The Kraftwerk case – does a two-second sample infringe copyright?

Advocate General Szpunar has provided a thought-provoking opinion in a case on sampling.[1] Sampling involves taking a sample of a sound recording for use as an element (which is often repeated as a hook or loop) in a new sound recording. The German Federal Court of Justice[2] referred several questions to the Court of Justice of the European Union on unauthorised sampling. According to the Advocate General, sampling without permission infringes the exclusive right of a phonogram producer to authorise or prohibit the reproduction of their phonogram, even if the sample is as short as two seconds.

Background

The case concerned the unauthorised sampling of a 1977 recording by electro band Kraftwerk in a recording by Sabrina Setlur, a German rapper. Mr Ralf Hütter and Mr Florian Schneider-Esleben, members of the music group Kraftwerk, claimed that Pelham GmbH sampled approximately two seconds of a rhythm sequence from the track *Metall für Metall* and incorporated the sample as a continuous loop and with minimal modifications in Sabrina Setlur's track *Nur mir*. They issued proceedings in the German courts claiming that Pelham GmbH had infringed their exclusive rights of reproduction in the phonogram.

The Federal Court of Justice referred several questions to the CJEU for a preliminary ruling on the interpretation of EU law on copyright and related rights, and fundamental rights. The questions included, among others, the following:

- Is there an infringement of the phonogram producer's exclusive right under Article 2(c) of the Copyright Directive (2001/29/EC) to reproduce its phonogram if very short audio snatches are taken from its phonogram and transferred to another phonogram?

- Is a phonogram which contains extracts transferred from another phonogram (i.e. samples) a copy of the other phonogram within the meaning of Article 9(1)(b) of the Rental Directive (2006/115/EC), which gives phonogram producers an exclusive right to make their phonograms available to the public?

- Can a work be used for quotation purposes under Article 5(3)(d) of the Copyright Directive if it is not evident that another person's work or subject matter was being used?

- A request for guidance as to the consistency of German law with these provisions and the application of the quotation exception in Article 5(3)(d) of the Copyright Directive.

- How are the fundamental rights set out in the EU Charter of Fundamental Rights to be taken into account when interpreting the scope of the exclusive rights of phonogram producers under the Copyright Directive and the Rental Directive and the limitations and exceptions to those rights?

Opinion of Advocate General Szpunar

<u>Phonogram producer's exclusive right to reproduction</u>

[1] *Pelham GmbH v Ralf Hütter* (Case C–476/17) EU:C:2018:1002.

[2] The *Bundesgerichtshof*.

The Advocate General considered that sampling amounts to reproduction within the meaning of Article 2 of the Copyright Directive, and that unauthorised sampling amounts to an infringement of the phonogram producer's relevant exclusive rights.

He observed that a phonogram is a fixation of sounds that is protected by virtue of the fixation itself, as opposed to other factors, such as the arrangement of those sounds. Distinguishing phonograms from other works, he explained that, although a sound or a word cannot be monopolised by an author by fixation alone, a phonogram falls within the scope of copyright protection as soon as such sound or a word is recorded (i.e. fixed). So the reproduction of the recording is the exclusive right of the producer of that phonogram.

The Advocate General rejected the view that this right protects only extracts of phonograms long enough to represent financial investment as a misreading of the *Infopaq* case.[3] In his opinion, there is no *de minimis* threshold in relation to works protected by copyright.

He considered it wrong to limit the legitimate financial interest of a phonogram producer to protection against piracy: exploitation of a producer's phonogram is not limited to selling copies, as producers may exploit their phonograms in other ways, such as by authorising sampling.

The Advocate General went on to address the concern that phonogram producers should not be eligible for greater protection than authors. Dismissing this concern as a misinterpretation, he commented that the difference in subject-matter (i.e. a phonogram) does not make it receive any greater protection than the protection given to authorial works. The scope of protection of a phonogram is independent from, and in no way subject to, the scope of protection of the work that it may contain.

