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Article

Inspiration or infringement? Social media 'viral' trends: a case study on TikTok

Michela Galea*

Department of Law, Stockholm University, Stockholm, Sweden

Michela Galea is currently enrolled in the LLM in European Intellectual Property Law at Stockholm University and was admitted to the Maltese Bar, Superior Courts of Malta in 2023.

*Email: galea.michela.mg@gmail.com

Abstract

Short-form videos have recently gained popularity thanks to social media platforms like TikTok. Some of the videos created by users go 'viral' and are 'reproduced' by others as they become trends on this platform.

This article examines whether viral social media trends can warrant copyright protection and whether, by recreating such trends without permission, a potential infringement takes place. The idea–expression dichotomy will form the basis of the analysis so that the question is whether the infringer merely borrows an unprotected idea or rather copies a protectable expression.

Additionally, as hinted in the pending referral in *Mio* (C-580/23), the Court of Justice of the European Union (CJEU) is yet to determine how the assessment of similarity, when examining an alleged infringement, must be conducted—is this one of *recognizability* or rather *overall impression?* Exceptions and limitations—most pertinently, pastiche—also form part of the discussion as questions are raised on the application of this undefined concept, pending the judgment in *Pelham II* (C-590/23).

A balancing approach shall be taken between the interests of the different stakeholders at hand, including having regard to freedom of expression and protection of IP.

1. Introduction

Social media platforms have seen a constant rise in users over the past two decades. Despite the short-form nature of these videos, creators on platforms like TikTok produce works that involve a certain degree of creativity. Recently, brands and users have been recreating videos that have gone viral (so-called 'TikTok trends') by *inter alia* using a certain song, a style of filming, post-production editing or a combination thereof (by way of illustration, see the 'Tube Girl' trend,[1] which prompted several creators recreating this trend[2] and also Wes Anderson-style videos[3]) in order to reach the highest of audiences through the platform's algorithms. A question arises whether (i) these works merit copyright protection, and if so, (ii) by recreating these viral trend-style videos, the author of the secondary work potentially infringes the rights of the original author. Regarding the latter, it is also necessary to consider whether (iii) exceptions and limitations under copyright can be applied to such scenarios.

The analysis consists of three main parts: Section 1 briefly considers the constitutive requirements for copyright protection under EU law. Section 2 discusses whether TikTok 'trends' may be protected by reviewing EU legislation and case law of the Court of Justice of the European Union (CJEU). Section 3 explores exceptions and limitations to copyright, in particular, the notion of pastiche also in light of the upcoming *Pelham II* judgment.[4] The present analysis also considers the relevance of the platforms' terms of service (ToS) and the availability of features like TikTok's 'stitches'.[5]

2. Requirements for copyright protection under EU law

The necessary and cumulative requirements of copyright are that there must be a work, which is original. Regarding the first requirement, although there is no legislative definition thereof,

[1]See, as an example of TikTok viral videos, the short-form video by creator Sabrina Bahsoon. Available at https://www.tiktok.com/@sabrinabahsoon/video/7271726424191536402?is_from_webapp=1&sender_device=pc&web_id=7302440018051122720 (accessed 31 January 2024).

[2]See an example of recreation of the viral trend. Available at https://www.tiktok.com/@carolinehxr/video/7286050631402458400?is_from_webapp=1&sender_device=pc&web_id=7307935075647522336 (accessed 31 January 2024).

[3]See an example of Wes Anderson-inspired TikToks. Available at https://www.tiktok.com/@danclemt/video/7227195613459270938?is_from_webapp=1&sender_device=pc&web_id=7307935075647522336 (accessed 31 January 2024).

[4]Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 25 September 2023—*CG and YN v Pelham GmbH and Others*, C-590/23.

[5]See more on what creating a 'stitch' entails. Available at https://support.tiktok.com/en/using-tiktok/creating-videos/stitch (accessed 20 February 2024).

