Kluwer Copyright Blog

Thou shalt not sample… without permission!

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On 12 December 2018 Advocate General (AG) Szpunar delivered his Opinion in Case C-476/17, *Pelham*. The case concerns the practice of sampling, i.e. the reproduction of minimal parts of a phonogram for the purposes of using it in another phonogram.

As harmonized by EU law, the phonogram producer holds a related right of reproduction (Article 2(c) InfoSoc Directive) and a distribution right in relation to their phonograms (Article 9(1)(b) Rental and Lending Directive). Sampling artists, for their part, use these partial reproductions of various lengths in different ways to create new creative works. It is unclear whether sampling can be permitted under existing exceptions in the *acquis*, like those for quotation, caricature, parody pastiche, or for *de minimis* uses in national law (Article 5(3)(d), (k) and (o) InfoSoc Directive; and Article 10(1) Rental and Lending Directive).

This case addresses the fundamental tension between exclusive rights of producers, which are essentially incentive-based, and the artistic freedom of sampling artists. After summarizing the facts and questions, we go through the different answers provided by the AG, followed by a few concluding remarks.

Facts and Questions

The facts of the case have been previously discussed in this blog. In essence, in 1977 the band Kraftwerk published a phonogram featuring the song *Metall auf Metall*. Pelham sampled approximately two seconds of a rhythm sequence from that song and incorporated it as a continuous loop in the song *Nur mir*. The relevant claim here is that such sampling infringes

Kraftwerk's related rights as phonogram producers.

After lengthy procedures in Germany – which included a stop in the Federal Constitutional Court (BVerfG) in 2016 – the case ended up in the Federal Court of Justice, who referred a number of questions to the CJEU. Before discussing these, it bears noting that § 24(1) of the German Law on Copyright and Related Rights (UrhG) allows, under certain conditions, for the creation of an independent work in the free use of another work without the consent of the author of the work or subject matter used (hereinafter: "free use provision"). It is argued that this provision could allow sampling.

In simplified terms, the German court asks the following questions: whether sampling is an infringement of the phonogram producers' right (1), whether an extract of a phonogram is a "copy" of that phonogram for purposes of the Rental and Lending Directive (2), whether national rules like the German "free use provision" are acceptable under EU law (3), whether sampling is covered by the quotation exception (4), what latitude there is for the national implementation of exceptions in this respect (5), and how fundamental rights in the Charter can be taken into account in this context (6). The following section explains the AG's answer and reasoning for each question.

The Opinion

- **Unauthorized sampling is an infringement of the phonogram producers' rights**

The AG states from the outset that unauthorized sampling – even of a two-second sequence – is a reproduction in part of a phonogram and therefore an infringement of the phonogram producers' reproduction right. To reach this conclusion, he rejects four main opposing objections set out by the Commission and intervening Governments.

First, he argues that there is no *de minimis* threshold of copying that must be overcome for a sample to infringe the producer's reproduction right. Among the multiple arguments to support this view, the AG notes that no such threshold exists for authorial works (despite *Infopaq*), that phonograms enjoy a different type of protection, and that producers should be entitled to exploit the market for authorizing sampling.

Second, prohibiting unauthorized sampling will not afford greater protection to phonogram producers than authors. This view is rooted in his expansive reading of *Infopaq* and the fact that the protection of phonograms is independent from that of works. These are "related" but not "derived" rights, i.e. their scope of protection is not interdependent.

Third, the AG rejects the analogy between the protection of the rights of phonogram producers and makers of databases (reminder: the latter are protected only against the extraction and/or re-utilisation of the whole or of a substantial part of their databases.)

Fourth, he likewise rejects the argument that Article 11 WIPO Performances and Phonograms Treaty provides only for protection against the unauthorised reproduction of a phonogram as a whole. He notes that both that treaty and the InfoSoc Directive apply to reproductions in part, such as those involved in sampling.

- **An extract of a phonogram (sample) is not a copy of that phonogram within the meaning of Article 9(1)(b) Rental and Lending Directive**

Article 9(1)(b) provides for a distribution right for phonogram producers. As results from the Geneva Convention and the Directive's recitals, the main purpose of that right is to protect against piracy. On this basis, the AG argues that the concept of "copy" in these legal instruments is narrower than e.g. that of the InfoSoc Directive. It includes only copies that incorporate "all or a substantial part of the sounds of a protected phonogram and which are intended to replace lawful copies thereof" (para. 47). Because sampling is not used to create a pirated copy of the sampled phonogram and does not incorporate all or substantial parts thereof, it should not qualify as a copy within the meaning of Article 9(1)(b) of the Rental and Lending Directive.