The Advocate General went on to discard the analogy raised about the protection of rights held by the makers of databases under Article 7(1) of the Database Directive (96/9/EC) (i.e. the right to prevent the extraction and/or re-utilisation of the whole or of a substantial part of a database). He confirmed that a literal interpretation of the Database Directive and the Copyright Directive excludes the possibility of such analogy, considering that the Copyright Directive provides that a phonogram producer is protected against unauthorised reproduction "in whole or in part" and does not make any reference to a "substantial part".

The Advocate General also rejected the position that Article 11 of the WIPO Performances and Phonograms Treaty provides only for protection against the unauthorised reproduction of a phonogram as a whole.

He concluded by stating that taking an extract of a phonogram for the purpose of using it in another phonogram (i.e. sampling) infringes the exclusive right of the producer of the first phonogram to authorise or prohibit the reproduction of their phonogram, where it is taken without the latter's permission – regardless of the length of the sample.

<u>Making a phonogram available to the public</u>

The Advocate General acknowledged that the main purpose of Article 9(1)(b) of the Rental Directive is to protect against what is commonly referred to as "piracy", being the production and distribution of counterfeit copies of phonograms intended to replace lawful copies. Observing that the scope of Article 9(1)(b) of the Rental Directive is narrower that Article 2(c) of the Copyright Directive, the Advocate General considered that sampling is not used to produce a phonogram that replaces the original phonogram and a phonogram created by sampling does not incorporate all or a substantial

[3] *Infopaq International A/S v Danske Dagblades Forening* (Case C-5/08) EU:C:2009:465.

part of the sounds of the original phonogram. Accordingly, a phonogram does not constitute a copy of such other phonogram within the meaning of Article 9(1)(b) of the Rental Directive**.**

Sampling and the quotation exception

In the Advocate General's opinion, there is no reason why the quotation exception could not apply to musical recordings generally, but he made clear that if the exception is to apply, certain conditions must be satisfied in order for it to be considered lawful. Those conditions provide that the quotation:

- must enter into some kind of dialogue with the work quoted (for the purposes of critique and review, for instance);
- must be incorporated in the quoting work without modification; and
- must indicate the source, including the author's name.

The Advocate General provided that sampling in general, and the use of the phonogram at issue in this case, does not satisfy the necessary conditions. In his opinion, the aim of sampling is to take extracts from other phonograms and to use them as raw materials to be included in new works to form integral and unrecognisable parts of those new works. Accordingly, Article 5(3)(d) of the Copyright Directive does not apply where an extract of a phonogram has been incorporated into another phonogram: (a) without the apparent intention that such phonogram will interact with the quoted phonogram; and (b) in such a way that it forms an indistinguishable part of the second phonogram. Interestingly, he also acknowledged that in the case of a musical track, it is difficult, if not impossible, to indicate the source of a quotation.

National-law considerations

Member States must ensure the protection of the exclusive rights set out in Articles 2 to 4 of the Copyright Directive in domestic law. In the Advocate General's view, such rights may only be limited by application of the exceptions and limitations detailed within Article 5 of the Copyright Directive. While Member States do have a limited degree of autonomy in the choice and wording of the exceptions they deem to be appropriate in national law, they cannot introduce new exceptions or extend the scope of the existing exceptions. The Advocate General pointed out that a Member State's autonomy is further limited by the consideration that failing to provide for certain exceptions in domestic law could be incompatible with the Charter of Fundamental Rights.

EU Charter of Fundamental Rights

The Advocate General interpreted the German court's question to ask whether freedom of the arts, as enshrined in Article 13 of the Charter, limits or justifies the infringement of a phonogram producer's exclusive right to authorise or prohibit reproduction, in part, of their phonogram under Article 2(c) of the Copyright Directive. In his opinion, a phonogram producer's exclusive right is not contrary to the freedom of the arts, and the requirement of obtaining a licence for use, such as sampling in this case, is not contrary to, and does not restrict, the freedom of the arts to a degree that extends beyond normal market constraints.

