

Case C-590/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

25 September 2023

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

14 September 2023

Applicant and appellant in the appeal on a point of law:

CG

YN

Defendant and respondent in the appeal on a point of law:

Pelham GmbH

SD

UP

Subject matter of the case in the main proceedings

Infringement of copyright and related rights resulting from using extracts from another person's phonograms by means of 'sampling'

Subject matter and legal basis of the reference

Request for a preliminary ruling under Article 267 TFEU concerning the interpretation of Article 5(3)(k) of 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

Questions referred

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?

Provisions of European Union law

Article 5(3)(k) of Directive 2001/29

National legislation cited

Paragraph 51a of the Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights, ‘the UrhG’)

Brief summary of the facts and procedure

- 1 In 1977, the group ‘Kraftwerk’, the members of which included the first applicant and the predecessor in law to the second applicant, published a phonogram featuring the song ‘*Metall auf Metall*’. The second and third defendants composed the song ‘*Nur mir*’, which the first defendant recorded on phonograms released in 1997.
- 2 The applicants contend that the defendants electronically copied (‘sampled’) approximately two seconds of a rhythm sequence from the song ‘*Metall auf Metall*’ and used that sample in a continuous loop in the song ‘*Nur mir*’ although it would have been possible for them to play the adopted rhythm sequence themselves. The applicants claim that as the phonogram producers, the defendants thus infringed their copyright-related right. The applicants brought an action against the defendants, inter alia seeking a prohibitory injunction, the provision of information and the surrender of the phonograms for the purposes of their destruction.
- 3 The Landgericht (Regional Court) upheld the action and the defendant’s appeal was dismissed. Following an appeal on a point of law (*Revision*) brought by the defendant, the case was referred back to the appellate court for re-examination. After the appeal was dismissed a second time and the appeal on a point of law was

unsuccessful, the Bundesverfassungsgericht (Federal Constitutional Court, Germany) overturned the judgments in the appeal on a point of law and the second appeal and referred the case back to the referring court. In the context of the third appeal proceedings on a point of law, the latter referred questions to the Court of Justice for a preliminary ruling, to which the Court replied (judgment of 29 July 2019, C-476/17). By the third judgment on appeal on a point of law, the Senate hearing the defendants' appeal on a point of law overturned the appeal court's decision and referred the case back to the appeal court for a further hearing and decision.

- 4 The appeal court changed the judgment of the Regional Court to the effect that the defendants were requested to provide information on the number of phonograms produced and/or delivered between 22 December 2002 and 7 June 2021 with sound recordings of the title '*Nur mir*' as well as to surrender copies of those phonograms for the purposes of their destruction to the extent that their liability to pay damages was established; in all other respects, it dismissed the action. By their appeal on a point of law brought before the referring court, the applicants maintain their claims with effect from 7 June 2021. The defendants contend that the appeal on a point of law should be dismissed.

Brief summary of the basis for the reference

- 5 The success of the appeal on a point of law depends on the interpretation of Article 5(3)(k) of Directive 2001/29.
- 6 The appeal court denied any infringement of the law for the period after the entry into force of Paragraph 51a of the UrhG on 7 June 2021. It held that the claim for a prohibitory injunction was unfounded and that the claims for information, for surrender for the purposes of destruction and for determination of damages did not exist (any longer) from 7 June 2021, because the inclusion of the rhythm sequence from the title '*Metall auf Metall*' by means of sampling was a pastiche within the meaning of the first sentence of Paragraph 51a of the UrhG in the version in force from that date.
- 7 The appeal on a point of law must be upheld if the appeal court erred in holding that the inclusion of the rhythm sequence from the title '*Metall auf Metall*' by means of sampling is use for the purpose of pastiche permitted in accordance with the first sentence of Paragraph 51a of the UrhG in the version in force from 7 June 2021, with the result that there is no infringement of the copyright-related rights invoked by the applicants as producers of phonograms or performers or of the first applicant's copyright.
- 8 According to the referring court, the appeal court did not err in law in finding that the applicants' rights as producers of phonograms and performers were infringed and that the rhythm sequence reproduced is a musical work capable of being protected by copyright.

