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# Advocate General turns down the music – sampling is not a fundamental right under EU copyright law

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Case Comment

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**Legislation:** Directive 2001/29/EC, Article 2(c), Article 5(3)(d), Article 5(5)

**Case:** Pelham v Hütter, Case C-467/17, EU:C:2018:1002 (AG Opinion)

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In his Opinion in Pelham Advocate General Szpunar argues that music sampling is not possible without the authorization of the right holder of a phonogram. A wide interpretation of the exclusive right under Article 2(c) of the Information Society Directive, a narrow interpretation of applicable exceptions and a very careful approach to fundamental rights balancing outside of the copyright rules do not leave room for derived musical creativity. The Advocate General goes against the position of the German Constitutional Court which had argued that a balancing of the relevant fundamental rights protected under the Basic Law of the Federal Republic must come to the result that sampling of short extracts constitutes an exercise of artistic freedom that cannot be limited to protect the right to property of phonogram producers. Despite its merits, there are key aspects of the Opinion that raise concerns: a too broad interpretation of the reproduction right; and an unduly strict view of copyright exceptions – especially quotation – and the role of fundamental rights in shaping the scope of copyright protection. On those points, we suggest that the Court does not follow the Opinion.

## Legal Context

The “Metall auf Metall” saga<sup>1</sup> has finally reached the CJEU and the question whether sampling is an expression unbound by copyright law is to be decided. On 12 December 2018

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<sup>1</sup> Much has been written on this already legendary litigation, for recent analyses see e.g. B.J. Jütte & H. Maier, A Human Right to Sample – Will the CJEU Dance to the BGH-Beat, 12(9) Journal of Intellectual Property Law & Practice (2017), 784-796 and S. Schonhofen, Sechs Urteile über zwei Sekunden, und kein Ende in Sicht: Die

Advocate General (AG) Macej Szpunar delivered his Opinion in *Pelham and Others*<sup>2</sup> in which he suggests that sampling, even of short sequences, requires authorization from the right holder of a sound recording.

The relevant facts can be summarized as follows. 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 slightly slowed down continuous loop in the song “Nur mir”. The relevant claim here is that such sampling infringes Kraftwerk’s related rights as phonogram producers. The lengthy procedures in Germany included a stop in the Federal Constitutional Court (Bundesverfassungsgericht) in 2016.<sup>3</sup> At that time, the Bundesverfassungsgericht concluded that an application of copyright law that would make sampling subject to permission by the right holder of a sound recording would constitute an unjustified infringement of the right to artistic freedom under the German Basic Law. In reaching this conclusion, the court suggested that the civil courts adopt an interpretation of the German ‘free use’ limitation that allows striking a balance between the fundamental rights of phonogram producers and sampling artists.

The case eventually ended up (for the third time) in the German Federal Supreme Court (Bundesgerichtshof), which referred six preliminary questions to the Court of Justice of the European Union (CJEU).<sup>4</sup> These questions deal with the scope of the right of phonogram producers, open norms in national copyright laws, the scope of the quotation exception under Article 5(3)(d) of the Information Society Directive,<sup>5</sup> possible flexibilities for Member States (MS) when implementing the EU copyright rules, and how fundamental rights must be taken into consideration in the interpretation of the EU copyright *acquis*.

## The Opinion of Advocate General Szpunar

First, AG Szpunar suggests an interpretation of the reproduction right under Article 2(c) of the Information Society Directive that would make every partial reproduction of a phonogram an infringement. In doing so, he rejects the argument that there is a *de minimis* threshold of copying that must be overcome for a sample to constitute a reproduction of

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„Sampling“-Entscheidung des BVerfG, 8(16) Gewerblicher Rechtsschutz und Urheberrecht. Praxis im Immaterialgüter- und Wettbewerbsrecht (2016), 277-279, see also the Opinion of the European Copyright Society on the case: L. Bently, S. Dusollier, C. Geiger, et al., Sound Sampling, a Permitted Use Under EU Copyright Law? Opinion of the European Copyright Society in Relation to the Pending Reference before the CJEU in Case C-476/17, *Pelham GmbH v. Hütter*, International Review of Intellectual Property and Competition Law (2019). <https://doi.org/10.1007/s40319-019-00798-w>.

