Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 12 December 2018 [1]

Case C-476/17

Pelham GmbH,
Moses Pelham,
Martin Haas
v
Ralf Hütter,
Florian Schneider-Esleben

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling — Copyright and related rights — Right of reproduction — Reproduction of minimal parts of a phonogram (sampling) — Free use of a work — Consideration of the fundamental rights of the Charter of Fundamental Rights of the European Union)

Introduction

1. Sampling is the process of taking, by means of electronic equipment, a portion or sample (hence the name of the technique) of a phonogram for the purpose of using it as an element in a new composition in another phonogram. When reused, those samples are often mixed, modified and repeated in a loop in such a way as to be more or less recognisable in the new work. It should also be noted that those samples may be of different lengths; of a duration of between less than a second and several tens of seconds. Sampling is therefore a multifaceted phenomenon, thus making its legal characterisation difficult. [2]

2. Although the concept of composers reusing motifs from earlier works is probably as old as music itself, sampling is a new phenomenon made possible by modern recording and sound modification techniques, at first analogue, but now digital. Unlike the use of a fragment of another musical work in the composition of a new work, the idea behind sampling is to take the sounds fixed in the phonogram, that is to say the work performed and recorded, directly in order to incorporate them into the phonogram that contains the new work. Consequently, sampling is a phenomenon specific to the reality of music recorded in the form of phonograms. In other words, copying fragments from the score of a musical work to be incorporated into the score of a new work and subsequently performing that score does not constitute sampling.

1 Original language: French.

2 See, in particular, Piesiewicz, P., 'Dzieło muzyczne i nowe technologie (aspekty prawne "samplingu")', *Państwo i prawo*, nº 3/2006.

3. Although sampling can be used in any musical genre, it is particularly important in rap and hip hop music which developed in the working-class areas of New York (United States) in the 1970s.[3] Rap and hip hop music is rooted in the practice of disc jockeys ('DJs') who splice, manipulate and mix sounds from music tracks recorded on vinyl. That practice has resulted in genuine compositions derived therefrom. Accordingly, sampling forms the basis of those musical genres. Some works may even consist only of a mix of samples.

4. Notwithstanding the importance of its role in that new musical creation, sampling is a genuine legal issue, especially since hip hop left the streets of the Bronx to enter the mainstream and became a significant source of revenue for its authors, performers and producers. The difficulty in the legal assessment of that phenomenon lies in the fact that it is not a question of the classic relationship between works under copyright law, but between phonogram, a commercial product, and work, an artistic creation. By sampling, the artist not only draws inspiration from the creations of others, but also appropriates the results of that effort and editorial investment in the form of the phonogram. That set-up, which is new in copyright law,[4] concerns issues such as the related rights of producers of phonograms, on the one hand, and the creative freedom of samplers, on the other.

5. This request for a preliminary ruling, which brings the issue of sampling within the scope of EU law, is the culmination of a lengthy legal saga at national level,[5] in which two of the highest German courts have already given a ruling. It is now for the Court of Justice to contribute to this debate in which 'postmodern' artistic freedom is set up against good old property rights.

Legal context

European Union law

6. Article 2(c) of 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[6] provides:

'Member States shall provide for 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:

…

(c) for phonogram producers, of their phonograms;

…'

7. Under Article 5(3)(d), (k) and (o) and Article 5(5) of that directive:

'3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

…

3 For the history of hip hop and rap, see Evans, T.M., 'Sampling, Looping, and Mashing… Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law', *Fordham Intellectual Property, Media and Entertainment Law Journal*, 2011, vol. 21, No 4, p. 843.

4 Although one of the first cases concerning sampling, *Grand Upright Music, Ltd* v. *Warner Bros. Records Inc.*, heard by the United States District Court for the Southern District of New York (United States), dates back to 1991.

5 The application initiating proceedings at first instance in the main proceedings was lodged on 8 March 1999.

6 OJ 2001 L 167, p. 10.

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

…

(k) use for the purpose of caricature, parody or pastiche;

…

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

…

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 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 rightholder.'

8. Article 9(1)(b) of 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[7] provides:

'1. Member States shall provide the exclusive right to make available to the public, by sale or otherwise, the objects indicated in points (a) to (d), including copies thereof, hereinafter "the distribution right":

…

(b) for phonogram producers, in respect of their phonograms;

…'

9. Under the first subparagraph of Article 10(2) of that directive:

'Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organisations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works.'

German law

10. Directives 2001/29 and 2006/115 were transposed into German law by the Gesetz über Urheberrecht und verwandte Schutzrechte — Urheberrechtsgesetz (German Law on Copyright and Related Rights) of 9 September 1965 ('the UrhG'). The rights of phonogram producers are protected under Paragraph 85(1) of that law.

7 OJ 2006 L 376, p. 28.

11. Paragraph 24 of the UrhG contains a general exception to copyright which is worded as follows:

'1. An independent work created in the free use of the work of another person may be published and exploited without the consent of the author of the work used.

2. Subparagraph 1 shall not apply to the use of a musical work in which a melody is recognisably taken from the work and used as the basis for a new work.'

Facts, the main proceedings, and the questions referred for a preliminary ruling

12. Mr Ralf Hütter and Mr Florian Schneider-Esleben, claimants at first instance and respondents in the appeal on a point of law in the main proceedings ('the respondents'), are members of the music group Kraftwerk. In 1977, the group published a phonogram which features the song *Metall auf Metall*. The respondents are the producers of that phonogram, but also the performers of the work in question and Mr Hütter is also the author (composer).

13. Pelham GmbH, a company governed by German law, defendant at first instance and appellant on a point of law in the main proceedings, is the producer of a phonogram which features the song *Nur mir*, performed, inter alia, by the singer Sabrina Setlur. Mr Moses Pelham and Mr Martin Haas, also defendants at first instance and appellants on a point of law in the main proceedings, are the authors of that work.

14. The respondents claim that Pelham, Mr Pelham and Mr Haas ('the appellants') copied — electronically sampled — approximately two seconds of a rhythm sequence from the song *Metall auf Metall* and incorporated it, as a continuous loop, in the song *Nur mir*. They submit that the appellants thus infringed the related right they hold as producers of the phonogram in question. In the alternative, the respondents invoke the intellectual property rights they hold as performers and allege an infringement of Mr Hütter's copyright in the musical work. In the further alternative, the respondents allege an infringement of competition law. However, the proceedings before the referring court concern only the rights of the respondents as producers of the phonogram.

15. The respondents requested the termination of the infringement, the award of damages, the provision of information and the surrender of the phonograms for the purposes of destruction. The court of first instance upheld the action and the appeal brought by the appellants in the main proceedings was unsuccessful. By judgment of 20 November 2008, the referring court, in response to an appeal on a point of law brought by the appellants, upheld the judgment of the appeal court and the case was referred back to the appeal court for further examination. The appeal court again dismissed the appeal brought by the appellants. By judgment of 13 December 2012, the referring court, in response to a second appeal on a point of law brought by the appellants, dismissed that appeal. That judgment was annulled by the Bundesverfassungsgericht (Federal Constitutional Court, Germany),[8] which referred the case back to the referring court.

16. In those circumstances, the Bundesgerichtshof (Federal Court of Justice, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

(2) Is a phonogram which contains very short audio snatches transferred from another phonogram a copy of the other phonogram within the meaning of Article 9(1)(b) of Directive [2006/115]?

