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THE CHILLING EFFECT OF "KRAFTWERK I/II" ON SOUND SAMPLING

PLEA FOR SELF-REGULATION TO ADVANCE THE USE OF SAMPLING

Sound sampling has become a mature musical technique. We are years beyond the notion of "sound rip-off". This art form still faces needless limitations due to legal uncertainty and high transaction costs while the technical options for sampling are now nearly without limit. German and American courts have narrowed the leeway for sample users and the question is whether the Dutch courts will follow. It is high time for self-regulation to stimulate sound sampling as an art form.

Using even a two-second sound sample can infringe the related rights of the phonogram producer. Like the seven-differences myth [2] in the field of design, the rumor in the music world has been that a six-second sample is permitted. If it was not already clear that this is not the case, the German Federal Court of Justice, the *Bundesgerichtshof*, recently sent the six-second rumor off to the land of fairy tales. In its two rulings in "*Metall auf Metall I/II*"" (the cases are also known as "*Kraftwerk I/II*") the German Federal Court of Justice clearly stated that any take-over of any sound fragment recorded in a phonogram - however small - can infringe the related rights of the phonogram producer. That means that the phonogram producer has what amounts to an absolute right to its sound recording and its investment in it enjoys maximum protection. Good news for the phonogram producers, bad news for users of sound samples. There has already been great to-do about sound sampling in the international music world. Here is an overview.

To sample or not to sample

Sound sampling is a special way of using music that takes and repurposes often small snippets of existing musical works and/or music recordings, other sounds, and/or voices in new music productions. The development of the technology has had great influence on the nature and extent of sound sampling. Where the equipment needed to sample was quite expensive well into the 1980s, new

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[2] The comparison arises with the incorrect "seven points of difference" argument pursued by the respondent in infringement cases involving multiples of design works. See, i.a., T.Y. Adam-van Straaten, "*Het auteursrecht en modellenrecht in de fashion industrie. De ontrafeling van het zeven verschillen sprookje, en meer*",["Copyright and design right in the fashion industry. The unraveling of the seven differences fairytale and more"] *BMM Bulletin* 1/2010, p. 8-10.

hardware and software has gradually appeared on the market that has made digital sound sampling quite a bit cheaper and easier. Today it is possible to sample from home - as they say - with one push of a button. The use of sound samples in new music productions has consequently increased, exponentially.

The reasons[3] to use a sound sample vary widely. One obvious reason is to derive commercial benefit from the popularity of another's music production. Other, perhaps less obvious, reasons for the use or reuse of fragments of music productions can include making a musical tribute to a particular artist, the parody of existing music productions, the up-dating of music productions, the artistic modification of fragments of music productions, combining specific samples together into new music productions, and to lend a new music production an aura of authenticity with the aid of fragments of original music productions.

Sound sampling is used especially in hip-hop[4] and electronic music[5] but it certainly appears in other genres, also.[6] The popular rap group De La Soul already ran up against the limits of sound sampling in 1989 with its sample-stuffed debut album "*3 Feet High and Rising*". The Turtles sued for unauthorized use of a fragment from their 1968 song, "*You Showed Me*".[7] A well-known example from pop music is one of the major hits of the British pop band, The Verve's *"Bitter Sweet Symphony"* (1997), which uses a sound sample of an orchestral version of the Rolling Stones' "*The Last Time"*. The clearance for this sound sample turned out not to cover this use so that The Verve also was sued for unauthorized sound sampling. It consequently has been able so far to earn little or nothing from this hit. Holland's Radio 6 annual Black List includes many samples and also shows that soul, jazz, and hip-hop have grown somewhat closer in terms of musical history.[8]

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[3] See, i.a., M.T.M. Koedooder, "*Recycling in de populaire muziek. De juridische implicaties van sound sampling*", ["Recycling in popular music. The legal implications of sound sampling] *Informatierecht/AMI* August-September 1994, p. 131-138.

[4] See, i.a., the historic sketch by D.M. Morrison in "*Bridgeport Redux: Digital Sampling and Audience Recoding. The Origins of Sampling in Hip-Hop Music*", p. 90-94, http://ssrn.com/abstract=1334809; recently the estate of the American rapper *The Notorious B.I.G.* who died in1997 a court case to get a decision that the rapper had not been guilty in the past of unauthorized sound sampling: http://www.hollywoodreporter.com/thr-esq/notorious-big-estate-files-pre-692525.

[5] See, i.a., D. Nasrallah, "*From Plunderphonics to Frankensampling: a Brief History of How Sampling Turned to Theft*", 13 September 2013, www.djbroadcast.net; Moby was also recently sued for unauthorized sound-sampling on its debut album of 22 years ago: http://www.spin.com/articles/moby-first-choice-lawsuit-thousand-sample/.

[6] See the website www.whosampled.com for an extensive historic review of samples, covers and remixes.

[7] This question ultimately was settled. See, i.a., the biography of De La Soul on Rolling Stone's website: http://www.rollingstone.com/music/artists/de-la-soul/biography.

[8] Radio 6 also gave attention to sound sampling in March 2014 in the context of its Black List: http://www.radio6.nl/nieuws/detail/2526/zwarte-lijst-special-samples-in-de-zwarte-lijst.