Confirming that copyright law takes account of various rights and interests that could conflict with the exclusive rights of rights-holders, particularly the freedom of the arts, the Advocate General stated that rights-holders should be aware of the rights and fundamental freedoms of others that limit or restrict their freedom to create, referring specifically to those others' intellectual property rights. In such cases, the balancing of different rights and interests is a particularly complex exercise that is the legislature's responsibility in the first instance.

Comment

Depending on whether the CJEU follows the Advocate General's opinion, it could have a significant impact on the music industry. Applying phonogram producer's exclusive right to reproduction strictly to all types and durations of samples would pose practical challenges in the context of modern music production. Sampling is widespread across a broad range of different genres, and some commentators have expressed concerns that this decision might stifle creativity and create significant impracticalities for producers of recordings. If the use of any amount of a recording is to be afforded protection – no matter how short the sample is, and even if it has no discernible character – then this protection would cut across how many producers make music.

For example, it is commonplace for producers to copy and re-use individual drum hits, and most rights-holders will turn a blind eye to that practice unless there is something unusually distinctive about the sample. And there has long been a general acceptance within the music industry that these types of very short copying of fairly generic sounds are unlikely to require a sample licence, in contrast with, say, a short extract of more distinctive character that is used prominently and without alteration (e.g. a vocal hook).

A total rejection of the quotation defence would also be controversial. Under English law, many have considered that the quotation defence is capable of applying to sound recordings, and indeed US-based synchronisation defences based on "fair use" are, in current practice, often extended to similar arguments in relation to UK "fair dealing". It is also curious for the Advocate General to adopt, as it were, a strict-liability approach to sampling and, at the same time, to disapply the most relevant copyright exception, which would appear to become all the more necessary if there is to be zero tolerance on minimum duration in terms of *prima facie* infringement.

From a legal perspective, the Advocate General's total rejection of a *de minimis* threshold also seems open to question. Despite acknowledging that a *de minimis* concept for sampling exists in the United States, he commented that the United States is a radically different legal environment, and that such reasoning cannot be applied to European law. The Advocate General observed that a *de minimis* threshold poses serious difficulties in practice (for example, the process of defining a specific *de minimis* threshold).

Yet this position sits uneasily with earlier European judgments on substantial copying. Even if there may be no hard and fast rule about where the cut-off point would be (as the *Infopaq* judgment made clear), there could still, both conceptually and in practice, be a reproduction that is so negligible as not to be deserving of protection under copyright law. For example, the CJEU in *Infopaq* contemplated that "sentences" – or even "parts of sentences" – might convey the originality of an underlying article, but did not go as far as to suggest that an individual word might be protectable. And while *Infopaq* did not rule that out as a possibility, the requirement of "expression of the intellectual creation" still acts as a threshold of sorts, even if a flexible one.

Besides, it is not clear whether, if accepted into EU law, this opinion would unintentionally create an anomalously onerous position for samplers of sound recordings, providing (despite the Advocate General's protestations) a unique protection for the original producers that would arguably be broader than that afforded to authors of other works, such as musical compositions. For instance, copying a single note of a composition will still not involve reproduction of the original composer's own intellectual creation – whereas sampling a recording of that same note could, on the Advocate General's theory, infringe the copyright in the original sound recording. There is, admittedly, a difference, in that a very short extract of a recording could be distinctive in a different way (e.g. in timbre or performance quality) from a mere note; but it would seem more consistent with other copyright rules if some sort of distinctiveness were required before an isolated sound were considered capable of protection in its own right.

Accordingly, it will be interesting to see whether, if adopting the Advocate General's opinion in this case on the sampling of the sound recording, the CJEU would then attempt to apply similar reasoning to Mr Hütter's additional claim for infringement of his copyright in the underlying musical composition, *Metall für Metall*. But it is hard to see how the CJEU could reasonably distinguish its earlier decisions on the qualitative threshold for copying of authorial works. Those judgements, including *Infopaq*, appear to suggest that in the case of a very short extract of an authorial work – even if it is a question of fact in each case – there may still be a line to be drawn.

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