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Legal Scenarios for Borrowing in Electronic Music

Abstract: This article refers to various intertextual strategies in the field of electronic music and their legal categorization. The main part of the article is devoted to the problem of sampling, widely discussed in the literature and jurisprudence. Possible legal qualifications are discussed, as well as controversies related to the different scope of protection of works, artistic performances, and phonograms. The article also refers to other phenomena in the electronic field, including reedit, remix, or mash-up. In the summary, the general rules for making a legal assessment of musical borrowing strategies, interpretative guidelines in relation to a musical quotation, as well as *de lege ferenda* postulates are outlined.

Keywords: electronic music, borrowing, sampling, copyright protection, fair use, quotation, inspiration, derivative work

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Introduction

Technological progress has had a profound impact on music in just about every area. During the past century, however, a unique dynamic of shifts can be observed. This is largely due to the fact that it is now possible to capture and record what used to be ephemeral. Contemporary recording capabilities have made it possible to eliminate its one-off limitations[1] and have changed music in a way similar to how the invention of print influenced literature.[2] Along with the development of mass communication and the Internet, the music distribution and promotion models have also undergone a massive transformation. It is even fair to say that the entire "music industry" has changed dramatically. Music recordings have become the central element of musicians' activities,[3] marginalizing interest in other aspects of musical practice.

Technological change has also affected the compositional process itself. Successive waves of progress in recording technologies have not only made it possible to create new sounds, but have also opened up new opportunities for intertextuality in music. In the past, any use of someone's musical work meant that one had to reach for someone else's musical "content", i.e. specific material, for example a theme. With the existing recording technologies at one's disposal, it has become possible to make references not only to specific musical works but to the original performances of those works. As a consequence, the scope of available artistic strategies[4] has become much broader. Incorporating multiple contexts into one's work has become possible on a much wider scale. Moreover, it has also become much easier, more accessible, and more common thanks to technological advancement. Hence, a collision of the aforementioned trends with copyright was only a matter of time. After all, copyright law was created in a completely different socio-economic and technological reality.[5]

1 See M. Katz, *Capturing Sound. How Technology Has Changed Music*, University of California Press, Berkeley–Los Angeles–London 2010, p. 4. By removing one-off limitations, the recording technology has brought the ontological status of a performance closer to a work – see C. Moore, *Work and Recordings: The Impact of Commercialisation and Digitalisation*, in: M. Talbot (ed.), *The Musical Work: Reality or Invention?*, Liverpool University Press, Liverpool 2000, pp. 90-91.

2 P. Tschmuck, *Creativity and Innovation in the Music Industry*, 2nd ed., Springer, Berlin–Heidelberg 2012, p. 118.

3 J. Demers, *Steal This Music. How Intellectual Property Law Affects Musical Creativity*, University of Georgia Press, Athens, GA 2006, p. 35; P. Théberge, *Technology, Creative Practice and Copyright*, in: S. Frith, L. Marshall (eds.), *Music and Copyright*, 2nd ed., Edinburgh University Press, Edinburgh 2004, p. 143. Nor can one ignore technological changes in legal discourse, e.g. T.L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court's Attempt to Afford "Sound" Copyright Protection to Sound Recordings*, "Columbia Journal of Law & the Arts" 2008, Vol. 31, pp. 378-379.

4 S. Lacasse, *Intertextuality and Hypertextuality in Recorded Popular Music*, in: M. Talbot (ed.), *The Musical Work: Reality or Invention?*, Liverpool University Press, Liverpool 2000, p. 58.

5 L. Landy, *Understanding the Art of Sound Organization*, MIT Press, Cambridge–London 2007, p. 114; N. Collins, M. Schedel, S. Wilson, *Electronic Music*, Cambridge University Press, Cambridge 2013, pp. 22-23.

Before engaging in legal considerations, however, one general thesis comes to the fore: it has always been a matter of what one can hear, not how it is done. Even a superficial overview of the possible techniques (the first that comes to one's mind is sampling, and then anything that can be done with smaller or larger excerpts: changes of pitch, key, tempo, looping, sequencing, morphing, reverse replay, remix, re-edit, and mash-up (to name only a few) leads to a rather obvious conclusion: none of possible scenarios are new or especially innovative *per se*, despite the new names. Contemporary tools that enable the modification of isolated musical material are not so different from those employed by composers who modified themes from fugues, twelve-tone series, or musical themes in variations. In all of these scenarios, a specific piece is transposed, and changes in mode, sound, colour, tone as well as modifications such as reduction, enrichment, diminution, augmentation, inversion, etc. are introduced.

