

# A Human Right to Sample – Will the CJEU Dance to the BGH-Beat?

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## This article:

- The German Constitutional Court (BVerfG) ruled in its recent *Metall auf Metall* judgement that the right to artistic freedom under Art. 5(3) of the German Basic Law requires that the provisions of the German Copyright Act (UrhG) are interpreted to enable certain uses of samples. However, it did not conclusively decide whether this set target must be reached through a restrictive interpretation of the exclusive right of phonogram producers or a wide interpretation of the applicable ‘free use’ exception.
- Under the EU legal framework of the Information Society Directive (*InfoSoc Directive*) an equivalent to the German ‘free use’ does not exist. This raises the question whether a preliminary reference to the CJEU on the compatibility of Article 5 of the directive would create a conflict between the right to artistic freedom (Art. 13) and the right to the protection of intellectual property (Art. 17(2)) under the EU Charter.

jurisprudence on the interpretation of limitations and exceptions, or to limit the scope of the exclusive right of phonogram producers to such an extent that certain samples can be used by creative musicians without prior authorisation.

## 1. Introduction

Music sampling is a technique that uses parts of existing songs to construct new compositions.

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Although musical appropriation in general, and sampling in particular, are far from new phenomena, their legality has not been determined with certainty. One important question raised in this context is whether the extraction of fragments of sound recordings constitutes copyright infringement. Whereas it seems obvious that this is a question of degree, e.g. length of the sample, courts have struggled to define the quantitative and qualitative borders. Some courts have adopted a strict, or-bright-line rule, effectively prohibiting the unauthorized sampling of the shortest extracts. A widely-discussed series of German judgments established a rather exotic solution, which demanded that a sample can only be used without prior authorization, if it cannot be reproduced by an average producer. In late spring 2016, this line of cases led to the German Constitutional Court (BVerfG). The Court requested corrections to the civil courts' interpretation in order to accommodate the right to artistic freedom of artists who engage in the sampling of sound recordings. This paper briefly analyzes the German jurisprudence in this field and attempts to project its further development. It ponders the possibility of a referral of the case to the Court of Justice of the European Union (CJEU) on the question whether the current EU legal framework sufficiently considers the fundamental right to artistic freedom under Article 13 of the Charter of Fundamental Rights of the European Union (EU Charter). Eventually, it is considered whether a potential preliminary reference from the German Federal Supreme Court (BGH) can effect changes in secondary EU copyright legislation to enable sampling through a balancing of the interests of right holders and users, and thereby harmonize the relevant rules at EU level through a reliance on fundamental rights.

## **2. The Judgment of the BVerfG**

The dispute in the case “Metall auf Metall” arose between the music producer Moses P. and the German band Kraftwerk. The former had used a two-second sample of the latter band's song *Metall auf Metall* and integrated it into the song “Nur Mir”, which the defendant had produced for the German hip-hop artist Sabrina Setlur. The lower courts in Germany, as well as the BGH, had found an infringement of the sound recording, although the limitation of the German “free use” exception of Article 24 of the German Copyright Act (UrhG) would theoretically apply. However, the lower courts established a special rule for the application of the exception to sound recordings. The unauthorized use of parts of sound recordings within the scope of that exception would only be allowed if a

producer with average skills could not reproduce the sample with their or her own means. Throughout the line of judgments from the District Court Hamburg (2004)<sup>1</sup> to the BGH,<sup>2</sup> which discussed the case not once but twice,<sup>3</sup> the German courts interpreted the exclusive right to sound recordings widely to the effect that even smallest snippets of songs fall within its scope of protection.

The defendants in the main proceedings lodged a constitutional complaint, arguing that the conditions imposed on creative musicians by the application of the free use defense to sound recordings would infringe upon their artistic freedom under Article 5(3) of the German Basic Law (GG). The BVerfG rendered its judgement on 31 May 2016 and remanded the case back to the BGH.<sup>4</sup> It stated that the relevant provisions of the UrhG are in principle constitutional,<sup>5</sup> however, the lower courts' decisions had failed to create an appropriate balance between the property rights of phonogram producers, as protected by article 14(1) GG, and the right to artistic freedom of creative musicians. Specifically, the courts had not given the latter sufficient weight with the results that the appreciation of fundamental right was fundamentally flawed.<sup>6</sup>

The BVerfG found that the use of certain samples should be permitted irrespective of whether the user of such a sample can reproduce the sequence.<sup>7</sup> The exercise of the exclusive right under such a condition could prevent the new artistic creations even if licenses for samples were made available.<sup>8</sup>

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1 LG Hamburg, 08.10.2004 - 308 O 90/99.

2 For an overview of the procedural history of the “Metall auf Metall” saga see e.g. S Schonhofen, ‘Sechs Urteile über zwei Sekunden, und kein Ende in Sicht: Die „Sampling“-Entscheidung des BVerfG’ [2016] GRUR-Prax 277, 277, M Leistner, ‘Die „Metall auf Metall“- Entscheidung des BVerfG. Oder: Warum das Urheberrecht in Karlsruhe in guten Händen ist’ [2016] GRUR 772, 772, T Reilly, ‘Good Fences Make Good Neighboring Rights: The German Federal Supreme Court Rules on the Digital Sampling of Sound Recordings in *Metall auf Metall*’ [2012] Minn. J.L. Sci. & Tech. 153, 193-199, see also F Niemann & LN Mackert, ‘Limits of sampling sound recordings: the German Federal Supreme Court of Justice’s Metall auf Metall I & II holdings in light of the US jurisprudence on digital sampling’ [2013] E.I.P.R. 356, 358-360.

3 The first decision was handed down in 2008 (BGH, 20.11.2008 - I ZR 112/06), “Metall auf Metall” had its second appearance before the highest German civil court in 2012 (BGH, 13.12.2012 - I ZR 182/11), and returned, and is currently pending in 2016 (BGH - I ZR 115/16 – pending).

4 BVerfG, Decision of 31.05.2016 – 1BvR 1585/13 (“Metall auf Metall”).

5 The BVerfG argued that the provisions of the UrhG leave the judiciary ample room to create a balance by interpreting the interplay between the exclusive right for phonogram producers on the one hand, and the exception for ‘free use’ in the other. It distinguished between the right to control the use (“Verfügungsrecht”) and the right to exploit (“Verwertungsrecht”); the latter of which could only be restricted based on a high public interest, whereas restrictions of the former can already be justified by common welfare considerations. This does not mean, so the BVerfG that phonogram producers must be able to exercise their exploitation rights regarding every possible opportunity (BVerfG, Decision of 31.05.2016 – 1BvR 1585/13 (“Metall auf Metall”), paras 73-4).

6 BVerfG, Decision of 31.05.2016 – 1BvR 1585/13 (“Metall auf Metall”), para 64.

7 BVerfG, Decision of 31.05.2016 – 1BvR 1585/13 (“Metall auf Metall”), paras 90-92.

8 BVerfG, Decision of 31.05.2016 – 1BvR 1585/13 (“Metall auf Metall”) paras 96-98; the BVerfG recognized sampling as an art form and further acknowledged that the use of samples is a stylistic characteristic of hip-hop music (para 99).

The BVerfG concluded that, in this case, a significant restriction of artistic freedom was opposed by only a minimal infringement of the property right.

The court discussed two alternatives by which the two competing interests could be reconciled. First, it suggested that an analog application of the ‘free use’ defense to sound recordings in the light of the right to artistic freedom could enable creative musicians to use samples without authorization.

Second, the court also proffered the idea that a restrictive interpretation of the exclusive right to the effect that it would only extend to uses that touch upon the economic interest of the right holder could achieve the same (enabling) result.<sup>9</sup>

The highest German court made one particularly interesting observation, which unfolds the hypothetical scenario that forms the analytical background for this paper. Considering that large parts of copyright, including the right of phonogram producers<sup>10</sup> and possibly applicable limitations and exceptions,<sup>11</sup> are harmonized by EU law, the BGH would have to inquire in how far EU law leaves room for the interpretation and application of the relevant rules of the German UrhG. In this context, it could become necessary to inquire whether the European rules are in conformity with the corresponding rights of the EU Charter, namely Article 17(2) and 13.<sup>12</sup> This paper specifically aims to ascertain whether the InfoSoc Directive in its current form sufficiently considers the fundamental right to artistic freedom under Article 13.