Article 9(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)[6] provides that '[c]opyright protection shall *extend to expressions and not to ideas*…' (emphasis added). In *Levola Hengelo*, the CJEU provided that: 'for there to be a "work" as referred to in Directive 2001/29, the subject matter protected by copyright must be *expressed* in a manner which makes it identifiable with sufficient precision and objectivity…'[7] (emphasis added). Therefore, the test is concerned with the manner in which the work is expressed, such that in the case study of TikTok, it is how the video is edited, the words are chosen and ordered, ideas are executed or what song choice is operated.

Turning to originality, settled CJEU case law provides that this shall be understood as the author's own intellectual creation. The CJEU has long held that it is not the individual elements but rather the combination thereof which confers originality.[8] Therefore, if one applies this criterion to the issue at hand, one might be able to infer that a creator's stylization, combination of sounds and content, makes up a work which has the potential to be copyright protected. As the CJEU recapped in *Funke Medien*, 'originality […] arises from the choice, sequence and combination of the words by which the author expressed his or her creativity in an original manner and achieved a result which is an intellectual creation […]'.[9] This also impinges on the fact that the outcome or final product must be such that it expresses the personality of the author[10] and the choices made were not restricted—such choices could have been made at any time/phase, such as pre-production or post-production, as decided by the CJEU in *Painer*.[11] Despite over a decade-long string of CJEU decisions, it is still unclear what factors need to be taken into consideration when assessing originality. Recently, the Swedish Patents and Market Court of Appeal made a referral to this effect in *Mio*[12] (see further in Section 3).

3. The test of originality and infringement in recreating a 'viral' video trend

'The success of a user's TikTok video is linked to the content and sound choices that the user makes. To achieve success, a user has the choice of creating their own novel content and sounds or recreating another user's video idea using the same content and sounds… As such, sounds and content may be repeated in separate videos posted by different users thousands if not millions of times on the platform. However, reusing the same sounds and content over and over may be unfair to the original user.'[13]

In line with the above, a question arises: what happens when content becomes 'too' successful? Can a TikTok video that has become a trend 'lose' its protection, somewhat akin to a trade mark when it becomes 'generic'?

In copyright law, it is assumed that a 'style' or a 'trend', like an 'idea', is *not* protected.[14] If a style or concept behind a work has become a 'trend' and has been, as a result, reproduced several times, it can be argued that it is more challenging to protect. This is because it may be difficult to establish a clear and distinctive boundary between original expression and commonly adopted elements within the trend. In such cases, enforcing copyright becomes complex as the line between inspiration and infringement might tend to be blurred. Additionally, the broader dissemination of a particular style or concept may contribute to its status as part of the public domain, further complicating the assertion of exclusive rights by individual creators.

While the concept of a trend is not protected (it being, 'the idea'), the content of a viral video ('the expression') is capable of protection, as it is the author's own intellectual creation and the result of free and creative choices.[15] Given that different components of a TikTok video usually require the use of a song/sound, a catchy/trendy hashtag and numerous filters and editing styles, the evaluation as to its protection (or otherwise) will need to be carried out on a case-by-case basis, depending on the 'TikTok trend' at hand and the re-created video.

By way of illustration, the summer 2023 Wes Anderson-style TikTok videos entailed creators filming their day-to-day activities in the style of filmmaker Wes Anderson, in combination with the track 'Obituary' from *The French Dispatch*, while adding a romantic, quant and idyllic feel to such short-videos.[16] By recreating this 'style' of content, it can be argued that a creator may not necessarily be infringing on the original author's copyright.[17] This is because the mere replication of individual elements or the style itself may not inherently constitute a breach of copyright, as copyright protection typically extends to the specific expression of ideas rather than the ideas or styles themselves. However, it is crucial to note that the determination of copyright infringement is highly fact-specific, and other factors such as substantial similarity or the use of protected elements in a way that goes beyond mere inspiration could still result in legal implications. Because of this, it can also be argued that the 'expression' of the 'idea' of a trend is reproduced; thus, the right of reproduction and communication to the public would be engaged.

