Kluwer Copyright Blog

Every breath you take (is intertextual): AG Emiliou's opinion in C-590/23 Pelham II – Part 2

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Welcome back to Part II of the analysis of AG Emiliou's Opinion in *C-590/23 Pelham II*. In Part I (here), we analysed the interpretation of *pastiche* as an autonomous concept of EU law, along with its defining features.

In this Part II, we turn to the balancing of fundamental rights. Here, the AG ventures into bold territory, challenging assumptions about the scope of copyright protection, emphasising the importance of artistic freedom, and sending a clear signal to both the EU legislator and industry stakeholders. We'll also explore what's missing and what this means for the recording industry.

The great in-between freedoms…

The concluding section of AG Emiliou's opinion highlights the inherent complexity in balancing the fundamental rights of artistic freedom and freedom of expression with the right to property. While these rights are formally recognised as equal under the Charter, the opinion clearly tilts the balance towards the supremacy of artistic freedom.

Crucially, the opinion oversimplifies the extent to which the EU legislature is afforded discretion in mediating between these competing rights. While some cited case law (ECtHR *Ashby Donald*, paras 40–41; *Neptune Distribution*, para 76) does suggest that a broader margin of appreciation may be granted where commercial speech is concerned, this does not imply that such a margin should extend entirely to artistic expression. Instead, those judgments seem to support the view that national authorities are often better positioned to undertake the nuanced balancing required in such commercial cases and ECtHR case law does emphasise a narrower margin in case of artistic expression (ECtHR Vereinigung Bildender Künstler v. Austria, noting that in the case of artistic expressions, the margin should be particularly limited; para 6). By asserting a wide legislative margin of appreciation at the EU level, however, the opinion risks undermining the careful

balancing role traditionally reserved for national courts and potentially diminishes the protections afforded to artistic freedom, which demands a more stringent and context-sensitive approach. Admittedly, the ECtHR's own position is not without ambiguity. For instance, in Sousa Goucha v Portugal, the Court acknowledged that particular care must be exercised due to the potential implications for freedom of expression, yet still held that national authorities enjoyed a wide margin of appreciation (para 50), reflecting a certain tension in its reasoning and going against a well-established line of case law.

Central to the AG's analysis is the recognition of the social function of pastiche as a vehicle for cultural commentary and artistic engagement. Against this backdrop, AG Emiliou suggests that artistic freedom ought, in practice, to take precedence over proprietary interests where the creative reuse of protected content is concerned. Relying on Article 17(2) of the Charter by producers and broadcasters is, in his view, less persuasive when measured against the broader objectives of cultural exchange and creative reuse. These related rights must be interpreted considering their functional purpose and should not be extended so far as to inhibit forms of creative appropriation such as legitimate pastiche (paras 114-115).

The opinion goes further still, suggesting what we can find in relation to databases. It asserts that right-holders should only be protected against the communication of parts of their protected subject matter (such as samples of phonograms) when those parts are sufficiently substantial, either quantitatively or qualitatively, to undermine their ability to secure an adequate return on investment (para 117). This threshold is linked to the risk of market substitution: protection is warranted only where the reuse could generate a competing product capable of adversely affecting sales or other legitimate commercial uses.

Yet, the AG draws a distinction between related and authorial rights. While the balance *might* shift when dealing with the musical composition itself (e.g., the score or lyrics), the opinion maintains that in the context of related rights, such as those held by phonogram producers, the equilibrium should favour artistic freedom (para 128). However, this delineation raises potential complications. As the AG himself recognises, in cases of sampling, both the recording (master rights) and the underlying composition (authors' rights) may require clearance. If the goal is to foster legal certainty and facilitate creative reuse, privileging artistic freedom in one domain while maintaining restrictive standards in another may inadvertently entrench complexity, rather than reduce it. The elevation of artistic freedom in this context, while laudable in principle, may therefore produce outcomes that are at odds with the practical realities of music production and licensing.

The silence of the Opinion

It is important to note what is not covered by the opinion and which may need further consideration. There is nothing about the interpretation of the three-step test as prescribed in article 5(5) InfoSoc Directive and derived from international treaties such as first appeared in the Berne Convention, article 9(2) which states that: '[…] the reproduction of such [i.e. literary and artistic] works in certain special cases, provided such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author'. This test is well-rooted in the international copyright framework and can also be found in article 13 TRIPS and article 10(2) WIPO Copyright Treaty. Nevertheless, the opinion does confirm that, in order for an exception to apply, the use must not only satisfy the requirements of a specific

exception but also need to conform with the three-step test on a case-by-case basis (para 125). And in relation to other exceptions, the three-step test was used to add a proportionality requirement. This can be seen in the *Painer* (at 134) and *Deckmyn* (at 27) decisions whereby the application of the exception is also subject to 'strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors'. Here, the opinion remains vague, leaving one to wonder about the reason for this omission.

Against all obiter

Overall, the AG's opinion reflects a clear openness to enhancing flexibility within the EU copyright system, particularly by recognising the imperative to better align it with the fundamental right to artistic freedom. Notably, the AG interprets the pastiche exception in a broad manner (although not as broad as some may want it to be), while also directing a pointed message to the EU legislator: more comprehensive legislative reform is needed to modernise copyright law considering Charter values (see especially paras 79 and 113–132). Alongside this, the opinion delivers a strong call to right-holders and collective management organisations to adapt their licensing models and remove barriers to creative reuse (para 100), while also acknowledging the complexities specific to the music industry (paras 101–102).

However, such an approach is unlikely to be welcomed by all. By effectively weakening the traditional exclusive rights under copyright, the opinion challenges long-standing assumptions in the creative industries and markets built on rights granted. Although it commendably centres the position of grassroots creators, it remains unclear whether the interpretation offered would provide them with practical legal certainty or simply add new layers of complexity, as I have noted in relation to master vs composition rights, which may further obscure rather than clarify the legal framework. And while the freedom to reuse creatively is valorised, there is a risk that lesser-known artists whose work is sampled might miss out on potential financial gains should their material be included in a later commercially successful work.

At this point, given the opinion's otherwise forward-looking tone and its explicit concern with contemporary modes of creative production, one might have expected at least a brief engagement with generative AI and digital replicas, tools that not only rely heavily on pastiche-like techniques but also pose new challenges to the boundaries of copyright. While the mention of *Andersen v Stability AI* and *Getty Images v Stability AI* in footnote 103 gravitates toward this area, it is confined to a narrow observation about right-holders seeking protection over style and therefore, justifying the need for a pastiche exception rather than a deeper reflection on how such technologies complicate existing legal concepts. The opinion signals a shift from the traditionally strong protection of right-holders in EU copyright law, subordinating exclusive rights to artistic freedom. This shift may empower grassroots creators (in theory) but also deepens legal and contractual uncertainty, especially for those whose work is now more easily harvested, repurposed, and commercially exploited.

All attention now turns to the CJEU as we await what is set to be a highly anticipated and landmark ruling.

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