### **3. The right to artistic expression (Art. 13 EU Charter)**

The following section investigates, as a preliminary question, whether the EU Charter applies at all to the facts of the case<sup>13</sup> before turning to the substance of the right to artistic freedom in the EU Charter and the ECHR.

#### *a. Relevance of EU fundamental rights*

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9 BVerfG, Decision of 31.05.2016 – 1BvR 1585/13 (“Metall auf Metall”), para 110.

10 Article 2(c) 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, OJ L 167, 22.6.2001, p. 10-19 (*InfoSoc Directive*).

11 Article 5 InfoSoc Directive.

12 This, of course, under the assumption that EU fundamental rights offer comparable protection for fundamental rights provided by the GG, cf. BVerfG, Decision of 31.05.2016 – 1BvR 1585/13 (“Metall auf Metall”), para 123.

13 It is assumed that certain acts in the context of the dispute come within the temporal scope of application of the InfoSoc Directive, cf. Art. 10 of the directive for its temporal applicability.

According to Article 51 (1), the EU Charter of fundamental rights is addressed to EU institutions and to Member States “only when they are implementing Union law”. CJEU case law has established that this entails the implementation of EU directives into national law.<sup>14</sup>

Regarding sampling, the InfoSoc Directive’s provisions on the reproduction right and its list of exceptions and limitations may be relevant. The InfoSoc Directive does not expressly entail provisions on an adaptation right or a free use doctrine, let alone a right to remix or sample. At the same time, it is commonly understood that exclusive rights are fully harmonized on a European level<sup>15</sup> and that the list of possible limitations and exceptions is exhaustive<sup>16</sup>.

Further, the CJEU has rarely opted to let the Member States interpret vague legal terms in copyright directives.<sup>17</sup> In *Infopaq*, the CJEU held that the concept of ‘reproduction in part’ is an autonomous concept of EU law.<sup>18</sup> Similarly, regarding exceptions and limitations, the Court has considered a coherent interpretation to be necessary, arguing that diverging interpretations in different Member States would adversely affect the functioning of the internal market.<sup>19</sup> Thus, one may well argue that there is very little leeway for Member States to regulate the reproduction of parts of a sound

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14 CJEU: Judgement in *Rhimou Chakroun v Minister van Buitenlandse Zaken*, Case C-578/08, EU:C:2010:117, paras 44 et seq.

15 M Grünberger, ‘Bedarf es einer Harmonisierung der Verwertungsrechte und Schranken? Ein Beitrag zur Entwicklung dogmatischer Bausteine eines umweltsensiblen Urheberrechts’ [2015] ZUM 273, 274; cf. for the reproduction right Judgements in CJEU: Judgment in *Infopaq International A/S v Danske Dagblades Forening*, Case C-5/08, EU:C:2009:465, para 27 and CJEU: Judgment in *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08)* and *Karen Murphy v. Media Protection Services Ltd (C-429/08)*, Joined cases C-403/08 and C-429/08, EU:C:2011:631, paras 154, 159.

16 E Rosati, ‘Copyright in the EU: in search of (in)flexibilities’ [2014] GRUR Int 419, 592 et seq.

17 Safe for the ‘grandfather clause’ in Art. 5 (3) (o) and exceptions in other directives such as Art. 6 of Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299/5, 27.10.2012, p. 5-12 (Orphan Works Directive). A Metzger, ‘Der Einfluss des EuGH auf die gegenwärtige Entwicklung des Urheberrechts’ [2012] GRUR 118, 121 et seq.; E Rosati, ‘Just a Laughing Matter? Why the CJEU Decision in *Deckmyn* is Broader than Parody’ [2015] C.M.L. Rev. 511, 520 et seq; cf. the judgements in CJEU: in *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)*, Case C-467/08, EU:C:2010:620, para 32; CJEU: Judgement in *Ekro BV Vee- en Vleeshandel v Produktschap voor Vee en Vlees*, Case C-327/82, EU:C:1984:11, para 11; CJEU: Judgement in *Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster*, Case C-287/98, EU:C:2000:468, para 43; CJEU: Judgement in *Oliver Brüstle v Greenpeace eV.*, Case C-34-10, EU:C:2011:669, para 25; CJEU: Judgment in *UsedSoft GmbH v Oracle International Corp.*, Case C-128/11, EU:C:2012:407, para 39.

18 CJEU: Judgment in *Infopaq International A/S v Danske Dagblades Forening*, Case C-5/08, EU:C:2009:465, paras 27 et seq.

19 See e.g. judgements CJEU: Judgment in *ACI Adam BV and Others v Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoeding*, Case C-435/12, EU:C:2014:254, para 34; CJEU: Judgment in *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, Case C-201/13, EU:C:2014:2132, paras 15 et seq.

recordings, even if its form was altered.<sup>20</sup> Furthermore, according to CJEU jurisprudence, EU fundamental rights are even relevant when the directive in question leaves Member States some discretion for its implementation.<sup>21</sup> In such a case, national fundamental rights and European fundamental rights are both applicable.<sup>22</sup> Hence, while the BVerfG in *Metall auf Metall* has left it for the BGH to decide whether restrictive provisions of the InfoSoc Directive for sampling need to be measured against EU fundamental rights<sup>23</sup>, it seems clear that the EU Charter is in fact (also) relevant.<sup>24</sup> As the BGH has acknowledged the mapped out state of harmonization regarding exclusive rights and limitations and exceptions in a recent decision<sup>25</sup>, it seems likely that it will, in fact, decide to pose a set of preliminary questions to the CJEU on June 1.

*b. The right to artistic freedom in the EU Charter and in the ECHR*

Article 13 of the European Charter states that “[t]he arts and scientific research shall be free of constraint.” The contours of this right are still rather unclear as there is no significant jurisprudence of the CJEU.<sup>26</sup> Even in cases when the Court could have at least mentioned Art. 13 (such as *Netlog*<sup>27</sup> and *UPC Telekabel*<sup>28</sup>), it referred solely to freedom information as laid down by Art. 11 of the Charter.<sup>29</sup>

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20 Although the CJEU has left the question of whether the right of adaptation is harmonised open, see the judgement in CJEU: Judgment in *Art & Allposters International BV v Stichting Pictoright*, Case C-419/13, EU:C:2015:27, paras 27, 46. The court also left open the interpretation of Art. 12 Berne Convention, which provides: “Authors of literary or artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works.” On the relationship between the right of reproduction and the right of adaptation, see J Cabay & M Lambrecht, ‘Remix prohibited: how rigid EU copyright laws inhibit creativity’ [2015] *JIPLP* 359, 362 et seq.

21 Judgements in CJEU: Judgment in *Åklagaren v Hans Åkerberg Fransson*, Case C-617/10, EU:C:2013:105, para 29 and CJEU: Judgment in *Stefano Melloni v Ministerio Fiscal*, Case C-399/11, EU:C:2013:107, para 60.

22 Judgements in CJEU: Judgment in *Åklagaren v Hans Åkerberg Fransson*, Case C-617/10, EU:C:2013:105, para 29: “[W]here a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised”. Cf. J Masing, ‘Einheit und Vielfalt des Europäischen Grundrechtsschutzes’ [2015] *JZ* 477, 483.

23 BVerfG, Decision of 31.05.2016 – 1BvR 1585/13 (“Metall auf Metall”) para 120.

24 In a case like this, where EU law does determine the bulk of the relevant questions, political accountability and fundamental rights commitment are linked, and the relevance of EU fundamental rights therefore also seems sensible. Cf. Masing, op cit. *supra*, note # at 458 who also points out the many issues that arise from a fundamental rights protection on three different levels.

25 BGH, 28.07.2016 - I ZR 9/15, para 24.

26 I Augsberg ‘Europäisches Unionsrecht/GRC’ in von der H Groeben and J Schwarze and A Hatje (eds.), *Commentary* (7th ed., Nomos Baden-Baden 2015), at Art. 13 para 2.

27 CJEU: Judgment in *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, Case C-360/10, EU:C:2012:85.

28 CJEU: Judgment in *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, Case C-314/12, EU:C:2014:192.

Of course, Art. 11 and Art. 13 of the Charter are closely connected.<sup>30</sup> Nevertheless, the fact remains that there is no approximation of a definition of freedom of the arts at the EU level.

