ORGANIZED CREATIVITY

Organized Creativity Discussion Paper
No. 20/1

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The Temporal Unfolding of “Metall auf Metall”

Berlin, Februar 2020

ISSN 1908-2016 (online)

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Organized Creativity Discussion Paper No. 20/1
ISSN 1908-2016 (online)
URL: http://www.wiwiss.fu-berlin.de/forschung/organized-creativity/discussion-paper01
Berlin, August 2016

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Justifying Music Practices under Regulatory Uncertainty: The Temporal Unfolding of "Metall auf Metall" [1]

Konstantin Hondros

Abstract
Uncertainty about intellectual property regulation (IPR) manifests in legal disputes over copyright, trademarks, patents and other forms of IP. In these critical moments where situated action is unclear, actors justify their positions in order to find feasible ways for further practice and cooperation. While academic literature discusses the opposing justifications of individual exploitation and social dissemination as arising typically in court struggles over IPR, the temporal unfolding of regulatory uncertainty in lengthy court cases has not yet been sufficiently investigated. This paper asks how regulatory uncertain creative practices are justified at court over time. Looking at the two-decade-long German court case "Metall auf Metall" concerned with music sampling, I find that actors refer to a set of conventions when justifying sampling as either in line or not in line with copyright. Instead of presenting justifications in the form of a clear opposition, my research suggests to depict them as developing and changing over time. Though the strengthening of individual exploitation has been historically dominant, court cases regarding hip-hop music in Germany recently sided instead with social dissemination, referring to the basic right of artistic freedom. I show the plurality of conventions and justifications brought to the fore by the involved actors during the temporal unfolding of the court suit and depict the justification of facing regulatory uncertainty as a "never-ending" balancing act.

Keywords
Regulatory uncertainty, justifications, conventions, court verdicts, music sampling

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Introduction

Instead of fostering legal certainty for creatives, intellectual property regulations (IPR) are themselves regularly reported as being sources of regulatory uncertainty (Lessig, 2008; McLeod & DiCola, 2011; Silbey, 2014). A typical case for regulatory uncertainty related to IPR is the practice of music sampling (Brown, 1992; Salagean, 2008; Sewell, 2014), where small pieces of previously recorded and thus copyright-protected music is integrated in novel music productions. Especially noticeable is this regulatory uncertainty in court cases (Schietinger, 2005) where different justifications of the practice are voiced against each other. In other words, this relates to creative practices that are regulatory uncertain and brought to courts' attention (Frimmel & Traumane, 2018). In their verdicts, courts engage with a central regulatory uncertainty regarding copyright, balancing individual exploitation of creations on the one hand and their social dissemination on the other (Lessig, 2008; Sell & May, 2001; Vaidhyanathan, 2003). We know how these opposing justifications are struggling constantly since granting a copyright is basically an artificial setting of a monopoly over intellectual objects like pieces of music, allowing exploitation, but impeding dissemination (Demers, 2006). Though individual exploitation has been dominant as for instance subsequent extensions of protection periods suggest, an historic perspective gives evidence that this relationship is far from unidirectional (May & Sell, 2006). Sampling court cases are basically about these justifications for an either more or less restrictive interpretation of copyright law (Jütte & Maier, 2017). Yet, we know

[1] The author is grateful to Sigrid Quack for her extensive comments on earlier versions of the article.

little about the unfolding relationship between exploitation and dissemination over time throughout the course of court cases.