8 Judgment of 31 May 2016, 1 BvR 1585/13.

(3) Can the Member States enact a provision which — in the manner of Paragraph 24(1) of the [UrhG] — inherently limits the scope of protection of the phonogram producer's exclusive right to reproduce (Article 2(c) of Directive 2001/29) and to distribute (Article 9(1)(b) of Directive 2006/115) its phonogram in such a way that an independent work created in free use of its phonogram may be exploited without the phonogram producer's consent?

(4) Can it be said that a work or other subject matter is being used for quotation purposes within the meaning of Article 5(3)(d) of Directive [2001/29] if it is not evident that another person's work or another person's subject matter is being used?

(5) Do the provisions of EU law on the reproduction right and the distribution right of the phonogram producer (Article 2(c) of Directive 2001/29 and Article 9(1)(b) of Directive 2006/115) and the exceptions or limitations to those rights (Article 5(2) and (3) of Directive 2001/29 and Article 10(2), first sentence, of Directive 2006/115) allow any latitude in terms of implementation in national law?

(6) In what way are the fundamental rights set out in the Charter of Fundamental Rights of the European Union ('the Charter') to be taken into account when ascertaining the scope of protection of the exclusive right of the phonogram producer to reproduce (Article 2(c) of Directive 2001/29) and to distribute (Article 9(1)(b) of Directive 2006/115) its phonogram and the scope of the exceptions or limitations to those rights (Article 5(2) and (3) of Directive 2001/29 and Article 10(2), first sentence, of Directive 2006/115)?'

17. The request for a preliminary ruling was received at the Court on 4 August 2017. Written observations were submitted by the parties in the main proceedings, the German, French and United Kingdom Governments and the European Commission. All the parties concerned were represented at the hearing on 3 July 2018.

Analysis

18. In the present case, the Bundesgerichtshof (Federal Court of Justice) refers a number of questions to the Court for a preliminary ruling on the interpretation of EU law on copyright and related rights, and fundamental rights, in the event of circumstances such as those at issue in the main proceedings. I will consider those questions in the order in which they were submitted.

The first question referred

19. By its first question referred for a preliminary ruling, the referring court asks, in essence, whether Article 2(c) of Directive 2001/29 should be interpreted as meaning that taking an extract of a phonogram for the purpose of using it in another phonogram (sampling) infringes the exclusive right of the producer of the first phonogram to authorise or prohibit the reproduction of his phonogram within the meaning of that provision, where it is taken without the latter's permission.

20. The interested parties that have submitted observations in the present case have differing views on this subject. While the respondents and the French Government suggest that that question should be answered in the affirmative, the appellants, the other Governments and the Commission suggest, however, that the question should be answered in the negative. Before analysing the various arguments put forward, I believe it would be useful to examine a preliminary question.

Preliminary observations — Scope ratione temporis of Directive 2001/29

21. The referring court observes that Directive 2001/29, in Article 10 thereof, limits the temporal effect of that directive to any acts concluded after 22 December 2002, whereas the phonogram at issue in the main proceedings, which features the work entitled *Nur mir*, appeared in 1997.

22. It should be noted, however, that, according to Article 10(1) of Directive 2001/29, the directive applies in respect of all works and other subject-matter which are, on 22 December 2002, protected by the Member States' legislation, which is the case of the phonogram belonging to the respondents.

23. It is true that, under Article 10(2) of Directive 2001/29, the directive applies without prejudice to any acts concluded and rights acquired before 22 December 2002. It is also true that the Court has held, on the basis of that provision, that acts of using works or other subject-matter prior to that date are not affected by that directive.[9] However, the referring court takes the view that acts of exploitation of the phonogram at issue in the main proceedings also occurred after 22 December 2002. Directive 2001/29 is therefore applicable to those acts.

24. Having clarified that point, I will now examine the substance of the first question referred.

Substantive analysis

25. It is common ground between the parties in the main proceedings that the appellants reproduced an extract of approximately two seconds of a rhythm sequence from the phonogram of the work *Metall auf Metall* and incorporated it, as a continuous loop, with minimal modifications and in such a way as to be recognisable, as a rhythm sequence in the phonogram of the work *Nur mir*.[10]

26. In my opinion, it goes without saying that such an act amounts to reproduction within the meaning of Article 2 of Directive 2001/29, which concerns, as I recall, any 'direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part' of subject-matter. Sampling (generally) involves the direct and permanent reproduction, by digital means and in digital form, of a portion or sample of a phonogram. It therefore seems to be quite clear that that act amounts to an infringement of the right of the producers of the phonogram in question to authorise or prohibit such a reproduction made without their permission.

27. However, the appellants, certain Governments that have submitted observations, and the Commission have put forward a number of arguments to demonstrate that such a right of producers must be limited so that acts of reproduction such as the one at issue in the main proceedings do not fall within the scope of that exclusive right.

– *The de minimis threshold*

28. In the first place, those parties draw an analogy with the Court's case-law relating to copyright protection of extracts of works. The Court has held that copyright protection concerns works which are the expression of the intellectual creation of the author. Accordingly, extracts of works may be protected by copyright provided that they contain elements which are the expression of the intellectual creation of the author of the work.[11] With regard to the right of producers of phonograms protecting not intellectual creation but financial investment, some of the parties argue in the present case that that right protects only extracts of phonograms that are long enough to represent that

9 See, to that effect, judgment of 27 June 2013, *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:426, paragraph 1 of the operative part).

10 It should be noted that there are several versions of that track. I am referring to the basic version, simply entitled *Nur mir*.

11 Judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraph 39 and paragraph 1 of the operative part).

investment. Consequently, taking — or sampling — very small extracts would not pose a threat to the financial interests of producers of phonograms and would not therefore fall within the scope of their exclusive right. Accordingly, according to some of the parties, the protection of the rights of phonogram producers is subject to a *de minimis* threshold, as is the protection of the rights of authors.

29. It seems to me that this reasoning is based on a misreading of the aforementioned case-law of the Court. In its judgment in *Infopaq International*, the Court found that the literary works at issue in that case consisted of words which, considered in isolation, were not protected by copyright. Only their original arrangement was protected as an intellectual creation of the author of the work.[12] That finding is obvious: the author of a literary work cannot appropriate common words or expressions, in the same way that a composer cannot claim an exclusive right over the notes or a painter a right over the colours. However, this in no way constitutes recognition of a *de minimis* threshold in the protection of works by copyright, but is simply the result of the definition of the work, within the meaning of copyright, as an intellectual creation of the author of the work. Although the Court held in that judgment that the reproduction of an extract comprising only eleven words of a newspaper article may fall within the scope of the exclusive right of reproduction set out in Article 2 of Directive 2001/29,[13] it is therefore difficult to find recognition of any *de minimis* threshold in that case-law.

30. The reasoning followed by the Court concerning extracts of a work cannot, however, be applied to phonograms. A phonogram is not an intellectual creation consisting of a composition of elements such as words, sounds, colours etc. A phonogram is a fixation of sounds which is protected, not by virtue of the arrangement of those sounds, but rather on account of the fixation itself. Consequently, although, in the case of a work, it is possible to distinguish the elements which may not be protected, such as words, sounds, colours etc., from the subject-matter which may be protected in the form of the original arrangement of those elements, such a distinction is not, however, possible in the case of a phonogram. A phonogram is not made up of small particles that are not protectable: it is protected as an indivisible whole. Moreover, in the case of a phonogram, there is no requirement for originality, because a phonogram, unlike a work, is protected, not by virtue of its creativeness, but rather on account of the financial and organisational investment. In other words, a sound or a word cannot be monopolised by an author as a result of its inclusion in a work. By contrast, from the moment they are recorded, the same sound performed by a musician or the same word read out loud constitute a phonogram which falls within the scope of copyright and related rights protection. The reproduction of such a recording is therefore the exclusive right of the producer of that phonogram. However, anyone may reproduce the same sound himself.