Sound sampling in The Netherlands

The phenomenon of sound sampling burgeoned in the Dutch legal literature with the rise of hip-hop and electronic music, and since the introduction of the Netherlands' Neighboring (or Related) Rights Act (WNR). Sound sampling was described at the time as "sound rip-off"[9], which set the tone. While sound sampling has become some 25 years later now a normal form of creation in the music world it still wrestles with the old negative connotation of sound rip-off. Driven by the progress in technology, it seems that everyone wants to take samples from their predecessors' music productions but that no one wants to be burnt by the possible negative consequences of doing so. As a result, sound sampling still exists in a shadow world in 2014 and the clearing of sound samples for use has itself become an art form[10]. It is no slam dunk to obtain permissions from the various rights holders to music productions - which include the music publisher, music author, phonogram producer, not to mention the artists - because of the many offices and interests with which the sample user must deal in order to obtain a clearance. This does not even include the often high transaction costs involved and the uncertainty about the amount of usage fees to be paid.

There are at least two decisions in Dutch cases that deal with sound sampling. Both pre-date the WNR coming into force. In the case about the use of the voice of American singer Loleatta Holloway in "*Ride On Time*" (1989) by the Italian dance trio Black Box, the President of the Haarlem District Court[11] ruled that so much is added in "*Ride On Time*" to the elements taken from the original song "*Love Sensation*" and that these were given such a degree of creative treatment, that in terms of copyright law there is no "pure reproduction" or a treatment (too) similar to the original number. This judge also found that sampling in general terms is not simply "free" merely because of the common practice of not requesting permission before a sample is used. The second case dealt with the use of sampling techniques in the making of the house music version of Carl Orff's classical composition, "*O Fortuna*", from his *Carmina Burana*. The President of the Amsterdam District Court[12] found that the house music version performed by Apotheosis was not a form of sound sampling in terms of copyright law. It did not involve a "clip" but a totally modified copy of the original music work. The

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[9] P.B. Hugenholtz and M.T.M. Koedooder, "*Klankjatten: juridische aspecten van sound sampling*" ["Sound rip-off: legal aspects of sound sampling"], *NJB* 19/26 December 1987, p. 1511-1515.

[10] B.H.M. Schipper, "*De kunst van het clearen. Het verkrijgen van toestemming voor het gebruik van samples*" ["The art of clearance. Obtaining consent for the use of samples"], *Music world* 2007/4, pp. 37-40

[11] Pres. Haarlem District Court 13 October 1989, *BIE* 1991/6, p. 20-23 (*Ride on Time/Love Sensation*).

[12] Pres. Amsterdam District Court 24 February 1992, *Informatierecht/AMI* 1992/6, 112 (*O Fortuna*).

court found that the house music version infringed the personality rights under copyright law of (the estate of) Carl Orff.

The Dutch literature at first doubted whether the Dutch Copyright Act (DCA) or the WNR could offer rightsholders relief against unwanted sound sampling. An important preliminary question for copyright is whether a brief music fragment, sound and/or voice alone satisfies the copyright protection criterion. If not, there is no work within the meaning of copyright that could be infringed and therefore no copyright infringement. There is then also no performance of a work protected by copyright and the performing artist will see his claim go up in smoke. It is likely that only the phonogram producer could have a claim if the sound fragment used can be deemed to be a reproduction of (a portion of) the original phonogram. It appears that where sound sampling is involved the related rights of the phonogram producer will catch hold sooner than will the related rights of the performing artist, because, for example, a performance of a work is far from always protected by copyright.

According to older Dutch legal literature from just before or after the WNR came into force, copyright and related rights cannot or seldom provide a helping hand to "victims" of sound sampling. Hugenholtz and Koedooder[13], Peeperkorn[14], Kökbugur[15], Koedooder[16] and Du Bois[17] were very skeptical at the time about the possibility to fight sound sampling successfully using copyright law and the (future) related rights. It is possible that where there is indiscriminate takeover one could fall back on the protection of time, investment, and/or effort involved with the formation of music productions in terms of unfair competition or invoke a "voting right" analogous to a portrait right.[18] Only Ribbert[19] thought that the performing artist could defend his related right against use of "his note" in sampled form if it derived from a recording of his performance.

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[13] Prior to the WNR coming into force, sound sampling as form of "*sound rip-off*": P.B. Hugenholtz and M.T.M. Koedooder (1987), see note 9.
[14] Prior to the WNR coming into force, sound sampling as form of "*music piracy*": D. Peeperkorn, "*Music piracy*", p. 89-99 in T. Pronk (ed.), *Klankrechtwijzer: muziek en recht*, ["A guide to the law on sound: music and law"] SDU/Boekmanstichting, The Hague, 1991.
[15] Soon after the WNR coming into force, sound sampling as possible "*social problem*": S. Kökbugur, "Sound sampling: artistieke creativiteit of maatschappelijk probleem?" ["Sound sampling: artistic creativity or social problem?"], *AA* 43 (1994), p. 554-562.
[16] Soon after the WNR coming into force, sound sampling as form of "*musical recycling*": M.T.M. Koedooder (1994), see note 3.
[17] Soon after the WNR coming into force, sound sampling as form of "*adaptation or processing of musical information*": R.L. du Bois, "Muziek over muziek", ["Music about music"] *Informatierecht/AMI* June-July 1996, no. 6, p. 107-112.
[18] M.T.M. Koedooder (1994), see note 3 and S. Kökbugur (1994), see note 15.
[19] Soon after the WNR coming into force: R.P.J. Ribbert, "Tweeënhalf jaar Wet op de Naburige Rechten: een overzicht", ["Two and one half years into the Neighbouring Rights Act" an overview"] *NTBR* 1996/4, p. 99-100.

