

Kluwer Copyright Blog

The next chapter in the “Metall auf Metall” saga – Pastiche to be clarified by the CJEU

Susan Bischoff (Morrison Foerster) · Thursday, September 21st, 2023

In Greek mythology, the saga of Sisyphus personifies relentless and never-ending toil – condemned by the gods to an eternity of pushing a massive boulder up a steep hill, only to watch it roll back down again as he nears the summit. With 24 years of legal proceedings and a dozen court rulings behind them, both the German electronic music pioneers *Kraftwerk* and the German rapper/music producer *Moses Pelham* (and certainly their legal teams) must feel the Sisyphian ordeal of seemingly endless challenges.



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When the German Federal Court of Justice (BGH) issued its *fourth* ruling in the “Metall auf Metall” copyright sampling case in April 2020, it seemed that the dispute would finally reach the top of the hill (see [here](#)). But on 14 September 2023, the case was not only back at the BGH, but also referred to the Court of Justice of the EU (CJEU) – again.

Asked now to clarify the pastiche copyright exception, the CJEU’s decision will have a significant impact on EU copyright law and the re-use of third party copyrighted material far beyond this particular case, affecting classical art as well as digital forms of interacting creation, from remixes and mash-ups to memes and other user-generated content, and – depending on how this is assessed under copyright law in the future – the output of generative AI.

The “Metall auf Metall” case: Two seconds is all it takes

As befits a case that will soon have lasted for a quarter of a century, much has already been written about the underlying facts. In 1977 *Kraftwerk* released a phonogram featuring the instrumental electronic song “Metall auf Metall” (Metal on Metal). 20 years later, *Pelham* composed (together with a second defendant), produced and released the hip-hop rap song “Nur mir”, which is underlain by a continuous loop of a two-second rhythmic sequence of metallic drum sounds that had been electronically copied from the “Metall auf Metall” phonogram.

Members of the band *Kraftwerk* brought an action against these acts of reproduction and distribution, claiming infringement of their copyright and their related rights as performers and phonogram producers of “Metall auf Metall”. The plaintiffs sought injunctive relief, disclosure and damages, as well as the surrender of the phonograms for the purpose of their destruction.

The initial copyright questions

In its first run through the courts between 1999 and 2012, from the Hamburg Regional Court (LG Hamburg, 8.10.2004 – 308 O 90/99) all the way up (and halfway down and back up again) to the BGH (20.11.2008 – I ZR 112/06; 13.12.2012 – I ZR 182/11), the case tapped into two main questions:

Can the extraction of even the smallest sound particle infringe the rights of the phonogram producer? Yes, all the courts said (with slight differences in their reasoning).

Is Pelham’s sampling permitted by law under the “free use” (freie Benutzung) of then-Sect. 24(1) German Copyright Act (UrhG), which allows the use of pre-existing works and protected subject matter in a new, independent work with sufficient distance to the old work? No, said the Hamburg Higher Regional Court (OLG Hamburg, 17.8.2011 – 5 U 48/05) and the BGH, arguing that *Pelham* could have produced the sound sequence himself instead of sampling it (see [here](#)).

So it was *Kraftwerk* who emerged victorious from this first lengthy round of litigation. However, these judgments were overturned by the German Federal Constitutional Court (BVerfG) in 2016 on the grounds that they did not sufficiently take into account the artistic creative process as protected by the constitutional freedom of art (BVerfG, 31.5.2016 – 1 BvR 1585/13; commented [here](#)).

Assigned the case for the third time, the BGH then referred to the CJEU for a preliminary ruling on the interpretation of the relevant EU law (BGH, 1.6.2017 – I ZR 115/16; commented [here](#)). In 2019, the CJEU clarified that the exclusive right of the phonogram producer under Art. 2(c) InfoSoc Directive (2001/29/EC) also protects against the taking of a “very short” sound sample for the purpose of including it in another phonogram, unless this is done in “a modified form unrecognizable to the ear” (CJEU, 29.7.2019 – Case C-476/17; see [here](#), [here](#) and [here](#); the Advocate General’s Opinion is commented [here](#)). With regard to the “free use” of then-§ 24(1) UrhG, the CJEU stated that the national copyright laws may not provide for exceptions or limitations other than those listed in Art. 5 InfoSoc Directive.

