Kluwer Copyright Blog

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

João Pedro Quintais (Institute for Information Law (IViR)) and Bernd Justin Jütte (University College Dublin) · Tuesday, November 19th, 2019

The first part of this blogpost discussed the interpretation given to the right of phonogram producers under Article 2(c) of Directive 2001/29/EC (InfoSoc Directive) and Article 9(1)(b) of Directive 2006/115 (Rental and Lending Rights Directive) by the Court of Justice of the European Union (CJEU or Court) in *Pelham*. Contrary to the Opinion of Advocate General (AG) Szpunar, the CJEU limited the scope of protection of the phonogram right to samples which can be recognized in a new song. This second part of our blogpost discusses the Court's approach to samples which can be recognized and whether use of such samples comes within the scope of the exceptions and limitations (E&Ls) to the exclusive right.

In the national proceedings leading up to this preliminary reference, Moses Pelham had relied on the German 'free use' defense. The legality of this defense in the light of EU law and the applicability of other E&Ls was the subject of questions 3 to 5 referred to the CJEU.

Legality of 'free use' defense

With the second question answered in the negative, the Court limited its analysis of the third question to whether a Member State may prescribe E&Ls other than those provided for in Article 5 InfoSoc Directive. German law includes a so-called 'free use' limitation in Section 24 of its Act on Copyright and Related Rights. This provision permits users of protected works the 'free use' of the same in the creation of a new and independent work. Such an open-worded limitation is not contained in the exhaustive list of E&Ls in Article 5 InfoSoc Directive.

In his Opinion, AG Szpunar had in principle left room for the existence of a 'free use'-style exception (or limitation) provided that its application would not extend the scope of the E&Ls listed in Article 5(2) and (3) InfoSoc Directive. The CJEU ruled differently.

According to the Court, the InfoSoc Directive already internalizes the legal mechanisms to strike a fair balance between competing interests of rightholders and users, as well as the public interest. These mechanisms are included in the exclusive rights in Articles 2 to 4, and especially the countervailing E&Ls in Article 5, complemented by the three-step test in Article 5(5). Pursuant to this logic, allowing a Member State to derogate from the exhaustive list of E&Ls in Article 5(2) and (3) by extending their scope would affect the legislative balance struck, be detrimental to the effectiveness of EU copyright harmonization, the objective of legal certainty, and the requirement of consistent application of E&Ls. As a result, national laws of Member States are not allowed to recognize E&Ls to the right of reproduction in Article 2(c) other than those provided for in Article 5 InfoSoc Directive.

In other words, national rules like the German 'free use' provision or an open-ended norm are unlikely to fit into the current EU copyright framework. For sampling in particular, this means that – absent express authorisation – the exercise of this (now) recognized form of artistic expression must rely on existing rules, namely the limited set of potentially available E&Ls in the *acquis*.

One noteworthy aspect of the Court's reasoning in this respect should be pointed out. Because fundamental rights are deemed to be internalized in existing E&Ls, the Court states that such E&Ls – despite their *optional* nature – *must* in certain (unspecified) cases be transposed by Member States. This is because such 'mechanisms must nevertheless find concrete expression in the national measures transposing that directive and in their application by national authorities' (para 60). This suggests that where an E&L is justified by fundamental rights it must always be recognized in national law. That is to say, the E&L may in certain cases no longer be optional, but rather mandatory. This conclusion is all the more relevant since the same passage is repeated verbatim by the Court in *Funke Medien* (para 58) and *Spiegel Online* (para 43).

Musical Quotation

The Court then turned to the question of whether existing E&Ls could enable sampling. For this purpose, it interpreted the quotation exception in Article 5(3)(d) InfoSoc Directive. According to this, to qualify as quotation, the use of a work or other subject matter must be in accordance with fair practice, and to the extent required by the specific purpose. Pursuant to its ordinary meaning, the purpose of a quotation of a work or extract thereof is to interact with a statement by the user, for example by means of illustration or intellectual comparison or in some other way. In line with AG Szpunar, the Court states that for a quotation to be covered by the E&L the user must 'have the intention of entering into "dialogue"' with the quoted work (para 71).

According to the Court, the quotation E&L – read in light of Article 13 of the Charter – may apply to the making of *recognisable* samples. Such application will require a case-by-case assessment of the use in question, subject to compliance with the conditions of Article 5(3)(d) InfoSoc Directive and, in addition, the user's intention of entering into dialogue with the sampled work (para 72). If a sample is deemed unrecognisable, no such dialogue is possible.