This paper investigates the development of justifications applied in the German court case referred to in the public discourse as "Metall auf Metall", dealing with alleged copyright infringements in hip-hop music through the music practice of sampling. "Metall auf Metall" is a more than 20-year-long struggle about a two-second long piece of music from the music group Kraftwerk's 1977 track "Metall auf Metall" that hip-hop producer Moses Pelham looped in the 1997 track "Nur mir". The case has passed all stages of appeal of Germany's legal system and recently the European Court of Justice (ECJ) reached its verdict. Scholars engaged with "Metall auf Metall" on numerous occasions. Yet usually they were interested in the influence of single decisions on the cultural practice of sampling (Conley & Braegelmann, 2008; Döhl, 2015; Mimler, 2017), the connection between copyright and basic rights (Jütte & Maier, 2017), or evaluations of likely developments in the case (Döhl, 2018). By analyzing "Metall auf Metall" as a case of justifying a music practice under regulatory uncertainty over time, I take a so-far-neglected processual perspective on the case. Therefore, I examine regulatory uncertainty about copyright in lengthy court cases and the justifications applied to its development.

I conducted a detailed content analysis of all eight verdicts and an elaborate "Advocate General Opinion" (AGO) and show the unfolding of justifications in "Metall auf Metall". These justifications center around the argumentative backdrops of art, market and labor, but morals, law and science are also crucial for justifying sampling at court. While individual exploitation takes the form of "protection of property" and is often connected to market and labor, social dissemination is coupled with "artistic freedom". I understand these "argumentative backdrops" as conventions in the sense of value orders. Theoretically I draw on research dealing with the multiplicity of conventions, the theoretical approach of the economy of conventions (EC) and the works of Luc Boltanski and Laurent Thévenot (1999; 2006) in particular. To follow "Metall auf Metall" through all its appeal stages allows the emergence, growth and dissolution of justifications and conventions to be traced.

The first part of the paper gives a theoretical background on the EC and the relation between justifications and conventions. After framing court cases as tests in the sense of the EC, I outline central aspects of copyright regulation important for "Metall auf Metall" and present the issue of IPR as fostering or preventing creativity. After a description of my methodological proceedings, I show in my findings how sampling is justified as either in line or not in line with copyright regulation during the court case of "Metall auf Metall" and retrace how the actors try to balance the struggle between economic and artistic interests. Finally, I discuss how the temporal unfolding of justifications is telling in respect to music sampling in particular, but also regulatory uncertainty about IPR and creativity in general.

Theoretical framework

Conventions and justifications

To capture this issue of justifying sampling as a music practice under regulatory uncertainty theoretically, the pragmatic approach of the EC offers a framework to analyze critical moments, actors' diverse justifications and the issue of coordination (Boltanski & Thévenot, 1999; 2006; Diaz-Bone, 2011, 2015a). Simply put, critical moments are moments of uncertainty. For my case, it is regulatory uncertainty I am particularly interested in. Typically, regulatory uncertainty is the uncertainty about the future development of regulation (Hoffmann, Trautmann, & Schneider, 2008). I go beyond this and understand regulatory uncertainty as the inability of

actors to align their practices with regulation or the paucity of knowledge regarding which rules to apply at all (Dobusch, Hondros, Quack, & Zangerle, 2018).

In critical moments, actors delineate their positions by drawing on justifications. These justifications relate to conventions that the EC understands as coordination logics on higher levels of generality (Diaz-Bone, 2011). While originally intended to go beyond a highly one-sided rationalist approach towards value in neoclassical economics, the discussion within the framework of the EC has broadened into the fields of creativity (Karpik, 2010) and law (Bessy & Favereau, 2003; Diaz-Bone, 2015b; Thévenot, 1992). Conventions are understood as orders of worth (Boltanski & Thévenot, 1999) which relate them to a societal value that actors invoke when justifying. In line with the literature (Knoll, 2013a, 2013b), I consider the terms conventions and orders of worth synonymous, but constrain myself to using "convention" in the following.

In particular, Boltanski and Thévenot (Boltanski & Thévenot, 1999; Boltanski & Thévenot, 2006) show how actors relate to diverse conventions when they face critical moments of uncertainty and conflict. In critical moments, not all actors follow a universally applicable mode of coordination everyone can relate to (Thévenot, 2002). In order to (re-)establish coordination, the actors justify their respective positions by drawing on conventions. These conventions act as coordination logics (Diaz-Bone, 2015a) and depict a generally applicable value that is connected to conceptions of a common good and public values. Conventions suggest a moral view on justifying and strengthening actors' agency, since it is their active engagement that establishes what is "good" in a critical moment. Conventions are in no case finally bounded by the moment itself. A convention is not a structural characteristic of a moment; actors take part actively in whatever convention they relate to.