31. It is true that a similar concept of the *de minimis* threshold has been developed in the case-law of the United States courts on sampling.[14] It is, however, a radically different legal environment to that of continental Europe and EU law. Indeed, under US law, phonograms are protected by copyright in the same way as works and other subject-matter. It is therefore required that they display a minimum degree of originality. The existence of a *de minimis* threshold has been generally recognised in respect of all such subject-matter since the nineteenth century and that threshold is one of the criteria for assessing the application of the general exception of fair use.[15] I take the view that the reasoning of the US courts cannot therefore be applied to EU law.

32. Moreover, it seems to me that a *de minimis* threshold poses serious practical difficulties associated with its application. First of all, it is necessary to establish a threshold. Should it only be quantitative (length of the extract reproduced) or also qualitative (significance of the extract for the work in question)? In addition, should the threshold be assessed in relation to the source phonogram, the

12 Judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraphs 44 to 46).

13 Judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraph 1 of the operative part).

14 See, inter alia, judgment of the United States Court of Appeals, Ninth Circuit, of 2 June 2016, *VMG Salsoul, LLC* v. *Ciccone*.

15 See Section 107 of the Copyright Law of the United States.

target work or both? To take the example of the phonograms at issue in the main proceedings, the extract taken by the appellants is approximately two seconds long. It would therefore seem that, a priori, it could fall below a *de minimis* threshold as claimed by some of the interested parties in the present case. However, it should be observed that the phonograms in question feature works belonging to two genres of music — electronic music in respect of *Metall auf Metall* and rap with regard to *Nur mir* — in which rhythm plays a key role in the composition of works. By copying a rhythm sequence from the song *Metall auf Metall* and incorporating it, as a continuous loop, in the song *Nur mir*, the appellants have effectively copied a substantial part of the first phonogram for use as the entire rhythm section of their work.[16] According to a qualitative approach, that would undoubtedly exceed any *de minimis* threshold. To be convinced of this, it is sufficient to delete the rhythm section in question from both phonograms and to listen to what remains. It is inevitable that the application of a *de minimis* threshold would lead to differences in national case-law and undermine the main objective pursued by Directive 2001/29, namely the harmonisation of copyright law within the Member States.

33. Lastly, it is, in my opinion, incorrect to limit the legitimate financial interests of producers of phonograms to protection against piracy, that is to say against the distribution or the communication of their phonograms as such to the public. Producers can exploit phonograms in other ways than by selling copies, such as authorising sampling and generating income therefrom. The fact that the right of the phonogram producer in the phonogram is aimed at protecting his financial investment does not preclude that right from covering other uses such as sampling. Furthermore, if the legislature has chosen to give producers, as an instrument to protect their financial interests, the exclusive right to authorise or prohibit any reproduction of their phonograms, in whole or in part, it does not seem logical to me to call that choice into question on the grounds that that such a right does not satisfy the objective pursued.

– *Level of protection equal to that of works*

34. Second, some of the interested parties that have submitted observations in the present case claim, again referring to the judgment in *Infopaq International*,[17] that producers of phonograms cannot be eligible for greater protection than that given to authors. I am not, however, convinced by that argument, for two reasons.

35. On the one hand, as in respect of the argument relating to the *de minimis* threshold, I take the view that that argument is based on a misinterpretation of the scope of the aforementioned judgment. In that judgment, the Court defined the concept of 'work' within the meaning of EU copyright law, by holding that it constituted the author's own intellectual creation. The same criterion for protection must be applied to extracts of a work, excluding from the protection the elements of that work which must clearly remain in the public domain, such as words taken in isolation or common expressions. It is therefore in no way a limitation of the protection but rather a definition of what should be protected. So far as concerns phonograms, the fact that the subject-matter of protection is different does not mean that the protection exceeds that given to works. Both works and phonograms are protected as a whole.

36. On the other hand, the right to the protection of the phonogram exists and applies quite independently of the protection of the work possibly featured in that phonogram. While the majority of phonograms contain the fixation of the performances of works protected by copyright, there are, however, other situations. The phonogram may, for example, contain the fixation of the performance

16 The same finding was made, according to the information contained in the order for reference, by the appellate court in the main proceedings, according to which the extract at issue constitutes 'the dominant part' of the song *Metall auf Metall* and appears continuously in the song *Nur mir*.

17 Judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465).

of a work for which the protection has expired or even sounds which in no way constitute a work, such as sounds of nature. Such a phonogram constitutes the subject-matter of the protection in its own right. This is, moreover, confirmed by the definition of phonogram set out in the World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty[18], Article 2(b) of which states that a phonogram is 'the fixation of the sounds of a performance or of other sounds'. Although the rights of producers of phonograms are rights related to copyright, they are not, however, derived rights. Accordingly, the scope of protection of a phonogram is in no way subject to the scope of protection of the work that it may possibly contain.

– *The analogy with the protection of the rights of makers of databases*

37. Third, some of the interested parties draw an analogy between the protection of phonograms and that of databases. Article 7(1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases[19] provides for a sui generis right for the maker of a database to prevent 'extraction and/or re-utilisation of the whole or of a substantial part' of that database. According to those parties, the situation of a producer of phonograms is similar to that of a maker of databases, in so far as, in both cases, the right granted to them is for the protection of their financial investments. Consequently, the protection of producers of phonograms should also be limited to the reproduction of a substantial part of the phonogram.

38. I am, however, more sympathetic to the argument put forward in that regard by the respondents, according to which a reading *a contrario* of Directive 2001/29 should be adopted in the present case. That directive contains no references to the protection of a substantial part of the phonogram. On the contrary, the producer of the phonogram is protected against unauthorised reproduction, 'in whole or in part', of the phonogram in question, in the same way as the author of a work (and, moreover, like the author of a database under Article 5(1) of Directive 96/9). Accordingly, the literal interpretation of Directives 96/9 and 2001/29 already excludes, in my opinion, any possibility of drawing an analogy between the scope of protection of a maker of databases and that of a producer of phonograms.

– *Protection of the phonogram as a whole*

39. Fourth, nor can I agree with the argument put forward by the Commission that Article 11 of the WIPO Performances and Phonograms Treaty provides only for protection against the unauthorised reproduction of a phonogram as a whole.[20] Indeed, Article 11 of that treaty reproduces the wording of Article 10 of the Rome Convention.[21] According to the WIPO Guide to interpreting that convention,[22] at the Diplomatic Conference that adopted the text, the view was taken that 'the right of reproduction is not qualified, and is to be understood as including rights against partial reproduction of a phonogram'.[23] Article 11 of the abovementioned WIPO Treaty must therefore be interpreted in the same way. Furthermore, Article 2 of Directive 2001/29 expressly refers to the reproduction 'in part' of a phonogram.

