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Something Stolen, Something New, Something Copyright Protected in the EU

A Study of Swedish Compatibility with EU Copyright Law Following the Pelham Judgment

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Contents

Abstract

Creativity is at the very essence of being human. For as long as we have created, we have done so on the basis of what we have seen previously. This was true for the classical composers of the enlightenment, for the rock stars of the 70s and for the early DJs of Jamaica and New York who, when technology allowed it, started to extract samples from previous music and making their owns tracks with it – thus giving birth to the age of sampling.

Up until the European Court of Justice adjudicated the Pelham case, it was uncertain whether small samples were at all considered an infringement, based on EU law. Now we know that, according to the Court's interpretation of the Infosoc Directive, even a two second sample is enough to constitute a reproduction, at least in part. While the case is yet to be tried on its merits in the German court system, the EU judgment provides some welcome insights into the copyright implications of sampling, in a time where the barriers to sampling are getting lower by the day and the practice is only growing in popularity.

With fresh clarity on the EU-side of copyright law, the laws of the member states might need to be looked over. The Swedish system is no exception, with legal features that seem very much to deviate from the EU framework. Future cases will have to reveal the facts but, as this essay will show, there are now reasons to question the compatibility of Swedish copyright law with EU law.

Sammanfattning

Kreativiteten är inneboende och speciell för människan. Så länge vi har skapat har vi gjort det utifrån vad tidigare tagit del av. Så var fallet för de klassiska kompositörerna från upplysningstiden, för rockstjärnorna på 70-talet och för den tidiga generationen DJ:s från Jamaica och New York som, så fort tekniken tillät det, började sampla tidigare musik och mixa sina egna versioner med dem, vilket blev starten på samplingens tidsålder.

Fram tills EU-domstolen avgjorde Pelham-målet var det osäkert om mindre samples överhuvudtaget ansågs utgöra intrång, baserat på EU-rätten. Nu vet vi att, enligt domstolens tolkning av Infosoc-direktivet, räcker till och med en sample på två sekunder för att utgöra ett mångfaldigande, åtminstone delvis. Även om målet ännu inte är färdigprövat av de tyska domstolarna, ger EU-domen några välkomna insikter om de upphovsrättsliga konsekvenserna av sampling, i en tid där tröskeln för att ägna sig åt sampling minskar för varje dag och populariteten av det ökar.

Med ny klarhet på EU-sidan av upphovsrätten kan medlemsstaternas lagar behöva ses över. Det svenska systemet är inget undantag, med rättsliga drag som i hög grad verkar avvika från EU:s ramverk. Framtida praxis får visa utslaget men, som denna uppsats kommer att visa, finns det nu skäl att ifrågasätta svensk upphovsrättsrätts förenlighet med EU-rätten.

1 Introduction

1.1 Background

"Lesser artists borrow, great artists steal" [1]

– Igor Stravinsky

Variants of this quote have been awarded to T.S. Eliot, Tchaikovsky, Picasso and others. Regardless of the origin, a recurring argument can be seen in the artistic debate postulating that it is part of the essence of creative work to build on existing works, regardless of whether it is literature, music or art. In few areas is this as apparent as in music, specifically regarding sampling – i.e. taking bits of a previous song and using it in one's own creation. This essay will explore the origins and evolution of this practice, as well as its legal implications.

Another interesting problem we come across when examining the copyright law on sampling is the fascinating struggle of attempting to find a connection between law and music, two fields so vastly different from each other, and to, as senior lecturer in intellectual property law at Glasgow University, Andreas Rahmatian puts it, "remodel the phenomenon of music in a way that renders it intelligible to the concepts of law" [2]. It is like trying to find the middle ground between two languages, to put it differently.

After the European Court of Justice (the 'ECJ') delivered its judgment in Case C-476/17 Pelham and Others (hereafter 'Pelham'), Swedish law has been put into question because of a provision in the Swedish Copyright Act giving copyright to 'new and independent works' achieved on the basis of previous works. Distinguishing adaptations from new independent works is a notorious challenge in Swedish copyright law and goes to the very heart of

[1] Exact origin unknown, first credited in Lamport (1986), p. 7.

[2] Rahmatian (2015), p. 78.

the copyright problem itself.[3] In this essay, I will attempt to dissect this problem and provide some insight into what the law of the EU says and if Swedish law is on par.

1.2 Purpose

The line between inspiration and plagiarism is notoriously thin. This is a highly relevant problem in copyright law, which, after the ECJ delivered its judgment in Pelham, has been particularly relevant when it comes to the issue of sampling. This has prompted me to explore specifically the following research questions:

- How is sampling treated in EU copyright law following Pelham?
- Is Swedish copyright law on sampling compatible with EU law following Pelham?

1.3 Delimitations

Many interesting questions will be bordering the discussion going on throughout this essay. Bearing this in mind, my aim is to focus on the questions that are relevant for the Pelham judgment and its effect on Swedish law. For example, when explaining copyright in Sweden, I will not go into the moral rights awarded to the copyright holder, since that would not be a point relevant to bring up in the analysis.

1.4 Method

This thesis employs a legal dogmatic method revolving around current sources of EU law and Swedish law, including doctrine and case law. A legal comparative method is also used, when discussing the compatibility of Swedish law with EU law.

[3] Levin (2019), p. 76.

1.5 Material

This essay employs legal sources of EU law and Swedish law, as well as case law from both jurisdictions. Relevant doctrine is also referenced to give a deeper and more nuanced picture of the legal landscape. This includes legal literature on the copyright law of EU and Sweden respectively, with Torremans and Pila primarily representing the former and Levin primarily representing the latter, since they are widely regarded as the most accepted literature in their respective jurisdictions. The essay also includes literature which problematizes the relationship between music and copyright and music, as well as literature on history of the arts, such as Burgess, where sampling is discussed as a phenomenon.