When a user recreates a video of a creator because it has become a 'trend', it raises the question whether this is (essentially) 'copying' that is relevant copyright-wise. If so, what are the requirements that need to be present—is it only a question of a viewer/user 'recognizing' such a trend? All these have become once again topical following the recent referral by the Swedish Court in the *Mio*,[18] as mentioned above. It shall be noted at the outset that, while this case is intrinsically dealing with a

[6]World Trade Organisation, *Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending the TRIPS Agreement*, s9(2).

[7]*Levola Hengelo BV v Smilde Foods BV*, 13 November 2018, C-310/17, EU:C:2018:899, para 40.

[8]See Thomas Margoni, 'The Harmonisation of EU Copyright Law: The Originality Standard', 13; Stef van Gompel, 'Creativity, Autonomy and Personal Touch: A Critical Appraisal of the CJEU's Originality Test for Copyright' (The Work of Authorship), Amsterdam University Press, 95–144; Eleonora Rosati, 'Why Originality in Copyright Is Not and Should Not Be a Meaningless Requirement' (2018) 13 *Journal of Intellectual Property Law & Practice* 597–98.

[9]*Funke Medien NRW GmbH v Bundesrepublik Deutschland*, 29 July 2019, C-469/17, ECLI:EU:C:2019:623, para 23.

[10]Aikaterini Pilichou, 'Originality Under EU Copyright Law', International Hellenic University, October 2017, 33. See also Eleonora Rosati 'Copyright at the CJEU: Back to the Start (of copyright protection)' (Oxford, United Kingdom) in Hayleigh Bosher and Eleonora Rosati (eds) *Developments and Directions in Intellectual Property Law. 20 Years of The IPKat* (OUP 2023) 220–25.

[11]*Eva-Maria Painer v Standard VerlagsGmbH and Others*, 1 December 2011, C-145/10, ECLI:EU:C:2011:798, para 90.

[12]Request for a preliminary ruling from the Svea Hovrätt, Patent—och marknadsöverdomstolen (Stockholm, Sweden) lodged on 21 September 2023—*Mio AB, Mio e-handel AB, Mio Försäljning AB v Galleri Mikael & Thomas Asplund Aktiebolag, Mio and Others*, C-580/23.

[13]Jordan Meggison-Decker, Viral TikTok or Copyright Infringement Lawsuit? Available at https://www.brownwinick.com/insights/viral-tiktok-or-copyright-infringement-lawsuit (accessed 2 December 2023).

[14]Daniel Inguanez, 'A Refined Approach to Originality in EU Copyright Law in Light of the ECJ's Recent Copyright/Design Cumulation Case Law' (2020) 51 *IIC-International Review of Intellectual Property and Competition Law* 818. See also Michelle Brownlee, 'Safeguarding Style: What Protection Is Afforded to Visual Artists by the Copyright and Trademark Laws?' (1993) 93 *Columbia Law Review* 1159.

[15]Rosati (n 10)(Oxford, United Kingdom) 220

[16]One can also find articles on how to create this TikTok trend and the background behind it. See 'Turning Life into a Wes Anderson Movie: What's Behind the Viral Trend?' Available at https://english.elpais.com/culture/2023-05-16/turning-life-into-a-wes-anderson-movie-whats-behind-the-viral-trend.html (accessed 10 December 2023).

[17]This could be, in this example, Wes Anderson himself as the creator of unique visual films, the creator of the original TikTok or even when taken in another context, the original creator of a video whose content has 'gone viral'.

[18]*Mio*, C-580/23 (n 12).

copyright-design case, its outcome (together with the questions of the referring court) might have far-reaching ramifications.

In formulating its referral, the Swedish court focused on the assessment of similarity in relation to an alleged infringement. The Court recalled *Pelham*[19] when it considered that an option for the examination might be whether the claimant's work is *recognizable* in the allegedly infringing subject-matter. Questions are also raised as to the kind of assessment to be conducted and what such a 'recognizability test' shall encompass. Another option is whether the secondary work being examined 'creates a different overall impression' from the claimant's work. This latter test is one which echoes design law.

