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

European Copyright Society; Mezei, P.; Senftleben, M.; Sganga, C.; Geiger, C.

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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.

Executive summary:

In its questions for preliminary ruling, the German Federal Court of Justice asked for clarification as regards the definition of pastiche under EU copyright law; and, in essence, whether and how this concept applies to musical sampling. In the present Opinion, the European Copyright Society takes the view 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.

1. Introduction and overview of *Pelham* II

The *Metall auf Metall* saga started in 1999 when members of the German band Kraftwerk sued hip-hop composer and producer Moses Pelham for copyright infringement. Pelham had copied a two-second segment from Kraftwerk's recording "Metall auf Metall", a piece of electronic music that was part of the album "Trans Europa Express" which Kraftwerk released in 1977, and integrated it as a continuous loop 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.

Over the course of the following years, the case would make its way through the instances of the German court system, with two appearances at the German Federal Court of Justice[1] and

[1] German Federal Court of Justice, 20 November 2008, case I ZR 112/06, 'Metall auf Metall', GRUR 2009, 403; German Federal Court of Justice, 13 December 2012, case I ZR 182/11, 'Metall auf Metall II', GRUR 2013, 614.

one intermission at the Federal Constitutional Court,[2] culminating in the 2017 referral to the Court of Justice of the European Union ("CJEU"). The CJEU rendered its judgment in July 2019, holding that, interpreted in the light of Article 2(c) of the Information Society Directive 2001/29/EC ("ISD"),[3] any reproduction of a sound recording, even if very short, constituted an infringement of the phonogram producers' exclusive right, unless the sample were integrated, possibly in modified form, into a new song so that it became unrecognisable to the ear.[4] The CJEU also put an end to Sec. 24 of the German Copyright Act ("UrhG") which codified the so-called "free use" doctrine[5], arguing that an open and flexible norm would be irreconcilable with the closed list of exceptions of Article 5 ISD and the principle of legal certainty, and would hamper the harmonisation which the ISD sought to achieve in the area of exceptions and compromise its role in the proper functioning of the internal market.[6]

Following the CJEU judgment, the German Federal Court of Justice decided in 2020 that Pelham's use of the sample had been lawful up until 2001 under the limitation of Sec. 24 UrhG. However, with the adoption of the ISD, Sec. 24 UrhG could no longer be applied and, as a result, Pelham's use was unlawful rather than a "free use" ("freie Benutzung").[7]

The introduction of Sec. 51a into the UrhG in 2021 was, on the one hand, a reaction to the elimination of Sec. 24 thereof. On the other hand, it satisfied the mandatory requirement under Article 17(7) of the 2019 Directive on Copyright in the Digital Single Market ("CDSMD")[8] for Member States to provide an exception for the purposes of parody, caricature and pastiche for the benefit of users uploading content on online content-sharing service providers ("OCSSPs"), which was not previously expressly covered by the UrhG.[9] The new provision stipulates that a published work may be reproduced, distributed and communicated to the public for the purposes of caricature, parody and pastiche. It therefore replicates the substantive language of Article 17(7) CDSMD and the older Article 5(3)(k) ISD. Besides the requirement of prior publication, the new rule does not provide any additional criteria for applicability.

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[2] German Federal Constitutional Court, 31 May 2016, case 1 BvR 1585/13, 'Zulässige Verwendung von Samples ohne Zustimmung des Tonträgerherstellers – Metall auf Metall', GRUR 2016, 690.

[3] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001 L 167, 10.

[4] Judgment of the Court (Grand Chamber) of 29 July 2019, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben*, Case C-476/17, EU:C:2019:624, paras. 36–39.

[5] "Freie Benutzung" under Section 24(1) of the German Copyright Act (UrhG) reads as follows: "An independent work created in the free use of the work of another person may be published and exploited without the consent of the author of the work used." Based on this provision, parodies and pastiches could be considered in the past as being non-infringing adaptations under German copyright law if they had new original features of their own that made the individual features of the incorporated, copyrighted source material fade away. Cf. German Federal Court of Justice, 16 April 2015, case I ZR 225/12, 'Goldrapper', GRUR 2015, 1189 (1198); German Federal Court of Justice, 1 December 2010, case I ZR 12/08, 'Perlentaucher', GRUR 2011, 134 (137-138); German Federal Court of Justice, 20 November 2008, case I ZR 112/06, 'Metall auf Metall', GRUR 2009, 403, para. 14; German Federal Court of Justice, 20 March 2003, case I ZR 117/00, 'Gies-Adler', GRUR 2003, 956 (958).

[6] CJEU, *Pelham*, para. 63. On the European Copyright Society's opinion on this judgment see: Lionel Bently, Christophe Geiger, Jonathan Griffiths, Axel Metzger, Alexander Peukert, Martin Senftleben: *Sound sampling, a permitted use under EU copyright law? Opinion of the European Copyright Society in relation to the pending reference before the CJEU in Case C-476/17, Pelham GmbH v Hütter* (2019). Available at https://europeancopyrightsociety.org/wp-content/uploads/2019/02/ecs-opinion-metall-auf-metall_final_rev.pdf (last visited on 29 September 2024).

