# The art of sampling after *Pelham*

Limitations to the neighbouring rights of the phonogram producer

Bjorn Schipper

The CJEU rules in *Pelham*[1] that the copyrights and the neighbouring rights must be considered against the freedom of the arts as laid down in article 13 of Title II of the European Charter. With regard to the use of so-called sound samples – short sound clips of phonograms – the CJEU rules, in the light of the freedom of the arts, that sound samples in a modified form unrecognisable to the ear are, from a neighbouring rights perspective, not reproductions of the original sound samples of the phonogram and do, consequently, not fall under the scope of the exclusive reproduction right of the phonogram producer. Sound samples that are recognisable as such are in principle subject to consent of the phonogram producer but can, according to the CJEU, fall under the right to quote if these recognisable sound samples engage in a dialogue with the sampled work.

The decision in the *Pelham* case is in line with a series of rulings[2] of the Court of Justice (CJEU) on the tension field inspired by the European Charter between, on the one hand, copyrights and neighbouring rights and, on the other hand, fundamental rights, including the freedom of information, the protection of privacy, the freedom to conduct a business, the freedom of education and the freedom of the arts[3]. What are the consequences of *Pelham* for the neighbouring rights of the phonogram producer in relation to sound sampling?

**German case: 'Metall auf Metall I, II and III'**

In the *Pelham* case the legendary German group Kraftwerk – pioneers in the area of electronic music – have been litigating for well over fifteen years against the producers Moses Pelham and Martin Haas. The case is essentially about the use of a drumbeat of two seconds from the song 'Metall auf Metall' of Kraftwerk from 1977. The producers used this two-second rhythm sequence as a repetitive sound sample in the hip hop song 'Nur Mir' of artist Sabrina Setlur from 1997.

[1] CJEU 29 July 2019, C-476/17, ECLI:EU:C:2019:624 (*Pelham*), also known as the '*Metall auf Metall*' and '*Kraftwerk*' case.

[2] Also see CJEU 29 July 2019, C-469/17, ECLI:EU:C:2019:623 (*Funke Medien*) and CJEU 29 July 2019, C-516/17, ECLI:EU:C:2019:625 (*Spiegel Online*). Both cases centre on the tension field between copyrights and the freedom of the press (as part of the freedom of information).

[3] See, inter alia, C. Alberdingk Thijm & C. de Vries, 'De toenemende invloed van het Handvest op het recht van intellectuele eigendom', *BIE* 2015, pages 174-183.

The Bundesgerichtshof decided in its earlier rulings *Metall auf Metall I and II*[4] that the use of a sound sample of a phonogram, even if very short, in principle infringes the neighbouring rights[5] of the phonogram producer if consent of the party (parties) entitled to the neighbouring rights has not been obtained[6]. In this respect, the Bundesgerichtshof considers that if the original sound sample itself can also be reproduced in a fairly simple manner, that the party who intends to use this sound sample should, if necessary, personally produce the sound sample – in terms of creating a cover or sound-alike - in order to use it without prior consent of the phonogram producer. A complaint of both producers before the German federal constitutional court, the Bundesgerichtshof[7], also inspired by the freedom of the arts, ultimately results, after referral, in the *Metall auf Metall III*[8] ruling of the Bundesgerichtshof in which the questions referred for a preliminary ruling were asked that gave cause to the decision of the CJEU in the *Pelham* case.

**Sampling and the neighbouring reproduction right**

First of all, the CJEU determines what exactly needs to be understood as the 'full or partial reproduction' of a phonogram from a neighbouring rights perspective as intended in article 2 under c) of the Copyright Directive (2001/29/EC) (first and sixth question). In line with its earlier rulings[9] on the manner upon which the meaning of terms from European directives should be interpreted, in the case at hand the CJEU links up with the meaning and scope of the term 'reproduction' in accordance with the colloquially common meaning of it, also in consideration of the context in which it is used and the purposes pursued by the scheme of article 2 under c) of the Copyright Directive (2001/29/EC). According to the CJEU the literal interpretation of 'reproduction' is in line with the purposes of the said article 2 under c), i.e. the offer of a high level of protection to the copyrights and the neighbouring rights and the protection of the investments in (the production of) the phonogram. A reproduction of a sound sample, even if very short, of a phonogram should therefore, according to the CJEU, basically be qualified as a 'partial reproduction' of the said phonogram. This implies that – in line with the earlier opinion of Advocate General Szpunar[10] − the use of (short) sound samples basically also falls under the scope of the exclusive neighbouring reproduction right of the phonogram producer.

