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From Sampling to Generative AI: The Scope of Pastiche after Pelham II

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Abstract

Exceptions and limitations play a pivotal role in European copyright law and have been the subject of significant developments in the case law of the Court of Justice of the European Union. In this context, the judgment in *Pelham II* (C-590/23) is particularly noteworthy. First, it provides long-awaited clarification of the notion of "pastiche" under Article 5(3)(k) of Directive 2001/29/EC by recognising it as an autonomous concept of EU law and by articulating a structured framework governing its application. Secondly, the ruling may have far-reaching implications for the legal treatment of AI-generated outputs within the European copyright framework. This comment examines the Court's interpretation of pastiche as requiring an artistic or creative dialogue with a pre-existing work that is objectively recognisable, whilst rejecting any requirement of subjective intent on the part of the user. It further analyses the emergence of the "recognisability" criterion in the CJEU's recent case law and considers the broader implications of the judgment for transformative uses, artistic freedom, and the balancing of fundamental rights in EU copyright law. Particular attention is paid to the relevance of *Pelham II* for generative AI. This comment argues that the Court's flexible conception of pastiche may

encompass certain AI-generated outputs, whilst highlighting the continuing importance of the three-step test as a potential limiting principle.

Keywords: European copyright; exception; pastiche; artificial intelligence

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1 Introduction

In April 2026, the Court of Justice of the European Union (CJEU) delivered its judgement in C-590/23, *Pelham II*[1], thereby bringing to a close almost two decades of litigation in the well-known *Pelham* saga. This long-awaited judgement is significant in several aspects. Firstly, it provides clarification of the concept of "pastiche" as a copyright exception under European law, whilst also offering broader reflections on the possible treatment of AI-generated outputs within the European copyright framework. More importantly, the decision may result in the three-step test emerging as the key limiting principle governing AI-generated outputs following the Court's flexible conception of pastiche.

The dispute stems from the unauthorised use, by the producers of the song "*Nur mir*," released in 1997 and interpreted by Sabrina Setlur, of a musical sample lasting approximately two seconds, reproducing a rhythmic sequence from the 1977 track "*Metall auf Metall*" by the band Kraftwerk.

After lengthy proceedings before the German courts, marked by numerous decisions and reversals since 2004, the CJEU issued its first ruling in 2019 in *Pelham I*[2]. That judgement attracted considerable academic commentary[3]. It notably held that the use of a sound sample, even of a very short duration, constitutes an act of reproduction requiring the authorisation of the phonogram producer where the sample is recognisable[4]. The decision therefore introduced a

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[1] Case C-590/23 *CG and YN v Pelham GmbH* (Pelham II) ECLI:EU:C:2026:290.

[2] Case C-476/17 *Pelham GmbH v Hütter* (Pelham I) ECLI:EU:C:2019:624.

[3] Bernd Justin Jütte and João Pedro Quintais, 'The Pelham Chronicles: Sampling, Copyright and Fundamental Rights' (2021) 16 Journal of Intellectual Property Law & Practice 213 <https://doi.org/10.1093/jiplp/jpab040> accessed 11 May 2026; Martin Senftleben, 'Flexibility Grave – Partial Reproduction Focus and Closed System Fetishism in CJEU, Pelham' (2020) 51 IIC - International Review of Intellectual Property and Competition Law 751 <https://doi.org/10.1007/s40319-020-00940-z> accessed 11 May 2026.

[4] Pelham I (n 2) para 39.

novel criterion for infringement, namely the 'recognisability' test, according to which infringement will arise only where the protected subject matter remains recognisable within the allegedly infringing work. Although this criterion was initially confined to neighbouring rights in *Pelham I*, it was subsequently reaffirmed by the CJEU in *Mio and Konektra*, this time with regard to copyright[5]. The Court further adopted a restrictive interpretation of the quotation exception, holding that its application presupposes engagement with an identifiable work, thus excluding the form of sampling at issue in the present case. As the quotation exception was therefore deemed inapplicable, the dispute shifted towards the scope and interpretation of the pastiche exception.