The unexpected “Metall auf Metall” effect: Spotlight on pastiche

Against the background of the constitutional requirements laid down by the BVerfG and the interpretation of EU law by the CJEU, the BGH had to deal with the case for the fourth time (BGH, 30.4.2020 – I ZR 115/16; see [here](#) and [here](#)). With this and the subsequent decision of the Hamburg Higher Regional Court (OLG Hamburg, 28.4.2022 – 5 U 48/05), it became clear that the “Metall auf Metall” case is leading to two highly significant developments in copyright law that were certainly not to be expected at the beginning of the dispute: the end of the German “free use” dogma and, as a reaction to the remaining void, the rise of the pastiche exception. This development is illustrated by the three different time periods relevant for the assessment of the sampling, which have emerged from the recent decisions of the BGH and the OLG Hamburg:

- *Until 22 December 2002: Free use*

The CJEU has clarified that a “free use” provision such as then-Sect. 24(1) UrhG is incompatible with the exhaustive list of copyright exceptions and limitations in Art. 5 InfoSoc Directive. However, this blocking did not take effect until the expiry of the Directive’s transposition deadline on 22 December 2002. Prior to that date, the free use provision was valid and, as eventually held by the OLG Hamburg in 2022, applicable to *Pelham*’s sampling. As a result, the plaintiff’s claims were dismissed as far as they concerned the use of the sound sequence before 22 December 2002.

- *22 December 2002 to 7 June 2021: Copyright infringement*

However, from 22 December 2002, the sampling can no longer be considered free use. The effects of this repeal of then-Sect. 24(1) UrhG go far beyond this particular case. For decades, German courts have used this provision to establish a balanced and sufficiently flexible legal space for artistic re-use of copyrighted material. Its abolition has left a significant legal void for established forms of artistic borrowing of and interaction with pre-existing creations. The remaining exceptions for parody and caricature were only helpful for humorous, mocking or satirical interactions. As a result, *Pelham*’s sampling was found to have infringed the plaintiffs’ copyright and copyright-related reproduction rights from 22 December 2002 as it does not constitute a permissible quotation, caricature, parody, incidental inclusion or – in the absence of an adequate provision in the UrhG – a pastiche (see [here](#)).

- *After 7 June 2021: Pastiche(?)*

On the occasion of the implementation of the DSM Directive (EU 2019/790) and in reaction to the CJEU’s “Metall auf Metall” decision, the German legislator not only abolished the “free use” of then-Sect. 24(1) UrhG, but also included an explicit pastiche exception in the new Sect. 51a UrhG, which came into effect on 7 June 2021. In the [explanatory memorandum](#), the German legislator shows a very broad understanding of the concept of pastiche, covering any incorporation of third party works or parts thereof, provided that an interaction with the original can be discerned (see [here](#)). Accordingly, the new pastiche exception has already proven to be a workable solution for the artistic reuse of pre-existing works, as shown by the very first pastiche decision by the Berlin Regional Court (LG Berlin, 2.11.2021 – 15 O 551/19; commented [here](#)). The new Sect. 51a UrhG also led to the OLG Hamburg 2022 finding that the *Pelham* sample is a permissible pastiche. As a

result, the plaintiff's claims were dismissed as far as the use of the sound sequence after 7 June 2021 was concerned.

Questions for Luxembourg: What is pastiche, really?

Underlining the lack of case law on and the unclarity of the interpretation and scope of pastiche in Sect. 51a UrhG, the OLG Hamburg allowed for an appeal on a point of law with regard to its dismissal of the claims as of 7 June 2021. Unsurprisingly, the plaintiffs continue to pursue their copyright infringement claims through this appeal to the BGH.

