Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

29 July 2019 * [i]

(Reference for a preliminary ruling — Copyright and related rights — Directive 2001/29/EC — Information Society — Harmonisation of certain aspects of copyright and related rights — Sampling — Article 2(c) — Phonogram producer — Reproduction right — Reproduction 'in part' — Article 5(2) and (3) — Exceptions and limitations — Scope — Article 5(3)(d) — Quotations — Directive 2006/115/EC — Article 9(1)(b) — Distribution right — Fundamental rights — Charter of Fundamental Rights of the European Union — Article 13 — Freedom of the arts)

In Case C-476/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), by decision of 1 June 2017, received at the Court on 4 August 2017, in the proceedings

Pelham GmbH,

Moses Pelham,

Martin Haas

v

Ralf Hütter,

Florian Schneider-Esleben,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Arabadjiev, M. Vilaras, T. von Danwitz, C. Toader, F. Biltgen and C. Lycourgos, Presidents of Chambers, E. Juhász, M. Ilešič (Rapporteur), L. Bay Larsen and S. Rodin, Judges,

Advocate General: M. Szpunar,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 3 July 2018,

* Language of the case: German.

after considering the observations submitted on behalf of:

– Pelham GmbH, Mr Pelham and Mr Haas, by A. Walter, Rechtsanwalt,

– Mr Hütter and Mr Schneider-Esleben, by U. Hundt-Neumann and H. Lindhorst, Rechtsanwälte,

– the German Government, by T. Henze, M. Hellmann and J. Techert, acting as Agents,

– the French Government, by D. Colas, D. Segoin and E. Armoët, acting as Agents,

– the United Kingdom Government, by Z. Lavery and D. Robertson, acting as Agents, and by N. Saunders, Barrister,

– the European Commission, by T. Scharf and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 December 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(c) and Article 5(3)(d) 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 (OJ 2001 L 167, p. 10), and of Article 9(1)(b) and of the first subparagraph of Article 10(2) 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 (OJ 2006 L 376, p. 28).

2 The request has been made in proceedings between Pelham GmbH, Mr M. Pelham and Mr M. Haas ('Pelham'), on the one hand, and Mr R. Hütter and Mr F. Schneider-Esleben ('Hütter and another'), on the other, concerning the use, in the recording of the song '*Nur mir*', composed by Mr Pelham and Mr Haas and produced by Pelham GmbH, of an approximately 2-second rhythm sequence from a phonogram of the group Kraftwerk, of which Hütter and another are members.

Legal context

International law

3 Article 1 of the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms, signed in Geneva on 29 October 1971 ('the Geneva Convention'), reads as follows:

'For the purposes of this Convention:

(a) "phonogram" means any exclusively aural fixation of sounds of a performance or of other sounds;

(b) "producer of phonograms" means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds;

(c) "duplicate" means 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;

(d) "distribution to the public" means any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof.'

4 Article 2 of the Geneva Convention provides:

'Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.'

European Union law

Directive 2001/29

5 Recitals 3, 4, 6, 7, 9, 10, 31 and 32 of Directive 2001/29 state:

'(3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

…

(6) Without harmonisation at [EU] level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.

(7) The [EU] legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented.

…

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. …

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

…

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. … In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.'

6 Under the heading 'Reproduction right', Article 2 of Directive 2001/29 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 Article 5 of Directive 2001/29 sets out the exceptions and limitations to the rights referred to in Articles 2 to 4 thereof. Article 5(3) and (5) provides:

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

…

(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;

…

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.'

Directive 2006/115

8 Recitals 2, 5 and 7 of Directive 2006/115 state:

'(2) Rental and lending of copyright works and the subject matter of related rights protection is playing an increasingly important role in particular for authors, performers and producers of phonograms and films. Piracy is becoming an increasing threat.

…

(5) The creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned.

…

(7) The legislation of the Member States should be approximated in such a way as not to conflict with the international conventions on which the copyright and related rights laws of many Member States are based.'

9 Under the heading 'Object of harmonisation', Article 1(1) of that directive provides:

'In accordance with the provisions of this Chapter, Member States shall provide, subject to Article 6, a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 3(1).'