2 AG Szpunar, Opinion of 12.12.2018, *Pelham and Others*, Case C-476/17, EU:C:2018:1002.

3 BVerfG, Decision of 31.05.2016 – 1BvR 1585/13 (Metall auf Metall), for a brief comment see e.g. M. Leistner, Die „Metall auf Metall“- Entscheidung des BVerfG. Oder: Warum das Urheberrecht in Karlsruhe in guten Händen ist, 118(8) Gewerblicher Rechtsschutz und Urheberrecht (2016), 772-777.

4 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 is currently pending (BGH – I ZR 115/16 – pending).

5 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).

authorial works or phonograms.<sup>6</sup> He points out that although the reproduction of small extracts of protected works can constitute copyright infringement, this requires that the potential infringer copies part of the intellectual creation of the author.<sup>7</sup> In contrast, even extremely short extracts from phonograms without prior authorization constitute infringement because the protection rationale of Article 2(c) is based on the financial and organizational investment of the producer.<sup>8</sup>

Second, the AG addresses the questions of whether sampling infringes the rights of reproduction and distribution of phonogram producers.<sup>9</sup> He concludes that whereas the taking of a sample constitutes an infringement of the reproduction right under Article 2(c) of the Information Society Directive, the new song that incorporates the sample is not a ‘copy’ within the meaning of Article 9(1)(b) of the Rental and Lending Rights Directive.<sup>10</sup> This conclusion is anchored in the consideration that although phonograms enjoy a scope of protection independent of that of the underlying work, the distribution right under the Rental and Lending Rights Directive only extends to full or substantial copies of phonograms that constitute substitutes for the original phonograms.<sup>11</sup>

Third, MS are not permitted to maintain in their national copyright rules exceptions in form of an open norm that go beyond the scope of exceptions and limitations provided for in Article 5 of the Information Society Directive.<sup>12</sup> In the AG’s view, national provisions allowing uses outside the limits set by the exclusive right and exceptions listed in the copyright *acquis* threaten the effectiveness of EU copyright harmonization.<sup>13</sup> It follows that a ‘free use’ exception, such as the one contained in § 24(1) of the German Copyright Law,<sup>14</sup> can only be applied in accordance with EU copyright law. If such an exception were to enable sampling, it would exceed the scope of existing exceptions in the *acquis* and be incompatible with EU law.<sup>15</sup>

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6 AG Szpunar, C-476/17 Pelham and Others, paras. 28-33. In this context, the AG further argues that prohibiting unauthorized sampling will not afford greater protection to phonogram producers than authors, rejects the analogy between the protection of the rights of phonogram producers and makers of databases, and 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. *Ibid*, paras 34-40.

7 AG Szpunar, C-476/17 Pelham and Others, para. 29.

8 AG Szpunar, C-476/17 Pelham and Others, para 30; here the AG distinguishes the EU approach to the protection of phonograms from that in the US, where the scope of protection of phonograms, albeit contested, is congruent with that of authorial works. For a comparative analysis of US and EU copyright law see B.J. Jütte, , Sampling of sound recordings in the United States and Germany: revival of a discussion on musical creativity, in: P. Torremans, Research Handbook on Copyright Law (Cheltenham, Northampton: Edward Elgar, 2017).

9 AG Szpunar, C-476/17 Pelham and Others, paras. 41-49.

10 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372, 27.12.2006, p. 12-18 (Term Directive), para. 41-9.

