

# Intertextuality and pastiche: the perfect recipe, or bland mediocrity?

## The EU copyright exception of pastiche in light of the *Pelham II* referral and AG Opinion

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### ABSTRACT

Remixes, fan art, fan fiction, and sampling are longstanding methods of cultural expression that now flourish in online spaces. These derivative forms of creation raise pressing questions for copyright law, particularly within the European Union's closed catalogue of exceptions and limitations. Central among them is the little-explored *pastiche* exception, introduced by Article 5(3) (k) of the InfoSoc Directive, alongside parody and caricature. While the meaning of parody has been clarified by the CJEU, the contours of pastiche remain uncertain. With the implementation of the DSM Directive obliging all Member States to adopt this exception, and recent cases such as *Pelham II* bringing the question of interpretation before the CJEU, the scope and meaning of pastiche have gained new relevance. This article argues that pastiche should be understood as an autonomous legal concept of EU law, encompassing a broad range of transformative uses where recognisable elements of pre-existing works contribute to the creation of new and noticeably different ones. Rejecting limiting requirements such as humour, stylistic imitation, or tribute, the article proposes that pastiche can function as a flexible balancing tool between rightholders' economic interests and users' freedom of expression. Properly interpreted, it may offer the EU a viable alternative to fair use in safeguarding contemporary creativity

### 1. INTRODUCTION

– *I don't get it. What does this mean?*  
– *Nobody tell them.*

This exact virtual conversation, and countless variations of it can be encountered all over the internet, in response to images, videos and texts alluding to previous works, sometimes multiple at the same time.<sup>1</sup> The understanding of the different layers of intertextuality creates, in many an internet user, sentiments of intellectual satisfaction, superiority and belonging. Fan art, art inspired by pre-existing works of art, is one of the most surefire ways any artist can achieve notoriety without even the need to self-promote actively. Countless songs remixing and sampling others are uploaded and mass consumed online. The author of this very article has had more than a hundred thousand people read her fictional stories without committing any effort other than to upload them to an internet platform, simply by virtue of the fact that they

incorporate characters of other authors' literary works, a practice also known as fan fiction.

With the internet having completely changed the way creative works are consumed, and users being able to create and make available their works more easily than ever, creative borrowing and derivation, practices as old as art itself, are more relevant than ever. In the contemporary digital environment, users play a dual role, as recipients of content and creators of content alike. Information society services base their design and business model on that dual role.<sup>2</sup>

But derivative creation does not only confine itself to internet spaces. Paintings that incorporate elements of previous visual works can be found in many museums, and their significance is all the richer for people that understand the reference(s) made. Rappers and other artists sample and quote melodies of their predecessors

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<sup>1</sup> Colloquially known as *memes*.

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<sup>2</sup> Report A8-0245/2018 of the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)), 160.

in new music. This article itself is, in fact, a pastiche of the author's master thesis, which in turn is a synthesis of various different sources, combined with personal opinions. In this new reality where creative borrowing is more wide-spread and prominent than ever, it is necessary for copyright law to account for those uses and achieve a fair balance between overt punitiveness that would unduly stifle creativity, and excessive impunity that would jeopardize holders' economic rights and undermine copyright at large.

Enter *pastiche*.

The EU pastiche exception was first introduced in 2001, as part of the closed catalogue of exceptions introduced by Directive 2001/29/EC (Infosoc Directive)<sup>3</sup>. Said exceptions aimed to strike a *fair balance* between the interests of rightholders and those of users.<sup>4</sup> Article 5(3) of said Directive granted Member States the discretionary power to implement any of the exceptions or limitations mentioned in said paragraph, to the economic rights of reproduction, distribution and communication to the public.<sup>5</sup> Each Member State was (almost)<sup>6</sup> free to choose the implementation of any exceptions they desired from the extensive catalogue, which was created taking *due account of the different legal traditions in Member States*.<sup>7</sup>

Pastiche is part of a 'three-pronged list' of exceptions listed in article 5(3)(k), the provision stating that Member States may provide for exceptions or limitations to the rights of reproduction, communication to the public and distribution in the cases of *use for the purpose of caricature, parody or pastiche*. Though the concept of parody has been clarified by the CJEU in *Deckmyn*,<sup>8</sup> no such definition can be found for caricature or pastiche in the legal texts or the case-law of the court of justice as of yet.

Until the DSM Directive, few countries had implemented the pastiche exception into their national copyright law. the concept of pastiche was largely overlooked by national legislations and legal academia alike.<sup>9</sup> For example, in his Opinion in *Deckmyn*, AG Cruz Villalón deemed it unnecessary to proceed with a further distinction of the three concepts of 5(3)(k) Infosoc, since *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*.<sup>10</sup>

Following the DSM Directive, all 27 Member States have implemented the pastiche exception in their national legislations.<sup>11</sup> Greece, Sweden Denmark, Cyprus, Poland, Italy, Austria, Czech Republic and Latvia limit the exception to user-generated content in OCSSPs.<sup>12</sup>

In his Opinion in *Pelham* (hereinafter referred to as *Pelham I*), AG Szpunar considered whether sampling might fall under article 5(3)(k) of the Infosoc Directive *with regard to the use of extracts from one phonogram in another phonogram*.<sup>13</sup> This, combined with the effect the DSM Directive had in the introduction of the pastiche exception to Member State national copyright laws and followed by Germany's (at the time of writing) pending referral made by the Bundesgerichtshof to the CJEU regarding the interpretation of the legal meaning of pastiche,<sup>14</sup> have created increased interest in the term.

To appropriately safeguard online user creative activities, there have been suggestions that the term could be used as a quasi-fair use clause, meaning a more flexible exception, that encompasses even creative borrowing not falling under other exceptions such as quotation, parody<sup>15</sup> etc., either for non-commercial purposes,<sup>16</sup> or with remuneration as suggested counterbalance.<sup>17</sup>

Since fair use clauses were deemed incompatible with EU copyright law,<sup>18</sup> however, such an interpretation might not be accepted,<sup>19</sup> though setting a broader scope for an already existing exception within the EU copyright *acquis* might not contradict the court's mandate.<sup>20</sup> German legislature envisioned a broad concept of pastiche, which, subject to a fair balance between the rights and interests of copyright holders and users of protected subject mat-

<sup>3</sup> Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc), OJ L 167/10.