In this context, the *Bundesgerichtshof* (Federal Court of Justice) referred, once again, the matter to the CJEU for a preliminary ruling, seeking clarifications on the scope of the pastiche exception provided for under Article 5(3)(k) of Directive 2001/29, the InfoSoc directive[6].

The referring court submitted two questions to the CJEU for a preliminary ruling.

By its first question, the referring court asks, in essence, whether Article 5(3)(k) of Directive 2001/29 must be interpreted as meaning that the exception for "pastiche", within the meaning of that provision, has a catch-all nature which covers, at the very least, any artistic engagement with an existing work, including in the form of sampling, without it being necessary for that engagement to be an expression of humour, a stylistic imitation or a tribute.

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[5] The "recognisability" test was subsequently reaffirmed by the CJEU in Mio and Konektra, this time in the context of copyright infringement, see Joined cases C-580/23 and C-795/23 *Mio and Konektra* ECLI:EU:C:2025:941.

[6] 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 [2001] OJ L167/10 (InfoSoc Directive).

By its second question, the referring court sought clarification as to whether use "for the purposes" of pastiche requires a finding that the user intended to use a copyright-protected work for the purposes of a pastiche, or is it sufficient that the pastiche character is recognisable to persons familiar with the copyright-protected work to which reference is made and has the requisite intellectual understanding to perceive the pastiche?

This comment argues that *Pelham II* represents a significant step forward in clarifying the scope of the pastiche exception, with potentially far-reaching consequences for the legal treatment of AI-generated outputs under EU copyright law. In particular, it contends that whilst the Court's flexible conception of pastiche may accommodate certain AI outputs, the three-step test is likely to emerge as the principal limiting principle in this context, especially where such outputs risk substituting for original works in existing markets.

2 Pastiche after Pelham II: Towards an Autonomous EU Law Concept

The decision begins by observing that the concept of "pastiche" is not defined in the InfoSoc Directive, and must therefore be regarded as an autonomous concept of EU law[7]. As a consequence, the notion requires a uniform interpretation throughout the European Union.

The Court further notes that pastiche is a rarely used term capable of encompassing a variety of meanings[8]. Certain definitions conceive pastiche as a form of concealed imitation, whereas others require an overt and recognisable

[7] *Pelham I* (n 2) para 34.

[8] On the various meanings attributed to the concept of pastiche, see European Copyright Society, 'Opinion of the European Copyright Society on CG and YN v Pelham GmbH and Others, Case C-590/23 (Pelham II)' (6 November 2024) < https://europeancopyrightsociety.org/wp-content/uploads/2024/11/ecs-opinion-pelham-ii-1.pdf> accessed 11 may 2026.

use of characteristic elements drawn from one or more pre-existing works within a new creation that imitates those works in order to establish an artistic or creative dialogue with them[9].

In order to determine the appropriate interpretation of the exception, the Court must also consider the broader context in which the notion of pastiche operates, together with the objectives pursued by Article 5(3)(k) of Directive 2001/29/EC.

First, the pastiche exception is included alongside caricature and parody within the same provision. Although those concepts share common characteristics, notably the reference to a pre-existing work and the possible presence of humour or mockery, the Court emphasises that they nonetheless remain distinct concepts. The EU legislature intended to recognise three separate categories of use, and the interpretation adopted must preserve the practical effectiveness (*l'effet utile*) of each exception so as to avoid rendering them legally redundant[10].

The Court further clarified that the notion of pastiche cannot extend to disguised reproductions of protected works or to plagiarism. Rather, the concept presupposes an open and recognisable use of protected subject matter as such[11].

Against this background, the CJEU proceeds to define the concept of pastiche. The Court first rejects the proposition that pastiche constitutes a residual or catch-all exception. This notion covers "creations which evoke one or more existing works, while being noticeably different from them, and which uses […] some of those works' characteristic elements protected by copyright"[12].