By way of pre-empting the Court's decision, it is in the opinion of the author that the different features of both the claimant's work and the secondary work shall be assessed in such a way as to determine whether the particular similarities are *close, numerous or extensive enough*.[20] Therefore, it is being submitted that it should be a question of 'recognizability' rather than 'overall impression', and the assessment should be one that takes into consideration the abovementioned points. This is supported by the view that, in copyright, the similarities between the works are the main point of departure when assessing a case of potential infringement,[21] while the differences take an ancillary role in order to be able to identify and assess the 'overall impression' that the work provides. Another premise or argument that supports the 'recognizability' criterion is the fact that the CJEU has previously used this test in *Pelham*[22] whereby it held that the right of reproduction of phonograms is limited to samples that can be recognized in the new work. With that being said, the author further opines that both these 'tests' may work together to determine the level of 'copying', rather than being as a 'either/or' type of analysis.

4. Safeguards and defences

The preceding analysis has evidenced that by recreating (to the extent that it is a copy that incorporates original features) a work that satisfies the conditions of copyright protection, the subsequent work may be prima facie infringing. However, it is essential to note that such a prima facie determination does not preclude potential defences that may be available under copyright law.

To this end, it appears appropriate to consider, at the outset, platforms' functionalities, like TikTok's 'stitch' allowing users to integrate and build upon others' videos. With stitches, the creator of the secondary work adds new material to the previous creator's original video by reproducing such content into their own content. Yet, the original creator has to enable the stitch feature, thus allowing or permitting other users to incorporate or use the original content (or parts thereof) into their videos. The potential interpretation of this feature raises questions about the implicit permissions granted within this collaborative space. When users choose to stitch a video, this could be viewed as an implicit licence by the original creator to use their content for collaborative purposes.

In any event, irrespective of whether a 'stitch' has occurred, creators may still be able to rely on exceptions and limitations that are available under inter alia the InfoSoc Directive 2001/29[23] and the DSM Directive 2019/790.[24]

4.1. Exceptions and limitations

With particular reference to TikTok, the exceptions for (i) quotation, criticism and review and (ii) parody, caricature and pastiche, both referred to in Article 5(3) of the InfoSoc Directive and Article 17(7) of the DSM Directive, shall be considered.

4.1.1. *Quotation, criticism or review*

In both *Spiegel Online*[25] and *Pelham*,[26] the CJEU has suggested that the term 'quotation' must be given its usual meaning in everyday language and that the essential characteristics of a quotation are the use of a work or more generally of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user. It also contended that the user of a protected work must have the intention of entering into a dialogue with the quoted work.[27] In addition to this, the Court indicated that the quoted material must be secondary and that sufficient acknowledgement must be given.[28] Accordingly, the quotation right is intended to strike to a fair balance between the right to freedom of expression of users of a work and the reproduction right conferred to authors.[29]

This exception or limitation also finds its way into the platform TikTok, as the latter makes available various functions for its users to 'duet' an existing video through references to pre-existing works. By allowing a user to use this functionality, the audience of the secondary work is able to cross-refer to the 'original' video by creating an impression that the secondary work is building on the main creator's work to provide, essentially, a criticism or review thereof. In any event, it must be noted that, in order to enable someone to rely on this exception, it is not strictly necessary that this function is used, though it facilitates the means of dialogue and artistic confrontation that is required under EU law and CJEU case law.

4.1.2. *Parody, caricature and pastiche*

Parody, caricature and pastiche are also exceptions that can be relied upon by an alleged infringer. That said, there is still some considerable ambiguity surrounding the term 'pastiche', found in both the InfoSoc Directive and the DSM Directive, as no formal definition has been provided yet. However, this does not negate from the fact that pastiche (similar to and in analogy with parody and caricature, in this instance) is an autonomous concept of

[19] *Pelham GmbH, Moses Pelham, Martin Haas v Ralf Hütter, Florian Schneider-Esleben*, 29 July 2019, C-476/17, ECLI:EU:C:2019:624. It shall be noted that this judgment was specifically rendered as having regard to the phonogram producer's related right of reproduction and not the authorial right of reproduction.