<sup>4</sup> Infosoc, recital 31.

<sup>5</sup> *Ibid.*, articles 2, 3 and 4.

<sup>6</sup> Article 5(1) Infosoc introduces a mandatory exception for some temporary acts of reproduction.

<sup>7</sup> *Ibid.*, recital 32.

<sup>8</sup> Judgement in Case C-201/13, *Deckmyn and Vrijheidsfonds VZW v Vandersteen and Others* [2014] ECLI:EU:C:2014:2132.

<sup>9</sup> Frédéric Döhl, *The Concept of "Pastiche" in Directive 2001/29/EC in the Light of the German Case Metall auf Metall*, [Media in Action 37, 2017], 48.

<sup>10</sup> Opinion of Advocate General Cruz Villalón in Case C-201/13, *Deckmyn and Vrijheidsfonds*, ECLI:EU:C:2014:458, [46].

<sup>11</sup> Dr. Christina Angelopoulos, *Articles 15 & 17 of the Directive on Copyright in the Digital Single Market: Comparative National Implementation Report*, (2024), Centre for Intellectual Property and Information Law, <https://informationlabs.org/wp-content/uploads/2023/12/Full-DCDSM-Report-DrAngelopoulos.pdf>, Accessed 1 March 2025, 58.

<sup>12</sup> For a comprehensive overview of the implementation of the exception as of 2024 in 25 of the 27 Member States, see *ibid.* (n 11), 58.

<sup>13</sup> Opinion of Advocate General Szpunar in Case C-476/17, *Pelham GmbH and Others v Hütter and Another*, ECLI:EU:C:2018:1002., [70].

<sup>14</sup> Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 25 September 2023, *CG and YN v Pelham GmbH and Others*, C-590/23 (*Pelham II*).

<sup>15</sup> For a creative artistic borrowing to fall under parody, it needs to constitute an expression of humour or mockery, as per *Deckmyn*. For it to fall under quotation, it needs, *inter alia*, to have an intention of entering into dialogue with the original work.

<sup>16</sup> Bernd Justin Jütte, *The EU's Trouble with Mashups: From Disabling to Enabling a Digital Art Form* [Journal of Intellectual Property, Information Technology and Electronic Commerce Law 172, 2014], paras 82–84.

<sup>17</sup> Communia, *Policy Recommendations*, (2022), Communia, <https://comunia-association.org/policy-recommendations/> Accessed 15 May 2025, policy recommendation 7; Martin Senftleben, *Institutionalized Algorithmic Enforcement—The Pros and Cons of the EU Approach to UGC Platform Liability*, (FIU Law Review 14, 2020) 313.

<sup>18</sup> Judgement in Case C-476/17, *Pelham GmbH and Others v Hütter and Others*, ECLI:EU:C:2019:624, [63]–[65].

<sup>19</sup> In the 18/1/2025 CJEU hearing for *Pelham II*, AG Emiliou asked Germany whether the new copyright pastiche exception was an attempt to re-introduce free use through the back door.

<sup>20</sup> See Péter Mezei, *Knock, Knock, Knockin' on Transformiveness' Doors*, [International Review of Intellectual Property and Competition Law 55(4), 2024].

ter, encompasses a variety of transformative uses, such as mashups, remixes, fan art and fan fiction.<sup>21</sup>

In his Opinion in *Pelham II*,<sup>22</sup> released 17<sup>th</sup> of June, AG Emiliou already rejected such a broad interpretation,<sup>23</sup> as will be analysed further on.

This article will endeavor to suggested answers to the questions referred to the CJEU in *Pelham II*, as well as offer commentary on AG Emiliou's Opinion.

The questions referred to the CJEU by the German Federal Supreme Court (BGH) were:

1. *Is the provision limiting use for the purpose of pastiche within the meaning of Article 5(3)(k) of Directive 2001/29/EC (1) 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?*

## 2. MEANING IN EVERYDAY LANGUAGE AND PURPOSE OF THE PASTICHE EXCEPTION

Since the Infosoc Directive does not contain a definition of pastiche, the meaning and scope of the terms for which EU law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part, as the CJEU has consistently held.<sup>24</sup>

It follows that the definition of pastiche in lay terms must serve as the starting point of this investigation.

Such an endeavor, however, is not easy. The term has been used in a variety of ways with a plethora of different meanings.<sup>25</sup> According to Dyer, the word *pastiche* has two primary definitions: a kind of combination of aesthetic elements or a kind of aesthetic imitation. He argues that, often, pastiche entails an element of intention, present in most dictionary definitions,<sup>26</sup> and that it means to

be understood as a pastiche by those who perceive the work.<sup>27</sup>

Moreover, the term is in practice extremely elastic. Historically, it has initially been used with negative connotations as blank parody, or cheap imitation<sup>28, 29</sup>. Originating as an Italian culinary dish containing a mix of various ingredients,<sup>30</sup> *pasticcio* gained a metaphorical meaning in the Renaissance as a genre of painting that mixed and matched different techniques, often with deceitful intent.<sup>31</sup>

In the field of music, *pasticcio* was used in 18<sup>th</sup> century Italy to signify the creation of a new opera that compiled favourite arias of the composers and singers from various previous ones, with the creation of a new, overarching plot.<sup>32</sup> This practice was also adopted in the English ballad opera and the French *comédie en vaudevilles*.<sup>33</sup>

From Italy, the term travelled to France and became *pastiche*. Brunot makes a distinction between *originaux*, paintings that opened a new path in art and deserve to be studied, or authentic paintings. On the other side of the spectrum there are *copies*, faithful reproductions. Somewhere in the middle lie the *pastiches*, paintings that are *neither originals, nor copies, but counterfeits*.<sup>34</sup> Like the various different elements of the food *pasticcio* compose one single taste, so do the elements of pastiche compose one single truth. In early 20<sup>th</sup> century France, the term branched over to literature.<sup>35</sup> Genette observes that a pastiche is not necessarily a stylistic affair in the usual sense of the term: there is no rule against imitating also the content, the actual theme, of the model. Even further, he observes that style is form in general and therefore encompasses both the form of the expression *and* the content.<sup>36</sup>

Pastiche has, through time, been used as a synonym for many words:<sup>37</sup> adaptation, appropriation, collage, imitation, montage, parody, plagiarism.

