Kluwer Copyright Blog

Every breath you take (is intertextual): AG Emiliou's opinion in C-590/23 Pelham II – Part 1

Sabine Jacques (University of Liverpool) · Friday, June 27th, 2025

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The long-awaited opinion of Advocate-General (AG) Emiliou in C-590/23 *Pelham*, the enduring dispute between the electronic music group Kraftwerk against hip-hop producers, and their production company Pelham GmbH, has now been published. For those who had not been following the developments, the case has once again reached the Bundesgerichtshof (BGH), Germany's Federal Court of Justice, which has submitted a new request for a preliminary ruling to the Court of Justice of the European Union (CJEU). The facts behind the dispute are by now familiar: in 1997, Pelham released the track *Nur mir*, which incorporated a two-second sample from Kraftwerk's 1977 track *Metall auf Metall*, without the group's consent. Given the strikingly unconventional tone of this opinion, this commentary will be divided into two parts. Part I sets the scene, offering context and examining the AG's interpretation of *pastiche*. Part II will focus into the balancing of fundamental rights, highlight key gaps, and offer some concluding reflections.

In an earlier phase of the litigation, the CJEU held in *Pelham* (C-476/17) that the act of sampling (even very short audio fragments) falls within the exclusive reproduction right granted to phonogram producers under Article 2(c) of Directive 2001/29/EC (InfoSoc Directive). According to the Court's reasoning, using such samples without prior authorisation can constitute an infringement of that exclusive right, unless the sample is unrecognisable in the alleged infringing use (which has given rise to a lot of commentary, see here, here and here).

The latest reference from the BGH asks whether unlicensed sampling might nonetheless be lawful when it qualifies as a "use for the purpose of pastiche" under Article 5(3)(k) of the InfoSoc Directive. The term "pastiche" is not defined in the Directive, and this referral gives the CJEU an

opportunity to clarify whether certain forms of artistic reuse, such as music sampling, may fall within this exception. In essence, the case invites a re-examination of how copyright rules should apply to artistic practices that rely on transformation and reinterpretation rather than mere duplication.

The two questions referred to the CJEU are as follows:

- Whether the "pastiche" exception under Article 5(3)(k) of the InfoSoc Directive should be interpreted broadly to cover artistic reuse of existing works, such as sampling, without requiring specific elements like humour, stylistic imitation, or homage.
- Whether a use qualifies as pastiche only if intended by the user, or if it is sufficient that an informed audience recognises it as such.

Kiss your rights (as you knew them) goodbye…

AG Emiliou's opinion stands out as a particularly engaging and far-reaching intervention in the ongoing conversation around copyright and artistic freedom. The opinion embraces an interdisciplinary lens, drawing not only on legal doctrine and scholarship but also on cultural theory and creative practice. It situates the legal question of pastiche within a broader cultural and technological context, one that spans both analogue and digital forms of expression and signals an awareness of the evolving dynamics of artistic production in the twenty-first century. In doing so, it goes beyond the specificities of the music recording industry to reflect more broadly on user-generated content, including references to memes and other digital forms of reinterpretation.

Before turning to the questions referred by the Bundesgerichtshof, the AG sets the stage with a reflection on the underlying tension in copyright law: while its purpose is to incentivise creativity, it may, under certain conditions, restrict it. This tension, AG Emiliou suggests, is particularly acute in contexts where creative reuse is central to artistic expression. In this light, the pastiche exception in Article 5(3)(k) of the InfoSoc Directive and rooted in the rights guaranteed under Articles 13 and 11 of the Charter of Fundamental Rights of the European Union ('the Charter') emerges as a potentially vital protection for the freedom of the arts.

According to AG Emiliou, there is increasing recognition that copyright law struggles to accommodate forms of creative reuse, particularly in artistic movements like appropriation and conceptual art. This tension is further exacerbated by the growing use of content moderation and automated infringement detection technologies, especially those introduced under Article 17 of the Directive on Copyright in the Digital Single Market (CDSM; for an overview of where we are 5 years later, see here), facilitating the control of short excerpts of copyright-protected works. For the AG, these mechanisms illustrate how copyright can impose a chilling effect on artistic expression, a problem compounded by the failure of existing exceptions to evolve in a way that adequately counterbalances these developments.

The framing here is significant. Rather than rooting the analysis in the language of exclusive rights (or the need for a high-level of protection for right-holders, seerecitals 4 and 9 of the InfoSoc Directive), the opinion emphasises the regulatory function of copyright within a democratic cultural space. One might note, with some curiosity, the absence of a property-based rationale in

favour of a rights-balancing approach centred on artistic freedom until the near end of the opinion (article 17(2) of the Charter). This interpretive position suggests a shift in emphasis: not a mere balancing of artistic freedom and property rights on equal constitutional footing, but a view that recognises the evolving primacy of artistic freedom in light of how works are created, shared, and transformed in today's digital landscape, and thus calls for a corresponding evolution in copyright law beyond internal mechanisms such as the idea/expression dichotomy.

