Rules of reproduction

THE CASE:
Pelham GmbH, Moses Pelham and Martin Haas v Ralf Hütter and Florian Schneider-Esleben
Court of Justice of the European Union
29 July 2019

Simon Clark and **Marc Linser** consider whether sampling will always amount to a reproduction under Article 2(c) of the Infosoc Directive (Directive 2001/29)

The *Pelham* decision concerned a two-second sample of a rhythm sequence taken from the song *Metall auf Metall* produced by the German band *Kraftwerk*. The sample was incorporated into a continuous rhythmic loop in the song "*Nur Mir*" composed by Pelham and Haas and produced by Pelham GmbH. As producer of *Metall auf Metall*, Kraftwerk's primary infringement claim was that use of the sample constituted infringement of their reproduction right under Article 2(c) of Directive 2001/29 (Infosoc Directive).

Does sampling amount to reproduction rights infringement?

On the face of the wording of Article 2(c) alone it seems clear that reproducing part of a sound recording should always amount to an act of primary infringement, since it reads: "the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part". The Court of Justice of the European Union (CJEU) noted that the concept of "reproduction... in whole or in part" is not defined in the directive and that the words should be given their "usual meaning in everyday language", while taking into account the context in which they appear and the purposes of the rules of which they are part.

The CJEU found that even reproduction of a very short sound sample of a phonogram must, in principle be regarded as reproduction of a part, and therefore falls within the exclusive right of the producer under Article 2(c). It added that such a literal interpretation was consistent with the directive's stated objective in the recitals of establishing a high level of protection of copyright and the specific objective for the exclusive right of the phonogram producer under Recital 10 to protect their considerable investment.

If the CJEU had stopped there, then there would have been no surprises – taking a two-second sample of a drum beat and using it as the drum beat throughout a new song is a straight-forward primary infringement of copyright. However, instead the CJEU went on to say that, in exercising "the freedom of the arts", using a sound sample "in a modified form unrecognisable to the ear" in a new work must be held "not to constitute a 'reproduction' within the meaning of Article 2(c)".

According to the CJEU this conclusion is consistent with Recitals 3 and 31 of the Infosoc Directive and the objective of guaranteeing a fair balance between ensuring a high level of protection for phonograph producers on the one hand, and the freedom of arts enshrined in Article 13 of the Charter of Fundamental Rights on the other. In the CJEU's mind sampling was a form of artistic expression protected by the freedom of arts.

What does reproduction mean?

The CJEU justified this conclusion on two grounds. First, it said that to find that using a sample in a new work in a modified form unrecognisable to the ear for the purposes of a distinct artistic creation amounted to a reproduction within the meaning of Article 2(c) would "run counter to the usual meaning of that word in everyday language". In fact, the word reproduction has several possible meanings. The sample which has been taken has clearly been reproduced in the sense that a two-second sample has been copied. So is reproduction referring to the actual act of copying or whether the resulting copy is sufficiently similar to the original to infringe?

The advocate general was of the view in his opinion that "it goes without saying that [the sample in this case] amounts to reproduction" as it was "a reproduction by any means and in any form, in whole or in part", as stated in Article 2. He rejected any concept of a *de minimis* threshold having been established in the *Infopac* decision but said that in any event sound recordings differed from works of intellectual creation as they were simply a fixation of sounds with no originality requirement, unlike for other works, and that fixation is what was protected by copyright in phonograms. However, the CJEU chose not to follow him on this point.

Why is recognition relevant?

The second justification the CJEU gave was that finding an unrecognisably modified sample to be an infringement would fail to meet the requirement of a fair balance between rightsholders and the interests and fundamental rights of users as well as the public interest.

The logic behind the CJEU's approach is that if a modified sample is unrecognisable then there is no harm to the economic rights of the producer (ie, the producer's ability to recoup satisfactory returns on their investment in the production of a phonograph by preventing unauthorised reproduction). This approach was supported by the European Copyright Society which pointed out that a sample does not automatically represent a quantitatively or qualitatively substantial part of the producer's investment nor does it necessarily prejudice the producer. As such it is incorrect to say that a sample per se involves a reproduction, rather it may be said that a protected phonogram is reproduced in part only if the copying freerides on a substantial investment (arguing that the rules which have evolved in the field of database protection should be taken as a reference point).[1]

Given the reproduction right is an exclusive right, it is arguable that how a sample is used or whether that sample remains recognisable should be irrelevant to determining if there has been a reproduction and, in any event, regardless of whether the sample has been

modified, the act of sampling per se involves a reproduction. The question of whether the act complained of affects the investment of the rightsholder is, in the authors' opinion, an issue more for the application of the exceptions and limitations to copyright infringement, rather than to the interpretation of the exclusive right in the first place. The issue of protecting the rightsholders' investment is a relevant criteria for the exceptions and limitations, as Article 5(5) states that the exceptions and limitations provided for in the directive *"shall only be applied 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 rightsholder"*. However, the directive also makes clear that the exceptions and limitations set out in the directive are exhaustive (see Recital 32). It could therefore be said that the CJEU has effectively included a new exception or limitation by reading into the definition of the exclusive right in Article 2(c) a requirement that the sample must be recognisable, which does not appear anywhere in the directive.