However, Art. 52 (3) of the Charter states that “as far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.” The Charter could provide a more extensive protection than the ECHR, but the scope of freedom of expression under the Charter has so far been largely congruent with the scope of the right to freedom of expression under the ECHR.<sup>31</sup> While the ECHR does not entail a specific provision dedicated to artistic freedom, the ECtHR held early on that Art. 10 ECHR “includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.”<sup>32</sup> The CJEU can thus rely on the jurisprudence of the ECtHR to interpret Art. 13 of the Charter.<sup>33</sup>

In its cases on copyright and Art. 10, the ECtHR has applied a fairly broad understanding of the scope of activities protected under freedom of expression. As *Geiger* and *Izyumenko* note regarding the *Ashby Donald*<sup>34</sup> and *The Pirate Bay*<sup>35</sup> decisions, “even illegal and profit-making sharing of copyright-protected material is not deprived of freedom of expression guarantees.”<sup>36</sup> Under this jurisprudence, the taking of small samples for the creative use in a new song would be considered to fall within the ambit of Art. 10 ECHR. If copyright rules prohibit this action and lead to a conviction for copyright infringement, this would constitute an interference with freedom of expression. Freedom of

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29 Cf. G Spindler, ‘Zivilrechtliche Sperrverfügungen gegen Access Provider nach dem EuGH-Urteil „UPC Telekabel“’ [2014] GRUR 826, 829 regarding the lack of mention of the rights of the users who post content that may be subject to overblocking in the *UPC Telekabel* case.

30 N Bernsdorff ‘Charta der Grundrechte der Europäischen Union’ in J Meyer (ed.), *Commentary* (4th ed., Nomos Baden-Baden 2014), at Art. 13 para 12.

31 I Augsberg ‘Europäisches Unionsrecht/GRC’ in von der H Groeben and J Schwarze and A Hatje (eds.), *Commentary* (7th ed., Nomos Baden-Baden 2015), at Art. 13 para 2.

32 ECtHR, *Müller v Switzerland*, no. 10737/84, 24 May 1988, para 27. See also *Meyer-Ladewig* in: Meyer-Ladewig, *EMRK – Europäische Menschenrechtskonvention, Handkommentar* (4th ed. 2017), Art. 10 para 20.

33 Cf. CJEU: *Judgment in Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, Case C-112/00, EU:C:2003:333, para 75 et seq. for the CJEU’s reliance on the ECtHR jurisprudence on freedom of expression.

34 ECtHR, *Ashby Donald v France*, no. 36769/08, 10 January 2013.

35 ECtHR, *Neij and Kolmisoppi (The Pirate Bay) v Sweden*, no. 40397/12, 19 February 2013.

36 C Geiger & E Izyumenko, ‘Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression’ [2014] IIC 316at 339.

expression can thus serve as an external limit to copyright<sup>37</sup>.

If an interference is established, the ECtHR applies its “three-part-test” to assess whether the measure was prescribed by law, pursues a legitimate aim and passes the necessity test – i.e. whether the measure was necessary in a democratic society (cf. Art. 10 (2) ECHR). As the first two conditions are usually easily met in copyright cases, the necessity test becomes the central point of interest. It is well established case law that freedom of expression “is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly.”<sup>38</sup> The ECtHR has identified some criteria that it deems relevant – such as the nature and the character of the act (including whether the use is commercial or political and whether it serves the public interest)<sup>39</sup> or the proportionality of the state imposed measure<sup>40</sup>. The Court does, however, leave a wide margin of appreciation for states when two convention rights (freedom of expression and the protection of property) are implicated.<sup>41</sup>

The exact weight the Strasbourg court would give to the interests of the artist in a sampling case is difficult to foresee. Different types of expression may be protected differently.<sup>42</sup> It is, for example, well established that political speech enjoys a particularly strong protection under Art. 10 ECHR<sup>43</sup>. In *Karataş v. Turkey*<sup>44</sup> the Strasbourg court based its finding of a violation of Art. 10 *inter alia* on the fact that the poems in question had an “obvious political dimension” and “that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of

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37 E Izyumenko, 'The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective' [2016] JWIP 115, 116.

38 See e.g. ECtHR, *Delfi AS v. Estonia*, no. 64569/09, 16 June 2015, para 131 with further references.

39 See e.g. ECtHR, *Neij and Kolmisoppi (The Pirate Bay) v Sweden*, no. 40397/12, 19 February 2013: “[T]he Court must take into account various factors, such as the nature of the competing interests involved and the degree to which those interests require protection in the circumstances of the case.”

40 See e.g. ECtHR, *Ashby Donald v France*, no. 36769/08, 10 January 2013, para 43. The exact contours remain unclear as *Geiger/Izyumenko* point out, C Geiger & E Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' [2014] IIC 316, 525 et seq.

41 ECtHR, *Neij and Kolmisoppi (The Pirate Bay) v Sweden*, no. 40397/12, 19 February 2013, and *Ashby Donald and Others v. France*, no. 36769/08, 10 January 2013 para 40 et seq.

42 BJ Jütte, 'The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe' [2016] E.I.P.R. 11, 16; comparing political and commercial speech.

43 See, e.g., C Kearns, 'The Judicial Nemesis: Artistic Freedom and the European Court of Human Rights' [2012] I.L.J. 56, 56; C Geiger & E Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' [2014] IIC 316, 525 et seq. See also ECtHR, *Tatár and Fáber v. Hungary* Application nos. 26005/08 and 26160/08, 12 September 2012, para 41, where the ECtHR based its finding of an Art. 10 *inter alia* on the fact that “an administrative sanction, however mild, on the authors of such expressions which qualify as artistic and political at the same time can have an undesirable chilling effect on public speech.”

44 *Karataş v. Turkey*, no. 23168/94, 8 July 1999.



public interest” (para 50). In cases of political expression there is thus a much smaller margin of appreciation left for state measures.<sup>45</sup>

Music – as the pending Pussy Riot case may demonstrate<sup>46</sup> – can certainly be very political, and hip hop as a genre also has a strong relation to political speech.<sup>47</sup> However, many sampling practices – such as the taking of the two second sample for “Nur Mir” – likely lack an obvious political dimension.<sup>48</sup> This could mean that that the Strasbourg Court would consider the safeguards afforded to this artistic expression to be on a lower level than those for political speech.<sup>49</sup>

It is important to note, though, that the ECtHR has, to a certain degree, also taken into consideration the necessities of specific genres of art<sup>50</sup> in its interpretation of Art. 10 ECHR. So far, this is primarily the case for satires.<sup>51</sup> This was first established in *Vereinigung Bildender Künstler v. Austria*<sup>52</sup>, when the ECtHR found a violation of Art. 10 ECHR in an Austrian court’s injunction prohibiting the display of a controversial Otto Mühl painting. The painting showed various public figures – among them FPÖ politician Meischberger – in sexual positions, and the Austrian court had found that this amounted to a debasement of the politician’s public standing. The ECtHR, however, noted: “The Court finds that such portrayal amounted to a caricature of the persons concerned using satirical elements. It notes that satire is a form of artistic expression and social commentary and, by its

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45 *Ashby Donald and Others v. France*, no. 36769/08, 10 January 2013, para 39.

46 *Mariya Vladimirovna Alekhina and others against Russia*, no. 38004/12, lodged on 19 June 2012.

47 Cf., for example, T Rose, *Black Noise: Images and Interpretations: Rap Music and Black Culture in Contemporary America* Wesleyan University Press, Middletown 1994). See also the landmark U.S. Supreme Court case *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994) that involved the hip hop band 2 *Live Crew* and their critical parody of Roy Orbison's rock ballad, “Oh, Pretty Woman”.

48 *Duhanic* describes the function of samples as follows: “The practice of finding fragments of past recordings that can be made appealing to the present audience illustrates two major functions of digital sampling: it serves as innovation catalyzer as it brings existing material into a new context and secondly, it serves as an informational filter by notifying listeners of the existence of the underlying composition, thus simultaneously archiving, advertising and identifying past artistic expression.”, I Duhanic, ‘Copy this Sound! The Cultural Importance of Sampling for Hip Hop Music in Copyright Law – A Copyright Law Analysis of the Sampling Decision of the German Federal Constitutional Court’ [2016] GRUR Int. 1107, 1009.

49 Cf. *Neij and Kolmisoppi (The Pirate Bay) v Sweden*, no. 40397/12, 19 February 2013. However, the expression in question in this case was quite different from sampling.

