

BVMI on the Opinion in the case “Metall auf Metall”:

“Welcome clarity in favour of intellectual property and the rights of phonogram producers!”

Berlin, 12 December 2018 - The Bundesverband Musikindustrie e.V. (BVMI) welcomes the news that Advocate General Maciej Szpunar has advised the Court of Justice of the European Union (CJEU) in his Opinion, to decide that sampling constitutes an infringement of the rights of phonogram producers to the extent it happens without their knowledge. The underlying case, which has been ongoing since the late 1990s, concerns an extract from the Kraftwerk song “Metall auf Metall”, which Moses Pelham used in a track sung by Sabrina Setlur.

The Advocate General reasoned, among other things, that an audio recording is protected as an indivisible whole. The use, without consent, of an extract as a sample on another phonogram constitutes an infringement of the exclusive right of the producer to authorise or prohibit a reproduction of its phonogram. The AG also concluded that the situation at hand did not concern a copy within the meaning of the Rental and Lending Rights Directive 2006/115, as a phonogram containing a sample is not a copy of another phonogram. According to the AG, the InfoSoc Directive 2001/29 precludes a provision under national law according to which an independent work may be created in the free use of another work, without the consent of the author of that other work, because such an exception would restrict the exclusive exploitation rights too severely. Moreover, the AG stated that sampling is not a quotation, as extracts taken using the techniques of sampling and incorporated into a new work as integral and unrecognisable parts, are without any intention of interacting with the original work.

Dr. **Florian Drücke**, Chairman & CEO of BVMI: “It is pleasing to see that the Opinion is based on the principles of intellectual property and on the rights of phonogram producers specifically. Particularly in a time where attempts to weaken exclusive rights are commonplace, the Opinion represents an important acknowledgement of the principles of existing copyright law. If the CJEU follows this line of reasoning in this 20-year long legal dispute, that will create greater clarity in the area of licensing”.

René Houareau, Managing Director Legal & Political Affairs at BVMI: “The Advocate General makes it clear that the primacy of exclusive rights does not, in principle, impair artistic freedom and that the possibility of exercising licensing rights is an integral part of a healthy market. Artists still have legal ways to use a certain sound sequence in their own productions, including reproducing the notes themselves or the completely standard practice of ‘source clearing’, whereby one can obtain a licence for the relevant rights from the rightholders.”

In recent years, BVMI has repeatedly spoken out against a use of sound snippets without consent by way of sampling because such a practice carries the risk of further eroding the copyrights and neighbouring rights of artists and their partners. Where it is recognisable that a sound sequence



has been taken from another work or where this is possibly even the specific intent, that should remain illegal unless the rightholder grants authorisation. Legal possibilities include reproducing the sound sequences or entering into source clearing with the rightholder.

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