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THE PELHAM CHRONICLES: SAMPLING, COPYRIGHT AND FUNDAMENTAL RIGHTS

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This article:

- Revisits the CJEU's ruling in Pelham (C-476/17) and its adoption by the German Federal Supreme Court.
- Assesses the implications of a wide construction of the reproduction right for sound recordings and a narrow interpretation of copyright exceptions and limitations for music sampling.
- Discusses the normative implications of the CJEU's judgment on the interplay between fundamental rights and copyright, particularly in a digital environment.

1. Introduction

On 29 July 2019 the Court of Justice of the European Union (CJEU or Court) rendered its long-awaited judgment in *Pelham*.¹ This judgement was published together, but not jointly, with those on *Spiegel Online*² and *Funke Medien*.³ A bit less than a year later, on 30 April 2020, the German Federal Court of Justice (Bundesgerichtshof or BGH), which had referred the cases to Luxembourg, rendered its judgments in all three cases. There are obvious parallels between these judgments, and their combined relevance for the interpretation of European copyright law in the light of EU fundamental rights cannot be understated.⁴

This article focuses on *Pelham*, or the “Metall auf Metall” saga, as it is known in Germany. It analyses the relevant aspects and impact of *Pelham* in EU copyright law and examines how the BGH implemented the guidance provided by the CJEU. Where relevant, we draw the parallels to *Funke Medien* and *Spiegel Online*. *Pelham* gave the Court the opportunity to define the scope of the related right of reproduction of phonogram producers in art. 2(c) of Directive 2001/29/EC (InfoSoc Directive).⁵ The question whether such right enjoys the same scope of protection as the reproduction right for authorial works had made its way through the German courts for a remarkable two decades. This saga included a constitutional complaint, which in 2016 answered the question in the affirmative.⁶ The BGH’s preliminary reference to the CJEU was particularly important because on the back of the reproduction question it sought to clarify issues with fundamental rights implications, in particular the scope of the quotation right or defence and its application to musical creativity in the form of sampling.

This article proceeds as follows. After this introduction, we briefly revisit the *Pelham* saga in its journey through the German and European courts, providing the context to the underlying legal issues (2). We then turn to the interpretation of the scope of the reproduction and distribution rights for phonograms (3) before examining the CJEU’s assessment of the systematic nature of exceptions and limitations (E&Ls) (4). We then discuss the wider implications of *Pelham* on the role of fundamental right in copyright law (5). We conclude with some doctrinal and practical observations on the wider implications of the “Metall auf Metall”-saga (6).

¹ CJEU, Judgment of 29.07.2019, *Pelham and others*, Case C-476/17, EU:C:2019:624.

² CJEU, Judgment of 29.07.2019, *Spiegel Online*, Case C-516/17, EU:C:2019:625.

³ CJEU, Judgment of 29.07.2019, *Funke Medien NRW*, Case C-469/17, EU:C:2019:623.

⁴ Their importance is underlined by the fact that they all three cases were assigned to the CJEU’s Grand Chamber.

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).

⁶ BVerfG, Judgment of 31 May 2016, 1 BvR 1585/13, DE:BVerfG:2016:rs20160531.1bvr158513; see for commentary Leistner, M., 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; Jütte, B. J. & 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; Jütte, B. J., 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); Mezei, P., Thou Shalt (Not) Sample? New Drifts in the Ocean of Sampling, 11(2) *Zeitschrift für Geistiges Eigentum* (2019), 170-198; Döhl, F., Nach § 24 Abs. 1 UrhG: Zum Pastichebegriff im Kontext der anstehenden Neuaufstellung der Spielregeln freier Benutzung, 83(1) *UFITA - Archiv für Medienrecht und Medienwissenschaft* (2019), 19-41.

2. The *Pelham* saga: there and back again

Underlying the preliminary reference was a dispute between the music producer Moses Pelham and the iconic German electronic music band Kraftwerk. Before the German courts, Mr. Pelham had argued unsuccessfully that he should be permitted to use a sample from the song “Metall auf Metall” by the Kraftwerk in his song “Nur Mir”, which he had created for the hip-hop artist Sabrina Setlur. In this song, Mr. Pelham included a 2-second sample as a continuous loop. Before various German courts,⁷ he had attempted to rely on sec. 24 of the German Act on Copyright and Related Rights (UrhG).⁸ Under this provision, the “free use” of a work in the creation of a new and independent work does not require permission from the rightholder.

Because the German courts, including the BGH in 2012, only permitted the free use of a sample under very strict conditions,⁹ Moses Pelham launched a constitutional complaint arguing that the restrictive conditions for sampling, which would make the unauthorised use of a sample virtually impossible, violated his right to artistic freedom as protected under art. 5 of the German Basic Law.¹⁰ After the German Constitutional Court (Bundesverfassungsgericht or BVerfG) upheld the complaint, it handed the case back to the BGH with an express encouragement to consider the implications of EU law on the interpretation of German copyright law. Concretely, the BVerfG suggested that the BGH should consider making a preliminary reference to the CJEU so as to: clarify the interpretation of the scope of the exclusive rights of phonogram producers; and how sec. 24 UrhG must be interpreted in light of art. 5 InfoSoc Directive and EU fundamental rights to acts that took place after the transposition deadline for the InfoSoc Directive.¹¹

The BGH then stayed the proceedings and referred six questions to the CJEU: (1) whether sampling is an infringement of the phonogram producers’ right; (2) whether an extract of a phonogram is a “copy” of that phonogram for the purposes of Directive 2006/115 (Rental and Lending Rights Directive)¹²; (3) whether national rules like the German “free use” provision are acceptable under EU law; (4) whether sampling is covered by the quotation E&L; (5) what latitude exists for the national implementation of E&Ls in this respect; and (6) how

⁷ For an overview of the procedural history of the Metall auf Metall saga see, e.g., Schonhofen, S., Sechs Urteile über zwei Sekunden, und kein Ende in Sicht: Die „Sampling“-Entscheidung des BVerfG, 8(16) *Gewerblicher Rechtsschutz und Urheberrecht. Praxis im Immaterialgüter- und Wettbewerbsrecht* (2016), 277-279 and Leistner, GRUR (2016).

⁸ Act on Copyright and Related Rights, (Urheberrechtsgesetz – UrhG), Federal Law Gazette I, p. 2014. Available at: https://www.gesetze-im-internet.de/englisch_urhgf/ (hereafter UrhG) The provision in its official translation 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.”

⁹ Although the BGH allowed an analogous application of Section 24(1) UrhG to sound recordings, it subjected the unauthorised use of a sample to the condition that the sample could not be reproduced by an average producer with his own means, BGH, Judgment of 13. December 2012, I ZR 182/1 (*Metall auf Metall II*), paras. 27-28, BGH, Judgment of 20 November 2008, I ZR 112/06 (*Metall auf Metall*), para 37, see also Leistner, GRUR (2016), p. 772.

¹⁰ Basic Law for the Federal Republic of German (Grundgesetz), Federal Law Gazette I p. 404. Available at: https://www.gesetze-im-internet.de/englisch_gg/. Article 5(3), first sentence of the German Basic Law states: “Arts and sciences, research and teaching shall be free”.

¹¹ Member States had to transpose the provisions of the InfoSoc Directive before 22 December 2002 (Article 13(1) InfoSoc Directive)

¹² 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 L 372, 27.12.2006, p. 28-35 (Rental and Lending Rights Directive)

fundamental rights in the EU Charter of Fundamental Rights (Charter) must be taken into account in this context.