50 R Grote and N Wenzel ‘EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz’ in O Dörr and R Grote and T Marauhn (eds.), *Commentary* (2nd ed., Mohr Siebeck Tübingen 2013), Chapter 18, at para 129. Cf. E Polymenopoulou, ‘Does one Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights’ [2016] HRLR 511, 530 *et seq.* who identifies an emerging defence for humor, satire and parody, and the Court’s options to “take into account the distinct nature of the arts as a separate defence” (at 535) albeit underlining the ECtHR’s current “preference towards the rather contextual defence of the ‘contribution to the public debate’” (at 538).

51 See e.g. *Alves da Silva v Portugal*, no. 41665/07, 20 October 2009, para 27; *Welsh et Silva Canha v Portugal*, no. 16812/11, 17 Sept 2013, para 29; *Eon v. France*, no. 26118/10, 14 March 2013, para 60.

52 *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, 25 January 2007.

inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care” (para 33) (emphasis added). Similarly, in *Karataş v. Turkey*<sup>53</sup> the ECtHR found that the contents of the text in question could not be taken literally, because “the medium used by the applicant was poetry, a form of artistic expression” (para 49).

In a case concerning sampling, it therefore seems possible that the ECtHR would build on its jurisprudence and, like the German Constitutional Court, take into consideration the necessities of the art in question, including “genre specific considerations”<sup>54</sup>. Of course, the outcome would always heavily rely on the facts of the specific case. There is, however, some potential that an ECtHR decision on sampling would lead to an outcome similarly favorable to artistic freedom as the German decision.<sup>55</sup> The fundamental rights of the ECHR, similar to the German constitution,<sup>56</sup> add another layer of review that may find a violation of freedom of expression even when copyright exceptions and limitations exist.<sup>57</sup>

With regard to a possible CJEU decision on Art. 13 EU Charter, when compared to a ECtHR decision on Article 10 ECHR, it seems even less likely that the court would grant much leeway with regards to the balancing of the competing fundamental rights. That is, it is argued, because the ECHR provides a minimum standard of protection while the EU Charter provides for a full-fledged fundamental rights protection (against acts of the EU).<sup>58</sup> The margin of appreciation the ECHR leaves can hence be understood to leave room e.g. for different national weighing of fundamental rights or different rules

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53 *Karataş v. Turkey*, Application no. 23168/94, 8 July 1999.

54 M Leistner, 'Die „Metall auf Metall“ - Entscheidung des BVerfG. Oder: Warum das Urheberrecht in Karlsruhe in guten Händen ist' [2016] GRUR 772, 1014, translating the German Constitutional Court decision.

55 See also C Geiger & E Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' [2014] IIC 316, 335: „It is hardly imaginable that in a case with strong freedom of expression interests (which was not the case in *Ashby Donald* and in 'TPB'), the proprietary interests of the copyright holder would prevail. As we have seen, the recent trend in the case law of the CJEU rather confirms a will to use freedom of expression to overcome 'over-protectionist' tendencies of copyright protection”.

56 It is important to note that there are, of course, differences between the Art. 10 ECHR and Art. 5 (3) of the German Basic Law (Grundgesetz). The latter, for example, only allows limits to the freedom of the arts that are inherent in the constitution itself (such as other fundamental rights), cf. R Grote and N Wenzel 'EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz' in O Dörr and R Grote and T Maruhn (eds.), *Commentary* (2nd ed., Mohr Siebeck Tübingen 2013), Chapter 18, at para 130.

57 BJ Jütte, 'The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe' [2016] E.I.P.R. 11, 16.

58 J Masing, 'Einheit und Vielfalt des Europäischen Grundrechtsschutzes' [2015] JZ 477, 480.

on burden of proof.<sup>59</sup> The CJEU however, would possibly not leave this balance up to the Member States, if two fundamental rights need to be weighed against each other, and more protection for one thus implies less protection for the other. In particular, in a case in which the validity of a EU directive is questioned, a margin of discretion may possibly only be granted for the redrafting after a declaration of incompatibility. The exact weight the CJEU would give to Art. 13 of the Charter is difficult to foresee. At the same time, as mentioned above, if the CJEU draws on ECtHR jurisprudence to interpret Art. 13 of the Charter, this could lead to a similar result as the BVerfG decision in that it could recognize an artistic right to use small snippets without authorization.

#### 4. Exclusive Rights

The BVerfG suggested two options for reconciling the right to artistic freedom with (German) copyright regulating sampling, i.e. limiting the scope of exclusive rights or applying the free use limitation. Respectively, this section turns to the protection of parts of sound recordings on the EU level, before section 5. looks at exceptions and limitations for creative uses.

##### a. *Stumbling over a low threshold*

In *Metall auf Metall*, the German courts unanimously ruled that even small excerpts of sound recordings are protected by the exclusive right of Article 85 UrhG, which find its equivalent in Articles 2(b) and 3(2)(b) InfoSoc Directive. The CJEU has consistently held that right holders deserve a high level of protection, which could also justify such an interpretation of the right in sound recordings.<sup>60</sup> In *Infopaq I*, the Court suggested that 11 words from a newspaper article could be protected by copyright proper, given that these words in themselves display a degree of originality.<sup>61</sup> This was also echoed in *SAS Institute*, where the Court ruled that the reproduction of a part of a work

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<sup>59</sup> *Ibid.*, 480.

<sup>60</sup> Cf. Recital 9 InfoSoc Directive states that “[any harmonisation of copyright and related rights must take as a basis a high level of protection” and Recital 10 further provides that “[i]f authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work”, see further CJEU: Judgment in *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v. Media Protection Services Ltd* (C-429/08), Joined cases C-403/08 and C-429/08, EU:C:2011:631, para 186, CJEU: Judgment in *Infopaq International A/S v Danske Dagblades Forening*, Case C-5/08, EU:C:2009:465, para 40, CJEU, CJEU: Judgment in *Eva-Maria Painer v Standard VerlagsGmbH and Others*, Case C-145/10, EU:C:2011:798, para 107, and CJEU: Judgment in *GS Media BV v Sanoma Media Netherlands BV and Others*, Case C-160/15, EU:C:2016:644, paras 30, 53; see also J Pila & P Torremans, *European Intellectual Property Law* Oxford University Press, Oxford, New York, etc. 2016), 338.

<sup>61</sup> CJEU: Judgment in *Infopaq International A/S v Danske Dagblades Forening*, Case C-5/08,

is infringing, if that part in itself is an “expression of the intellectual creation of the author”.<sup>62</sup> The Court has not yet ruled on the scope of protection for sound recordings, but it is argued that originality has been established as a horizontal standard for copyright and related rights.<sup>63</sup> Torremans and Stamatoudi have suggested that such an interpretation could also bring sampling within the scope of application of the reproduction right.<sup>64</sup> This would leave room for the position of the German courts that even short samples can constitute infringement under the additional condition that such samples constitute an “expression of the intellectual creation of the author”. This would enable the right holder in a sound recording to enjoy protection for even relatively small extracts, provided that originality can be found in this extract.

But there are also good reasons to distinguish, in principle, as the German Courts did, between the right to authorial works and related rights such as the right for phonogram producers in their phonograms under Article 2(c) InfoSoc Directive, granting them protection for parts that are below the threshold of originality. When analyzing the German judgments, an argument resurfaces constantly which suggests that due to the nature of the right in sound recordings, which protects the economic effort rather than artistic creativity, every extract should enjoy protection. Pursuant to this line of argument, the smallest and shortest parts of sound recordings carry economic value and therefore deserve protection.<sup>65</sup> There is no indication, however, that such an interpretation can rely on a sound basis in the interpretation given to Article 2 by the jurisprudence of the CJEU. Therefore, sound recordings could be subject to the same originality standard as copyright proper. This could limit the protection of sound snippets to such snippets that encapsulate and reflect some sort of

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EU:C:2009:465, para 38.

62 CJEU: Judgement in SAS Institute Inc. v. World Programming, Case C-406/10, EU:C:2010:259, para 70: “(...) Article 2(a) of Directive 2001/29 must be interpreted as meaning that the reproduction, in a computer program or a user manual for that program, of certain elements described in the user manual for another computer program protected by copyright is capable of constituting an infringement of the copyright in the latter manual if — this being a matter for the national court to ascertain — *that reproduction constitutes the expression of the intellectual creation of the author* of the user manual for the computer program protected by copyright.” (*emphasis added*), cf. E Barker & I Harding, ‘Copyright, the ideas/expression dichotomy and harmonization: digging deeper into SAS’ [2012] JIPLP 673, 677.