In modern dictionaries, it is oft defined as stylistic imitation or collage: for example, the online version of the Oxford English Dictionary defines pastiche as *a novel*,

<sup>21</sup> Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, Case C-590/23 (*Pelham II*), [19].

<sup>22</sup> Opinion of Advocate General Emiliou in case C-590/23, *CG, YN v Pelham GmbH and Others*, (*Pelham II*) [2025], ECLI:EU:C:2025:452.

<sup>23</sup> *Ibid.*, [71].

<sup>24</sup> See, *inter alia*, Judgement in Case C-549/07, *Friederike Wallentin-Hermann v Alitalia — Linee Aeree Italiane SpA*, [2008], ECLI:EU:C:2008:771, [17]; *Deckmyn*, [19].

<sup>25</sup> Richard Dyer, *Pastiche* (2007), Routledge, 7–8.

<sup>26</sup> *Ibid.*, 2.

<sup>27</sup> *Ibid.*, 3.

<sup>28</sup> Ingeborg Hoesterey, *Pastiche: cultural memory in art, film, literature*, (2001), Indiana University Press, 1.

<sup>29</sup> Ferdinand Brunot, *Histoire de la langue française des origines à 1900*, tome VI:1:II, (1966), Armand Colin, 718, footnote 3.

<sup>30</sup> If you ever find yourselves in Greece, try its traditional Hellenic counterpart, a delicious pie comprising of pasta, minced meat and béchamel sauce.

<sup>31</sup> *Ibid.*, [n 28], 1.

<sup>32</sup> Peter J Burkholder, *A Brief History and Typology of Musical Borrowing and Reworking* in Enrico Bonadio and Chen Wei Zhu (eds), *Music Borrowing and Copyright Law: A Genre-by Genre Analysis*, (2023), Bloomsbury Collections, 34.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, [n 29], 717–718.

<sup>35</sup> A famous example is Marcel Proust's *Pastiches et Mélanges*, in the first part of which he relates the same story in the style of various famous authors.

<sup>36</sup> Gérard Genette, *Palimpsests: literature in the second degree*, (1997), University of Nebraska Press, 105.

<sup>37</sup> *Ibid.*, [n 28], 10.

*poem, painting, etc., incorporating several different styles, or made up of parts drawn from a variety of sources and a musical composition incorporating different styles; a medley.*<sup>38</sup> The online version of the Cambridge Dictionary offers a *piece of art, music, literature, etc. that intentionally copies the style of someone else's work or is intentionally in various styles, or the practice of making art in either of these ways* as a definition.<sup>39</sup> The Merriam-Webster dictionary defines it as a *literary, artistic, musical, or architectural work that imitates the style of previous work and a musical, literary, or artistic composition made up of selections from different works.*<sup>40</sup>

It is apparent that pastiche is something more than a mere adaptation. The latter is an extensive transposition of a particular work of works.<sup>41</sup> Essentially a transposition of a work to a different medium, a reinterpretation, a variation. It is the transformation of a work into another form of expression that is not tantamount to a simple reproduction<sup>42</sup> and does not result in the creation of a new work, but, rather in the modification of the original one.<sup>43</sup> Pastiche, on the other hand results in the “birth” of a new work.

Continuing with the second requirement of the CJEU's settled case law, the purpose of the pastiche exception will be discussed.

The purpose of all copyright exceptions to the exclusive economic rights,<sup>44</sup> is to ensure that a balance is struck between the four fundamental freedoms of the internal market: the freedoms of law and especially of property, including intellectual property, the freedom of expression and the public interest.<sup>45</sup> Copyright is not an absolute, inviolable right.<sup>46</sup> A fair balance must be struck between the rights and interests of different categories of right-holders, as well as users of protected subject matter.<sup>47</sup>

Article 5(3)(k) Infosoc is especially relevant to the freedom of expression, as laid out in article 11 CFEU, and the freedom of the arts and sciences, as laid out in article 13 CFEU.<sup>48</sup> In accordance with article 6(1) of the Treaty on the European Union, the CFEU holds equivalent status to the founding EU treaties.

All three concepts mentioned in the Infosoc article are transformative uses of pre-existing works, and thus artistic expressions that can be classified as manifestations of the freedom of expression.<sup>49</sup> As already mentioned, AG Cruz Villalón stated that *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.*<sup>50</sup> In the words of AG Szpunar, exceptions such as parody, caricature, and pastiche constitute an expression of the freedom of the arts because they *facilitate dialogue and artistic confrontation through references to pre-existing works.*<sup>51</sup>

The three concepts, while not tautological in their meaning, are grouped together due to the similarity of their legal *ratio*. Thus, the purpose of article 5(3)(k) specifically is to strike a fair balance between the interests and rights of persons referred to in Articles 2, 3 and 4 of Infosoc, and the freedom of expression, which includes the freedom of artistic expression,<sup>52</sup> of the users relying on the exception.<sup>53</sup> Whether said balance is achieved is for the national courts to determine on a case-by-case basis.<sup>54</sup> The application of all exceptions must safeguard their effectiveness as well as observe their purpose,<sup>55</sup> fully adhering to the fundamental rights enshrined in the CFEU.<sup>56</sup>

AG Szpunar, in his Opinion in *Pelham I*, argued that *fundamental rights [...] (are) a sort of ultima ratio which cannot justify departing from the wording of the relevant provisions except in cases of gross violation of the essence of a fundamental right.*<sup>57</sup> Although it is not unreasonable to view an expansive interpretation as potentially threatening for the protection of copyright and the EU *acquis*,<sup>58</sup> the adoption of a restrictive view on copyright exceptions would compromise necessary flexibility in Union copyright law and limit adjustment potential to new circumstances and technological advances.<sup>59</sup>

<sup>38</sup> *pastiche* in Oxford University Press, 2024.

<sup>39</sup> *pastiche* in Cambridge University Press, 2024.

<sup>40</sup> *pastiche* in Merriam-Webster, 2024.

<sup>41</sup> Linda Hutcheon, *A Theory of Adaptation* (2013), 2nd edn, Routledge, 7.

