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SÚDNY DVOR EURÓPSKEJ ÚNIE  
SODIŠČE EVROPSKE UNIJE  
EUROOPAN UNIONIN TUOMIOISTUIN  
EUROPEISKA UNIONENS DOMSTOL

## JUDGMENT OF THE COURT (Grand Chamber)

14 April 2026 \*

(Reference for a preliminary ruling – Copyright and related rights – Directive 2001/29/EC – Information society – Harmonisation of certain aspects of copyright and related rights – Article 2 – Reproduction right – Article 5 – Exceptions and limitations – Article 5(3)(k) – Concept of ‘pastiche’ – Use ‘for the purpose of pastiche’ – Reproduction of parts of a phonogram (sampling) – Fundamental rights – Charter of Fundamental Rights of the European Union – Article 11 – Freedom of expression – Article 13 – Freedom of the arts – Article 17 – Right to property)

In Case C-590/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 14 September 2023, received at the Court on 25 September 2023, in the proceedings

**CG,**

**YN,** acting as successor in title to RL,

v

**Pelham GmbH,**

**SD,**

**UP,**

THE COURT (Grand Chamber),

\* Language of the case: German.

composed of K. Lenaerts, President, T. von Danwitz, Vice-President, K. Jürimäe, C. Lycourgos, I. Jarukaitis, I. Ziemele (Rapporteur) and F. Schalin, Presidents of Chambers, S. Rodin, M. Gavalec, S. Gervasoni and N. Fenger, Judges,

Advocate General: N. Emiliou,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 14 January 2025,

after considering the observations submitted on behalf of:

- CG and YN, by H. Lindhorst, Rechtsanwalt,
- Pelham GmbH, SD and UP, by S. Scherer, L. Schramke and A. Walter, Rechtsanwälte,
- the German Government, by J. Möller, M. Hellmann and J. Simon, acting as Agents,
- the European Commission, by J. Samnadda and T. Scharf, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 June 2025,

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns 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 (OJ 2001 L 167, p. 10).
- 2 The request has been made in proceedings between, on the one hand, CG and YN, who is RL's successor in title, and, on the other, Pelham GmbH, SD and UP (together, 'Pelham and Others'), concerning the use, in the recording of the song '*Nur mir*', composed by SD and UP and produced by Pelham, of an approximately two-second rhythm sequence taken from a phonogram of the band Kraftwerk, of which CG and RL are the founders.

### **Legal context**

#### ***European Union law***

- 3 Recitals 3, 4, 9, 10, 31 and 32 of Directive 2001/29 state:

- (3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.
- (4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.
- ...
- (9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.
- (10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as “on-demand” services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.
- ...
- (31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.’

4 Under Article 2 of that directive, entitled ‘Reproduction right’:

‘Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;

...’

5 Article 3 of that directive, entitled ‘Right of communication to the public of works and right of making available to the public other subject matter’, provides:

‘1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

- (a) for performers, of fixations of their performances;
- (b) for phonogram producers, of their phonograms;
- (c) for the producers of the first fixations of films, of the original and copies of their films;
- (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.'

6 Article 5 of that directive, entitled 'Exceptions and limitations', provides:

' ...

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

...

(k) use for the purpose of caricature, parody or pastiche;

...

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall 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.'

### ***German law***

7 Paragraph 51a of the Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) (Law on copyright and related rights (Law on Copyright)) of 9 September 1965 (BGBl. 1965 I, p. 1273), in the version applicable to the dispute in the main proceedings ('the UrhG'), entered into force on 7 June 2021 and provides:

'The reproduction, distribution and communication to the public of a published work shall be authorised for the purpose of caricature, parody or pastiche. The authorisation referred to in the first sentence shall cover the use of an image or other reproduction of the work used, even if that image or other reproduction is itself protected by copyright or a related right.'

8 Under Paragraph 83 and Paragraph 85(4) of the UrhG, Section 6 of Part 1 of that law, of which Paragraph 51a is part, applies *mutatis mutandis* to the rights of performers and to the rights of phonogram producers.