The application of modern technologies has merely broadened the spectrum of creative possibilities and made it possible to synthesize new sounds and create altogether new effects. However, from the perspective of the categorizations used in music and building higher musical structures, all of the options described above are hardly surprising, especially for people who are familiar with the history and theory of music.[6] It is merely the scale of these possibilities that has grown bigger in the wake of creative opportunities offered by modern technologies. It appears, therefore, that the copyright classification of the above phenomena should be similar to "conventional" categories[7] and classified under either fair use (quotation), an inspiration,[8] or a derivative work. However, as is so often the case, it is difficult to lay down clear borders and each specific instance requires an independent assessment. One can, however, rely on a number of general guidelines.

Sampling: Dancing Around Quotation

As a technique, sampling makes one think of quotations as a most suitable legal scenario. Essentially, it is about isolating a given sound quality or characteristic (sound, phrase, layer, excerpt) that serves as a component for a new musical piece. This brings us to two fundamental legal categories: fair use and a derivative work (with the grey area of inspiration in between). To make a proper legal qualification, a number of fundamental questions need to be addressed: which parts

[6] One can argue, though, that the scale of creative paths is enormous and exceeds the limits of imagination of Western musicians, see J. Demers, op. cit., pp. 21-24. See also R. Middleton, *Work-in(g)-Practice: Configurations of the Popular Music Intertext*, in: M. Talbot (ed.), *The Musical Work: Reality or Invention?*, Liverpool University Press, Liverpool 2000, p. 71 and C. Moore, op. cit., p. 93.

[7] See J.R.R. Mueller, *All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*, "Indiana Law Journal" 2006, Vol. 81(1), p. 436.

[8] In Polish Copyright Law an inspired work borrows only a general idea, style, technique, convention, frames of a genre, i.e. layers not subject to copyright protection.

where borrowed?; where were they used? (and whether the incorporating work itself meets the criteria for copyright protection); and how? (in both quantitative terms, i.e. the extent to which they were integrated into a new work, and qualitative, i.e. what kind of additional modifications were introduced?).

Let us consider a situation when sampling meets the premises of a quote. If the abstracted sound quality in itself meets the copyright protection criteria,[9] it can be transplanted into a new work within the legal framework of fair use. The dissimilarity of a musical quote allows, firstly, to modify the borrowing; secondly, to acknowledge the quote *post factum*; and thirdly, to separate it using purely musical means. Assuming that in a specific case the acquisition will not exceed the permissible size (assessed in the context of the entire work) and that it will enter into dialogue with the new work, the sampling practice may be within the limits of the quotation.[10] The above has also been confirmed by the Court of Justice of the European Union (CJEU) in the *Pelham* ruling.[11] Any categorization as a quotation should also include an assessment in the context of related rights – both rights to an artistic performance as well as rights to the phonogram.[12] Furthermore, this may also apply to a sound mosaic, where a musical work relies on multiple quotations. Each of those quotations should be looked at in the context of the full work, both in terms of its size and the function performed in the work.

A certain reservation needs to be made here. Sampling is an intertextual strategy, and as such it is much more profound than a typical musical quotation. Not only is the textual layer absorbed, but also the actual performance.[13] Hence, in my opinion once a quotation categorization is made, one should not automatically accept

[9] The CJEU in several judgments (Case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*, ECR, 2009, I-06569; Case C-145/10, *Eva-Maria Painer v. Standard VerlagsGmbH*, ECR, 2011, I-12533; or Case C-393/09, *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvu kultury*, ECR, 2010, I-13971) has established a very low level of copyright protection. Nevertheless, in music where there is no traditional idea/expression dichotomy, the degree of communitarization of entire fragments based on popular patterns (for example scales, arpeggios, progressions, cadences) is of a greater level – compare R.S. Rosen, *Music and Copyright*, Oxford University Press, Oxford–New York 2008, pp. 164-167; G. Mania, *Muzyka w prawie autorskim* [Music in Copyright Law], Polskie Wydawnictwo Muzyczne, Kraków 2020, pp. 114-117.

[10] Compare the judgment of Bundesverfassungsgericht of 31 May 2016, 1 BvR 1585/13, GRUR 2016, 690; and L. Bently et al., *Sound Sampling, a Permitted Use Under EU Copyright Law? Opinion of the European Copyright Society in Relation to the Pending Reference before the CJEU in Case C-476/17, Pelham GmbH v. Hütter*, "International Review of Intellectual Property and Competition Law (IIC)" 2019, Vol. 50, para. 4.6, p. 482.

[11] Judgment of 29 July 2019, Case C-476/17, *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben*, ECLI:EU:C:2019:624 ("*Pelham* judgment").