Essentially, the BGH asked whether sampling requires authorization from the rightholder for the phonogram from which a sample is extracted. Whereas the rights of phonogram producers are harmonized at EU level by art. 2(c) InfoSoc Directive and by art. 9(1)(b) Rental and Lending Rights Directive, the applicable E&Ls are harmonized in art. 5 InfoSoc Directive, which provides for an exhaustive list of what Member States can foresee in their national laws as “permitted uses”.¹³ The question what role fundamental rights play in the interpretation of the applicable rules permeates all issues. For this reason, *Pelham* should also be read in the context of the rulings in *Spiegel Online* and *Funke Medien*.¹⁴ In fact, some of the relevant parts of the judgments are reproduced verbatim or worded almost identically.¹⁵

3. The exclusive rights of phonogram producers

At the heart of the proceedings lay the question whether the reproduction of a sample and its subsequent inclusion into a new song constitutes an act of reproduction. How the scope the right of phonogram producers had to be interpreted has been a controversial topic in copyright law not only in Europe but also in the US, where it was already subject to judicial disagreement, leading to a circuit split between the Ninth and the Sixth Circuit¹⁶. As we explain below, *Pelham* goes a long way into clarifying the state of the EU law on this side of the Atlantic.

3.1. Reproduction

The InfoSoc Directive recognizes the exclusive right of phonogram producers to reproduce their phonograms in art. 2(c). How the scope of this right, or any other related right for that matter, has to be interpreted had not been the subject of a preliminary reference before *Pelham*. The CJEU had extensively interpreted the scope of the reproduction rights for original subject

¹³ See for criticism of this approach by the EU legislator Hugenholtz, P. B., Why the Copyright Directive is unimportant, and possibly invalid, 22(11) *European Intellectual Property Review* (2000), 499-505; Guibault, L. M. C. R., Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC, 1(1) *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2010), 55-66; Jütte, B. J., *Reconstructing European Copyright Law for the Digital Single Market: Between Old Paradigms and Digital Challenges*, Nomos, (Baden-Baden, 2017), pp. 244-245.

¹⁴ See for example Rendas, T., Advocate General Szpunar in *Spiegel Online* (or why we need fair use in the EU), 14(4) *Journal of Intellectual Property Law & Practice* (2019), 265-267; Griffiths, J., Taking power tools to the *acquis* – the Court of Justice, the Charter of Fundamental Rights and European Union copyright law, in: C. Geiger, C. A. Nard, & X. Seuba, *Intellectual Property and the Judiciary* (Cheltenham, Northampton: Edward Elgar, 2018); Jütte, B. J., Forcing Flexibility with Fundamental Rights: Questioning the Dominance of Exclusive Rights, in: T.-E. Synodinou, P. Jougoux, C. Markou, & T. Prastitou, *EU Internet Law in the Digital Era* (Cham: Springer, 2019); see for comments on the BGH judgments following CJEU, C-516/17 *Spiegel Online* Priora, G. & B. J. Jütte, No copyright infringement for publication by the press of politician’s controversial essay, 15(8) *Journal of Intellectual Property Law & Practice* (2020), 583-584 and CJEU, C-469/17 *Funke Medien NRW* Jütte, B. J. & G. Priora, Leaking of secret military reports qualifies as reporting of current events, 15(9) *Journal of Intellectual Property Law & Practice* (2020), 681-682.

¹⁵ Compare CJEU, C-476/17 *Pelham and others*, para 60, CJEU, C-469/17 *Funke Medien NRW*, para. 58, CJEU, C-516/17 *Spiegel Online*, para. 43.

¹⁶ See e.g. Mezei (2010) *ZGE*, p. 187.

matter, such as traditional works, but also original databases¹⁷ and software.¹⁸ According to the Court's jurisprudence, copying a part of a work only constitutes a reproduction within the meaning of art. 2(a) InfoSoc Directive if that part "[shares] the originality of the whole work".¹⁹

The German courts had argued that the scope of the reproduction right for phonograms covers any part of a sound recording, irrespective of the length of the reproduced part.²⁰ Advocate General (AG) Szpunar adopted this interpretation in his Opinion and suggested that no *de minimis* threshold exists in relation to the reproduction of phonograms.²¹ The Court agreed with the AG in principle, underlining that the protection rationales for original works and other subject matter, including phonograms, are different. Whereas works under copyright are protected by virtue of their originality, phonograms are protected because of the investment made in their production. In that line, the copying of parts of an original work infringes the reproduction right if they contain elements which are the expression of the author's own intellectual creation. Differently, related rights are infringed if part of the investment in the protected subject matter is appropriated. In that connection, the financial and organisational investment that gives rise to such legal protection can be reflected in even the smallest part of the phonogram.²²

However, despite setting forth such a broad scope of protection for the phonogram reproduction right, the Court carved out a small pocket for musical creativity. In order to enable sampling to some degree, the taking of a sample is not subject to prior authorization if it is unrecognizable to the ear once integrated into the new work.²³ This qualification to the exclusive right applies when a user includes a sample in a new sound recording "in exercising the freedom of the arts."²⁴ This inherent limitation is therefore the result of a balancing between the right to intellectual property under art. 17(2) Charter and the freedom of artistic creation under art. 13 Charter. In this regard, the Court's assessment explicitly takes account of the limited economic impact of the free use of extremely short samples on the reproduction right of phonogram producers.²⁵

At national level, this outcome partially appeased the BVerfG, which had reprimanded the BGH for its rigid interpretation of the phonogram producers' right.²⁶ According to the BVerfG, a complete prohibition of unauthorized uses of samples would not be in accordance with the German constitutional order and a balance between the right to property and the right to artistic freedom under art. 5(3) German Basic Law.

¹⁷ CJEU, Judgment of 1 March 2012, *Football Dataco*, Case C-604/10, EU:C:2012:115.

¹⁸ CJEU, Judgement of 12.05.2012, *SAS Institute*, Case C-406/10, EU:C:2010:259.

¹⁹ See CJEU, Judgment of 19.07.2009, *Infopaq I*, Case C-5/08, EU:C:2009:465, para. 38.

²⁰ See especially BGH, Judgment of 20 November 2008, I ZR 112/06 (*Metall auf Metall*), para. 19.

²¹ Szpunar, AG, Opinion of 12.12.2018, *Pelham and Others*, Case C-476/17, EU:C:2018:1002, paras. 28-33, see also Jütte, B. J., CJEU permits sampling of phonograms under a *de minimis* rule and the quotation exception, 14(11) *Journal of Intellectual Property Law & Practice* (2019), 827-829.

²² Szpunar, C-476/17 *Pelham and Others*, paras. 28-30, CJEU, C-476/17 *Pelham and others*, paras. 29-30.

²³ CJEU, C-476/17 *Pelham and others*, paras. 31-39.

²⁴ CJEU, C-476/17 *Pelham and others*, para. 31.

²⁵ CJEU, C-476/17 *Pelham and others*, para. 38.

²⁶ See e.g. Jütte & Maier, *JILP* (2017), p. 785; Jütte, B. J., New perspectives for sampling - US and German developments and what comes next, 28(4) *Entertainment Law Review* (2017), 127-130, p. 127.

