



Max Planck Institute  
for Innovation and Competition



# „Old Town Road“ lessons to learn for copyright law?

November 4, 2019

**Reto M. Hilty**

# „Old Town Road“

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# Story of „Old Town Road“



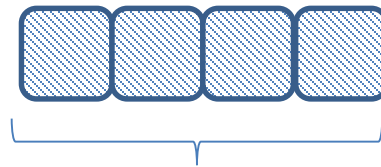
Billboard  
HOT 100



# Story of „Old Town Road“

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Sampling  
by *YoungKio*



Hip-hop beat



*YoungKio*

# Story of „Old Town Road“

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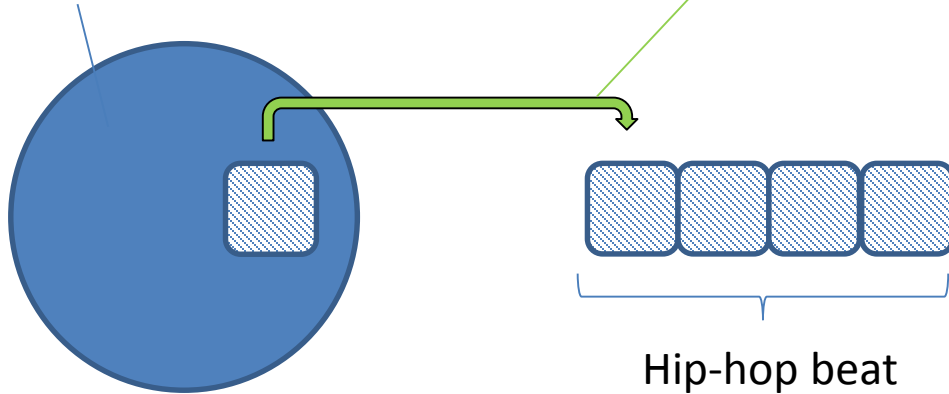
## „34 Ghosts IV“ by Nine Inch Nails



# Story of „Old Town Road“

Song „34 Ghosts IV“  
by *Nine Inch Nails*

Sampling  
by *YoungKio*



*Nine Inch Nails*



*YoungKio*

# Story of „Old Town Road“

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„34 Ghosts IV“  
by Nine Inch Nails



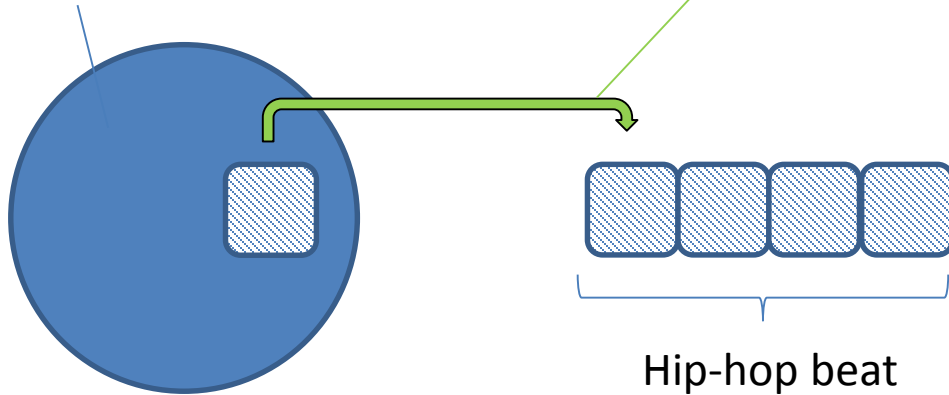
„Old Town Road“  
by YoungKio & Lil Nas X



# Story of „Old Town Road“

Song „34 Ghosts IV“  
by *Nine Inch Nails*

Sampling  
by *YoungKio*



*Nine Inch Nails*



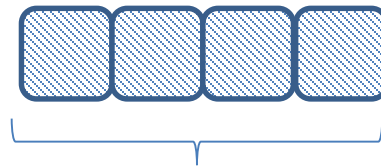
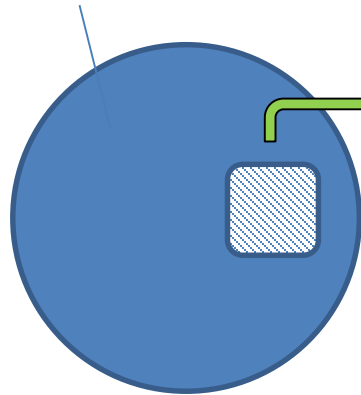
*YoungKio*



# Story of „Old Town Road“

Song „34 Ghosts IV“  
by *Nine Inch Nails*

Sampling  
by *YoungKio*



Hip-hop beat

BeatStars



*Nine Inch Nails*



*YoungKio*



# TikTok

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Chinese Company „Byte Dance“

(= most valuable non-listed company worldwide)

> 150 countries

1,5 billion downloads worldwide

110 million downloads USA

500 million active users / month

15 sec. = maximum length

# TikTok – „Old Town Road“



# Story of „Old Town Road“

**TOP 30**  
**Billboard**  
*Country Songs*



 YouTube 800 mio.