10 Under the heading 'Distribution right', Article 9(1) of the directive provides:

'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;

…'

11 The first subparagraph of Article 10(2) of Directive 2006/115 reads as follows:

'… 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

12 Paragraph 24 of the Gesetz über Urheberrecht und verwandte Schutzrechte — Urheberrechtsgesetz (Law on copyright and related rights) of 9 September 1965 (BGBl. 1965 I, p. 1273; 'the UrhG') provides:

'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.'

13 Paragraph 85(1) of the UrhG, which transposes Article 2(c) of Directive 2001/29 and Article 9 of Directive 2006/115, provides, in its first sentence, first and second cases, that the producer of a phonogram has the exclusive right to reproduce and distribute the phonogram.

The case in the main proceedings and the questions referred for a preliminary ruling

14 Hütter and another are members of the group Kraftwerk. In 1977, that group published a phonogram featuring the song '*Metall auf Metall*'.

15 Mr Pelham and Mr Haas composed the song '*Nur mir*', which was released on phonograms produced by Pelham GmbH in 1997.

16 Hütter and another submit that Pelham electronically copied ('sampled') approximately 2 seconds of a rhythm sequence from the song '*Metall auf Metall*' and used that sample in a continuous loop in the song '*Nur mir*', although it would have been possible for them to play the adopted rhythm sequence themselves.

17 As the phonogram producers, Hütter and another's principal claim is that Pelham infringed their copyright-related right. In the alternative, they claim that their intellectual property right as performers and Mr Hütter's copyright in the musical work were infringed. In the further alternative, they claim that Pelham infringed competition law.

18 Hütter and another brought an action before the Landgericht Hamburg (Regional Court, Hamburg, Germany) seeking a prohibitory injunction, damages, the provision of information and the surrender of the phonograms for the purposes of their destruction.

19 That court upheld the action, and Pelham's appeal before the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany) was dismissed. Following an appeal on a point of law (*Revision*) brought by Pelham before the Bundesgerichtshof (Federal Court of Justice, Germany), the judgment of the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) was overturned and the case was referred back to that court for re-examination. That court dismissed Pelham's appeal a second time. In a judgment of 13 December 2012, the Bundesgerichtshof (Federal Court of Justice) once again dismissed Pelham's appeal on a point of law. That judgment was overturned by the Bundesverfassungsgericht (Federal Constitutional Court, Germany), which referred the case back to the referring court.

20 The referring court notes that the outcome of the *Revision* proceedings turns on the interpretation of Article 2(c) and Article 5(3)(d) of Directive 2001/29 and of Article 9(1)(b) and Article 10(2) of Directive 2006/115.

21 According to the referring court, it must, in the first place, be determined whether, by using Hütter and another's sound recording in the production of its own phonogram, Pelham encroached on the exclusive right of Hütter and another to reproduce and distribute the phonogram featuring the song '*Metall auf Metall*', as laid down in Paragraph 85(1) of the UrhG, which transposes Article 2(c) of Directive 2001/29 and Article 9 of Directive 2006/115. In particular, it must be determined whether such an infringement can be found where, as in the present case, 2 seconds of a rhythm sequence are taken from a phonogram then transferred to another phonogram, and whether that amounts to a copy of another phonogram within the meaning of Article 9(1)(b) of Directive 2006/115.

22 In the second place, if it is found that there has been an infringement of the phonogram producer's right, the question arises of whether Pelham may rely on the 'right to free use', laid down in Paragraph 24(1) of the UrhG, which is applicable by analogy to the phonogram producer's right, according to which an independent work created in the free use of the work of another person

may be published or exploited without the consent of the author of the work used. The referring court notes, in that context, that that provision has no express equivalent in EU law and therefore asks whether that right is consistent with EU law in the light of the fact that that provision limits the scope of protection of the phonogram producer's exclusive right to reproduce and distribute his or her phonogram.

23 In the third place, the national law exceptions and limitations to the reproduction right referred to in Article 2(c) of Directive 2001/29 and to the distribution right referred to in Article 9(1)(b) of Directive 2006/115 are based on Article 5(3) of Directive 2001/29 and the first subparagraph of Article 10(2) of Directive 2006/115. However, the referring court harbours doubts as to the interpretation of those provisions in circumstances such as those at issue in the main proceedings.