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[9] *Pelham I* (n 2) paras 35-37.
[10] *Ibid* paras 40-41.
[11] *Ibid* para 49.
[12] *Ibid* para 58.

Without such differentiation, the exception would be devoid of independent purpose. Moreover, the use must "engage with those works in an artistic or creative dialogue that is recognisable as such"[13].

According to the Court, this dialogue may take various forms, including, in particular, open stylistic imitation, tribute, or humorous or critical engagement with the referenced works[14]. Significantly, the conception of pastiche adopted in *Pelham II* appears broader and more flexible than that previously associated with parody. Humour is no longer treated as a defining element of the exception, but merely as one possible manifestation thereof. Furthermore, the forms that such creative dialogue may assume are not exhaustive, as demonstrated by the Court's use of the expression "in particular"[15]. Within this framework, the Court expressly acknowledges that sampling is, in principle, capable of falling within the scope of the pastiche exception[16].

As noted by A. Guadamuz[17], the decision makes it then possible to derive a structured test for determining whether a use falls within the scope of the pastiche exception, composed of four cumulative elements:

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[13] *Ibid*.

[14] *Ibid* paras 50- 56. As previously noted, the requirement of engagement or "dialogue" with the referenced work had already been identified by the CJEU in Pelham I as a condition for the application of the quotation exception, see Pelham I (n 2) paras 71-73.

[15] *Ibid* paras 53 and 58.

[16] *Ibid* para 55.

[17] Andres Guadamuz, 'Pastiche or Cliché? What Pelham II Might Mean for AI Outputs' (TechnoLlama) <https://www.technollama.co.uk/pastiche-or-cliche-what-pelham-ii-might-mean-for-ai-outputs> accessed 11 May 2026. The structure of the test created by the judgements is not without recalling the notion of transformative use under the US fair use doctrine. The transformative nature of AI-generated outputs is currently the subject of significant litigation in the United States.

> (1) the evocation of an existing work; (2) a noticeable difference from it; (3) the use of characteristic, copyright-protected elements of that work; and (4) an engagement in an artistic or creative dialogue that is recognisable as such.

More importantly, the Court clarified that it is irrelevant whether the user intended to create a pastiche. What matters instead is whether the pastiche character of the use is recognisable to a person familiar with the original work[18], thereby extending the "recognisability" test developed in the CJEU's recent case law.

3 The "Person Familiar with the Existing Work"

Another noteworthy aspect of the judgment lies in the Court's reliance on the perspective of a "person who is familiar with [the] existing work and who has the requisite intellectual understanding"[19] in order to determine whether a use may qualify as a pastiche.

According to the CJEU, the pastiche character of a work must therefore be recognisable from the standpoint of such a person familiar with the source material from which the protected elements are borrowed. Is EU copyright law witnessing the emergence of its own fictional legal person? Other branches of intellectual property law are already structured around similar normative figures, such as the "person skilled in the art" in patent law, the "average consumer" in trademark law, or the "informed user" in design law. As Eleonora Rosati observes, the Court's formulation may also assist in "elucidating the (puzzling) recognisability standard embraced in Pelham I and, more recently, in

18 *Ibid*.
19 *Pelham I* (n 2) para 62.

Mio/Konektra"[20]. In those decision, the CJEU's relied on recognisability as a criterion for infringement without expressely detailing how this criterion should be assessed. By referring to a "person familiar with the work" in *Pelham II*[21], the Court seems to provide a more concrete criterion for assessing if protected elements are recognisable.

