Kluwer Copyright Blog

Is Pastiche an Autonomous Concept of EU Copyright Law? Hearing of Pelham II in the CJEU – Part I

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On 14 January 2025, the Court of Justice of the European Union (CJEU) heard oral arguments in the much-anticipated case C-590/23 *Pelham II*, where the German Federal Court submitted a request for preliminary ruling on the interpretation of "pastiche". The purpose was to ascertain whether a two-second sample from a phonogram could fall under the scope of the (undefined and unharmonized) pastiche exception to copyright infringement. Due to the breadth and depth of topics covered during the three-hour hearing, this is a two-part commentary. Part I deals with the core interpretation of pastiche, while Part II focuses on the interesting relationship between pastiche and Article 17 CDSM Directive, and provides an overall commentary on the hearing.

Context

Any student, lawyer, or expert in copyright law will know the name "Pelham", not necessarily by virtue of the music he produces, but from the CJEU's landmark 2019 decision. There, the Court took the view that a sample as short as two seconds of a phonogram could be considered copyright infringement, unless that sample is included in the phonogram in a modified form unrecognisable to the ear. Subsequently, when the case went back before the national court, the defendants were found liable for copyright infringement (I-ZR 115/16) (see also here for a more detailed analysis). However, in parallel, Germany implemented the "caricature, parody, and pastiche" exception into national law. This is because of the apparent incompatibility of the German "free use" exception with the closed list of exceptions in the InfoSoc Directivewhich the defendants had attempted to rely on, according to the Court's judgment in *Pelham I* (see paras 62-65). This introduction

triggered another case before the German courts on whether Pelham's actions could be covered by the exception, which resulted in the referral before the CJEU.

In essence, the questions (which can be found here, with more background on the case here, here, and here) revolved around the scope and interpretation of the pastiche exception as a "catch-all clause", and how to apply said provision. In total, four parties pleaded before the Court: the applicants, defendants, and Germany and the European Commission acting as interveners. It appeared that, in preparation for the hearing, the Court addressed four questions to the parties, seemingly focused on two topics: *how* to interpret pastiche, and how it interacts with Article 17 CDSM Directive. This part focuses on the former, while Part II covers the latter point.

Overall, conflicting interpretations of pastiche were advanced by the parties, differing on the content, scope, and means of assessment. A very interesting point was further brought up by Germany, which occupied a substantial part of the hearing.

Parody as guiding principle? The importance of the *Deckmyn* judgment.

Parties' arguments

While the applicants and defendants focused on a more general interpretation of pastiche, Germany suggested a tripartite approach based on *Deckmyn*:

- The 'new' work must evoke the existing work;
- There must be noticeable differences between the works;
- The new work must artistically (or in some way) engage with the existing one.

Seemingly, the first two elements are imported from the *Deckmyn* criteria. Regarding the third element, Germany considered that the engagement with the work in the context of parody is humour or mockery (as laid down in *Deckmyn*), but that with pastiche it should not be exhaustive. Indeed, they considered that the wide scope of pastiche means that the engagement could be to pay tribute or homage to the original work, or any form of meaningful engagement. They further noted that stylistic imitation should not be made a requirement for the application of pastiche. Nevertheless, they contended that the criteria should not be extended beyond their formulation, at the risk of affecting the *fragile* balance of interests, which should be preserved through applying the infamous three-step test, and as restated by the Court in *Deckmyn* (paras. 26-27). They joined the other parties on the need for a uniform and harmonious interpretation of pastiche with reference to caricature and parody, heavily deferring to *Deckmyn*. Similarly, the European Commission stated that pastiche should be seen as an autonomous concept of EU Copyright Law and supported a *Deckmyn*-based approach. Their support was seemingly based on the complexities of defining pastiche, with inherently different meanings among Member States. Notwithstanding this, the Commission warned against defining pastiche in light of parody/caricature, as they were drastically different from one another.

Finally, the fundamental rights aspect was brought up, with the Juge Rapporteur citing the Charter of Fundamental Rights and how IP rights (Article 17) should be balanced with competing rights and interests, such as freedom of expression (Article 13). The Commission noted that this would have to be decided on a case-by-case basis whereby the application of the pastiche exception should come down to the specific use of the original work and how it is engaged with, making a reference back to the three-step test.

Commentary

Undeniably, the *Deckmyn* judgment could have decisive value in this case. The defendants, Germany, and the Commission gave huge deference to the Court's previous harmonisation in their pleadings and responses. Indeed, the references made to the judgment and its two-part criteria were rather compelling. Perhaps this stemmed from the InfoSoc Directive's formulation, having "caricature, parody, and pastiche" all together in one single provision, which could warrant a "uniform" application. What seemed particularly interesting is how pastiche seemingly required a third different element for its test, as opposed to parody, and especially what this element was. Defining "artistic engagement" might create an obstacle for the Court in its interpretation, having to provide a clear and *somewhat* unequivocal test.

Deciphering pastiche through "artistic engagement"

Parties' Arguments

As part of its proposal, Germany's new criteria of "artistic engagement" with the original work occupied a good part of the hearing. They explicitly rejected AG Szpunar's point from Pelham I that pastiche should be limited to imitation, since style is not the subject-matter of protection under the InfoSoc Directive. The judges were interested to hear more on what "artistic engagement" meant for the parties. AG Emiliou (the AG in Pelham II) questioned the sort of elements which could be deemed useful to ascertain this meaning, asking the defendants to develop on their claim that pastiche could only be applicable in instances where "artistic confrontation" happened, or "engaging in dialogue". They responded that the use had to go beyond taking the work and needed to make it "*special or integrate it into something new*". The AG pressed them on the idea of dialogue, to which they responded that it could be one of the many forms qualifying under "artistic engagement" but that the interpretation adopted by the Court should not be narrow. They further argued that since the InfoSoc Directive was silent on how to interpret art, courts should not be arbitrators of artistic quality or engagement, but be limited to determining whether elements have been taken from the original work, and whether the new work had engaged with it.

Turning to the applicants, the AG asked for their interpretation. The applicants responded that the meaning and interpretation of pastiche not only varied by language but also by medium, citing that Italians used pastiche to refer to operas. They further elaborated that the necessary engagement required going beyond the simple act of stating that one enters into a dialogue with the original work. In other words, it is not just the mere fact of entering into a dialogue with the work, but what kind of dialogue. After citing some examples without explaining what the dialogue or engagement

was, the AG asked the applicants to specifically point out what exactly would be required in the present case. The only response provided was that such a question was difficult to answer since it required the defendants to answer *why* they took the original work. We also heard questions from the bench, seeking clarifications on how national courts should be guided towards making such decisions, and even what "intention" could mean for pastiche with regards to the use of the original work and how it is used *per se* (as it is not paired with humour or mockery, like caricature and parody).

Commentary

While hearing the discussions on "artistic engagement" in pastiche, one could not help but think about how US courts have previously dealt with such matters. After all, one of the four (if not the most important) criteria for fair use under S.107 of the US Copyright Act 1976 is the need for the use of the work to be "transformative". In the list of cases which have redefined this understanding, one finds *Suntrust v Houghton* (268 F.3d 1257 (11th Cir. 2001)) or *Campbell v Acuff-Rose Music* (510 U.S. 569 (1994)) whereby the courts had stressed that the use of any work needed to be transformative. While fundamentally different to the EU permitted uses regime, the Court perhaps could take a page out of the fair use book to define how "transformative" one's use of a protected work must be to classify as a pastiche.

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