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Sample, sample in my song, can they tell where you are from? The Pelham judgment – Part I

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On 29 July the Court of Justice of the European Union (CJEU) finally rendered its long-awaited judgment in Case C-476/17, *Pelham v Hütter and Schneider-Esleben.*, together with its judgments on two other cases: Case C-516/17, *Spiegel Online GmbH v Volker Beck* and Case C-469/17, Funke Medien NRW GmbH v Bundesrepublik Deutschland. All three cases are of particular importance in advancing the interpretation of the role of fundamental rights in EU copyright law, not just for their content but also because they are Grand Chamber judgments.

The question in *Pelham*, whether sampling of sound recordings requires prior authorization from the rightholder, had been simmering in the German Courts for more than a decade (see here and here). Advocate General (AG) Szpunar submitted his Opinion in early 2019 (discussed here and here).

The dispute centred on whether sampling requires authorization from the rightholder for the phonogram from which a sample is extracted. The rights of phonogram producers are harmonized at EU level by Article 2(c) of Directive 2001/29/EC (InfoSoc Directive) and by Article 9(1)(b) of Directive 2006/115 (Rental and Lending Rights Directive). The applicable exceptions and limitations (E&Ls) are harmonized in Article 5 InfoSoc Directive, which provides for an exhaustive list of what can be considered 'permitted uses'.

The defendant in the proceedings, music producer Moses Pelham, used a 2-second sample when he created the song "Nur Mir" for the German hip-hop artist Sabrina Setlur. For the musical composition he had used an extract from the claimant's song 'Metall auf Metall'. Before the German courts, Pelham relied on Section 24 of the German Act on Copyright and Related Rights. This provision permits the publication and exploitation of an independent work, which makes 'free use' of the work of another person.

The case eventually made its way to the German Constitutional Court (BVerfG) by way of a constitutional complaint launched by Moses Pelham. He argued that a requirement to acquire prior permission to sample would violate his right to artistic freedom under the German Basic Law. The BVerfG found that the German Courts had indeed not considered Pelham's right to artistic freedom sufficiently and handed the case back to the German Federal Supreme Court, which referred six questions to the CJEU: (1) whether sampling is an infringement of the phonogram producers' right; (2) whether an extract of a phonogram is a 'copy' of that phonogram for the purposes of the Rental and Lending Directive; (3) whether national rules like the German 'free use' provision are acceptable under EU law; (4) whether sampling is covered by the quotation E&L; (5) what latitude there is for the national implementation of E&Ls in this respect; and (6) how fundamental rights in the EU Charter can be taken into account in this context.

At the core of this preliminary reference lies the question of what role fundamental rights play in relation to the EU copyright rules. Therefore, the judgment in *Pelham* must be read in the context of the aforementioned rulings in *Spiegel Online* and *Funke Medien*. Some of the main aspects of this question, which feature prominently in all three judgments, have already been discussed in this blog by Tatiana Synodinou in relation to *Spiegel Online* here and here.

This blogpost is divided into two parts, which focus on the sampling-specific implications of the *Pelham* ruling. The remainder of this Part I discusses the CJEU's interpretation of the exclusive right of phonogram producers and the notion of 'copy' in relation to phonograms. Part II is dedicated to the application of E&Ls to sampling.

The exclusive rights of phonogram producers

Article 2(c) InfoSoc Directive, as implemented into national laws, recognises for phonogram producers the exclusive right to reproduce their phonograms. So far, the CJEU has only interpreted the term 'reproduction' in relation to authors and their works (see *Infopaq I*). In his Opinion, AG Szpunar had suggested that any extract of a phonogram used without authorization in the creation of a new phonogram infringes the reproduction right in Article 2(c). The Court agreed and underlined that the purpose of the exclusive right of phonogram producers is to protect their investment, which is why even the smallest extract constitutes a reproduction 'in part'. However, the Court continued its analysis of the scope of Article 2(c) in the light of the sixth question referred by the BGH, which the AG had treated separately. This enabled the Court to address this issue in light of the conflict between the right to property and the freedom of the arts. In doing so, the Court reached a slightly different outcome from the AG.

Read in the light of fundamental rights, the right of phonogram producers does not extend to the use of samples in a new work, where such samples become unrecognisable to the ear. This result is achieved by balancing the various fundamental rights in the EU Charter against one another: rightholders' property right in Article 17(2) of the EU Charter on the one hand; samplers' freedom of artistic creation in Article 13 (itself a manifestation of freedom of expression in Articles 11 of the Charter and 10(1) ECHR) on the other. According to the Court, an interpretation that would allow rightholders to prevent this form of artistic expression in relation to very short samples would fail to strike a fair balance between the fundamental rights at stake.

After AG Szpunar's Opinion, the future of sampling looked bleak. The AG had suggested a wide interpretation of the reproduction right for phonograms, which would cover even short and unrecognizable extracts. Although he recognized that his interpretation might appear "excessive", he argued that it was up to legislature, not the courts, to adjust this balance. We had previously criticised this reasoning as flawed, and argued that it would significantly impair the exercise of artistic creation.

The CJEU appears to have shared similar concerns, and dealt with the issue by considering the balance between freedom of the arts and the right to property within the scope of Article 2(c). It argued for an application of the right that leaves breathing space for sampling in cases that do not compete with the economic interests of rightholders. This means that the exclusive right at issue must be limited to samples that can be recognized in the new work. Therefore, it does not seem to matter whether the sample forms a substantial part of the original phonorecord or not, but rather how the sample integrates into the new work.

One important, even innovative, aspect of the Court's ruling is that it appears to have carried out a case-specific exclusion of subject matter protection on the basis of fundamental rights. In the Court's reasoning, the key argument to disqualify the making of unrecognizable samples as a relevant reproduction and, as a result, as subject matter protected by (at least) related rights turns on the balancing of the freedom of the arts (and, by extension, freedom of expression). To our knowledge, this is the first time this has occurred in CJEU case law, since previous subject matter exclusions had been, generally speaking, based on the idea/expression distinction: individual words (C-5/08, *Infopaq I*); sporting events (C-403/08 and C-429/08, *Murphy/Premier League*); and the taste of cheese [at least at the current state of technology] (C-310/17, *Levola Hengelo*).

Notion of a 'copy' under the Rental and Lending Rights Directive

Whereas the right of phonogram producers to prevent reproductions is contained in the InfoSoc Directive, their right to 'make available to the public, by sale or otherwise' in relation to their phonograms and copies thereof is provided by Article 9(1)(b) Rental and Lending Rights Directive. Whether a phonogram containing a sample of another phonogram constitutes a copy of the latter was the subject of the second question.

The Court relied on the legislative context to find that a phonogram which contains samples taken from another phonogram does not constitute a 'copy' within the

meaning of Article 9(1)(b). Pursuant to Recitals 2 and 5 of the Rental and Lending Rights Directive, the purpose of the right of distribution granted to phonogram producers is to recoup their investments and to fight piracy. The right should be used to prevent the marketing of copies that can decrease the income generated from phonograms placed on the market with the authorization of the rightholder; in other words, which can substitute legal copies.

With reference to the AG's Opinion, the Court stated that only phonograms which reproduce the entirety, or a substantial part of an original phonogram constitute 'copies' within the meaning of the provision. This finding is also supported by the relevant international instruments, such as the 1971 Geneva Convention. Accordingly, phonograms that only reproduce short extracts, and which cannot be considered substitutes for an original phonogram, are considered 'copies' of said phonograms.

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