The AG had applied a restrictive notion of artistic freedom which limited the tools to exercise this freedom to those which the artist can afford or has legal access to. He compared samples from sound recordings to the paint and paintbrushes of painter: in the same way that a painter has to pay for his materials a music producer should pay for his “material”.²⁷ But this analogy does not hold up to scrutiny. To our knowledge, no legal system gives the owner or seller of a stolen brush or paint used to produce a painting a right to prevent the exhibition and sale of that painting. The AG essentially compares apples and oranges (or brushes and phonograms) to develop a logically flawed argument that obscures the speech hindering effect of overbearing “pure” property rights of phonogram producers. It also fails to fully appreciate the specific musicological context of the use of samples. The use of samples in modern music, and hip-hop music in particular, is more than merely employing physical (or digital) tools. In the production of music, samples carry meaning by way of references to earlier works; they are therefore essential elements in a postmodern cultural landscape.²⁸

Be that as it may, the AG’s proportionality analysis at this point is implicit and includes a balancing between the freedom of the artist to create and the property right of the producer of the materials necessary to create. The CJEU neither endorsed nor reject this argument. Instead, it advanced two arguments to permit use of samples that are unrecognizable to the ear.

First, the Court states that a literal interpretation of the term “reproduction”, which is not defined in the InfoSoc Directive, includes very short parts of a phonogram. This is consistent with the aim of the directive to provide rightholders with a high level of protection and to protect the investment made by phonogram producers.²⁹

Second, a fair balance between the relevant fundamental rights requires that sampling is permitted in order to “[afford] the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds”.³⁰ Sampling is therefore a form of artistic expression protected by art. 11 Charter and art. 10 of the European Convention of Human Rights (ECHR). The reasoning of the CJEU suggests that a complete ban through an extensive interpretation of the right in art. 2(c) InfoSoc Directive would not enable a proper balance to be struck. The Court comes to the conclusion that a wide interpretation of the exclusive right would fail to comply both with a literal interpretation of the notion of “reproduction” and a fair balance between the competing fundamental rights.³¹

However, it is not entirely clear why, in order not to infringe the phonogram producer right, a sample must be “unrecognizable to the ear”. The argument could flow from competition considerations in the light of the second step of the three-step test of art. 5(5) InfoSoc Directive.³² However, this would have to be based on the assumption that, either, the use of any sample could be monetized, or, more unlikely, that a song containing a sample stands in economic competition with the work from which the sample has been taken. But even this

²⁷ In para. 52 of his Opinion AG Szpunar stated. “Is it conceivable for a painter to rely on his freedom of creation so as not to pay for his paint and paintbrushes?”

²⁸ Klaas, N., *Kreative Referenzkultur und Urheberrecht im globalen Wandel*, 83(19) *UFITA - Archiv für Medienrecht und Medienwissenschaft* (2019), 7-12, p. 8, (with further references).

²⁹ CJEU, C-476/17 *Pelham and others*, para 30 with reference to recitals 4, 9 and 10 InfoSoc Directive.

³⁰ CJEU, C-476/17 *Pelham and others*, para. 34.

³¹ CJEU, C-476/17 *Pelham and others*, para. 37.

³² According to this, E&Ls in art. 5(1)-(4) must “not conflict with a normal exploitation of the work or other subject-matter”.

interpretation is open to criticism, since it relies on a norm of EU law to assess E&L (the three-step test) in order to justify a requirement for the application of the exclusive right.

The solution the Court opted for is also problematic because it leads to incongruent scopes of protection for phonograms as compared to original works. With a relatively broad scope of the reproduction right for phonograms, which covers all samples in their entirety with a carve-out based in how the sample is integrated into a new work, phonogram producers arguably enjoy broader protection than authors. This is because the latter enjoy protection for parts of their work only inasmuch as they are original, according to the standard developed by the Court.³³ This distinct treatment between phonograms and works is based on the investment-rationale that phonogram producers must be able to generate satisfactory returns.³⁴ However, it is in our view unclear why such a rationale justifies broader protection than that afforded to authors.

Furthermore, the primary mechanisms to strike the fair balance required by the Court would be the E&Ls in art. 5 InfoSoc Directive.³⁵ Especially as the Court states later in its judgment that the balance is reflected in the exclusive rights and E&Ls of the InfoSoc Directive.³⁶ Admittedly, in the absence of a clearly applicable exception, a purposive interpretation of the reproduction right achieves through the backdoor what cannot otherwise be achieved through the front door: a fair balance.

This type of interpretative elasticity to delimit the scope of the exclusive rights in light of fundamental rights is not unprecedented in CJEU case law.³⁷ For instance, in relation to the right of communication to the public, the Court relied on the right to freedom of expression in *GS Media* to draw a distinction between hyperlinks set for profit and hyperlinks set for purposes that do not pursue a profit.³⁸ In technologically identical situations, a subjective or mental element constitutes the watershed between copyright infringement and (presumptively) permitted use.

A comparison with prior restrictions to the reproduction right in CJEU case law is difficult to make due to the differences in protected subject matter. In previous cases, the Court limited the scope of the reproduction right on the basis of the idea/expression dichotomy, or the

³³ CJEU, C-5/08 *Infopaq I*, para. 47. CJEU, Judgment of 19.07.2009, *Infopaq I*, Case C-5/08, EU:C:2009:465,

³⁴ CJEU, C-476/17 *Pelham and others*, para. 30. The CJEU is inconsistent in the distinction between the related rights and works protected by copyright, see for example CJEU, Judgment of 15.03.2012, *SCF*, Case C-135/10, EU:C:2012:140, para 33 and CJEU, Judgment of 31.05.2015, *Reha Training*, Case C-117/15, EU:C:2016:379, paras. 76-77.

³⁵ Later in the judgment the Court points out that the mechanisms in which the fair balance is reflected are the exclusive rights and limitations and exceptions (CJEU, C-476/17 *Pelham and others*, para. 60). Admittedly, the Court does not construct rights and exceptions as absolute poles, but leaves room for an interpretation that the balance is reflected in an interplay and that both contribute to both sides of the balance.

³⁶ CJEU, C-476/17 *Pelham and others*, para. 60.

³⁷ In *GS Media*, the Court argued that qualifying all hyperlinks as acts of communication to the public would have a chilling effect on freedom of expression and therefore restricted the scope of the art. 3(1) right to hyperlinks made in the context of economic activities; see CJEU, Judgment of 08.09.2016, *GS Media*, Case C-160/15, EU:C:2016:644, paras. 31, 44-45; see further Quintais, J. P., Untangling the hyperlinking web: In search of the online right of communication to the public, 21 *The Journal of World Intellectual Property* (2018), 385-420, p. 394 and Rosati, E., *GS Media and Its Implications for the Construction of the Right of Communication to the Public within EU Copyright Architecture*, 54(4) *Common Market Law Review* (2017), 1221-1242, p. 1229.

³⁸ CJEU, C-160/15 *GS Media*, para. 47.

complete lack of originality in relation to individual words,³⁹ sporting events⁴⁰ and the taste of cheese.⁴¹ In *Pelham*, the Court uses the notion of a fair balance to exclude certain uses from the scope of the reproduction right.

In practice, such a case-specific substantive rights restriction will be difficult to apply.⁴² The "unrecognizable to the ear" criterion will be even more challenging in practice. First, because the Court failed to determine the standard against which to determine it. Second, because it is by nature an objective test (what is recognizable to the human hear) with significant subjective variations depending on the audience.

This will probably push national courts to introduce legal fictions similar to those used in other areas of intellectual property law – the informed user of design law, the average consumer of trademark law, the person with ordinary skill in the art of patent law – in order to operationalise the criterion. In that line, the BGH, in applying the CJEU's ruling in *Pelham*, created the notional figure of the "average music listener" to whose ear a sample integrated in a new sound recording must be unrecognizable.⁴³

Applying this standard to potentially infringing acts *after* the implementation deadline of the InfoSoc Directive (22 December 2002) the BGH found that Kraftwerk's sample, albeit slightly modified, was still recognizable in "Nur Mir" in its characteristic features.⁴⁴ The German "free use" exception is no longer available because art. 5 InfoSoc Directive does not foresee an equivalent in its exhaustive list of E&Ls.⁴⁵ Accordingly, German law cannot maintain such a flexible exception in its national copyright law and section 24(1) UrhG can merely function as an *inherent limitation* to the scope of the exclusive right under the conditions established by the CJEU.⁴⁶

For acts taking place before the implementation deadline of the InfoSoc Directive, section 24(1) UrhG can be applied by analogy and interpreted in the light of the German constitutional

³⁹ CJEU, C-5/08 *Infopaq I*.