63 See to that effect e.g. J Pila & P Torremans, *European Intellectual Property Law* Oxford University Press, Oxford, New York, etc. 2016), 302, see also E Barker & I Harding, ‘Copyright, the ideas/expression dichotomy and harmonization: digging deeper into SAS’ [2012] JIPLP 673, 677, cf. CJEU: Judgment in Infopaq International A/S v Danske Dagblades Forening, Case C-5/08, EU:C:2009:465, para 37.

64 I Stamatoudi & P Torremans, ‘The Information Society Directive’, in I Stamatoudi & P Torremans (eds), *EU Copyright Law: A Commentary*, (Edward Elgar Publishing, Cheltenham, Northampton 2014) 395, para 11.12.

65 BGH, Decision of 20.11.2008 – I ZR 112/06, paras 14-15, see K Wagner, ‘Sampling als Kunstform und die Interessen der Tonträgerhersteller. Auswirkungen der BVerfG-Rechtsprechung auf die Kunstfreiheit’

creative effort or originality.

Alternatively, since the purpose of the protection of sound recordings is to protect the investment and the organizational effort of the producer, another threshold for the protection of small parts could come into play. The investment the producer of a sound recording makes would only be affected if the new use were to compete with the original recording.<sup>66</sup> Thus, as *Ohly* suggests, those uses of sound recordings that do not, on any level, compete with the original, could fall outside the scope of protection.<sup>67</sup> Interestingly, the BVerfG also emphasized this option as one way accommodate the artistic practice of music sampling.<sup>68</sup> It stressed that the artistic and temporal distance, the significance of the sample used, the dimension of the economic harm to the rights holder and his prominence should be taken into consideration to evaluate such danger of substitution and decline in sales.<sup>69</sup> This would avoid the unfortunate situation that a phonogram producer would enjoy a scope of protection that is larger than that of the associated work, and could thus prevent uses which would not require authorization by the author. As this question is not yet settled at the European level, introducing such a threshold could be one option for the CJEU to enable some sampling practices. Of course, this would have no effect on the legality of samples that do take original parts of a song that are protected by copyright proper and not just by related rights.

*b. Restricting wide interpretation (Article 2 InfoSoc)*

If the BGH were to pose the question to the CJEU whether the interpretation of the lower courts of the exclusive rights of phonogram producers in their sound recordings is compatible with the provisions of the InfoSoc Directive, the Court could reasonably come to the conclusion that a 2-second sample does not fall within the scope of protection of the exclusive rights because it is not, as a part of the whole of the sound recording, original in itself. Such an interpretation would subsequently leave sufficient room for creative efforts of sampling artists to use excerpts from sound recordings and integrate them into existing works. The hindering effect of exclusive rights could thus be limited to

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[2016] MMR 513, 514.

66 A Ohly, *Verhandlungen des 70. Deutschen Juristentages Hannover 2014 Bd. I: Gutachten Teil F: Urheberrecht in der digitalen Welt - Brauchen wir neue Regelungen zum Urheberrecht und dessen Durchsetzung* (1 C.H.Beck, München 2014), F 41.

67 *Ibid.*, F 41.

68 BVerfG, Decision of 31.05.2016 – 1BvR 1585/13 (“Metall auf Metall”), para 110.

69 BVerfG, Decision of 31.05.2016 – 1BvR 1585/13 (“Metall auf Metall”), para 102.

such instances in which the appropriated extracts are original in themselves. This would still leave right holders with ample opportunity to exploit their sound recordings economically and exercise their property rights.

But even a systematic decoupling of the originality standard from sound recordings could leave limited, but possibly sufficient room for sampling to the effect that an effective exercise of the right to artistic expression would be ensured. The scope of protection under Article 85(1) UrhG interpreted in the light of Article 2(c) InfoSoc Directive and in the light of German and European fundamental rights could be limited to very short samples – possibly integrating the substitution criterion mentioned above.<sup>70</sup> In most cases, such samples would also fail to meet the originality threshold.

Depending on the length of a sample, this would also leave room for the protection of samples that do not meet the originality threshold, but which are nevertheless protected and therefore contribute to the realization of the economic interests of the phonogram producer.

The limitation of the scope of protection for phonogram producers to samples that meet a certain quantitative or qualitative threshold could contribute to create a fair balance between the interest of right holders and sampling artists. Ideally, this threshold would be congruent with the threshold of infringement of copyright in the musical composition in order to guarantee legal certainty.

## 5. Limitations for Creative Uses

More than about exclusive rights for phonogram producers, the “Metall auf Metall” litigation was about the scope of the free use exception under German copyright law. Limitations are the flipside of exclusive rights and have more recently been referred to as user rights. Their precise nature as well as the distinction between limitations and exceptions are still subject to debate,<sup>71</sup> their essential functions are, however, undisputed. They form little pockets of freedom for users to work with and consume, without prior authorization, protected subject matter. They are, as *Geiger* put it “islands of freedom in

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70 M Leistner, 'Die „Metall auf Metall“ - Entscheidung des BVerfG. Oder: Warum das Urheberrecht in Karlsruhe in guten Händen ist' [2016] GRUR 772, 776, R Podszun, 'Postmoderne Kreativität im Konflikt mit dem Urheberrechtsgesetz und die Annäherung an »fair use«' [2016] ZUM 606, 611, S Schonhofen, 'Sechs Urteile über zwei Sekunden, und kein Ende in Sicht: Die „Sampling“-Entscheidung des BVerfG' [2016] GRUR-Prax 277, 279, I Duhanic, 'Copy this Sound! The Cultural Importance of Sampling for Hip Hop Music in Copyright Law – A Copyright Law Analysis of the Sampling Decision of the German Federal Constitutional Court' [2016] GRUR Int. 1107, 1015.

71 C Geiger, 'Der urheberrechtliche Interessenausgleich in der Informationsgesellschaft - Zur Rechtsnatur der Beschränkungen des Urheberrechts' [2004] GRUR Int. 815.

an ocean of exclusivity<sup>72</sup>.<sup>72</sup> In this context it has also been argued that exceptions and limitations could, conversely constitute the ocean in which economic rights form islands of exclusivity.<sup>73</sup> This discussion already exposes the problem that the BVerfG has highlighted in its ruling. Limitations and/or exceptions may be necessary for the exercise of fundamental rights. Their absence can be detrimental for creativity; their narrow interpretation can limit creativity unduly.

a. *Restrictions for sampling through narrow interpretation*

There is no exception in the exhaustive list of Article 5 InfoSoc Directive that expressly permits the use of musical works for creative re-appropriation. While the post-Murphy jurisprudence suggests interpreting exceptions in order to safeguard their effectiveness,<sup>74</sup> the Court did not go beyond the literal scope of the exceptions in question in any of these cases.

In an impressively long line of case-law, the CJEU has emphasized and repeatedly underlined that exceptions to exclusive rights must be interpreted strictly.<sup>75</sup> It developed this relation between exclusive rights and exceptions from the more general rule of interpretation that derogations from a general principle established by a directive must be interpreted strictly.<sup>76</sup> In relation to the InfoSoc Directive this means that the general principle governing its application is a high level of protection of the rights of right holders, and the derogations to this principle are the exceptions contained in Article 5. This interpretation, so the CJEU in *Infopaq I*, is also supported by Recitals 4, 6 and 21 of the directive, which mandate that right holders must have legal certainty as regards the protection of their protected works.<sup>77</sup> One could find many an issue with this interpretation, most notably that such a strong focus on legal certainty for right holders, which is safeguarded by a strict interpretation of Article 5, does not sufficiently take into consideration the interest of non-right holders. Nevertheless,

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72 C Geiger, 'Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?' [2004] IIC 268, 272.

73 A Kur, 'Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations under the Three Step-Test?' [2008] 48, 6-8.

74 See only CJEU: Judgment in *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, Case C-201/13, EU:C:2014:2132, para 23; see on that judgement E Rosati, 'CJEU rules on the notion of parody (but it will not be funny for national courts)' [2015] JIPLP 80, and in particular S Arrowsmith, 'What is a parody? Deckmyn v Vandersteen (C-201/13)' [2015] E.I.P.R. 55, 57.