[7] German Federal Court of Justice, 30 April 2020, case I ZR 115/16, 'Metall auf Metall IV', GRUR 2020, 843.

[8] Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ 2019 L 130, 92.

[9] See the explanatory memorandum: Gesetzesbegründung BT-Drs. 19/27426, p. 89. (https://dserver.bundestag.de/btd/19/274/1927426.pdf).

The existence of this rule necessitated German courts to revisit whether sampling might fit into the concept of pastiche per Sec. 51a UrhG. The pending preliminary questions which the German Federal Court of Justice formulated in *Metall auf Metall V*, however, go far beyond the specific sampling scenario underlying the *Pelham* case. The German Federal Court of Justice seeks a more general clarification of the pastiche concept in EU copyright law. With its preliminary questions in *Pelham II*,[10] it paves the way for a more general discussion of the meaning and scope of the exemption of pastiche in Article 5(3)(k) ISD. The Court referred the following questions for a preliminary ruling:

> 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?

The much-awaited judgment of the CJEU will not be the first decision seeking to add conceptual contours to the exemption of pastiche. In *Shazam/Only Fools*, the High Court of England and Wales already started this process. In the light of the "three-step test" in Article 5(5) ISD, the High Court warned against an overbroad application of the elastic rule.[11]

More importantly for the pending *Pelham II* case, German courts have attempted to give shape to pastiche in various decisions, including one on transformative fine arts[12] and another on musical sampling,[13] from which the new preliminary reference to the CJEU arose.[14] These rulings suggest that the scope of pastiche is not limited to the imitation of an artist's style, a use that would not require reliance on an exception. Instead, the pastiche exception enables the recognisable use of original elements of specific works[15] insofar as the new work engages in some form of dialogue or intellectual interaction with the original work borrowed.[16] In addition to these substantive requirements, an important role in the balancing exercise is reserved for the three-step test. The CJEU considered this in relation to parody, although not by explicitly referring to Article 5(5) ISD, in *Deckmyn*.[17] In the light of this principle, courts applying an

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[10] Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 25 September 2023 – CG and YN v Pelham GmbH and Others, Case C-590/23.

[11] Shazam Productions Ltd. v. Only Fools the Dining Experience Ltd. [2022] EWHC 1379 (IPEC).

[12] LG Berlin, 2 November 2021, case 15 O 551/17, 'Zulässige künstlerische Auseinandersetzung mit einem übernommenen Werk – The Unknowable', GRUR-RR 2022, 216.

[13] OLG Hamburg, 28 April 2022, case 5 U 48/05, 'Erlaubtes Tonträger-Sampling bei Überführung in selbstständiges Werk – Metall auf Metall III', GRUR 2022, 1217.

[14] For further decisions see LG Köln, Teilurteil vom 28. März 2024 – 14 O 181/22 –, juris; OLG Frankfurt, Urteil vom 2. Februar 2023 – 11 U 101/22 –, juris; LG München I, Urteil vom 20. Juni 2022 – 42 S 231/21 –, juris; LG Hamburg, Urteil vom 30. Dezember 2021 – 310 O 321/21 –, juris.

[15] Metall auf Metall III, p. 1217, para. 70; The Unknowable, p. 216, para. 28.

[16] Metall auf Metall III, p. 1217, para. 71.

[17] CJEU, 3 September 2014, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, case C-201/13, EU:C:2014:2132, para. 27; See on this decision Christophe Geiger, Jonathan Griffiths, Martin Senftleben, Lionel Bently and Raquel Xalabarder, Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion of the European Copyright Society on the Judgment of the CJEU in Case C-201/13 *Deckmyn*, 46(1) *IIC* 2015, 93; see also Metall auf Metall III, p. 1217, para. 72.

exception must ensure that, in each specific case, admitting a transformative use under Sec. 51a UrhG does not prejudice the legitimate interests of the rightholder. Considering the general nature of the preliminary questions which the German Federal Court of Justice formulated, it is conceivable that the three-step test will also play a crucial role when the scope of the pastiche exemption is further delineated by the CJEU.

Against this background, the following analysis discusses both preliminary questions referred to the CJEU with a special focus on the three-step test's potential impact. The discussion goes beyond the sampling scenario that occupies centre stage in the German *Metall auf Metall* saga. In line with the observations made by the German Federal Court of Justice in connection with its questions, it also addresses the application of the pastiche exemption to user-generated content ("UGC") uploaded to platforms of online content-sharing service providers in the sense of Article 2(6) CDSMD ("OCSSP"). The explicit reference to pastiche in Article 17(7) CDSMD confirms that this field of application has particular importance.