⁴⁰ CJEU, Judgment of 4.10.2011, *FAPL/Murphy*, Joined cases C-403/08 and C-429/08, EU:C:2011:631.

⁴¹ CJEU, Judgment of 13.11.2018, *Levola*, Case C-310/17, EU:C:2018:899.

⁴² In relation to hyperlinks and the not-for-profit exclusion the Court had provided a relatively straightforward standard, with which the national courts already struggled. The German BGH ruled that *GS Media* does not apply to Google Search due to the essential nature of internet search engines, BGH, Judgment of 21 September 2017, I ZR 11/16 (*Vorschaubilder III*).

References to German Court.

⁴³ BGH, Judgment of 30.04.2020, I ZR 115/16 (*Metall auf Metall IV*), DE:BGH:2020:300420UIZR115.16.0, para. 29, with reference to Apel, S., *Sampling ohne Zustimmung kann Eingriff in Rechte des Tonträgerherstellers darstellen – „Metall auf Metall“*, 22(9) *MultiMedia und Recht* (2019), 597-603, p. 602 (Leistner, GRUR 2019, 1008, 1010; Wagner, MMR 2019, 727, 729)), see also Senftleben, M., *Flexibility Grave – Partial Reproduction Focus and Closed System Fetishism in CJEU, Pelham*, 51 *International Review of Intellectual Property and Competition* (2020), 751-769.

⁴⁴ BGH, Judgment of 30.04.2020, I ZR 115/16 (*Metall auf Metall IV*), DE:BGH:2020:300420UIZR115.16.0, para. 30-31.

⁴⁵ See CJEU, C-476/17 *Pelham and others*, 56-65.

⁴⁶ See BGH, Judgment of 30.04.2020, I ZR 115/16 (*Metall auf Metall IV*), DE:BGH:2020:300420UIZR115.16.0, para. 37; doctrinally, the BGH saves Article 24(1) UrhG from becoming obsolete, see also further below in relation to the quotation exception.

order. Pursuant to the interpretation of the BVerfG, a balancing of the right to artistic freedom and the right to intellectual property would have to give priority to the former.⁴⁷

The conclusion on this point is that the interpretation of the reproduction right for phonograms leaves little room for what in German is often referred to as ‘*Referenzkultur*’ (reference culture).⁴⁸ Whereas in relation to non-musical works the reproduction right for original works is the only right that stands between the author and the referencing artist, users of samples encounter two formidable obstacles: strong copyright protection *and* (arguably) even stronger related rights protection. In theory, in the absence of a license, these obstacles could be overcome if a sampler could rely on an E&L to both exclusive rights. In practice, as we examine below, this will frequently not be possible. The result is that creating art that builds on themes and patterns of prior works through appropriation appears to be more difficult when the reference is taken from a phonogram (protected by related rights) rather than a painting or a work of literature (protected by copyright). This is a rather surprising outcome since normative justifications underpinning this area of law, the EU legal framework and its interpretation by the CJEU, typically favour a broader protection for copyright than related rights. The outcome in this case is the inverse. Relatedly, *Pelham* also highlights the challenges for creative reuses in the area of music.

3.2. Distribution

In the “*Metall auf Metall*” litigation the claimants did not only seek to establish that the defendant Moses Pelham had infringed their reproduction right. They further had asked for an injunction that prevented the further circulation of the sound recording of “Nur Mir”. The distribution right in art. 4 InfoSoc Directive only applies to authors and their works. The equivalent for phonograms is art. 9(1)(b) Rental and Lending Rights Directive, which applies to the marketing of physical copies.⁴⁹ In this context, it is important to remember that when this litigation started in 1997 commercial distribution of copies was probably the most relevant means of exploitation of phonograms.

According to the Court, the purpose of the distribution right for phonograms is to ensure that producers of phonograms can recoup their investments and to fight the trade in unlawful copies of phonograms.⁵⁰ Only copies of phonograms that could jeopardize achieving these objectives – i.e. which reproduce the entirety or a substantial part of an original phonogram – fall under the notion of “copies” in art. 9(1)(b). In other words, a phonogram that infringes the reproduction right under the InfoSoc Directive *does not automatically infringe the distribution right under the Rental and Lending Rights Directive*. For an infringement of the distribution right, the sample must be reproduced to an extent that it creates economic competition for the original phonogram.⁵¹

As a result, phonograms that contain reproductions of shorter samples from an original phonogram can be sold or otherwise made available to the public without infringing the

⁴⁷ BVerfG, Judgment of 31 May 2016, 1 BvR 1585/13, DE:BVerfG:2016:rs20160531.1bvr158513, paras. 88-108, see BGH, para 13.

⁴⁸ Klaas, UFITA (2019).

⁴⁹ Art. 9 Rental and Lending Rights Directive expressly refers to “objects”.

⁵⁰ See recitals 2 and 5 Directive 2006/115/EC. CJEU, C-476/17 *Pelham and others*, para. 45.

⁵¹ See implicitly in CJEU, C-476/17 *Pelham and others*, para. 50.

distribution right. This interpretation reflects the independence of the economic right of distribution from that of reproduction, which cannot be undermined with reference to art. 8(1) InfoSoc Directive through a sort of injunctive overreach.⁵² However, the rightholder still has recourse to the remedies available for infringements of the reproduction right to effectively prevent distribution of phonograms containing unauthorized samples. After all, such samples constitute, by way of incorporation into a new phonogram, reproductions of a phonogram for the purposes of art. 2(c) InfoSoc Directive.⁵³ That is to say, although the rights of reproduction and distribution in the different directives are independent and have different scopes, rightholders can still enforce the reproduction right to prevent acts of distribution.

4. Mitigating exclusivity with flexible exceptions

The *Pelham* preliminary reference considered three options to enable sampling in the event the reproduction right would have turned out, as it did, to be an insurmountable barrier to this activity. First, the BGH had considered whether sampling could, in some cases, constitute a quotation within the meaning of art. 5(3)(d) InfoSoc Directive. Second, if no E&L under art. 5 were available, whether fundamental rights could justify an exception outside the cases listed in the InfoSoc Directive. Between these two options lay a third possibility. The UrhG contains the so-called “free use” clause, which permits the use of works protected by copyright under strict conditions. As no such open-ended clause is foreseen in the exhaustive regime of the InfoSoc Directive, the BGH inquired whether Member States could maintain such a provision in their national copyright laws in order to create flexibility beyond art. 5.

4.1. Sampling as Quotation

The InfoSoc Directive does not provide an E&L that would apply to user-generated content in the online environment. The closest example can be found in art. 5(3)(k) which allows Member States to implement E&Ls for the purposes for parodies,⁵⁴ caricatures or pastiches.⁵⁵ The BGH

⁵² BGH, Judgment of 30.04.2020, I ZR 115/16 (*Metall auf Metall IV*), DE:BGH:2020:300420UIZR115.16.0, para. 81. Art. 8(1) InfoSoc Directive states: “Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive”. The BGH stresses that claims for the infringement of the reproduction right cannot extend to acts reserved to the rightholder under the distribution right, i.e. the “distribution to the public by sale or otherwise”, including the offering for sale.