Conventions, in the sense of the EC, are more than a set of norms or informal rules (Becker, 2008 [1982]; Weber, 2002 [1920]) and are not equivalent to conventions in the form of international treaties like the Human Rights Convention. They are rather tacit, yet publicly shared and recognized, valuations that serve as a backdrop to base justifications on. For my dealing with court cases, looking at conventions sharpens my perspective on how diversely justifying in critical moments and how multifaceted value can be (Lamont, 2012). Boltanski and Thévenot (1999) develop an open-ended and historically contingent set of six conventions, or orders of worth. They base their theoretical findings on an inductive analysis of canonical works within political philosophy and political economy. Their original denomination depicts conventions as orders of grandeur (Boltanski & Thévenot, 2006), which points to a conviction that these conventions were applicable in a great many situations. Yet, since actors' agency allows for change, they were never established as a final set, and were extended numerous times (Boltanski & Chiapello, 2005; Salais, 1989; Thévenot, Moody, & Lafaye, 2000). Diaz-Bone (2015a, 2015b) summarizes the plurality of conventions the EC has analyzed and depicts a vital theoretical approach. A simplified overview of the six conventions originally conceived is still helpful to understand what a convention in the sense of the EC is. The mode of valuation is a key dimension to differentiate between the six conventions. We see that each convention has a distinct way of evaluating and thereby justifying worth:

Convention	Inspired	Domestic	Civic	Opinion	Market	Industrial
Mode of Valuation	Grace, nonconformity, creativeness	Esteem, reputation	Collective interest	Renown	Price	Productivity, efficiency

Table 1: cf. Boltanski & Thévenot, 1999, p. 368

Within the convention of the market, for instance, price or cost are the modes for determining value. From a perspective of the industrial convention, it is however not price or cost, but technical efficiency that determines value. The distinctive connection between value and convention and the diverse forms it may adopt is important for my understanding of how justifications are related to conventions.

Court cases as tests of conventions

Though the EC is interested in the study of law (Diaz-Bone, Didry, & Salais, 2015), court cases have not yet been a particular focus. I understand court cases as critical moments where the legality or illegality of a practice is under dispute between involved actors. During court cases, actors justify their positions towards the disputed practice in diverse ways, trying to reestablish coordination between practice and law from their respective position. Boltanski and Thévenot (2006, p. 82) point out that court cases need to be understood as tests that relate justifications to conventions:

> A court trial constitutes a test, and during such a test the arguments advanced for the purpose of justification cannot consist in simple associations. In order to be convincing, they must be developed in such a way that they bring clearly to light the principle of worth, the sacrifice, or the dignity suited to the polity from which they stem. The test is in this respect an opportunity to make worth manifest (…)

The quote stresses that justifying at court is not merely arguing based on associating possibilities, but is connected to a certain "principle of worth", the convention. It makes manifest what is valuable in a situation. For the EC, tests are in place to deal with uncertainty (Boltanski & Thévenot, 2006). Particularly when value is uncertain, tests can aid in reducing uncertainty (Diaz-Bone, 2015a). Furthermore, tests are central when conventions "clash" (Reinecke, van Bommel, & Spicer, 2017), which is typically the case in critical moments where coordination of action fails like in court cases. Tests aid to overcome uncertainty about applicable conventions and to find new ways for coordination (Boltanski & Thévenot, 2006; Diaz-Bone, 2015a). To do so, court actors are putting their justifications to the test. In a court ethnography, Angeletti (2017) observes how actors at court justify during trials. The author is interested in the justification of rules and finds a ubiquitous justifying on the part of involved actors and how they negotiate applicable conventions:

> While only the defendant was actually on trial, potentially facing a conviction, the other individuals involved, from the lawyers to the witnesses, never stopped putting boundaries between legitimate and illegitimate practices. (Angeletti, 2017, p. 122)

In court cases, all involved actors become part of the process of justifying the disputed practice. They relate their arguments to conventions to value their position. This is certainly also true for court verdicts that comprise the positions of involved parties and introduce courts' justifying of practices as legitimate or illegitimate, as is the case with the practice of music sampling in "Metall auf Metall".

