Kluwer Copyright Blog

Oops, I sampled again… The meaning of ‘pastiche’ as an autonomous concept under EU copyright law

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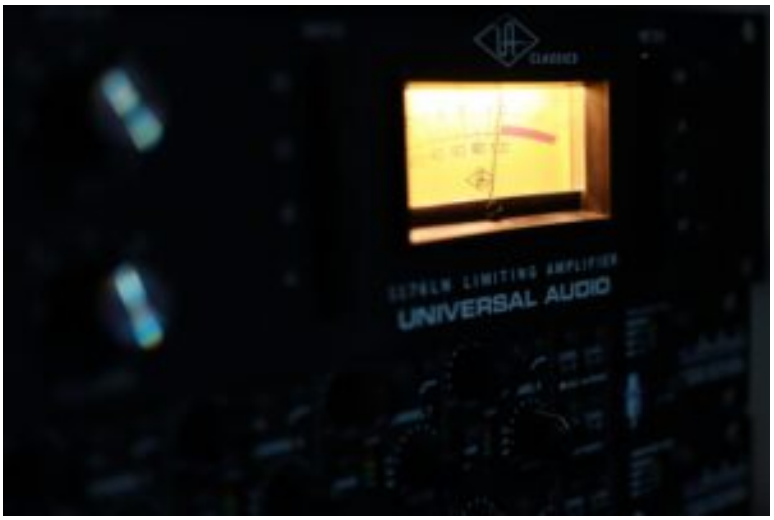

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The Court of Justice of the European Union (CJEU) is about to write yet another chapter in the never-ending, or so it seems, ‘Metall auf Metall’ saga. The facts of the case are all too familiar by now: in 2004, German band Kraftwerk took hip hop producer Moses Pelham to court for copyright infringement after he sampled two seconds of their song “Metall auf Metall” and looped it in Sabrina Setlur’s track “Nur Mir”. For thirteen years, the case toured the German court system, culminating in a 2017 referral to the CJEU.

In July 2019, the CJEU held that any sample of a sound recording, regardless of its length, constitutes an infringement of the phonogram producer’s exclusive right, except if it is integrated, possibly in a modified form, into a new song making it unrecognizable to the ear. The CJEU also seized the opportunity to pull the plug on then §24 of the German Copyright Act (UrhG), commonly known as the “free use” exception, contending that an open and flexible exception is irreconcilable with the self-contained list of exceptions provided by art. 5 InfoSoc Directive (for an exhaustive overview of the CJEU’s Pelham I decision, see here and here). Finally, in 2020, the German Federal Court of Justice (BGH) ruled that Pelham’s use of the Metall auf Metall sample was lawful up until the adoption of the InfoSoc Directive but was rendered unlawful after the pre-emptive effect of art. 5 (with its limited and closed list of exceptions) kicked in.

Everything old is new again: the Pelham case after §51a UrhG

The introduction, in 2021, of §51a UrhG put another coin in the jukebox. Adopted to fill the gap left by §24, and pursuant to art. 17(7) CDSM Directive (although in a broader context than that of users' uploads on OCSSPs), §51a permits the reproduction, distribution and communication to the public of a published work for the purpose of caricature, parody and, relevant for the present discussion, pastiche. In the explanatory memorandum to the German act, pastiche is understood broadly, as integral to human creativity (particularly in, but not limited to, the context of the Web 2.0), and encompassing such creations as remixes, memes, GIFs, mashups, fan arts, fan fiction and sampling. A subsequent decision by the Berlin Regional Court related to transformative fine art shows a similar, capacious, understanding of pastiche.

In 2022, the Hamburg Higher Regional Court held Pelham's use of the Metall auf Metall sample to be lawful under §51a, arguing that pastiche covers the recognizable (re)use of original parts of protected works, insofar as the borrowing work engages in some form of discussion or intellectual interaction with the original work. After the decision was appealed to the BGH, the case was referred again to the CJEU. The Pelham case's (likely) final contribution to the shaping of EU copyright law lies in clarifying the emerging contours of the pastiche exception as an autonomous concept of EU law.

How will I Know: Pastiche as an autonomous concept of EU law

A swift, but no less essential, look into the common meaning of pastiche, as well as its understandings in the humanities, reveals a notion that far exceeds the mere imitation of a work's style, or that of its author. Spanning from imitation to recombination in form, pastiche has been variously regarded as a medium for homage, satire and/or didactic expression. However, one would be hard pressed to find one single, comprehensive and functional operating definition of pastiche on which the CJEU could rely.