18 WIPO Performances and Phonograms Treaty adopted in Geneva on 20 December 1996 and entered into force on 20 May 2002, to which the European Union is a party pursuant to Council Decision 2000/278/EC of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (OJ 2000 L 89, p. 6). In accordance with recital 15 of Directive 2001/29, that directive also serves to implement that treaty.

19 OJ 1996 L 77, p. 20.

20 That provision states that 'producers of phonograms shall enjoy the exclusive right of authorising the direct or indirect reproduction of their phonograms, in any manner or form'.

21 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, signed at Rome on 26 October 1961.

22 *Guide to the Copyright and Related Rights Treaties administered by WIPO*, WIPO, Geneva, 2003.

23 Ibid., p. 154.

40. I therefore propose that the answer to the first question referred for a preliminary ruling be that Article 2(c) of Directive 2001/29 must be interpreted as meaning that taking an extract of a phonogram for the purpose of using it in another phonogram (sampling) infringes the exclusive right of the producer of the first phonogram to authorise or prohibit the reproduction of his phonogram within the meaning of that provision, where it is taken without the latter's permission.

The second question referred

41. By its second question referred for a preliminary ruling, the referring court asks whether Article 9(1)(b) of Directive 2006/115 should be interpreted as meaning that a phonogram which contains extracts transferred from another phonogram (samples) is a copy of the other phonogram within the meaning of that provision.

42. The interested parties that have submitted observations in the present case, with the exception of the French Government, seem to analyse the first and second questions referred together and are inclined to give corresponding answers (although those answers differ from one party to the next). However, I rather take the view, as does the French government, that Article 9(1)(b) of Directive 2006/115 should be interpreted in the light of its objective and independently of Directive 2001/29.

43. Article 9 of Directive 2006/115 provides for a distribution right for, inter alia, phonogram producers. That right concerns making available to the public, by sale or otherwise, copies of subject-matter, including phonograms.

44. At international level, that same right is recognised under the Geneva Convention.[24] The European Union is not a party to that convention, but 22 Member States are. Moreover, that convention is probably referred to in recital 7 of Directive 2006/115 as one of the 'international conventions on which the copyright and related rights laws of many Member States are based' with which compliance should be ensured in the context of the harmonisation carried out by that directive.

45. The main purpose of the distribution right is to protect against what is commonly referred to as 'piracy', that is to say the production and distribution to the public of counterfeit copies of phonograms (and other subject-matter, such as films). Those copies, by replacing lawful copies, significantly decrease the revenue of phonogram producers and, consequently, the revenue that authors and performers may legitimately expect to receive from the sale of lawful copies. The threat of piracy is expressly referred to in recital 2 of Directive 2006/115 as one of the reasons for the adoption of that directive.

46. Piracy is characterised by the production and distribution of counterfeit copies of phonograms intended to replace lawful copies. It is for that reason that Article 1 of the Geneva Convention defines a duplicate as 'an article which contains sounds taken directly or indirectly from a phonogram and which embodies all or a substantial part of the sounds fixed in that phonogram'. Only a copy of this kind gives listeners the opportunity to listen to the phonogram without having to purchase a lawful copy.

24 Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms of 29 October 1971, entered into force on 18 April 1973.

47. In so far as Article 9 of Directive 2006/115 provides for the same distribution right as the Geneva Convention and since both acts have the same objective — protection against piracy — I am of the opinion that the concept of 'copy' contained in that provision must be interpreted in a similar way to that convention and in the light of that objective, that is to say as meaning a copy which incorporates all or a substantial part of the sounds of a protected phonogram and which are intended to replace lawful copies thereof. I take the view that the scope of that provision is therefore narrower than that of Article 2 of Directive 2001/29.

48. Sampling is not used to produce a phonogram that replaces the original phonogram, but to create a new work independent of that phonogram. In the same way, a phonogram created through sampling does not incorporate all or a substantial part of the sounds of the original phonogram. Such a phonogram should not therefore be classified as a copy within the meaning of Article 9(1)(b) of Directive 2006/115.

49. Accordingly, I propose that the answer to the second question referred for a preliminary ruling is that Article 9(1)(b) of Directive 2006/115 must be interpreted as meaning that a phonogram which contains extracts transferred from another phonogram (samples) is not a copy of the other phonogram within the meaning of that provision.

The third question referred

50. By its third question referred for a preliminary ruling, the referring court asks, in essence, whether Article 2(c) of Directive 2001/29 and Article 9(1)(b) of Directive 2006/115 must be interpreted as precluding the application of a provision of the national law of a Member State, such as Paragraph 24(1) of the UrhG, according to which an independent work may be created in the free use of another work without the consent of the author of the work used,[25] to phonograms.

51. As I explained in my answer to the second question referred, Article 9 of Directive 2006/115 does not apply to reproductions of subject-matter which are not intended to replace lawful copies of thereof. This is particularly the case of independent works created by using elements of other works. Article 9 of Directive 2006/115, which does not apply to the situations governed by Paragraph 24 of the UrhG, does not preclude this. The analysis of the third question must therefore be limited to the interpretation of the provisions of Directive 2001/29.

52. Directive 2001/29 establishes, in Articles 2 to 4 thereof, the exclusive rights granted to certain categories of persons, in particular the right of phonogram producers to authorise or prohibit the reproduction of their phonograms, as provided for in Article 2(c) of that directive. Those rights are unconditional. However, Article 5 of Directive 2001/29 sets out a number of exceptions to and limitations on those exclusive rights that the Member States are authorised to make provision for under their national law. That list of exceptions and limitations is exhaustive, as confirmed by recital 32 of Directive 2001/29 and the Court's settled case-law.[26]

53. That list contains certain exceptions and limitations to exclusive rights to facilitate dialogue and artistic confrontation through the use of pre-existing works including, inter alia, the quotation exception provided for in Article 5(3)(d) of Directive 2001/29 and the caricature, parody or pastiche exception set out in Article 5(3)(k).

25 Paragraph 24 of the UrhG expressly refers only to the use of works. However, according to the referring court, that provision is intended to apply, by analogy, to the use of other subject-matter, inter alia, phonograms.

26 See, in the last place, judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraph 16).

54. By contrast, the list of exceptions and limitations to exclusive rights set out in Article 5 of Directive 2001/29 does not include a general exception permitting the use of works of others for the purposes of creating a new work. It follows that the Member States are not entitled to provide for such an exception under national law if it were to extend further than the exceptions set out in Directive 2001/29, in particular those referred to in the previous paragraph.

55. That finding is not called into question by the fact that, as the referring court observes, under German law, the provisions of Paragraph 24(1) of the UrhG are not regarded as an exception to copyright, but rather as a limitation inherent in it. Article 5 of Directive 2001/29 does not distinguish between the exceptions and limitations to copyright (or related rights). Some of the situations provided for in that provision concern limitations which are as inherent in copyright as the possibility of free use of a work for the purposes of creating another. One can mention the example of the private copying exception, provided for in Article 5(2)(b) of Directive 2001/29.[27] The EU legislature nevertheless found it necessary to include that limitation in the list of possible exceptions and limitations.

56. Moreover, as the respondents rightly observe, to allow each Member State to introduce limitations not included in the list provided for in Article 5 of Directive 2001/29 which it considers to be inherent in copyright would threaten the effectiveness of the harmonisation of exceptions to copyright undertaken by the EU legislature. As stated in recital 31 of that directive, the elimination of differences in the application of those exceptions to copyright and related rights by the Member States is one of the objectives pursued by that directive.