⁵³ BGH, Judgment of 30.04.2020, I ZR 115/16 (*Metall auf Metall IV*), DE:BGH:2020:300420UIZR115.16.0, para. 28.

⁵⁴ Parody has been interpreted by the CJEU in CJEU, Judgment of 03.09.2014, *Deckmyn*, Case C-201/13, EU:C:2014:2132. In analogy to US fair use case-law an application of the parody exception to mashups and remixes has been considered also under EU law, see including Jütte, B. J., The EU’s Trouble with Mashups: From Disabling to Enabling a Digital Art Form, 5(3) *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2014), 173-193; Cabay, J. & M. Lambrecht, Remix prohibited: how rigid EU copyright laws inhibit creativity, 10(5) *Journal of Intellectual Property Law & Practice* (2015), 359-377; Jacques, S., Mash-ups and Mixes: What Impact Have the Recent Copyright Reforms Had on the Legality of Sampling?, 27(1) *Entertainment Law Review* (2016), 3-10.

⁵⁵ On the feasibility of a user-generated content exception under the InfoSoc Directive’s framework, see Quintais, João, Rethinking Normal Exploitation: Enabling Online Limitations in EU Copyright Law (December 2017). AMI - tijdschrift v oor auteurs-, media- en informatierecht 2017/6, Available at SSRN: <https://ssrn.com/abstract=3106729>

had however suggested the quotation exception in art. 5(3)(d) InfoSoc Directive as a potential release valve for creative sampling. Before the three preliminary references in *Pelham*, *Funke Medien* and *Spiegel Online*, the quotation exception had not received the attention of the CJEU. The provision states that Member States can provide in their national laws for an E&L for “quotations for purposes such as criticism or review, provided that (...) their use is in accordance with fair practice”. Importantly, the purposes for which quotations can be permitted are not restricted to criticism or review, but can also relate to other comparable (“such as”) uses of works. Second, the requirement of “fair practice” leaves Member States some margin of discretion.⁵⁶

In the absence of a definition of “quotation” the Court referred to the ordinary meaning of the term. The term is defined by the use of a work or an extract thereof “for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user”.⁵⁷ AG Szpunar had further qualified that such use must be intended to enter into a dialogue with the work which has been reproduced, an argument which the Court adopted.⁵⁸

As a result of this interpretation, the scope of permissible quotations is relatively narrow. Most importantly, in the case of music, it is restricted to quotations that are recognizable to the ear, because otherwise no comparison or dialogue could be established between the two works. This means also that, in principle, musical quotation can constitute a permissible quotation within the meaning of art. 5(2)(d) only if a dialogue can be established and the use complies with all other conditions of the provision, including that it is “in accordance with fair practice”.

In this context, the Court makes a vague reference to art. 13 Charter, in the light of which the quotation exception can be read to include musical sampling.⁵⁹ The reference to fundamental rights could be understood in a similar way as the fundamental rights-driven limitation of the reproduction right for phonograms.⁶⁰ If so, it would require national courts to exercise lenience when applying the quotation exception to artistic expression.

One other element of the notion of quotation should be addressed, namely that suggested by the AG that it must *intend to enter into a dialogue* with the quoted work. In our view, the reference to a mental element – intention – suggests that this is a *subjective* requirement that must be assessed from the perspective of the sampling artist. It should therefore not matter whether a user can “recognize” the dialogue. Rather, if this is indeed a requirement of quotation, the intention of the sampler to enter into a dialogue should be sufficient, if all other all other criteria are met, to bring the use of a sample within the scope of the E&L.

Naturally, this is easier to state in theory than to assess in practice. Absent guidance from the CJEU, this assessment rests with national courts and may vary according to applicable presumptions or procedural rules. Is it sufficient for the sampling artist to claim that a dialogue was intended? An affirmative answer would facilitate sampling activities but may call into question the effectiveness of the E&L, as it translates into a relatively low bar to clear. Should

⁵⁶ CJEU, C-516/17 *Spiegel Online*, para. 28.

⁵⁷ CJEU, C-476/17 *Pelham and others*, para 71.

⁵⁸ Szpunar, C-476/17 *Pelham and Others*, paras. 64-65 and CJEU, C-476/17 *Pelham and others*, paras. 71-72.

⁵⁹ CJEU, C-476/17 *Pelham and others*, para. 72.

⁶⁰ See *supra* at 3.1.

the sampler be required to reasonably explain the dialogue beyond a trivial argument, if confronted with an infringement claim? This could be a solution, but the question arises where to draw the reasonableness line, especially in manner that is consistent across the EU single market.

What cannot be avoided, given this combination of vague and subjective factors, is that national courts will have to assess quotations on a case-by-case basis. As long as a sample is recognizable in a new work, it will be for the lawyers to argue and courts to decide on the dialogue between musical creations. At least until further guidance is provided by the CJEU.

The BGH ultimately came to the conclusion that the use of the two-second sample was insufficient to constitute a dialogue between the two works. The conditions of section 51 UrhG, which implements art. 5(3)(d) InfoSoc Directive, were not deemed to be fulfilled. In particular, the length of the sample did not permit an intellectual engagement with the original work which can form a point of attachment for individual commentary. In any case, this would require that the sample can be identified as foreign to the new work. According to the BGH, although the sample can be recognized in the new production by Moses Pelham, a listener cannot assume that the sample has been taken from another phonogram. It is the recognition of a foreign element that constitutes the basic condition for a dialogue between two musical works.⁶¹

The BGH therefore set a high bar for samples to qualify for an E&L. This is especially true for samples that do not contain lyrics, such as the sample at issue from the Kraftwerk song “Metall auf Metall”, which Moses Pelham included in “Nur Mir”. Following the BGH’s approach, it is indeed difficult to argue how a two-second sample taken from an avant-garde piece of electronic music of 1977 can enter into a dialogue with a hip-hop song from the late 1990s.

However, in our view, the BGH’s approach brings with it several problems. First, it leads to a paradoxical result: samples of a longer length and that are closer in nature to the sampled work (and therefore closer in market and potential harm) are more likely to qualify as a permissible quotation than shorter samples with less obvious connections. Second, as we read it, the CJEU requires the assessment of a mental element of intention – a *subjective* requirement. If so, then the focus should be on the sampler’s intention rather than on the *objective* assessment of whether a dialogue is indeed entered into. To be sure, this conflation of subjective and objective elements derives from the CJEU’s judgement and is not entirely of the BGH’s doing. Third and related, if indeed an objective test of “entering into a dialogue” is required, then its application by the BGH in the present case shows its inadequacy. In particular, if the test relies on factors such as length of sample, presence of lyrics, and proximity of genre, how will judges make these determinations without passing their own aesthetic or cultural judgments on the use of the sample before them? From a normative perspective, this would be an undesirable outcome.⁶² National courts will have to grapple and struggle with these notions. It cannot be excluded that some of them will return to the CJEU in the mid-term.

On this point, it bears remembering that art. 10 Berne Convention sets the international minimum standard on quotation. It positively establishes, in right-like fashion, that quotations

⁶¹ BGH, Judgment of 30.04.2020, I ZR 115/16 (*‘Metall auf Metall IV’*), DE:BGH:2020:300420UIZR115.16.0, paras. 54-55.