4 The Purpose of the Pastiche Exception and its Balancing Against Other Rights

The decision also addresses the thorny issue of balancing intellectual property rights against competing rights, and especially fundamental rights. In examining the purpose of the pastiche exception, the Court reiterates that Article 5(3)(k) of Directive 2001/29/EC seeks, particularly within the digital environment, to strike a fair balance between, on the one hand, the interests of copyright and related rights holders in the protection of their intellectual property rights and, on the other hand, the protection of the interests and fundamental rights of users of protected works, including freedom of expression and freedom of the arts, guaranteed respectively by Articles 11 and 13 of the Charter of Fundamental Rights of the European Union, as well as the general interest[22].

The Court hence confirmed that the application of the exception requires a balancing exercise between these competing rights and interests. Since the right to intellectual property, protected under Article 17(2) of the Charter, is not absolute, the concept of pastiche must not be interpreted restrictively, but rather

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[20] Eleonora Rosati, 'CJEU Delivers Pastiche-Style Judgment on … Pastiche' (The IPKat) <https://ipkitten.blogspot.com/2026/04/cjeu-delivers-pastiche-style-judgment.html> accessed 11 May 2026.

[21] *Pelham I* (n 2) para 62.

[22] *Ibid* para 45.

in a manner consistent with the freedoms and objectives underpinning Article 5(3)(k)[23].

5 The Curious Absence of the Three-Step Test

Another distinctive feature of the decision is the absence of any explicit reference to the three-step test.

Article 9(2) of the Berne Convention first introduced the three-step test during the 1967 Stockholm Revision, confining permissible reproductions to certain special cases that neither conflict with the normal exploitation of the work nor unreasonably prejudice the legitimate interests of the author[24]. This formulation was adopted into EU copyright law through Article 5(5) of Directive 2001/29/EC[25], which applies horizontally across the exceptions and limitations provided for under that Directive.

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[23] *Ibid* para 48. Prior to 2019, the CJEU endorsed a strict interpretation of copyright exceptions and limitations, see for example, Case C-265/16 *VCAST Limited v R.T.I. SpA* ECLI:EU:C:2017:913, para 32. Since then, however, the Court's case law has appeared to adopt a more flexible approach, maintaining the principle of a closed list of exceptions under EU copyright law while interpreting certain exceptions in light of competing fundamental rights and the requirement to ensure their effectiveness, see, in this regard, Case C-469/17 *Funke Medien v Bundesrepublik Deutschland* ECLI:EU:C:2019:623, paras. 69–71 ; Case C-516/17 *Spiegel Online GmbH v Volker Beck* ECLI:EU:C:2019:625, paras. 53–55. On this notion, see also, Elena Izyumenko, 'Op-Ed: "Pelham II and the Notion of Pastiche in EU Copyright Law: Is the Court of Justice Finally Giving Creative Reuse Some Breathing Space?"' (EU Law Live, 16 April 2026) <https://eulawlive.com/op-ed-pelham-ii-and-the-notion-of-pastiche-in-eu-copyright-law-is-the-court-of-justice-finally-giving-creative-reuse-some-breathing-space/> accessed 12 May 2026.

[24] Article 9, paragraph 2, Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, as amended on September 28, 1979).

[25] On the three step, see Daniel Jongsma, 'The Nature and Content of the Three-Step Test in EU Copyright Law: A Reappraisal' The Routledge Handbook of EU Copyright Law (Eleonora Rosati, Routledge 2021) <https://papers.ssrn.com/abstract=3665934> accessed 9 June 2026; Richard Arnold and Eleonora Rosati, 'Are National Courts the Addressees of the InfoSoc Three-Step Test?' (2015) 10 Journal of Intellectual Property Law & Practice 741 <https://doi.org/10.1093/jiplp/jpv138> accessed 9 June 2026.

Despite this, the Court made no express reference to the three-step test in *Pelham II*. However, some commentators[26] note that by rejecting an interpretation of the pastiche exception that would authorise any form of more or less creative reuse, and by emphasising the requirement of an objective justification for the use at issue, the Court implicitly acknowledged the limits of the concept and, consequently, the boundaries of the resulting defence. The three-step test might also play an important role regarding AI-generated outputs.