57. It is true that Article 5(3)(o) of Directive 2001/29 contains a standstill clause as regards the application by the Member States of exceptions and limitations which already existed under national law at the time of entry into force of that directive. However, this is a question of the use of subject-matter in 'certain … cases of minor importance'. I take the view that an exception as broad as that provided for in Paragraph 24(1) of the UrhG cannot be regarded as being limited to certain cases of minor importance. In addition, uses falling within the scope of Article 5(3)(o) of Directive 2001/29 must be limited to analogue uses. In any event, that provision cannot therefore cover the communication to the public by electronic means of phonograms containing extracts from other phonograms.

58. Lastly, according to Article 5(5) of Directive 2001/29, the exceptions and limitations provided for in that article apply only in certain special cases which do not adversely affect the normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder. That provision, commonly referred to as the 'three-step test', reflects similar provisions of international conventions on copyright and related rights. It constitutes a restriction of the exceptions and limitations applicable to exclusive rights. By contrast, that provision cannot be understood as authorising the introduction of exceptions and limitations not provided for or as extending the scope of the existing exceptions on the grounds that they do not adversely affect the normal exploitation of the work or other subject-matter or the legitimate interests of the holders of exclusive rights.[28]

59. I therefore propose that the answer to the third question referred for a preliminary ruling is that Article 2(c) of Directive 2001/29 must be interpreted as precluding the application of a provision of the national law of a Member State, such as Paragraph 24(1) of the UrhG, according to which an independent work may be created in the free use of another work without the consent of the author of the work used, to phonograms, in so far as it exceeds the scope of the exceptions and limitations to exclusive rights provided for in Article 5(2) and (3) of that directive.

27 See, with regard to the inherent nature of that limitation, my Opinion in *EGEDA and Others* (C-470/14, EU:C:2016:24, points 15 and 16).

28 See, to that effect, judgment of 10 April 2014, *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraphs 26 and 27).

The fourth question referred

60. By its fourth question referred for a preliminary ruling, the referring court asks, in essence, whether the quotation exception provided for in Article 5(3)(d) of Directive 2001/29 applies where an extract of a phonogram has been incorporated into another phonogram such that it forms an indistinguishable part of the second phonogram.

61. That question concerns the substantive issue of the application of the quotation exception in situations such as that at issue in the main proceedings.

62. The quotation exception has its origin and is mainly used in literary works. However, in my opinion, there is nothing to indicate that, under EU copyright law, the quotation exception may not concern other categories of works, in particular, musical works.[29] It must also be assumed that such a quotation may be effected through the reproduction of an extract of a phonogram, since the exceptions and limitations provided for in Article 5 of Directive 2001/29 concern the rights of phonogram producers as well as the rights of authors.

63. However, a quotation must satisfy a number of conditions in order to be considered lawful. Three of those conditions are particularly relevant with regard to use such as that at issue in the main proceedings.

64. The first of those conditions is expressly provided for in Article 5(3)(d) of Directive 2001/29 and concerns the purpose of the quotation in question. According to that provision, the quotation must be 'for purposes such as criticism or review'. The use of the words 'such as' indicates that it is not an enumerative list of the purposes of the quotation, but rather an illustration. Many quotations, in particular artistic quotations, for example musical quotations, are not for purposes of criticism or review, but pursue other objectives. Nevertheless, 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. Whether in confrontation, as a tribute to or in any other way, interaction between the quoting work and the work quoted is necessary.

65. The second condition for the lawfulness of a quotation, which arises in one way or another from the first, is the unaltered and distinguishable character of the quotation. Accordingly, in the first place, the extract quoted must be incorporated in the quoting work as such or, in any event, without modification (certain amendments being traditionally permitted, particularly translation). In the second place — this is the point directly raised by the question referred — the quotation must be incorporated into the quoting work so that it may be easily distinguished as a foreign element. That requirement may be inferred from the first condition: how could the quoting work enter into dialogue with or be compared to the work quoted if the two are indissociable from one another?

66. The two conditions referred to above make it possible to distinguish between quotation and plagiarism.

67. Sampling in general, and the use of the phonogram at issue in the main proceedings in particular, do not satisfy those conditions. The aim of sampling is not to enter into dialogue with, be used for comparative purposes, or pay tribute to the works used. Sampling is the act of taking extracts from other phonograms, which are used as raw materials, to be included in new works to form integral and unrecognisable parts. Moreover, those extracts are often modified and mixed in such a way that all

29 See, inter alia, Mania, G., 'Cytat w muzyce — o potrzebie reinterpretacji przesłanek', *Zeszyty Naukowe Uniwersytetu Jagiellońskiego*, No 1/2017, p. 63 to 88. See, also, Vivant, M., Bruguière, J.-M., *Droit d'auteur et droits voisins*, Dalloz, Paris, 2015, p. 571. The Court appears tacitly to have accepted the quotation exception with regard to a photographic work (see judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, paragraphs 122 and 123).

original integrity is lost. It is not therefore a form of interaction but rather a form of appropriation. The case in point, where an extract from a phonogram — too short to allow any interaction — is repeated in a loop throughout the new phonogram for use as the rhythm section, is a perfect illustration.

68. In addition to those substantive conditions for the lawfulness of a quotation, Article 5(3)(d) of Directive 2001/29 also sets out a third formal requirement: to indicate the source, including the author's name, unless it is not possible. Of course, in the case of a musical work, it is difficult (even if not impossible) to indicate the source of the quotation in the work itself. However, this can be done, for example, in the description of the quoting work, or even in its title. I do not believe that it is customary in hip hop or rap culture to indicate the sources of the samples that make up the works belonging to those genres of music. In any event, it is not apparent from the order for reference that the appellants tried to indicate the source of the extract used in the song *Nur mir* or the names of the respondents.

69. I therefore propose that the answer to the fourth question referred for a preliminary ruling be that the quotation exception provided for in Article 5(3)(d) of Directive 2001/29 does not apply where an extract of a phonogram has been incorporated into another phonogram without any intention of interacting with the first phonogram and in such a way that it forms an indistinguishable part of the second phonogram.

70. Among the exceptions and limitations provided for in Article 5(3) of Directive 2001/29 is the caricature, parody or pastiche exception (Article 5(3)(k) of Directive 2001/29) referred to above. That exception could possibly be taken into account with regard to the use of extracts from one phonogram in another phonogram. That exception is not transposed as such into German law but could be inferred, according to the referring court, from Paragraph 24(1) of the UrhG. However, in my opinion, that court was right to dismiss the idea of applying that exception to the present case. That exception, like the quotation exception, presupposes interaction with the work used, or at least with its author, which is lacking in the case of sampling, such as that at issue in the main proceedings.[30]

The fifth question referred

71. By its fifth question referred for a preliminary ruling, the referring court seeks to determine the degree of latitude afforded to the Member States in transposing into their domestic law the provisions relating to the exclusive rights provided for in Articles 2 and 3 of Directive 2001/29 and Article 9 of Directive 2006/115 and the exceptions to those rights set out in Article 5 of Directive 2001/29 and Article 10 of Directive 2006/115. I note at the outset that the distribution right provided for in Article 9(1)(b) of Directive 2006/115 does not, in my opinion, apply to a situation such as that at issue in the main proceedings[31] and I will therefore analyse that question in the light of Directive 2001/29 alone.