<sup>42</sup> Silke von Lewinski, *International Copyright Law and Policy*, (2008), Oxford University Press, 143.

<sup>43</sup> Although according to article 12 of the Berne Convention, authors enjoy the exclusive right of authorizing adaptations of their works, the right of adaptation is not harmonised at an EU level. While some Member States (e.g. Italy, Germany) have established a right of adaptation, others consider it a reproduction. For more on this see Eleonora Rosati, *Copyright in the EU: In Search of (In)Flexibilities* (Journal of Intellectual Property Law & Practice 9(7), 2014), 20.

<sup>44</sup> Infosoc, 2–4.

<sup>45</sup> *Ibid.*, recital 3.

<sup>46</sup> Judgment in C-516/17, *Spiegel Online v Volker Beck*, ECLI:EU:C:2019:625, [56]; *Pelham I*, [33].

<sup>47</sup> Infosoc, recital 31; *Pelham I*, [32].

<sup>48</sup> DSM, recital 70.

<sup>49</sup> *Deckmyn*, [27] as well as AG Opinion in *Deckmyn*, [70], for parody specifically.

<sup>50</sup> AG Opinion in *Deckmyn*, [46].

<sup>51</sup> AG Opinion in *Pelham I*, [95].

<sup>52</sup> *Ibid.*, [91]; *Pelham I*, [34].

<sup>53</sup> *Deckmyn*, [34].

<sup>54</sup> *Ibid.*, [35].

<sup>55</sup> *Spiegel Online*, [55].

<sup>56</sup> Judgment in Case C-469/17, *Funko Medien NRW GmbH v Bundesrepublik Deutschland*, ECLI:EU:C:2019:623, [76].

<sup>57</sup> AG Opinion in *Pelham I*, [98].

<sup>58</sup> Jonathan Griffiths, *Fair dealing after Deckmyn: the United Kingdom's defence for caricature, parody and pastiche*, in Megan Richardson, Sam Ricketson, *Research Handbook on Intellectual Property in Media and Entertainment* (2017), Edward Elgar Publishing Limited, 85.

<sup>59</sup> Lionel Bently and others, *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*, (International Review of Intellectual Property and Competition Law 50, 2019), 5.

### 3. SUGGESTED ANSWERS TO THE PELHAM II QUESTIONS

#### 3.1 Preliminary observations

As CJEU jurisprudence dictates, if a provision of EU law makes no specific reference to national legislation, the relevant concept is an autonomous concept of EU law, meaning that it must not be defined at a national level, but, rather, be given an independent and uniform interpretation throughout the EU.<sup>60</sup> This has been repeatedly stated by the CJEU, which has explicitly identified various terms as autonomous concepts of EU law.<sup>61</sup> The goal through their establishment is to achieve greater harmonisation,<sup>62</sup> a higher level of protection,<sup>63</sup> uniform legal interpretation, and establish the autonomy of EU law over the national laws of the Member States.

Nowhere in the provisions concerning pastiche is Member State legislation mentioned. Furthermore, parody, stated as an exception in the same letter of article 5(3) Infosoc, has already been explicitly declared an autonomous concept of EU law.<sup>64</sup>

It follows that pastiche, also, is an autonomous concept of EU law whose meaning is to be interpreted by the CJEU, and Member States cannot each give their own interpretation to it. Consequently, there is no concept of pastiche specific to each country or even for each artistic genre.<sup>65</sup> Just like parody (and all other copyright exceptions) holds the same meaning regardless of the medium of its expression, there is only one definition of pastiche that is to be applied to each specific case.

#### 3.2 Pastiche as a catch-all clause

The German BGH asks if pastiche should be *a catch-all clause at least for artistic engagement with a pre-existing work or other object of reference*.

There is nothing suggesting that pastiche should be limited to one, or a handful of sectors of the arts only. Furthermore, the historically diverse definition of the concept in everyday language refers to various art sectors, such as painting, music, literature, architecture etc. A broad use of the term would enhance the freedom of

expression and freedom of information of the beneficiaries.<sup>66, 67</sup>

This view is not without its dissenters. AG Szpunar expressed the opinion that the requirement of a copyright license of original works *not for purposes of interaction, but rather in the creation of new works bearing no relation to the pre-existing works* does not contradict the freedom of the arts, which *cannot guarantee the possibility of free use of whatever is wanted for creative purposes*.<sup>68</sup> It has also been argued elsewhere that such a reading is too broad,<sup>69</sup> contradicting the dogma of strict interpretation of copyright exceptions,<sup>70</sup> as well as the three-step test of 5(5) Infosoc, mostly the first requirement of *certain special cases*. Indeed, a pastiche exception encompassing any and all creative borrowing without making any further distinctions would be incompatible with the three-step test and the fair balance doctrine between copyright and other rights listed in the CFEU.

The three-step test dictates that all copyright exceptions should only be applied in accordance with three cumulative requirements: in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholders. This is to be considered both by legislators, while drafting the letter of the law, and, according to the most accepted opinion, by courts,<sup>71</sup> while deciding if a specific use fulfills the conditions of the exception. The purpose of the three-step test is to contribute to the fair balance between exclusive rights and exceptions and limitations.<sup>72</sup> Furthermore, the Court has increasingly started referring to the exceptions and limitations as *user rights*.<sup>73</sup>

The perceived disproportionately broad scope of the exception could be circumscribed with the aid of the test on a case-by-case basis.<sup>74</sup> If its conditions are not cumulatively satisfied, then the exception of pastiche cannot be applied.

In this regard, a proposed solution is that while the artistic engagement falling under pastiche can in principle be of any kind and relate to any type of pre-existing work, the derivative creation will need to be examined in order to differ noticeably from the original work.

In accordance with the definitions of pastiche in everyday language, this artistic engagement is specifically sug-

<sup>60</sup> E.g.: Judgement in Case C-467/08 *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)* [2010] ECLI:EU:C:1984:11[32].

<sup>61</sup> For a comprehensive catalogue, see Eleonora Rosati, *Copyright and the Court of Justice of the European Union* (2023), 2nd edn, Oxford University Press. 62–63.

<sup>62</sup> Infosoc, recital 4.