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

9 SD and UP composed the song 'Nur mir', which was released on phonograms produced by Pelham in 1997.

- 10 CG and RL, who died in 2020, founded the band Kraftwerk, which published, in 1977, a phonogram containing the song ‘*Metall auf Metall*’.
- 11 CG and YN, who is RL’s successor in title, submit that Pelham and Others 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 record that sequence themselves.
- 12 CG and YN’s principal claim is that Pelham and Others infringed their copyright-related right that they hold as phonogram producers. They allege, in the alternative, infringement of the related right which they hold as performers and, in the further alternative, infringement of CG’s copyright over the musical work. Lastly, in the further alternative, they allege that Pelham and Others infringed the rules on competition penalising free-riding.
- 13 CG and RL brought an action before the Landgericht Hamburg (Regional Court, Hamburg, Germany) seeking a prohibitory injunction, damages, the provision of information and the surrender of the phonograms for the purposes of their destruction.
- 14 By judgment of 8 October 2004, the Landgericht Hamburg (Regional Court, Hamburg) upheld that action, and the appeal brought by Pelham and Others against that judgment before the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany) was dismissed by judgment of 7 June 2006. Following an appeal on a point of law (*Revision*) brought by Pelham and Others before the Bundesgerichtshof (Federal Court of Justice, Germany), the Bundesgerichtshof (Federal Court of Justice), by judgment of 20 November 2008, set aside the judgment delivered by the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) and referred the case back to that court for re-examination. By judgment of 17 August 2011, the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) again dismissed the appeal brought by Pelham and Others against the judgment of 8 October 2004. By judgment of 13 December 2012, the Bundesgerichtshof (Federal Court of Justice) dismissed the new appeal on a point of law (*Revision*) brought by Pelham and Others against that judgment of 17 August 2011.
- 15 That judgment of 13 December 2012 and the previous judgment of the Bundesgerichtshof (Federal Court of Justice) of 20 November 2008 as well as the second judgment of the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) of 17 August 2011 were set aside by the Bundesverfassungsgericht (Federal Constitutional Court, Germany), which referred the case back to the Bundesgerichtshof (Federal Court of Justice).
- 16 In the context of those third proceedings on an appeal on a point of law (*Revision*), the Bundesgerichtshof (Federal Court of Justice) made a request to the Court of Justice for a preliminary ruling concerning, inter alia, the interpretation of

Article 2(c) and Article 5(3)(d) of Directive 2001/29 and of Article 9(1)(b) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28).

- 17 By the judgment of 29 July 2019, *Pelham and Others* (C-476/17, EU:C:2019:624), the Court of Justice held, inter alia, that Article 2(c) of Directive 2001/29 must, in the light of the Charter of Fundamental Rights of the European Union ('the Charter'), be interpreted as meaning that the phonogram producer's exclusive right under that provision to authorise or prohibit the reproduction of his or her phonogram allows him or her to prevent another person from using a sound sample, even if very short, of his or her phonogram for the purposes of including that sample in another phonogram, unless that sample is included in that other phonogram in a modified form unrecognisable to the ear. The Court also held that Article 9(1)(b) of Directive 2006/115 must be interpreted as meaning that a phonogram which contains sound samples transferred from another phonogram does not constitute a 'copy', within the meaning of that provision, of that phonogram, since it does not reproduce all or a substantial part of that phonogram.
- 18 By judgment of 30 April 2020, the Bundesgerichtshof (Federal Court of Justice) set aside the judgment of the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) of 7 June 2006 and referred the case back to that latter court. By judgment of 28 April 2022, the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) varied the judgment of the Landgericht Hamburg (Regional Court, Hamburg) of 8 October 2004, distinguishing, in its assessment, three separate periods.
- 19 As regards the first period, that is to say, prior to the end of the period for transposition of Directive 2001/29, which expired on 22 December 2002, the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) ruled out any infringement of a copyright or of a related right on the basis of the provisions of the UrhG in their version applicable during that period.
- 20 As regards the second period, from the expiry of the period for transposition of Directive 2001/29 until the entry into force, on 7 June 2021, of the rule defining the limitations of copyright laid down in Paragraph 51a of the UrhG, the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg), first, ordered Pelham and Others to provide information on the number of phonograms containing sound recordings of the song '*Nur mir*' that had been manufactured and/or placed on the market during that period and to surrender the copies of those phonograms for destruction, and second, found that Pelham and Others had to pay damages. It found, inter alia, that, by publishing again, in 2004, two phonograms containing recordings of that song, Pelham and Others had infringed the reproduction right held by CG and RL as phonogram producers, since the sequence taken from the song '*Metall auf Metall*' was clearly noticeable in the song '*Nur mir*' and recognisable for listeners familiar with the first of those songs. In addition, by manufacturing and placing on the market the two phonograms in

2004, Pelham and Others infringed CG’s copyright over the reproduced rhythm sequence, since that sequence meets the requirements for being a copyright-protected work.