 Spotify 1.2 bn.

**Billboard**  
**HOT 100**



# Lessons to learn for copyright law?

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**Sampling**

**User Generated Content**

**Plattformen**



# Sampling

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**“In music, sampling is the reuse of a portion (or sample) of a sound recording in another recording. Samples may comprise rhythm, melody, speech, or other sounds.”**

[https://en.wikipedia.org/wiki/Sampling\\_\(music\)](https://en.wikipedia.org/wiki/Sampling_(music))



# Sampling

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## Copyright

→ economic rights

→ moral rights

## Right of performer

→ economic rights

→ moral rights

## Right of producer of phonogram

→ economic purpose



# Sampling

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## Scope of protection

use of work for...	permitted?	protected?
<b>modification</b>	no *	no
<b>adaptation</b>	no *	yes
<b>inspiration</b>	yes („free use“)	yes

\* technical reproduction + own generation of sound!



# Sampling

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## Arguments for permission

	copyright law

- \* CJEU C-5/08 (Infopac): < 11 words
- \*\* e.g. Art. 10 BC: Quotation
- \*\*\* Art. 5 (3)(i) Dir. 2001/29: incidental use

use of work for...	permitted?
<b>Modification</b>	no *
<b>Adaptation</b>	no *
<b>Inspiration</b>	yes („free use“)



# Sampling

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## Scope of protection – sound recording

use of work for...	permitted?	permitted?
modification		no
adaptation		yes
inspiration	yes („free use“)	yes

**prevention of market failure**

**technical reproduction** ↔ **own generation of sound**

# Sampling

## Arguments for permission

	copyright law	sound recording
„fading out“	„free use“	
short excerpt *	„free use“	
E&L **		
„de minimis“ ***		

\* CJEU C-5/08 (Infopac): < 11 words

\*\* e.g. Art. 10 BC: Quotation

\*\*\* Art. 5 (3)(i) Dir. 2001/29: incidental use

**no...!**  
(if no substitution)



# Sampling

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Song „Metall auf Metall“  
by *Kraftwerk*



*Kraftwerk*

# Comparison – „Metall auf Metall“ vs. „Nur mir“

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**„Metall auf Metall“**  
**by Kraftwerk**



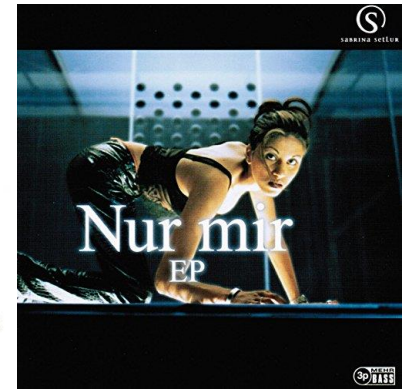
**„Nur mir“**  
by Moses Pelham & Sabrina Setlur

# Comparison – „Metall auf Metall“ vs. „Nur mir“

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**„Metall auf Metall“**  
by Kraftwerk



**„Nur mir“**  
by Moses Pelham & Sabrina Setlur



# Sampling

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## CJEU C-476/17 (Pelham [„Metall auf Metall“])

**Consideration 39** (see also 31, 36 and 37)

“... Article 2(c) of Directive 2001/29 must ... be interpreted as meaning that the phonogram producer’s exclusive right under that provision to reproduce and distribute his or her phonogram allows him or her to **prevent another person from taking a sound sample, even if very short**, of his or her phonogram for the purposes of including that sample in another phonogram, **unless that sample is included in the phonogram in a modified form unrecognisable to the ear.**”

**Article 2 Dir. 2001/29 – Reproduction right**

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

...

(c) for phonogram producers, of their phonograms;

...



# Sampling

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## CJEU C-476/17 (Pelham [„Metall auf Metall“])

### Article 5 Dir. 2001/29 – Exceptions and limitations

...

3. Member States **may provide for exceptions or limitations** to the rights provided for in Articles 2 and 3 in the following cases:

...

(d) **quotations for purposes such as criticism or review, provided that** they relate to a work or other subject-matter which has already been lawfully made available to the public, that, **unless this turns out to be impossible, the source, including the author's name, is indicated**, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

...