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[4] BGH 20 November 2008, no. I ZR 112/06 (*Metall auf Metall I*) and BGH 13 December 2012, I ZR 182/11 (*Metall auf Metall II*), inter alia via IEF 12135; see also B.H.M. Schipper, 'Het chilling effect van Kraftwerk I/II op sound sampling', *AMI* 2014, edition 4, pages 105-112, as well as the translation and introduction by N. Conley & T. Braegelmann, 'Metall auf Metall: the Importance of the Kraftwerk Decision for the Sampling of Music in Germany', *Journal of the Copyright Society of the U.S.A*., pages 1017-1037, http://ssrn.com/abstract=1504982.

[5] The copyrights on the underlying musical work of Kraftwerk had already ended up on a procedural side track before the lower German court due to the consideration that the matter as a whole could be settled on the basis of the neighbouring right.

[6] A fairly strict rule in favour of the phonogram producer comparable to the way that the holder of the so-called *sound recording copyright* enjoys, under American copyrights, protection against sound sampling without consent as a result of the judicial ruling in *Bridgeport Music, Inc. v. Dimension Films*, US Court of Appeals for the Sixth Circuit 3 June 2005; also see D.M. Morrison in 'Bridgeport Redux: Digital Sampling and Audience Recoding', pages 75-141, http://ssrn.com/abstract=1334809

[7] BHG 1 June 2017, I ZR 115/16, IEF 16844 (*Metall auf Metall III*).

[8] BHG 1 June 2017, I ZR 115/16, IEF 16844 (*Metall auf Metall III*).

[9] See, inter alia, section 27 of CJEU 30 January 2014, C-285/12, EU:C:2014:39 (*Diakité*) and section 19 of CJEU 3 September 2014, C-201/13, EU:C:2014:2132 (*Deckmyn and Vrijheidsfonds*).

[10] See, inter alia, the sections 33 and 40 of the opinion of A-G M. Szpunar of 12 December 2018 in the *Pelham* case, ECLI:EU:C:2018:1002.

When answering the fifth question the CJEU moreover rules with regard to article 2 under c) of the Copyright Directive (2001/29/EC) that this pursues complete harmonisation of the substantive content of the same. Hence, there is no discretionary possibility for the German legislator (anymore) to assess the neighbouring reproduction term in the light of the German guaranteed fundamental rights.

**Exception: modified and aurally unrecognisable samples**

The CJEU considers that if a sound clip of a phonogram is copied in such way that the sound sample is used in a personal artistic creation 'in a modified form unrecognisable to the ear', there is actually no question of 'reproduction' as intended in article 2 under c) of the Copyright Directive (2001/29/EC). This category of sound samples falls, according to the CJEU, under the freedom of the arts guaranteed by article 13 of the European Charter (as part of the freedom of expression of article 11 of the European Charter and article 10 paragraph 1 of the ECHR) and does, otherwise, not prejudice the possibilities of the phonogram producer to recover his investments made in (the production of) the phonogram. Hence, the CJEU interprets the term 'reproduction' from a neighbouring rights perspective in a stricter manner against the background of the freedom of the arts. A different (broader) interpretation would, according to the CJEU, be at odds with the colloquially common meaning of the reproduction term and could result in disruption of the equilibrium between the relevant interests that are worthy of protection from the European Charter and the fundamental rights of entitled parties and users of protected material, also in consideration of the public interest[11]. Hence, the exclusive neighbouring right of the phonogram producer does not appear to be an inviolable right with absolute effect.

