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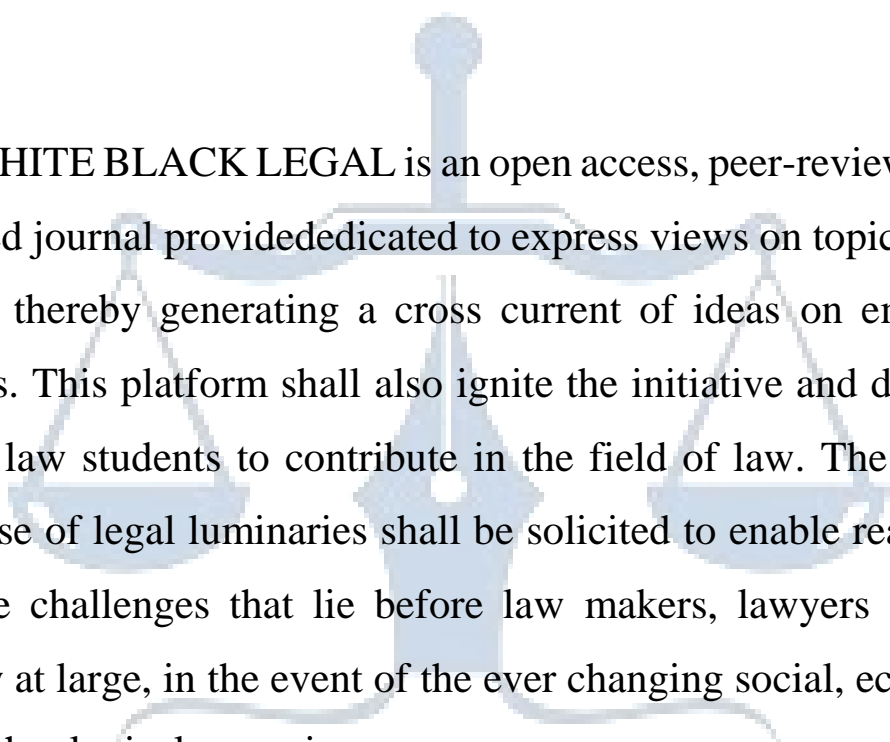


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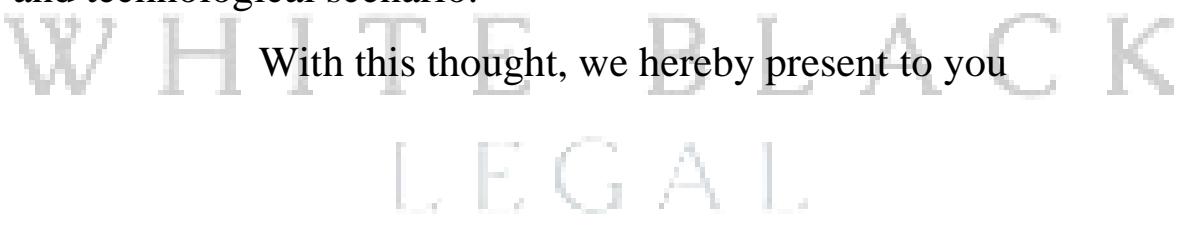
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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you



# **SAMPLING AND COPYRIGHT: ANALYSIS OF PELHAM GMBH V. RALF HUTTER (CASE C-476/17)**

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## **Introduction**

Following the European Union Court of Justice (CJEU) judgment in 2019, there was an expectation that the German Federal Court of Justice (BGH) would deliver a decisive ruling. However, on April 30, 2020, the BGH once again refrained from fully resolving the case and referred it back to the Higher Regional Court, continuing the protracted legal battle.

This case is significant not only because the CJEU addressed whether sampling constitutes copyright infringement, but also because it sheds light on the interaction between EU law and German national copyright law, particularly in the context of fundamental rights and artistic freedom.

## **Facts of the Case**

The case revolves around a sampling dispute involving the 1977 song “Metall auf Metall” by Kraftwerk. The plaintiffs, Ralf Hutter and another Kraftwerk member, alleged that a 2-second electronic sample from their phonogram was copied and used in a continuous loop by Pelham GmbH in their song “Nur Mir.” Hutter and his co-members claimed that this unauthorized sampling infringed their copyright and sought an injunction, damages, and surrender of Pelham’s phonograms.

The case was first heard by the Regional Court of Hamburg, Germany, which ruled in favor of Kraftwerk and granted an injunction in 2004. This decision was upheld by the Higher Regional Court of Hamburg (2006) and later by the BGH (2008). However, in 2016, the German Federal Constitutional Court (BVerfG) ruled in favor of Pelham, arguing that the lower courts had failed to consider the minimal economic impact of the sampled portion on Kraftwerk’s market. The BVerfG prioritized artistic freedom, stating that requiring license fees for minor samples would hinder creativity. The court emphasized the importance of striking a balance between the rights of phonogram producers and those of artists using samples.