Later Dutch literature still questioned the feasibility of a copyright claim against sound sampling but did see good chances for a claim based on related rights. The key question in judging a copyright claim is and remains whether the use of a brief music fragment also takes on one or more copyright protected features of the (recognizable) original music work. In the words of Spoor, Verkade, and Visser[20]: whatever is taken over must satisfy the copyright protection criterion. For this to be so, the sampled music fragment must be deemed to be the music author's own intellectual creation. There could be infringement of the related rights of the performing artist according to Verkade and Visser[21] if - assuming that the sample itself also pertains to a work - the personal contribution of the performing artist has been taken over in a recognizable way in the end result. Spoor, Verkade and Visser[22] speak of the takeover of something personal from the interpretation concerned. Sampling a sound recording can, furthermore, have the consequence that the related rights of the phonogram producer are also infringed if such a sound sample can be deemed to be a reproduction of a phonogram protected under the WNR. The sound sample must then be taken from the phonogram. For this, according to Verkade and Visser[23] it is necessary that the sound sample used is recognizable in an aural sense. Du Bois[24] also relies heavily on the recognizability of the sample used. Visser[25] placed great value on the provability of the fact that a sound sample came from a particular phonogram. He thought it defensible for a portion, however short, of the original phonogram (and the "unique" aspect of the musical performance recorded in it) to be a relevant reproduction under related rights. The length of the music fragment made no difference here.[26]

Under certain circumstances it could be argued that use of a sound sample under copyright and/or related rights falls under the (music) right to quote and thus is not infringing. The (music) quote must then satisfy the strict statutory requirements of Article 15a paragraph 1 DCA and/or Article 10 sub a WNR, such as the requirement of a "serious" context, and may most certainly not serve

[20] J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht*, ["Copyright"] p. 162, Kluwer 3rd printing, 2005.
[21] See, i.a., D.W.F. Verkade and D.J.G. Visser (red.), *T&C Intellectuele eigendom*, ["T&C Intellectual property"] note 7 to Article 1 WNR, note 1b At Article 2 WNR and note. 2 to Article 6 WNR, Kluwer, 4th printing, 2013.
[22] J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht*, ["Copyright"] p. 654, Kluwer 3rd printing, 2005.
[23] D.W.F. Verkade and D.J.G. Visser (red.), *T&C Intellectuele eigendom*, ["T&C Intellectual property"] note 2 to Article 6 WNR, Kluwer, 4th printing, 2013.
[24] Du Bois (1996), see note 17.
[25] D.J.G. Visser, *Naburige rechten*, ["Neighbouring Rights"] p. 53 and 54, W.E.J. Tjeenk Willink, 1999.
[26] M.T.M. Koedooder (ed.), *Artiest & Recht. Nieuwe Praktijkgids Muziekrecht [Artist & Law: New Practical Guide to Music Law] 2011/2012*, p. 220, Kluwer, 2011.

merely as decoration or embellishment.[27] In a normal commercial context invoking the (music) right to quote will therefore not easily legitimize the use of a sound sample. This applies also to an appeal to the parody exception on the ground of Article 18b DCA and/or Article 10 sub j WNR. In a normal commercial context there will be no use of a sound sample in the context of caricature, parody, or pastiche.[28]

The "de minimis" limitation of Article 18a DCA does not hold in principle, according to the Dutch legislator[29], for the processing of deliberately chosen sound fragments in a new music work. Sampling will always - however small the sample - be intentional and knowing and therefore not by chance, with the object of its integration in and increasing the value of the new (music)work in which the sample is used. The use of a sample is therefore never a minor detail of a chance processing of a music fragment. The related right of ad hoc processing in Article 10 sub h WNR is in keeping with this.

The fact is, under Dutch copyright law and related rights it is far from always certain in advance when the use of a sample is permissible. There are always borderline cases. The question then is whether standards of foreign law could offer us any additional guidance that could be used to make a better estimate in advance as to whether the use of a sample is allowed under certain circumstances. The rulings of German and U.S. courts particularly can furnish additional insight.

Kraftwerk: "Metall auf Metall I"

In the 1970s the German group Kraftwerk planted an important seed for the furthering of electronic music. Present day music authors and producers still are inspired by Kraftwerk's music productions. It is where inspiration passes over to taking over (parts of) the music productions of others that problems could arise. This was the case in the hip-hop number, "*Nur Mir*" of Moses Pelham and Martin Haas, released in the mid-1990s. Kraftwerk contended that this number contained an unauthorized sample from its music production "*Metall auf Metall*" from 1977. At issue was a sample drum beat of two measures with a total length of two seconds. Kraftwerk had been litigating for some 12 years before the German courts on the question whether the taking of the two second sample at

[27] A.C.M. Alkema, *Kort begrip van het intellectuele eigendomsrecht*, [Brief concept of intellectual property law] p. 491, Kluwer, 10th printing, 2011.
[28] See, i.a., Pres. Haarlem District Court 20 September 1994, no. 521/1994, *Kort Geding* [interim injunction proceedings] 1994/408 (*Dominee/Never Mind Music*).
[29] Explanatory Memorandum to Article 18a Copyright Act, 28 482, no. 3, p. 52-53; see also D.W.F. Verkade and D.J.G. Visser (ed.), *T&C Intellectuele eigendom*, , ["T&C Intellectual property"] note 1 to Article 18a Aw, Kluwer, 4th printing, 2013.

issue from its music production "*Metall auf Metall*" in the hip-hop number "*Nur Mir*", infringes its copyright and related rights.