⁶² Goldstein, P. & Hugenholtz, P. B., *International Copyright: Principles, Law, and Practice*, Oxford University Press, (Oxford, New York, etc., 2012), p. 193.

that meet the further conditions of that provision must be permitted in laws of the contracting parties of the Berne Union.⁶³ These conditions are echoed in art. 5(3)(d) InfoSoc Directive. Unfortunately, the interpretation given to the quotation exception by the CJEU adds little in terms of legal certainty. The element of a dialogue makes this particular exception extremely malleable, underlining the problematic nature of the requirement. Moreover, the interpretation given to the notion of ‘quotation’ goes beyond what is required under the Berne Convention, having a restricting effect on the application of the exception.⁶⁴

4.2. Sampling beyond musical quotation

The quotation exception, although in principle applicable to extracts of sound recordings, has a limited scope to accommodate most sampling activities. Between a dialogue with the work from which a sample is borrowed, on the one hand, and the marginal uses permitted under a mildly flexible interpretation of the exclusive right for phonogram producers, on the other, lies a wide spectrum of uses. These uses trigger the exclusive right of phonogram producers in art. 2(c) InfoSoc Directive.

In search of flexibility to accommodate some of those uses, the BGH suggested that more creative space for sampling could be accommodated by a flexible, non-specific open norm. The German UrhG contains such a norm in the form of the “free use” defense. This provision permits users of protected works the “free use” of the same in the creation of a new and independent work. However, the nominally exhaustive list of art. 5 InfoSoc Directive does not foresee a E&L of that kind.

In his Opinion, AG Szpunar had not categorically excluded that Member States maintain or introduce a flexible norm into their national copyright law as long as the interpretation and application of that norm does not extend the scope of the E&Ls listed in art. 5(2) and (3) InfoSoc Directive.⁶⁵ An application of such a norm by a national court that permits certain acts provided for in the exhaustive list of art. 5 could have been lawful, arguably even if the respective Member State had not implemented that particular option. However, according to the AG, art. 5 does not contain a “general exception permitting the use of works of others for the purposes of creating a new work.”⁶⁶

The Court took a more restrictive position. Although it systematically differs from that of the AG, it comes to the same result. For the Court, a flexible norm such as the German “free use” defense of section 24(1) UrhG is in principle not compatible with the closed-list system of E&Ls in the InfoSoc Directive. As noted, according to the Court, the mechanisms that ensure the fair balance between the interests of rightholders, users and the public are contained in the

⁶³ See, generally, Aplin, T., & Bently, L. (2020). *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge Intellectual Property and Information Law). Cambridge: Cambridge University Press. doi:10.1017/9781108884099

⁶⁴ Cf. C-201/13 *Deckmyn*, para. 24; where the CJEU argues that an exception should not be further limited by additional conditions which are not contained in the wording of the relevant exceptions, or which do not emerge from the usual meaning of the concept of the respective exception. This stands in contrast with AG Szpunar’s conclusion that, in relation to quotations “the wording of the provision in question clearly indicates, in my opinion, that the quotation must enter into some kind of dialogue with the work quoted.”, Szpunar, C-476/17 *Pelham and Others*, para. 64.

⁶⁵ Szpunar, C-476/17 *Pelham and Others*, para. 59.

⁶⁶ Szpunar, C-476/17 *Pelham and Others*, para. 54.

InfoSoc Directive: exclusive rights on the one side; E&Ls on the other.⁶⁷ Allowing Member States to permit further uses in their national laws would therefore disturb the balance set by the European legislator. Adding to this, the Court further argued that introducing flexibility at the national level, essentially by the national courts, would endanger the effectiveness of harmonization and the objective of legal certainty.⁶⁸ This line of reasoning was echoed in *Spiegel Online* and *Funke Medien*.

In the absence of an express E&L that permits musical creativity – or reference culture in general – a Member States have no leeway to introduce this possibility into their national laws. Users of samples must therefore make do with the limited space available in the existing rules of the *acquis*. In this way, the Court forecloses the possibility of a flexible open norm in the copyright *acquis*, at least within the framework of the InfoSoc Directive.

There is however one concern that seems to contradict the CJEU's argument in this respect. While the exclusive right of reproduction of phonogram producers is implemented in all Member States, the availability of an E&L for a particular use is dependent on policy choices at national level. If a Member States chooses not to implement a particular E&L from the InfoSoc catalogue, then the balance between competing fundamental rights – as reflected in the interplay between exclusive rights and E&Ls – is not safeguarded in every Member State. Such a result would not ensure the effectiveness of harmonization and would contribute little to cross border legal certainty.

The CJEU addressed this concern implicitly, in what constitutes an important contribution not only of *Pelham*, but also of *Funke Medien* and *Spiegel Online*. The Court notes that the balance between the competing fundamental rights which is established by the interplay of exclusive rights and E&Ls must find its expression in the national laws of the Member States who are obliged to implement the provisions of the InfoSoc Directive. But because the directive leaves Member States a choice which of the optional E&Ls to implement, this balance could be skewed. Therefore, the duty to implement art. 5 in the light of the EU Charter requires Member States in some cases to adopt an E&L if that is necessary to maintain the balance between, as for the case of sampling, the right to property and artistic freedom.⁶⁹

The Court's statements in this respect have significant implications. In particular, irrespective of the optional nature of the exception, Member States must ensure that users can avail themselves of the quotation E&L for the purposes of sampling. The Court's language also suggests that fundamental rights-based exceptions have a minimum core, which limits their strict interpretation by national courts.⁷⁰

Interestingly, the BGH considered the applicability of the E&Ls for caricature and parody and pastiche under art. 5(3)(k) InfoSoc Directive, none of which find an express equivalent in the

⁶⁷ CJEU, C-476/17 *Pelham and others*, para. 60.

⁶⁸ CJEU, C-476/17 *Pelham and others*, para. 63.

⁶⁹ Cf. CJEU, C-476/17 *Pelham and others*, para. 60, identically CJEU, C-516/17 *Spiegel Online*, para. 43 and CJEU, C-469/17 *Funke Medien NRW*, para. 58. However, in principle, the ambiguity of the distinction between "exception" and "limitation" also should leave discretion to Member States to achieve the results pursued by a particular instance of art. 5(2) and (3) through legal mechanisms other than E&Ls.

⁷⁰ For a similar argument under previous case law, see Quintais, J. P., *Copyright in the Age of Online Access: Alternative Compensation Systems in Eu Law*, Kluwer Law International, (Alphen aan den Rijn, 2017), pp. 199–207.

text of the UrhG. However, the BGH argued that a parody exception has long been recognized in the jurisprudence of the German courts and could therefore be relied on under section 24(1). Systematically, the BGH considers the general “free use” defence as an implementation of the caricature and parody E&L.⁷¹ Such a jurisprudence does not exist for pastiche. For that reason, the BGH rejects the existence of a pastiche exception under German law, which would therefore require express recognition by the legislator. Here, the BGH saves the “free use” norm as a flexible provision that must be read in the light of national jurisprudence as well as the provisions of the InfoSoc Directive. As a result, after the implementation deadline of the InfoSoc Directive, defendants may rely on the “free use” norm as a defence against infringement if both national jurisprudence *and* the directive provide for an E&L applicable to the act in question.

5. Beyond sampling: fundamental rights implications

The *Pelham* judgment is important not only for sampling, but projects into EU copyright law in general. The interpretation of the harmonized rules of the InfoSoc Directive and other elements of the *acquis* in light of fundamental rights will have to be guided by the principles unambiguously expressed in *Pelham*. In order to assess the role of fundamental rights in EU copyright law, the judgment must be read together with, and in light of the judgments in *Funke Medien* and *Spiegel Online*. That all three judgments were handed down by the Grand Chamber underlines their significance. The re-occurrence of the key statements (often verbatim) further adds to their importance.

