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Permissible Pastiche in Pelham II: A proposed response

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For 25 years, a case has been circling the German Courts like a roller coaster without a final decision. To date, the Federal Court (hereinafter "BGH") alone has ruled on the matter five times. Now, it is in the hands of the Court of Justice of the European Union (hereinafter "CJEU")– for the second time. We refer to none other than *Pelham GmbH et al* (Case C-590/23) (hereinafter "*Pelham II*").

It all began in 1999 when electronic music duo Kraftwerk sued Moses Pelham, a hip-hop producer, because the latter extracted a two-second sample from the song *Metall auf Metall*, and used it in a loop in his song *Nur Mir*. In short, therefore, the dispute is about the non-authorized use of a couple of seconds of recorded music.

Fast forward to the current state of affairs, as the CJEU is called upon to end this legal odyssey by clarifying the interpretation of the pastiche exception. The Court's interpretation will be pivotal for the future permissibility of sampling as a lawful form of artistic liberty – essential for the protection of the freedom of the arts.

This post will propose a response for the preliminary questions that the BGH formulated before the CJEU that defends the lawfulness of sampling on the grounds of the pastiche exception, according to the interpretative guidelines established in *Deckmyn* and *Pelham I (Case C?476/17).* The preliminary questions submitted to the Court are as follows:

1. Is the provision limiting use for the purpose of pastiche within the meaning of Article 5(3)(k) of Directive 2001/29/EC a catch-all clause at least for artistic engagement with a pre-existing work or other object of reference, including sampling? Is the concept of pastiche subject to limiting criteria, such as the requirement of humour, stylistic imitation or tribute?
2. Does use 'for the purpose of' pastiche within the meaning of Article 5(3)(k) of Directive 2001/29/EC require the determination of an intention on the part of the user to use copyright

> subject matter for the purpose of a pastiche, or is it sufficient for the pastiche character to be recognisable for a person familiar with the copyright subject matter who has the intellectual understanding required to perceive the pastiche?

The first preliminary question contains two inquiries: the first examines the constitution of pastiche as, at least, a catch-all clause, involving artistic interaction between pre-existing material and a new intellectual creation as a result of sampling; and the second examines whether pastiche should be restricted to humorous, imitative or homage purposes.

Let's begin with the second. To do so, we must consult the dictionary to establish whether pastiche should be restricted to any of the aforementioned purposes. The Oxford English Dictionary (hereinafter "OED") defines pastiche as follows: "A novel, poem, painting, etc., incorporating several different styles, or made up of parts drawn from a variety of sources"; and, "a musical composition incorporating different styles; a medley." Evidently, pastiche does not imply a burlesque use of pre-existing material, only use in the form of a mixture of elements. We are talking about an intellectual creation that is based on a previous one. Usage is inevitable. However, it is different from parody because it doesn't intend to mock the work or its author.

Considering that in *Deckmyn* the CJEU did not impose any restrictive requirements to legally define parody, the legal definition of pastiche should meet the same fate. If its ordinary meaning does not foresee a humorous manifestation, then it should not be required for its legal meaning. Moreover, the very system of general principles of law obliges us to rule out redundancy of legal concepts, especially in an exhaustively listed system of exceptions and limitations, where there ought not to be room for the coexistence of different legal concepts with the same meaning – to hold otherwise would be to allow a distinction without differentiation, a legal nonsense. For this reason, national and European legislators, in different legislative frameworks, despite having included the triad "caricature, parody and pastiche" in the same article, have typified all three concepts. Therefore, pastiche, being an autonomous concept, should have its own distinctive legal definition, which should not demand meeting restrictive requirements such as humorous manifestation. This only applies to the parody exception. Pastiche could have a neutral or laudatory connotation with respect to the pre-existing work(s) used to make it, but this should not be legally required. In the final analysis, we must safeguard the essential core of users' freedom of the arts and allow them to create artistic mixtures. From here stems the need to distinguish between parody and pastiche, according to the richness of the free and multifaceted development of the dignity of the human being. This is the cornerstone of law; the latter is in service to the former.

Regarding the catch-all nature of pastiche, it is necessary to recall AG Szpunar's conclusions in *Pelham I*. In footnote 30 of his Opinion, AG Szpunar stated that, according to the facts of the case,

"the work entitled *Nur Mir* constitutes neither a parody nor a caricature of the work *Metall auf Metall*. As for the concept of pastiche, it consists in imitating the style of a work or an author, without necessarily taking the elements of this work. Well, in the present case, we are in the presence of the opposite situation in which a phonogram is used to create a work in a completely different style".

In other words, the AG rules out the subsumption of sampling in parody and caricature. As a final option, he evaluates the covering of sampling by pastiche, but discards it. Thus, the logic of AG Szpunar indicates the residual or catch-all nature of pastiche. That is to say, that an imitation or use of a work that does not consist of a burlesque treatment of the previous work could residually fit in

the catch-all pastiche exception, since the latter does not require said treatment.

Also, in order to demonstrate that, in our opinion, AG Szpunar mistakenly discards sampling as a form of pastiche, we would highlight that the CJEU in *Pelham I* defined sampling as:

"that technique which consists of a user extracting, most of the time with the help of electronic equipment, a sample of a phonogram and using it in order to create a new work – [and which] constitutes a form of artistic expression included in the freedom of the arts, protected by Article 13 of the Charter."

In this sense, we can clearly see the relationship between pastiche and sampling: Both refer to a combination of elements that creates something new. Generically, pastiche is an intellectual creation composed of a combination of elements of *any kind* from pre-existing works. Specifically, sampling consists of extracting fragments of *musical phonograms* and inserting them into a new musical work. Ergo, there is a genre-species relationship between pastiche and sampling. Therefore, since sampling is a form of artistic expression included in the freedom of the arts, and since the basis of the pastiche exception is said freedom, the pastiche exception encompasses the technique of sampling as a manifestation of the freedom of the arts. Sampling fits within the scope of protection of pastiche.

The second preliminary question formulates a single inquiry but contains two exclusive assumptions: On the one hand, the BGH questions whether the user, when using protected material, must have the intention of creating a pastiche; or whether it is sufficient that a third party can recognize the material referenced in the new creation and can identify that such creation constitutes a pastiche. Let's start with the first assumption. Here we must point out that requiring the verification of the intention of the user to use a work for purposes of pastiche would generate unnecessary problems of proof and legal uncertainty. In addition, it is unlikely that the user is thinking beforehand of using a work for purposes of pastiche, since this term is not normally present in common language. The OED places pastiche in the fourth band of frequency of use. This means that it's used between 0.1 and 1.0 time per million words in modern English. Given that it is a word infrequently used, it's unreasonable to require that the user must intend to use a work for purposes of pastiche. Therefore, the application of the exception must be evaluated using an objective criterion, in the sense that the identification of the pastiche as such by a third party would suffice. In *Pelham II*, the recognizability of the characteristic metallic cymbals of *Metall auf Metall* in *Nur Mir* are obvious.

The CJEU is faced with issuing a crucial preliminary ruling, since it has a duty to define pastiche to fully enforce the fundamental right of sampling. As AG Szpunar stated in *Funke Medien*: "there may be *exceptional cases* in which copyright… must give way to a preponderant interest related to the application of a fundamental right or freedom." This is that exceptional case. Let's hope the CJEU agrees.

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