6 The Implications of Pelham II for AI-Generated Outputs

Lastly, the judgement is of particular significance in relation to one of the most topical issues in contemporary copyright law, namely the legal treatment of AI-generated outputs. Indeed, where AI-generated outputs incorporate or evoke protected works, one possible defence to infringement under EU law may lie in the application of the pastiche exception. Prior to *Pelham II*, however, the concept of pastiche remained largely undefined, leaving considerable uncertainty as to its scope and practical application.

The test articulated by the Court appears capable of applying to a significant number of outputs generated by generative AI systems. As A. Guadamuz observes, the definition adopted by the Court is sufficiently broad to encompass a substantial proportion of what generative AI systems actually do[27]. Indeed, many generated outputs may evoke pre-existing works while simultaneously presenting perceptible differences from them, incorporating recognisable copyright-protected elements, and engaging in a form of artistic or creative dialogue with the referenced works. Recent examples illustrate this

[26] Rosati (n 20).
[27] Guadamuz (n 17).

phenomenon. For instance, in 2025, OpenAI unveiled an image-generation tool integrated into ChatGPT capable of producing visuals inspired by recognisable artistic universes, including the aesthetic associated with Studio Ghibli. Although copyright law does not protect artistic style as such, users rapidly generated images closely evoking the visual identity of Ghibli's works whilst differing in their specific expression and composition.

Such outputs may therefore satisfy several of the criteria identified by the Court in *Pelham II*, notably the evocation of an existing work, perceptible differentiation, and the existence of a recognisable creative dialogue with the referenced material. These outputs may also incorporate recognisable copyright-protected elements of the referenced works themselves, thereby fulfilling all the conditions of the test, and making reliance on a copyright exception necessary to avoid infringement. Nevertheless, the criteria established by the Court should not be understood as legitimising all forms of AI-generated content. In particular, outputs amounting merely to the reproduction or regurgitation of memorised[28] content would likely remain excluded from the scope of the exception, since such uses would not involve any genuine artistic or creative dialogue, but rather mere copying. Indeed, as noted beforehand, the Court expressly clarified that the notion of pastiche cannot extend to disguised reproductions of protected works or to plagiarism[29].

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[28] Memorisation is a phenomenon that may occur in foundation models, including large language models. It refers to the ability of a model to memorise portions of its training data and, when appropriately prompted, to reproduce certain of those data verbatim in its outputs. Some authors further argue that where memorisation occurs, the training data are not merely reproduced in the model's outputs, but are also encoded within the model's parameters themselves. See on this issue, Nicholas Carlini and others, 'Quantifying Memorization Across Neural Language Models' (arXiv, 6 March 2023) <https://doi.org/10.48550/arXiv.2202.07646> accessed 9 June 2026; A Cooper and James Grimmelmann, 'The Files Are in the Computer: On Copyright, Memorization, and Generative AI' (2025) 100 Chicago-Kent Law Review 141 <https://scholarship.kentlaw.iit.edu/cklawreview/vol100/iss1/9> accessed 9 June 2026.

[29] *Pelham I* (n 2) para 49.

A further difficulty arises from the interaction between the objective recognisability test established in *Pelham II* and the specific nature of AI-generated outputs. Under the Court's approach, subjective intent is irrelevant; what matters is whether the pastiche character of the use is recognisable to a person familiar with the referenced work. However, the application of this criterion becomes more complex in the context of generative AI. The judgment leaves unresolved the question from whose perspective recognisability should be assessed, and at what stage of the creative process. If the relevant perspective is that of the user prompting the system, doubts may arise as to whether that person possesses sufficient familiarity with the referenced works, particularly where outputs are generated with limited human involvement. Indeed, AI systems are often described through the distinction between the training phase and the output or deployment phase. Although this distinction is technically simplified, it remains useful for understanding the general functioning of generative AI systems. Broadly speaking, the training phase consists in the development of the model by the provider, including the design of the model's architecture, the curation of training datasets, and fine-tuning processes. This is then followed by the deployment phase, during which users interact with the system by prompting it in order to generate outputs, often with limited human involvement. Consequently, users generally have no control over the composition of the training data. As a result, prompting the system may trigger an engagement with a particular protected work even where no such engagement was intended by the user, and despite the relatively limited degree of intervention exercised by them in the generation process.In this respect, the framework articulated by the Court, seemingly conceived with human acts of creation in mind, may ultimately require further judicial refinement or legislative clarification in order to accommodate the realities of AI-generated content.

