

# Kluwer Copyright Blog

## Opinion of the European Copyright Society on the CG and YN v Pelham GmbH and Others, Case C-590/23 (Pelham II)

Peter Mezei (University of Szeged, Hungary), Martin Senftleben (Institute for Information Law (IViR)), Caterina Sganga (Scuola Superiore Sant'Anna), and Christophe Geiger (Luiss Guido Carli University)  
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In its latest opinion, the European Copyright Society has reviewed the German Federal Court of Justice's (BGH) referral in the Pelham II (a.k.a. Metall auf Metall) case.

Although the beginning of the legal dispute dates back to 1999, a quarter century seemed to be not enough to answer all possible questions surrounding the sampling of a two-second segment of Kraftwerk's recording "Metall auf Metall" in the recording of the song "Nur Mir", that was part of the 1997 album "Die neue S-Klasse" of the German rapper Sabrina Setlur.

Although the Court of Justice of the European Union provided its preliminary judgment in 2019 on the analysis of sampling in light of phonogram producers' reproduction right and the exception of quotation, the national transposition of the CDSM Directive by Germany opened a possible new route for the free use of protected subject matters, namely, pastiche. (This exception was not regulated by Germany preceding 2021.) The newly introduced Article 51a of the German Copyright Act gave way to a growing body of German case law on the application of pastiche to transformative reuses – including sampling.

In 2023, the BGH referred the Pelham case back to Luxembourg for a more general clarification of the pastiche concept in EU copyright law. The BGH raised two questions:

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?

In its recent opinion, the European Copyright Society argues that pastiche is an autonomous concept of EU law. Article 5(3)(k) InfoSoc Directive (ISD) should be read as an overarching provision including three forms of permitted use that share their underlying nature but shall be judged differently. The meaning of pastiche cannot be understood as a mere imitation of an artistic style and it need not entail an explicit interaction with the original work. The presence of humour or mockery is not a necessary requirement for the application of the pastiche exception. Also, the expression resulting from the exercise of the pastiche exception need not itself be an original work. Finally, the intention of the user to create pastiche plays no role in the review of the legality of any given use. At the same time, legitimate forms of pastiche need to have their own features that are distinguishable from the copyrighted expression in pre-existing works used as source materials. Overall the use of the pastiche exception for purposes of musical sampling, as in the underlying Metall auf Metall case, complies with all the three steps of Article 5(5) ISD.

You can find the complete opinion on the European Copyright Society's [here](#).

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*The European Copyright Society (la Société européenne du droit d'auteur) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law and policy. Its members are scholars and academics from various countries of Europe, seeking to articulate and promote their views of the overall public interest on all topics in the field of authors rights, neighbouring rights and related matters. The Society is neither funded nor instructed by any particular stakeholders. Its Opinions represent the independent views of a majority of ECS members.*

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