[12] This can be very beneficial for a phonogram producer, see I. Duhanic, *Copy This Sound! The Cultural Importance of Sampling for Hip Hop Music in Copyright Law – A Copyright Law Analysis of the Sampling Decision of the German Federal Constitutional Court*, "Journal of Intellectual Property Law & Practice" 2016, Vol. 11(12), p. 942.

[13] M. Katz (op. cit., pp. 149-150) calls sampling a "performative quotation". See also J. Okpaluba, *Digital Sampling and Music Industry Practices, Re-Spun*, in: K. Bowrey, M. Handler (eds.), *Law and Creativity in the Age of the Entertainment Franchise*, Cambridge University Press, Cambridge 2014, p. 81.

the actual performance being included therein. It is not always the case that a reference to a specific musical text necessitates a reference to a specific performance. If, for example, a specific artistic effect is to be evoked as a result of a reference (dialogue) to a specific musical piece and the semantic layer of the text itself, there is no justification for taking over a specific performance, let alone a phonogram.[14] If, however, a reference (dialogue) is made both to the piece and a specific performance, such a quotation can be seen as acceptable within the framework of the copyright law and related rights.[15] In such a situation, how such an incorporation was made (in a technical sense) becomes irrelevant, similarly to whether it is easier or more difficult to incorporate someone's works.[16]

The question of the copyright status of the incorporating work does not entail any legal issues that would be unique for the electronic field. However, a question arises regarding the status of those works which, while using someone else's work, themselves rely on repeatable and clichéd elements to such an extent that they hardly deserve a copyright protection. It may happen, therefore, that borrowing from another work is the only characteristic element of the new piece, and therefore defines its uniqueness. In other words, if we deduct the borrowed part from the piece, what is left fails to meet the minimum criteria for protection. A situation like this would take place in the case of some products that consist only in compiling other people's works (created as a result of, e.g., mixing), as well as those creative trends in which only the verbal layer, rhythmic recitation, or melorecitation, for example, are added to the existing work.[17] The same reasoning can be applied with caution to some cases of so-called "appropriation art", in particular when the re-use of someone else's material consists only in changing the creative context without interfering with the expression (the form).[18] In such instances, one should conclude that the conditions for fair use are not met, therefore the use of someone else's work is only its multiplication and requires the consent of the author or copyright owner under the law of copyright and related rights.

Another question, that of how the extraction has been used, opens a whole series of issues. This aspect alone may determine one of three possible qualifications

[14] If the borrowed sample is used in a different function, is transformed, or becomes a rhythmic base, as often is the case in rap music (see S. Vaidhyanathan, *Copyright and Copywrongs. The Rise of Intellectual Property and How It Threatens Creativity*, NYU Press, New York–London 2001, p. 131), then the necessary dialogue that is crucial for quotation is problematic.

[15] See J. Barta, R. Markiewicz, *Prawo autorskie* [Copyright Law], Wolters Kluwer, Warszawa 2016, p. 242.

[16] Or how well equipped is a producer – which is a reference to the *Metall auf Metall II* judgment of BGH of 13 December 2012, I ZR 182/11, GRUR 2013, 614.

[17] The mere fact that incorporation becomes a building material, a base for new rhythmic structures (see S. Vaidhyanathan, op. cit., p. 144) does not automatically mean that the borrowing is justified.

[18] In such cases, copyright law particularly strongly shows its deep historical and aesthetical anchoring in 18th and 19th centuries.

(a quote, an inspiration/independent work, a derivative work). The framework of a musical quote is different from the terms of a literary quote. In the case of music, it is possible to modify the incorporated fragment, as long as it does not affect its recognisability (after all, this is the meaning and condition of a quote), and also, possibly, as long as it does not distort the meaning or message of both the piece and its performance.[19] It is, therefore, possible to modify the acquired sample, as well as to locate the abstracted qualities in a new sound space.[20] After all, these modifications are often dictated not only by the musical expression, but also by the extra-musical influence of music. In many cases, sampling is about playing with contexts, giving the transplant a new, surprising sense. The game with contexts alone, however, devoid of changes in the form of expression, will usually remain in the sphere of an idea, even if it is a most brilliant one.

The recognizability of a musical quote can be achieved by various means, primarily musical. However, it may also result, for example, from the right narration of verbal and musical works. It is not possible to isolate the incorporated fragment in a way that would be similar to literary works, and the application of such a requirement would be contrary to the widely accepted musical practice. The appropriate marking of the quote may also be different – it may be situated on the album cover, in the file description, in the song description, etc. It is, however, necessary, both in terms of the requirement to respect personal rights in fair use and to avoid the allegation of plagiarism.

