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Court of Justice of the European Union

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Advocate General's Opinion in Case C-476/17
Pelham GmbH, Moses Pelham, Martin Haas v Ralf Hütter, Florian
Schneider-Esleben

Advocate General Szpunar proposes that the Court should rule that sampling constitutes an infringement of the rights of the producer of a phonogram when it is done without his authorisation

Mr Ralf Hütter and Mr Florian Schneider-Esleben are members of the musical group Kraftwerk, which published, in 1977, a phonogram containing the work entitled *Metall für Metall*. Pelham GmbH, a company under German law, is the producer of a phonogram containing the work entitled *Nur mir*. Mr Hütter and Mr Schneider-Esleben claim that Pelham, Mr Moses Pelham and Mr Martin Haas copied, using the sampling technique,¹ approximately two seconds of a rhythm sequence from the song *Metall auf Metall* and incorporated them, as a continuous loop, with minimal changes and recognisably, in the song *Nur mir*. Being of the view that that infringed the related right which they held as producers of the phonogram in question, Mr Hütter and Mr Schneider-Esleben requested, inter alia, the termination of the infringement, the award of damages and the surrender of the phonograms for the purposes of their destruction.

In those circumstances, the Bundesgerichtshof (Federal Court of Justice, Germany), hearing the case, referred a number of questions to the Court of Justice for a preliminary ruling concerning the interpretation of EU law on copyright and related rights,² and fundamental rights.

In today's Opinion, Advocate General Maciej Szpunar notes, firstly, that a phonogram is a fixation of sounds which is protected, not by virtue of the arrangement of those sounds, but rather on account of the fixation itself. It is therefore protected as an indivisible whole. A sound or a word cannot be monopolised by an author as a result of its inclusion in a work but, from the moment a sound or a word is recorded, it constitutes a phonogram which falls within the scope of copyright and related rights protection. The reproduction of such a recording is therefore the exclusive right of the producer of that phonogram. The Advocate General points out in that regard that producers can exploit phonograms in other ways than by selling copies, such as authorising sampling and generating income therefrom. The fact that the right of the phonogram producer in the phonogram is aimed at protecting his financial investment does not preclude that right from covering other uses such as sampling. Furthermore, he considers that the right to the protection of the phonogram is a right which exists and applies independently of the protection of the work possibly featured in that phonogram. Accordingly, the scope of protection of a phonogram is in no way subject to the scope of protection of the work that it may possibly contain. For all those reasons, Advocate General Szpunar concludes that **the taking an extract of a phonogram for the purpose of using it in another phonogram (sampling) infringes the exclusive right of the producer of the first phonogram to authorise or prohibit the reproduction of his phonogram, where it is taken without his permission.**

¹ Sampling is a technique consisting of taking, using electronic equipment, extracts of a phonogram in order to use them as elements in a new composition in another phonogram.

² 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 2001 L 167, p. 10) and Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28).

Secondly, with regard to whether **a phonogram which contains extracts transferred from another phonogram (samples)** constitutes a copy of another phonogram, the Advocate General points out that, in accordance with Directive 2006/115, a copy incorporates all or a substantial part of the sounds of a protected phonogram and is intended to replace lawful copies thereof. Since sampling is not used to produce a phonogram that replaces the original phonogram and does not incorporate all or a substantial part of the sounds of the original phonogram, Advocate General Szpunar concludes that such a phonogram **does not constitute a copy of that other phonogram**.

Thirdly, the Advocate General considers **that Directive 2001/29 precludes a provision of national law, such as that at issue in the present case, according to which an independent work may be created in the free use of another work without the consent of the author of the work used, in so far as it exceeds the scope of the exceptions to and limitations on exclusive rights provided for in that directive**. Although the exclusive rights granted to phonogram producers to authorise or prohibit the reproduction of their phonograms are unconditional, the directive sets out a number of exceptions to and limitations on copyright and related rights that the Member States are authorised to make provision for under their national law.³ Nevertheless, that provision cannot be understood as authorising the introduction of exceptions and limitations not provided for or as extending the scope of the existing exceptions on the grounds that they do not adversely affect the normal exploitation of the work or other subject-matter or the legitimate interests of the holders of exclusive rights.

Fourthly, with regard to the quotation exception provided for in Directive 2001/29, the Advocate General points out that a quotation must satisfy certain conditions in order to be considered lawful, in particular, that it must enter into some kind of dialogue with the work quoted, the extract quoted must be incorporated in the quoting work without modification and finally a quotation must indicate the source, including the author's name. In the view of the Advocate General, sampling in general, and the use of the phonogram at issue in the main proceedings in particular, do not satisfy those conditions. In the sampling technique, extracts taken from other phonograms are used as raw materials to be included in new works to form integral and unrecognisable parts thereof. Accordingly, he considers that **the quotation exception does not apply where an extract of a phonogram has been incorporated into another phonogram without apparent intention of interacting with the first phonogram and in such a way that it forms an indistinguishable part of the second phonogram**.

Fifthly, with regard to the degree of latitude afforded to the Member States in transposing the provisions of Directive 2001/29 on exclusive rights and exceptions thereto into their national law, the Advocate General notes that those rights are worded unconditionally and the protection of those rights in the national law of the Member States is mandatory. Accordingly, **those rights can be limited only in the application of the exceptions and limitations listed exhaustively in that directive**. Member States are nevertheless free as to the choice of form and methods which they consider appropriate to implement in order to comply with that obligation.

Finally, with regard to the possible primacy of the freedom of the arts over the exclusive right of phonograms producers, the Advocate General states that **the exclusive right of phonogram producers to authorise or prohibit reproduction, in part, of their phonograms in the event of its use for sampling purposes is not contrary to that freedom as enshrined in the Charter of Fundamental Rights of the European Union**. Copyright and related rights establish a rightholders' monopoly over intellectual or artistic property and are likely to restrict the exercise of certain fundamental rights, in particular, the freedom of expression and the freedom of the arts. In addition, intellectual property is itself protected as a fundamental right to property. It is therefore necessary to strike a balance between those rights. In the view of the Advocate General, the requirement of obtaining a licence for use such as that at issue in the main proceedings does not restrict the freedom of the arts to a degree that extends beyond normal market constraints.

³ In particular the quotation exception and the caricature, parody or pastiche exception.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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