However, as A. Guadamuz[30] further notes, Article 5(5) of Directive 2001/29/EC and the three-step test continue to operate in the background as important limiting principles. Even where a use *prima facie* satisfies the requirements of the pastiche exception, it must still not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the rightsholder. From this perspective, large-scale commercial AI outputs capable of substituting for original works within their natural market may remain vulnerable under the third step of the test. Generative AI systems are capable of producing substantial volumes of content at minimal cost, including outputs that may compete directly with works created by human authors. Where such outputs are generated through systems trained on protected works and reproduce recognisable elements thereof, they may risk conflicting with the normal exploitation of those works, particularly if they operate as market substitutes for commissioned artistic. Moreover, the large-scale production and commercial dissemination of such outputs could cause unreasonable prejudice to the legitimate interests of rightholders, especially where the economic value of their works is affected without corresponding authorisation or remuneration. In such circumstances, even if a use were *prima facie* capable of qualifying as a pastiche under *Pelham II*, it could nonetheless fail to satisfy the conditions imposed by the three-step test.

Similar concerns have also been expressed in academic commentary[31], which emphasises that the three-step test may become the principal, if not the sole, remaining constraint preventing AI-generated outputs from being regarded as lawful pastiches where the exception does not require any specific intention

[30] Guadamuz (n 17).

[31] Söğüt Atilla-Aydın, 'ECS's Opinion on Pelham II and Its Potential Implications for AI-Generated Pastiches – Part 2' (The IPKat) <https://ipkitten.blogspot.com/2025/01/ecss-opinion-on-pelham-ii-and-its.html> accessed 12 May 2026.

on the part of the user, as is the case under the approach adopted in *Pelham II*. Accordingly, the Court's silence on the matter should be approached with caution, as the three-step test remains highly relevant. This context underlines the growing importance of the three-step test, which appears to constitute one of the most suitable tools for addressing disruptive uses in copyright law.

The European Parliament's Voss Resolution of March 2026 reflects precisely this tension, calling on the Commission to prevent infringements arising from AI-generated outputs whilst ensuring that lawful exceptions, including pastiche, remain available. The Resolution's explicit mention of pastiche in this context suggests an emerging awareness that the exception may serve as a defence for certain AI outputs[32].

7 Concluding Remarks

While the Pelham saga may now have come to an end, *Pelham II* constitutes a landmark ruling in EU copyright law and, more specifically, in the interpretation of the exceptions and limitations provided for under Directive 2001/29/EC. By recognising pastiche as an autonomous concept of EU law and articulating a structured framework for its application, the CJEU has provided long-awaited clarification of what had, until now, remained a blurry and uncertain notion.

At the same time, *Pelham II* is likely to assume particular significance in the context of ongoing debates surrounding AI-generated outputs. The judgment offers a conceptual framework capable of accommodating certain forms of AI-assisted or AI-generated content, while reaffirming that disguised reproductions

[32] European Parliament resolution of 3 February 2026 on copyright and generative artificial intelligence – opportunities and challenges (2026/2051(INI)) P10_TA(2026)0066, https://www.europarl.europa.eu/doceo/document/TA-10-2026-0066_EN.html accessed 12 May 2026.

and acts of plagiarism remain excluded from the scope of lawful pastiche. In this context, however, the three-step test appears likely to assume a central role in the near future, particularly where AI-generated outputs may compete with or substitute for original works within existing markets.