The German Federal Court of Justice has now issued two rulings. Both rulings (still) pertain exclusively to the question whether the sample of two seconds yields an infringement of the related rights of the phonogram producer. Kraftwerk's copyright to the music work was dropped in the lower court because the judge found that Kraftwerk's claim could be allowed on the basis of related right. There was no longer any occasion for an independent answer to the issue of copyright infringement.

In its ruling "*Metall auf Metall I*"[30] the German Federal Court of Justice found that quality and quantity are not relevant to the answer to the question whether a sample infringes the related right of the phonogram producer since its related rights stand apart from the quality and quantity of the audio recordings laid down in the phonogram. The taking over of a sound fragment laid down in a phonogram – however small sometimes - can already constitute infringement. The possible economic benefit to the sampler is not relevant here.[31]

In the words of the German Federal Court of Justice (legal grounds 11b, 13 and 14bb):

"(...) Dem von den Klägern hergestellten Tonträger sind nach den Feststellungen des Berufungsgerichts lediglich zwei Takte einer Rhythmussequenz des Titels „Metall auf Metall" und damit nur kleinste Tonpartikel entnommen worden. (...) Die Beurteilung des Berufungsgerichts stellt sich jedoch im Ergebnis als richtig dar. Ein Eingriff in das durch § 85 Abs. 1 Satz 1 UrhG geschützte ausschließliche Recht des Tonträgerherstellers ist bereits dann gegeben, wenn einem Tonträger kleinste Tonfetzen entnommen werden. (...)"

Only two bars of a rhythm sequence, and thus only the smallest of parts of the song Metall auf Metall , were taken from the phonogram produced by the Plaintiffs. (...) Nevertheless, the appeals court is ultimately correct in its holding. It is already an interference with the exclusive right of a producer of phonograms, which is protected by section 85, paragraph 1, sentence 1, of the UrhG, when even the smallest parts of sounds are taken from a phonogram (...)

"(...) Die Qualität oder die Quantität der von einem Tonträger entnommenen Töne kann, wie die Revision mit Recht rügt, kein taugliches Kriterium für die Beurteilung sein, ob die Übernahme von Ausschnitten eines Tonträgers in die Rechte des Tonträgerherstellers eingreift. Die Leistungsschutzrechte des Tonträgerherstellers bestehen unabhängig von der Qualität oder der Quantität der auf dem Tonträger festgelegten Töne und erstrecken sich auf Tonträger mit Tonaufnahmen jeglicher Art. (...)"

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[30] German Federal Court of Justice, BGH 20 November 2008, no. I ZR 112/06 (*Kraftwerk/Pelham et al.*), translated and introduced by N. Conley and T. Braegelmann, "Metall auf Metall: the Importance of the Kraftwerk Decision for the Sampling of Music in Germany*"*, *Journal of the Copyright Society of the U.S.A.*, p. 1017-1037, http://ssrn.com/abstract=1504982.

[31] Which also fits with the object of Article 1/2 the Convention of Geneva of 29 October 1979.

The quality or the quantity of the sounds that were taken from a phonogram cannot, as the Defendants correctly argued, be a suitable criterion for the assessment of whether the appropriation of excerpts of a phonogram interferes with the rights of a producer of phonograms. The neighboring rights of the phonogram producer exist independently from the quality or the quantity of the sounds that are fixed on the phonogram and encompass phonograms with audio recordings of any type .

"(...) Selbst die Entnahme kleinster Tonpartikel stellt einen Eingriff in die durch § 85 Abs. 1 Satz 1 UrhG geschützte Leistung des Tonträgerherstellers dar. (...)"

(...) Even the taking of the smallest pieces of sounds constitutes an interference with the effort of the producer of phonograms, which is protected by section 85, paragraph 1, sentence 1, of the UrhG. (...)

