This aspect of the decision clarifies how fair shares should be calculated, likely providing a high watermark for employee compensation: this being a case where the employee was the sole inventor and the employer did not incur much risk or cost. It is predicted that few, if any, future cases will exceed 5% compensation.

It should finally be noted that amendments to sections 39–41 (applicable to patents granted after 2005) extend these provisions to benefits derived from the invention as well as the patent. Nevertheless, this should not materially alter the approach recommended in this case. Overall, the Supreme Court's decision represents a significant improvement in the clarity of the law in this area.

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SAMPLING AND COPYRIGHT – DID THE CJEU MAKE THE RIGHT NOISES?

MUSIC sampling – the practice of incorporating a fraction or "sample" of a pre-existing sound recording within a new musical arrangement – began in earnest with the advent of commercially available digital samplers in the late 1970s. Five decades later and sampling has become a mainstay of recorded music worldwide. Professional and amateur music producers scour the sound recordings of yesteryear; searching for interesting rhythms, hooks, riffs, refrains, melodies and motifs that can be recontextualised in new compositions. Yet the legality of sampling has long been a source of uncertainty. Books, articles and whole academic theses have been written on the subject. In particular, it has hitherto been unclear whether sampling of sound recordings requires the permission of the holder of copyright (or, in EU terms "related rights") in the recording. Some steps to resolving this question were taken by the Court of Justice of the European Union (CJEU) in Case C-476/17, *Pelham v Hütter*, Judgment of 29 July 2019, EU:C:2019:624.

The case concerned the German music producer Pelham, who, without authorisation, sampled approximately two seconds of a rhythm sequence from a 1977 Kraftwerk sound recording. Pelham incorporated this sample, with minimal changes, as a continuous loop into his new musical composition. Kraftwerk alleged infringement. The legal issues involved necessitated a preliminary ruling from the CJEU. The first key question was whether the two second sample comprised a "reproduction … in part" of Kraftwerk's sound recording for the purposes of Article 2(c) of InfoSoc Directive (Directive 2001/29/EC (O.J. 2001 L 167 p.10)). If so, the second key question was whether the use of the sample fell within an exception, such as the quotation exception in Article 5(3)(d) of the same Directive.

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Article 2(c) permits music producers the exclusive right to authorise "reproduction … in part" of their sound recordings. The CJEU reasoned that these words must "be determined by considering their usual meaning in everyday language" while taking into account the context and purpose of the Directive (at [28]). And since the Directive requires "a high level of protection", the term "part" must be given a "literal interpretation" (at [30]). Thus any sample, "even if very short", is considered "part" of the phonogram (i.e. sound recording) from which it was extracted (at [29]). Yet the CJEU also defined the usual meaning of "reproduction" as only including aural reproductions recognisable "to the ear" (at [31]). Thus the overall concept of "reproduction… in part" only provides exclusivity over the unmodified use of samples.

The CJEU supported this interpretation of Article 2(c) by confirming that sampling "constitutes a form of artistic expression which is covered by freedom of the arts, as protected in Article 13 of the Charter" (at [35]). Insofar as artistic freedom also falls within the scope of freedom of expression (Art. 11 of the Charter and Art. 10(1) of the European Convention for the Protection of Human Rights), then sampling also "affords the opportunity to take part in the public exchange of cultural, political and social information and ideas" (at [34]). In light of these fundamental rights, allowing the term "reproduction" to encompass aural reproductions modified beyond human recognition "would also fail to meet the requirement of a fair balance" (at [37]). The CJEU left the application of this reasoning to the German courts.

The CJEU's definition of "reproduction … in part" invites three comments. First, the CJEU has defined "part" in a quantitative sense. Even a one-millisecond sample would be a "part". This quantitative reading differs from the British concept of "substantial part" under section 16(3)(a) of the Copyright, Designs and Patents Act 1988. The House of Lords defined substantial part as being "determined by its quality rather than its quantity" (*Designers Guild v Williams* [2000] 1 W.L.R. 2426). Thus only "parts" that embody the overall essence of the sound recording would have been traditionally protected in the UK.

Second, the CJEU has created two different "part tests" within the EU related rights framework. A second, distinct "part test" comes via the CJEU's requirement of "substantial part" under Article 9(1)(b) of the Related Rights Directive (Directive 2006/115/EC (O.J. 2006 L 376 p.28)). Article 9(1)(b) grants producers an exclusive distribution right over their sound recordings, and "copies thereof". In defining "copies thereof", the CJEU held that the Related Rights Directive is intended to prevent piracy (at [44]). The term "copies" therefore only covers "counterfeit copies", which are intended as replacements for "lawful copies" (at [46]). Moreover, the term "copies" should be understood as articles "which contain sounds taken directly or indirectly from a phonogram [sound recording]

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and which embody 'all or a substantial part' of the sounds fixed in that phonogram [sound recording]" (at [52]). But samples are not substitutes for a "lawful copies", being used "for the purposes of creating a new and distinct work" (at [47]). Thus samples cannot constitute "a substantial part" under the Related Rights Directive, despite being a "part" for the purposes of the InfoSoc Directive.