Methodology

Case context: Copyright, protection of property and artistic freedom

The actors in the German trial concerning "Metall auf Metall" justify sampling with regard to "Urheberrecht", usually translated into English as "author's rights". In comparison to the Anglo-American copyright that is often connected to a utilitarian approach, Urheberrecht stresses the moral rights of an author (Khan, 2008). Since harmonization of these legal systems is a supranational goal on a global level (Vaidhyanathan, 2003), Urheberrecht and copyright

have essentially been approximating each other. Processes of law-making at courts further foster this development (Dinwoodie, 2000). The remaining differences in the legal systems, however, have been influential for the legal evaluation of sampling (Salagean, 2008). Pointing out some key aspects of German Urheberrecht is useful for understanding the specificities of the case. To avoid the German term, when I use the term copyright in the following parts of the article, I mean Germany's Urheberrecht.

German copyright differentiates two pillars of rights. On the one hand, there are the author's rights, which comprise economic as well as moral rights and are often called "publishing rights". They deal with the composition and thus with works of art that are "personal, intellectual creations"[2]. On the other hand, there is ancillary copyright or performance protection law, often referred to as mastering rights. It mainly deals with recording rights and the rights of the involved practicing musicians. Both rights grant rightsholders exclusivity to exploit a musical product for a certain amount of time. However, a piece of music can be protected by mastering and recording rights even if it is not protected by publishing rights. This is, for instance, the case when a music sample fails to surpass the threshold of originality. Though this threshold is itself disputed, it considers whether a creation is a personal, intellectual one. The verdicts submitted in the case of "Metall auf Metall" predominantly refer to the mastering rights of the record producers and refrain from a detailed engagement with author's rights.

There are certain exceptions and limitations to the rightsholders' exclusive rights called "barriers". They are explicitly in place to foster creativity. These barriers allow for the use of protected material for creative purposes like commenting, quoting, and making a parody or a pastiche. Only under these circumstances can material be used without the explicit permission of the rights-holders. Besides barriers, there is so-called "free use". Free use allows the use of material of third parties in cases where an independent work in its own right originates from the usage. An evaluation of a "distance" between the works is necessary to determine whether an independent work has been created. This is usually seen as a case-by-case decision (Wegmann, 2012). Additionally, Germany's free use approach entails a limitation for music in particular that protects melody: the "starre Melodieschutz" (rigid protection of melody)[3], which has been disputed for decades (Czernik, 2009). These barriers, as well as the free use statute, are central to copyright's protection of artistic freedom, which is part of article 5 of Germany's constitutional that from a general perspective deals with freedom of expression.[4]

The case "Metall auf Metall" and Germany's appeal stages

In 1997 Sabrina Setlur's track "Nur mir", produced by Moses Pelham and Martin Haas, was released. Pelham and Haas are – together with Pelham's own music label – the main culprits in the "Metall auf Metall" case. The track's beat consists of several samples, one of which is a two-second rhythmic sequence taken from the track "Metall auf Metall" produced by the German electronic music luminaries "Kraftwerk" in 1977 and released on their album "Trans Europa Express". The sample, basically rhythmic hits on pieces of metal, is audible especially at the beginning of "Nur mir" and underlays the song in a loop, as experts concluded. Ralf Hütter and Florian Schneider-Esleben, the founding members of Kraftwerk and the composers and producers of "Metall auf Metall", filed a court suit in 1999. They are "Metall auf Metall"'s plaintiffs. Up to this day, the case has had an astonishing legal career, going through all of

[2] "persönliche, geistige Schöpfungen"

[3] See § 24 of Germany's Urheberrecht: https://www.gesetze-im-internet.de/urhg/__24.html, visited: 11.05.2019.