Since the essay problematizes the relationship between EU law and Swedish law, a substantial part of the material referenced is in Swedish. In these instances, I strive to write in such a way that the reader does not have to rely on reading the reference material to understand the point being made, thus making the essay equally accessible to the non-Swedish speaking audience.

1.6 Existing Research

There exist many essays on the subject of copyright law within the EU, and even some regarding sampling in particular. The essay which has given the most inspiration to my writing is ‘Den moderna musikens upphovsrättsliga skydd’, in which the author, Ebba Bosma, brilliantly describes the topic of sampling and copyright in a Swedish, pre-Pelham context, although EU sources are also examined. Since the Pelham judgment, many have questioned the compatibility of some national legal orders within the EU, such as Sweden, but there is still a gap in academic texts exploring the subject. My hope is that this essay will play a small part in bridging this gap.

1.7 Outline

The essay begins with an explanation of sampling as a phenomenon. This is followed by an EU law on copyright in general and sampling in particular. This part is divided according to the different sources analyzed – primary and secondary EU law respectively, applicable international law, the effect of national laws of the member states, and finally, the Pelham judgment.

The next part describes Swedish copyright law and how it applies to sampling. The essay then ends with an analysis of the current legal landscape regarding sampling and how its treatment in Swedish copyright law fits into the EU framework.

2 Sampling as a Phenomenon

2.1 Technical Explanation

To intuitively understand what sampling is, it helps to think of the simpler concept of *covering*, defined in the Cambridge dictionary as "a performance or recording of a song or tune that has already been recorded by someone else" [4]. The same dictionary provides the following definition of sampling, within music: "to record part of a song and use the recording to make a new piece of music" [5].

Sampling used to be done with a machine called a *sampler*, which would allow the user to input a song and select parts of it to repeat, cut out, and add effects or other tracks to.[6] Since about 1986,[7] today almost exclusively, this has been achieved using digital audio workstations such as ProTools and Ableton Live, rendering the term 'sampler' archaic in relation to modern sampling.[8]

2.2 History

Poet and artist Brion Gysin is credited with claiming, in 1959, that writing was 50 years behind painting.[9] To counteract this, he contributed to creating techniques of collaging and montaging within writing and music, that in retrospect can be seen as the first form of sampling.[10] Even before this, however, there have been examples of sound collages that could arguably be

[4] Definition of 'cover' on dictionary.cambridge.org.

[5] Definition of 'sample' on dictionary.cambridge.org.

[6] Evans (2011), p. 857.

[7] Pareles (1986), p. 23.

[8] 'When did sampling become so non-threatening?' on TheGuardian.com.

[9] Goldsmith (2011), p. 13.

[10] Nicol (2009), p. 70.

characterized as sampling. The earliest prevailing example is 'Central Park in the Dark', composed by Charles Ives, which is an impressionistic collage pulling sounds from nature, city ambience and short samples of popular music from the time.[11]

Even further back, there are many examples of covering, for example, in Tchaikovsky's *1812 Overture* from 1880, which contains elements from the French national anthem *La Marseillaise*, written 88 years prior, during the French Revolution, by Claude-Joseph Rouget.[12]

The idea of the modern disc jockey ('DJ') was born in Jamaica during the 1950's, where people who owned expensive audio equipment would travel around with it to play music to large crowds, often talking or, some might say, rapping, or beatboxing, over it, with a microphone.[13] This was further developed into what might more accurately be called sampling, during the 1960s in New York disco clubs, where early DJs such as Terry Noel and Francis Grasso would have two record players running at the same time, fading between them to create seamless transitions, loops of song parts, while also adding effects such as reverb, and sometimes mixing the beat of one song with, for instance, the vocals of another track, to create something that the crowd had not heard before – a new work.[14]

Roughly a decade later and 10 miles uptown, the foundations of another genre were being laid – hip hop. Clive Campbell, alias 'DJ Kool Herc', is often cited as the creator of hip hop. He kept building on the idea of manipulating previous records into something new. Being a Jamaican immigrant, Campbell had lots of inspiration to draw from the early Jamaican DJ scene, as well as the disco scene in New York. He was, in the

[11] Burgess (2014), p. 167.

[12] Burgess (2014), p. 167.

[13] Burgess (2014), pp. 167–168.

[14] Burgess (2014), p. 169; cf. above definition of 'sampling' in the Cambridge Dictionary.

beginning, perhaps most famous for looping song parts, a technique which he called ‘the merry-go-round’, to build tension or to rap lyrics with the music as backing track, all in an effort to make music that thrived in dance clubs.[15]

Campbell’s techniques evolved into a concept called ‘breakbeats’ and went hand in hand with technical innovation in the field of sampling, causing a surge in what became known as ‘loop-based composition techniques’. With his ground-breaking techniques, Campbell was not just extending parts of songs that the crowd liked, he was drastically deconstructing and reconstructing music into something never heard before. In his footsteps came artists and groups such as Grandmaster Flash, Afrika Bambaataa and Grand Wizard Theodore, who would contribute further to spreading the use of sampling to popular music.[16] This early generation of New York DJs all employed the same method of sampling popular dance songs, looping parts of them and rapping over them.[17] Interpolating the song ‘Good Times’ by the Chic, The Sugarhill Gang’s ‘Rappers Delight’ from 1979 is the first known rap song to achieve commercial success, with a #36 spot on *Billboard’s Top 100*.[18]

In the decades that followed, hip hop and its use of sampling only grew. Although copyright law at the time, especially on music, was much more primitive than it is today, it quickly became apparent that many instances of sampling could be considered copyright infringement, potentially forcing the sampling artists to pay the sampled artists vast amounts of money. Many of the big rappers paid settlements to the artists they sampled (and many did not, especially the less known names), but it was standard practice to record and release first, and settle afterwards. To counteract this, big record labels

[15] Burgess (2014), p. 170.