Finally, it is unclear why the CJEU chose recognisability "to the ear" as its determining factor in its new modification test for determining "reproduction". Human recognisability is certainly welcomed. Protection clearly does not extend to aural reproductions only recognisable by robots and machines. However, many samples are humanly unrecognisable while remaining unmodified. For example, samples lasting a few milliseconds could be considered "too short to be recognised". Alternatively, samples from recordings of the natural or industrial sound (such as recordings of waves breaking on the coast, or the bustle of traffic) could be considered unrecognisable due to having "an unrecognisable source". It is unclear why these alternative unrecognisable samples should be protected under Article 2(c), while those samples "modified beyond recognition" are excluded. This curiosity is exacerbated by how the CJEU answered the German court's second key question; whether the use of a protectable sample can fall within the scope of the quotation exception in Article 5(3)(d) of the InfoSoc Directive?

Article 5(3)(d) of the InfoSoc Directive allows Member States to provide a qualified exception or limitation to protection for "quotations for purposes such as criticism or review". The CJEU wasted no time identifying sampling as a legitimate form of quotation (at [68]). Yet the CJEU also found it necessary to define "quotation". Accordingly, "the essential characteristics of a quotation are the use ... 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". Put otherwise, the user must "have the intention of entering into 'dialogue' with that work" (at [71]). The CJEU left it for the German courts to decide whether Pelham had entered into a dialogue with Kraftwerk.

These new essential characteristics of quotation also invite comment. First, it is unclear what is meant by "intention of entering into 'dialogue'", but presumably the CJEU would not have confirmed that samples can be quoted unless samples can also satisfy the "dialogue" criterion. The Advocate General (AG) has suggested that acts of confrontation, tribute and interaction are permissible forms of "dialogue" (EU:C:2018:1002, at [64]). Whether anything unites this list is uncertain and, prima facie, the AG's examples fall short of samplers' full ambit of opportunities "to take part in the public exchange of cultural, political and social information and ideas". Moreover, in relation to quoting authorial works, the AG's delimitation of "dialogue" might restrict the EU quotation right beyond the mandatory requirements of international copyright (see Art. 10(1) of

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the Berne Convention for the Protection of Literary and Artistic Works (as amended 28 September 1979)).

Professor Drassinower has previously offered an alternative, more expansive definition of "dialogue", which ensures that users' rights are not unduly restricted. Drassinower argues that the concept of authorship (which underpins copyright) should be understood as an ongoing "dialogue" between past, present and future authors (*What's Wrong with Copying?* (2015)). Insofar as a sampler is creating a new work of authorship – namely a new musical work itself protected by copyright – the sampler is deemed to have engaged with an intention of entering into "dialogue". Therefore a national court can immediately proceed to consider whether: (1) the source material had already been lawfully made available to the public; (2) the source of the sampled sound recording is indicated; (3) the use of the sample accords with fair practice; and (4) the sample lasts no longer than is required by the purpose of creating a new recording (Art. 5(3)(d)).

Lastly, an unwelcome quirk in the CJEU's reasoning casts further doubts on whether one can sample from sound recordings that do not contain authorial works. The CJEU interpreted sampling solely as a means by which one quotes a "protected musical work" (at [68]). But what if sampler reproduces non-authorial sounds, such as the aforementioned waves and traffic sounds? With no author to speak to, how is the sampler supposed to engage in "dialogue"?

While the CJEU has thus opened up some space for unauthorised sampling of sound recordings containing musical works, its judgment has generated a cacophony of questions that will now need to be resolved.

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DECONSTRUCTING PARENTHOOD: WHAT MAKES A "MOTHER"?

FIFTY years ago, before the development of artificial reproductive technology, and when same-sex relationships and transgender individuals were unrecognised by the law, the question of who was a child's mother was so obvious as not to warrant judicial or legislative attention. However, the social shape and legal understanding of the family has dramatically changed over the last half-century, giving rise to difficult questions concerning parenthood and filiation. For this reason, when the court was called upon for the first time to define the term "mother" under English law in *TT and YY v The Registrar General for England and Wales* ([2019] EWHC 2384 (Fam)), it required no fewer than 58 pages to provide an answer.

The facts of this case are straightforward: TT was registered female at birth, but later transitioned to live in the male gender, and in April 2017

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