<sup>63</sup> *Ibid.*, recital 6.

<sup>64</sup> *Deckmyn*, [14]–[17].

<sup>65</sup> *Contra*: article 122-5 4o of the French CPI that which states that parody, caricature and pastiche should be judged *taking into account the rules of each artistic genre*.

<sup>66</sup> Emily Hudson, *The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting?* (2017) Intellectual Property Quarterly 2017(4), 2017, 4.

<sup>67</sup> Péter Mezei and others, *Opinion of the European Copyright Society on CG and YN v Pelham GmbH and Others, Case C-590/23 (Pelham II)* (European Copyright Society, 2024), para 2.4.

<sup>68</sup> AG Opinion in *Pelham I*, [96].

<sup>69</sup> *Ibid.*, [n 58], 85.

<sup>70</sup> *Ibid.*, [n 67], para 4.2.5.

<sup>71</sup> *Ibid.*, [n 61], 228.

<sup>72</sup> *Funke Medien*, [61]; *Pelham I*, [62].

<sup>73</sup> E.g. *Funke Medien*, [70]; *Spiegel Online*, [54].

<sup>74</sup> Of course, this presupposes that the three-step test can indeed be applied directly by courts.

gested to be the utilisation of original<sup>75</sup> elements of a pre-existing work in the making of a new creation.<sup>76</sup>

Therefore, the proposed answer is that pastiche is a catch-all clause at least for artistic engagement with a pre-existing work or other object of reference. This engagement includes sampling.

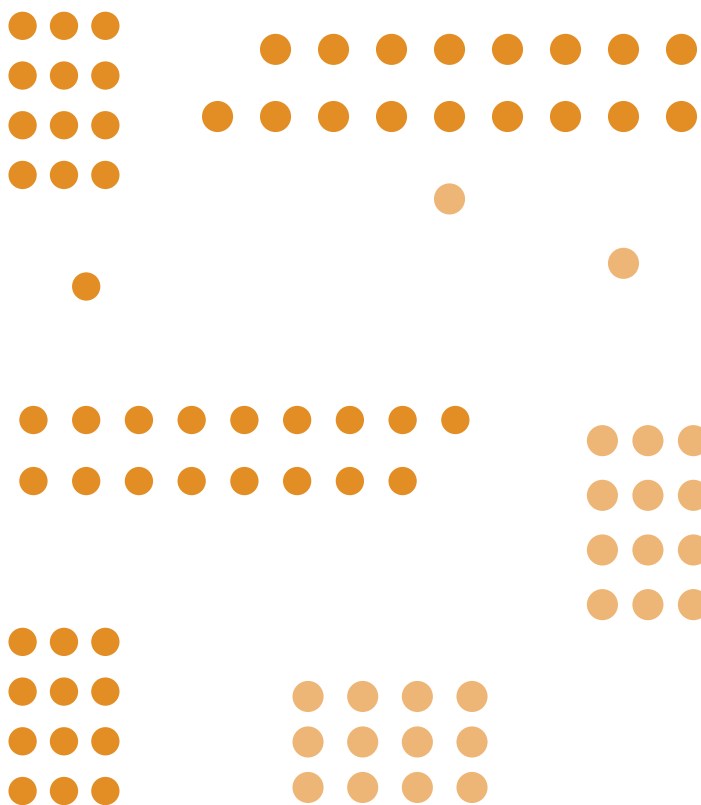
### 3.3 Requirement of humour

Next, the BGH inquires if the pastiche exception is *subject to limiting criteria*. The first criterion listed is a requirement of humour. In its judgement in *Deckmyn*, where a definition was given by the CJEU for parody as an autonomous concept of EU law, the essential characteristics were *first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery*.<sup>77</sup> In some legal traditions, such as France and Belgium, parody and pastiche are considered tautological or synonymous, with the result that pastiche is thought to also require humorous intent on the part of the pasticheur.<sup>78</sup>

Such an interpretation stems from the French definition of pastiche. The term is used synonymously to parody and caricature, according to one popular interpretation with only a difference in genre: parody refers specifically to music, pastiche to literature, and caricature to drawing.<sup>79</sup> This definition results in a large intersection of the three terms, leading to their grouping under the umbrella of parody.<sup>80</sup> On a similar vein, in his opinion in *Deckmyn*, AG Cruz Villalón also considered that parody, as a concept, also encompassed caricature and pastiche, and that further distinction between the three terms was not necessary.<sup>81</sup>

However, as has been pointed out elsewhere,<sup>82</sup> parody, caricature and pastiche are not situated within the letter of the same provision because they are tautological in meaning or synonyms with slight differences in nuance.<sup>83</sup> Rather, they are listed together because they are artistic expressions that derive from an original work. The grouping of the three terms is, therefore, taxonomical, and not indicative of three alternate words for the same broader concept.

A broader interpretation of the meaning of the term appears appropriate. The French interpretation, apart from potentially restricting pastiche to the literary genre, does not take into account contemporary artistic expres-



sions, such as audiovisual works.<sup>84</sup> Besides, not all definitions of pastiche in everyday language include a component of humorous intent.

Therefore, the proposed answer is that the concept of pastiche is not subject to the requirement of humour.

### 3.4 Requirement of stylistic imitation

Next, the BGH asks if pastiche is subject to the criterion of stylistic imitation. One of the most often encountered definitions of pastiche, perhaps the most common, is, indeed, an imitation of a style.<sup>85</sup> AG Szpunar was also in accordance with this interpretation. In his Opinion in *Pelham I*, he stated that *pastiche[...] consists in the imitation of the style of a work or an author without necessarily taking any elements of that work*.<sup>86</sup>

While this might be one of the many correct interpretations of pastiche in everyday language, it does not appear to be useful from a legal standpoint. As already established, for an exception to be applied, there needs to be a *prima facie* copyright infringement: without the rule, there is no need for the exception. According to the fundamental idea-expression dichotomy, copyright law does not protect ideas, only their concrete expressions.<sup>87</sup> Style

<sup>75</sup> The utilisation of non-original elements is irrelevant to copyright.

<sup>76</sup> *Ibid.*, [n 66], 2; *Ibid.*, [n 67], 4.

<sup>77</sup> *Deckmyn*, [33].

