

ANALYSIS



Pharma & Healthcare

Use as pastiche of another person's work or rendition protected by copyright

The Court of Justice's judgment of 14 April 2026, *Pelham* (C-590/23, ECLI:EU:C:2026:290), defines pastiche as an autonomous concept of EU law that allows the use of elements from others' works or renditions to create a new work that engages with the latter, without requiring a humorous purpose. This exception seeks to balance copyright protection and artistic and creative freedom.

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1. Introduction

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, in Article 5(3)(k), grants Member States the power to provide for an exception or limitation to the rights of reproduction, communication, and making available to the public enjoyed by authors (in respect of their works), performers (in respect of fixations of their performances), and phonogram producers (in respect of their phonograms), where the use of such protected works or other subject matter is “for the purpose of *caricature, parody or pastiche*”.

The Court of Justice has recently issued a judgment interpreting the concept of *pastiche* for the purposes of this exception. This is the Grand Chamber judgment of 14 April 2026, *Pelham* (C-590/23, ECLI:EU:C:2026:290), issued in response to a request for a preliminary ruling from the German Federal Court of Justice (*Bundesgerichtshof*) regarding a case in which an approximately two-second rhythm sequence taken from another party’s phonogram was used in the recording of a song.

The Court of Justice had previously held (Judgment of 29 July 2019, *Pelham and Others*, C-476/17, EU:C:2019:624) that the exclusive right conferred by Directive 2001/29/EC on the phonogram producer to authorise or prohibit the reproduction of his or her phonogram “allows him to prevent another person from taking 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 the phonogram

in a modified form unrecognisable to the ear”. However, what the Court now addresses in the new judgment is the possibility of applying the exception for *pastiche*, which leads to an examination of the scope of this limitation.

2. The concept of *pastiche*

In defining the concept of *pastiche*, the Court of Justice makes clear that, since Directive 2001/29/EC makes no reference to national law on this point, it must 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 the legislator. On that basis, the Court examines each of these aspects:

- a) As regards the usual meaning of the term *pastiche*, the Court notes that in this case it is not a decisive test because the term is rarely used in everyday language and because it encompasses diverse meanings; it is sometimes used to refer to a concealed imitation that is made with an intent to deceive, and in other cases to refer to overt recreations that engage in dialogue with previous works. Furthermore, the term is used to refer to conduct that may serve various purposes: tribute, criticism, humour, or a pure stylistic exercise.
- b) As regards the context in which the concept of *pastiche* occurs, the court considers it highly significant that Directive 2001/29/EC groups the

concepts of *caricature*, *parody*, and *pastiche* under the same provision, because this, in its view, signifies two things: the first is that the three concepts have certain common essential characteristics, that is to say, in particular, that of “evoking an existing work, while being perceptibly different from it”; the second consequence is that “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”.

The concept of “*pastiche*” should not be interpreted restrictively

That being the case, the concept of *pastiche* cannot be the same as that of *parody* or *caricature*. Therefore, although *pastiche* may, like *parody* and *caricature*, constitute an expression of humour or mockery, 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. This is an important conclusion because a sector of legal scholarship has long argued that *pastiche* is merely a form of parody.

Similarly, and for the same reason — to avoid an interpretation that would end up attributing the same meaning to *pastiche*, *caricature*, and *parody* — the concept of ‘*pastiche*’ cannot be interpreted as covering every creation that evokes an existing work and is noticeably different from it, because that is also true of *caricature* and *parody*.

- c) Finally, as regards the objective pursued by the legislature in introducing the exception for *pastiche*, the Court emphasizes that Directive 2001/29/EC seeks to safeguard 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. This, according to the Court, means that the concept of *pastiche* (like those of *caricature* and *parody*) must not be interpreted restrictively, since the limitation relates to those fundamental freedoms; and, furthermore, that it cannot cover concealed imitations of protected subject matter or plagiarism because, if it did, the aforementioned balance of interests would be compromised.

On the basis of all the foregoing, the Court of Justice states that *pastiche* presupposes that the works or renditions of others are recognizable as such. The concept, according to the Court, “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”, an artistic or creative dialogue with the work or works from which the elements used originate that “may 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”.

And, 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 [...] 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 right-holder, the exception for *pastiche* must, to a certain extent, allow the use of such protected elements, otherwise it would be ineffective”.

Consequently, applying all of the foregoing to the specific case, the Court concludes that “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” above.

3. The objective nature of pastiche

Another important point clarified by the Court of Justice regarding the exception for pastiche is that it is not necessary to establish that the user wishing to rely on this provision intended to use an existing

work or rendition for that purpose, since “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”. Therefore, pastiche must be assessed objectively and not in light of the subjective intention of the person creating it.

4. Pastiche in Spanish copyright law

The case law established by the Court of Justice will be fundamental for applying the Spanish rules that incorporate the exception for pastiche.

In this regard, it should be noted that in Spain, the exception under Article 5(3)(k) of Directive 2001/29/EC, concerning *caricature*, *parody*, and pastiche, is set forth separately in two different legal texts. Thus, Article 39 of the recast version of the Copyright Act (approved by Royal Legislative Decree 1/1996), which also applies to related rights by virtue of the reference in Article 132 of that Act, provides that “the parody of a published work shall not be considered a transformation requiring the author’s consent, provided that it does not entail a risk of confusion with the work or cause harm to the original work or its author”.

In contrast, the exception for pastiche is set out in Article 70 of Royal Decree-law 24/2021, of 2 November, transposing various European Union directives, which provides that “the adaptation of a published work consisting of taking certain characteristic elements of an artist’s work and combining them in such a way as to give the impression of being an independent creation, provided that this does not entail a risk of confusion with the original works

or renditions nor cause harm to the original work or its author. This limitation shall also apply to uses other than digital ones”.

This separate legal recognition stems from the fact that Royal Decree-law 24/2021, of 2 November, transposes Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market, in which Article 17 (devoted to the “use of protected content by online content-sharing service providers”) requires Member States to “ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services: (a) quo-

tations, criticisms, and reviews; (b) uses for the purposes of caricature, parody, or pastiche”.

The fact is that the Spanish legislature, in transposing this provision, has given it a general scope, allowing pastiche in all cases, and not only in relation to the use of protected content by providers of online content-sharing services. And, by acting in this manner, the Spanish legislature is in fact also exercising the discretion conferred by Article 5(3)(k) of Directive 2001/29/EC (which, as already noted, provides for the exception for pastiche in a general sense). Therefore, the doctrine established by the Court of Justice is equally applicable in relation to Article 70 of Royal Decree-law 24/2021.