30 Admittedly, in its judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds* (C-201/13, EU:C:2014:2132), the Court did not impose strict requirements on the concept of parody. Nevertheless, it held that the concept of parody 'evokes' another work (see paragraph 2 of the operative part). In my opinion, it is moreover clear that, in the circumstances of the present case, the work entitled *Nur mir* is neither a parody nor a caricature of the work *Metall auf Metall*. As for the concept of pastiche, it consists in the imitation of the style of a work or an author without necessarily taking any elements of that work. However, the present case concerns the reverse situation whereby a phonogram is taken to create a work in a completely different style.

31 See the section of this Opinion devoted to answering the second question.

72. As the referring court observes, that question arises from the case-law of the Bundesverfassungsgericht (Federal Constitutional Court) according to which, in so far as a directive affords the Member States no latitude in terms of transposing it into national law, the provisions transposing that directive into German law must be assessed, in principle, not in the light of fundamental rights guaranteed by the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany; 'the Basic Law') of 23 May 1949, but having regard to fundamental rights as guaranteed by the European Union's legal order. [32]

73. With regard to the review, in the light of fundamental rights, of national measures which implement the provisions of EU law, the Court considered, referring to Article 53 of the Charter, that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised. [33] Accordingly, a Member State cannot compromise the efficacy of a provision of EU law which is not contrary to the Charter by applying its own national standards of protection of fundamental rights. [34]

74. So far as concerns the degree of latitude afforded to the Member States in transposing Directive 2001/29, it is limited in several ways.

75. First, the rights set out in Articles 2 and 3 of Directive 2001/29, in particular the reproduction right of phonogram producers in respect of their phonograms, provided for in Article 2(c) of that directive, are worded unconditionally and the protection of those rights in the national law of the Member States is mandatory.

76. Second, the concepts used in the provisions of Directive 2001/29, which make no reference to the law of the Member States, are autonomous concepts of EU law. [35] This is the case, in particular, with regard to the concept of 'reproduction' within the meaning of Article 2 of that directive. [36] This is also the case of concepts which define the various exceptions and limitations to the exclusive rights governed by Directive 2001/29, in particular the concept of 'parody' used in Article 5(3)(k) of that directive. [37] The same must be true of the concept of 'quotation' within the meaning of Article 5(3)(d) of that directive.

77. Third and lastly, the exclusive rights provided for unconditionally and compulsorily for the Member States in Articles 2 to 4 of Directive 2001/2009 are subject only to the exceptions and limitations listed exhaustively in Article 5(1) to (3) of that directive. In so far as those exceptions, except for one, are optional, the Member States have a degree of latitude in the choice and wording of the exceptions they consider appropriate to transpose into their national legislation. By contrast, they may not introduce exceptions not provided for or extend the scope of the existing exceptions. [38] It should be noted, however, that that degree of latitude is also limited, since some of those exceptions reflect the balance struck by the EU legislature between copyright and various fundamental rights, in particular the freedom of expression. Failing to provide for certain exceptions in domestic law could therefore be incompatible with the Charter. [39]

32 That case-law was recalled by the Bundesverfassungsgericht (Federal Constitutional Court) in its judgment of 31 May 2016, 1 BvR 1585/13, which is the basis of the present order for reference (see point 81 of this Opinion).

33 Judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 60).

34 See, to that effect, judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 63).

35 See, in particular, judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraph 27).

36 See, judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraph 32).

37 Judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds* (C-201/13, EU:C:2014:2132, paragraph 15).

38 Judgment of 10 April 2014, *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraphs 26 and 27).

39 See also my Opinion in *Funke Medien NRW* (C-469/17, EU:C:2018:870, points 38 and 39).

78. Accordingly, the Member States are required to ensure the protection, in their domestic law, of the exclusive rights set out in Articles 2 to 4 of Directive 2001/29, the scope of which is defined, where appropriate, by the Court's case-law, in so far as those rights can be limited only in the application of the exceptions and limitations listed exhaustively in Article 5 of that directive. Member States cannot rely on a provision of national law, even one constitutional in nature or assuming the character of a fundamental right, to contest that obligation.[40] Member States are nevertheless free, as is the case for each directive in accordance with the third paragraph of Article 288 TFEU, as to the choice of form and methods they consider appropriate to implement in order to comply with that obligation. In the context of that choice, they may of course be guided, inter alia, by considerations of their constitutional principles and by fundamental rights, provided that the effectiveness of EU law is not undermined.

79. In the light of the foregoing, I propose that the answer to the fifth question referred for a preliminary ruling be that Member States are required to ensure the protection, in their domestic law, of the exclusive rights set out in Articles 2 to 4 of Directive 2001/29, in so far as those rights can be limited only in the application of the exceptions and limitations listed exhaustively in Article 5 of that directive. Member States are nevertheless free as to the choice of form and methods which they consider appropriate to implement in order to comply with that obligation.

The sixth question referred

Preliminary observations

80. By its sixth question referred for a preliminary ruling, the referring court asks how the fundamental rights set out in the Charter are to be taken into account when interpreting the scope of the exclusive rights of phonogram producers under Directives 2001/29 and 2006/115 and the limitations and exceptions to those rights provided for by those same directives.

81. In view of the wording, in very general terms, of that question, I doubt whether it would be useful for the referring court if it were answered in such a general way. However, it is clear that that question was raised in relation to the judgment of the Bundesverfassungsgericht (Federal Constitutional Court)[41] which, on the one hand, criticised the decision of the referring court upholding the judgment on appeal in favour of the respondents on the grounds of the freedom of artistic creation enshrined in Paragraph 5 of the Basic Law and, on the other, referred the case back to the referring court for reconsideration, where appropriate, in the light of the fundamental rights guaranteed by the European Union's legal order, by making a reference for a preliminary ruling to the Court if necessary.

82. It is therefore necessary to understand the sixth question referred for a preliminary ruling in the sense that the referring court asks, in essence, whether the freedom of the arts, enshrined in Article 13 of the Charter, constitutes a limitation or justifies the infringement of the exclusive right of phonogram producers to authorise or prohibit reproduction, in part, of their phonogram or use in another phonogram. In other words, that question raises the issue of the possible primacy of the freedom of the arts over the excusive right of reproduction of phonogram producers.

83. Accordingly, the opposition between the freedom of the arts and the right related to copyright seems, at first view, paradoxical. The main objective of copyright and related rights is to promote the development of the arts by ensuring artists receive revenue from their works, so that they are not dependent on patrons and are free to pursue their creative activity.[42]

40 See, to that effect, judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 59 and the case-law cited).

41 Judgment of 31 May 2016, 1 BvR 1585/13.

42 That function of copyright and related rights is, moreover, expressly confirmed by recitals 9 to 11 of Directive 2001/29.

84. It is true that the present case does not directly concern the exclusive right of authors but rather the exclusive right of producers who benefit therefrom on account of their financial and organisational contribution. However, on the one hand, although the EU legislature has provided for exclusive rights for producers, it is because they contribute to the creation and dissemination of works in an auxiliary capacity. The right they hold in phonograms is a guarantee of a return on their investment. On the other hand, while a phonogram does not necessarily constitute the fixation of a performance of a work, it is normally the case of musical phonograms such as those at issue in the present case. In addition to producers, authors and performers are also normally involved in the making of a phonogram and their rights would also be infringed by the unauthorised use of the phonogram. While the case in the main proceedings may concern only the rights of phonogram producers, when the discussion turns to fundamental rights, the other interested parties cannot, in my opinion, be forgotten.