[4] Cf. https://www.gesetze-im-internet.de/gg/art_5.html visited: 22.05.2019

Germany's stages of appeal. In July 2019, the ECJ reached a decision, sending the case back to Germany for further consideration. Instead of a linear climb through stages of appeal, we see a clustered seesaw between the single appeal stages over time. This underlines that the involved actors – parties and courts – used all means provided by the jurisdiction systems of Germany and the European Union:

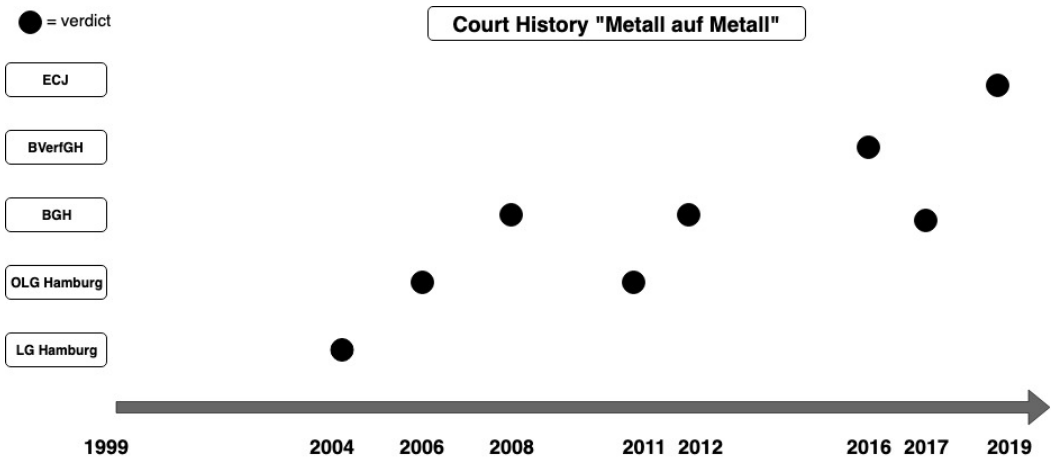

Table 2: Court History "Metall auf Metall", author's representation

Germany's legal system has four levels of jurisdiction: the district court (not involved[5]), the regional court (LG), the higher regional court (OLG), and the federal court of justice (BGH), usually the highest legal stage of appeal. However, in cases where actors believe they have been systematically denied their constitutionally granted basic rights in all decisions, they can file a constitutional complaint with the federal constitutional court (BVerfGH). In the case of "Metall auf Metall" this constitutional complaint was successful and the BGH had to seek a new verdict, which has not happened yet. From a temporal perspective, we see how the case's verdicts cluster around three periods. The first three verdicts between 2004 and 2008 show a typical court case proceeding through the stages of appeal. In 2011 and 2012, a "loop" clarified the question of free use. The verdict of the federal constitutional court in 2016 finally triggered concerns related to European law. The case was passed on to the ECJ, which reached a verdict in 2019 and sent the case back again to the BGH. The BGH plans its next decision in April 2020.

The court proceedings from the regional to the federal court of justice level are typical and involve the judges, the two parties of the case, the defendants and the plaintiffs. Additionally, experts appear to give their opinions. The proceeding of the constitutional complaint is a case between the plaintiff Moses Pelham (and other plaintiffs) against the state and against the prior verdicts. The original plaintiffs are not part of the court case directly. This proceeding involved eight judges and gathered ten written statements by a diverse set of actors interested in the case, such as the plaintiffs in the original case and associations in the legal and in the music business. At court, eight more oral statements were heard, mainly by the current plaintiffs and the original plaintiffs, but also by the government of Germany and a set of experts. It seems important to note how this complaint reached out for an "holistic" collection of possibly involved or interested actors concerned with the matter of music sampling and their respective justifications.

