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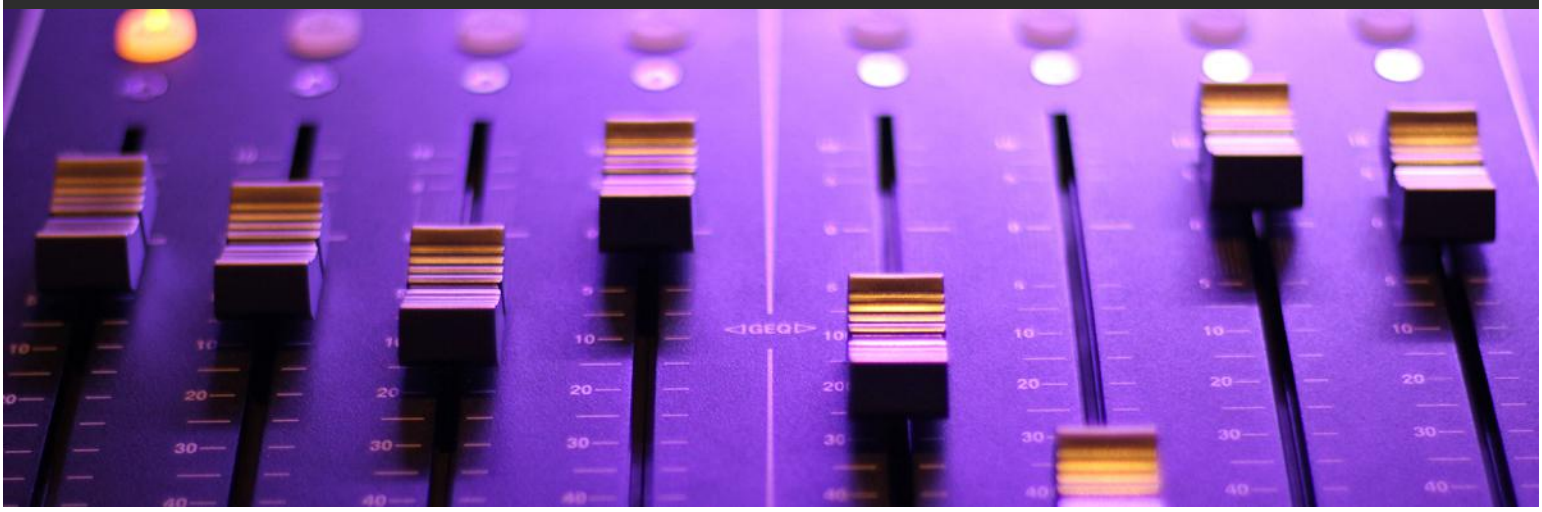

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German Federal Court of Justice Applies CJEU's 'Pastiche' Doctrine and Confirms Lawful Music Sampling

Read in German.

On 3 September 2026, the German Federal Court of Justice (Bundesgerichtshof, hereinafter: BGH) delivered its long-awaited judgment in the latest chapter of the "Metall auf Metall" litigation (Case I ZR 74/22). Applying the framework established by the Court of Justice of the European Union (CJEU) earlier this year in Pelham II, the BGH confirmed that the use of a sampled rhythm sequence from Kraftwerk's song "Metall auf Metall" in Sabrina Setlur's song "Nur mir" may qualify as a lawful "pastiche" under Section 51a of the German Copyright Act (UrhG).

The decision is an early national application of the CJEU's interpretation of pastiche. It provides guidance for music producers, labels, publishers, digital platforms, and businesses licensing copyright-protected content.

At the same time, the judgment confirms that pastiche remains a limited exception. It does not create a general right to sample protected works without consent.

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Background: More Than 25 Years of "Metall auf Metall"

The dispute concerns, in essence, the use of a two-second rhythm sequence taken from Kraftwerk's 1977 recording "Metall auf Metall." The sample was copied and repeatedly incorporated into the 1997 song "Nur mir," performed by Sabrina Setlur and produced by Moses Pelham.