- 21 As regards the period from the entry into force, on 7 June 2021, of Paragraph 51a of the UrhG, the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) ruled out any infringement of copyright or of related rights, taking the view that the reproduction, by means of sampling, of the rhythm sequence of the song ‘*Metall auf Metall*’ constituted use for the purpose of ‘pastiche’, authorised under that provision.
- 22 CG and YN brought an appeal on a point of law (*Revision*) before the Bundesgerichtshof (Federal Court of Justice), which is the referring court, against the part of that judgment of 28 April 2022 dismissing their claims in so far as they related to the period after 7 June 2021.
- 23 The referring court considers that the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) was fully entitled to find that there had been an infringement of the rights held by the appellants in the main proceedings as phonogram producers and performers on the ground that Pelham and Others had reproduced the rhythm sequence concerned in a form which, although slightly modified, was nevertheless recognisable to the ear.
- 24 The referring court considers that the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) also did not err in law in finding that that rhythm sequence constituted a musical work liable to copyright protection.
- 25 However, the referring court states that, under the first sentence of Paragraph 51a of the UrhG, the reproduction, distribution and communication to the public of a published work are to be authorised for the purpose of caricature, parody or pastiche. That court adds that, in accordance with Paragraph 83 and Paragraph 85(4) of the UrhG, that provision is applicable to the related rights of performers and of phonogram producers.
- 26 Taking the view that the reproduction of the rhythm sequence at issue does not meet the requirements for classification as ‘caricature’ or ‘parody’, given that there is nothing to suggest that the song ‘*Nur mir*’ is an expression of humour or mockery, the Bundesgerichtshof (Federal Court of Justice) seeks to determine whether the reproduction at issue may be regarded as having been made for the purpose of ‘pastiche’, within the meaning of Article 5(3)(k) of Directive 2001/29, since Paragraph 51a of the UrhG must be interpreted in a manner consistent with that provision, which it seeks to transpose into German law.
- 27 To that end, the Bundesgerichtshof (Federal Court of Justice) asks, first, whether the rule defining the limitations of copyright and related rights as regards the use of a work or other subject matter for the purpose of pastiche, within the meaning of Article 5(3)(k) of Directive 2001/29, has a catch-all nature (*Auffangtatbestand*) that covers in any event artistic engagement with an existing work or other object

of reference, including in the form of sampling, or whether the concept of 'pastiche' is subject to restrictive criteria such as a requirement of humour, stylistic imitation or tribute.

- 28 According to the referring court, that question is decisive for the outcome of the dispute in the main proceedings, in the light of the finding, made by the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg), that the song '*Nur mir*' evokes the rhythm sequence taken from the song '*Metall auf Metall*', while being noticeably different from it, but is neither a stylistic imitation of that rhythm sequence nor an expression of humour or mockery. That court also found that the song '*Nur mir*' artistically engages with that rhythm sequence, inasmuch as that sequence is reproduced in a song of a different music genre, while being, despite the reduction in tempo and the metric modulation, recognisable as alluding to the original.
- 29 The Bundesgerichtshof (Federal Court of Justice) states, in that regard, that it could follow from the fact that the exceptions for pastiche, caricature and parody are governed by the same provision that those three exceptions have common essential characteristics, in particular that of evoking an existing work while being noticeably different from that work. By contrast, it is not certain whether the concept of 'pastiche' must also exhibit other essential characteristics, such as that of being an expression of humour or mockery, required in respect of caricatures and parodies, or that of imitating the style of the work in question or of being a form of tribute to that work. The objective of Article 5(3)(k) of Directive 2001/29, which is to ensure a fair balance between, on the one hand, the rights and interests of authors and, on the other, those of users of protected subject matter, in particular their freedom of expression and artistic freedom, enshrined in Articles 11 and 13 of the Charter, could militate in favour of an interpretation according to which the exception for pastiche has a catch-all nature and covers in any event artistic engagement with an existing reference work, including in the form of sampling.
- 30 Second, the Bundesgerichtshof (Federal Court of Justice) asks whether a finding that a work or other subject matter protected by copyright is used 'for the purpose' of pastiche presupposes an intention on the part of the user to use that protected work or subject matter for that purpose, since the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) took the view that such an intention was not required and that it was therefore not necessary to make findings in that regard.
- 31 In those circumstances the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- '(1) Is the provision limiting use for the purpose of pastiche within the meaning of Article 5(3)(k) of Directive [2001/29] ... catch-all [in nature (*Auffangtatbestand*)] 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] 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?’