75 Initially CJEU: Judgment in *Infopaq International A/S v Danske Dagblades Forening*, Case C-5/08, EU:C:2009:465, para 56, see more recently CJEU: Judgment in *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH*, Case C-138/16, EU:C:2107:218, paras 37-38.

76 CJEU: Judgment in *Infopaq International A/S v Danske Dagblades Forening*, Case C-5/08, EU:C:2009:465, para 56.

77 *Ibid.*, para 59.

the Court has continued to follow this restrictive approach and relaxed it only marginally.

Article 5(5) constitutes a further limiting factor in the application of exceptions and limitations. In interpreting the limits of the potentially applicable exceptions and limitations, the three-step test has to be taken into consideration. Whereas the precise purpose and systematic locus of the test within EU law is still not entirely clear,<sup>78</sup> it is safe to say that the test is – and must be – used to interpret specific copyright exceptions. Article 5(5) InfoSoc Directive permits only such exceptions that apply in “certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.” With regard to sampling, a step-by-step interpretation of the test could potentially lead to a prohibitive stance towards sampling. Already the first step, if applied to the existing list of exceptions and limitations would prove difficult to surpass. Although scholars have suggested that the first step is redundant and should be ignored, a narrow interpretation of the test would fail to see sampling falling within one of the ‘certain’ special cases. If, for example, the quotation exception were to be stretched to encompass musical samples, it could be questioned whether that particular exception constitutes such a case. With the current understanding of the test within the context of the directive and its specific formulations such an extensive formulation therefore seems rather unlikely.

Commentators have suggested using the test as a tool to open up the list of exceptions under Article 5 InfoSoc, and in general as a tool that could introduce flexibility to exceptions and limitations.<sup>79</sup> In particular, the last two steps of the test would not necessarily stand in the way of a more flexible interpretation of the existing exceptions.<sup>80</sup> Yet, the current interpretation and application of the test

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78 The CJEU has used the test in a variety of ways, merely stating that its conditions are fulfilled, as in CJEU: Judgment in Technische Universität Darmstadt v Eugen Ulmer KG, Case C-117/13, EU:C:2014:2196, para 34, or, more recently, even conducted a full analysis of all three steps (AG Campos Sánchez-Bordona: Opinion in Stichting Brein v. Jan Frederik Wullems under the name of Filmspeler, Case C-527/15, EU:C:2016:983, paras 73-82). It is now widely assumed that the test is addressed at both the legislature and the judiciary, cf. R Arnold & E Rosati, ‘Are national courts the addressees of the InfoSoc three-step test?’ [2015] JIPLP 741.

79 Christophe Geiger, Reto M. Hilty, Jonathan Griffiths, & Uma Suthersanen, “*Declaration: A Balanced Interpretation Of The “Three-Step Test” In Copyright Law*”, 01.09.2008 (Max Planck Institute for Innovation and Competition), available at: [http://www.ip.mpg.de/de/aktuelles/declaration\\_on\\_the\\_three\\_step\\_test.html](http://www.ip.mpg.de/de/aktuelles/declaration_on_the_three_step_test.html) (accessed: 10.01.2016), also published in C Geiger, RM Hilty, J Griffiths, U Suthersanen, &, ‘Declaration: A Balanced Interpretation Of The “Three-Step Test” In Copyright Law’ [2010] JIPITEC 119.

80 Cf. M Kleinemenke, ‘Google Books und Fair Use – Lehren für eine flexiblere Ausgestaltung und Anwendung urheberrechtlicher Schrankenbestimmungen (auch) im deutschen und europäischen Recht’ [2014] GRUR Int. 892, 898, and M Kleinemenke, *Fair Use im deutschen und europäischen Urheberrecht?: Eine rechtsvergleichende Untersuchung zur Flexibilisierung des urheberrechtlichen*



prohibits such an approach, as the test is used as an additional restriction to the interpretation of copyright exceptions.<sup>81</sup>

*b. Relaxing restrictive interpretation (Article 5 InfoSoc)*

Already in *FAPL/Murphy*, the CJEU added that, in addition to strict interpretation, the application of exceptions and limitations should be supplemented by a functional approach that should aim at safeguarding the effectiveness of the exception in question<sup>82</sup>. This more balanced approach would also take into consideration the idea encapsulated in Recital 31 of the Copyright Directive, which is to create a “fair balance of rights and interests [...] between the different categories of right holders and users of protected subject-matter“. What precisely the interests of right holders are is unclear (reasonable exploitation<sup>83</sup>, efficient enforcement). An interpretation, or, more accurately, substantiation of these ‘interests’ has not yet taken place. But what forms the rather vague notion of ‘interests’ is much less clear for **users** of protected subject matter, aside from the fact that one of the interests is the exercise of such exceptions that are explicitly enumerated in the Copyright Directive and the other directives of the copyright *acquis*.

A more liberal interpretation of exceptions to copyright is not entirely unprecedented, and the CJEU even employed such an approach to overcome the absence of a specific exception to the reproduction right. In *TU Darmstadt*, the Court supplemented the exception under Article 5(3)(n) with an ancillary right of reproduction in order to enable libraries to digitize works so they can be accessed by the public.<sup>84</sup> Similarly, it permitted libraries to lend e-books under the public lending exception of Article

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*Schrankenataloges nach dem Vorbild der US-amerikanischen Fair Use-Doktrin* Nomos, Baden-Baden 2013), 448 et seq, in more detail Gervais, D Gervais, *The TRIPS Agreement: Drafting History and Analysis* (3<sup>rd</sup> Sweet & Maxwell, London 2008), para 2.121, focusing more on the second and third step, and )D Gervais, ‘Towards a new core international copyright norm: the reverse three-step test’ [2005] Marq. Intell. Prop. L. Rev. 1, 15, suggesting that the interpretation by *Ricketson* should prevail who suggested that ‘special’ means that an exception must have a purpose and be justified by public policy.

81 See more recently AG Campos Sánchez-Bordona: Opinion in *Stichting Brein v. Jan Frederik Wullems* under the name of *Filmspeler*, Case C-527/15, EU:C:2016:983, where the AG argued that once a certain use is covered by an exception that use “would still have to pass the test in Article 5(5)” (para 73)

82 CJEU: Judgment in *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v. Media Protection Services Ltd* (C-429/08), Joined cases C-403/08 and C-429/08, EU:C:2011:631, para 163.

83 As in *Ibid.*, paras 108 et seq.; this suggests that the interest of right holders are, at least partially, to be derived from the specific subject-matter of copyright as developed by the Court since CJEU: Judgment in *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, Case 78/70, EU:C:1971:59.

84 CJEU: Judgment in *Technische Universität Darmstadt v Eugen Ulmer KG*, Case C-117/13, EU:C:2014:2196, para 43.

6(1) Directive 2006/115 although the application of that exception to e-books was not expressly addressed in the directive. The Court supported its conclusion with reference to “the contribution of that exception to cultural promotion”<sup>85</sup>, a conclusion which was otherwise largely based on considerations of functional equivalence.<sup>86</sup>

If an exception existed that could provide an angle for a more flexible or purposive interpretation, the willingness of the Court to make room for ancillary or similar uses could also have an enabling effect on music sampling. However, in the absence an exception that clearly applies to the reproduction right, this flexibility, if used, will certainly be subject to criticism. *Per se*, the principle of narrow interpretation is not harmful because of the Court’s flexible approach to safeguard the effectiveness of exceptions and the balance between the different interests involved. Considering the existing case-law, this interpretative circumvention would find its limits, if interpreted strictly, in the absence of a primary exception, to which another exception could be attached, or form an ancillary exception to. In other words, in the absence of an express exception for music sampling of musical works or sound recordings the current rules on copyright at EU level lack a point of attachment for a more flexible interpretation.

But a relaxed interpretation must not be limited to such cases in which an ancillary exception can give effect to the effective exercise of an existing exception. It is also conceivable that the Court could permit, in certain special cases, that existing exceptions are applied by analogy to similar cases, as long as that application remains limited to certain special cases. These could be the exceptions for quotations<sup>87</sup> or for caricature, parody or pastiche.<sup>88</sup>

Alternatively, or in addition, the Court could, as suggested below, assign the principle of strict interpretation a lower status in the interpretative approach to exceptions and limitations. This could go hand-in-hand with a more flexible approach to defining the scope of particular exceptions.