[20] For further analysis on this point, see Moon Hee Lee, 'Seeing's Insight: Toward a Visual Substantial Similarity Test for Copyright Infringement of Pictorial, Graphic, and Sculptural Works' (2016) 111 *Northwestern University Law Review* 866.

[21] This is explained in the German Federal Court of Justice in the case of *Porsche 911* (7 April 2022, I ZR 222/20, ECLI:DE:BGH:2022:070422UIZR222.20.0) whereby it was determined that in order to assess infringement, the first step shall be one that includes an examination of the objective features which determine the creative originality of the work used.

[22] *Pelham* C-476/17 (fn 19), paras 36–39, 72.

[23] 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, L 167/10, s5(3).

[24] 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, OJ L 130, 17.5.2019, s17(7).

[25] *Spiegel Online GmbH v Volker Beck*, 29 July 2019, C-516/17, ECLI:EU:C:2019:625, para 77.

[26] *Pelham*, C-476/17 (fn 19), paras 70–71.

[27] Ibid, paras 71–21. See also Opinion of Advocate General Szpunar, *Pelham GmbH, Moses Pelham, Martin Haas v Ralf Hütter, Florian Schneider-Esleben*, 12 December 2018, ECLI:EU:C:2018:1002, para 69.

[28] *Spiegel Online*, C-516/17 (fn 25), para 79.

[29] See Stavroula Karapapa 'The Quotation Exception under EU Copyright Law: Paving the Way for User Rights' (2021) in Eleonora Rosati (ed) *The Routledge Handbook of EU Copyright Law* 252, (Routledge: London and New York, 2021)

EU law which shall adopt its own definition—one which is different and separate from parody.[30] The recent referral to the CJEU in *Pelham II*[31] is aimed at answering the question on the definition of pastiche. Following the long saga surrounding this same case (in relation to reproduction in the case of phonograms), the German court has asked for clarification on this matter, specifically in relation to the 'intention on the part of the user' and whether 'the recognizability of its character as a pastiche is sufficient'.

The basic dictionary definition of pastiche is the imitation of a style of a work or an author; hence, pastiche does not normally require humour. Yet, Advocate General (AG) Cruz Villalón in his Opinion in *Deckmyn*[32] viewed this differently as he hinted at the fact that 'parody', 'pastiche' and 'caricature' do not appear in isolation, but are rather placed in the same sub-article on purpose. He opined that since '[i]t may be difficult in a specific case to assign a particular work to one concept or another when those concepts are not in competition with one another, it does not appear "to be necessary to proceed any further with that distinction"'.[33] Owing to this uncertainty, it may be beneficial to undertake a comparative analysis as to the application of pastiche across Europe.

In the recent UK judgment of *Shazam*,[34] the Intellectual Property Enterprise Court looked into a potential definition of the term 'pastiche' and also made reference to an article by Emily Hudson,[35] as it contrasted between this term and 'parody'. In its deliberation, the court referred to two essential ingredients for pastiche: (i) the use imitates the style of another work or (ii) it is an assemblage (medley) of a number of pre-existing works. Yet, in both cases, the product must be *noticeably different* from the original work.[36] It also referred to the well-known House of Lords decision in *Designs Guild Ltd v Russell Williams*[37] whereby it was provided that 'the inquiry is directed to the similarities rather than the differences'. The court stressed the fact that pastiche must not be interpreted too broadly in order for it not to become a general fair use provision as this would go against the intention of the InfoSoc Directive.[38]

By way of striking a balance between freedom of expression and the rights of users and authors, the Regional Court of Berlin[39] took a similar approach as it explored the scope and the grounds of the pastiche exception under its national law. It ruled that the use of the earlier work is permissible if the newly produced work keeps a *sufficient distance* from the earlier work and is not an adaptation or a transformation thereof. It continued by saying that the evaluation of the various freedoms in question must be done using 'the objective standard of a person who is familiar with the pre-existing work' and who 'has the necessary intellectual capacity to understand the communicative respectively artistic approach' with a minimum requirement of using one's own creativity. This latter point raises a number of questions—is the German court creating new rules/tests for the standard of pastiche (similar to the one of originality created by the CJEU in *Infopaq*)? It will be compelling to see whether a similar method or technique will be adopted by the CJEU in deciding *Pelham II*.