[16] Burgess (2014), p. 170.

[17] Evans (2011), pp. 855–856.

[18] Evans (2011), p. 855.

initiated lawsuits against some creators to get landmark cases that would force sampling creators to negotiate pre-release forthcoming. These lawsuits are interesting because the grounds used were often those of exclusive rights of the phonogram producers and not the copyright itself, similar to Pelham. The questions of law will, however, not be treated further, since they concern American law.[19]

The lawsuits worked and thus grew the industry of sampling settlements between original creators (or their record labels, depending on the terms of contract between the creator and the label) and artists that sampled these works. Some artists that had made their name by creating music that built heavily on samples, never quite recovered from this shift in landscape, such as the group Public Enemy.[20]

2.3 Sampling Today

Since 1979, hip hop has had a constant significance in pop music and sampling has always been vigorously used as a base for a lot of the most popular tracks.[21] The RZA, a prominent member of the famous rap group *Wu-Tang Clan*, writes in his book on about the group:

> *The sampler is a tool and a musical instrument. That's how I always thought about it. [...][T]he sampler is an instrument that I play.*[22]

The view of sampling as an instrument used in composition is one widely shared today, and sampling is used across many different genres in modern

[19] Evans (2011), pp. 861–862.

[20] Evans (2011), pp. 861–862.

[21] Evans (2011), pp. 855–856.

[22] The RZA (2005), p. 190.

popular music.[23] However, this also comes with the backside of some creators using sampling to blatantly steal music, an angle often highlighted by copyright holders of frequently sampled works, but also by some hip hop artists themselves.[24] For example, RZA writes in his book that a lot of rappers have used the sampler like a Xerox (copying) machine rather than an instrument.[25]

To this day, there remains a large divide between those claiming that sampling is an instrument in its own right that everyone should be allowed to use freely, and other groups claiming it is an outright method of copyright infringement.[26] Some rap artists even embrace the notion of stealing previous works through sampling, as a form of Robin Hood-like counterculture to the music industry.[27]

Since the early days of sampling, where creators on the hip hop scene would use sample pre-existing works rampantly without major negative consequences for themselves, the last decades have seen a shift where creators are paying more mind to the potentially huge fees that would come with sampling. It is especially uncommon these days to see artists sample several different works in one creation, since it generally is not economically feasible due to the multiple fees it would incur. This has led to what some refer to as the death of the 'collage-style' sampling genre popularized by Public Enemy, arguably killing the creativity that intellectual property laws seek to protect.[28]

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[23] Evans (2011), pp. 858–859; For Swedish context, see Stannow (2014), p. 72.

[24] Evans (2011), p. 858.

[25] RZA (2005), p. 191.

[26] Evans (2011), p. 858.

[27] McLeod (2004); Evans (2011), p. 858.

[28] Evans (2011), pp. 862–863.

3 EU Copyright Law and Sampling

3.1 Primary Law

Even though this thesis is aimed at an audience with basic knowledge on EU law, it makes pedagogical sense to start with the most fundamental building blocks, when describing the system of intellectual property law in the EU.

All EU law stems from its basic instruments known as primary law, which are the Treaty on European Union (the 'TEU'), The Treaty on the Functioning of the European Union (the 'TFEU'), and the Charter of Fundamental Rights of the European Union ('the Charter'). Art. 118 of the TFEU sets out the task of the EU to enact laws protecting intellectual property rights in the EU, with centralized coordination and supervision.

Furthermore, Art. 17 of the Charter sets out a right to property, which according to its second paragraph also applies to intellectual property.

3.2 Secondary Law

With the mandate granted by primary law, the EU can pass legislation, known as secondary law, either through regulations that apply directly to all citizens of the EU, or through directives that the member states must implement and enforce in their national legal orders in a uniform way across the EU. In the field of copyright, there are several directives, of which the Infosoc Directive is the most fundamental.

The EU system differentiates, as most legal orders do, between full copyright and related rights. Among the latter is the right of phonogram producers to their phonograms. Infosoc provides authors with protection for

their works, and phonogram producers with protection for their phonograms.[29] Authorial works are given broader protection – a full copyright, as it were, while phonograms belong to the category of related rights, which have a more limited scope of protection.[30]

The copyright provided in Infosoc is a formless one, awarded to all works created within the EU.[31] The ECJ said in Infopaq that all subject-matter that is the author's own intellectual creation is protected by copyright.[32] Infosoc justifies this strong protection for human creativity on the basis that it is good for authors, performers, producers, culture, trade and industry, and for society as a whole, because it causes more works to be created.[33] For phonograms specifically, recital 10 reflects the ambition to renumerate phonogram producers for their hefty investments by offering a strong protection for phonogram producers and not just the authors of the works produced. Interestingly, the legislators also bring attention to the issue of on-demand streaming services using phonogram-protected materials, and explicitly encourages that licensing agreements be used to mitigate the effects that this has on the economic viability of producing phonograms.[34]

Another piece of secondary law that is important for the purpose of this essay is 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 ('the Lending Directive'). Art. 9(1)(b) of this directive prescribes a duty for

[29] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, "Infosoc directive", Art. 2.