[Above English translation of legal grounds 11b, 13 and 14bb in BGH 20 November 2008, no. I ZR 112/06 (*Kraftwerk/Pelham et al.*), by Neil Conley affiliation not provided to SSRN Tom H. Braegelmann Benjamin N. Cardozo School of Law November 1, 2009; Journal of the Copyright Society, Vol. 56, p. 1017, 2009 is found at the url http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1504982]

The samplers Moses Pelham and Martin Haas adopted the defense that the use of the sample from "*Metall auf Metall*" was allegedly allowed under the German right of so-called "free use" or "*freie Benutzung*". They argued that their hip-hop number "*Nur Mir*" should be seen as an independent creation that had sufficient distance from the original by Kraftwerk. The German right of "*freie Benutzung*" makes one think of the American principle of "fair use" but it is not the same when viewed dogmatically.[32] The legal concepts have in common the high value they attach to free access to and the free use of cultural heritage relative to the exercise of copyright. But when compared with the American "fair use" the German right of "freie Benutzung" is strongly colored by the interest for continued cultural development. Adapted use of protected works should be possible under certain circumstances in order to move the culture as a whole further along. In addition, nearly every artist elaborates on the works of her/his predecessors and cultural expression will nearly automatically come to form part of the cultural public domain. The German right of "freie Benutzung" dogmatically is closer rather to Dutch copyright law's concepts of free adaptation or arrangement. A reproduction in revised form within the meaning of Article 13 DCA that can be deemed to be a new and original work comes close to the free adaptation allowed under the German right of "freie Benutzung", or "free use". Free adaptation is an intrinsic limitation of copyright - in the sense of a limitation on the right of reproduction - and is on the cutting edge of the monopoly of the

[32] For a comparison see, i.a., T. Reilly, *Good Fences Make Good Neighboring Rights: The German Federal Supreme Court Rules on the Digital Sampling of Sound Recordings in Metall auf Metall*, 2011, p. 38-40, unpublished work in progress, http://works.bepress.com/tracy_reilly/3.

original makers and the freedom of successive makers to become inspired by what has been made previously and to create independent works[33].

While the right of "freie Benutzung" can be applied legally only under German copyright law, the German Federal Court of Justice ruled that this principle can also be applied analogously under the German related right, more in particular in relation to the phonogram producer's exclusive exploitation rights. With this the German Federal Court of Justice applied free adaptation under copyright law analogously to the related right of the phonogram producer. The analogous application of the right of "freie Benutzung", according to the German Federal Court of Justice, does not hold if the samplers could have produced the sampled sound fragment, themselves, quite easily. The related right of the phonogram producer then does not stand in the way of cultural development because there is a simple alternative available to the sample users. The analogous application of the right of "freie Benutzung" is also not appropriate when the use of the sample infringes the copyright of the underlying music work, because, for example, the melody has also been taken over in a recognizable way.

Kraftwerk: "Metall auf Metall II"

Based on the legal framework set out in its first decision, the German Federal Court of Justice then found in "*Metall auf Metall II*"[34] that the use of the sample from Kraftwerk in the hip-hop number "*Nur Mir*" cannot be justified by analogous application of the right of "freie Benutzung" and thus infringe the related right of the phonogram producer. An important consideration of the German Federal Court of Justice is that Moses Pelham and Martin Haas could quite simply have themselves performed and recorded the sound fragment and not be hindered in so doing by the protection of the phonogram's related rights.

Consequences of "Kraftwerk I/II"

Both "*Kraftwerk*" decisions of the German Federal Court of Justice make clear that the phonogram producer's related rights should not be trifled with by sound sampling from the original phonogram. With the ever-advancing technologies for (electronic or digital) music production the question is whether sound sampling can still be justified under German law by an appeal to the right of "freie Benutzung". It is certain that with hardware and software recording technology has come within the reach of nearly everyone. Taking advantage of it may not always be simple, but making a recording certainly is today. The outcomes in "*Kraftwerk I/II*" could certainly have the result that samplers seek refuge in the

[33] J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht*, [Copyright] p. 157, Kluwer 3rd printing, 2005.
[34] German Federal Court of Justice, BGH 13 December 2012, I ZR 182/11 (*Metall auf Metall II*), including via *IEF* 12135.

use of relatively inexpensive imitations of sound samples, also known as *sample-alikes*. The decision that at first sight appears favorable could turn out to have negative consequences for phonogram producers in the music business. Users of cheaper sample-alikes will no longer have to call on the phonogram producer to obtain permission for the use of original sound samples. The producers of the sample-alikes will be the ones to benefit.[35] Another consequence of "*Kraftwerk I/II*" could be that samplers would make the original samples used unrecognizable to prevent rights holders from sounding the alarm. Technical tools would then be used to play hide and seek in musical terms so that the unwitting phonogram producer would not collect a usage fee.

The outcome of "*Kraftwerk I/II*" will nevertheless be music to the ears of phonogram producers under Dutch related rights. With "*Kraftwerk I/II*" in hand it becomes defensible to hold that every provable takeover of a sound fragment - however brief - is a reproduction of the phonogram. Prior permission is needed. A more nuanced approach, that one can speak of reproduction under law only if the nature and scope of the fragment taken over justifies it, seems to have lost ground. The digital tools available to process music make it difficult for sample users to maintain these days that it is not possible to record one's own sound fragment in a simple way and easily modify it. The musical alternative to the use of the original sound sample appears to be within reach. The sampler can himself select a sound fragment to play and to record or as the case may be to pay for the use of the original sound sample. In many cases this decision will be made on financial grounds.

America: Bridgeport Music, Inc. v. Dimension Films

The outcome in "*Metall auf Metall I*" resembles in a certain sense the outcome in another prominent case involving sound sampling that played out in the United States in 2005: *Bridgeport Music, Inc. v. Dimension Films*.[36] It is important to recognize that a phonogram can enjoy protection under U.S. copyright law as a *sound recording* as an independent work separate from the underlying music work. This is not the situation in Germany. Like our own Dutch WNR, a phonogram enjoys related rights protection under German law due to the investment in or bearing the risk for realizing the phonogram. In essence, U.S. sound recording copyright, like the Dutch and German, amounts to the phonogram's neighboring right: an intellectual property right in a (sound) recording.