It is remarkable that the CJEU, with the formulation of this category of sound samples in a modified form unrecognisable to the ear 'excepted' from the reproduction right of the phonogram producer, takes a clearly different stance than Advocate General Szpunar. According to Szpunar artists should, when creating personal artistic creations, 'all the more so' take limitations and restrictions 'imposed by life on the freedom of creation' into account, in particular when they are related to intellectual property rights[12]. In this respect Szpunar appears to depart from a properly operating market for the use of sound samples and the relevant *clearance*[13]. The CJEU does, however, expressly endorse sound sampling in general by considering that sampling of sound samples in a modified form unrecognisable to the ear is, in itself, an artistic expression that enjoys protection in the context of the freedom of the arts under the European Charter. Unlike Advocate General Szpunar, the CJEU does not interfere with this artistic form of sound sampling by ruling that it is not a reproduction of a phonogram.

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[11] See section 41 of CJEU 7 August 2018, C-161/17, EU:C:2018:634 (*Renckhoff*).

[12] See sections 89 up to and including 98 of the opinion of A-G M. Szpunar of 12 December 2018 in the *Pelham* case, ECLI:EU:C:2018:1002.

[13] In this context *clearance* refers to the asking of consent from the entitled parties with the intention of obtaining, on the basis of reasonable conditions, a licence for the use of sound samples. The present issues surrounding clearance represent, apart from legal uncertainty, the main causes of the *chilling effect* on the market for the use of sound samples. See note 4, B.H.M. Schipper.

Up to *Pelham* the use of a sound samples was deemed to be relevant from a neighbouring rights perspective in the Netherlands if the sound sample used in another phonogram was aurally recognisable[14]. Thus, every (actually) demonstrable[15] use of a sound sample of a phonogram, even if very short, could lead to an infringement. A different opinion[16] is that there is only question of a relevant reproduction under neighbouring rights if the nature and the scope of the used part justify this. In *Pelham* the CJEU opts for the approach where sound samples which are not, or barely, modified and which are recognisable to the ear as well fall under the scope of the neighbouring reproduction right.

The consideration of the CJEU about the category of sound samples in a modified form unrecognisable to the ear raises new, interesting, questions pertaining to sound sampling. The CJEU literally refers to 'the ear' in its ruling, which basically means the human ear. At a glance this places the often used intelligent audio recognition software, e.g. Shazam, SoundHound and DJ Monitor, on the side lines. And what kind of human ear does this regard? The auditorily trained ear of a musicologist or the ear of the – by analogy with the 'reference person' in trademark law[17] – averagely informed listener who regularly listens to music?

**Sampling and the neighbouring distribution right**

A phonogram that contains sound samples of another phonogram is, according to the CJEU, neither a 'copy' of the original phonogram as intended in article 9 paragraph 1 under b) of the Lending Right Directive (2006/115/EC) (second question). The distribution right of the phonogram producer laid down in this scheme is mostly meant to offer protection against the distribution of unauthorised *bootlegs* by way of substitute for the original phonograms[18]. Like Advocate General Szpunar[19], the CJEU rules that a phonogram that contains a sound sample is not a substitute for the original phonogram, on account of the fact that use of the entire phonogram or an essential part of it is out of the question. Hence, infringement of the neighbouring distribution right of the phonogram producer is out of the question if a short sound clip of the original phonogram is used.