[30] Pila and Torremans (2019), p. 249.

[31] Pila and Torremans (2019), p. 249.

[32] Case C-5/08 *Infopaq*, para 37.

[33] Infosoc, recital 9.

[34] Infosoc, recital 26.

member states to ensure that phonogram producers enjoy an exclusive distribution right of their phonograms or copies of their phonograms.

3.3 International Legislation

While the legal basis of EU law is governed by its primary law and, by extension, its secondary law, this is also regarded as including certain instruments of international legislation that the member states are party to through the EU. [35]

For instance, Infosoc does not provide a definition of what a 'phonogram' is. Instead, we look at the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms ('the Geneva Convention'), which states in its first article that a phonogram is "any exclusively aural fixation of sounds of a performance or of other Sounds". A virtually identical definition is also found in Art. 3 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations ('the Rome Convention'), as well as Art. 2(b) of the WIPO Performances and Phonograms Treaty ('WPPT').

In other words, the holder of a phonogram right has the right to the recording itself, of a copyrighted auditive work, such as a song. While the copyright holder, such as a songwriter, has the right to all use and reproductions of the work, with the exceptions provided by law, one of which is the phonogram right, which entitles the holder protection only against reproduction of the recording itself.[36]

[35] Pila and Torremans (2019), p. 248.

[36] Geneva Convention, Art. 2; Infosoc Directive, Art. 3(2)(b).

3.4 National Legislation of the Member States

Finally, copyright law in the EU is also affected by national laws that differ from each other in some respects, causing a certain variation between member states. However, since there are several EU directives and judgments from the EU courts, this forms a common EU copyright framework, which is binding for all member states and the area is generally viewed as highly harmonized. Many of the differences across member states can therefore be subject to review by the EU courts. This was the case in Pelham, which will be discussed below, and it is also the reason why it makes sense to analyze the compatibility of Swedish copyright law under EU law.[37]

3.5 Case C-476/17, Pelham and Others

3.5.1 Background

The applicants in the referring court are members of the music group Kraftwerk, which released the song *Metall auf Metall*[38] in 1977 under its own private label. The respondents are record label Pelham GmbH, which in 1997 produced *Nur Mir*, as well as Moses Pelham and Martin Haas, who co-wrote the song. The song, performed by Sabrina Setlur, contains a two-second segment taken from Metall auf Metall, which is used in a loop throughout the song.[39]

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[37] Pila and Torremans (2019), p. 248.

[38] 'Metall Auf Metall (2009 Remaster)' on YouTube: https://www.youtube.com/watch?v=CXVB4Hc05TQ.

[39] 'Sabrina Setlur - Nur Mir (Music Video)' on YouTube: https://www.youtube.com/watch?v=QweX1pEqpIM.

The applicants filed a lawsuit in the German courts based on their exclusive rights as phonogram producers, alternatively their copyright as songwriters, claiming that the respondents had infringed their rights through the release of their own phonogram.[40]

3.5.2 The Questions Posed by the Referring Court

To be able to solve this matter, the German supreme court needed to ensure a correct application of EU law, prompting them to refer the following questions to the ECJ.

1. Does taking very short snatches of audio from a previous phonogram to use in another phonogram constitute an infringement in the exclusive right of the producer of the previous phonogram, under Infosoc, Art. 2(c)?
2. In such a case, does the second phonogram constitute a copy of the first, within the meaning of the Lending Directive, Art. 9(1)(b)?
3. Are Member States allowed to inherently limit the scope of the phonogram producer's exclusive right to reproduce (Art. 2(c) Infosoc) and distribute (Art. 9(1)(b) Lending Directive) by enacting a 'free use' provision?
4. Can it be said that a work or other subject matter is being used for quotation purposes within the meaning of Infosoc Art. 5(3)(d) if it is not evident that it is another person's work that is being used?
5. Do the provisions of EU law on the reproduction and distribution right of the phonogram producer (Infosoc Art. 2(c) and Lending Directive Art. 9(1)[b]) and the exceptions or limitations to those rights (Infosoc Arts. 5(2) and (3) and Lending Directive Art. 10(2)

[40] A question of competition law was also raised, which will not be discussed since it turned out to be immaterial in the case and since it falls outside the topic of this essay.

para 1) allow any latitude in terms of implementation in national law?

6. In what way are the fundamental rights set out in the Charter to be taken into account when ascertaining the scope of these rights and of their limitations?

3.5.3 The ECJ's Answer to the Questions

Question 1 & 6

The ECJ answers the first and last question together. This structure will be followed here for pedagogical reasons. Read together, the conjoined question could be summarized as follows:

Should the meaning of Infosoc Art. 2(c) 2001/29, in the light of the Charter, be interpreted as meaning that the phonogram producer's exclusive right to reproduce and distribute their phonogram allows them to prevent others from taking a sound sample, even if very short, of that phonogram for the purposes of including it as a sample in another phonogram?

The Court starts by interpretating the wording of Art. 2(c) Infosoc, which gives phonogram producers the exclusive right of "reproduction […] in whole or in part" of their phonograms. Since there is no definition provided in Infosoc, the Court states that the wording should be interpreted according to its usual meaning in everyday language, while also considering the context that the wording is used in and the purpose behind the rule in which the phrase is used.[41] This view has precedence in previous cases tried by the ECJ.[42]

[41] Pelham, para 28.

[42] Case C-201/13, *Deckmyn and Vrijheidsfonds*, para 19 and the case law cited.