2. Question 1 – Pastiche as an autonomous concept of EU law and its requirements?

According to Article 5(3)(k) ISD, Member States may derogate from the rights of reproduction and communication to the public when the work is used "for the purpose of caricature, parody or pastiche". The three genres were joined on the basis of an assumption that they all entail the borrowing of (parts of) a pre-existing creative work protected by copyright as building blocks for new literary and artistic expression.[18] Subsuming them under the same provision also had the aim of overcoming the differences in Member States' copyright laws and traditions. The provision aimed to balance the interests of authors, and the freedom of expression and artistic creativity of users.

As a response to concerns over the negative impact of automated content filtering on UGC, the EU legislator introduced Article 17(7) CDSMD, which is declared mandatory in order to secure the operation of the underlying fundamental rights which the exemption of parodies, caricatures and pastiches is intended to guarantee. The contrast with the optional nature of the ISD's general parody/caricature/pastiche exception, however, is evident. This inconsistency, engendered by the fact that the EU legislator preferred to introduce a provision *ex novo,* and limit it to the scope of Article 17 CDSMD, rather than amending Article 5 ISD, has further exacerbated the patchwork of national approaches to the matter, with obvious negative effects on the state of EU harmonisation.[19]

To date, the CJEU has given no direct guidance on the concept of pastiche. The only two opportunities to expand on its meaning presented themselves in the *Deckmyn* parody case and the first *Pelham* case on sampling. In *Deckmyn*, Advocate General Cruz Villalón offered his understanding of the relation between the three concepts contained in Article 5(3)(k) ISD as follows:

> I do not believe that a comparison with each of the concepts with which it coexists is of particular relevance for the present purposes. It may be difficult in a specific case to assign a particular work to one concept or another when those concepts are not in competition with one

[18] Silke von Lewinski, Michel M. Walter, *European copyright law. A commentary* (OUP 2011), §11.5.67. On the historical origins of pastiche in and the transposition of the ISD rule to the legal system of various Member States, see Péter Mezei, Bernd Justin Jütte, Caterina Sganga, Léo Pascault, Oops, I Sampled Again … the Meaning of "Pastiche" as an Autonomous Concept Under EU Copyright Law, 55(8) *IIC*, 1225 (1233-1247).
[19] Mezei, Jütte, Sganga, Pascault, op. cit, at 1240.

> another. That being so, *it does not seem to me to be necessary to proceed any further with that distinction, since, in short, all those concepts have the same effect of derogating from the copyright of the author of the original work which, in one way or another, is present in the – so to speak – derived work.*[20]

The CJEU, in its subsequent ruling, did not, however, expand on the relationship between the three concepts, but focussed instead on the definition of the notion of parody. According to the CJEU, a parody must "evoke an existing work, while being noticeably different from it" and "constitute an expression of humour or mockery".[21] The CJEU further elaborated that a parody need not have an original character itself but must merely display "noticeable differences with respect to the original parodied work".[22]

In his Opinion in *Pelham and Others*, First Advocate General Szpunar referred to pastiche as a mere "imitation of the style of a work or an author without necessarily taking any elements of that work".[23] The CJEU did not discuss the concept of pastiche, but approached sampling as quotation.[24]

In the absence of any further guidance on the meaning of pastiche, its contours as an autonomous concept under EU law must be developed by the CJEU. However, *Deckmyn* contains two interesting systematic approaches that could guide the CJEU towards finding a definition.

First, the Advocate General Cruz Villalón suggested that Member States retain a margin of discretion to determine specific additional criteria as part of their own domestic legal traditions.[25] To the contrary, the Grand Chamber stated that parody was an autonomous concept under EU law and therefore had to have an autonomous meaning within the EU.[26] With the CJEU's rejection of the Advocate General's "diversity in parody" approach, it seems clear that pastiche must not only constitute an autonomous concept, but that there shall not be "diversity in pastiche" either. Hence Member States have no margin of discretion to determine specific additional criteria as part of their own domestic legal traditions.[27]

Second, and this is more problematic for the broad understanding of pastiche towards which the German courts and legislator[28] seem to lean, the CJEU, adopted an interpretation of parody in its "usual meaning in everyday language".[29] Such an interpretation has been expressly

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[20] Opinion of Advocate General Cruz Villalón of 22 May 2014, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, case C-201/13, EU:C:2014:458, para. 46 (emphasis added).
[21] CJEU, *Deckmyn*, para. 33.
[22] Ibid.
[23] Opinion of First Advocate General Szpunar of 12 December 2018, *Pelham and Others*, case C-476/17, EU:C:2018:1002, footnote 30.
[24] CJEU, *Pelham*, paras. 71-73.
[25] Opinion, *Deckmyn*, paras. 53–56.
[26] CJEU, *Deckmyn*, paras. 14–17.
[27] Mezei, Jütte, Sganga, Pascault, op. cit. at 1241.
[28] According to Paragraph 51a of the German Copyright Act, introduced in German Copyright Law in 2021 (to comply with the CJEU Pelham decision), "*it is permitted to reproduce, distribute and communicate to the public a published work for the purpose of caricature, parody and pastiche*". The explanatory memorandum reveals that the German legislator sees pastiche as crucial for securing artistic freedom. The legislator emphasizes that "*quoting, imitating and borrowing cultural techniques are a defining element of intertextuality and contemporary cultural creation and communication on the 'social web'*" and explicitly lists practices such as remixes, Memes, GIFs, mashups, fan art, fan fiction, and sampling when assessing the importance of a pastiche exception. See Gesetzesbegründung BT-Drs. 19/27426, supra note 9.
[29] CJEU, *Deckmyn*, para. 19.