24 In the fourth place, the referring court notes that EU law must be interpreted and applied in the light of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union ('the Charter'). In that context, it asks whether the Member States have any discretion for the purposes of the transposition into national law of Article 2(c) and Article 5(2) and (3) of Directive 2001/29 and of Article 9(1)(b) and the first subparagraph of Article 10(2) of Directive 2006/115. The referring court notes that, according to case-law of the Bundesverfassungsgericht (Federal Constitutional Court), national legislation which transposes an EU directive must be measured, as a rule, not against the fundamental rights guaranteed by the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) of 23 May 1949 (BGBl. 1949 I, p. 1), but solely against the fundamental rights guaranteed by EU law, where that directive does not allow the Member States any discretion in its transposition. That court also harbours doubts as to the interpretation of those fundamental rights in circumstances such as those at issue in the main proceedings.

25 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) 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]?

(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 [the first subparagraph of Article 10(2)] 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] 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 [the first subparagraph of Article 10(2)] of Directive [2006/115])?'

Consideration of the questions referred

The first and sixth questions

26 By its first and sixth questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 2(c) of Directive 2001/29 must, in the light of the Charter, be interpreted as meaning that the exclusive right granted to a phonogram producer to authorise or prohibit the reproduction of his or her phonogram allows him to prevent another person from taking a sound sample, even if very short, of his or her phonogram for the purposes of including that sample in another phonogram.

27 Under Article 2(c) of Directive 2001/29, Member States are to provide for the exclusive right of phonogram producers '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.

28 Directive 2001/29 does not define the concept of 'reproduction … in whole or in part' of a phonogram for the purposes of that provision. The meaning and scope of those words must, as the Court has consistently held, be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part (judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 19 and the case-law cited).

29 It is clear from the wording of Article 2(c) of Directive 2001/29 stated in paragraph 27 above, that the reproduction by a user of a sound sample, even if very short, of a phonogram must, in principle, be regarded as a reproduction 'in part' of that phonogram within the meaning of the provision, and that such a reproduction therefore falls within the exclusive right granted to the producer of such a phonogram under that provision.

30 That literal interpretation of Article 2(c) of Directive 2001/29 is consistent, first, with the general objective of that directive which is, as follows from recitals 4, 9 and 10, to establish a high level of protection of copyright and related rights, and, second, the specific objective of the exclusive right of the phonogram producer, referred to in recital 10, which is to protect a phonogram producer's investment. As stated in that recital, the investment required to produce products such as phonograms is considerable, so that it is necessary to guarantee phonogram producers the opportunity of satisfactory returns.

31 However, where a user, in exercising the freedom of the arts, takes a sound sample from a phonogram in order to use it, in a modified form unrecognisable to the ear, in a new work, it must be held that such use does not constitute 'reproduction' within the meaning of Article 2(c) of Directive 2001/29.

32 It must be borne in mind, in that regard, that it follows from recitals 3 and 31 of Directive 2001/29 that the harmonisation effected by that directive aims to safeguard, in particular in the electronic environment, a fair balance between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property rights now guaranteed by Article 17(2) of the Charter and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter as well as of the public interest (see, to that effect, judgment of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 41).

33 The Court has thus previously held that there is nothing whatsoever in the wording of Article 17(2) of the Charter or in the Court's case-law to suggest that the intellectual property rights enshrined in that article are inviolable and must for that reason be protected as absolute rights (judgments of 24 November 2011, *Scarlet Extended*, C-70/10, EU:C:2011:771, paragraph 43; of 16 February 2012, *SABAM*, C-360/10, EU:C:2012:85, paragraph 41; and of 27 March 2014, *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, paragraph 61).

34 A balance must be struck between that right and other fundamental rights, including freedom of the arts, enshrined in Article 13 of the Charter, which, in so far as it falls within the scope of freedom of expression, enshrined in Article 11 of the Charter and in Article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds (see, to that effect, ECtHR, 24 May 1988, *Müller and Others v. Switzerland*, CE:ECHR:1988:0524JUD001073784, § 27, and ECtHR, 8 July 1999, *Karataş v. Turkey*, CE:ECHR:1999:0708JUD002316894, § 49).