In order to shed light on the possible scope of the autonomous concept of pastiche, the four of us teamed up to review both the hints of the *acquis communautaire* as well as the experiences of various Member States of the EU. On that last point, where a pastiche exception exists in national copyright law, it is eclipsed by, or rather subsumed into, the more extensively developed concept of parody. Given that parody hinges on a subjective element of humoristic intent, which may be too restrictive for pastiche, this illustrates the pressing need for clarification by the CJEU.

The current rules and case law on quotation and parody, including art. 5(3)(k) InfoSoc Directive, might be instructive but are neither clear-cut nor conclusive for that purpose. The CJEU already addressed the quotation exception in Pelham I. More important arguments can be derived from the review of the parody exception. Subsuming parody and pastiche (as well as caricature) under the same provisions had the aim of overcoming the differences in Member States' copyright laws and traditions regarding the aim of the borrowing (humour and mockery for parody and caricature, imitation as a specific artistic genre for pastiche) as well as the basis of the type of work they borrow from, be it literal, artistic/visual or musical.

The CJEU also decided on the meaning of parody in *Deckmyn*. Although AG Crúz Villalon argued in his Opinion (para. 46) that "it does not seem to me to be necessary to proceed any further with th[e] distinction [of parody, caricature and pastiche], since, in short, all those concepts have the same effect of derogating from the copyright of the author of the original work which, in one way

or another, is present in the — so to speak — derived work." The CJEU did not, however, conclude expressly that pastiche should be judged in the same vein as parody. In sum, the current EU law leaves the door open for the CJEU to look for the everyday meaning, as well as the purpose and the context of the EU rules on pastiche.

Member States' domestic norms and case law seem to be even more chaotic. Neither the optional exceptions of art. 5(3)(k) InfoSoc Directive, nor the mandatory rules in art. 17(7) CDSM Directive led to a real approximation of laws of Member States, nor are they supported by any harmonious court practice. This unharmonized patchwork of national solutions makes the BGH referral to the CJEU a historic opportunity to clearly define and distinguish the features of different forms of reinterpretation of existing works, going beyond the purpose-bound perimeters of quotation and parody.

Based on the content of the preliminary reference made by the BGH, five questions need to be addressed, which are

- (a) whether pastiche is merely an imitation of an artistic style;
- (b) what 'distance' must be marked from the original work for the exception to apply;
- (c) whether the expression of humour or mockery is a necessary requirement;
- (d) whether the resulting (pastiched) expression should be itself an original work; and
- (e) what criteria should be applied to determine whether a particular pastiche is proportionate, that is whether it complies with art. 5(5) InfoSoc Directive and its three-step test.

Our main findings for each point are as follows.

(a) pastiche as an exception to copyright's exclusive rights would be unduly restricted if it was subject to the condition that only non-protected parts of the source work, including the style of the work/author, could be used without prior authorization;

(b) pastiche should be understood as a "pastiche with" concept, which would enable the use of a work for a variety of expressive purposes; EU copyright would thereby ensure the proper and proportionate exercise of fundamental rights, including the right to freedom of expression;

(c) the three (autonomous) concepts of art. 5(3)(k) (parody, caricature, pastiche) serve different purposes and must therefore be subject to different conditions; considering the art-focused scope of pastiche, as opposed to the more semantic orientation of parody and caricature, an expression of humor or mockery (which is a condition for the parody exception), or even homage, cannot be a condition for the exercise of the pastiche exception;

(d) EU copyright law does not require the work that relies for its creation on the pastiche exception to be original in itself (as per the *Deckmyn* ruling for parody); however, the work or subject matter that the lawful pastiche is based on must be recognizable (to the ear, eye or any other sensory organ).

(e) the concept of pastiche is not, and cannot be developed, as a fully flexible 'catch-all clause', that would not be compatible with the CJEU's systematic approach to the interpretation of art. 5 InfoSoc Directive as a closed-list system that provides legal certainty; a degree of flexibility can, however, be instilled through an application of the three-step test based on specific uses.

The *Pelham II* ruling will have a significant impact on the interpretation of EU limitations and

exceptions. Arguably, limited to the field of *artistic* creativity, the concept of pastiche can be reasonably developed into a format-independent defense for the re-use of existing works and subject matter. This mean that established and emerging artforms (art must be understood broadly here) can rely on an exception for creative re-uses. The difficulty the Court will face is to distinguish permitted pastiche-use from authorization-dependent derivative works as well as to set the appropriate limits to a flexible interpretation of pastiche as a quasi-free-use exception. Here the three step test will be essential in negotiating the interests of rightholders (including the commercial exploitation of the non-harmonized derivative works rights) and those of users of protected works in the light of the fundamental rights of freedom of expression and artistic freedom.

Our pre-print manuscript is available via SSRN. The paper has been accepted for publication in 55(8) IIC – International Review of Intellectual Property and Competition Law (2024).

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