**No limitation of neighbouring right 'outside'**

The third question regards the so-called *freie Benutzung* embedded in German copyright law as a potential limitation of the neighbouring right of the phonogram producer. In comparison to Dutch copyright law, the German right of the freie Benutzung balances on the interface of, on the one hand, free adaptation of a work that can be qualified independently as a new and original work and, on the other hand, the simplification in changed form that, in the sense of

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[14] See, inter alia, A.C.M. Alkema, in: Ch. Gielen et al., *Kort begrip van het intellectuele eigendomsrecht*, Deventer: Wolters Kluwer 2017, page 607 and D.J.G. Visser, *T&C Intellectuele eigendom*, Deventer: Wolters Kluwer 2019, note 2 with Section 6 Subsection 1 of the Dutch Neighbouring Rights Act, page 200.
[15] D.J.G. Visser, *Naburige rechten*, Zwolle: W.E.J. Tjeenk Willink 1999, page 53.
[16] Spoor/Verkade/Visser, *Auteursrecht*, Deventer: Wolters Kluwer 2019, page 849 (note 73).
[17] See, for instance, J. Muyldermans, 'De maatman in het merkenrecht', *BMM Bulletin* 2015/3, pages 108-118.
[18] Explanatory notes to the considerations 2 and 5 with and article 9 paragraph 1 under b) of the Lending Right Directive 2006/115/EC in relation to the preamble and articles 1 under c) and 2 of the Geneva Convention on the Protection of Producers of Phonograms against Unauthorised Preproduction of their Phonograms of 29 October 1971.
[19] See section 46 of the opinion of A-G M. Szpunar of 12 December 2018 in the *Pelham* case, ECLI:EU:C:2018:1002.

Section 13 of the Dutch Copyright Act, should not be qualified independently as a new and original work[20]. The referring German court describes the doctrine of the freie Benutzung as the 'right to freely use' that, as such, does not represent a deviation from the copyrights but rather an 'inherent restriction' of the scope of protection of the copyrights. The latter against the background that a cultural creation would be implausible without following on from creations of other creators. The right of the freie Benutzung was by analogy deemed to be applicable to German neighbouring rights law[21].

Hence, this centres on the question whether the German legislator can, with application of the right of the freie Benutzung, foresee in a statutory restriction of the neighbouring reproduction right of the phonogram producer of article 2 under c) of the Copyright Directive if the said restriction has not been included in the exhaustive list of limitations and restrictions of article 5 of the said Directive. The CJEU rules that Member States are not allowed to deviate from the exhaustive enumeration of article 5 of the Copyright Directive (2001/29/EC). In this respect it is noted that the Member States are held to apply the permitted limitations and restrictions in a coherent manner and that they are not free to implement or expand (other) limitations of restrictions. The latter also to prevent disruption of the proper operation of the internal market and in the light of the legal certainty. In this respect I also note that the material weight that the CJEU allocates to the exhaustive enumeration of article 5, also on account of the circumstance that the equilibrium between the interests worthy of protection from the European Charter and the fundamental rights of entitled parties and users of protected material has, as it were, been 'embedded' in the permitted limitations and restrictions of article 5. Whether there is, in a specific instance, question of a disruption of the equilibrium shall need to be established on the basis of a balancing of interests when interpreting the limitations and restrictions. There does not appear to be room (anymore) for a separate 'outside' balancing[22] on the basis of an external restriction[23]. The CJEU is, on this point, on the same line as Advocate General Szpunar[24].

**Sound quotation right**

The CJEU expressly places the category of sound samples in a modified form unrecognisable to the ear outside the reproduction right of the phonogram producer. Is the use of recognisable sound samples then by definition subject to consent of the phonogram producer? In principal yes, unless a statutory restriction is applicable to the use of a sound sample of a phonogram. The fourth question regards the application of the right to quote in relation to sound samples

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[20] See note 4, B.H.M. Schipper, pages 108-107; for a legal comparison between the American 'fair use' doctrine and the German 'freie Benutzung' doctrine see, inter alia, 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*, 2011, pages 38-40, unpublished work in progress, http://works.bepress.com/tracy_reilly/3.

[21] See note 4, BGH 20 November 2008, no. I ZR 112/06 (*Metall auf Metall I*).

[22] See for an extensive analysis of the findings on this point of A-G M. Szpunar in the context of the series of rulings mentioned with note 1: C. Geiger & E. Izyumenko, 'Freedom of expression as an external limitation to copyright law in the EU: The Advocate General of the CJEU shows the way', *CEIPI Studies Research Paper* No. 2018-12, pages1-17.