The question remains as to the size of the quote and its role in the context of the work as a whole. No numerical framework for an acceptable musical quotation exists.[21] It can be a fragment which is a few seconds long, but also longer. Its admissibility is determined in each specific case both by the purpose of the quotation (the purpose of the artistic dialogue) and the size of the incorporating work. In the case of music, the artistic goal depends on the context of the entire piece. It may be that a more extensive quote is necessary for the narrative. In no case, however, can a quote replace the person's own work or constitute a dominant element of a new work. The quote should fulfil an auxiliary, enriching, and beautifying role. Therefore, works whose uniqueness is based essentially on the borrowed characteristics will not fall within the limits of fair use. We will often be dealing with such a situation if we take over even a short fragment that is looped and constitutes the structural axis of a new work. The situation will be quite sim-

[19] Cf. M. Katz, op. cit., pp. 157-158. See also D.J. Moser, C.L. Slay, *Music Copyright Law*, Cengage Learning PTR, Boston 2012, p. 90 and T.L. Reilly, *Debunking the Top Three Myths…*, p. 395.

[20] See S. Lacasse, op. cit., p. 39.

[21] There are no strict, quantitative rules applicable to all possible scenarios – compare D.J. Moser, C.L. Slay, op. cit., p. 33 discussing the *Marks v. Leo Feist* case (Inc., 290 F. 959, 960 (2nd Cir. 1923)), incorrectly applied to factual situations different from the one which was the basis of the judgment.

ilar in the case of building a new piece around one long fragment.[22] As long as the activity of the author does not aim at blurring the features of the original borrowing to build an entirely independent work, as is the case with variations, such activity cannot be classified as an inspiration either. It will then remain a derivative work.

Sampling: If Not Quotation, Then…?

Sampling may involve taking over insignificant fragments of a musical text, or such deep modifications that the "quotation scenario" is unlikely. In these situations a number of peculiarities inevitably enter into the debate, resulting from the overlap of protection categories: copyright protection of a recorded musical work, related rights to an artistic performance, and related rights to the phonogram.

Lack of protection of the borrowed material resulting from the fact that a certain fragment does not meet the creative- and unique-characteristics criteria effectively precludes its copyright relevance. This applies to both larger and non-original pieces, as well as micro-entities, which are not subject to individual copyright protection as independent pieces, e.g. a single sound or a simple sequence of a few sounds.[23]

The principle illustrated above should also apply to related performance rights. If a "subject" performed cannot be classified as a "work" within the copyright framework, it does not have the artistic merits necessary for copyright protection. In other words, if a borrowed piece does not have the potential for developing sufficient originality within the "textual" framework itself, consequently, there is not enough space for an interpretation that could be referred to as artistic.

The situation is more complicated with phonograms. Here protection is very often linked to the first recording of any acoustic phenomenon, thus protecting the investment necessary to complete a recording. If, therefore, parts of a given piece that are not protected by copyright law are borrowed, there is not enough justification for reference to a quotation, let alone a derivative work. Such an instance is not an example of infringement on the rights of performance artists, however borrowing even a short excerpt[24] can constitute an infringement of rights to the phonogram.

[22] Compare M. Katz, op. cit., pp. 154-158, describing a composition *Praise You* by Norman Cook, which uses a song *Take Yo' Praise* by Camille Yarbrough.

[23] Just because a sample is taken from a protected work does not automatically imply copyright protection of the sample itself. If even a short sample is a manifestation of individuality, it may be subject to copyright protection, nevertheless, there should not be any automatism in legal assessment – compare the judgment of the BGH of 16 April 2015, I ZR 225/12, GRUR 2015, 1189 ("Goldrapper").

[24] The quantity or quality is irrelevant, J. Barta, R. Markiewicz, op. cit., p. 418.

Such a conclusion may meet some resistance, however,[25] because neighbouring rights are also derivative rights in a sense, hence, as the name suggests, they should "sway" towards the copyright law.[26] Furthermore, such an interpretation leads to a conclusion that even a single recorded sound is subject to protection. However, because other characteristics justify the relevance of related rights (to the phonogram), the scope of protection, it would seem, may be different.[27]

Such a highly conservative interpretative approach was pursued by the Advocate General, Maciej Szpunar, in his review of the *Pelham* case[28] and almost immediately became subject to criticism by the European Copyright Society.[29] In the *Pelham* case, the CJEU concluded that intellectual property rights are not inviolable or subject to protection as absolute rights.[30] These rights should be weighed against other fundamental rights, including artistic freedom.[31] Sampling, as a form of expression, is part of this freedom. The CJEU has concluded that sampling consisting in the use of an altered sample, unrecognizable to the ear[32] in a new work, does not infringe on the protected rights (in particular the right of reproduction) of phonograph producers.[33]

Following the logic of the CJEU's reasoning, it is also acceptable to consider a situation in which the small fragment, borrowed and unmodified, in itself remains unrecognizable to the ear. What does change are external parameters, which allows the sample to merge into a new sound constellation.