<sup>78</sup> Julien Cabay and Maxime Lambrecht, *Remix Prohibited: How Rigid EU Copyright Laws Inhibit Creativity*, [Journal of Intellectual Property Law & Practice 10, 2015].

<sup>79</sup> Henri Desbois, *Le droit d'auteur en France*, (1978), 3rd edn, Dalloz, § 254.

<sup>80</sup> Carine Bernault, André Lucas, Agnès Lucas-Schloetter, *Traité de la propriété littéraire et artistique* (2017), 5th edn, LexisNexis, para 480.

<sup>81</sup> AG Opinion in *Deckmyn*, [46].

<sup>82</sup> *Ibid.*, [n 67], para 2, question 1.

<sup>83</sup> *Ibid.*, [n 61], 3.

<sup>84</sup> Péter Mezei and others, *Oops, I Sampled Again ... the Meaning of "Pastiche" as an Autonomous Concept Under EU Copyright Law*, [International Review of Intellectual Property and Competition Law 55(8), 2024], para 3.2.2.

<sup>85</sup> *Ibid.*

<sup>86</sup> AG Opinion in *Pelham I*, footnote 30.

<sup>87</sup> The TRIPS agreement states in article 9(2) that *copyright protection shall extend to expressions and not to ideas*. Similarly, article 2 of the WCT also states that *copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such*.



is most commonly defined as *a way of doing something*,<sup>88</sup> or *manner/fashion*.<sup>89</sup> For a creation to be considered a work meriting copyright protection, it needs to be identifiable with sufficient precision and objectivity<sup>90</sup> and be original, in the sense that it is the author's own intellectual creation.<sup>91</sup> This means that the author has to make free and creative choices that reflect their personality.<sup>92</sup>

It follows that styles are outside the scope of copyright protection. In the opposing scenario, common techniques of each artistic sector, so-called *tools of the trade*, would perhaps falsely be attributed to and safeguarded by one specific rightholder, thus paralysing artistic freedom.

As already established and supported by legal scholars,<sup>93</sup> stylistic imitation is not the only meaning of the term pastiche, and there is no reason to limit it to this restrictive and not useful for copyright law definition.

Therefore, the proposed answer is that the concept of pastiche is not subject to the requirement of stylistic imitation.

### 3.5 Requirement of tribute.

A pastiche rendering tribute to a pre-existing work is synonymously described as a homage: A homage is defined

as *a work of art or entertainment which incorporates elements of style or content characteristic of another work, artist, or genre, as a means of paying affectionate tribute*.<sup>94</sup>

There is no definition of homage/tribute in the EU copyright *acquis*. Tribute, as AG Szpunar mentioned in his Opinion in *Pelham I*,<sup>95</sup> is a form of interaction between the original and the subsequent creation, a dialogue with the original work. Thus, tribute, in the legal sense, could be defined as a dialogue/interaction of a subsequent creation with the original work that is carried out with laudatory intention. Drawing analogy from quotation, that dialogue/interaction would need to be identifiable, otherwise the tribute could not exist.<sup>96</sup>

It is, in my opinion, doubtful if it is a needed requirement. Unlike parody, whose meaning in everyday language is uncontestedly connected to humour/mockery, it is not so for pastiche. The plethora of different meanings of the word through time does not permit such a uniformly accepted and certain definition.

Consequently, this requirement, as all the rest, needs to be interpreted purposively, in a way that assures a high level of protection for rightholders' right to property, which includes intellectual property, while simultaneously safeguarding users' freedom of expression and freedom of the arts.<sup>97</sup> It appears more appropriate to leave the interpretation of pastiche more 'neutral' (without requiring humour/mockery, or, at the other end of the spectrum, homage), so as to include a broader amount

<sup>88</sup> Style, in Cambridge University Press, 2024.

<sup>89</sup> Style, in Oxford University Press, 2024.

<sup>90</sup> Judgement in Case C-310/17, *Levola Hengelo BV v Smilde Foods BV*, [2018] ECLI:EU:C:2018:899, [40].

<sup>91</sup> Judgement in Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECLI:EU:C:2009:465, [37].

<sup>92</sup> Judgement in Case C-145/10, *Eva-Maria Painer v. Standard VerlagsGmbH*, [2011] ECLI:EU:C:2011:798, [89]–[90].

<sup>93</sup> *Ibid.*, [n 66], 2; *Ibid.*, [n 67], 3.

<sup>94</sup> Homage in Oxford University Press, 2024.

<sup>95</sup> AG Opinion in *Pelham I*, [64].

<sup>96</sup> *Pelham I*, [73]–[74].

<sup>97</sup> DSM, recital 70.

of artistic practices and safeguard artistic expression, and allow it to be, as supported above, a catch-all clause.<sup>98</sup>

While a homage can certainly fall under the definition of pastiche and is a good indicator for its existence, not all instances of pastiche are homage, and not all homages are pastiches.

Therefore, the proposed answer is that the concept of pastiche is not subject to the requirement of tribute.

### 3.6 Requirement of intention...

Moving on to the second question, the court asks if an intention of pastiche is necessary for pastiche to subsist. It is assumed that said intention does not lie in the user's awareness that what they are doing is called *pastiche*, but rather in the awareness that they are using protected elements of someone else's work and incorporating them into theirs.

A criterion of intention exists for the quotation exception,<sup>99</sup> as determined in the *Pelham I* judgement. The court agreed with AG Szpunar that a quotation must have the intention of *entering into dialogue with the original work*.<sup>100</sup>

No such requirement was explicitly presented in *Deckmyn* for parody. Nevertheless, the expression of humour or mockery that the CJEU set as a prerequisite, is implied in the judgement to lie in the intention of the parodist, rather than the effect of the parody. For parodies, if there is no intention of humour/mockery, even if the end result happens to be humorous, there is no parody to speak of. For pastiche, on the other hand, if no requirement of tribute is present, there is no need for the creative borrowing to have been an intentional, conscious choice for it to be defined as a pastiche. The absence of any subjective requirement (intention), would render the concept of pastiche more neutral, and by consequence, broader, able to encompass more art forms objectively, without having to rely on any assessment of the creators' psyches.<sup>101</sup>

Therefore, the proposed answer is that the concept of pastiche does not require the determination of an intention on the part of the user to use copyright subject matter for the purpose of a pastiche.