rejected by the German Federal Court of Justice in *Metall auf Metall V*, partly because no exception would be required if pastiche were to be understood to mean the imitation of an artistic style.[30] Fortunately, the CJEU added that account must be taken of "the context in which [the term] occurs and the purposes of the rules of which it is part".[31]

2.1. The usual meaning in everyday language and the artistic meaning of pastiche

As already explained, Article 5(3)(k) ISD allows EU Member States to introduce exceptions and limitations ("E&Ls") in copyright and neighbouring rights law covering "use for the purpose of caricature, parody or pastiche." While the meaning of "caricature" and "parody" may be clear, the word "pastiche" is opaque.[32] The *Oxford Dictionary of English* defines pastiche as "an artistic work in a style that imitates that of another work, artist or period," and "an artistic work consisting of a medley of pieces imitating various sources".[33] The *Merriam-Webster English Dictionary* defines pastiche as "a literary, artistic, musical, or architectural work that imitates the style of previous work."[34] It also refers to a "musical, literary, or artistic composition made up of selections from different works."[35] Similarly, the *Collins English Dictionary* describes pastiche as "a work of art that imitates the style of another artist or period" and "a work of art that mixes styles, materials, etc."[36] A review of these and other non-English language dictionaries might be a path forward for the Advocate General in *Pelham II*. All these sources might clearly show that pastiche has at least two different meanings.[37]

Indeed, over the centuries, at least eight different understanding of pastiche have been developed. As early as the 16th century, pastiche meant (1) the artistic production of artificial stones and (2) the recombinative and decorative use of old/antique building materials. From the early 17th century, the term assumed a meaning (3) relevant for the fine arts: that of the ironic/pejorative imitation of characteristic motifs and stylistic elements, predominantly of paintings (occasionally counterfeiting or plagiarising the source work). From the 18th century, pastiche also meant (4) mixed compositions ("mélange" or "composition mêlée") of paintings, and later also of musical, literary and architectural works. Pastiche in theatre/opera ("Pasticcio Opera"), using source works in a recombinative manner (5), also reached its peak in the 18th century. Imitations of the style of literary works (6) started to mushroom in the late 18th century as well, and formed a part of public education and exercise in style until the 20th century. Finally, two further meanings of pastiche emerged during the 19th century: (7) a satirical/critical exaggeration, moving pastiche closer to parody and caricature; and (8) the anachronistic recreation of works of faded ages.[38]

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[30] German Federal Court of Justice, 14 September 2023, case I ZR 74/22, 'Metall auf Metall V', GRUR 2023, 1531 (1534).
[31] CJEU, *Deckmyn*, para. 19.
[32] See the detailed analysis conducted by Emily Hudson, The pastiche exception in copyright law: a case of mashed-up drafting? *Intellectual Property Quarterly* (2017) p. 348-352. Hudson's research confirms the elastic, flexible meaning of the term encompassing "the utilisation or assemblage of pre-existing works in new works". Ibid. at 363.
[33] The Oxford Dictionary of English, Oxford University Press, 3rd edn., s.v. "Pastiche".
[34] Merriam-Webster English Dictionary. Available at https://www.merriam-webster.com/dictionary/pastiche (last visited on 29 September 2024).
[35] Ibid.
[36] Collins English Dictionary. Available at https://www.collinsdictionary.com/dictionary/english/pastiche (last visited on 29 September 2024).
[37] To the same effect, see Emily Hudson, *Drafting Copyright Exceptions. From the Law in Books to the Law in Action*, Cambridge University Press (2020), p. 290.
[38] In greater detail see Eberhard Ortland, Pastiche im europäischen Sprachgebrauch und im Urheberrecht, 14(1) *Zeitschrift für Geistiges Eigentum / Journal of Intellectual Property Law* (2022), pp. 3, 17-19.

These eight historic interpretations demonstrate that pastiche has no clear meaning in *art*. One can hardly expect to distil from them a single, comprehensive, and functionally operating legal definition of pastiche. Consequently, the multiple faces of pastiche (various meanings in art or literary theory) might render the dictionary-based approach overly limited (or even arbitrary). Hence, the second avenue leading to the establishment of autonomous concepts – focusing on the context and purpose of the rule – should have greater relevance in defining pastiche.

2.2. The context in which the term occurs and the purposes of the rules of which it is part – Possible approaches to pastiche

Since pastiche is included in Article 5(3)(k) ISD and Article 17(7) CDSMD alongside parody and caricature, the CJEU might consider, whether these three are identical or distinct artistic forms of expression, and whether or not, and to what extent, pastiche needs to meet the requirements that have been defined for parody (and/or caricature). Within this matrix, there could be four different approaches to define pastiche vis-á-vis parody and caricature.

