Kluwer Copyright Blog

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

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Welcome back for the second part of the C-590/23 *Pelham II* hearing commentary. In part one (here), we covered the interpretation of pastiche. However, a very interesting topic arose in the Court's pre-emptive questions, and during the oral questions: the interaction of "pastiche" with Article 17 CDSM Directive. This was not originally part of the referral but made its way into the Court's assessment. This part explains why pastiche will have a decisive power over how copyright is conceived, even outside the exceptions framework.

The importance of preserving culture, through Article 17 CDSM Directive

As a reminder, Article 17 CDSM Directive introduced a special liability mechanism for copyright infringement for online content sharing service providers (OCSSPs). The applicants discussed how pastiche was included in recital 70 CDSM Directive, which created an impetus for service providers to preserve users' freedom of expression by means of use of copyrighted content within the context of exceptions and limitations to copyright protection. During the hearing, a certain emphasis was placed on the use of "upload filters" and how platforms filter content, but without much substance to it. Nonetheless, according to a "music industry source" of the applicants, creators are allegedly divided on the aspect of allowing pastiche to take elements from a protected work, especially its most important ones.

In stark contrast, the defendants focused on the CDSM Directive's "reproductive and transformative" aims, which they saw as protecting artistic freedom. They noted that UGC (User Generated Content) almost always contained copyright content, and that the exceptions enshrined in the InfoSoc Directive, and recital 70 of the CDSM Directive, protected this new form of expression. They mentioned that an amendment to a draft of the CDSM Directive ("Amendment 14") was presented before the European Parliament to include a "recital 21A", which would have expanded on the nature of the interaction between pastiche, Article 17, and other copyright matters.

This amendment however did not make it to the final directive text. They also discussed licensing mechanisms (similar to those used for Article 17), according to which online service providers such as Spotify and SoundCloud receive irrevocable licences from artists to use the work in whatever way they see fit (albeit SoundCloud also allows users to do the same). This might have been a suggestion from the defendants to the Court that the use of copyright content to further create is a core mechanism of the framework itself, so long as it is contractually agreed upon by the parties or protected by an exception.

On their end, Germany stressed that they were not aware of any discussion on the use of pastiche as a term within the CDSM Directive, but pleaded for a uniform understanding and application across EU Law. On the notion of licensing and Article 17, they argued that the Collective Management Organisations (or CMOs) and stakeholders they consulted only had a remote reference to the provision itself (on pastiche) but that there was a manifest interest in getting a "fleshed out" definition. This is especially the case where service providers are legally obliged to pay licensing fees for communications to the public, even in the case of non-commercial UGCs. Something very interesting to hear was AG Emiliou's question to Germany on the Explanatory Notice of the German Law introducing pastiche into national law. Indeed, he cited that it appears that the Notice makes reference to "free use" of copyright works, which might refer to the old German catch-all exception to copyright infringement. He therefore asked directly whether this was an attempt to re-introduce free use through the back door. Germany rejected this idea, stating that their intention was not rooted in backdoor schemes but simply that following the decision in *Pelham I*, they had proceeded to somewhat of an update of their copyright framework, introducing new concepts directly from the InfoSoc and CDSM Directives. They reassured the Court that they were not trying to circumvent its jurisdiction, nor EU Law, but simply sought an interpretation of pastiche.

Finally, the Commission also made reference to recital 70, and cited that for them and the European Council, pastiche should be deemed a mandatory exception. This was on the basis that it could affect the "memes" and "gifs" culture, a particularly popular form of expression for younger people. They also made reference to the Parliament Rapporteur's paper on the CDSM Directive and the risks attached with Article 17 towards guaranteeing freedom of expression and collaborative works (for UGC of non-commercial nature), following the new obligations on service providers to take down infringing content. They also stressed the effects of Article 17 and a harmonious application of the EU Copyright framework in light of UGCs, memes, gifs, and user interaction. This was supplemented by a comment on the fact that in some instances users can interact with some works without infringing the works, citing YouTube's copyright policy and the explicit mechanisms for the inclusion/use of copyright material.

Throughout the questions, the judges were keen to hear from the parties on the idea of balancing the interests to determine whether a certain use of protected works could be covered under pastiche. This arguably stemmed from, as rightfully pointed out by the parties, the international commitments of EU Copyright Law and the three-step test of the Berne Convention. Nonetheless, what was interesting to see was how this argument echoed the proviso included in the *Deckmyn* judgment on the need to ensure a respect for fundamental freedoms. This was a recurrent theme throughout the hearing, with an important emphasis placed on the need to ensure the proper balance of said interests. Indeed, and similarly to parody, one's freedom of expression and creation should not supersede one's right to IP. The introduction of the UGC variable made the case even more timely, especially in the wake of Article 17 CDSM Directive. One thing is sure, the ruling will have important ramifications which extend well beyond what pastiche means in general, or

even for this case specifically, potentially setting up a standard for users' interaction with copyright content and arts more generally.

An overall assessment of the *Pelham II* hearing

This hearing was nothing short of a feast for any copyright enthusiast. All the arguments laid before the Court had compelling value to them. The task of the Court is by no means easy. We saw it with *Deckmyn* and the incredibly difficult endeavour of harmonising parody, where almost every jurisdiction in the Union had a unique perspective and approach to parody. What makes this case harder in my opinion is the lack of judicial treatment of pastiche in the Member States or EU Courts prior to this case. We saw the defendants suggesting that AG Szpunar's Polish background had influenced his understanding of pastiche in his *obiter dicta* in *Pelham I*. We also saw the European Commission being unable to provide a definition or high-level appreciation of the notion, given its complex roots and differing understandings across the Union.

Furthermore, the Court, by introducing further questions on the interaction of pastiche with the CDSM Directive, will have to consider how its interpretation will impact the digital sphere. UGC was a prominent term used during the hearing, signalling that perhaps an overly broad interpretation of "pastiche" might create a loophole to copyright infringement, whereby anyone who remotely engages with the work can wash their hands of the consequences of an unlawful use of copyrighted works.

The author here believes that there is value in the tripartite analysis suggested by Germany, but that the notion of "engaging" with the work might be too unfamiliar for the civil law dominance of EU Copyright Law. What US courts might achieve with determining whether a work is transformative under fair use also stems from the discretion they get from common law rules of interpretation. This might not be the case in the EU. Moreover, if one adds the complex balancing exercise of one's right to IP protection with another's freedom of expression, the Court's role is one that no-one could possibly want in this instance.

The AG is set to deliver his opinion on this case on 6 May 2025. In the meantime, one can only hope that the Court manages to decipher an interpretation that protects copyright while not granting a monopoly. This might, after all, be a step forward towards the European birth of the "derivative work", although the Court has been known to adopt a cautionary approach when asked whether fundamental rights can justify going beyond the established InfoSocframework.

Overall, it is impossible to do justice to this hearing in a commentary. While the case still has at least a year before a decision is given by the Court, so much sprung from the hearing. From the parties' pleadings and responses to the depth and scope of the questions coming from the bench. One thing is sure: pastiche will be defined. How? That is a question for the Grand Chamber of the Court of Justice to determine.

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