Subsequently, the case was referred to the CJEU for a preliminary ruling on key legal questions concerning EU copyright law and its interaction with German national law. The CJEU's decision in July 2019 addressed four main issues:

1. Does sampling infringe the exclusive rights of phonogram producers under EU copyright law?
2. What is the scope of the "right of reproduction" under EU law?
3. Can Member States introduce additional exceptions to phonogram reproduction rights beyond those specified in the EU Directive?
4. To what extent can fundamental rights (such as artistic freedom) be used to determine the scope of copyright protection and exceptions?

### Key Findings of the CJEU

The CJEU made several crucial determinations:

1. Definition of Reproduction:
  - Sampling does not amount to reproduction if the extracted portion is unrecognizable to the ear in the new work.
  - Intellectual property rights are not absolute, and artistic freedom under the EU Charter of Fundamental Rights allows for transformative use.
  - However, if the sample is recognizable, it falls within the definition of reproduction, requiring authorization from the copyright holder.
2. Definition of a "Copy":
  - A sampled phonogram does not qualify as a copy unless a substantial part of the original is reproduced.
  - This interpretation aligns with the Geneva Convention, which, while not part of EU law, was considered relevant by the Advocate General in the case.
3. Limitations on National Law Exceptions:
  - The CJEU categorically ruled that Member States cannot introduce additional exceptions beyond those explicitly provided in the EU Directive.
  - Allowing countries to introduce their own exceptions would undermine the harmonization of copyright law across the EU and disrupt the internal market for copyrighted works.
4. Supremacy of EU Law:
  - In case of conflict between EU law and national law, EU law prevails under the principle of supremacy.



- National authorities must apply EU law directly, even if conflicting national provisions remain on the books.

These issues reflect broader debates in EU copyright law and its implications for musicians, producers, and content creators.

### 1. The Legal Definition of Sampling and Reproduction Rights

Sampling involves taking a portion of an existing sound recording and incorporating it into a new composition. The central legal issue in this case was whether unauthorized sampling constitutes copyright infringement under the EU Directive on Copyright and Related Rights (2001/29/EC).

The CJEU clarified that:

- If a sample is recognizable to the ear, it constitutes reproduction and requires authorization from the copyright owner.
- If the sample is unrecognizable, it does not qualify as reproduction and can be used without permission under artistic freedom.

This ruling creates a subjective threshold for determining infringement—recognizability—which could lead to inconsistencies in legal interpretation.

### 2. Conflict Between Artistic Freedom and Copyright Protection

The case also highlights the tension between artistic freedom and copyright enforcement.

- Artists argue that sampling is a creative tool that contributes to the evolution of music and should be protected under freedom of artistic expression (Article 13 of the EU Charter).
- Phonogram producers argue that sampling infringes on their exclusive reproduction rights, reducing their ability to control and monetize their work.

The BVerfG (German Federal Constitutional Court) initially ruled in favor of artistic freedom, stating that a strict copyright regime could stifle creativity. However, the CJEU's decision placed greater emphasis on protecting phonogram producers' rights, ensuring that their investment in creating sound recordings is not unfairly exploited.

### 3. The Impact on Music Industry Practices

The ruling has significant implications for the music industry, particularly for:

- Hip-hop, electronic, and remix artists, where sampling is a common practice.

- Music producers, who now need to ensure that samples are either unrecognizable or properly licensed to avoid copyright disputes.
- Record labels and copyright holders, who may use this ruling to demand licensing fees for even minor samples.

The decision raises concerns about whether it could limit artistic expression by making it harder for musicians to experiment with existing works.

#### 4. The Interpretation of ‘Copy’ in Copyright Law

A crucial legal question was whether a sampled portion of a phonogram constitutes a "copy" under copyright law.

- The CJEU ruled that a copy must contain a substantial portion of the original work.
- A two-second sample does not necessarily qualify as a copy unless it reproduces a recognizable element of the original work.

This ruling aligns with the Geneva Convention but introduces uncertainty about what constitutes a substantial portion.

#### 5. Harmonization of Copyright Laws in the EU

The case also raises broader concerns about the harmonization of copyright laws across EU Member States.

- Germany’s national law (Urheberrechtsgesetz – UrhG) previously allowed more flexibility for artists under the “free use” exception.
- The CJEU decision overruled this, stating that Member States cannot introduce additional exceptions beyond those explicitly provided in the EU Directive.

This ruling reinforces the supremacy of EU law but also limits the ability of national courts to interpret copyright exceptions in a way that supports artistic creativity.

### **Conclusion**

The Pelham case has set a significant precedent in European copyright law, balancing the rights of phonogram producers with the freedom of artistic expression. The CJEU’s ruling clarifies that recognizable samples require authorization, reinforcing the economic rights of original creators, while also acknowledging that unrecognizable samples do not constitute infringement, thereby protecting artistic creativity.

The court's decision also reinforces the uniform application of EU copyright law, restricting Member States from expanding exceptions beyond those established in the EU Directive. The case highlights the ongoing tension between intellectual property rights and artistic freedom, demonstrating the complex interplay between national and EU law.



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