### 3.7 ...or recognisability for a person familiar with the protected subject matter?

The alternative the BGH offers is the criterion of recognisability by a person for a person familiar with the copyright subject matter who has the intellectual understanding required to perceive the pastiche.<sup>102</sup>

The CJEU held in *Pelham I*, regarding quotation, that there is no quotation if it is not possible to identify the

original work from the quotation in question.<sup>103</sup> The evocation of a pre-existing work for parody in *Deckmyn* also implies a recognisability requirement. If the original work is not recognisable within the parody, it is essentially devoid of function.

The same could reasonably apply for pastiche. After all, for an infringement claim to be sought, someone will, in most cases, recognise that elements of a work were taken (unless the fact of the pastiche is stated by the pasticheur themselves). In addition, enforcing copyright in a case where the artistic borrowing is not even perceptible might prove disproportionate to fundamental rights, such as the freedom of expression.<sup>104</sup>

Therefore, the proposed answer is 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 required to perceive the pastiche.

### 3.8 Additional criteria

As analysed before, a crucial parameter that must be taken into consideration for the drafting and implementation of copyright exceptions is the three-step test of article 5(5) Infosoc. The inclusion of any and all creative borrowing in the scope of the pastiche exception, without making any further distinction, would clearly contradict it.

Once again, the same criterion used in *Deckmyn* can find application here: namely, that the subsequent creation must noticeably differ from the one it derives from.<sup>105</sup> As pastiche belongs in the same three-pronged exception as parody, it is reasonable that the same degree of 'distance' from the original work should be required for it. If there is no creative distance, the use would perhaps qualify more as a quotation. For it to be considered a pastiche, the new work should be genuinely new and independent from the original one and have its own intellectual/aesthetic effect.

Again, drawing analogy from *Deckmyn*, there is no need for the new creation to fulfill the condition of originality, be reasonably attributed to a person other than the author or make specific reference to the original work.<sup>106</sup> It is evident that a case-by-case assessment of the effect produced is necessary to determine whether pastiche applies.

### 3.9. In sum: a proposed definition of pastiche.

Pastiche is the utilisation of original elements of a pre-existing work or other object of reference, in the making of a new, noticeably different creation, wherein the utilisation is recognisable by a person familiar with the copyright subject matter who has the intellectual understand-

<sup>98</sup> Till Kreutzer, *The Pastiche in Copyright Law*, (Gesellschaft für Freiheitsrechte e.V., 2022), para 2.4.

<sup>99</sup> Infosoc, 5(3)(d).

<sup>100</sup> *Pelham I*, [71].

<sup>101</sup> *Ibid.*, (n 84), 21; *Ibid.*, (n 67), para 3.

<sup>102</sup> A concept reminiscent of the *person skilled in the art* of patent law.

<sup>103</sup> *Pelham I*, [74].

<sup>104</sup> In Germany, for example, this type of use falls outside the scope of copyright via article 23(1) UrhG.

<sup>105</sup> *Deckmyn*, [33].

<sup>106</sup> *Ibid.*, (n 98), 17.

ing required to perceive the pastiche. Said creation is not subject to the requirement of humour, stylistic imitation, tribute, originality, or intention on the part of the user to create a pastiche.

#### 4. AG OPINION ON PELHAM II

In his opinion on *Pelham II*, delivered on June 17<sup>th</sup>, AG Emiliou suggested an interpretation of the pastiche exception while also weighing in on the fair balance mandate between the CFEU and the Infosoc Directive.

After an interesting analysis of the history of creative borrowing, as well as of its cultural significance in the digital age,<sup>107</sup> pastiche was deemed an autonomous concept of EU law, to be interpreted according to its meaning in everyday language while also taking into account the context in which it occurs and the purposes of the rules of which it forms part.<sup>108</sup> The AG also suggested that the derivative creation differ noticeably from the original work, as per *Deckmyn* regarding parody.<sup>109</sup>

However, after deeming that stylistic imitation is *at the heart of that conception of 'pastiche'*<sup>110</sup> and assessing that the alternate definition of combination of pre-existing original elements must not have played a very significant role in the implementation of pastiche in the Infosoc Directive,<sup>111</sup> he supported a definition of pastiche as stylistic imitation,<sup>112</sup> arguing that this was never the intention of the legislator when implementing pastiche,<sup>113</sup> and that a purposive interpretation of it to this effect would extend the provision to the point of distortion.<sup>114</sup>

The AG also rejected a definition of pastiche synonymous to parody and argued in favour of the distinct meaning of the three concepts of article 5(3)(k) Infosoc.<sup>115</sup>

Regarding the argument, also supported by the author, that stylistic imitation would not be useful from a legal standpoint, AG Emiliou held that *the line between the borrowing of unprotected elements and the reproduction of protected material is tenuous* and that *the elements borrowed, while 'stylistic', could still be regarded as original, especially when combined*.<sup>116</sup> Deeming recognisability an essential element of pastiche (otherwise the use would constitute, in his view, deceitful plagiarism),<sup>117</sup> he supported that an overt stylistic imitation of an original work *would allow for some leeway to reuse protected elements*

*from works or subject matter (in a 'recognisable' way) in their creation, so long as those elements serve an overt imitation of something else*.<sup>118</sup> In the alternative, parody and caricature would become mere sub-categories of pastiche.<sup>119</sup>

This looser interpretation of stylistic imitation to bypass the idea-expression dichotomy "hurdle" and render pastiche practically relevant appears interesting and appropriate. The limiting of pastiche to overt, textually signified imitations is also logically sound and sensible.

The AG concluded that pastiche is an artistic creation which (i) *evokes an existing work, by adopting its distinctive 'aesthetic language' while (ii) being noticeably different from the source imitated, and (iii) is intended to be recognised as an imitation*.<sup>120</sup>

In section C of his opinion, the AG weighed on the compatibility of the InfoSoc Directive with freedom of the arts. He acknowledged the inability of the current copyright regime to distinguish between extensive plagiarism and minimal usage of protected material that does not conflict with the normal exploitation of the work, punishing both equally.<sup>121</sup> The AG concluded in favour of the establishment of a more open-ended clause by the legislature, to remedy the current system's inflexibility and rigidity vis à vis derivative creations.<sup>122</sup>

While, on the one hand, AG Emiliou argued in favour of a free-use type clause, he concluded that pastiche, specifically, cannot be interpreted in a way that fulfills this function. He favoured a historical rather than a purposive interpretation of the provision, arguing that the legislators of Infosoc did not envision it in this way.