On the other hand, introducing no change to a sample combined with its auditory recognizability constitutes a violation of the rights of phonogram producers, even if the rights of authors or performers are not infringed. As samplers do not use samples as a creative substance, altered by them, nor do they enter in an artis-

[25] See B. Fitzgerald, D. O'Brien, *Digital Sampling and Culture Jamming in a Remix World: What Does the Law Allow?*, "Media and Arts Law Review" 2005, Vol. 10(4), p. 2 and L. Bently et al., op. cit., paras. 3.1, 3.2, 3.4, pp. 479-480.

[26] M. Czajkowska-Dąbrowska, in: J. Barta (ed.), *System prawa prywatnego* [Private Law System], Vol. 13: *Prawo autorskie* [Copyright Law], C.H. Beck, Warszawa 2013, pp. 461-462. Compare also the *Metall auf Metall II* judgment; I. Duhanic, op. cit., p. 936; and paras. 28-38 of the opinion of Advocate General (Szpunar) delivered on 12 December 2018, Case C-476/17, *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben*, ECLI:EU:C:2018:1002 ("*Pelham* opinion").

[27] See A. Kopff, in: S. Grzybowski, A. Kopff, J. Serda, *Zagadnienia prawa autorskiego* [Issues of Copyright Law], PWN, Warszawa 1973, pp. 277-278, and the *Pelham* opinion, paras. 34-36.

[28] *Pelham* opinion, para. 30.

[29] L. Bently et al., op. cit., para. 3.1, p. 477.

[30] *Pelham* judgment, para. 33.

[31] Ibidem, para. 34.

[32] CJEU did not determine whose recognition is relevant – whether an average listener, a specialist, or a well-informed amateur, for example – compare M. Senftleben, *Flexibility Grave – Partial Reproduction Focus and Closed System Fetishism in CJEU, Pelham*, "International Review of Intellectual Property and Competition Law (IIC)" 2020, Vol. 51, p. 757.

[33] *Pelham* judgment, para. 39.

tic dialogue as part of a quotation, there is no justification for the use of someone else's investment. In such a situation, the remark about the freedom to synthesize a specific sample on one's own, expressed in American[34] and German[35] judgments as well as by the Advocate General's opinion,[36] is warranted.

Inspired/Independent Works in Electronic Arts

Electronic methods of processing the reference material enable modifications on such a large scale that an inspired piece, or even an independent piece, may be created. This is often the case with far-reaching arrangements that already have the character of free variations or fantasies. Inspiration is only possible when the acquired elements appear only as reminiscences, some kind of flashbacks. The traces of the original work, its fragments, and its performance characteristics become blurred, and its originality is determined exclusively by the features of the secondary (inspired) work. We often deal with such a situation in the field of sampling[37] (and generally in music).

However, a peculiarity that can be seen with the adoption of non-original elements re-emerges here. The creation, use, and disposal of an inspired work does not require the consent of the author of the inspiring work. It is not necessary – in my opinion – to seek the consent of the performer. With the uniqueness of the original work disappearing, the artistic quality connected with the performance of this work also becomes blurred. The author of the inspired piece, however, still relies on the original phonogram. As long as this fact is proven,[38] an inspired (or even self-contained piece), in which even someone else's "flashes" are audible, may constitute a multiplication of a phonogram and – as a consequence – come under the scope of the economic exclusivity of its producer.[39] Again, such a conclusion

[34] Two American legal cases should be mentioned here in particular. The first case, *Newton v. Diamond* (349 F.3d 591 (9th Cir. 2003)) ends with a conclusion that the use of a short excerpt of a recording, that is not subject to copyright protection, is admissible if a relevant licence agreement is signed with the producer of the sound recording. In the second case, *Bridgeport Music, Inc. v. Dimension Films* (410 F.3d 792 (6th Cir. 2005)) the core consideration was whether a short guitar riff can be borrowed. The unique characteristics of the excerpt and the artistic merit of the performance did not have enough legal justification for protection. However, the user of the excerpt could contribute such aspects (perform, synthesize) autonomously and freely, instead of reaching for a existing recording ("Get a license or do not sample. [...] It must be recalled that if an artist wants to incorporate a 'riff' from another work in his or her recording, he is free to duplicate the sound of that 'riff' in the studio"). By saving some extra work, the characteristics that are legally protected within the neighbouring sound recording framework were infringed upon.

[35] See the *Metall auf Metall II* judgment.