Therefore, it seems uncertain that the jurisprudence on effective exercise alone would suffice to apply an existing exception to the case of sound sampling. The quotation defense under Article 5(3)(d)

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85 CJEU: Judgement in *Vereniging Openbare Bibliotheken v Stichting Leenrecht*; interveners: *Nederlands Uitgeversverbond and Others*, Case C-174/15, EU:C:2016:856, para 51.

86 *Ibid.*, paras 52-53.

87 Article 5(3)(d) InfoSoc Directive.

88 Article 5(3)(k) InfoSoc Directive.

InfoSoc Directive, for example, still seems to be subject to rather strict conditions.<sup>89</sup> The Court in *Painer* has clarified that the exception is not limited to literary works, but at least AG Trstenjak had underlined further limitations to the quotation defense, which would only permit uses of extracts from pre-existing works if they, in some way, engage the original by way of “criticism or review”.<sup>90</sup> Although the wording of the directive (“such as”) implies that other forms of engagement are conceivable, it remains uncertain how other requirements, notably the necessity to cite the source, would be dealt with in a sampling case. It would therefore require interpretative creativity to bring sampling of the kind that was at dispute in *Metall auf Metall* within the scope of application of a national quotation exception read in the light of Article 5(3)(d) InfoSoc Directive.<sup>91</sup>

This uncertainty does not mean that a relaxed interpretation could under no circumstances be used to bring sampling within the scope of either defense. What would be necessary, however, for the sake of legal certainty, is a change of course in the case-law of the CJEU that would expressly recognize the rather unfortunate limitation of Article 5 by the paradigm of strict interpretation, and to open up its catalog to similar or comparable uses.<sup>92</sup>

Another route to relax the interpretation of Article 5, which will be explored in more detail in the following section, is to turn to fundamental rights. The interplay between the different fundamental rights on the copyright battlefields have been dormant until more recently. The tension had been simmering, but the CJEU had avoided addressing this direct conflict. In particular, the Court frequently dodged the seemingly unresolvable disaccord between the protection of the right to property under Article 17(2) EU Charter and the right to freedom of expression under Article 11 EU

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89 See S Jacques, ‘Mash-ups and Mixes: What Impact Have the Recent Copyright Reforms Had on the Legality of Sampling?’ [2016] Ent. L.R. 3, 6.

90 AG Trstenjak: Opinion in *Eva-Maria Painer v Standard VerlagsGmbH and Others*, Case C-145/10, EU:C:2011:239, paras 208-9.

91 Similar arguments for sampling and remixing have been offered, mainly in relation to the parody defense at EU level, see e.g. BJ Jütte, ‘The EU’s Trouble with Mashups: From Disabling to Enabling a Digital Art Form’ [2014] JIPITEC 173, para 33), S Jacques, ‘Mash-ups and Mixes: What Impact Have the Recent Copyright Reforms Had on the Legality of Sampling?’ [2016] Ent. L.R. 3, 6), in relation to the US fair use defense see E Harper, ‘Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm’ [2010] 405, 423.

92 This would still leave the hurdle of Recital 32 InfoSoc Directive, which could also be overcome by a more ‘relaxed’ interpretation of recitals in general and this specific recital in particular.

Charter the Court.<sup>93</sup> Finally, in *Deckmyn v Vandersteen*, the CJEU addressed this conflict, albeit not in very much detail.<sup>94</sup> It did not provide more than a mere mapping out of the conflict, a clear statement as to its resolution was not made. It did, however, make clear that for those exceptions that are strongly grounded in fundamental rights, and specifically in the right to freedom of expression, a strict interpretation of exceptions is not tenable.<sup>95</sup>

*c. Exceptions and limitations in the light of fundamental rights*

In the context of the InfoSoc Directive, fundamental rights could help resolve some inflexibilities and be instrumental in reaching the declared goal of Recital 31 to achieve a “fair and just balance”. In *Painer*, the Court made an interesting observation in relation to the balance of interest when it stated that Article 5(3)(d) strikes a “fair balance (...) by favouring the exercise of the users’ right to freedom of expression over the interest of the author in being able to prevent the reproduction of extracts from his work which has already been lawfully made available to the public, whilst ensuring that the author has the right, in principle, to have his name indicated.”<sup>96</sup>

As much as fundamental rights are part of the interests of right holders, in particular regarding the effective exercise of their exclusive rights, they are also at the core of the interests of users of protected content. Therefore, they must be taken into consideration when interpreting exceptions and limitations. And because of their status as general principles of EU law,<sup>97</sup> fundamental rights should, if not higher, be positioned alongside the rule (as the Court put it) that exceptions to a general principle should be interpreted strictly. It is very well arguable that fundamental rights should even

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93 CJEU: Judgment in *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Case C-70/10, EU:C:2011:771; CJEU: Judgment in *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, Case C-360/10, EU:C:2012:85; CJEU: Judgment in *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, Case C-314/12, EU:C:2014:192; cf. BJ Jütte, ‘The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe’ [2016] E.I.P.R. 11, 16-7.

94 CJEU: Judgment in *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, Case C-201/13, EU:C:2014:2132, para 27, see further: A Lauber-Rönsberg, ‘Parodien urheberrechtlich geschützter Werke. Eine Bestandsaufnahme nach der »Deckmyn«-Entscheidung des EuGH’ [2015] ZUM 658, 665.

95 C Geiger, J Griffiths, L Bently, & R Xalabarder, ‘Limitations and exceptions as key elements of the legal framework for copyright in the European Union. Opinion on the Judgment of the CJEU in Case 201/12 *Deckmyn*’ [2015] IIC 93, para 25.

96 CJEU: Judgment in *Eva-Maria Painer v Standard VerlagsGmbH and Others*, Case C-145/10, EU:C:2011:798, para 134.

97 T Tridimas, *The General Principles of EU Law* (2<sup>nd</sup> Oxford University Press, Oxford, New York etc. 2007), 298 et seq, see CJEU: Judgment in *Stauder v. City of Ulm - Sozialamt*, Case 29-69, EU:C:196957, para 7, CJEU: Judgment in *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11-70, EU:C:1970:114, para 4.

trump this established mantra of EU copyright law. But still such elevation of fundamental rights arguments over the principle of strict interpretation of exceptions and limitations would only shift this very basic conflict to another level, on which the right to property must then be positioned against the right to freedom of expression and other fundamental rights, including artistic freedom. Admittedly, this shift may entail more emphasis on the user-creators' rights. In Germany, the BVerfG has stressed the importance of the fundamental rights of the user-creator not only in *Metall auf Metall*, but also in its *Germania 3* decision.<sup>98</sup> In this latter case, the court held that if the (re-)use of a work constitutes an artistic expression, the quotation exception must be interpreted in a broad way and cannot be limited to purposes such as criticism or review.<sup>99</sup> It seems possible that the CJEU could follow a similar approach – if not already in the course of a relaxed interpretation, then because of the ‘external’ pressure exerted by fundamental rights – and interpret the quotation exception broadly to accommodate the artistic practice of sampling. As mentioned above, the decision in *Painer* already emphasized the importance of the closely-related freedom of expression.

As convincing as this approach may be, it does lead to a situation in Germany where the text of the quotation exception does not at all reflect the range of creative re-uses that are allowed under this jurisprudence. Further, it remains somewhat unclear how the other criteria of the quotation exception (notably the need to provide the source and the prohibition of alterations<sup>100</sup>) are affected by and fit with the broad interpretation of the allowed purposes of the quotation.

Conflictual harmonization through a clashing of fundamental rights can, of course, go beyond the mere interpretation of legal provisions in the light of fundamental rights. It could, as the *Metall auf Metall* dispute suggests, lead to legislative clarifications or even the introduction of new legal rules that might prove to be necessary to give effect to a fair balance between the rights of right holders and those – rights or interests<sup>101</sup> – of users.

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98 BVerfG, Decision of 29.06.2000 – 1 BvR 825/98 (“Germania 3”).