- 9 Under the first sentence of Paragraph 51a of the UrhG, it is permitted to reproduce, distribute and communicate to the public a published work for the purpose of caricature, parody and pastiche. This provision is applicable *mutatis mutandis* to the copyright-related rights of the performer and of the phonogram producer.
- 10 Paragraph 51a of the UrhG transposes Article 5(3)(k) and (4) of Directive 2001/29 and must therefore be interpreted in conformity with the directive.
- 11 Given that the disputed reproduction of the rhythm sequence does not fulfil the conditions of a caricature or parody of the song '*Metall auf Metall*', it is decisive in the present case whether the contested reproduction was made for the purpose of pastiche within the meaning of Paragraph 51a of the UrhG, read in conjunction with Article 5(3)(k) of Directive 2001/29.
- 12 On the first question: It is necessary to clarify whether the provision limiting use for the purpose of pastiche within the meaning of Article 5(3)(k) of Directive 2001/29 is a catch-all clause at least for artistic engagement with a pre-existing work or other object of reference, including sampling, and whether the concept of pastiche is subject to limiting criteria, such as the requirement of humour, stylistic imitation or tribute.
- 13 The appeal court did not rule on the usual meaning of the concept of 'pastiche' in everyday language in the Member States of the European Union. The range of the meaning of the concept of 'pastiche' in the everyday language of many Member States appears to range from stylistic imitation to recombining arrangements or new compositions of already existing material of foreign origin. What all meanings appear to have in common, however different they may be in detail, is the characteristic of referring to something already in existence.
- 14 The fact that pastiche has been regulated in a limiting provision together with parody and caricature may suggest that pastiche, parody and caricature have some essential characteristics in common. According to the case-law of the Court (judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, paragraph 20), the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and secondly, to constitute an expression of humour or mockery. However, a parody does not necessarily display an original character of its own.
- 15 Accordingly, an essential characteristic of pastiche in any event is to be seen in the fact that it evokes an existing work while being noticeably different from it. However, it appears doubtful whether it is also an essential characteristic of pastiche, like parody and caricature, to constitute an expression of humour or mockery, or to imitate the style of copyright subject matter or make reference in the form of a tribute. Since Article 5(3)(k) of Directive 2001/29 contains an exception to the rights provided for in Articles 2 and 3 of the directive, it must be

interpreted strictly; however, that interpretation must enable the effectiveness of the exception thus circumscribed to be safeguarded and its purpose observed.

- 16 The objective of the ‘pastiche’ exception might suggest that this limiting provision be seen as a catch-all clause, at least for artistic engagement with a pre-existing work or other object of reference, including sampling, which does not require any other limiting criteria. The Court recalls, in that regard, the objectives of Directive 2001/29 in general, which include a harmonisation which will help to implement the four freedoms of the internal market, and the achievement of a fair balance between, in particular, the rights and interests of authors on the one hand, and the rights of users of protected subject matter on the other (see, to that effect, judgment, C-201/13, paragraphs 25 and 26).
- 17 Accordingly, the ‘pastiche’ exception could potentially apply in the event of artistic engagement with the work used. The pastiche limitation could be understood as a general limitation of artistic freedom.
- 18 The rights of copyright holders, phonogram producers and performers provided for in Articles 2 and 3 of Directive 2001/29 enjoy the protection of intellectual property under Article 17(2) of the Charter of Fundamental Rights of the European Union. On the other hand, any use of works or other protected subject matter for the purpose of caricature, parody or pastiche may fall within the scope of the protection of freedom of expression or freedom of the arts. Thus, the technique of ‘electronically copying sound samples’ (sampling), at issue in the present case, where a user takes a sound sample of a phonogram and uses it to create a new work, is a form of artistic expression which falls within the scope of the freedom of the arts protected by Article 13 of the Charter of Fundamental Rights of the European Union.
- 19 When introducing the new limitation laid down in Paragraph 51a of the UrhG, the German legislature had in mind a broad concept of pastiche, which, subject to a fair balance between the rights and interests of copyright holders and users of protected subject matter, was intended to include, in particular, practices such as sampling, because the cultural techniques of quoting, imitating and borrowing are a dominant element of intertextuality and contemporary cultural creation and of communication in the ‘social web’.
- 20 The second question: It remains necessary to clarify when use within the meaning of Article 5(3)(k) of Directive 2001/29 is made ‘for the purpose’ of pastiche. According to the referring court, it should be sufficient, in that regard, to determine that use as pastiche is recognisable for a person familiar with the copyright subject matter to which reference is made and who has the intellectual understanding required to perceive the pastiche.
- 21 The questions referred are relevant to the decision. The first question referred is relevant to the decision in the light of the findings of the appeal court that the song ‘*Nur mir*’, while recalling the rhythm sequence taken from ‘*Metall auf Metall*’, at

the same time shows perceptible differences in comparison with that sequence, and neither imitates the style of the rhythm sequence taken from ‘*Metall auf Metall*’ nor constitutes an expression of humour or mockery. The second question referred is relevant to the decision in the light of the fact that the appellate court did not make any findings as to the defendants’ intention because it took the view that it was not necessary to determine that the processor intended to imitate or pay tribute.

- 22 The objective of a fair balance between rights and interests takes account of Article 5(5) of Directive 2001/29. Accordingly, the exceptions and limitations provided for in Article 5 of the directive may only be applied 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 rightholder (‘three-step test’). According to the findings of the appeal court, those conditions are satisfied in the present case.