While this is undoubtedly so, the evolution of a term's interpretation to better accommodate new cultural practices is not, in the author's opinion, undesirable. This might better fulfill the purposes of the rules of which the provision forms part, compared to an interpretation in accordance with the purposes of the legislators of twenty-five years ago, when the internet was still in diapers.

The second argument as to why pastiche cannot serve such a purpose, namely, that the secondary meaning of pastiche in everyday language as a combination of original elements is secondary and not prominent at all, does not appear correct, as this interpretation of pastiche is present in many modern dictionaries, and has been used historically.<sup>123</sup>

It is true that, through such an interpretation, the exceptions of parody and caricature would be rendered redundant, but so would all of article 5(3)(k) upon the introduction of a fair-use clause, as was suggested.

<sup>107</sup> AG Opinion in *Pelham II*, section A.

<sup>108</sup> *Ibid.*, [44]–[45].

<sup>109</sup> *Ibid.*, [53].

<sup>110</sup> *Ibid.*, [54].

<sup>111</sup> *Ibid.*, [56].

<sup>112</sup> *Ibid.*, [59].

<sup>113</sup> *Ibid.*, [74].

<sup>114</sup> *Ibid.*, [78].

<sup>115</sup> *Ibid.*, [53], [62].

<sup>116</sup> *Ibid.*, [65]–[66].

<sup>117</sup> *Ibid.*, [61].

<sup>118</sup> *Ibid.*, [67].

<sup>119</sup> *Ibid.*, [69].

<sup>120</sup> *Ibid.*, [81].

<sup>121</sup> *Ibid.*, [106]–[108].

<sup>122</sup> *Ibid.*, [131]–[132].

<sup>123</sup> For example, as he, himself concedes in paragraph 55, in the Italian *pasticcio* opera.

The CJEU has held that free-use clauses are incompatible with the EU copyright legislative system, due to the closed-catalogue nature of copyright exceptions. It appears improbable that EU legislature will change its course and implement a free use clause any time soon. Thus, if AG Emiliou's interpretation is to be accepted, while some creative borrowing uses (the obvious, recognisable ones) will fall under pastiche, minimal creative borrowing such as the Kraftwerk sample used in *Nur Mir* will remain unprotected, although they impact the right-holders' interests minimally, if at all.

## 5. CONCLUSION

In the dawn of the information society, while the European Union strives to not fall behind with the times, when gigantic amounts of copyright protected material are more accessible than ever and user interaction with already existing works is at an all-time high, it is imperative for EU copyright law to take account of and acclimate to this new reality. This path the Union is called to follow is a dangerous one that must be trodden carefully. If copyright law is too strict and limiting on derivative creations, it runs the risk of becoming rigid and obsolete. On the other hand, if it is too lax, it runs the risk of undermining itself.

One must therefore proceed with caution. But in what direction?

The touchstone of copyright is originality. A work only deserves protection if it is the author's own intellectual creation. But what if this creation has used another as a stepping stone, an inspiration, and in the process borrowed original elements? It is true that there is no parthenogenesis in art, but how much borrowing is too much? Is any creative borrowing tantamount to a theft,<sup>124</sup> so that it all requires a license?

Such an assumption appears too harsh and disproportionate. To use the example of the *Metall auf Metall* case, the requirement of licensing for any kind of sampling or other form of musical borrowing will undoubtedly end up stifling creativity and disturbing the fair balance between copyright, neighbouring rights and artistic expression. If such is the direction of copyright laws, only the upper echelons of the music industry (and any other artistic industry) will have the financial ability to exercise true artistic freedom.

Even though a fair use clause is (rightly) deemed incompatible with the dogma and structure of EU copyright, this does not exclude the possibility of a more flexible interpretation of already existing copyright exceptions.

The perfect tool for EU copyright to safeguard and promote artistic freedom, while maintaining a fair balance

between copyright and user rights, may have been resting on the Union's hands, unnoticed, this entire time.

As all EU Member States have, as of now, implemented the pastiche exception in one form or another, and its definition is only now tentatively being shaped by (as of now not many) national courts, it might present the perfect vehicle for those purposes: that will depend on how the Court will reason in *Pelham II*.

The definition of the pastiche exception as an autonomous concept of EU law, proposed in this article, is one that encompasses a plethora of creative uses, allowing for the exercise of artistic freedom. It is argued to not be a sub-category of parody but rather hold its own, independent meaning. Lest it becomes impermissibly broad, it is circumscribed with the aid of the *noticeable difference* criterion of the derivative work from the original one, set by the CJEU for parody in *Deckmyn*. In addition, the three-step test is proposed to be applied by national courts on a case-by-case basis. The broad interpretation of an already existing exception (even in ways the original legislator could not have possibly envisioned) is, in the author's opinion, more realistic than AG Emiliou's suggestion that EU legislature adopts a different, flexible, open-ended clause.

In the (admittedly likely) event that a definition such as the one proposed in this thesis is deemed too broad by the CJEU, the one offered by AG Emiliou, while more conservative and exclusionary of minimal creative usage, appears appropriate and compliant with the three-step test.

Even though the legislators in the dawning of the new millennium surely did not envision for pastiche to be interpreted in such a manner, the once overlooked exception that was deemed unimportant and useless is now on the verge of transforming from an outcast ugly duckling to a beautiful swan. Its first rite of passage was realised with article 17(7) DSM. The final nudge in this direction, or, in the alternative, its hindering and return to irrelevance, rests in the hands of the CJEU. Let us hope that whatever the direction the Court decides to take, the result will be a happily ever after for rightholders and users alike.



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<sup>124</sup> In the landmark US sampling case *Grand Upright Music v. Warner Bros. Records, Inc.* [1991], the judge famously began his mandate by quoting the biblical commandment *Thou shalt not steal*.