35 In that context, it should be noted that the technique of 'sampling', which consists in a user taking a sample from a phonogram, most often by means of electronic equipment, and using the sample for the purposes of creating a new work, constitutes a form of artistic expression which is covered by freedom of the arts, as protected in Article 13 of the Charter.

36 In exercising that freedom, the user of a sound sample, when creating a new work, may decide to modify the sample taken from a phonogram to such a degree that that sample is unrecognisable to the ear in that new work.

37 Thus, to regard a sample taken from a phonogram and used in a new work in a modified form unrecognisable to the ear for the purposes of a distinct artistic creation, as constituting 'reproduction' of that phonogram within the meaning of Article 2(c) of Directive 2001/29 would not only run counter to the usual meaning of that word in everyday language, within the meaning of the case-law set out in paragraph 28 above, but would also fail to meet the requirement of a fair balance set out in paragraph 32 above.

38 In particular, such an interpretation would allow the phonogram producer to prevent another person from taking a sound sample, even if very short, from his or her phonogram for the purposes of artistic creation in such a case, despite the fact that such sampling would not interfere with the opportunity which the producer has of realising satisfactory returns on his or her investment.

39 In the light of the foregoing considerations, the answer to the first and sixth questions is that Article 2(c) of Directive 2001/29 must, in the light of the Charter, be interpreted as meaning that the phonogram producer's exclusive right under that provision to authorise or prohibit the reproduction of his or her phonogram allows him or her to prevent another person from using a sound sample, even if very short, from his or her phonogram for the purposes of including that sample in another phonogram, unless that sample is included in that other phonogram in a modified form unrecognisable to the ear.

The second question

40 By its second question, the referring court asks, in essence, whether Article 9(1)(b) of Directive 2006/115 must be interpreted as meaning that a phonogram which contains sound samples transferred from another phonogram constitutes a 'copy', within the meaning of that provision, of that phonogram.

41 Under Article 9(1)(b) of Directive 2006/115, Member States are to provide phonogram producers with the exclusive right to make available to the public, by sale or otherwise, their phonograms, including copies thereof.

42 Neither Article 9 of Directive 2006/115 nor any other provision of that directive defines the concept of 'copy' within the meaning of that article.

43 That concept must therefore be interpreted by taking into account the legislative context of the provision in question and the purposes of the relevant legislation.

44 It must be borne in mind that the phonogram producer's exclusive distribution right provided for in Article 9(1)(b) of Directive 2006/115 is intended to afford a producer, through adequate legal protection of intellectual property rightholders, with the possibility of recouping investments made by him or her in order to produce phonograms, since those investments can prove to be especially high and risky, as stated in recitals 2 and 5 of Directive 2006/115.

45 In that regard, it is clear from recital 2 of Directive 2006/115 that the protection conferred on a phonogram producer under that directive aims, in particular, to fight piracy, that is, as the Advocate General stated in point 45 of his Opinion, the production and distribution to the public of counterfeit copies of phonograms. The distribution of such copies poses a particularly serious threat to the interests of such phonogram producers in that it is capable of significantly decreasing the revenue that they receive by making phonograms available.

46 As the Advocate General stated in point 46 of his Opinion, 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 of that phonogram and, therefore, capable of constituting a copy of that phonogram within the meaning of Article 9(1) of Directive 2006/115.

47 That is not, by contrast, the case of an article which, without reproducing all or a substantial part of the sounds fixed in a phonogram, merely embodies sound samples, where relevant in a modified form, transferred from that phonogram for the purposes of creating a new and distinct work from that phonogram.

48 That interpretation of Article 9(1)(b) of Directive 2006/115 in the light of its purposes is supported by the legislative context of which that provision is part.

49 In that regard, as stated in recital 7 of Directive 2006/115, that directive aims to approximate the legislation of the Member States in such a way as not to conflict with the international conventions on which the copyright and related rights laws of many Member States are based.

50 The Geneva Convention is one of those conventions, which, according to its preamble, has, inter alia, the aim of addressing the widespread and increasing unauthorised duplication of phonograms and the damage that this is occasioning to the interests of producers.

51 Article 2 of that convention contains an analogous provision to Article 9(1)(b) of Directive 2006/115 which specifically provides that the producers of phonograms are to be protected against the making and distribution to the public of 'duplicates' of their phonograms without their consent.