To that end, the Court finds it clear that even a very small sample taken from one phonogram and put into another, must be regarded as a reproduction in part, thereby falling under the exclusivity of the original phonogram owner, at least in principle.[43] Furthermore, the Court states that such a literal interpretation of Art. 2(c) is consistent with the spirit of the Infosoc Directive in general, being to strengthen the protection of copyright in order to incentivize creativity among creators and investments in the copyright industry,[44] as well as the specific objective of Art. 2(c) in ensuring that the significant investments made by phonogram producers is met with a satisfactory return in the form of protection.[45]

Highlighting the other side of the interest scale, the Court points out that snippets taken from one phonogram and put into another phonogram in form so modified that average person could not recognize its origin, do not fall within the scope of Art. 2(c).[46] This reflects the fair balance between the property right of existing copyright holders, as it is expressed in Art. 17(2) of the Charter, on the one hand, and users of copyright, as well as the general public, on the other.[47]

According to previous ECJ case law, the right to intellectual property enshrined in the Charter is in no way an absolute one, which means that exceptions must be made in some cases where, in principle, something would be protected.[48] The Court exemplifies the freedom of arts as another fundamental right that must sometimes be counterweighed against the right

[43] Pelham, para 29.

[44] Pelham, para 30; Infosoc Directive, recitals 4, 9 and 10.

[45] Pelham, para 30; Infosoc Directive, recital 10.

[46] Pelham, para 31.

[47] Pelham, para 32; Case C-161/17, *Renckhoff*, para 41.

[48] Pelham, para 33; Case C-70/10, *Scarlet Extended*, para 43.

to intellectual property,[49] and clarifies that sampling constitutes use of the freedom of arts.[50]

If someone, while exercising their freedom of arts through sampling, modifies the original sample to such an extent that its origin becomes unrecognizable to the ear, the Court infers that it would go against the everyday meaning of the word 'reproduction', against previous case law of the ECJ, as well as against the spirit of the rule and the balancing of interests, to find that such a use would constitute a reproduction.[51] In particular, it would render the right of the original phonogram producer too far-reaching, since it would have the effect of preventing works that would not interfere with their opportunity of getting a satisfactory return on their investment.[52]

Consequentially, the Court's answer to the first and sixth questions is that a sample constitutes an infringement of the phonogram producer's exclusive right of reproduction, unless it has been made unrecognizable to the ear.[53]

Question 2

The second question is essentially about whether a reproduction, as defined through the first and sixth questions, automatically constitutes a 'copy' within the meaning of Art. 9(1)(b) of the Lending Directive. Said article prescribes an obligation for member states to give phonogram producers the exclusive right in making copies of their phonograms available to the public.

[49] Pelham, para 34; the Charter, Art. 13.

[50] Pelham, para 35.

[51] Pelham, para 37.

[52] Pelham, para 38.

[53] Pelham, para 39.

In the absence of a legal definition, the Court once again looks at the legislative context surrounding the article.[54] The Court focuses particularly on recital 2 of the Lending Directive, which says that the Directive aims to combat pirated copies.[55] Here, we shall indulge in a direct quote from the Court, since it is difficult to imagine a clearer way of expressing the point:

only an article which reproduces all or a substantial part of the sounds fixed in a phonogram is, by its nature, intended to replace lawful copies[56]

By this reasoning, the Court finds that short sample of a phonogram does not constitute a copy within the meaning of the Lending Directive, since it does not reproduce a substantial part of the phonogram.[57]

Question 3

Concerned in the case is an article of German law allowing new works to be made that build upon previous works, under the label of 'free use', without constituting an infringement.[58] The article concerns copyright by is applicable to neighboring rights, including those of a phonogram producer, by analogy.[59] The rationale behind the article is that all cultural works build upon previous works to some extent.[60]

The Court, however, does not pay any mind to this, since the list of exceptions given in Art. 5 Infosoc is exhaustive, according to its 32nd recital,

[54] Pelham, paras 42–43.

[55] Pelham, para 45.

[56] Pelham, para 46.

[57] Pelham, para 55.

[58] Pelham, para 56.

[59] Pelham, para 56.

[60] Pelham, para 56.

its preparatory works, as well as previous case law of the Court,[61] thereby declaring that member states are not allowed to make exceptions to the phonogram producers' rights, outside the scope of Art. 5 Infosoc, such as enacting a free use provision.[62]

Question 4

Art. 5(3)(d) Infosoc states that the use of a quotation counts as an exception from the exclusive right of a phonogram holder. The fourth question asks if this is applicable even if it is not made clear that the work in question is a citation of another work.

Since the term 'quotation' is not defined in law, the Court once again examines the meaning of the word in everyday language, as well as the context behind Infosoc, and the particular rule in question.[63] To this end, the Court finds that the nature of a quotation is to make a factual or intellectual point and to engage in dialogue with the author of the work which is being cited,[64] and that this is not possible if the origin of the quotation is not made clear.[65]

The distinction made by the Court is that a musical work can be a quotation if the phonogram which is being sampled is identifiable in the new phonogram,[66] which just happens to not be the case in Pelham.[67]

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[61] Pelham, para 58; Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society; Case C-161/17, *Renckhoff*, para 16.

[62] Pelham, para 65.

[63] Pelham, para 70.

[64] Pelham, para 71.

[65] Pelham, para 73.

[66] Pelham, para 72.

[67] Pelham, para 74.