Option 1 might treat parody and pastiche as identical artistic expressions while applying distinct legal requirements. Such an option is conceptually hard to imagine.

Option 2 might approach parody and pastiche as identical artistic expressions that shall be judged under identical legal requirements. Such an option would conclude on a conceptual level that caricature, parody and pastiche are only exemplifications, and any or all similar forms of expression (e.g. travesty, persiflage, bluette, etc.) might fit into Article 5(3)(k) ISD, subject to the same legal scrutiny.

Option 3 might declare parody and pastiche as distinct artistic expressions that are subject to identical legal requirements. This option would approach the issue pragmatically, and conclude that, despite the artistic differences of various forms of expression, a single ‘‘parody over all exception’’ exists in EU copyright law. Consequently, this option would require that pastiche shall evoke an existing work, while being noticeably different from it, and shall constitute an expression of humour or mockery.

Finally, Option 4 would treat parody and pastiche as distinct artistic expressions and approach them (at least partially) under distinct legal requirements to give legal relevance to the differences between various artistic genres. Option 4 might lead to

(i) the clarification of the *shared background*, *features and functions* of the three forms of expressly enumerated exceptions, to justify why they are all covered by the same EU provisions, including but not limited to the argument that pastiche, just like parody and caricature,
   a. is based on freedom of expression as included in Article 11 of the EU Charter of Fundamental Rights and Article 10 of the European Convention on Human Rights;[39]
   b. shall rely on a pre-existing work (that is, taking more than its unprotected style) in order to be effectively classified as an exception to copyrights;

[39] Christophe Geiger, Jonathan Griffiths, Martin Senftleben, Lionel Bently and Raquel Xalabarder, Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion of the European Copyright Society on the Judgment of the CJEU in Case C-201/13 *Deckmyn*, 46(1), *op. cit.* at 98.

(ii) the *specification of different requirements or 'non-requirements'* for parody, caricature and pastiche, which better define their boundaries and scope, i.e. pastiche shall not be subject to certain limiting criteria, such as the requirement of humour, stylistic imitation or tribute.

The ECS opines that Option 4 – giving pastiche an individual meaning and function – fits best with existing CJEU case law that necessitates the *balancing of copyright protection against other fundamental values*, such as freedom of expression,[40] and points out that, in line with CJEU jurisprudence, *E&Ls constitute rights of users* seeking to exercise their right to freedom of expression.[41]

2.3. Application requirements

As the CJEU's case law indicates, the balancing of copyright protection against other fundamental values must take place within the established system of exclusive rights and E&Ls. It, therefore, requires an approach that uses the instruments in the EU *acquis* that are available for the balancing task, including giving individual meaning to the three branches of Article 5(3)(k) ISD.

Together with the necessary consistency with its previous case law, this is the background principle that should inspire the CJEU in its answer to the *Pelham II* referral, which requires the Court to specify the application requirements of the pastiche exception.

1. First, pastiche **cannot be intended as a mere imitation of an artistic style**, as suggested by AG Szpunar in *Pelham and Others*. "Style" has been typically left out of the concept of protected subject matter in EU Member States. It belongs to the realm of ideas, rather than expression, and it is a very subjective concept, occasionally representing common features of artistic movements. In this sense, the concept cannot have relevance in the legal definition of pastiche. This is also confirmed by the fact that both the ISD and the CDSMD expressly refer to pastiche as an E&L to the relevant economic rights, which apply solely to copyright-protected works. In addition, the CJEU has made it clear that, since artistic creativity fundamentally includes the freedom to rely on sources independently selected by the artist, secondary (transformative) uses must not be excessively limited.[42] A limitation of the pastiche exception to the imitation of an artistic style would run counter to the CJEU's fair balance doctrine, for it would constrain the application of the exception to the mere use of non-protected parts of the content used. This would *de facto* erode the pastiche exemption because the freedom to imitate the style of a pre-existing work already follows from the idea/expression dichotomy in copyright law,[43] and does not require the introduction of a specific copyright exception.
2. Second, pastiche **should not require an explicit interaction with the original work**. In *Deckmyn*, the CJEU ruled that Article 5(3)(k) ISD leaves the user performing the

[40] CJEU, 4 October 2011, cases C-403/08 and C-429/08, *Football Association Premier League/QC Leisure*, paras. 162-164; CJEU, 1 December 2011, case C-145/10, *Painer*, para. 132; CJEU, *Deckmyn*, para. 26; CJEU, 29 July 2019, case C-469/17, *Funke Medien NRW*, paras. 67-76; CJEU, 26 April 2022, case C-401/19, *Poland*, para. 66.
[41] CJEU, 29 July 2019, case C-516/17, *Spiegel Online*, para. 50-54; CJEU, *Funke Medien NRW*, paras. 65-70.
[42] See especially Judgment of the Court (Grand Chamber) of 29 July 2019, *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, Case C-469/17, EU:C:2019:623, para. 67 et seq; CJEU, *Pelham and Others*, para. 59 et seq; Judgment of the Court (Grand Chamber) of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, Case C-516/17, EU:C:2019:625, paras. 42 et seq.
[43] Article 9(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights; Article 2 of the WIPO Copyright Treaty.

parody to freely depart from the original work, as opposed to what is required to benefit from the quotation exception, which demands an explicit "dialogue" with it. In order to ensure consistency with the reading of Article 5(3)(k) ISD, the Court needs to interpret pastiche in the same way.