85. The present case is a perfect example. The respondents, in their capacity as the producers of the phonogram at issue, are also performing artists and one of them is the author of the work featured in that phonogram. [43] The configuration is similar on the other side of the dispute: the appellants are not only the composers of the work contained on the phonogram at issue but are also the producers thereof. The dispute in the main proceedings is not simply between an artist and a phonogram producer because those two functions are found on both sides. All of these different interests must therefore be taken into account when striking a balance between respective fundamental rights.

The judgment of the Bundesverfassungsgericht (Federal Constitutional Court)

86. The aforementioned judgment of the Bundesverfassungsgericht (Federal Constitutional Court) [44] is mainly based on the interpretation of Paragraph 24(1) of the UrhG, in the light of the freedom of artistic creation enshrined in the first sentence of Paragraph 5(3) of the Basic Law. That court criticised the referring court for not taking sufficient account of the right of artistic freedom of the appellants in the interpretation of Paragraph 24(1) of the UrhG, in particular by finding that that provision did not apply where the artist was himself able to reproduce the sound sequence taken from a phonogram of another party. Such an interpretation entails a disproportionate restriction of creative freedom and, consequently, of the possibility of entering into an artistic dialogue. The remaining possibilities for the artist — whether to obtain a licence, reproduce the sounds himself or limit himself to the sounds available in existing sample databases — are insufficient, in particular in the case of musical genres which depend heavily on sampling such as hip hop.

87. Conversely, according to the Bundesverfassungsgericht (Federal Constitutional Court) the application of Paragraph 24(1) of the UrhG to sampling restricts the right to property, enshrined in Paragraph 14(1) of the Basic Law, of phonogram producers only slightly, in so far as the new works are not in competition with their phonograms. Paragraph 85(1) of the UrhG, which concerns the rights of phonogram producers, protects them only against commercial use made of their phonograms and piracy thereof, which is not the case of sampling, that being an artistic practice. Although, in the view taken by the Bundesverfassungsgericht (Federal Constitutional Court), the legislature could have provided for compensation for the holders of exclusive rights for the free use of a work (*freie Benutzung*) under Paragraph 24(1) of the UrhG, the absence of such compensation does not restrict the constitutional right to property.

43 The rights they hold as authors and as performers have, moreover, been raised in the alternative in the proceedings at first instance (see point 14 of this Opinion).

44 The present analysis is based on the English-language version of Press Release No 29/2016 of 31 May 2016 of the Bundesverfassungsgericht (Federal Constitutional Court), available on its website, and, with regard to the descriptive part, on commentaries on that judgment, in particular, Duhanic, I., 'Copy this sound! The cultural importance of sampling for hip hop music in copyright law — a copyright law analysis of the sampling decision of the German Federal Constitutional Court', *Journal of Intellectual Property Law and Practice*, 2016, vol. 11, No 12, p. 932 to 945; Mezei, P., 'De Minimis and Artistic Freedom: Sampling on the Right Track?', *Zeszyty Naukowe Uniwersytetu Jagiellońskiego*, 2018, vol. 139, No 1, p. 56 to 67; and Mimler, M.D., *Metall auf Metall* — German Federal Constitutional Court discusses the permissibility of sampling of music tracks, *Queen Mary Journal of Intellectual Property*, 2017, vol. 7, No 1, p. 119 to 127.

88. Lastly, the Bundesverfassungsgericht (Federal Constitutional Court) adds that, in addition to the interpretation of Paragraph 24(1) of the UrhG in line with the freedom of the arts, the referring court can strike the correct balance between the rights in question by interpreting the rights of phonogram producers set out in Paragraph 85(1) of that law restrictively. Nevertheless, the Bundesverfassungsgericht (Federal Constitutional Court) observes that the case may thus fall within the scope of EU law in light of the harmonisation of the rights of phonogram producers under Directive 2001/29. In the event that that directive leaves no latitude to the Member States for its transposition, the referring court must ensure the protection of fundamental rights in accordance with the Charter, [45] if necessary by making a reference for a preliminary ruling to the Court. The referring court must also guarantee the maintenance of an inalienable minimum level of protection of fundamental rights, as defined in the Basic Law.

Assessment in the light of EU law

89. There is no restriction under EU copyright law of the exclusive rights set out in Directive 2001/29, similar to that provided for in Paragraph 24(1) of the UrhG. As I have discussed in the context of the answer to the third question referred, I take the view that that provision is not consistent with Directive 2001/29, in so far as it allows derogations from the exclusive rights which go farther than the exceptions set out in Article 5 of that directive, in particular the quotation, and caricature, parody or pastiche exceptions. However, those exceptions do not apply, in my opinion, to a situation such as that at issue in the main proceedings. [46] Reasoning similar to that followed by the Bundesverfassungsgericht (Federal Constitutional Court) is not therefore possible under EU law. How then should the exclusive right of reproduction of phonogram producers pursuant to Article 2(c) of Directive 2001/29 be assessed in the light of the fundamental rights enshrined in the Charter?

90. Copyright and related rights, inasmuch as they establish a rightholders' monopoly over intellectual or artistic property such as works, phonograms etc., are likely to restrict the exercise of certain fundamental rights, in particular, the freedom of expression and the freedom of the arts. In addition, intellectual property is itself protected as a fundamental right to property. It is therefore necessary to strike a balance between those rights, none of which are, in principle, superior to the others. [47] So far as concerns copyright, copyright law itself achieves this through the provision of a number of limitations and exceptions. The purpose of those limitations and exceptions is to strike a fair balance between, on the one hand, the rights and interests of rightholders of copyright and related rights and, on the other, various other public or private rights, including the protection of fundamental rights.

91. The freedom of the arts, referred to in the first sentence of Article 13 of the Charter, is a form of freedom of expression, set out in Article 11 of the Charter. The system provided for under the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), does not provide for such a freedom as an autonomous right, with the freedom of the arts being inferred from the freedom of expression enshrined in Article 10 of that convention.

45 In accordance with the case-law of the Bundesverfassungsgericht (Federal Constitutional Court) referred to in point 72 of this Opinion.

46 See the section of this Opinion devoted to answering the fourth question referred.

47 See, to that effect, most recently, judgment of 18 October 2018, *Bastei Lübbe* (C-149/17, EU:C:2018:841, paragraph 44).

92. Freedom of expression, from which the freedom of the arts emanates, concerns above all obtaining and disseminating ideas and information and, consequently, as regards art, the content of works.[48] It is the censorship of that content which is particularly likely to lead to a violation of the freedom of the arts.[49] I take the view, however, that the freedom of artists is less extensive so far as concerns acquiring the means of their creation. Artists must adapt to societal living conditions and the situation of the market on which they operate. The freedom of the arts does not free artists from the constraints of everyday life. Is it conceivable for a painter to rely on his freedom of creation so as not to pay for his paint and paintbrushes?[50] [51]

93. It is true that, in musical genres such as hip hop or rap, sampling plays a special role which provides not only the means of creation, but also constitutes an artistic process in itself. However, this cannot be a decisive argument in the legal discussion, since the interpretation of rules of law must be the same for all. If the sampling of extracts of phonograms without the authorisation of the rightholder were considered lawful, that would be true for hip hop artists as well as all other musicians.