Striking the balance between the different competing interests in *Pelham* has not been an easy task, in particular because all such interests can be grounded on fundamental rights. The Court ruled that, on the one hand, short samples included in a new song are do not require authorization if they are unrecognizable to the ear; their use therefore does not require prior authorization. This solution enables sampling artists to exercise their artistic freedom while no significant harm is caused to the economic and non-economic interest of rightsholders. On the other hand, the use of recognizable samples falls within the scope of the reproduction right and requires prior authorization. Without authorization, such a use is only permitted if it benefits from an E&L in art. 5 InfoSoc Directive, including the exception for quotation. For this to occur, the sample must meet the formal requirements of art. 5(3)(d) InfoSoc Directive. In addition, it would have to be demonstrated that the sampling artist has the “intention of entering into a dialogue”⁷² with the work from which the sample is taken. As a result, the application of the quotation exception to musical sampling will pose a challenging task for the courts.

Pelham is not a ground-breaking judgment in the sense that it would per se upset the existing understanding of the interplay between copyright and fundamental rights. But we should not ignore that the ruling uses art. 13 EU Charter to reign in – and effectively reduce – the scope of the reproduction right for phonogram producers as compared to the broad interpretation

⁷¹ BGH, Judgment of 30.04.2020, I ZR 115/16 (*Metall auf Metall IV*), DE:BGH:2020:300420UIZR115.16.0, para. 62.

⁷² CJEU, C-476/17 *Pelham and others*, para. 71, as suggested by AG Szpunar in para. 64 of his Opinion, see with substantial criticism on such a narrow reading of the quotation exception Bently, L. & Aplin, T., *Whatever Became of Global, Mandatory, Fair Use?: A Case Study in Dysfunctional Pluralism*, in: S. Frankel, *Is Intellectual Property Pluralism Functional* (Cheltenham, Northampton: Edward Elgar Publishing, 2019).

suggested by AG Szpunar.⁷³ Still, the Court's approach here demonstrates that role of fundamental rights is limited to an *internal* dimension in relation to the interpretation of the *acquis*. The rights contained in the EU Charter, and arguably those in the ECHR, can determine the fair balance of competing rights and interests *only* within the interpretative margins left by the rules set by the legislature.

As concerns the subject matter and scope of copyright, an *external* control of these rules through the prism of fundamental rights is not foreseen.⁷⁴ The existing legal framework, according to the Court, already reflects a proper balance between the competing interests of users, rightholders and the general public. This balance is expressed in the interplay between exclusive rights and E&Ls, including the three-step-test.⁷⁵ The Court's assessment can be criticized for neglecting to acknowledge the impact of the fast-paced technological developments of the last 20 years on the rights of users. Not only is the legal framework that manifests users' rights that old, but it also predates the codification of a European fundamental rights canon in form of the Charter.

Still, fundamental rights have been established as important factors in the interpretation and application of exclusive rights and E&Ls. They are considered arguably at the same level as other structural principles of EU law, including the effectiveness of internal market harmonization and legal certainty. The most important practical implication for EU copyright law is that the external inflexibility of the existing rules means that national legislators are bound by the exhaustive list of E&Ls in art. 5 InfoSoc Directive.⁷⁶ Although some margin for manoeuvre exists in relation to certain exceptions – notably those containing open concepts⁷⁷ – the list does not allow for additional exceptions as this would, according to the Court, jeopardize effective harmonization and legal certainty.⁷⁸

It has been argued that the optional nature of the E&L contained in art. 5(2) and (3) in itself constitutes a barrier to the operation of the internal market.⁷⁹ Indeed, the implementation of E&Ls across the Member States of the EU is far from harmonious. In that regard, one statement by the Court is remarkable: in a subclause, which is also repeated in *Spiegel Online* and *Funke Medien*, the CJEU suggests that some E&Ls of art. 5 have a quasi-mandatory nature. Specifically those E&Ls that give effect to fundamental rights and serve to create and maintain the internal balance in copyright law “may or even *must*, be transposed by the Member States”.⁸⁰ Undoubtedly, the exceptions for quotation, caricature, parody, and reproductions by

⁷³ Szpunar, C-476/17 *Pelham and Others*, paras. 19-40.

⁷⁴ As concerns *enforcement*, the case law of the Court appears to accept an external control of the reach of copyright, in the form of a balancing of the right to intellectual property in the Charter (art. 17(2)) and other fundamental rights, such as privacy, data protection, freedom of expression and freedom to conduct a business. See e.g. [CJEU, Judgment of 24.11.2011, *Scarlet Extended*, Case C-70/10, EU:C:2011:771; CJEU, Judgment of 16.06.2012, *SABAM v Netlog*, Case C-360/10, EU:C:2012:85; CJEU, Judgment of 27.03.2014, *UPC Telekabel Wien*, Case C-314/12, EU:C:2014:192; CJEU, Judgment of 15.09.2016, *Mc Fadden*, C-484/14, EU:C:2016:689.

⁷⁵ See Jütte, B. J., *Finding the Balance in Copyright Law: Internal and External Control Through Fundamental Rights*, in: P. Torremans, *Intellectual Property Law and Human Rights* (Alphen aan den Rijn: Kluwer Law International, 2020).

⁷⁶ CJEU, C-476/17 *Pelham and others*, paras. 56-65; see also CJEU, C-516/17 *Spiegel Online*, paras. 50-59.

⁷⁷ See CJEU, C-469/17 *Funke Medien NRW*, paras. 39-54.

⁷⁸ CJEU, C-476/17 *Pelham and others*, para. 63.

⁷⁹ See Hugenholtz, E.I.P.R. (2000) and Guibault, JIPITEC (2010).

⁸⁰ CJEU, C-476/17 *Pelham and others*, para. 60; CJEU, C-469/17 *Funke Medien NRW*, para. 58; CJEU, C-516/17 *Spiegel Online*, para. 43 (*emphasis added*).

the press should count amongst those that must necessarily be transposed into national law; for others there are good reasons to assume the same.⁸¹

To be sure, *Pelham* could have gone further in a progressive interpretation of the role of fundamental rights in copyright law. In particular, the Court could have opened the door for an occasional override of copyright in the public interest. The AG's Opinion in *Pelham* had at least suggested that this might be possible,⁸² similar to the general approach taken by the European Court of Human Rights in *Ashby Donald*⁸³ and *The Pirate Bay*.⁸⁴

Although it did not go this far, it is undeniable that *Pelham* – together *Funke Medien* and *Spiegel Online* – amounts to a positive reception by the Court of what has been coined the as the “constitutionalization” of copyright: the process of readjusting the balance in copyright law by reference to constitutionally guaranteed fundamental rights at national and European level in order to shape “internal contours” – and arguably also the external borders – of the central elements of copyright.⁸⁵

In addition to this “constitutionalization” facet, the Grand Chamber trilogy's has clearly exposed the rifts in the current state of the *acquis* as regards the interplay between copyright and fundamental rights. From that perspective, it is also possible to read the Court's strict reliance on effective harmonization and legal certainty as an appeal to the legislator to correct the balance within copyright law. If that was the case, then the recent adoption of art. 17 of the Directive (EU) 2019/790 (CDSM Directive) is an illustration of the adage “be careful what you wish for”.⁸⁶

As we have argued elsewhere, art. 17 CDSM Directive promises to upset this elusive balance yet again.⁸⁷ This provision regulates the activities of so-called online-content sharing service

⁸¹ One example is the exception for teaching and research, which gives expression to the freedom of the arts and sciences (Article 13 EU Charter).

⁸² Szpunar, C-476/17 *Pelham and Others*, para 94.

⁸³ ECtHR, ECtHR (5th section), 10 January 2013, case of *Ashby Donald and other v. France*, Appl. nr. 36769/08, Judgment (2013), 10 January 2013.