3. Third, **the presence of humour or mockery cannot be a necessary requirement.** While humour or mockery is a conceptual element of pastiche in various EU Member States, the German legislative reform proposal was based on the opposite logic and listed several non-humorous expressions as valid forms of pastiche.[44] This legislative decision was later put into practice.[45] In the Opinions in the *Deckmyn* and *Pelham and Others* cases, neither First Advocate General Szpunar[46] nor Advocate General Cruz-Villalón mentioned humour or mockery as a conceptual element of pastiche.[47] It is therefore not surprising that the German Federal Court of Justice's referral challenges the need for a lawful pastiche to feature any humour, mockery or other purposes, including homage. It might be argued that the fact that three permitted uses are listed under the same ISD rule implies that they must share common traits – one of them potentially being humour. However, it is safer to say that Article 5(3)(k) ISD groups the three forms of expression together because of the transformative nature of the listed expressive uses, even though they have different purposes and thus different characteristics.
4. Last, the expression resulting from the exercise of the pastiche exception **need not itself be an original work**. No E&L under Article 5 ISD imposes such a requirement, as noted in *Deckmyn* (paras 12 and 21), and the ordinary meaning of pastiche and the language of Article 5(3)(k) ISD do not suggest this additional criterion. Some difference from the original work should be present, as commonly required under national infringement tests. However, this does not entail a need for the new work to be fully original. In *Pelham*, the CJEU requested the sample to be unrecognizable to the ear in order not to constitute infringement under Article 2 ISD. *A contrario*, a pastiche should qualify as such only if it features a recognizable part of a pre-existing work, which is modified as to add something, rather than simply being a slavish copy.

After clarifying the requirements of applicability of the pastiche exception, the CJEU is also asked to specify what criteria should be applied to determine whether a particular pastiche is proportionate, that is to say whether it complies with Article 5(5) ISD and its three-step test.

2.4. Pastiche and the three-step test

In EU copyright law, Article 5(5) ISD delineates the limits of permissible copyright limitations. The three-step test enshrined in this provision – certain special cases (criterion 1); no conflict with a normal exploitation (criterion 2); no unreasonable prejudice to legitimate interests of right holders (criterion 3) – constitutes a flexible framework within which the application of copyright limitations listed in Article 5(1) to (4) ISD is possible. The three-step test of Article 5(5) ISD is an offspring of Article 9(2) of the Berne Convention ("BC"), Article 13 of the TRIPS Agreement ("TRIPS"), Article 10(1) and (2) of the WIPO Copyright Treaty ("WCT") and Article 16(1) and (2) of the WIPO Performances and Phonograms Treaty ("WPPT").[48] Its

[44] Gesetzesbegründung BT-Drs. 19/27426, pp. 90–91.
[45] Confirmed by Metall auf Metall III, pp. 1217–1225; and The Unknowable, pp. 216–223.
[46] Opinion, Pelham and Others, footnote 30.
[47] Opinion, Deckmyn, footnote 14.
[48] Recital 15 ISD.

three assessment criteria are in line with the substantive criteria set forth in these international provisions.

As the adoption of the pastiche rule in Article 5(3)(k) ISD shows, the EU legislature is confident that a flexible limitation concept, including the multi-faceted term pastiche, can survive scrutiny in the light of the three-step test. The status quo reached under the 1996 WIPO Copyright Treaty supports this approach. In the context of the three-step tests of Article 10 WCT, the Diplomatic Conference leading to the adoption of the WIPO Internet Treaties formally adopted an Agreed Statement together with the treaty text itself. This Agreed Statement makes it clear that the three-step test is not intended to pose obstacles to the further development of existing copyright limitations or the evolution of new copyright limitations that are appropriate in the digital environment:

> It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.
>
> It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.[49]

In the context of the ISD, this Agreed Statement is particularly relevant. Recital 15 ISD confirms that the Directive is intended to bring EU law in line with the international rules following from the WIPO Internet Treaties. Against this background, it is important to read the EU three-step test of Article 5(5) ISD in the light of the international three-step tests laid down in Article 10 WCT and Article 16 WPPT, including the Agreed Statement which applies to both international provisions.[50] From this international perspective, the three-step test in Article 5(5) ISD should thus offer room for the development of appropriate – and potentially new – concepts in the area of copyright limitations. It would thus seem inconsistent if the first test of "certain special case" already prohibited the introduction of an open-ended, flexible pastiche rule.[51]

There is a potential counterargument that a broad pastiche rule would have a broad group of beneficiaries and a field of application that covers various types of literary and artistic works. However, these factors, if applied strictly, would also cast doubt upon long-standing copyright limitations which, to this day, have not been abolished because of fears that they could be incompatible with the three-step test.