[36] *Pelham* opinion, para. 30. See also S. Lacasse, op. cit., p. 40 for borrowing imitating sampling whilst independently synthesizing musical content. See also R.S. Rosen, op. cit., p. 319.

[37] P. Théberge, op. cit., pp. 148-149; see also S. Lacasse, op. cit., p. 40.

[38] See J. Griffin, *Copyright in Music: A Role for the Principles of Reverse Engineering*, "Legal Studies" 2010, Vol. 30(4), pp. 664-665; in sampling, as in quotation, the recognizability is often essential, see D.J. Moser, C.L. Slay, op. cit., p. 90.

[39] Hence, the scope of phonogram protection is wider than copyright protection of a work – see M. Klekotko, *Sampling w świetle prawa autorskiego i praw pokrewnych* [Sampling in the Light of Copyright and Relat-

may arouse controversy, but a natural question arises: if the author of an inspired piece (or an independent work created on the basis of someone else's work and its recording) can modify the material so deeply, why shouldn't they be allowed to synthesize specific sound qualities?[40]

These considerations then involve the issue of investment outlays, but let me repeat that this is precisely the reason for introducing the concept of related rights to phonograms to copyright regulation. In my opinion there is currently no economic justification for the existence of a protection of phonograms in the copyright law system, considering the technical advancement and availability of recording devices. However, as long as these rights remain under protection, the qualification of some factual states will lead to similar paradoxes. If these considerations were transferred to other regulations, in which the value of investment outlays is considered suitable for protection (unfair competition), the blurring of the original features of the work and its specific recording would not constitute a risk for the authorized entity.[41] There would be no unauthorized use of someone else's work or investment outlay.

After the CJEU ruling in the *Pelham* case, it is possible to adopt a general rule that since we are dealing with an inspiration – or even a transformation of a borrowed material into a creative substance, practically unrecognizable in a new work – then no copyright-related reaction by the author should arise.[42] However, in a situation where the inspired work contains recognizable "flashes" of other people's phonograms, it will be sufficient for the authors to comply with the requirements of the quotation[43] (primarily in terms of tagging the inspiration, but also establishing the artistic dialogue). Since there is no idea/expression dichotomy in music, a recognizable reminiscence should meet flexible criteria for music quotation. That is why I do not see the *Pelham* case as a threat to artistic freedom, as long as the CJEU or any other court understands that the frames of quotation cannot be shaped by narrow standards adapted in the field of literature. Nor would I not exclude the possibility of qualifying some phenomena that use sampling as a kind of musical pastiche.[44]

ed Rights], "Przegląd Prawa Handlowego" 2007, Vol. 12, p. 16. See also J. Demers, op. cit., pp. 29-30; J. Barta, R. Markiewicz, op. cit., p. 418. Compare also the judgment of OLG Hamburg of 7 June 2006, 5 U 48/05, ZUM 2006, 758.

40 S. Vaidhyanathan, op. cit., p. 139, asks a similar question. See also J. Demers, op. cit., p. 97.

41 See S. Frith, *Music and Morality*, in: S. Frith (ed.), *Music and Copyright*, Edinburgh University Press, Edinburgh 1993, p. 9.

42 *Pelham* judgment, para. 39. See also 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*, "The Minnesota Journal of Law, Science & Technology" 2012, Vol. 13(1), pp. 206-207.

43 L. Bently et al., op. cit., para. 4.8, p. 483.

44 *Pelham* opinion, para. 70. However, the Advocate General requires interaction and dialogue, which is incompatible with the judgment of CJEU of 3 September 2014, Case C-201/13, *Deckmyn, Vrijheidsfonds VZW v. Helena Vandersteen and others*, ECLI:EU:C:2014:2132.

Derivative Works in Electronic Arts

Such practices in electronic music as re-edit and remix are nothing more than a type of arrangement.[45] They use and process the existing material. Therefore, their classification depends on their intrinsic properties. While the re-editing, enrichment, and processing of the work carried out by employing technical means will lead to a result characterized by a minimum level of individuality, it will be possible to speak of a derivative work. If the author who performs such operations has a creative freedom in the selection of methods of processing, montage, and deconstructing the reference material,[46] his or her actions come under copyright protection. If however the changes are of a clichéd character, for example consist of simple changes in the sound or some layers of the original piece (e.g. change of the rhythmic background), they should rather be denied protection. Such changes should be assessed similarly to minor changes in the instrumentation or re-harmonization of someone else's melody in a clichéd, schematic way. Even if the modifications are combined with giving the material a new dimension and presenting it in a new context, when not combined with musical manipulations within the texture itself they do not deserve protection.