⁸⁴ ECtHR, ECtHR (5th section) of 19 February 2013, case of *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden*, Appl. nr. 40397/12, Judgment (2013), 19.02.2013; see on both cases Jütte, B. J., *The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe*, 38(1) *European Intellectual Property Review* (2016), 11-22.

⁸⁵ See e.g. Geiger, C., „Constitutionalising“ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union, 37(4) *International Review of Intellectual Property and Competition* (2006), 371-406; Geiger, C. & E. Izyumenko, *The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!*, 51(3) *International Review of Intellectual Property and Competition* (2020), 282-306; Griffiths, J., *Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law*, 31(1) *European Law Review* (2013), 65-78, see also in relation to algorithmic enforcement Schwemer, S. & Schovsbo, J., *What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime*, in: P. Torremans, *Intellectual Property Law and Human Rights* (Alphen aan den Rijn: Kluwer Law International, 2020), pp. 578-579; for the role of fundamental rights in EU trademark law see e.g. Schovsbo, J., “Mark My Words”—Trademarks and Fundamental Rights in the EU, 8(3) *UC Irvine Law Review* (2018), 555-581.

⁸⁶ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92-125 (DSM Directive).

⁸⁷ Quintais, J. P. et al., *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics*, 10(3) *Journal of Intellectual Property*,

providers, a type of hosting service providers, for copyright-protected content uploaded by their third-party users.⁸⁸ Under the new regime, these providers are now unequivocally directly liable for communicating to the public the content they host.⁸⁹ From a freedom of expression perspective, most problematic are the obligations posed on such providers to ensure the unavailability of unlawful user-uploaded content protected by copyright uploaded by their users.

Briefly after the adoption of this controversial provision, the Polish government challenged this *lex specialis* enforcement regime directly under art. 263 TFEU.⁹⁰ The Polish challenge focuses directly on art. 17(4)(b) and (c) *in fine*, i.e. the provisions that set up a specific liability exemption mechanism and impose preventive obligations that can arguably lead to unlawful monitoring and filtering of user activities.

However, art. 17 also contains safeguards for the effective exercise of certain E&Ls,⁹¹ which the Court will have to consider in its analysis. In particular, art. 17(7) sets forth a set of E&Ls applying to protected content uploaded users on online content-sharing services for: quotation, criticism, review; and use for the purpose of caricature, parody or pastiche. These E&Ls are mandatory and arguably not subject to contractual derogation or override by technical protection measures. For that reason, we have argued that they are akin to user rights or freedoms.⁹² Art. 17(9), for its part, introduces a number of procedural safeguards, including an obligation on platforms to set up effective and expeditious complaint and redress mechanisms, obligations on rightholders to justify access disabling and content removal requests, and an obligation on Member States to put in place out-of-court redress mechanisms for the settlement of disputes.

Irrespective of the outcome of the Polish challenge to art. 17, it is our view that *Pelham* has potential implications for the interpretation of this provision. First, assuming quotation is an autonomous concept of EU law, the requirements set forth for its interpretation in *Pelham* as regards art. 5(3)(d) InfoSoc Directive should apply to the future interpretation of that concept on art. 17(7). Second, in light of the reinforced nature of the E&Ls in art. 17(7) – as compared to its counterparts in arts. 5(3)(d) and (k) InfoSoc Directive – and its explicit grounding on

Information Technology and E-Commerce Law (2019), 277-282. For an overview and criticism of Article 17 DSM Directive: Leistner, M., European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?, 12(2) *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal* (2020), 123-214.; Husovec, M. & J. P. Quintais, How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms, Available at SSRN: <https://ssrn.com/abstract=3463011> or <http://dx.doi.org/10.2139/ssrn.3463011> (2019), 1-27; The European Copyright Society, Comment of the European Copyright Society Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law, 11 (2020) JIPITEC 115 para 1.

⁸⁸ For the definition of “online content-sharing service providers” see art. 2(6) and supporting recitals 62 and 63 CDSM Directive.

⁸⁹ The exact nature of art. 17(1), which stipulates that “an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users” is disputed. While some argue that Article 17(1) creates a *lex specialis* right of communication to the public, other maintain that the provision merely clarifies the scope of Article 3(1) InfoSoc Directive. Contrast Husovec & Quintais, SSRN (2019) with Leistner, ZGE/IPJ (2020).

⁹⁰ CJEU, Application of 26.07.2019, Case C-401/19, .

⁹¹ Article 17(7) and (9) Directive 2019/790.

⁹² Quintais et al., JIPITEC (2019).

freedom of expression⁹³, it stands to reasons that *Pelham* provides a “floor” for the interpretation of the scope of the quotation exception. That is to say, the scope of the quotation concept in art. 17(7) can arguably be broader than what is set forth in *Pelham*, but not narrower.

6. Conclusion: Curtain Call for Creativity?

This article discussed the *Pelham* saga, which has found its conclusion with the judgment of the BGH in April 2020. What started as a national sampling dispute was elevated to European spheres and resulted in an intervention by the CJEU, giving it the opportunity to determine the constitutional contours of copyright law. The long journey, which one of Kraftwerk’s founding members only survived by six days, might have not delivered a great finale but will remain relevant for legal scholars and lawyers.

The BGH followed the CJEU’s lead on all main points. It is now clear that the scope of the exclusive right of reproduction for phonograms goes beyond the scope of the corresponding right for authorial works. Whereas parts of original works within the meaning of art. 2(a) InfoSoc Directive are only protected as long as they form part of the author’s original expression, every part of a phonogram appears to be protected under art. 2(c). Only if a user of parts of a phonogram samples it while exercising his fundamental right to artistic freedom will that use be permitted, provided the sample is not recognizable to the human ear when integrated into the new work. The question remains whether a similar test would apply to other related rights, specifically those of an audio-visual nature.

This qualification of the reproduction right seems to constitute a limitation to its scope, in a doctrinal sense. E&Ls to exclusive rights are in principle available, but difficult to apply to sampling. In the absence of a sampling-specific exception, sampling artists must rely on some of the existing E&Ls. However, the interpretation given to the quotation exception, which requires that the sample enters (or intends to enter) into a dialogue with the source work, makes it unlikely that reliance on this defence will be successful, specifically for shorter samples. At the same time, the CJEU has rejected the possibility that Member States can introduce creativity-conducive exceptions in their national law and fundamentally opposed the notion of a flexible norm in European copyright law.⁹⁴

From a constitutional perspective, *Pelham* might have a deeper impact in the future and should alert the European legislator to more careful drafting. The CJEU took a lot of flexibility out of the hands of national judiciaries, claiming the shaping of the balance in copyright law as a prerogative of the legislature. Otherwise, according to the Court, an exercise of judicial flexibility would jeopardize the proper functioning of the internal market. The highest EU court itself is sympathetic to cosmetic changes to the scope of rights and E&Ls when pressured by fundamental right. The general contours, however, must be drawn by the legislature.

For sampling artists, the battle is fought and for the most part lost. The general rejection of an enabling role of copyright law, as it stands, for musical creativity is a hard blow. Although the

⁹³ See recital 70 Directive 2019/790.

⁹⁴ For a previous credible call for such an open norm in EU copyright law, see Hugenholtz, P. B. & M. Senftleben, Fair Use in Europe: In Search of Flexibilities, Available at SSRN: <https://ssrn.com/abstract=1959554> or <http://dx.doi.org/10.2139/ssrn.1959554> (November 2011), 1-30.

Court recognized a mini-de minimis rule, referencing earlier works as a form of cultural expression requires permission. As with almost all things copyright, this will come at a price: whether this price will be paid by artists who continue to create despite copyright, or society which might see a decrease in unchained (musical) creativity remains to be seen.