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[35] Y. Vinckx, "*Het schelle is niet schel genoeg. Replay Heaven covert hits om goedkope samples te kunnen leveren*", [Shrill but not shrill enough. Replay Heaven covert hits to deliver cheap samples] *NRC Handelsblad*, 3 August 2007.

[36] US Court of Appeals for the Sixth Circuit 3 June 2005.

"*Bridgeport Music, Inc. v. Dimension Films"* concerned the use of a sample of two seconds from the number "*Get Off Your Ass and Jam*", recorded by Funkadelic and for which Bridgeport Music held the *sound recording copyright*. The sample was used by the well-known hip-hop group N.W.A in the number "*100 Miles and Running*". The sample was processed using a lowered pitch, among other things, to sixteen beats to have a total length of approximately seven seconds. This processed sample appears five times in the number "*100 Miles and Running*". After N.W.A.'s number was used in a film, Bridgeport Music brought legal action against the film producer for infringement of the *sound recording copyright*.

The U.S. court found in "*Bridgeport Music, Inc. v. Dimension Films"* that any takeover of a fragment from a *sound recording*, however small, requires the advance permission of its copyright holder(s). [37] Whether the sample is recognizable is not relevant.[38] The U.S. judge made the principle of "*get a license or do not sample*" sound loud and clear in his decision.[39] The German decision in "*Metall auf Metall I*" is in line with the decision in "*Bridgeport Music, Inc. v. Dimension Films"*. Under both U.S. and German law the sampler's leeway relative to rightsholders' claim(s) to a (sound) recording has become very narrow. Visser[40] appears to have been prescient under Dutch related rights: the use of a two-second sample would also be two seconds too much under related rights. The final word, however, is left to the Dutch courts, which have not yet determined what is the exact amount of leeway enjoyed by a sample. The question as to when there could be a free adaptation in terms of related rights that is equal to that under copyright remains to be answered.

Sound sampling has also been taboo in the United States right from the start. In one of the first court cases on sound sampling - the *Biz Markie* case - the commandment *"Thou shalt not steal*" the point of departure for the ruling by the U.S. judge as to whether taking over three words and looping two seconds of guitar chords (eight bars) was permissible.[41] Sampling was made the equivalent of theft. The *Biz Markie* case ended a period in which samples were usually used under the motto *catch me if you can*.[42] Samplers had to be on the lookout for

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[37] See for an analysis of the various forms of sampling in the light of *Bridgeport* D.M. Morrison in "*Bridgeport Redux: Digital Sampling and Audience Recoding*", p. 75-141, http://ssrn.com/abstract=1334809

[38] D.S. Passman, *All You Need to Know About the Music Business*, p. 334, 8th printing, Free Press, 2012; see also note 4.

[39] With reference to the analysis of D.M. Morrison, see note 4 and 37.

[40] D.J.G. Visser (1999), see note 25.

[41] *Grand Upright Music Ltd. v. Warner Bros. Records, Inc (Biz Markie)*, US Court for the Southern District of New York 17 December 1991 (780 F.Supp 182 SDNY 1991).

[42] Hip-hop group The Beastie Boys came up in the production of their second album "*Paul's Boutique*" not only with a musical masterpiece but also a wad of clearing of samples used: there are samples of105 numbers on the album all which which were cleared: see, i.a., P. Tingen, "*The Dust Brothers. Sampling, Remixing & The Boat Studio*", *Sound on Sound*, May 2005, Cambridge,

litigation from that moment on. Where an appeal to a non-infringing "de minimis" [43] had some success in earlier American cases [44] on sound sampling, after "*Bridgeport Music, Inc. v. Dimension Films"* it remains a question whether that defense will ever enjoy any success for sound sampling under U.S. law.[45] The same applies to a defense based on the principle of "fair use", which came up, for example, in "*Campbell v. Acuff-Rose Music, Inc."*[46] in which the Supreme Court allowed a commercial parody by the rap group 2 Live Crew of (a portion of) Roy Orbison's "*Oh, Pretty Woman*". While this argument does not reappear explicitly in the judgment in "*Bridgeport Music, Inc. v. Dimension Films"*, a defense based on "fair use" appears to have lost some degree of feasibility in the judgment on sound sampling.[47] When considering "fair use" cases on sound sampling review the nature and purpose of the sample use, the nature of the copyright protected work from which the sample was taken, the qualitative and quantitative scope of the sample used relative to the original work, and the effect of the use of the sample on the market of which the original work is part. An important basis for the "fair use" doctrine is that under certain circumstances a copyright monopoly may not imply any limitation on the public freedom of expression and open exchange of ideas. The basis for "de minimis" is less policy but more judicial efficiency to save time and money: there is no place for copyright futility in the courtroom.[48]

The fact is that under U.S. law the legal position of copyright holders to sound recordings relative to that of users of samples has become only stronger in the wake of "*Bridgeport Music, Inc. v. Dimension Films"*.