The advocate general felt that the need for artists to take a licence in order to sample from existing phonographs did not amount to an unjustified interference with the right to the freedom of arts sufficient to justify restricting the scope of the producer's reproduction right.

What is a recognisable sample?

There is no uniform definition of sampling in EU law, so there is no clear guidance on what the practice involves or how artists can sample without falling foul of copyright.

The assessment ought to be simple in cases were the sample has been completely transformed, but in marginal cases where there is some semblance of the original sample it will be difficult to assess whether the court will construe the reproduction right broadly or narrowly in those circumstances. Similarly, the test may be more difficult to apply to larger samples, sections of which may or may not be recognisable if only certain parts of the sample have been transformed. Due to the relatively small size of the sample in *Pelham* it is unclear if the entirety of a sample would need to be recognisable to infringe or if it is sufficient for parts of a larger sample to be recognisable.

Recognisable to who?

There is also the question of who the sample needs to be recognisable to. Unfortunately, the decision in *Pelham* is silent on this point and the standard or level of recognition remains unclear. It is entirely plausible, even in cases of unmodified short samples, that a sample would in reality be unrecognisable to a user once it has been incorporated into a new format.

The issue of recognition only arises where the sample has been modified, but at least for very short samples, it is reasonable to suppose that a very short modified sample would be unrecognisable to anyone other than an audiophile or to the original producer/performer/composer of the work that was sampled. If that is the case it seems an inevitable result of the *Pelham* decision that a *de minimis* level of sampling will be acceptable because the sample is not recognisable to the ear, whoever that ear belongs to. The height of the *de minimis* threshold will depend on the facts and circumstances of the sampling in any given case and whether the sample is substantial, both quantitatively and qualitatively. As mentioned above, the advocate general concluded that any perceived *de minimis* threshold was premised on a misinterpretation of the decision in *Infopaq*.

For the broader music industry, the outcome of *Pelham* may be received positively. As the German court considered, it is difficult to conceive of a cultural creation without building upon the existing work of other artists and to a certain extent this viewpoint is recognised by the CJEU. The quandary for artists post-*Pelham* is to know how much content can be sampled from existing works and modified legitimately without being recognisable. That uncertainty may put artists in a bind as it will be difficult to evaluate how much to sample and how much modification will be required to avoid infringement. If artists are forced to modify a sample to the extent that it is no longer recognisable then it begs the question of whether it is necessary for artists to sample at all. If you listen to the two songs in issue, it does make you wonder why they didn't simply record their own similar drum track.

Did the CJEU strike a fair balance?

The decision in *Pelham* aligns with a continued shift in CJEU case law towards striking a "fair" balance between fundamental rights of users and copyright owners; a shift that is well illustrated by the complex development of CJEU case law on the communication to the public right (see, for example, C-160/15 *GS Media* at [44]-[47] and the introduction of new criteria of whether or not the alleged infringer was acting for profit and their state of knowledge as to the consent or otherwise of the copyright owner). Some will argue that if the CJEU had followed the advocate general and afforded protection to any two second sample, which is a small fraction of the whole, that would have offered almost unfettered protection to phonograph producers, which goes beyond the intended scope of protection offered by copyright law and could have resulted in a chilling effect on artistic creativity.

Whereas copyright protection for most works is confined by the concepts of originality and (in the UK at least) substantial part, the broad interpretation of the reproduction right of the phonogram producer adopted by AG Szpunar would not be subject to any equivalent restrictions and could unjustifiably exceed the scope of copyright protection. By adopting a purposive interpretation of the reproduction right, the CJEU has attempted to ensure that the protection afforded to phonograph producers is limited to the circumstances in which a substantial part of their investment has been reproduced or the reproduction prejudices the producer's economic interests.

Even so, the suitability of the test adopted by the CJEU (namely whether the sample is recognisable to the ear) is questionable. Under Article 1(c) of the Geneva Phonograph Convention the definition of a "duplicate" requires *'all or a substantial part'* of the phonograph to have been taken. Arguably, the approach of the CJEU would have been more aligned with international law had it asked that very question for Article 2(c) and went on to assess whether the sample was quantitatively and qualitatively substantial enough to infringe.

The implications of the *Pelham* decision remain to been seen, but it is clear that the courts will have to endeavour to strike a fair balance between copyright and fundamental rights.

Footnote

1. Bently, L, Dusollier, S, Geiger, C *et al* IIC (2019) 50: 467. https://doi.org/10.1007/s40319-019-00798-w at [3.6]. Note, however, that there is no express requirement for "substantial investment" in the Infosoc Directive as there is in the Database Directive. Similarly, the two Directives are very different in terms of references to parts, with the Database Directive requiring "the extraction or re-utilisation of the whole or a substantial part" whereas the Infosoc Directive just refers to reproduction "in whole or in part".

Authors

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