52 According to Article 1(c) of the Geneva Convention, a 'duplicate' means 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.

53 It is true that the provisions of the Geneva Convention do not form part of the EU legal order, in that, first, the European Union is not a contracting party to that convention and, second, the European Union cannot be regarded as having taken the place of its Member States as regards its application, if only because not all of those States are parties to that convention (see, by analogy, judgment of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 41). The fact remains, however, that it is one of the international conventions referred to in paragraph 49 above and therefore the provisions of Directive 2006/115 must be interpreted, so far as possible, in the light of that convention (see, to that effect, judgments of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraph 35; of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 189; and of 19 December 2018, *Syed*, C-572/17, EU:C:2018:1033, paragraph 20).

54 It follows that it should be considered, as did the Advocate General in points 46 and 47 of his Opinion, that the concept of 'copy' within the meaning of Article 9(1)(b) of Directive 2006/115 must be interpreted consistently with the same concept as it is used in Article 1(c) and Article 2 of the Geneva Convention.

55 In the light of the foregoing considerations, the answer to the second question is that Article 9(1)(b) of Directive 2006/115 must be interpreted as meaning that a phonogram which contains sound samples transferred from another phonogram does not constitute a 'copy', within the meaning of that provision, of that phonogram, since it does not reproduce all or a substantial part of that phonogram.

The third question

56 The referring court notes that, according to Paragraph 24(1) of the UrhG, applicable by analogy to a phonogram producer's right, an independent work created using the work of another person may be used and exploited without the consent of the author of the work used. It states that such a 'right to free use' does not constitute a derogation from copyright as such but rather sets out an inherent limitation to its scope of protection, based on the idea that it is not possible to conceive of a cultural creation without that creation building upon the previous work of other authors.

57 In those circumstances, since it is clear from the answer to the second question that a reproduction such as that at issue in the main proceedings does not fall within the scope of Article 9(1)(b) of Directive 2006/115, it must be held that, by its third question, the referring court asks, in essence, whether a Member State may, in its national law, lay down an exception or limitation, other than those provided for in Article 5 of Directive 2001/29, to the phonogram producer's right provided for in Article 2(c) of Directive 2001/29.

58 As is clear both from the 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 of 10 December 1997 (COM(97) 628 final) and from recital 32 of Directive 2001/29, the list of exceptions and limitations contained in Article 5 of that directive is exhaustive, as the Court has also pointed out on several occasions (judgments of 16 November 2016, *Soulier and Doke*, C-301/15, EU:C:2016:878, paragraph 34, and of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 16).

59 In that regard, it has been recalled, in paragraph 32 above, that the harmonisation effected by Directive 2001/29 aims to safeguard, in particular in the electronic environment, a fair balance between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property rights and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter as well as of the public interest.

60 The mechanisms allowing those different rights and interests to be balanced are contained in Directive 2001/29 itself, in that it provides inter alia, first, in Articles 2 to 4 thereof, rightholders with exclusive rights and, second, in Article 5 thereof, for exceptions and limitations to those rights which may, or even must, be transposed by the Member States, since those mechanisms must nevertheless find concrete expression in the national measures transposing that directive and in their application by national authorities (see, to that effect, judgment of 29 January 2008, *Promusicae*, C-275/06, EU:C:2008:54, paragraph 66 and the case-law cited).

61 The Court has repeatedly held that the fundamental rights now enshrined in the Charter, the observance of which the Court ensures, draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories (see, to that effect, judgment of 27 June 2006, *Parliament* v *Council*, C-540/03, EU:C:2006:429, paragraph 35 and the case-law cited).

62 Article 5(5) of Directive 2001/29 also contributes to the fair balance mentioned in paragraph 32 above, in that it requires that the exceptions and limitations provided for in Article 5(1) to (4) of the directive be applied only 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.

63 In that context, to allow, notwithstanding the express intention of the EU legislature, set out in paragraph 58 above, each Member State to derogate from an author's exclusive rights, referred to in Articles 2 to 4 of Directive 2001/29, beyond the exceptions and limitations exhaustively set out in Article 5 of that directive, would endanger the effectiveness of the harmonisation of copyright and related rights effected by that directive, as well as the objective of legal certainty pursued by it (judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraphs 34 and 35). It is expressly clear from recital 31 of that directive that the differences that existed in

the exceptions and limitations to certain restricted acts had direct negative effects on the functioning of the internal market of copyright and related rights, since the list of the exceptions and limitations set out in Article 5 of Directive 2001/29 is aimed at ensuring such proper functioning of the internal market.