Given the current ambiguity surrounding the definition of pastiche as we wait for the above-mentioned ruling to be decided, it is important to keep in mind the legislators' intention for exceptions and limitations in copyright law—particularly that of establishing a balance between the different rightholders' interest and also the safeguarding of fundamental freedoms.[40] It shall be noted that an equilibrium shall be established between the freedom to conduct business and the freedom of expression in such a way that the creators of the secondary work do not overstep their rights and attempt to profit from the artist's creative effort without any effort of their own.[41]

5. Concluding remarks

While it is clear that recreating a verbatim copy of an existing viral video would require the prior authorization of the rightholder if such a video is eligible for protection, a legal uncertainty does exist with regard to secondary works that are not verbatim copies but are nonetheless clearly *inspired* by an earlier work. As analysed in this article, the make-up and contents of a viral video could merit copyright protection and, therefore creators of secondary works should adopt a cautious approach when borrowing elements from it, even though the intention may only be to display inspiration or homage.

Ultimately, creators should not be less deprived of protection on account of the fact that they post their work on the Internet—ultimately, a balance needs to be achieved between the different interests at hand. These technologies create a challenge to traditional copyright norms but ultimately, these enhance it by making a positive impact on creativity and innovation.[42] Fundamentally, copyright law fosters and promotes the expansion of creativity and originality and social media platforms such as TikTok undeniably help enrich the development (as well as the limitations) of this IP right.

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[30] Opinion of Advocate General Szpunar in *Pelham* (n 27) fn 30. This is also the view taken by Professor Dr Eleonora Rosati, 'Copyright and the Court of Justice of the European Union (2nd edn)' (Oxford University Press, Oxford, United Kingdom 2023), 344.

[31] *Pelham*, C-590/23 (fn 4).

[32] *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, 3 September 2014, C-201/13, ECLI:EU:C:2014:2132.

[33] See Opinion of Advocate General Cruz Villalón, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, C-201/13, delivered on 22 May 2014, para 46. It was further indicated that '[parody, caricature and pastiche] have the same effect of derogating from the copyright of the author of the original work which, in one way or another, is present in the—so to speak—derived work'. See critically Rosati (Oxford, United Kingdom) (n 30) 233–35.

[34] High Court of Justice, Business and Property Court of England and Wales, Intellectual Property Enterprise Court (IPEC), *Shazam Productions Ltd v Only Fools the Dining Experience Ltd, Imagination Workshop Pty Ltd, Alison Gay Pollard-Mansergh, Peter Gordon Mansergh, Katharine Mary Gillham, Imagination Workship Limited, Imagination Workshop Festival Limited and Jared Harford* (2022) EWHC 1379.

[35] Emily Hudson, 'The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting?' (2017) *Intellectual Property Quarterly (Vol. 4)* 346–68.

[36] *Shazam* (fn 34), para 188.

[37] Reference is made to the speech of Lord Millett in *Designers Guild Ltd v Russell Williams* (2000) 1 WLR 2416.

[38] Ibid, para 190.

[39] Regional Court of Berlin, 2 November 2021 (No 15 O 551/19). Available at https://openjur.de/u/2396832.html (accessed 3 December 2023).

[40] See DSM Directive, Recitals 2 and 70.

[41] Ruth Flaherty, 'Fair Dealing in a Fandemic: How Pastiche Can Be Used to Clarify the Position of User-Generated Content', 6, 11.

[42] Jennifer Graham, 'Book Review '*Defences to Copyright Infringement: Creativity, Innovation and Freedom on the Internet*' (by Stavroula Karapapa)' (2022) 30 *International Journal of Law and Information Technology* 266–68.

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