[23] Also see, in a comparable sense, M. Kingma, 'HvJEU in Spiegel Online en Funke Medien: een pyrrusoverwinning voor de informatievrijheid?, IEF 18625, 9 August 2019.

[24] See sections 54 up to and including 59 of the opinion of A-G M. Szpunar of 12 December 2018 in the *Pelham* case, ECLI:EU:C:2018:1002.

that fall under the scope of the exclusive reproduction right of the phonogram producer. On the basis of the prescribed manner[25] that terms from European directives must be interpreted, the CJEU considers, following Advocate General Szpunar[26], that 'quoting' as intended in article 5 paragraph 3 under d) of the Copyright Directive (2001/29/EC) can mostly be characterised by the illustration of an expression, the defending of an opinion or the triggering of an intellectual confrontation. In short, there can therefore be question of a permissible quote if it engages in a 'dialogue' with the other work from which the quote has been taken. The meaning that the CJEU attributes to this 'dialogue' appears to be comparable to the requirement of Section 15a Subsection 1 of the Dutch Copyrights Act in conjunction with Section 10 under b) of the Dutch Neighbouring Rights Act that a quote in connection with the work from which the quote is made must take place in an announcement, assessment, polemic, scientific discourse or expression with a comparable purpose. The more artistic, aurally recognisable sound sample could, in my opinion, - provided that all other statutory quote requirements are met – be placed as a 'more or less serious expression'[27] in the residual category of expressions with a comparable purpose.

Applied to sound sampling, the use of an aurally recognisable sound sample of a phonogram in a personal artistic creation can fall within the right to quote as a sound quotation. To this end the circumstances of the case are decisive and it is required that the use of the sound sample is meant to engage in a dialogue with the phonogram from which the sound sample was taken. In addition, it goes without saying that all other statutory quote requirements must be met. Of course, in the musical practice the question is when there will be a 'dialogue' in the context of a sound quotation. Whether a tribute, protest[28], social criticism, parody or musical history imply a dialogue[29] with the sampled work to a sufficient degree, shall always need to be established in the specific instance.

**Position of the performing artist**

*Pelham* is particularly about the scope of the neighbouring right of the phonogram producer. On account of the fact that phonograms often also contain recordings of musical performances of artists, indirectly *Pelham* does, of course, also bear relevance to the position of the performing artist whose performance was recorded on a phonogram. Where in the context of the worthiness of protection from a neighbouring rights perspective of a phonogram no requirement of a personal character is imposed and each and every sound recording is basically protected, the performance of a performing artist should, however, contain something

[25] See case law with note 9.
[26] See section 46 of the opinion of A-G M. Szpunar of 12 December 2018 in the *Pelham* case, ECLI:EU:C:2018:1002.
[27] Spoor/Verkade/Visser, *Auteursrecht*, Deventer: Wolters Kluwer 2019, page 283.
[28] See, inter alia, M.T.M. Koedooder, 'Kraftwerk revisited. Herkenbare samples zijn toegestaan, als voldaan is aan de eisen voor een citaat?', IEF 18621, 1 August 2019.
[29] See, for instance, the outcome in the *Pound Cake* case of the beneficiaries of Jimmy Smith versus rapper Drake. Sampling of the original text was permitted on the basis of '*fair use*' on account of the fact that the original text based on '*the primacy of jazz*' was transformed substantively by Drake into the '*the primacy of music*': *Estate of James Oscar Smith v. Cash Money Records, Inc.* (*Pound Cake*), US District Court Southern District New York, 30 May 2017 (https://www.copyright.gov/fair-use/summaries/estate-of-james-oscar-smith-cash-money-records-no.1-14-cv-02703-2017.pdf).

personal or unique to a certain degree[30] in order to qualify for protection from a neighbouring rights perspective. It is required of a performing artist that he or she makes a personal, artistic contribution to the performance or rendition.