11 AG Szpunar, C-476/17 Pelham and Others, para 47.

12 AG Szpunar, C-476/17 Pelham and Others, paras 50-59.

13 AG Szpunar, C-476/17 Pelham and Others, para 54.

14 The translation provided by the Federal Ministry of Justice and Consumer Protection reads: “An independent work created in the free use of the work of another person may be published or exploited without the consent of the author of the work used“ available at: [https://www.gesetze-im-internet.de/englisch\\_urhg/englisch\\_urhg.html](https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html) (last accessed on 26 March 2019)

15 AG Szpunar, C-476/17 Pelham and Others, para 59.

Fourth, the quotation exception of the Information Society Directive may, in principle, apply to sampling.<sup>16</sup> For a quotation to qualify under the exception of Article 5(3)(d) it must meet certain conditions: “enter into some kind of dialogue with the work quoted”; be distinguishable from the rest of the quoting work as a “foreign element”; and indicate the source from which it is taken from.<sup>17</sup> These conditions are not met in the present case, *inter alia* because there is no interaction with the sampled work, partly due to the fact that, in general, samples are often unrecognizable.<sup>18</sup> For similar reasons, AG Szpunar also dismisses the application of the caricature and pastiche exceptions.<sup>19</sup>

Fifth, EU copyright rules do not leave MS much flexibility when implementing them into national law.<sup>20</sup> National constitutional standards can be applied as long as they do not compromise the guarantees stemming from the EU Charter, and the effectiveness and unity of EU law. In this regard, the copyright *acquis* leaves MS very limited discretion, since many of its core notions are autonomous concepts of EU law.<sup>21</sup> As a result, national copyright laws cannot provide for narrower rights or broader exceptions. This means that MS can only implement exceptions contained in Article 5 of the Information Society Directive. They can neither extend their scope nor add new exceptions, even if this would be necessary under an interpretation of national constitutional rules.<sup>22</sup> In addition, since some exceptions reflect the balance between fundamental rights struck by the EU legislator, MS may – in certain circumstances – be obliged to implement an exception from the optional list of Article 5.<sup>23</sup>

Finally, AG Szpunar expressly rejects the position of the Bundesverfassungsgericht that sampling should, in some cases, be permitted without prior authorization from the right holder.<sup>24</sup> The balance between the right to artistic freedom of the user of a sample and the property right of the phonogram producer does not require that samples are free to use.<sup>25</sup> In other words, the requirement to obtain authorization is not an unjustified limitation to the right to artistic freedom, since the latter does not guarantee free and unlimited access to artistic source material.

## Analysis

The judgment of the Bundesverfassungsgericht had given sampling sympathizers new hope. AG Szpunar has now killed this mood with a rather restrictive opinion on music sampling and the impact of fundamental rights on the interpretation of the EU copyright rules. The AG, it would seem, feared the implications of a more liberal judgment. While accepting the possibility of allowing sampling, he clearly considers the courts to be the wrong forum to fight for this “right”, as that would go beyond their mandate to interpret the law. In

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16 AG Szpunar, C-476/17 Pelham and Others, paras 60-62.

17 AG Szpunar, C-476/17 Pelham and Others, para 65.

18 AG Szpunar, C-476/17 Pelham and Others, paras 67-69.

19 AG Szpunar, C-476/17 Pelham and Others, para 70.

20 AG Szpunar, C-476/17 Pelham and Others, paras 71-78.

21 AG Szpunar, C-476/17 Pelham and Others, paras 74-7.

22 AG Szpunar, C-476/17 Pelham and Others, para 78.

23 AG Szpunar, C-476/17 Pelham and Others, para 77.

24 AG Szpunar, C-476/17 Pelham and Others, paras 80-99.

25 AG Szpunar, C-476/17 Pelham and Others, para 96.

examining the opinion, there are three key aspects that merit closer scrutiny. How the CJEU tackles them will determine the impact of *Pelham* in shaping EU copyright law.

The first aspect relates to the scope of phonogram producers' reproduction right. Although the AG recognizes that it would be unfortunate if sampling artists were not allowed to copy from sound recordings, he believes that a gradual undermining of the rights of phonogram producers could significantly jeopardize the substantive subject matter of their right. This is what he implicitly refers to when discussing the justification for the right granted to phonogram producers. To be sure, a more flexible approach could be argued by establishing a *de minimis threshold*, below which small samples could be freely used.<sup>26</sup> Still, in the AG's view, there is no room for such a standard in EU copyright law. As a result, the scopes of protection of the reproduction right and the rights of phonogram producers (and most likely other related rights holders) are decoupled and exist independent of each other.<sup>27</sup>

Despite the merit in the AG's argument, it is conceptually difficult to reconcile the application of the producers' reproduction right to non-distinguishable samples, while at the same time arguing – as he 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 a broader protection than authors, no matter how one interprets *Infopaq*<sup>28</sup>. It also significantly limits the exercise of artistic creation.