64 In addition, as is clear from recital 32 of that directive, the Member States are required to apply those exceptions and limitations consistently. The requirement of consistency in the implementation of those exceptions and limitations could not be ensured if the Member States were free to provide for such exceptions and limitations beyond those expressly set out in Directive 2001/29 (see, to that effect, judgment of 12 November 2015, *Hewlett-Packard Belgium*, C-572/13, EU:C:2015:750, paragraphs 38 and 39), since the Court has moreover previously held that no provision of Directive 2001/29 envisages the possibility for the scope of such exceptions or limitations to be extended by the Member States (see, to that effect, judgment of 10 April 2014, *ACI Adam and Others*, C-435/12, EU:C:2014:254, paragraph 27).

65 In the light of the foregoing considerations, the answer to the third question is that a Member State cannot, in its national law, lay down an exception or limitation, other than those provided for in Article 5 of Directive 2001/29, to the phonogram producer's right provided for in Article 2(c) of that directive.

The fourth question

66 By its fourth question, which concerns a situation in which it is found that there has been an infringement of the phonogram producer's exclusive right provided for in Article 2(c) of Directive 2001/29, the referring court asks, in essence, whether Article 5(3)(d) of that directive must be interpreted as meaning that the concept of 'quotations', referred to in that provision, extends to a situation in which it is not possible to identify the work concerned by the quotation in question.

67 Under Article 5(3)(d) of Directive 2001/29, Member States may provide for exceptions or limitations to the exclusive rights of reproduction and of communication to the public referred to in Articles 2 and 3 of that directive in the case of 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.

68 First of all, it must be considered, as did the Advocate General in points 62 and 63 of his Opinion, that, in the light of the wording in Article 5(3)(d) of Directive 2001/29 which refers to 'a work or other subject-matter', the exception or limitation provided for in that article may apply to the use of a protected musical work, provided that the conditions provided for in that article are satisfied.

69 In particular, for Article 5(3)(d) of Directive 2001/29 to apply, as has been stated in paragraph 67 above, the use in question must be made 'in accordance with fair practice, and to the extent required by the specific purpose', so that the use at issue for the purposes of quotation must not be extended beyond the confines of what it necessary to achieve the informatory purpose of that particular quotation.

70 Since Directive 2001/29 gives no definition of the term 'quotation', the meaning and scope of that term must, according to the Court's settled case-law set out in paragraph 28 above, be determined by considering its usual meaning in everyday language, while also taking into account the legislative context in which it occurs and the purposes of the rules of which it is part.

71 As regards the usual meaning of the word 'quotation' in everyday language, it should be noted that the essential characteristics of a quotation are the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user, since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into 'dialogue' with that work, as the Advocate General stated in point 64 of his Opinion.

72 In particular, where the creator of a new musical work uses a sound sample taken from a phonogram which is recognisable to the ear in that new work, the use of that sample may, depending on the facts of the case, amount to a 'quotation', on the basis of Article 5(3)(d) of Directive 2001/29 read in the light of Article 13 of the Charter, provided that that use has the intention of entering into dialogue with the work from which the sample was taken, within the meaning referred to in paragraph 71 above, and that the conditions set out in Article 5(3)(d) are satisfied.

73 However, as the Advocate General stated in point 65 of his Opinion, there can be no such dialogue where it is not possible to identify the work concerned by the quotation at issue.

74 In the light of the foregoing considerations, the answer to the fourth question is that Article 5(3)(d) of Directive 2001/29 must be interpreted as meaning that the concept of 'quotations', referred to in that provision, does not extend to a situation in which it is not possible to identify the work concerned by the quotation in question.

The fifth question

75 As a preliminary matter, it should be noted, as is clear from paragraph 24 above, that the fifth question relates, in particular, to the application by the referring court, for the purposes of disposing of the case in the main proceedings, of Article 2(c) and Article 5(3)(d) of Directive 2001/29, and of Article 9(1)(b) and the first subparagraph of Article 10(2) of Directive 2006/115.