# Sampling

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## CJEU C-476/17 (Pelham [„Metall auf Metall“])

### Consideration 35

In that context, it should be noted that **the technique of ‘sampling’**, which consists in a user taking a sample from a phonogram, most often by means of electronic equipment, and using the sample for the purposes of creating a new work, **constitutes a form of artistic expression which is covered by freedom of the arts, as protected in Article 13 of the Charter.**

# User Generated Content (UGC)

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- “1.) The contribution is by the users of a product rather than the firm that sells the product.
- 2.) These **contributions are somewhat creative in nature and the user adds something new to what has been done before.**
- 3.) These ideas and contributions are posted online and are generally accessible to others.”

[https://en.wikipedia.org/wiki/User-generated\\_content#Defining\\_Characteristics\\_of\\_User-Generated\\_Content\\_\(UGC\)](https://en.wikipedia.org/wiki/User-generated_content#Defining_Characteristics_of_User-Generated_Content_(UGC))



# User Generated Content (UGC)

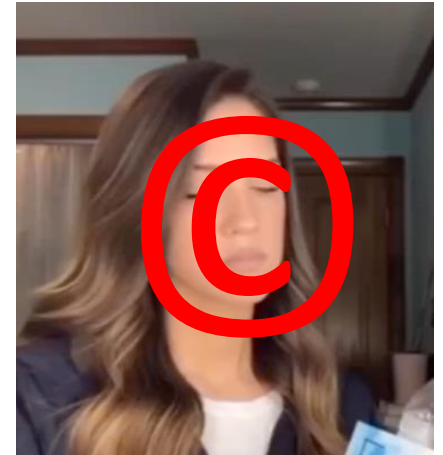
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*YoungKio*

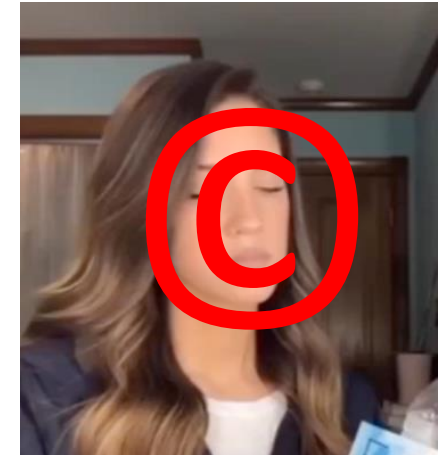


*Lil Nas X*



# User Generated Content (UGC)

	UGC
„fading out“	Red
short excerpt	Red
E&L	Green diagonal lines
„de minimis“	Red



existing provision?

(e.g. Art. 5 (3)(k) Dir. 2001/29:  
„use for purpose of **caricature, Parody or pastiche**“)

new provision?

(e.g. Canada 2012: 29.21:  
Non-commercial User-Generated Content)

# Platforms

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## Art. 2 Dir. 2019/790 (Digital Single Market)

...

(6) **‘online content-sharing service provider\*’** means a provider of an information society service of which the main or one of the main purposes is to **store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users**, which it organises and promotes for profit-making purposes.

...

\* OCSSP



# Platforms

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## Art. 17 Dir. 2019/790 (Digital Single Market)

### Use of protected content by OCSSP

...

2. Member States shall provide that, where an OCSSP **obtains an authorisation**, for instance by concluding a licensing agreement, that authorisation shall also cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC ... .

...



# Platforms

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## Art. 17 Dir. 2019/790 (Digital Single Market)

### Use of protected content by OCSSP

...

4. If no authorisation is granted, OCSSP **shall be liable** ...  
unless ... they have:

- (a) made **best efforts to obtain an authorisation**, and
- (b) made ... **best efforts to ensure the unavailability**  
of specific works ... for which the rightholders have  
provided ... relevant and necessary information; ...
- (c) acted expeditiously ... .

...



# Platforms

## Art. 17 Dir. 2019/790 (Digital Single Market)

### Use of protected content by OCSSP

...

7. ... shall not result in the prevention of the availability of works ... uploaded by users, which do not infringe copyright ..., including where ... **covered by an exception or limitation.**

**CJEU 476/17**  
(Pelham [Metall  
auf Metall])

Member States shall ensure that users ... are able to rely on the following **existing exceptions or limitations** when uploading ... **content generated by users** ...:

- (a) **quotation**, **criticism**, **review**;
- (b) use for the purpose of **caricature**, **parody** or **pastiche**.

**CJEU 201/13**  
(Deckmyn)



# Lessons to learn for copyright law?

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Copyright law risks **hindering** contemporary forms of cultural creation (rather than promoting them):

→ sampling: producer's right  
→ UGC: lack of (clear) E&L

**EU:** ± „Constitutional Court“

**USA:** Supreme Court („fair use“)

**Less legal protection might enhance creativity and lead to more national growth than overly strict copyright regime.**



**Thank you!**