## Consideration of the questions referred

### *The first question*

- 32 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 (*Auffangtatbestand*) 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.
- 33 Under Article 5(3)(k) of Directive 2001/29, Member States may provide for exceptions or limitations to the exclusive rights of reproduction and communication to the public referred to in Articles 2 and 3 of that directive, where there is use for the purpose of caricature, parody or pastiche.
- 34 Since the concept of ‘pastiche’ is not defined by Directive 2001/29 and Article 5(3)(k) thereof makes no reference to national law as regards the meaning to be given to that concept, that concept must, according to settled case-law, be regarded as an autonomous concept of EU law, the interpretation of which must be determined uniformly throughout of the European Union, by considering the usual meaning of the term in question in everyday language and taking into account the context in which that concept occurs and the objectives pursued by that provision (see, to that effect, judgments of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraphs 14, 15 and 19, and of 29 July 2019, *Spiegel Online*, C-516/17, EU:C:2019:625, paragraphs 62 and 65).
- 35 As regards, first, the usual meaning of the term ‘pastiche’, it must be noted, in essence, as the Advocate General observed in points 49 to 57 of his Opinion, that that term is rarely used in everyday language and that, although it is commonly used to designate a creation in a style which imitates that of another work, artist or works belonging to the same artistic movement, it nevertheless encompasses diverse meanings.
- 36 Thus, according to some meanings, even a concealed imitation that is made with an intent to deceive may be classified as ‘pastiche’, whereas other meanings require an overt, recognisable use of characteristic elements of one or more earlier

works in a new creation imitating that earlier work or those earlier works with a view to developing an artistic or creative dialogue with them.

- 37 Furthermore, while some meanings restrict the concept of pastiche to humorous or satirical imitations and others to stylistic imitations, many meanings recognise that the use covered by that concept may take different forms and take place with various intentions, such as the intention of paying tribute to the work or works subject to the pastiche, of expressing a form of humour or of criticism, or of engaging in a pure stylistic exercise.
- 38 Consequently, given that the usual meaning of the term 'pastiche' is not devoid of ambiguity, its interpretation must be based on the context in which that term occurs and the objectives pursued by Article 5(3)(k) of Directive 2001/29.
- 39 As regards, second, the context in which the concept of 'pastiche' occurs, it must be noted that, in addition to pastiche, Article 5(3)(k) of Directive 2001/29 makes reference, as exceptions to the exclusive rights of reproduction and of communication to the public referred to in Articles 2 and 3 of that directive, to 'caricature' and 'parody'.
- 40 The fact that those three concepts are contained within the same provision permits the inference that, in the mind of the EU legislature, they have certain common essential characteristics, that is to say, in particular, that of evoking an existing work while being noticeably different from it (see, to that effect, judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 20).
- 41 Nevertheless, as the Advocate General observed, in essence, in points 62 and 69 of his Opinion, by listing, on equal footing, three distinct concepts in Article 5(3)(k) of Directive 2001/29, the EU legislature intended to permit three categories of use which, although they may overlap in part, must nevertheless be interpreted in such a way as to ensure the effectiveness of each of those exceptions. Accordingly, the Court must be wary of interpreting one or more of those concepts as legally redundant.
- 42 It follows that although pastiche may, like parody and caricature, constitute an expression of humour or mockery (see, to that effect, judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 20), it cannot be required for that necessarily to be the case, since such an interpretation of the concept of 'pastiche' would have the effect of conferring on that exception a scope that is identical to that of 'parody' or 'caricature', thereby undermining its effectiveness.
- 43 Furthermore, the concept of 'pastiche' cannot be interpreted as covering every creation that evokes an existing work and is noticeably different from it, since such an interpretation would, as is clear from paragraph 40 above, have the effect of rendering redundant the other two exceptions listed in Article 5(3)(k) of Directive 2001/29.