The traditional exemption of private copying can serve as an example. Obviously, this copyright limitation has a broad group of beneficiaries: everybody can act as a private person in her private life. It may even be said that the circle of beneficiaries is even broader than in the case of contemporary artistic remix activities, such as the play with parts of pre-existing works in UGC. While the reference to "artistic engagement" in the preliminary questions posed by the German Federal Court of Justice can be understood to require creative effort, this condition does not apply to private copying. Moreover, private copying also affects the whole

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[49] Agreed Statement Concerning Article 10 WCT.

[50] According to the Agreed Statement Concerning Article 16 WPPT, the Agreed Statement Concerning Article 10 WCT is also fully applicable in the context of neighbouring rights relating to performances and phonograms.

[51] Although recital 15 ISD does not mention the three-step test under Article 13 TRIPS Agreement, the above arguments might be equally true in light of that provision.

canon of work categories. Hence it seems that this finding does not exclude a finding that a flexible, "catch-all" pastiche rule constitutes a "certain special case".[52]

Once the influence of fundamental rights – that has been confirmed in CJEU jurisprudence[53] – is considered, it becomes apparent that this result is sound. From the perspective of freedom of expression, a broad, "catch-all" pastiche rule for artistic engagement with pre-existing works constitutes a certain special case in the sense of the three-step test in EU copyright law. UGC, for instance, has led to a revolution in the creation and dissemination of online content: formerly passive users have become active participants in the literary and artistic online discourse. With users sharing their own works as well as remixes and mashups of third-party productions, the creation and dissemination of content via the internet has become much more democratic. Instead of being dependent on selection mechanisms and dissemination channels of the creative industry, users can directly make their creations available to other users. The alternative avenue of content dissemination via UGC platforms may have a disruptive effect on incumbent industries which face competition from non-professional content providers. Quite clearly, however, the creation and dissemination of user-generated content substantially enhances freedom of expression and freedom of information in the digital environment. Besides professional content that has been selected by traditional creative industries, UGC platforms offer access to an unprecedented variety of content for mainstream and niche audiences. This enhancement of freedom of expression and information is a central justification for the development of a pastiche rule that is capable of covering various forms of creative remix activities.

Turning to the second test of "no conflict with a normal exploitation", it is important to note that the CJEU held in *Stichting Brein (Filmspeler)* that a conflict with a normal exploitation arose from temporary acts of reproduction of protected works on a multimedia player with add-ons that provided links to illegal streaming websites because "that practice would usually result in a diminution of lawful transactions relating to the protected works."[54] To avoid a conflict with a normal exploitation, it thus seems necessary that legitimate forms of pastiche have sufficient features of their own – features that prevail over the original features of underlying third-party content that is used for the purpose of artistic engagement. Pastiches must not be mere copies or imitations that substitute demand for underlying original works. While, as indicated above, it seems inadequate to require pastiches to constitute copyright-protected works in their own right, they should have features that are distinguishable from the copyrighted expression in pre-existing works used as source materials.

At the same time, it seems clear that the test of "no conflict with a normal exploitation", as interpreted by the CJEU, does not require the exception to be confined to strictly non-commercial use. Long-standing EU copyright limitations that involve creative effort confirm this conclusion. The right of quotation laid down in Article 5(3)(d) ISD and the parody exemption following from Article 5(3)(k) ISD do not require that privileged use be of a non-

[52] Cf. CJEU, 10 April 2014, case C-435/12, *ACI Adam*, paras. 38-41, where the Court applied the three-step test to the exemption of digital private copying under Article 5(2)(b) ISD. In this context, the Court did not arrive at the conclusion that a private copying privilege with a broad group of beneficiaries and an impact on the whole spectrum of literary and artistic works, such as the Dutch private copying regime that had given rise to the preliminary questions in this case was impermissible because it failed to meet the test of "certain special case". Instead, the Court focused on a conflict with a normal exploitation and the risk of an unreasonable prejudice.

[53] CJEU, *Football Association Premier League/QC Leisure*, paras. 162-164; CJEU, *Painer*, para. 132; CJEU, *Deckmyn*, para. 26; CJEU, *Funke Medien NRW*, paras. 65-76; CJEU, *Poland*, para. 66; CJEU, *Spiegel Online*, paras. 50-54.

[54] CJEU, 26 April 2017, *Stichting Brein v Jack Frederik Wullems*, Case C-527/15, EU:C:2017:300, para. 70.

commercial nature. Quotations and parodies may fall within the scope of these copyright limitations even if they are published in commercial media, such as professional press publications. However, a quotation or parody may become excessive and impermissible if it predominantly consists of third-party content and adds very few features of its own.