On 14 September 2023, the BGH announced it would again turn to the CJEU for the interpretation of the relevant EU law (the BGH decision in I ZR 74/22 has not yet been published, the following is based on the court's [press release](#)). The BGH asks for clarification of the notion of "pastiche" within the meaning of Art. 5(3)(k) InfoSoc Directive under the following aspects:

1. **Requirements for pastiche:** Does the pastiche exception cover *any* artistic interaction with pre-existing copyrighted material, including sampling, in the sense of a catch-all provision, or do restrictive criteria such as the requirement of humour, imitation of style or homage apply?

The BGH indicates that only a broad understanding of pastiche can ensure a copyright exception that adequately protects artistic freedom. The court points out that an appropriate balance between artistic freedom and the protection of intellectual property can be struck by applying the criteria of the three-step test of Art. 5(5) InfoSoc Directive. This is in line with the first pastiche rulings of the Berlin Regional Court and the OLG Hamburg (which, however, also considers *Pelham's* sampling to be an homage) and with the pastiche approach of the German legislator.

Humour (or mockery) is already required for a use to fall within the exceptions for parody and caricature. To make humour also a characteristic of a pastiche would deny a wide range of other artistic interactions the possibility of even being considered a permissible use. And while the origins of pastiche in art can indeed be seen in the imitation of style (see [here](#)), the OLG Hamburg rightly noted that defining pastiche as such an imitation (as favoured by Advocate General Szpunar in his [Opinion in Metall auf Metall](#), fn. 30) would render the provision obsolete, since the mere style is not protected by copyright law.

2. **Recognisability of the pastiche:** Does a pastiche require a finding of intent on the part of the user to use copyrighted content for the purpose of a pastiche? Or is it sufficient if a person who is aware of the pre-existing work or protected subject matter used and who has the intellectual capacity to perceive a pastiche, recognises it as such?

The BGH does not express any view in this matter. It should be noted, however, that relying on the user's intent would be fraught with legal uncertainty and the risk that a pastiche would be asserted as a mere defence against infringement claims. Accordingly, the BGH bases its assessment of parody on the recognisability for a reasonable observer (e.g., [BGH](#),

28.7.2016 – I ZR 9/15 *auf fett getrimmt*, para. 33). The OLG Hamburg and the Berlin Regional Court have also applied this specified objective standard to pastiche.

Outlook

The interpretation of pastiche by the German legislator and the first court decisions is sufficiently broad to ensure a workable, fair and art-sensitive exception for the interaction with pre-existing material. It remains to be seen whether this understanding will be upheld by the CJEU. If the CJEU agrees with the well-reasoned approach of defining pastiche with a clear distinction from the parody and caricature exceptions (i.e., not requiring a specific form of interaction such as humour or mockery), pastiche may become the most relevant provision for re-using creation in the digital age. A fair balance with the interests and rights of rights holders in pre-existing material is better achieved through the three-step test than by restricting the scope at the outset.

In any case, the next chapter in the “Metall auf Metall” saga will set the tone for *all* national copyright laws of the EU Member States, as all of them had to implement a pastiche exception at least in the context of the new copyright liability of online content-sharing service providers (Art. 17(7) DSM Directive). The impact will be even greater for those copyright laws that had already provided for a general pastiche exception or, like Germany and Hungary^[1], have recently decided to do so.

Based on the timeline of the last round at the CJEU in the “Metall auf Metall” case, the decision can be expected in (mid-)2025.

[1] Many thanks to *Péter Mezei* for bringing this to the author’s attention.

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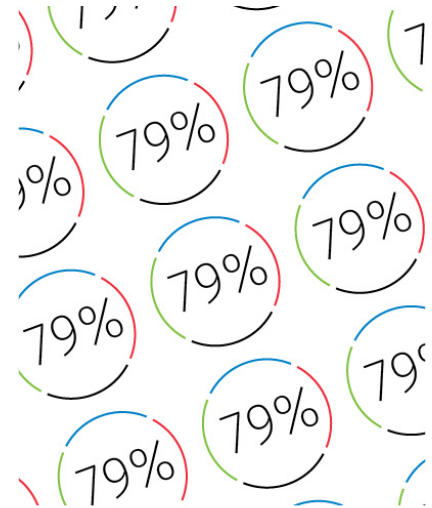
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