The litigation has been ongoing for more than 25 years and has involved multiple decisions by the BGH, a judgment of the German Federal Constitutional Court (*Bundesverfassungsgericht*), and two referrals to the CJEU. In its first Pelham judgment in 2019, the CJEU held that unauthorized sampling may infringe phonogram producers' rights unless the sampled fragment is incorporated in a form unrecognizable to the ear.

German law introduced the pastiche exception in 2021. Section 51a UrhG implements the exceptions for caricature, parody, and pastiche under the EU InfoSoc Directive.

The BGH subsequently asked the CJEU to clarify the meaning of pastiche. In April 2026, the CJEU held that pastiche is not a general or residual exception.

A new work may qualify as a pastiche where it:

1. evokes one or more existing works;
2. remains perceptibly different from those works; and
3. uses protected elements in a recognizable artistic or creative dialogue with the original.

Sampling may fall within this framework. However, the borrowed material must serve the required artistic or creative dialogue.

For a more detailed analysis of the CJEU's ruling, please see our previous GT Alert.

The New BGH Decision

The BGH dismissed the claimants' appeal on points of law. It upheld the Hamburg Higher Regional Court's finding that the disputed sampling was permissible.

The decision concerns the legal position from 7 June 2021. That date marks the entry into force of Section 51a UrhG.

In doing so, the BGH first confirmed that the incorporation of the rhythm sequence from "Metall auf Metall" constituted an impairment of the claimants' exclusive rights as phonogram producers, performers, and copyright holders. The court therefore did not conclude that the use fell outside the scope of copyright protection. Rather, the decisive question was whether the use may be justified under the statutory pastiche exception.

Applying the framework the CJEU established in Pelham II, the BGH reiterated that the pastiche exception is not a residual or catch-all defense. Instead, it applies only to creations that:

1. evoke one or more pre-existing works;
2. display perceptible differences from those works; and

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3. use copyright protected elements to engage in a recognizable artistic or creative dialogue with the original work.

The BGH further affirmed the examples identified by the CJEU, explaining that such an artistic or creative dialogue may take different forms, including an overt imitation of a particular style, a tribute or homage, or a humorous or critical engagement with the original work. The BGH further clarified that, in order for a use to be "for the purpose" of a pastiche within the meaning of Section 51a UrhG, it is sufficient that the pastiche character be recognizable to a person familiar with the original work from which the borrowed elements originate. The court therefore did not require that the pastiche nature be apparent to anyone, irrespective of the viewer's (or listener's) knowledge of the source work.

Applying these principles, the BGH concluded that the repeated use of the sampled rhythm sequence from "Metall auf Metall" constituted a permissible pastiche under Section 51a UrhG.

Conclusion

The judgment is relevant beyond this specific dispute. It affects music producers, labels, publishers, platforms, and other businesses using protected content.

The BGH's judgment marks a milestone in a long-running copyright dispute and provides one of the first substantial applications of the CJEU's newly articulated pastiche doctrine by a Member State court. While the decision confirms that music sampling may, in principle, be lawful without authorization, it also underscores that the pastiche exception remains a narrowly structured exception rather than a general license to reuse protected works similar to a "fair use doctrine." Recent disputes confirm the continuing relevance of sample clearance in popular music. For instance, in 2025, German singer-songwriter Alice Merton brought U.S. proceedings alleging that "Gun to My Head" by Kanye West used protected elements from her song "Blindside," despite permission having been refused. Against this background, the BGH's latest "Metall auf Metall" judgment provides important guidance on the circumstances in which sampling may nevertheless be permissible under European copyright law.

Outlook: Pastiche Remains a Narrow Exception

However, the judgment does not establish a general sampling exception. Whether a particular use qualifies as a pastiche remains dependent on the circumstances of the individual case and, in particular, on the existence of a recognizable artistic or creative dialogue with the pre-existing work. This may make sample-clearance negotiations more difficult, as users of samples may rely on the CJEU's express recognition that sampling can, in principle, fall within the pastiche exception to argue that authorization is not required. Accordingly, as courts across Europe begin applying the CJEU's framework, further guidance remains needed regarding the boundaries of lawful pastiche use under EU copyright law.

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