Question 5

The fifth question is, in essence, about whether Art. 2(c) Infosoc is a measure of full harmonization, meaning that the member states do not have any liberty in how it is implemented or interpreted.[68] The Court references the *Melloni* case, which states that not even the constitutional law of the member states can be allowed to undermine the effectiveness of EU law – EU law holds primacy over national law.[69]

That being said, national courts do enjoy a certain amount of discretion in cases that concern situations covered not only by EU law but also by national law.[70] This discretion allows them to go beyond the protection offered by EU law, but not below.[71]

Although Infosoc seeks to harmonize the field of copyright only partially, there are some parts of the directive that, by their very nature, have to be implemented unequivocally.[72] Art. 2(c) is one such part, stating explicitly that member states have to provide phonogram producers with the exclusive rights "to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part" of their phonograms.[73] This is an absolute requirement and thus, a measure of full harmonization, meaning the member states do not have the liberty of choosing to what degree the article is to be implemented.[74]

[68] Pelham, paras 75–77.

[69] Pelham, para 78; Case C-399/11, *Melloni*, para 59.

[70] Pelham, para 80.

[71] Case C-399/11, *Melloni*, para 60; Case C-617/10, *Åkerberg Fransson*, para 29.

[72] Pelham, paras 81–84.

[73] Pelham, para 83.

[74] Pelham, paras 85–86.

3.5.4 After the Court's decision

As of the moment of writing this essay, the dispute between Kraftwerk and Pelham is still ongoing in the German court system. German music law experts differ wildly in their speculations, with some saying the case could end up in any way imaginable.[75] The substantive decision will hinge on many different considerations, such as the intent of Pelham, the extent of use, the burden of proof and perhaps most importantly, whether the sampled part of Nur Mir will be considered recognizable by ear.

[75] 'Endet nun der Streit um "Metall auf Metall"?' on Legal Tribune Online.

4 Swedish Copyright Law and Sampling

4.1 The Fundamental Copyright Protection

Swedish copyright law is governed first and foremost by *Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk* (the 'Copyright Act'), which also serves as the main implementation of EU directives on the subject.[76]

In its first paragraph, the Copyright Act gives creators copyright to their works in. This right is formless but gives the explicit example of musical works in para 1(3). Protection is equally strong regardless of genre, form (for example, recorded or notated) and although the complexity might affect the scope of protection, even simple melodies and purely improvisational pieces are offered full protection of the copyright law.[77] The important thing is that copyright protects the intellectual creation of the author.[78]

If a person is deemed to have copyright over a certain work, the content of this right is further defined in Art. 2, which states that the author has the exclusive right to make use of the work by making copies of it and making it available to the public, in full or in part, including in technically modified forms, as well as in other types of media. According to Art. 2, para 2, every direct or indirect instance of the work being copied should be considered copying, regardless of the form and method.

[76] Levin (2019), p. 69.

[77] Stannow (2014), p. 36.

[78] NJA 2009 s. 159, *Mini Maglite*; Levin (2019), p. 85.

4.2 The Line Between Plagiarism and Inspiration

The thin line between plagiarism and inspiration in music has been subject to judicial review only once in the history of Swedish courts – in NJA 2002, s. 178, *Drängarna*. The case concerned two musical works, each with a repeating part in which the melodies were very similar. The older work was a song titled 'Tala om vart Du skall resa'[79] ('the first song') by the group Landslaget. The newer work was 'Om du vill bli min fru'[80] ('the second song') by Drängarna. EMI, which was the record company that owned the rights to the first song, sued Drängarna, alleging that the second song constituted an infringement into the right copyright of the first song.[81]

Both melodies were played on the fiddle in a traditional Swedish folk style, spanning over eight bars and encompassing 42 notes. Drängarna held that the second song was not based on the first song at all, but on elements from an old folk tune called 'Oxdansen', on which the eponymous traditional dance is based. The Court examined the melodies, analyzed the notational similarities and even consulted a music expert who elaborated on how certain note progressions come naturally due to different grips commonly taken on the fretboard of a fiddle. The Court also considered the large degree of famousness of the first song and the proximity in time between the releases of the two songs. With all these factors in mind, the Court found that the second song was not likely to have been composed independently from the first song, thus finding an infringement in the case.[82]

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[79] 'Tala Om Vart Du Ska Resa (1999 Remastered Version)' on YouTube: https://www.youtube.com/watch?v=E-NN_1dFlxo.

[80] 'Vill du bli min fru Drängarna' on YouTube: https://www.youtube.com/watch?v=OTZxtUxdoSc.

[81] NJA 2002, s. 178.

[82] NJA 2002, s. 178.

In the Court's reasoning can be found the particularly Swedish legal feature called *dubbelskapandekriteriet*, roughly translated to the dual creation criterion. It takes aim at whether a work which is alleged to infringe another work is likely to have been created independently of the first work. This feature has been used by Swedish courts for decades not as a legality assessment in itself but rather as an aid in determining *verkshöjd*, roughly translated to sufficient creativity. Due to the case law of the ECJ (see above), however, the validity of this assessment can be put into question, since national legal orders are not allowed to go beyond EU law by imposing standards on what qualifies for copyright protection, which the Swedish Supreme Court has acknowledged in later case law.[83]

In addition to its use of the archaic verkshöjd creativity assessment, the judgment in Drängarna has been criticized for awarding too wide of a copyright protection for musical works.[84] The critique is grounded in the notion that the first song should not have been awarded protection at all, at least not as strong a protection as it did, since it consists of simple note progressions that are very commonly used in western music.[85]

4.3 New and Independent Work

4.3.1 In the Swedish Copyright Act

The article that arguably makes the comparison with EU law post Pelham most interesting is Art. 4, which says that a person who makes an adaptation of a work or converts it into another artistic form, shall enjoy copyright for the work in its new form, to the extent that this does not collide with the original copyright.