The question is how this relates to the outcome in *Pelham*. In line with the decision of the CJEU, there would only be question of reproduction of a performance of a performing artist (recorded on a phonogram) in relation to sound sampling if the personal or unique character of the said performance or rendition was included in a modified and to the (human) ear aurally recognisable form. The threshold for the performing artist is therefore still slightly higher compared to the phonogram producer. Strictly speaking, *Pelham* does not alter this.

**Sampling as a form of art**

The decision of the CJEU in the *Pelham* case offers the users of sound samples, in my opinion, a bit more leeway. When it regards sound samples in a modified form unrecognisable to the ear then reproduction from a neighbouring rights perspective is out of the question and prior consent of the phonogram producer is therefore not required. Recognisable sound samples that engage, in one way or the other, in a dialogue with the sampled work may fall under the sound quotation right.

Moreover, in general the CJEU considers that 'sampling technique' – as, for instance, common in the musical industry – is a form of artistic expression that enjoys protection in the context of the freedom of the arts in pursuance of article 13 of the European Charter. Sampling can thus, according to the highest European court, be qualified as an art form itself, and not, as argued earlier and elsewhere, as a form of 'musical piracy' or 'theft'[31]. After *Pelham* the term 'klankjatten' ('snitching sounds') used in the Dutch copyright literature[32] long ago is in need of recalibration. In my view, an important establishment for, in particular, the process of musical creation because musical sampling has, in terms of connotation, been pushed out from a legal perspective for decades.

Recently, the American composer, multi-instrumentalist, producer and arranger Sylvester Uzoma Onyejiaka II performed a tribute as *Sly5thAve* with his orchestra to the rich hip hop oeuvre of producer Dr. Dre at the North Sea Jazz Festival. In an interview[33] with Dutch hip hop journalist Saul van Stapele Onyejiaka explains why the hip hop music of Dr. Dre is so important to him:

*"The music of Dr. Dre is interesting to an arranger like Onyejiaka, he says, 'because many of his compositions are so rich – full of samples and musical history. You study synthesizer sounds and puzzle: what sounds better, a flute, a violin? How does it work for an orchestra? I learnt how Dr. Dre stacked samples, sometimes in completely different*

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[30] See, inter alia, D.J.G. Visser, *Naburige rechten*, Zwolle: W.E.J. Tjeenk Willink 1999, pages 53-54.
[31] *Grand Upright Music Ltd. v. Warner Bros. Records, Inc (Biz Markie)*, US Court for the Southern District of New York 17 December 1991 (780 F.Supp 182 SDNY 1991). The judge in this case literally mentioned '*Thou shalt not steal*'.
[32] P.B. Hugenholtz & M.T.M. Koedooder, 'Klankjatten: juridische aspecten van sound sampling', *NJB* 1987, pages 1511-1515 (edition 45/46).
[33] Saul van Stapele, 'Dr. Dre raakt je onderbuik', interview with *Sly5thAve* in the runup to the North Sea Jazz Festival 2019, *NRC* Thursday 11 July 2019, C6.

*keys, and beyond the importance that he attaches to powerful drumbeats. I also wanted it to be funky with the orchestra – his music truly touches you straight in your underbelly'."*

The tribute of Onyejiaka to the hip hop music of Dr. Dre shows that musical sampling by creators is primarily qualified as a form of art. The decision of the CJEU in the *Pelham* case does, to a certain degree, seek harmonisation with this practice, which for users of sound samples from an artistic perspective is – apart from the earlier mentioned room leeway - an important gain of this ruling.

Bjorn Schipper

**SCHIPPER LEGAL**
mr. Bjorn Schipper
LLM, attorney-at-law

A'DAM Tower (9th floor)
Overhoeksplein 23k
1031 KS Amsterdam
Postbus 36424
1020 MK Amsterdam
The Netherlands
m +31619610500
f +31208908580
e bjorn@schipperlegal.nl
w www.schipperlegal.nl
tw @bjornschipper