The second aspect refers to the scope and application of the quotation exception. According to AG Szpunar, the wider scope of the phonogram right that he defends is not mitigated by any available exception. In particular, following a strict reading of Article 5(3)(d), he concludes that the quotation exception does not apply to sampling.

This interpretation appears unduly strict, especially when contrasted with more contemporary and flexible alternatives that are consistent with EU law. For instance, 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

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26 In this line, the European Copyright Society argues that, especially against the background of digital music production, only an extraction from a phonogram which "significantly prejudices the economic interests of the right holder" should be considered infringing. This would be the case if the sample has a substitutive effect in relation to the original phonogram. See Opinion of the European Copyright Society, IIC (2019), paras. 3.7 - 3.9.

27 This would have the effect that authors, if they hold the right in their sound recordings, could effectively block the use of a sample that would be permitted because it fails to pass the originality threshold of the author's own intellectual creation, see Jütte & Maier, JIPLP (2017), p. 791; on the development of the originality standard see CJEU, Judgment of 19.07.2009, *Infopaq I*, Case C-5/08, EU:C:2009:465, para 37 and CJEU, Judgment of 11.12.2011, *Painer*, Case C-145/10, EU:C:2011:798, para 94.

28 CJEU, Judgment of 16.07.2009, *Infopaq I*, Case C-5/08, ECLI:EU:C:2009:465. See also Opinion of the European Copyright Society, IIC (2019), para. 1-a)

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.<sup>29</sup> Such recordings therefore interact with the sampled subject matter. As a result, they should fall within the scope of application of the exception. Namely, short samples could constitute “fair practice” and the requirement of acknowledgement should not be read too strictly in cases of musical sampling. Furthermore, a flexible reading of exceptions is in line with the Court’s case law, as illustrated in *Deckmyn*<sup>30</sup> and *TU Darmstadt*<sup>31</sup>. Such reading is reconcilable with the formulation of the exception in the Directive and could be used to give effect to an EU-compliant interpretation of the German ‘free use’ exception.

Finally, the AG also confirmed the fears of many a copyright scholar that the three-step test cannot be used to interpret exceptions flexibly.<sup>32</sup> To be sure, the Opinion does not depart from established case-law on the test. However, it appears to go beyond it 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*<sup>33</sup> and *Deckmyn*, where the fair balance aim and the fundamental rights basis of the exceptions at issue reinforced their scope vis-à-vis exclusive rights, in line with the three-step test.<sup>34</sup>

On the three aspects discussed above, we would hope that the Court does not follow the AG. Still, despite our criticism, it is important to note the broader context of the Opinion and the reasons behind the AG’s approach. Pelham is one of three recent preliminary references by the Bundesgerichtshof – together with *Funke Medien* (C-469/17) and *Spiegel Online* (C-516/17) – in which AG Szpunar has been called to deliver an opinion.<sup>35</sup> All three cases regard the interaction of copyright with fundamental rights and may have far-reaching consequences for EU copyright law in years to come.<sup>36</sup> Against this background, the AG is particularly careful in setting out the limits of judicial interpretation and placing the

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29 Similarly, see See Opinion of the European Copyright Society, IIC (2019), paras. 4.1. – 4.8.

30 CJEU, Judgment of 03.09.2014, *Deckmyn*, Case C-201/13, EU:C:2014:2132.

31 CJEU, Judgment of 11.09.2014, *TU Darmstadt*, Case C-117/13, EU:C:2014:2196.

32 AG Szpunar, C-476/17 *Pelham and Others*, para 58.

33 CJEU, C-145/10 *Painer*.

34 For an analysis of this case law, see JP Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Kluwer Law International, 2017), pp. 199-205, for a discussion on the CJEU’s tendency for a less restrictive interpretation of copyright exceptions, see BJ Jütte, *Reconstructing European Copyright Law for the Digital Single Market: Between Old Paradigms and Digital Challenges* (Nomos, 2017), pp. 249-253.