Legal uncertainty: chilling effect

It is far from always easy In the music trade to (re)construe unauthorized sound sampling. The question remains for holders both of copyrights and related rights

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UK, SOS Publications Group, http://www.soundonsound.com/sos/may05/articles/dust.htm; see for claims relating to unauthorized sample usage on "*Paul's Boutique*": R. Roberts, "*Beastie Boy's sampling in "Paul's Boutique" again in spotlight*", 10 May 2012, *L.A. Times music blog*: http://latimesblogs.latimes.com/music_blog/2012/05/beastie-boys-trouble-funk-lawsuit.html and recently S. Kaufman, "*Beastie Boys Dig For Legal Loophole Gold in "Paul's Boutique" Sample Suit*", 12 June 2014, SPIN, http://www.spin.com/articles/beastie-boys-win-pauls-boutique-sampling-lawsuit/?utm_source=spintwitter&utm_medium=social&utm_campaign=spintwitter.

[43] See, i.a., the analysis of S.R. Wilson, "*Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*", p. 185-193, *Journal of High Technology Law* 1/1, 2002 and J.R.R. Mueller, "*All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*", p. 435-438 and p. 453-458, *Indiana Law Journal*, 2006: http://ilj.law.indiana.edu/articles/81/81_1_Mueller.pdf.

[44] See, for example, *Tuff "N" Rumble Management, Inc. v. Profile Records*, No. 95 CIV.0246 (SHS), 1997 WL 158364 (S.D.N.Y. April 2, 1997).

[45] J.R.R. Mueller (2006), see note 44 and M. Gilzenrat Davis, "*Is "De Minimus" Back in Vogue for Sampling?*", http://www.futureofmusic.org/blog/2013/11/21/"de-minimus"-back-vogue-sampling.

[46] U.S. Supreme Court 7 March 1994, 510 U.S. 569 (*Campbell v. Acuff-Rose Music, Inc.).*

[47] J.R.R. Mueller (2006), see note 44.

[48] J.R.R. Mueller (2006), see note 44.

whether it is possible to prevent the use of samples. The phonogram producer appears to hold the strongest cards under "*Kraftwerk I/II*" and "*Bridgeport Music, Inc. v. Dimension Films"* to counteract the use of samples. Users of samples must take this into account. Whether the use of a cheaper *sample-alike* will give rise to a claim by the performing artist remains to be seen. In addition, the personality rights of the music author and/or performing artist can be brought to bear on the use of sound samples. Quite apart from the feasibility of this type of claim or the possible defenses to be raised, the mere threat of a claim and the uncertainty about the legal and financial outcome for use of a sample has a deterrent effect on the use of sound samples.[49] The possibility of costly and time-consuming litigation - which will often involve musicologists as experts to assess the sound sampling - is usually not an inviting prospect for users of samples.

Furthermore, the clearing of sound samples can be time-consuming and costly and even put the brakes on musical careers.[50] Transaction costs are high, also because negotiations will be needed with each rights holder, each with his own interests. Because rights holders often want to judge a sound sample for themselves, the sample will have to be processed into a music production. Since it is by then too late, the sampler can no longer go back.

Legal uncertainty and doubts about the financial consequences of the use of a sample put the brakes on musical creativity. Over time that will cost the rights holders operating income from usage fees. In financial terms, it is always better to be sampled well than not at all. In an artistic sense the question remains whether increasing use of less expensive and less authentically sounding *sample-alikes* will benefit musical creativity.[51]

The rather narrow results of "*Kraftwerk I/II*" and "*Bridgeport Music, Inc. v. Dimension Films"* could have the consequence that fewer original sound samples will be used in the future. The technical resources to be able to sample have become available to all and the need for use of samples remains just as great. This is, in my opinion, an undesirable scenario because sound sampling must be encouraged at this time to promote cultural transfer and the increase of operating revenue from original music productions.

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[49] See, for example, D. Lynskey, "*Harlem Shake: could it kill sampling?*", *The Guardian*, 15 March 2013, http://www.guardian.co.uk/music/2013/mar/13/harlem-shake-internet-killing-sampling...

[50] B.H.M. Schipper (2007), see note 10. With reference to the example given there of DJ and producer Peter Gelderblom, known also for his 2007 hit record "*Waiting For*" that includes samples from the Red Hot Chili Peppers' "*By the Way*". Gelderblom had to wait for more than one year for the final green light for the commercial release of this hit record.

[51] See Digby, "*Keep It Sample: Why Sampling is More Important Than Ever*", Mixmag, http://www.mixmag.net/music/the-blog/keep-it-sample/why-sampling-is-more-important-now.

Self-regulation of sound sampling

The income interests of the rightsholders are primarily directed at obtaining a reasonable payment for use of sound sampling. Apart from the statutory exceptions and free inspiration the main rule is that a fee must be paid for demonstrable (and thus often recognizable) use of sound samples. The lower limit is that use of a sample not be qualified as infringement of the personality rights of music authors and/or performing artists. Sample users could have all sorts of motives for the use of original sound samples or *sample-alikes*.

In an ideal music world the law would allow a market to arise for the use of samples and this sample market would work properly, that is, demand and supply would clear each other in an agreed use of a sample and its usage fee. History shows that this market is still not functioning optimally and the question remains whether it ever will, despite initiatives to set up international music databases.