- **National free use provisions are not acceptable under EU law**

In light of the answer to the previous question, the only restrictions to a free use provision in relation to sampling arise from the rules in the InfoSoc Directive. These include the phonogram producers' right in Article 2(c) and the exhaustive list of exceptions in Article 5. Some exceptions may apply to sampling as they "facilitate dialogue and artistic confrontation through the use of pre-existing works": quotation, caricature, parody and pastiche. But there is no general exception permitting the use of works of others for the purposes of creating a new work. As such, the scope of any national free use provision must not go beyond the scope of the aforementioned EU exceptions.

For the AG, this conclusion is still valid if the free use provision at issue – like § 24(1) UrhG – is not qualified as an exception but a limitation "inherent" to copyright. To allow limitations outside the list of Article 5 would hinder the objective of effectiveness of the harmonization of exceptions in EU law, stated in Recital 31 of the Directive.

Furthermore, a free use provision would not be covered by Article 5(3)(o) InfoSoc Directive. The latter permits national laws to retain exceptions and limitations for "certain … cases of minor importance" existing at the time of the Directive's entry into force. The scope of protection of § 24(1) UrhG is broader and goes beyond such limited uses. Furthermore, Article 5(3)(o) covers only analogue uses and cannot extend to online communication to the public of sampled phonograms. Finally, the three-step test in Article 5(5) – viewed by the AG as a restrictive clause – does not allow for the extension of the scope of existing exceptions or the introduction of new ones.

In light of the above, national free use provisions that could enable sampling, such as § 24(1) UrhG, are not compatible with EU law insofar as they exceed the scope of existing exceptions.

- **Sampling is in most cases not covered by the quotation exception**

For the AG, the quotation exception in Article 5(3)(d) can apply to sampling, if the exception's conditions are met. First, a quotation must be for purposes such as criticism or review, i.e. it must at least "enter into some kind of dialogue with the work quoted", such as confrontation or tribute. Second, the quotation must be unaltered, incorporated without significant modification, and "easily distinguished as a foreign element" in the subsequent work. These conditions set quotations apart from plagiarism. Sampling in general – and the particular case of the song *Nur mir* – does not, for the most part, satisfy these conditions: there is no interaction with the sampled work and samples are often unrecognizable. Third, as a formal requirement, a quotation must indicate the source, unless it is not possible. To be sure, indication of source is not customary in the genres of music that mostly rely on sampling. Still, the AG notes that such indication is theoretically possible and that in the present case the defendants do not appear to have tried to do so. In this light, the AG

considers sampling not to be covered by the quotation exception if it does not meet its substantive conditions. The AG also quickly dismisses the application of the exception for caricature, parody or pastiche (Article 5(3)(k)), specifically due to the lack of indication of source or at least of the author of the sampled extract.

- **Limited degree of latitude for national implementation of exceptions**

The final two questions address the role of fundamental rights in general and in this particular case. First, AG Szpunar reiterates that Member States, when implementing EU law, are free to apply national standards of protection of fundamental rights as long as the level of protection under the Charter and the primacy, unity and effectiveness of EU law are not compromised. The provisions of the InfoSoc Directive leave Member States with a very limited margin of discretion in this respect. That is illustrated, in the present case, by the fact that the concept of "reproduction" in Article 2 and different concepts that determine the scope of exceptions in Article 5 are autonomous concepts of EU law.

As a result, Member States discretion here is limited. They can choose which of the optional exceptions in Article 5(2) and (3) to implement, but they cannot extend the scope of these provisions or add new exceptions. However, AG Szpunar qualifies, in some circumstances national legislators must implement an optional exception "since some of those exceptions reflect the balance struck by the EU legislature between copyright and various fundamental rights" (para 77). The exhaustive nature of Article 5(2) and (3) prevents national legislators from introducing exceptions beyond those contained therein by relying on an (*inter alia* constitutional) provision of national law.

- **The exclusive right of producers to prohibit sampling is not contrary to the freedom of the arts in the Charter**

The AG reformulates the last question into an inquiry as to whether the freedom of the arts constitutes a limitation or a justification for the infringement of an exclusive right in a phonogram. Rejecting the proposition of the BVerfG, which was based on a reading of § 24 UrhG that the AG considers contrary to EU law, he then turns to a balancing exercise between the right to property (Article 17(2) Charter) and the right to freedom of the arts (Article 13 Charter).

The main purpose of Article 13 is to protect artists against the unjustified censorship of their expression. But the provision does not guarantee artists the free acquisition or availability of the means to produce art; for that purpose, they are subject to "the constraints of everyday life". Therefore, (hip-hop) artists do not enjoy special privileges and are limited by what law permits. The AG notes in this context that it is for the legislature to conduct, in the first instance, the complex balancing exercise between different fundamental rights and interests, for which it enjoys a broad margin of discretion. In the second instance, courts are responsible for applying the legislative solutions to particular cases in compliance with fundamental rights. Save for exceptional circumstances, courts will do so within the bounds of applicable law.