[83] Levin (2019), p. 85; NJA 2009 s. 159, *Mini Maglite*.

[84] Torvund (2013), pp. 63–64.

[85] Torvund (2013), pp. 63–64.

In the second paragraph, the article goes on to state that if that person, on the other hand, has independently created a new and independent work, their copyright is not contingent on that of the original author. This paragraph highlights the distinction between works that constitute an adaptation according to the first paragraph, and works that are sufficiently independent from the original works so at to constitute an original work of their own. This is generally considered to follow from Art. 1, leading many scholars to view the Art. 4(2) as merely a redundant reiteration.[86]

Regardless, Art. 4(2) has, in practice, come to constitute the separator between adaptations that are so similar that they are in fact infringing on the original work, and new and independent works, with the important factor being the degree to which the new work gives an impression that is distinct from the original work.[87]

The delivery of the Pelham judgment has aroused the question of whether the 'new and independent' provision renders Swedish law incompatible with EU law.[88] To this end, Ulrika Wennersten, senior lecturer in intellectual property law at Lund University, points out in her article 'Areas not regulated by EU law – a Swedish perspective' that the ECJ makes clear in Pelham the full degree of harmonization set out in Art. 2(c) Infosoc. She highlights the Court's reasoning regarding 'reproduction in whole or in part', which concludes that even a two second soundbite from a song constitutes a reproduction in part.

Wennersten also references the Court's conclusion that a sample that has been modified to such an extent that its origin is no longer recognizable to the ear is not considered a reproduction of the sampled work. Lastly, she

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[86] Olin, Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk 4 §, Lexino (JUNO), accessed 2022-05-25; Axhamn (2016), p. 218.

[87] Levin (2019), p. 173.

[88] Wennersten (2020), p. 165.

reiterates the Court's decision to reject the lawfulness of the German free use exception, suggesting that if this exception was deemed unlawful, perhaps the 'new and independent work' requisite of Art. 4(2) of the Swedish Copyright Act might also be at risk of being deemed unlawful if brought before the ECJ.[89]

4.3.2 In Case Law

The free pass for new and independent works has been subject to critique even before Pelham. Case NJA 2017 s. 75, *Svenska syndabockar* (Swedish scapegoats), concerned a painting which contained a very realistic portrayal of a photograph of Christer Pettersson. Pettersson was, for many years, the main suspect in the investigation of the murder of Swedish prime minister Olof Palme. Pettersson was convicted for the murder in the district court but later vindicated in the court of appeals. Despite this, he remained a scapegoat in popular media, where people would often still point him out as the likely murderer of Palme, even after he had been cleared as a suspect. Painter Markus Andersson wanted to paint something that, through an allegory, would voice critique against the demand for scapegoats in popular media. He did so by adding Christer Pettersson into the foreground of the famous painting by William Holman Hunt from 1854 titled *The Scapegoat*. It was obvious that the portrayal of Pettersson was based on a photograph taken by Jonas Lemberg. Lemberg sued Andersson, claiming that Andersson's painting constituted an infringement of Lemberg's copyright to the photograph.[90]

The Swedish Supreme Court decided that the painting did not constitute an infringement into the copyright of the photograph, since Andersson had achieved a new and independent work. While the district court which had

[89] Wennersten (2020), pp. 165–166.

[90] NJA 2017, s. 75; Levin (2019), pp. 181–182.

also cleared Andersson of wrongdoing focused on factors such as how Andersson had changed the lighting and accentuated wrinkles in the face of Pettersson, the Supreme Court attributes more importance to the difference in context. The photograph taken by Lemberg had the characteristic of a stark photographic portrait, while the painting used the element in a whole new context, to make an allegoric point.[91]

The Court stated that a new and independent work has to be influenced by further choices made by the author, as an expression of their own creativity.[92] If the creative expressions in the original work are given a dominant role in the new work, however, that work is considered an adaption and not a new independent work.[93] Wennersten holds this to be problematic, since it suggests that a creator can take the most essential piece of someone else's work, give it a less prominent roll in their own creation and get away with it.[94]

Furthermore, the Court reflects on the difference in identity taken on by Pettersson in the two works. While the photograph portrays Pettersson as a person, the painting does not seek to bring attention to Pettersson himself, but rather use him as an example of the fact that anyone can become a scapegoat, thereby voicing critique against the phenomenon itself.[95] Wennersten once again asks whether this is an appropriate line of reasoning by the Court, since it could make it very difficult to claim infringement if the original work appears only in a part of a new work which is not that significant.[96]

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[91] NJA 2017, s. 75, paras 16–19.

[92] NJA 2017, s. 75, para 12.

[93] NJA 2017, s. 75, para 17.

[94] 'Nytt och självständigt verk eller bearbetning. Några kommentarer i anledning av NJA 2017 s. 75 (Svenska syndabockar)' on nir.nu.

[95] NJA 2017, s. 75, para 17.

[96] 'Nytt och självständigt verk eller bearbetning. Några kommentarer i anledning av NJA 2017 s. 75 (Svenska syndabockar)' on nir.nu.

5 Analysis

5.1 The Status of Sampling Today

Inevitably, sampling is only as old as the technique of sound recording, minus some years. The concept of playing one's own version of a previous performance must, however, surely be as old as music itself. It is, as Stravinsky, Tchaikovsky, Picasso, T.S. Eliot, and so many other great artists have held, the very essence of creative activity, to build upon what has come before. The classical composers of centuries ago discovered this when composing their masterpieces. The classic rock bands of the 60s and 70s discovered this when creating some of the biggest hits in pop music riding on the backs of older blues musicians. Similarly, the early DJs of New York discovered that, when sampling became technologically possible, it was a natural way to continue creating music.