94. Artists must be particularly aware of the limits and restrictions that life imposes on creative freedom where they concern the rights and fundamental freedoms of others, in particular their right to property, including intellectual property. In such cases, the balancing of different rights and interests is a particularly complex exercise and there is rarely a 'one size fits all' solution. That balancing exercise must, in a democratic society, be undertaken first of all by the legislature, which embodies the general interest. The legislature enjoys a broad margin of discretion in that regard.[52] The application of legislative solutions is then subject to the control of the courts which are in turn responsible for ensuring compliance with fundamental rights in the context of that application to specific cases. However, except in exceptional cases,[53] that control must normally be undertaken within the limits of the applicable provisions enjoying a presumption of validity, including with regard to fundamental rights. If only one solution were considered compatible with fundamental rights, the margin of discretion of the legislature would be zero.

95. As I have already stated, EU copyright law takes account of various rights and interests which could conflict with the exclusive rights of authors and other rightholders, in particular the freedom of the arts. Exceptions to the exclusive rights such as the quotation, and caricature, parody and pastiche exceptions facilitate dialogue and artistic confrontation through references to pre-existing works. Within the framework of the current rules, that confrontation may occur, in particular, in the following three ways. First, by the creation of works which, while drawing on pre-existing works, do not directly reproduce protected elements, second, in the context of existing limitations and exceptions to exclusive rights and finally, third, by obtaining the necessary authorisation.

48 According to the formula adopted by the European Court of Human Rights ('the ECtHR'), 'freedom of expression, as secured in paragraph 1 of Article 10 [of the ECHR], constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and for the self-fulfilment of the individual. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population (ECtHR, 25 January 2007, *Vereinigung Bildender Künstler v. Austria*, CE:ECHR:2007:0125JUD006835401, § 26).

49 See ECtHR, 25 January 2007, *Vereinigung Bildender Künstler v. Austria*, CE:ECHR:2007:0125JUD006835401).

50 Admittedly, a different assessment could be made in the event that such difficulties are encountered by artists in order to prevent them from creating on the grounds, specifically, of the content of their work (see *Afterimage*, a film by A. Wajda) concerning the harassment of the Polish painter Władysław Strzemiński during the Stalin era. Those are, however, extreme conditions.

51 In that regard, the ECtHR has held that 'artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10 [of the ECHR]. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, "duties and responsibilities"; their scope will depend on his situation and the means he uses' (ECtHR, 25 January 2007, *Vereinigung Bildender Künstler v. Austria*, CE:ECHR:2007:0125JUD006835401, § 26).

52 See, to that effect, ECtHR, 10 January 2013, *Ashby Donald and Others v. France* (CE:ECHR:2013:0110JUD003676908, § 40).

53 See, for example, Case C-469/17 *Funke Medien NRW*, in which I delivered an Opinion on 25 October 2018 (EU:C:2018:870).

96. However, I am not of the opinion that the freedom of the arts, as provided for in Article 13 of the Charter, requires the introduction or recognition of an exception similar to that provided for in Paragraph 24 of the UrhG, which covers uses such as those at issue in the main proceedings, in which the works or other subject-matter are used, not for purposes of interaction, but rather in the creation of new works bearing no relation to the pre-existing works. The requirement of obtaining a licence for such use does not restrict, in my opinion, the freedom of the arts to a degree that extends beyond normal market constraints, especially since those new works often generate significant revenue for their authors and producers. So far as concerns the argument that, in certain cases, obtaining a licence may prove impossible, for example in the event that the rightholders refuse, I take the view that the freedom of the arts cannot guarantee the possibility of free use of whatever is wanted for creative purposes.

97. Moreover, I do not believe that the financial interests of phonogram producers — the justification for their exclusive rights — are limited to protection against commercial use and piracy. Under EU law, this is true of the distribution right.[54] By contrast, the reproduction right is formulated broadly and covers all possible forms of exploitation of the phonogram. In addition, it seems fair that phonogram producers should share in the revenue derived from the exploitation of works created using their phonogram. Furthermore, in balancing fundamental rights, it is necessary to take account of the rights and material interests of phonogram producers, as well as the rights of performers and authors, including their moral rights. Moral rights, particularly the right to the integrity of the work, may legitimately preclude use of that work, even where that use is covered by an exception.[55]

98. The protection granted to phonogram producers under EU and international law may be considered excessive, in so far as it is equal to that of authors (as regards material rights). In my opinion, it should not be ruled out that the balancing of various rights and interests by the EU legislature may lead, in the future, to the introduction of an exception to the exclusive rights of authors and other rightholders for uses such as sampling. However, that is not for the Court to do. In the judicial review of the application of the current provisions, fundamental rights play a different role: a sort of *ultima ratio* which cannot justify departing from the wording of the relevant provisions except in cases of gross violation of the essence of a fundamental right.[56] Such is not the case, in my opinion, with regard to the process of sampling under EU copyright law.

99. I therefore propose that the answer to the sixth question referred for a preliminary ruling be that the exclusive right of phonogram producers under Article 2(c) of Directive 2001/29 to authorise or prohibit reproduction, in part, of their phonogram in the event of its use for sampling purposes is not contrary to the freedom of the arts as enshrined in Article 13 of the Charter.

Conclusion

100. In the light of all the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling by the Bundesgerichtshof (Federal Court of Justice, Germany) as follows:

(1) Article 2(c) of 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 must be interpreted as meaning that taking an extract of a phonogram for the purpose of using it in another phonogram (sampling) infringes the exclusive right of the producer of the first phonogram to authorise or prohibit the reproduction of his phonogram within the meaning of that provision where it is taken without the latter's permission.

54 See the section of this Opinion devoted to answering the second question referred.

55 See, to that effect, judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds* (C-201/13, EU:C:2014:2132, paragraphs 27 to 31).

56 See, to that effect, most recently, judgment of 18 October 2018, *Bastei Lübbe* (C-149/17, EU:C:2018:841, paragraph 46).

(2) Article 9(1)(b) of 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 must be interpreted as meaning that a phonogram which contains extracts transferred from another phonogram (samples) is not a copy of the other phonogram within the meaning of that provision.

(3) Article 2(c) of Directive 2001/29 must be interpreted as precluding the application of a provision of the national law of a Member State, such as Paragraph 24(1) of the Gesetz über Urheberrecht und verwandte Schutzrechte — Urheberrechtsgesetz (German Law on Copyright and Related Rights) of 9 September 1965, according to which an independent work may be created in the free use of another work without the consent of the author of the work used, to phonograms, in so far as it exceeds the scope of the exceptions and limitations to exclusive rights provided for in Article 5(2) and (3) of that directive.

(4) The quotation exception provided for in Article 5(3)(d) of Directive 2001/29 does not apply where an extract of a phonogram has been incorporated into another phonogram without any intention of interacting with the first phonogram and in such a way that it forms an indistinguishable part of the second phonogram.

(5) Member States are required to ensure the protection, in their domestic law, of the exclusive rights set out in Articles 2 to 4 of Directive 2001/29, in so far as those rights can be limited only in the application of the exceptions and limitations listed exhaustively in Article 5 of that directive. Member States are nevertheless free as to the choice of form and methods they consider appropriate to implement in order to comply with that obligation.

(6) The exclusive right of phonogram producers under Article 2(c) of Directive 2001/29 to authorise or prohibit reproduction, in part, of their phonogram in the event of its use for sampling purposes is not contrary to the freedom of the arts as enshrined in Article 13 of the Charter of Fundamental Rights of the European Union.