatGPT song written in style of Nick Cave:, The Guardian, 17.1.2023, https://www.theguardian.com/music/2023/jan/17/this-song-sucks-nick-cave-responds-to-chatgpt-song-written-in-style-of-nick-cave.

ontological features of the Artifact, that permits the conclusion that free choices have been made—albeit only through a process parroting human behavior. A further argument that may be advanced in favour of AI personhood in the context of artistic freedom must consequently be refuted. Freedom of art not only serves as a subjective right but also stabilizes the system of art as an institution by and large.[118] Yet it is precisely debatable whether such a system—based on the foregoing observations—is ultimately desirable.

## VII. Summation And Conclusion

First, the current debate lacks much differentiation, and is, concurrently and paradoxically, not expansive enough. The dangers associated with AI are not limited to copyright but endanger the future of all art. At the same time, isolated debates orbiting around transparency obligations, data mining, ownership of computer-generated works, and new neighbouring rights are too isolated, ignore the dimensions of conflicting rights, and are overall guided by an unwarranted and obscure objective to protect and promote AI products by and large.

Second, the discussion here has shown that—as a result of a highly complex exegesis—generative AI is not a candidate for personhood. The negative dimension of the fundamental right to freedom of art is therefore not attributable to AI, and broader concepts of collective fundamental rights cannot outweigh the individual rights of artists. Essentially, this means that autonomous machines cannot, in theory, invoke the pastiche exception. The function of pastiche for platforms ought not to be confused with its function in other settings, including AI. To fully understand that exception, a distinction has been made here. The broad scope attributed to the pastiche exception has not developed out of copyright thinking but out of an incremental recognition of access rights and collective expectations. It is, in short, a metaphor that generates a twofold consequence—one for platforms and one for ordinary copyright disputes. In the latter case, courts can easily fine-tune the assessment by way of establishing exceptions to the pastiche rule and, as the case may be, re-exceptions once it is

[118]KH Ladeur, Die Beobachtung der kollektiven Dimension der Grundrechte durch eine liberale Grundrechtstheorie 50 (2011) 4 Der Staat 493, 525 et seq; see also V Karavas, The Force of Code: Law's Transformation under Information-Technological Conditions 19 (2009) German LJ 463: G Teubner & A Fischer-Lescano, Regime Collisions (Oxford 2006), p. 7 et seq.

accepted that the term indeed is to be understood as metaphorical and that it may have different functions, as corroborated by the complex web of interests in the *Pelham* scenario outlined above. However, neither the function of pastiche in a traditional copyright context nor that attributed to the role and function of pastiches on platforms (as a metaphor for collective user rights) can be transferred indiscriminately to AI Artifacts since they do not express anything but the fact that such the resulting object was made by an algorithmic process, and because of that the AI object does not attach itself to any need to foster plurality of opinion.

Generative AI cannot be considered as a bearer of the right to freedom of art vis-à-vis artists' personality rights, and it follows that reliance on pastiche is excluded because there is no legitimate function of such right. Specifically, notions of personhood cannot be deduced from broader concepts of communicative freedoms. Claims of social media users to employ AI are therefore irrelevant when asserted as legitimate counter-rights to an artistic personality right. There are also much more serious concerns above and beyond individual claims by creators, such as the dystopian outlook produced by an incremental devaluation of creativity and its consequence of replacing (mostly because it is cheaper) human expression, the overall drastic effects that a work of AI generated art will have on the intrinsic motivation to create, and, necessarily, any control over dissemination and commercial exploitation in the interest of *authors*.[119] In fact, the danger—and unintended consequence—is that the pastiche exception, rather than mediating freedom of expression, is misinterpreted as an economic right in favour of the AI industry.

On balance, the interests of artists prevail over the economic interests of the AI industry and may equally be understood as having a collective dimension that can re-stabilise the system of art and prevent, at least to some degree, a complete substitution of human creativity with Artifacts produced by machines. The recognition of the negative dimension to freedom of art serves to provide a fundamental principle that can inform the current debate both in terms of law and policy, and it is necessary to understand such right as usually prevailing in the sense of providing a balancing factor that outstretches conventional copyright subject matter and integrates ideational interests in

[119] P Zurth, Artificial Creativity? A Case Against Copyright Protection for AI-Generated Works 25 (2021) UCLA J. L. & Tech. 1, 15 et seq., https://uclajolt.com/wp-content/uploads/2021/12/Zurth_Artificial-Creativity.pdf.;

maintaining control overt features such as controlling the oeuvre, including its distinctive properties such as styles. There exist, certainly, approximations to such "basic norm", including the indirect application of moral rights under copyright law and indeed considerations based on false association, endorsement, or confusion as they exist in the law of unfair competition or under personality rights laws such as the US-American publicity rights. Yet in the face of a potentially "high risk," artists face such piecemeal approaches are insufficient to capture the entire picture.