It is obvious from how the music business and the world at large have evolved over the past decades that the practice of sampling music is here to stay. The popularity of sampling goes up and down periodically within different genres but there are almost no genres where it never occurs in some form. Yet many creators are not aware of the copyright implications it brings, which in some cases can have the unfortunate effect of killing the creativity that copyright seeks to protect. Today, the music business can be said to have reached somewhat of an equilibrium compared to the rampant sampling culture of the 80s. Fewer artists are being blatantly ripped off but it is still common to sample and, at least in the larger scale of the music industry, pay some royalties to the sampled artist.

Due to technological advancements and the cover culture popularized by social networks such as TikTok, it is my belief that the use of sampling will only continue to increase – everyone wants to make something of their own and when the skill gap to do so decreases (i.e. you do not have to learn an

instrument or music production to create music), the amount of people engaged in sampling increases. Still, we cannot ignore the right to intellectual property, which stems from the very foundation of our legal order, as expressed in the Charter.

Simply put, sampled artists loose from having their works sampled and gain from having their copyright prevent sampling. The opposite is true for those wishing to sample music. What level of protection society as a whole would benefit most from is a question that is virtually impossible to provide an accurate answer to. Preferably it is somewhere in the middle, because if the rules are too loose, there is less incentive to create, but if the rules are too strict, there is less opportunity create, both scenarios being detrimental to the availability of music and thus to the public good.

5.2 Key Takeaways from Pelham

5.2.1 Lending Directive

Based on the Court's reasoning in para 57, the Lending Directive does not seem to affect sampling.[97] This in itself is an important clarification of law but the more nuanced precedents brought by the Pelham judgment are of course those regarding the scope of the phonogram producer's exclusive right of reproduction and distribution, i.e. what constitutes an infringement, as well as the lack of liberty awarded to member states in their implementation of the rules on phonograms in Infosoc, i.e. the degree of harmonization.

[97] See also "The CJEU Pelham decision: only recognizable samples as acts of reproduction?" on ipkitten.blogspot.com.

5.2.2 What Constitutes an Infringement

Samples are considered to infringe the original phonogram producer's exclusive right of reproduction, unless the origin is recognizable by ear. This is huge news. Before, nobody knew what implications sampling could have in the EU. Now, another difficult question arises, of course – what does it mean to be recognizable by ear? This is something that we can only hope to see the ECJ adjudicate in the future. Until then, we look with eager eyes as Germany decides on the Pelham case on its merits, once and for all.

5.2.3 Degree of Harmonization

The Court makes clear in Pelham that member states are not allowed to compromise on the content of Art. 2(c) Infosoc in their national legislation. Whereas the German courts regarded the free use provision as an inherent limitation of the scope of the exclusive right, the Court says clearly that it is rather to be considered a deviation from the right, and since it is not one of the exceptions in Infosoc or other EU primary law, an unlawful one. It is apparent now that many member states had overestimated their freedom in implementing Infosoc and that they might need to adjust their legal orders.

5.3 Swedish Law and Pelham

5.3.1 Phonogram Rights vs. Copyright

When comparing Pelham to Swedish copyright law, many scholars seem to skip the step of whether the judgment applies to regular copyright, and not just phonogram rights. In my view, this makes it confusing and unpedagogical for anyone lacking a PhD in copyright law to understand why their point is valid. It would also have been nice if the ECJ could have simply mentioned whether they hold their judgment to apply to regular

copyright also, or just strictly to phonogram rights. Barring this pet peeve with the inaccessibility legal academic elite, it holds up after close reflection, to interpret Pelham not just for phonogram rights but also analogously for regular copyright, since their content according to Infosoc largely correspond. Thus, I have no reason to deviate from the quiet assumption made by Wennersten and other scholars that use this interpretation.

5.3.2 New and Independent Work

The Swedish Supreme Court has changed its precedent on copyright before, more or less making the use of verkshöjd as an indicator of sufficient originality defunct, in the Mini Maglite case. There are, however, still traces of this concept to be found in the Swedish legal system. Art. 4(2) of the Copyright Act does not mention this word specifically but when determining whether a work is new and independent in relation to some previous work, scholars and courts still seem to lean towards a verkshöjd-based assessment by asking whether it is sufficiently original to qualify as a work.

This rhymes poorly with the strict harmonization highlighted by the ECJ in Pelham. Member States simply do not have a legal basis to assess the originality and creativity of works in a way that is not merited by Infosoc. As Wennersten has pointed out, the current legal situation according to Swedish case law suggests that a creator can take the most essential piece of someone else's work, give it a less prominent roll in their own creation and get away with it. It is necessary that to ensure that this is not the case, through an assessment that sufficiently balances the interests of both sides.

5.4 Concluding Remarks

It cannot be said for certain what the ECJ would declare if it were met with a Swedish copyright case similar to Pelham. However, there were reasons to doubt the compatibility of Swedish copyright law with EU law already before Pelham and it is certainly even more in the spotlight now.

For a long time, the EU has had the ambition of ensuring a competitive market for intellectual creators within the EU, which is arguably the main reason it chooses to harmonize copyright to be part of the internal market. With the extent that sampling is affecting the cultural expressions of our society, it is therefore great news that the ECJ could deliver its judgment in Pelham to provide insight into what the law is. I say this without giving an opinion on whether that law is good or bad, because those who are not satisfied with the legal situation now clarified through Pelham, at least now have better information upon which to seek change through the democratic process.

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