The result of this approach is to set a high bar for samples to fall within the quotation E&L. This is especially true for samples that do not contain lyrics, in relation to which it will probably be harder

to establish an intention to enter into a dialogue. Naturally, the assessment will turn on how strictly or flexibly national courts (and ultimately the CJEU) define what constitutes an intention to enter into dialogue for quotation purposes and, in particular, in the context of musical sampling. In many instances, this will be a challenging exercise, laying bare the problematic nature of this requirement. In fact, although many quotations are in practice dialogic, neither the ordinary meaning of quotation, nor the wording of Articles 5(3)(d) InfoSoc Directive or 10 of the Berne Convention impose a requirement to enter into dialogue with the previous work (see, in this respect, this paper by Lionel Bently and Tanya Aplin).

Discretion of national legislatures: reproduction right as measure of full harmonization

Finally, and very briefly, the CJEU states that the right in Article 2(c) InfoSoc Directive constitutes a measure of full harmonization of the corresponding substantive law. This is because the formulation of the provision is unequivocal, leaves no room for further interpretation, is not subject to further conditions, and requires no further action by the implementing Member State. As a result, when implementing the measure, Member States must solely rely on an interpretation that is consistent with the EU Charter.

Final Remarks

The *Pelham* judgment carries significance beyond sampling. It should also impact the interpretation and application of EU copyright rules in the light of fundamental rights. For its wider impact, *Pelham* must be considered together with the judgments in *Funke Medien* and *Spiegel Online* (commented here, here and here).

In addressing the legal status of sampling in light of fundamental rights, the Court has tried to strike a difficult balance of competing interests.

On the one hand, it ruled that short unrecognisable samples included in a new sound recording are not subject to copyright protection, and therefore do not require prior authorization. While rightholders suffer no economic or moral harm from such taking, users of samples can exercise their artistic freedom within certain limits.

On the other hand, an act of sampling that goes beyond such *de minimis* threshold and is considered recognisable is covered by the exclusive right of reproduction. Absent authorisation, such an act is only allowed if covered by the E&L for quotation. This means that the sampling at issue must meet the express conditions set out in Article 5(3)(d) InfoSoc Directive, as well as have the *intention of entering into dialogue* with the sampled work (or extract thereof). We expect that the application of this E&L to musical and audio-visual sampling will be challenging for the courts.

Overall, the Court's approach in *Pelham* to the role of fundamental rights on the scope of copyright law is somewhat conservative. To be sure, Article 13 of the Charter does have a key interpretative role in slightly reducing the potential scope of the right of reproduction of phonogram producers. However, the recourse to fundamental rights is limited to an internal dimension: they can only shape the copyright *acquis* rules within the boundaries set by the legislature. According to the Court, the extant legal framework already strikes the necessary balance between competing interests, including provisions – namely E&Ls and the three-step test – that function as internal mechanisms recognizing and protecting fundamental rights interests. In a realm of fast-paced technological development, this crystallization of the level of fundamental rights protection of

users in a legislative framework designed 20 years ago is, at the very least, debatable.

Be that as it may, the result is that fundamental rights become factors in the interpretation of exclusive rights and E&Ls, to be considered in combination with other factors, such as the effectiveness of harmonization and legal certainty. Crucially, this means that national legislators are bound by the exhaustive list of optional E&Ls in Article 5 InfoSoc Directive. Despite room to manoeuvre in relation to some of those provisions, they cannot go beyond that list, as that would endanger the effective harmonization and legal certainty.

One new insight gained from the Court's judgment in *Pelham* – and echoed in *Funke Medien* and *Spiegel Online* – is the quasi-mandatory nature of some E&Ls in Article 5(2) and (3) InfoSoc Directive. Namely, those E&Ls that operate as internal mechanisms to actualize the fundamental rights of users and strike a fair balance with the competing interests of rightholders "may or even *must*, be transposed by the Member States" (emphasis added). There is little doubt that this will at least include E&Ls like quotation, caricature, parody, and reproductions by the press. For others, a good case can certainly be made.

In closing, while the ruling in *Pelham* may not be revolutionary, it is significant in that it sets out in clear terms (some of the) functions fundamental rights serve in EU copyright law. This significance is amplified because *Pelham* is part of a trilogy of Grand Chamber judgments that share (sometimes verbatim) key statements in this respect. As argued by Christophe Geiger and Elena Izyumenko, while rejecting the idea of an external limitation based on freedom of expression, the Court appears receptive to the idea of 'constitutionalization' of copyright by accepting that this fundamental right helps shape the 'internal contours' of copyright's scope.

One might have preferred the Court to have expressly stated that in some cases copyright should give way to an overriding public interest or the right to freedom of expression, which would be in line with the jurisprudence of the European Court of Human Rights (e.g. *Ashby Donald*, commented here, and *The Pirate Bay*, commented here). But one could also read into the judgment an appeal to the legislator to take its responsibility to use its margin of discretion more responsibly than it has done in the past. Unfortunately, the recent changes to the EU copyright law (not to call it a reform) do not indicate much of an awareness of such responsibility.

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