76 In that context, the referring court asks whether those provisions of EU law allow the Member States discretion in their transposition, since, according to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), national legislation which transposes an EU directive must be measured, as a rule, not against the fundamental rights guaranteed by the Basic Law for the Federal Republic of Germany, but solely against the fundamental rights guaranteed by EU law, where that directive does not allow the Member States any discretion in its transposition.

77 As regards the answer to the second and fourth questions, it must be held that, by its fifth question, the referring court asks, in essence, whether Article 2(c) of Directive 2001/29 must be interpreted as constituting a measure of full harmonisation.

78 In that regard, it should be stated that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law in the territory of that State (judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 59).

79 It should be noted in that connection that, since the transposition of a directive by the Member States is covered, in any event, by the situation, referred to in Article 51 of the Charter, in which the Member States are implementing Union law, the level of protection of fundamental rights provided for in the Charter must be achieved in such a transposition, irrespective of the Member States' discretion in transposing the directive.

80 That said, where, in a situation in which action of the Member States is not entirely determined by EU law, a national provision or measure implements EU law for the purposes of Article 51(1) of the Charter, 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 (judgments of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 60, and of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 29).

81 Thus, it is consistent with EU law for national courts and authorities to make that application subject to the condition, emphasised by the referring court, that the provisions of a directive 'allow [some] discretion in terms of implementation in national law', provided that that condition is understood as referring to the degree of the harmonisation effected in those provisions, since such an application is conceivable only in so far as those provisions do not effect full harmonisation.

82 In the present case, the objective of Directive 2001/29 is to harmonise only certain aspects of the law on copyright and related rights, of which a number of provisions also disclose the intention of the EU legislature to grant a degree of discretion to the Member States in the implementation of the directive (see, to that effect, judgment of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 57).

83 As regards the exclusive right of holders, referred to in Article 2(c) of Directive 2001/29, it has been stated, in paragraph 27 above, that, according to that provision, Member States are to provide for the exclusive right of phonogram producers '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.

84 That provision therefore defines a phonogram producer's exclusive right of reproduction in the European Union in unequivocal terms. Furthermore, that provision is not qualified by any condition, nor is it subject, in its implementation or effects, to any measure being taken in any particular form.

85 It follows that Article 2(c) of Directive 2001/29 constitutes a measure of full harmonisation of the corresponding substantive law (see, by analogy, as regards the exclusive right of an EU trade mark proprietor, judgments of 20 November 2001, *Zino Davidoff and Levi Strauss*, C-414/99 to C-416/99, EU:C:2001:617, paragraph 39, and of 12 November 2002, *Arsenal Football Club*, C-206/01, EU:C:2002:651, paragraph 43).

86 In the light of the foregoing considerations, the answer to the fifth question is that Article 2(c) of Directive 2001/29 must be interpreted as constituting a measure of full harmonisation of the corresponding substantive law.

Costs

87 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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, in the light of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that the phonogram producer's exclusive right under that provision to authorise or prohibit the reproduction of his or her phonogram allows him or her to prevent another person from using a sound sample, even if very short, from his or her phonogram for the purposes of including that sample in another phonogram, unless that sample is included in that other phonogram in a modified form unrecognisable to the ear.**

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 sound samples transferred from another phonogram does not constitute a 'copy', within the meaning of that provision, of that phonogram, since it does not reproduce all or a substantial part of that phonogram.**

3. **A Member State cannot, in its national law, lay down an exception or limitation, other than those provided for in Article 5 of Directive 2001/29, to the phonogram producer's right provided for in Article 2(c) of that directive.**

4. **Article 5(3)(d) of Directive 2001/29 must be interpreted as meaning that the concept of 'quotations', referred to in that provision, does not extend to a situation in which it is not possible to identify the work concerned by the quotation in question.**

5. **Article 2(c) of Directive 2001/29 must be interpreted as constituting a measure of full harmonisation of the corresponding substantive law.**

[Signatures]

[i] The wording of paragraphs 1, 11, 15, 23-26, 30, 39, 65, 75 and 77 and the operative part of this document have been amended since it was first put online.