Therefore, one should approach with a degree of scepticism the qualification of mash-ups and mixes as dependent works. The act of combining some works with one another, even if it is a most surprising combination, does not in itself go beyond the sphere of an unprotected idea. A mash-up, if one were to compare it with a quodlibet and qualify it as a derivative work, requires more than a simple fusion of two works. The very fact of agreeing on their key or tempo is now a purely technical matter,[47] so it is difficult to qualify such changes as significant in the individuality test. Similarly problematic in the case of mash-ups is ascribing the uniqueness parameter of the selection to the actual choice of works blended together, even if it were to show the works used in a surprising, new context. However, if the mash-up is combined with deeper changes and allows two (or more) pieces to penetrate one another in a deeper sense, to exchange layers integrally, and furthermore enriches them with independent creative efforts,[48] such activity may constitute the development of a derivative work. It is also possible that a structurally complex mash-up[49] will effectively come closer to a music collage.[50] Finally, there are also

[45] See M. Fister, *Das Recht der Musik*, Sramek, Wien 2013, p. 37.

[46] See the examples described by R. Middleton, op. cit., pp. 62-71.

[47] K. McLeod, P. DiCola, *Creative License. The Law and Culture of Digital Sampling*, Duke University Press, Durham–London 2011, p. 176.

[48] See M. Katz, op. cit., pp. 166-168 and B.J. Jütte, *The EU's Trouble with Mashups. From Disabling to Enabling a Digital Art Form*, "Journal of Intellectual Property, Information Technology and E-Commerce Law" 2014, Vol. 3, p. 173.

[49] B.J. Jütte, op. cit., mentions mash-ups using over 30 different compositions.

[50] It is not necessary to give new names to old practices, see ibidem, p. 174.

situations in which the mash-up will be classified as a parody or pastiche, especially when the creative fusion of works takes on an ironic or critical character.[51]

In the case of mixing, it is the selection and method of combining existing works that may show at least the minimum level of individuality necessary to qualify a given activity as a work within the meaning of copyright law.[52] A mix can therefore be only a simple collection of pieces or their fragments, as well as make use of creative interventions to put them together. In other words, the creative element may result not only from the juxtaposition itself, but also from the method of connection and the interventions made to it. In this case, it may be a derivative work.[53] All the above-mentioned phenomena, regardless of their copyright status, will constitute the reproduction of the artistic performance and phonogram, and therefore in order to use and distribute them they will require the consent of those entitled under related rights.

Conclusions – About Music Borrowing in the Digital Age, Without Prejudice

To sum up, a few general directives and observations can be outlined. Firstly, on one hand the electronic means of processing sound material as well as their general availability make modifications easier, and on the other broaden the spectrum of creative possibilities. Both tendencies should be taken into account when examining the originality of new works and raising the level of the minimum criteria for copyright protection. Not every modification will be immediately associated with the granting of copyright protection, especially when using very popular measures which are widely available and commonly used.[54] Technology has enabled wide access to many modifications that previously required a musical background.[55] This has been achieved, however, through the use of often well-established patterns.

Secondly, although the intertextuality achieved by electronic means can basically be "fitted" into the existing legal categories, no automatic assignment should be made to the existing creative practices.[56] In other words, the fact that, for example, someone else's recording has been transplanted, should not be used immedi-

[51] Ibidem, pp. 173 and 181.

[52] As in reference to potpourris, G. Schulze, in: T. Dreier, G. Schulze, *Urheberrechtsgesetz. Kommentar*, C.H. Beck, München 2008, p. 127; see also M. Katz, op. cit., p. 136 ("Originality is judged […] based not on the source of the raw materials but on their selection, juxtaposition, and transformation").

[53] Polish Supreme Court, Judgment of 5 March 2002, II KKN 341/99, OSNKW 2002/9-10 poz. 82.

[54] T.L. Reilly, *Debunking the Top Three Myths…*, p. 381.

[55] In fact, anybody can compose using existing recordings – see B.J. Jütte, op. cit., p. 174.

[56] As does O.B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, "North Carolina Law Review" 2006, Vol. 84(2), pp. 564, 630-631. However, Tracy L. Reilly's skepticism, denying traditional qualifications for electronic borrowing, reaches a far too conservative point, see eadem, *Debunking the Top Three Myths…*, pp. 376-378.

ately to establish a quote. Similarly, a simple mash-up should be at once referred to as a quodlibet. Regardless of the technical method of creation, the requirement of a minimum level of individuality applies to all creative works whose authors would like to obtain copyright protection. However, on the other hand another tendency can be observed: an attempt to treat certain phenomena as new and unique, and to postulate the extension of the permitted fair use. Another name for a phenomenon that is by no means new[57] does not constitute a sufficient reason to formulate far-reaching *de lege ferenda* postulates.