In a situation where the use of (a small piece of) a phonogram implies nearly always that the phonogram producer must be satisfied first and the healthily functioning sample market seems to be utopia, I am arguing for self-regulation[52] of sound sampling by the (international) music industry, itself. If the receipt of a reasonable fee for the use of a sample is the main goal for a rightsholder, why not promote the use of original sound samples by the independent creation of an international code of conduct and a manageable framework for the establishment of sample fees? A regulation for sound sampling in the form of self-regulation is also preferable because the amendment of statutory regulation by treaty restrictions will involve much time and effort.

The point of departure, as the law now stands, is that the prior consent of the rightsholder(s) is needed for the commercial use of sound samples from a phonogram. In the framework of self-regulation such use of a sample must be allowed in principle, provided the sample user pays a reasonable usage fee based on pre-set parameters. This reasonable usage fee would have to be calculated in advance by the sampler using the parameters set by the music industry to determine the economic value of a sample. Such a reasonable fee could be expressed, for example, as fixed and/or variable rates or percentages, whether or not determined using sliding scales related to projected operating income. The great benefit from this is that the sampler has legal certainty in the sense that he

[52] Compare M.T.M. Koedooder (1994) who speaks of a "*Sampling Code*" (see note 3, p. 137-138), B.H.M. Schipper (2007) who opts for "*hard and fast rules*" (see note 10, p. 40) and C. Pilgram who refers to the "*intrinsic value of music productions*" in C. Pilgram, "Huidige muziekwetgeving moet aangepast aan moderne techniek. Chris Pilgram wil "intrinsieke waarde" produktie vaststellen" ["Current music legislation must be adjusted to modern technology. Chris Pilgram wants to establish "intrinsic value" of production"] *Muziek & Beeld*, p. 10-11, 26 August 1993.

no longer needs fear the threat of an injunction at the moment he has used the sample. This would also allow the sampler to make a better financial projection of the transaction costs and the fee to be paid for use of an original sample. Only the personality rights of the music authors and/or the performing artists could act as a brake on the intended use of sound samples. This could include, for example, (the threatened) mutilation of failure to comply with the required attribution. Furthermore self-regulation, as far as I am concerned, needs not to proceed every time from demanding copyright and related right fees from the sampler: demanding (some of these) rights would be opportune only when a sound sample "colors" the new music production to a very significant and recognizable degree.

Parameters for the pricing of original sound samples could, for example, be the nature and scope of the use of the sample set against the new music production, the recognizability of the original sample, the popularity both of the sample and the new music production in which this sample is processed, etc. Moreover, music works and phonograms could be classified by their popularity. If the sampler used a sound sample from a popular category its price would immediately be higher. These parameters would be applied (partially) by market forces.

Should any discussion arise between the parties for any reason about the standard pricing for the use of a sound sample, a special rate committee - which could be a unit of an existing national disputes resolution committee or collective rights organization[53] - could be able to break up the economic logjam. It is important that the sound sample should continue in use undisturbed while the discussion on rates continues. This might require posting some financial security to guarantee that rightsholders actually do receive a reasonable sample fee. A binding usage fee should express a balance between the interest of the sampler to be able to use the sound sample in his music production and the interest of the rightsholders to receive fair compensation for this.

Another important, more practical aspect of the self-regulation of sound sampling is as far as I am concerned to be able to use a single, worldwide, digital point of contact where sample users would be able to obtain all permissions needed. The various rightsholders should be able on this point to make better use of the

[53] At the national level a challenge to rates for *sample fees* could then be brought before the Copyrights Disputes Committee.

available digital options and the initiatives already launched in the past, for example by a (more intensive) pooling of resources.[54]

From rip-off artists to drivers of growth

The current generations are growing up in a digital world in which sound sampling is simpler than ever. Driving this phenomenon requires the rightsholders to "set free" - in part and in relative terms - their own music productions with the objective to increase their operating income with the help of sound sampling. Samplers, as I see it, are (no longer) rip-off artists from the get-go and therefore have no need to fear (post facto) rights claims, on condition that they first go to the central point of contact before using an original sample to establish the price to use the sample and then actually pay it. Samplers are free also to record new fragments or use cheaper *sample-alikes*. Self-regulation should lead to a reduction in transaction costs and more competition in the field of sound sampling, which would stimulate musical creativity[55].

I close with these words from Donald Passman[56] : "*The lesson in all this is that putting a sample in your record is serious business. So think carefully about what it means. A moment of pleasure can mean a lifetime of pain*". As the British pop group, The Verve, knows and rues.

B.H.M. Schipper, esq.

[54] Image an online application form for samples (like EMI Music Publishing) combined with international linked music databases in combination with the know-how and experience of specialized clearance offices.

[55] Sound sampling contrasted with the DJ's spin-art: B.H.M. Schipper, "Draaikunst of verdraaide kunst? De DJ-set als object van het auteursrecht", ["Spin Art or twisted skill: The DJ's set as an object of copyright"] *AA* 51-3 (2002), pp. 149-150 and B.H.M. Schipper "Vertolkers van vinyl. Nabuurrechtelijke aspecten van de dj-set" ["Interpreters of vinyl. Aspects of related rights of the DJ set"] , *AA* 51-4 (2002), pp. 227-232.

[56] D.S. Passman (2012), p. 335, see note 38.

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