This does not mean that artists can no longer create. They cannot however create by breaking the law, e.g. by using samples without authorization form the right holder. For the AG, the freedom of the arts in Article 13 Charter does not mandate the free availability of artistic resources. Rather, current EU copyright law offers legal avenues to create using existing works, for example the aforementioned exceptions and licensing. In closing, the AG states that an extension of the free use

of existing works (e.g. for sampling) is solely within the discretion of the legislature but cannot be realized by judicial intervention.

Comments

As is customary, AG Szpunar submits a well-reasoned Opinion. To be sure, his interpretation will be particularly disappointing to sampling artists and generally unsatisfactory to those scholars that argue for additional flexibility in EU copyright law. While accepting that sampling could possibly be permitted, the AG considers the courts are the wrong forum to fight for this "right", as it would go beyond their mandate to interpret the law. Nevertheless, there are at least three points in the Opinion that merit closer scrutiny. If the Court follows the AG, these might contribute to the further shaping of EU copyright law.

First, the extension of the phonogram producers' reproduction right to all types of sampling is unconvincing, as is the rejection of a *de minimis* threshold. It is conceptually difficult to reconcile the application of the right to non-distinguishable samples, while at the same time arguing – as the AG does – that such protection does not go further than that provided to authors. What is the relevant harm to producers beyond the loss of license fees for sampling sounds that are not distinguishable? Is this a market that should be reserved to producers if their right is based on an investment protection rationale? And what space does such interpretation leave for freedom of the arts, especially as an external delimitation on the scope of exclusive rights? Arguably, the real market for authorizing sampling (if any) should be for distinguishable (not necessarily *substantial*) sounds that are reproduced to an extent that impacts the investment protection function of the right. Protecting non-distinguishable and *de minimis* samples under a formalist interpretation of the law grants producers broader protection than authors – no matter how one interprets *Infopaq* – and significantly limits the exercise of artistic creation (see, in this sense, the Opinion of the European Copyright Society).

Second, one can also argue against the rejection of the application of the quotation exception to sampling. An interpretation of Article 5(3)(d) in the light of Article 13 Charter could also find that the use of a sample is a way of interaction with the existing work. The AG's argument seems to be grounded in a "textual" or "print-based" paradigm of quotation. This ignores or disregards the multiple different dimensions of "quotation", such as the ways in which the re-use of recordings of music can refer back, reinterpret and engage with the sampled work (on which, see here at 4.1-4.8). Such recordings therefore *interact* with the sampled subject matter. As a result, they should fall within the scope of application of the exception. In particular, short samples could constitute "fair practice" and the requirement of acknowledgement should not be read too strictly in cases of musical sampling.

What had already become apparent in his Opinion in *Funke Medien*, is that AG Szpunar does not consider fundamental rights as shaping forces for EU copyright rules outside of the legislative process. The notorious balance between the interests of right holders and users (and other interested parties) is struck in Brussels and Strasbourg, not in Luxembourg. It is interesting to note, though, that Article 5 (2)-(3) might not just be a wish list from which to cherry-pick, but fundamental rights mandate that some exceptions must be implemented into national law, as they enable dialogue and confrontation with existing works. However, exceptions under EU law form the external limits of creative freedom of national legislators.

Finally, the AG also confirmed the fears of many a copyright scholar that the three-step test cannot

be used to interpret exceptions flexibly. To be sure, the Opinion does not depart from established case-law on the test. However, it appears to go beyond it in its restrictiveness by arguing that the test should only be interpreted to restrict the scope of exceptions. In doing so, it disregards a more flexible reading of judgments like *Painer* and *Deckmyn*, where the fair balance aim and the fundamental rights basis of the exceptions at issue reinforced their scope vis-a-vis exclusive rights, in line with the three-step test.

On these crucial points, we would hope that the Court does not follow the AG.

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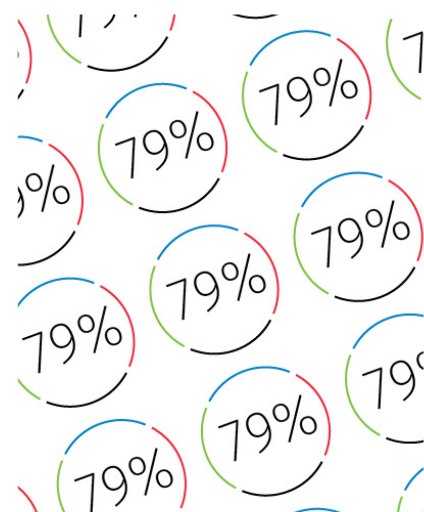

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