- 44 In addition, as the Advocate General observed, in essence, in points 69 and 71 of his Opinion and as is clear from paragraph 40 above, nothing in the context in which Article 5(3)(k) of Directive 2001/29 or, more generally, Article 5 thereof, occurs indicates that the exception for ‘pastiche’ was designed by the EU legislature to have a catch-all nature covering every form of creative use of copyright-protected material.
- 45 As regards, third, the objective referred to in Article 5(3)(k) of Directive 2001/29, it is clear from recitals 3 and 31 of Directive 2001/29 that Article 5(3)(k) of that directive seeks to safeguard, in particular in the electronic environment, a fair balance between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property rights and, on the other, the protection of the interests and fundamental rights of users of protected subject matter – and more specifically of their freedom of expression and artistic freedom, guaranteed by Articles 11 and 13 of the Charter – as well as of the public interest (see, to that effect, judgments of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraphs 25 and 26, and of 29 July 2019, *Pelham and Others*, C-476/17, EU:C:2019:624, paragraph 32).
- 46 It is true that, as is clear from recitals 4, 9 and 10 of Directive 2001/29, that directive seeks to ensure a high level of protection of copyright and related rights by conferring, in Articles 2 and 3 thereof, exclusive rights of reproduction and communication to the public. Nevertheless, the right to intellectual property, enshrined in Article 17(2) of the Charter, is not absolute, but a balance must be struck between that right and other fundamental rights, including, inter alia, freedom of the arts, which is enshrined in Article 13 of the Charter and which falls within the scope of freedom of expression, itself protected by Article 11 of the Charter (see, to that effect, judgment of 29 July 2019, *Pelham and Others*, C-476/17, EU:C:2019:624, paragraphs 33 and 34 and the case-law cited).
- 47 It follows that the interpretation and application, in a particular case, of the exceptions provided for in Article 5(3)(k) of Directive 2001/29 must strike a fair balance between, on the one hand, the interests and rights of the persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression and the artistic freedom of users of works protected by copyright as well as the public interest (see, to that effect, judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 27).
- 48 In particular, in view of the objective pursued by Article 5(3)(k) of Directive 2001/29 and the fact that the exceptions set out in that provision do themselves confer rights on the users of protected subject matter which are intended to ensure observance of fundamental freedoms, the concept of ‘pastiche’ must be interpreted not strictly but in full conformity with that objective and those freedoms (see, to that effect, judgments of 29 July 2019, *Funke Medien NRW*, C-469/17, EU:C:2019:623, paragraphs 69 to 71, and of 29 July 2019, *Spiegel Online*, C-516/17, EU:C:2019:625, paragraphs 53 to 55).

- 49 In those circumstances, it is important to note that the concept of 'pastiche' cannot cover concealed imitations of protected subject matter or plagiarism. Even supposing that such forms of use of copyright-protected subject matter could, under certain conditions, come within the scope of freedom of expression or freedom of the arts, an interpretation of that concept according to which those forms would be permitted, under Article 5(3)(k) of Directive 2001/29, without the prior authorisation of rightholders, would not be capable of achieving the fair balance which the EU legislature sought to establish between the protection of the intellectual property right of those rightholders and the protection of the fundamental rights of users of protected subject matter as well as of the public interest. Accordingly, that concept presupposes overt forms of use of the protected subject matter that are recognisable as such.
- 50 Furthermore, as regards the question which forms of overt use of protected subject matter are specifically covered by the concept of 'pastiche', it should be stated, having regard to the objective pursued by Article 5(3)(k) of Directive 2001/29, which is to ensure respect for the freedom of expression and the freedom of the arts, and to the considerations set out in paragraphs 35 to 43 above, that that concept covers creations which evoke one or more existing works, while being noticeably different from them, in order to engage with those works in a form of artistic or creative dialogue that is recognisable as such.
- 51 In that regard, it must first of all be stated that, in order for such a dialogue to be engaged in, it is necessary that the elements used in the new creation be characteristic of the work or works from which they originate.
- 52 Next, as the Advocate General observed, in essence, in points 65 and 66 of his Opinion, in so far as only the use of elements of a work which, individually or in combination, are protected by copyright may require the authorisation of the rightholder, the exception for pastiche must, to a certain extent, allow the use of such protected elements, otherwise it would be ineffective.
- 53 Lastly, the artistic or creative dialogue with the work or works from which the elements used originate may take different forms, in particular the form of a stylistic imitation of those works, of a tribute to them, or of a humorous or critical engagement with them.
- 54 In the present case, the referring court seeks to determine, in particular, whether the reproduction, by means of sampling, of the rhythm sequence of a song is such as to be covered by the exception for 'pastiche', provided for in Article 5(3)(k) of Directive 2001/29.
- 55 In that regard, it must be recalled, first, that that technique, which consists in a user taking a sample from a phonogram, most often by means of electronic equipment, and using the sample for the purpose of creating a new work, constitutes a form of artistic expression which is covered by freedom of the arts,

which is itself protected by Article 13 of the Charter (see, to that effect, judgment of 29 July 2019, *Pelham and Others*, C-476/17, EU:C:2019:624, paragraph 35).