The point, then, is *not* to afford protection for a style as such or to establish an opaque principle of artistic personality rights that must necessarily collide with copyright and other legal causes of action, but to refocus the AI debate by complementing the system of law with a personality rights dimension that is largely based on a right to oppose AI uses as a right to be let alone[120], much in the same sense that the claimants in *Pelham* might have a personality right (albeit unenforceable there) to not be associated with a particular genre they quite obviously loathe. That certainly requires further differentiations but—as copyright law shows—such delineations are part and parcel of an ever-changing copyright doctrine where questions concerning the necessary distance between "original" and "copy" are at stake—the profound complexities and inherent balancing issues that arise in any application of general principles, such as the distinction between idea and expression, the notion of substantiality, or the scope attributed to the former German free use concept, are testament to that. The introduction of pastiche predominantly as a metaphor for user freedoms has shifted that matrix in decision making as a much-needed response to communicative expectations, but evidently must shift back to some degree in case artistic expectations are pitted against AI uses.[121] In short, the decisive issue is that the construction of copyright exceptions is contingent upon the environment in which they operate.

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[120] Thus, a right that is ultimately rooted in the principle that exposure to AI appropriations has similarly detrimental effects on the human motivation to create as constant surveillance has on the general right to self-determination in general, as was asserted by the BVerfG in its seminal "census" decision: BVerfG 1 BvR 209/83, BVerfGE 65, 1, 43; see G Hornung/S Schnabel, "Data Protection in Germany I: The Population Census Decision and the Right to Informational Self-Determination" (2009) Computer Law and Security Review (CLRS) 84.

[121] For copyright see P Samuelson, "Generative AI meets copyright". Ongoing lawsuits could affect everyone who uses generative AI" 381 (2023) Science No. 6654, https://doi.org/10.1126/science.adi0656.

A first consequence to be drawn is that the law must develop relevant collision clauses between the need to establish collective communicative freedoms for human interactions on the one hand, and artists' personality interests as guiding principles in AI regulation on the other. The proper place where to put such collision clauses appears to be a future revision of the AI Act—to be regulated in the context of high-risk AI systems and clarifying the close connection between artists' interests and fundamental rights.

As with all technological progress, it will be impossible to practically prevent the use of AI for transformative purposes on platforms, and here the regulatory model under the German UrhDAG and its payment option can be followed. Such "medium of money"[122] solution should significantly alleviate the need for a more drastic solution, which would require platforms to distinguish between AI Artifacts and human content with a duty to technically remove the former. The conclusion to be drawn is to give artists a choice, and consequently to establish both a general right to prohibit the use for data mining purposes as a fundamental principle, but to complement such right with a statutory license that would encompass the entire chain of exploitation and that would therefore cover both uses of creative output for training purposes and subsequent uses on platforms.

Thus, neither the underlying rationale in the German UrhDAG nor notions of supra-individual rights can eradicate such negative liberty only because the individual right is considered to be usurped by collective expectations. The residual issue then concerns liability. Cases concerning alleged personality rights' violations, for instance by Google's auto-complete function,[123] show that liability can be attributed to the machine.[124]

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[122] See N Luhmann, Zur Funktion der subjektiven Rechte, in: Luhmann, Ausdifferenzierung des Rechts – Beiträge zur Rechtssoziologie und Rechtstheorie (2nd ed., Frankfurt am Main 2015; originally published 1970), 360.

[123] BGH (2013) Neue Juristische Wochenschrift 2348, paras. 24 et seq. – Google Auto-Complete. See further KN Peifer, „Google's autocomplete function – is Google a publisher or mere technical distributor? German Federal Supreme Court, Judgment of May 14, 2012 – Case No. VI ZR 269/12 – Google Autocomplete" 3 (2013) 4 Queen Mary Journal of Intellectual Property (QMJIP) 318; D Wielsch, „Haftung des Mediums", in: B Lomfeld, Die Fälle der Gesellschaft (Tübingen 2017) 125, 138-141.

[124] See also J Soh, "Legal Dispositionism and Artificially-Intelligent Attributions" 43 (2023) 4 Legal Studies 583, 593, discussing violations of personality rights by search engines and referring to the decisions in

Already at this stage, it becomes obvious that the exercise of *individual* fundamental personality rights (personality rights) remains relevant, and that the ability to rely on rights to object as a matter of self-autonomy is not eliminated. As a future legislative task, the central implication of a right to object will require a bespoke solution to fully regulate the entire chain of use.

Metropolitan International Schools Ltd v Designtechnica Corp & Others [2011] WLR 1743; Trkulja v Google LLC (No 5) [2015] VSC 635; Trkulja v Google LLC [2018] 263 CLR 149 (affirmed).