Shine a Little Style…

Turning to the questions referred by the German court, AG Emiliou begins by examining the scope of the pastiche exception under EU copyright law. As expected, he affirms that the concept of pastiche must be treated as an autonomous concept of EU law, requiring a uniform interpretation across all Member States. This interpretation should be guided by the ordinary meaning of the term, as well as the broader legal context and the objectives pursued by the exception itself. Furthermore, the opinion states that the exception does not necessarily have to be interpreted strictly, but rather that their effectiveness must be preserved (para 70). This is another indication of a shift in balance given that earlier case-law preferred to underline that strict interpretation did not mean restrictive interpretation and should ensure effectiveness of the provision (e.g. *Painer*, para 133; *Deckmyn*, para 22; *ACI Adam and Others*, para 23).

Rejecting the notion that the pastiche exception could serve as a general or open-ended clause (paras 71 and 75), an approach reminiscent of fair use doctrines, AG Emiliou cautions that such a reading could conflict with the three-step test outlined earlier in the opinion. Instead, he poses several essential characteristics that should define the scope and application of the pastiche exception.

In his interpretation of the pastiche exception, the AG draws on the CJEU's judgment in *Deckmyn* (para 60), while carefully distinguishing pastiche from its related concepts of parody and caricature (para 62). Although the three are grouped together in the provision, the AG notes that pastiche is conceptually distinct, being primarily defined by the stylistic imitation of an existing work, genre, artist, or artistic school through the deliberate adoption of its characteristic aesthetic language. Notably, while clarifying this distinction, the AG also offers a more generous reading of parody than is sometimes assumed. This is illustrated in footnote 175, where he acknowledges that humour in musical parody need not always take the form of overt ridicule, but may instead emerge through more subtle or incongruous juxtapositions, for example, the unexpected combination of folk music with a death metal track. This suggests a broader interpretative latitude for both exceptions, supporting a more flexible understanding of creative reuse under EU copyright law. (I personally remain convinced that the CJEU has an opportunity to ensure that humour is interpreted in a broad sense to cover more creative reuses and respect a greater range of forms of humour, perhaps thereby obviating the need to distinguish pastiche from parody for copyright purposes, see here and here.)

Three core features of a pastiche are identified:

- first, it must recall a pre-existing work or artistic tradition by reproducing its stylistic markers;
- second, it must incorporate perceptible differences from the source, ensuring it is not merely a

copy; and
- third, it must be intended to be recognisable as an imitation to those familiar with the referenced material.

Crucially, the purpose of the imitation, whether humorous, critical, or otherwise, is not decisive. What matters is that the new work clearly signals its referential nature and stylistic engagement with the original.

In one of the more critical clarifications of the opinion, AG Emiliou pushes back against a particularly expansive reading of the term “pastiche”. Although the German Government and the Commission had argued that pastiche should include any form of creative reuse, such as memes, mashups, or sampling, pointing to historical examples like the *pasticcio*opera of the eighteenth century (a genre made up of musical patchworks assembled from pre-existing arias) Emiliou draws a clear line. In his view, giving pastiche that kind of open-ended scope would overstate the weight of these alternative usages in ordinary language and, more importantly, overstate their influence on the drafters of the InfoSoc Directive. The implication is that not every act of reuse qualifies as pastiche simply because it borrows or assembles. What matters is whether the resulting work engages in overt recognisable act of stylistic imitation with perceptible differences from the original. As I’ve written elsewhere, a pastiche (like parody) is deeply connected to the original works reproduced and therefore, such uses require intentional reproduction of original works. Yet, the nature of the relationship is different as in a pastiche, there is less of detachment between the original and the use.

While the specific purpose behind a pastiche is not determinative (although it can be argued that the purpose of the copying is to create a pastiche), the user’s intent is essential, and that intent must be discernible in the resulting work. Pastiche is grounded in an intention to imitate or evoke the distinctive style of another work, artist, or genre. This intent must not be accidental or retrospective; it must guide the creation of the new work from the outset. The importance of intent ensures that the pastiche exception does not become a blanket licence for any form of reuse but rather supports artistic practices that consciously engage with and reframe existing works in a way that is identifiable and artistically meaningful (para 61).

Overall, despite good intentions, it is unfortunate that the purpose of creating is not more thoroughly examined. As the AG signals a shift away from the traditionally strong protection of exclusive rights, it becomes more important to ensure that this does not result in under-protection of copyright. Without a clear understanding of how uses like pastiche must meaningfully relate back to the original work, rather than treat it as a mere commodity, there is a risk that the balance intended by copyright law, between incentivising creation and enabling creative reuse, may be undermined.

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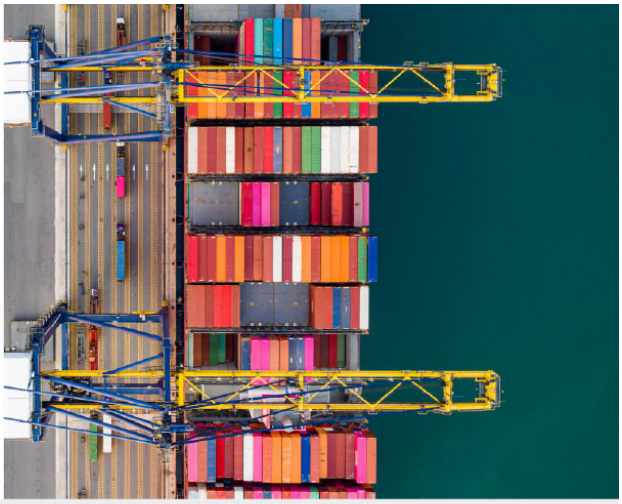

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