35 Opinion of Advocate General Szpunar in Case C-469/17, *Funke Medien NRW GmbH v. Federal Republic of Germany*, delivered on 25 October 2018, EU:C:2018:870, and Opinion in Case C-516/17, *Spiegel Online GmbH v. Volker Beck*, 10 January 2019, see respectively B. J. Jütte, *A matter of perspective – AG Szpunar suggests Member States are ineligible for copyright protection in confidential military reports* (Kluwer Copyright Blog), 1 November 2018, available at: <http://copyrightblog.kluweriplaw.com/2018/11/01/a-matter-of-perspective-ag-szpunar-suggests-member-states-are-ineligible-for-copyright-protection-in-confidential-military-reports/>, and T. Synodinou, *Mirror, mirror, tell me, is the Copyright law fair and balanced? Reflection on AG’s conclusions on the Spiegel Online case (Part I)*, (Kluwer Copyright Blog), 15 February 2019, available at: <http://copyrightblog.kluweriplaw.com/2019/02/15/mirror-mirror-tell-me-is-the-copyright-law-fair-and-balanced-reflection-on-ags-conclusions-on-the-spiegel-online-case-part-i/> (both last accessed on 21 April 2019)

36 For an analysis of the *Afghanistan Papers* opinion (with a brief reflection on the Spiegel Online and Pelham opinions) from the perspective of “the admissibility of an external freedom of expression limitation beyond the list of codified exceptions in EU copyright law”, see C. Geiger and E. Izyumenko, *Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way*. 41(3) *European Intellectual Property Review* (2019).

responsibility for balancing the interests reflected in EU copyright rules into the hands of the legislature.

Whereas one can disagree with his interpretation of the substantive rules in *Pelham*, it is harder to criticize AG Szpunar for rejecting a flexible interpretation of the EU copyright rules based on fundamental rights. The European Court of Human Rights has consistently held that MS enjoy a wide margin of appreciation when striking the balance between the right to freedom of expression and other colliding rights.<sup>37</sup> This balance has to be struck by the legislator, as, under the régime of the European Convention of Human Rights, any limitation of Article 10 must be “prescribed by law and are necessary in a democratic society”.<sup>38</sup> Arguably, when exercising its competence on behalf of the EU MS, the European legislator has prescribed the balance between musical creativity and copyright protection in the Information Society Directive. In the AG’s view, while it is in principle possible to adjust this balance, this can only be done by changing the Directive.<sup>39</sup> A different interpretation would hinder legal certainty and potentially give rise to a conflict between the CJEU and the Strasbourg Court. Our main criticism of this view is that it relies on a too restrictive interpretation of the *acquis*. As argued above, a more flexible interpretation of the relevant provisions in light of fundamental rights would reach a more normatively desirable outcome without going beyond the balance of rights and interests prescribed by the EU legislator.

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37 First in ECtHR, *Handyside v The United Kingdom*, no. 5493/72, 7 December 1975, CE:ECHR:1976:1207JUD000549372, para 48, the only two judgments of the Strasbourg Court that pitted copyright against freedom of expression were ECtHR, *Ashby Donald and Others v. France*, no. 36769/08, 10 January 2013, CE:ECHR:2013:0110JUD003676908; ECtHR, *Neij and Sunde Kolmisoppi v. Sweden* [“The Pirate Bay”] (dec.), no. 40397/12, 19 February 2013, CE:ECHR:2013:0219DEC004039712, in which the ECtHR in principle accepted the right to freedom of expression as an external limit to copyright; for commentaries on both cases see e.g. B.J. Jütte, *The Beginning of a (Happy?) Relationship – Copyright and Freedom of Expression in Europe*, 38(1) *European Intellectual Property Review* (2016) and C. Geiger and E. Izyumenko, *Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity through Freedom of Expression*, 45(3) *International Review of Intellectual Property and Competition Law* (2014).

38 Article 10(2) ECHR.

39 AG Szpunar, C-476/17 *Pelham and Others*, para. 98.