- 56 Second, the phonogram producer’s exclusive right under Article 2(c) of Directive 2001/29 to authorise or prohibit the reproduction of his or her phonogram allows him or her, in principle, to prevent another person from taking a sound sample of his or her phonogram for the purposes of including that sample in another phonogram in a manner that remains recognisable to the ear. That is consistent with the specific objective of the exclusive right of the phonogram producer, referred to in recital 10 of that directive, which is to protect that producer’s investment. As the EU legislature stated in that recital, the investment required to produce phonograms is considerable, so that it is necessary to guarantee phonogram producers the opportunity for satisfactory returns (see, to that effect, judgment of 29 July 2019, *Pelham and Others*, C-476/17, EU:C:2019:624, paragraphs 29 to 31).
- 57 Thus, the fair balance which has to be ensured between the protection of the freedom of the arts and the protection of copyright and related rights is achieved where the exception for ‘pastiche’ covers reproduction, by means of sampling, of the rhythm sequence of a song, provided that the sample thus taken is used for the purpose of creating a work that is in line with the requirements set out in paragraphs 49 to 53 above.
- 58 In the light of all the foregoing considerations, the answer to the first question is that Article 5(3)(k) of Directive 2001/29 must be interpreted as meaning that the exception for ‘pastiche’, within the meaning of that provision, does not have a catch-all nature (*Auffangtatbestand*) but covers creations which evoke one or more existing works, while being noticeably different from them, and which use, including by means of sampling, some of those works’ characteristic elements protected by copyright, in order to engage with those works in an artistic or creative dialogue that is recognisable as such and that can take different forms, in particular the form of an overt stylistic imitation of those works, of a tribute to them or of humorous or critical engagement with them.

***The second question***

- 59 By its second question, the referring court asks, in essence, whether Article 5(3)(k) of Directive 2001/29 must be interpreted as meaning that, in order for use to be ‘for the purpose’ of pastiche, within the meaning of that provision, a finding is necessary that the user wishing to rely on that provision intended to use an existing work for that purpose, or whether it is sufficient that the ‘pastiche’ nature be recognisable for a person who is familiar with that existing work and who has the requisite intellectual understanding.
- 60 As follows from the answer to the first question, classification as pastiche implies, inter alia, that in the new creation, which may take different forms, protected

characteristic elements of the existing work are used in order to engage with that work in an artistic or creative dialogue that is recognisable as such.

- 61 Nevertheless, as the Advocate General stated, in essence, in point 82 of his Opinion, in order to guarantee legal certainty, the question whether that is the case must be assessed objectively, with the result that the 'pastiche' nature must be recognisable for persons familiar with the existing work from which those elements have been borrowed.
- 62 It follows that the answer to the second question is that Article 5(3)(k) of Directive 2001/29 must be interpreted as meaning that, in order for use to be 'for the purpose' of pastiche, within the meaning of that provision, it is sufficient that the 'pastiche' nature be recognisable for a person who is familiar with the existing work from which the elements have been borrowed.

### **Costs**

- 63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **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**

**must be interpreted as meaning that the exception for 'pastiche', within the meaning of that provision, does not have a catch-all nature (*Auffangtatbestand*) but covers creations which evoke one or more existing works, while being noticeably different from them, and which use, including by means of sampling, some of those works' characteristic elements protected by copyright, in order to engage with those works in an artistic or creative dialogue that is recognisable as such and that can take different forms, in particular the form of an overt stylistic imitation of those works, of a tribute to them or of humorous or critical engagement with them.**

2. **Article 5(3)(k) of Directive 2001/29**

**must be interpreted as meaning that, in order for use to be 'for the purpose' of pastiche, within the meaning of that provision, it is sufficient that the 'pastiche' nature be recognisable for a person who is familiar with the existing work from which the elements have been borrowed.**

[Signatures]