99 BVerfG, Decision of 29.06.2000 – 1 BvR 825/98 (“Germania 3”), para 22.

100 Cf. Articles 39, 51, 62, 63 UrhG.

101 Historically, especially in relation to exceptions and limitations, the CJEU has avoided the term rights to describe the interests of users. However, more recently, it has taken a turn and refers to exceptions as “rights” of the user: CJEU: Judgment in Technische Universität Darmstadt v Eugen Ulmer KG, Case C-117/13, EU:C:2014:2196, para 43; CJEU: Judgment in UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH, Case C-314/12, EU:C:2014:192, para 57; CJEU: Judgment in Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others, Case C-201/13, EU:C:2014:2132, paras 25-26, see also Eleonora Rosati, “Copyright exceptions and user rights in

Whereas in the past copyright harmonization through the CJEU happened “by stealth”<sup>102</sup>, this emerging clash between fundamental rights has more recently been described as “harmonization by conflict”.<sup>103</sup>

It would be indeed a revolutionary move for the CJEU if it were to suggest changes to Article 5 InfoSoc Directive, though not necessarily an unrealistic scenario. Politically, this might cause a disharmonious relationship between the Court and the legislature. And a declaration to the effect that the InfoSoc Directive violates fundamental rights would inevitably lead to a process of political bargaining at the legislative level. On several occasions, commentators have suggested to extend the list of exceptions and limitations. And recent policy initiatives have indeed outlined possible additions to the closed list of Article 5 for certain specific purposes.<sup>104</sup>

A friendly order to that effect would not be completely unprecedented. Indeed, the CJEU can impose certain obligations onto Member States to make them comply with obligations arising under primary EU law.<sup>105</sup> Such a positive obligation could also exist to guarantee the relatively unhindered exercise of the rights enshrined in Article 13 EU Charter. This would be especially necessary, if the Court were to maintain its restrictive reading of the ‘special cases’ under Article 5 InfoSoc. The latter would impede Member States application of a more liberal interpretation, considering that exceptions must

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*Case C-117/13 Ulmer: a couple of observations*”, 20.11.2014 (The IPKat), available at: <http://ipkitten.blogspot.com/2014/09/copyright-exceptions-and-user-rights-in.html> (accessed: 07.04.2017); and Christophe Geiger et al., *Reaction of CEIPI to the Resolution on the Implementation of Directive 2001/29/EC on the Harmonisation of Copyright in the Information Society adopted by the European Parliament on the 9th July 2015* (2015), 6.

102 In relation to copyright “Harmonization by stealth” was first used by Lionel Bently at the 2008 Fordham IP Conference ([http://fordhamipconference.com/wp-content/uploads/2010/08/Bently\\_Harmonization.pdf](http://fordhamipconference.com/wp-content/uploads/2010/08/Bently_Harmonization.pdf)).

103 M Husovec, ‘Intellectual Property Rights and Integration by Conflict: The Past, Present and Future’ [2016] CYELS 239.

104 As part of the recent copyright reform package the European Commission has proposed to introduce new exceptions for text and data mining, cross border teaching activities and the preservation of cultural heritage (see Articles 3-5 of Proposal for a Directive on copyright in the Digital Single Market, COM/2016/593 final) and for certain uses of copyrighted material for the visually impaired (Proposal for a Directive on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, COM/2016/596 final).

105 *Ibid.*, 256-8, Husovec argues, based on the Court’s judgment in *Coty* (CJEU: Judgement in *Coty Germany GmbH v Stadtparkasse Magdeburg*, Case C-580/13, EU:C:2015:485), that fundamental rights could not only impose negative duties, but create positive obligations in order to safeguard the protection of intellectual property rights.

be interpreted in line with CJEU jurisprudence.<sup>106</sup> Following this line of thought, it could well be argued that Member States are obliged to implement those limitations that (potentially) give effect to fundamental rights. This would further limit the discretion of Member States to “cherry-pick”<sup>107</sup> from the exhaustive list of Article 5.

“Metall auf Metall” now bears the potential to escalate this conflict at a higher (EU) level. A finding that the current Article 5 InfoSoc does not give effect to the right of artistic freedom could mean that the EU legislator has to amend the InfoSoc Directive to amply reflect this balance of interests.<sup>108</sup> This is, of course, provided that the Court would not depart from its right holder-friendly extensive interpretation of exclusive rights.

## 6. Resolving Tensions

A new BGH-judgment in *Metall auf Metall* will pose a conundrum for the CJEU, if a set of preliminary questions indeed reaches Luxembourg. On the one hand, the Court will not be able to ignore the fundamental rights dimension of the right to artistic expression. On the other hand, it would upset the existing set of rules on copyright as enshrined in the InfoSoc Directive, but also the ongoing process of copyright reform, if the Court were to question the established mechanisms in EU copyright law.

Whether the CJEU would be willing to interpret existing exceptions, if necessary by analogy, to accommodate sampling as an exercise of the fundamental right to artistic expression, is still subject to (educated) speculation. To solve this uncertainty, Article 5(3)(o) of the directive could serve as an escape route for the court if it were to argue that the free use exception, whose introduction predates

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106 CJEU: in *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)*, Case C-467/08, EU:C:2010:620, para 32 (with further references); CJEU: Judgment in *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, Case C-201/13, EU:C:2014:2132, para 17; see further J Pila & P Torremans, *European Intellectual Property Law* Oxford University Press, Oxford, New York, etc. 2016), 340.

107 LMCR Guibault, ‘Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC’ [2010] JIPITEC 55, for an overview of the state of implementation of the Exception in the InfoSoc Directive see Brigitte Lindner & Ted Shapiro (Eds.), *Copyright in the Information Society: A Guide to National Implementation of the European Directive* (Cheltenham, Northampton: Edward Elgar Publishing, 2011), since then at least the UK has further introduced, more or less successfully, additional exceptions.

108 Albeit without express reference to fundamental rights, the European Commission has recognized an existing imbalance and stated this as a reason for the recent legislative efforts in the explanatory memorandum to COM/2016/593 final): “as new types of uses have recently emerged, it remains uncertain whether these exceptions are still adapted to achieve a fair balance between the rights and interests of authors and other rightholders on the one hand, and of users on the other.”

the InfoSoc Directive, falls within the scope of this provision. However, this particular exception, which is also referred to as the “grandfather clause”, has a very limited scope, especially if it has to be construed narrowly; a post-Murphy interpretation to give effect to this exception cannot be applied due to the special nature of this conserving rule. Article 5(3)(o) allows Member States to maintain exceptions for “certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses”. Whereas it has not been clarified what exactly is meant by “analogue uses”, it seems rather unlikely that sound sampling that often implies copying digital versions of musical works could be covered. Further, this exception could not be applied to the free use exception already because it is not limited to certain other cases. This is, if ‘certain’ is to be understood in the same meaning as the term is interpreted in relation to the three-step test.<sup>109</sup>

If, indeed, the CJEU were to find that the right to artistic freedom, or in its European formulation the freedom of the arts, is not sufficiently recognized by the existing normative framework, it has a number of options to propose, implicitly or explicitly. The first would be, as the BVerfG suggested, to retreat from an extensive interpretation of the exclusive right of reproduction. The second option would be to counter this extensive interpretation with a more liberal and flexible interpretation of the relevant exceptions and limitations. In a more extreme, but much more interesting scenario, which would let the Court remain adamant in its position on the interpretation of Article 2 and 5 of the InfoSoc Directive, it could suggest that the Directive itself does not reflect sufficient respect for the rights contained in Article 13 EU Charter. This finding would necessitate a redrafting, in whatever form, of Article 5 InfoSoc Directive. This situation is interesting not only for sampling, but for the effect of fundamental rights on secondary legislation in general. Martin Husovec has described this phenomenon, also with reference to *Metall auf Metall* but for intellectual property in general as “Integration by Conflict”.<sup>110</sup> If the CJEU went down this road, it could pave the way for new – thus far politically unlikely – legislative efforts to introduce a more open-ended copyright exception or

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109 See for an authoritative definition of all three steps see M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* Kluwer Law International, The Hague 2004).

110 M Husovec, ‘Intellectual Property Rights and Integration by Conflict: The Past, Present and Future’ [2016]



limitation that can better accommodate the right to artistic freedom.

Whichever way the CJEU chooses, casting aside the possibility that it would find the existing legal rules sufficiently reflective of a fair and just balance between the competing interests, any judgement can only be understood as an indication of a growing influence of fundamental rights on the rules of copyright and related rights. The right to artistic freedom would celebrate its debut on the jurisprudential stage, but a few encores could reasonably be expected in the future.