In the context of the final test – "no unreasonable prejudice to legitimate interests" – it is important to point out that not each and every interest of right holders is relevant. Only "legitimate" interests are to be factored into the equation. Furthermore, not each and every prejudice to legitimate interests is relevant. Only "unreasonable" prejudices are not acceptable. The third step, therefore, offers several filters that transform it into a refined proportionality test: the legitimacy of the interests invoked by right holders are to be weighed against the reasons justifying the use privilege and the fundamental rights at stake.[55]

As already discussed in the context of the requirement of "certain special case", breathing space for artistic engagement with pre-existing works substantially enhances freedom of expression and freedom of information. Against this background, it is not "unreasonable" to develop a flexible pastiche rule capable of covering a broad spectrum of creative remix activities. With the introduction of a "catch-all" clause, as suggested by the German Federal Court of Justice, the CJEU can provide a proper basis for striking a fair balance between creative users' freedom of expression and information, and right holders' interest in the exploitation of their copyright. The need to reconcile competing fundamental rights – freedom of expression on the one hand, and the right to intellectual property on the other – offers a solid basis for the adoption of a flexible pastiche concept.

Overall, option 4 may thus pave the way for a catch-all exception that prevents an overly broad application of exclusive rights, avoids inroads into freedom of expression and safeguards legitimate forms of transformative use of original works in EU copyright law. Considering these beneficial effects, the ECS concludes that option 4 can guarantee a flexible but balanced approach that leads to a "fair balance", as envisaged by the CJEU.[56]

3. Question 2 – Users' intention

Intention should not be a requirement of lawful pastiches. It is not required for parodies – and, presumably, for caricatures – and should not be required for pastiches either.[57] Even accidental pastiches should be covered by the exception. As such, the legal concept of pastiche could embrace the various forms of art in an objective manner, and irrespective of intent. The ECS believes that the CJEU should accept the second solution developed by the German Federal Court of Justice, namely, that it is "sufficient for the pastiche character to be recognisable for a person familiar with the copyright subject matter who has the intellectual understanding

[55] Christophe Geiger, Reto Hilty, Jonathan Griffiths, Uma Suthersanen, Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law, 39 (6) *IIC*, 707-712.

[56] Arguably, a proper balancing of fundamental rights and the need to secure appropriate freedom of artistic expression inevitably leads to a clash of the right to forbid uses inherent to the exclusive adaptation right with creative reuses. This will require courts in the future to draw the line between permitted creative reuses of copyrighted work under the pastiche exception and the arguably blurry scope of the (unharmonized) adaptation right. A deeper discussion of the scope of the adaptation right is beyond the scope of this Opinion.

[57] To the same effect, see CJEU, 13 November 2018, *Levola Hengelo BV v Smilde Foods BV*, Case C-310/17, EU:C:2018:899, paras. 41-42.; CJEU, 12 September 2019, *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV*, Case C-683/17, EU:C:2018:899, para. 33-34 & 53.

required to perceive the pastiche". This would allow the pastiche exception to work as a neutral tool to support freedom of artistic expression.[58]

4. Conclusions

In light of the above, we suggest that the CJEU takes the following position with regard to the *Pelham* referral.

a) **Pastiche is an autonomous concept of EU law**. Article 5(3)(k) ISD should be read as an overarching provision including three forms of permitted use that share their underlying nature but shall be judged differently.
b) Pastiche **cannot be intended as a mere imitation of an artistic style.**
c) Differently from quotation but in line with parody, pastiche **should not require an explicit interaction with the original work**.
d) **The presence of humour or mockery cannot be a necessary requirement** for the application of the pastiche exception.
e) The expression resulting from the exercise of the pastiche exception **need not itself be an original work.**
f) The **intention of the user** to create pastiche **plays no role** in the review of the legality of any given use.
g) 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.
h) Overall the application 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**.

Drafting committee: Péter Mezei, Martin Senftleben, Caterina Sganga, Christophe Geiger.

Signatories:

Prof. Lionel Bently, Professor, University of Cambridge, United Kingdom

Prof. Estelle Derclaye, Professor of intellectual property law, University of Nottingham, United Kingdom

Prof. Séverine Dusollier, Professor, School of Law, Sciences Po, Paris, France

Prof. Christophe Geiger, Professor of Law, Luiss Guido Carli University, Rome, Italy

Prof. Jonathan Griffiths, Professor of Intellectual Property Law, School of Law, Queen Mary University of London, United Kingdom

Prof. Martin Husovec, Associate Professor, London School of Economics and Political Science (LSE), LSE Law School, United Kingdom

Prof. Martin Kretschmer, Professor of Intellectual Property Law, University of Glasgow and Director, CREATe, United Kingdom

[58] Even more, the pastiche exception might effectively guarantee the use of protected subject matter for purposes such as advertising, journalism or political critiques. It is, however, beyond the scope of this Opinion – that focussed on the *Pelham II* case – to discuss this argument.