Thirdly, however, if there is already an electronic creative work that deserves protection, there are no grounds for refusing it the use of the existing legal framework, in particular the ones that allow it to be freely used.[58] How (technically) someone else's material is abstracted and incorporated is irrelevant for the purpose of legal assessments.[59] No prejudices, including aesthetic ones, may come into play. Otherwise the copyright law will restrict those phenomena that refer to the existing work in an extraordinary way, the result of which is a work with its own unique features. So if, using the sampling technique, one cites someone else's sound material, then when considering the admissibility of such a quotation one should refer to the looser definition of a musical quotation, and not to the rigid and non-normative framework of a literary quotation. To put it bluntly, a musical quote made by electronic means is still a quote under the copyright law.

Fourthly, digital electronics – essentially technical elements in music – have transformed musical aesthetics by highlighting not only some elements of the text phase of a musical work, such as sound, space, rhythm,[60] but also of the reception phase. To some extent, these changes should be taken into account in the legal discourse using a different, more nuanced and specialized approach[61] both in examining originality and in determining the existence of a specific intertextual strategy and musical plagiarism.

Fifthly, the improvement of sound processing technology and its dissemination has led to a renewed engagement of the audience.[62] In other words, it made

[57] In my opinion this is Bernd J. Jütte's argument, see idem, op. cit., pp. 174-175 and 184. It is, however, far too liberal and the reasoning underlying why mash-ups require a new fair use exception is unclear.

[58] Sampling should be considered in the broad context of musical borrowings, with the awareness, however, of both common roots and natural differences, see K. McLeod, P. DiCola, op. cit., pp. 45-48. Reilly is wrong in denying sampling traditional categorization, see eadem, *Debunking the Top Three Myths*..., pp. 378-379. See also O.B. Arewa, op. cit., p. 582.

[59] Otherwise and, in my opinion, wrong – T.L. Reilly, *Debunking the Top Three Myths*..., pp. 386 and 399. See also eadem, *Good Fences*..., pp. 161-162.

[60] S. Vaidhyanathan, op. cit., p. 144; D.J. Moser, C.L. Slay, op. cit., p. 34.

[61] See also J. Demers, op. cit., p. 99.

[62] N. Collins, M. Schedel, S. Wilson, op. cit., p. 21. See also P. Tschmuck, op. cit., p. 196; S. Lacasse, op. cit., p. 50; J. Attali, *Noise. The Political Economy of Music*, University of Minnesota Press, Minneapolis–London 2011, p. 32; C. Moore, op. cit., p. 106.

it possible to restore not only the improvisational trend and variability,[63] but also collectivity.[64] It became possible to use and process other people's music without musical knowledge. This is a key issue for a process-driven art. Digitalization has allowed for, in particular, not only a renaissance of the work of many forgotten composers and performers,[65] but also a real artistic dialogue. Music does not exist without a listener. Active reception is, in a way, a precondition for its existence.[66] To put it differently, it is a paradox that forgetting, not performing and not listening to specific works reduces the monopoly of authors much more than its extensive use. Of course, the explosion of the so-called recycling art may be perceived as a threat, however imposing the current requirements, especially in the case of a quotation, should be a sufficient protection of the interests of authors.

The final conclusion is the *de lege ferenda* postulate. It is about removing the differences that crystallize at the intersection of copyright and related rights. Situations in which a certain type of borrowing is either indifferent to copyright (when we are dealing with a lack of protection) or even desirable and acceptable (inspiration) should not lead to different legal assessments in the case of related rights. These differences of course result from different justifications for different groups of rights. However, their occurrence is itself a sign of an incorrect legislative technique.

As a result, situations arise in which certain intertextual strategies are acceptable under copyright law, but in the area of related rights they only constitute unauthorized copying or duplication of someone else's material. Therefore, in my opinion it is necessary either to place some related rights in other areas of the private law framework and remove them from the copyright universum, or to apply a general clause, making them subordinate to copyright. For if copyright is to stimulate creative activity and serve to protect creativity, then this value should also govern the related rights.

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63 See L. Landy, op. cit., pp. 154-155.

64 J. Gripsrud, *Creativity and the Sense of Collective Ownership in Theatre and Popular Music*, in: M. van Eechoud (ed.), *The Work of Authorship*, Amsterdam University Press, Amsterdam 2014, p. 227; I. Duhanic, op. cit., p. 933, mentions a consumer who became a prosumer.

65 O.B. Arewa, op. cit., p. 621; K. McLeod, P. DiCola, op. cit., p. 90.

66 See L. Landy, op. cit., p. 22.

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