[5] The district court has a limit to the sum in dispute it is allowed to handle. All legal struggles above a 5.000€ threshold directly commence at the regional court level.

Data

I collected most of the court verdicts online from different database sources. Only the verdict LG 2004 is not published online, so I had to obtain it directly from the regional court. Generally, anonymity of involved actors in court verdicts is very strict in German verdicts and court material like complete protocols of single court sessions is not available. Thus, since I limit my data to the final written verdicts made public, I bind the depictions of the invoked justifications to what was finally integrated into the court verdicts. It is, however, reasonable to assume that the main justifications are integrated, which I can substantiate by having attended the hearing at the federal court of justice in 2017 that led to the verdict "BGH 2017". This allowed me to compare my notes from the court hearing with the final verdict. Still, one has to keep in mind that it is actually the court speaking, even if the court repeats or summarizes what actors from the involved parties or music experts said. The following Table 3 gives an overview of court cases in chronological order. I added a word count to give information about the verdicts' lengths.

Verdict-ID	Paper-Name	Appeal stage	Year	Words
308 O 90/99	LG 2004	LG Hamburg	2004	2.250
5 U 48/05	OLG 2006	OLG Hamburg	2006	2.999
I ZR 112/06	BGH 2008	BGH	2008	4.729
5 U 48/05	OLG 2011	OLG Hamburg	2011	6.643
I ZR 182/11	BGH 2012	BGH	2012	4.176
1 BvR 1585/13	BVerfGH 2016	BVerfGH	2016	12.657
I ZR 115/16	BGH 2017	BGH	2017	6.664
C-476/17	ECJ 2019	AGO	2018	14.114
C-476/17	ECJ 2019	ECJ	2019	7.583

Table 3: "Metall auf Metall" court proceedings, author's representation

The table shows that the verdicts differ in length substantially. Though most verdicts repeat prior sentences of courts, this does not entirely explain the increase in length. The increase in word count could then point to the fact that a court struggled; what seemed to be a rather clear case in the beginning showed more and more complexity or was developed by the participating actors in a more and more complex manner. In terms of uncertainty and problem-solving. one could argue that a well-structured problem changed its face and became an ill-structured one (Simon, 1973). The AGO is a legal statement at the ECJ that is not legally binding but is rather a suggestion to the court. Though it is not a verdict in a strict sense, I add it to my data sample, because it is officially part of the court proceedings and illustrates the diversity of justifications very well. At the moment, the case remains undecided, maintaining regulatory uncertainty about music sampling.

Data analysis

To better understand and theorize about justifications in court and balancing justifications in critical situations, I engage with the material based on qualitative methodology (Denzin & Lincoln, 2008; Flick, 2016 [1995]). Asking questions focusing "how" the case developed is the most feasible way to arrive at conclusions about the temporality of justifications and conventions (Angeletti, 2017). At first (and maybe also second and third) glance, these documents are highly confusing. Time, experience, and engaging with the material in a circular way formed the necessary basis for developing an understanding of what was going on. I analyzed the verdicts with MAXQDA.

In my analytical framework, I use the concept of conventions in the sense of Boltanski and Thévenot (1999). I did not apply their concept in a deductive manner but rather approached my data inductively. To develop the conventions mentioned above, the authors proceeded inductively as well and analyzed canonical literature within political philosophy and political economy. This, however, renders these conventions non-generalizable for all situated specifics (Blokker & Brighenti, 2011). Diaz-Bone (2015a) calls them conventions of quality to restrain their scope, and the authors themselves point to analyzing justifications and conventions with respect to distinct contexts (Thévenot et al., 2000). I am looking for conventions on a more topic-specific level based on justifications of music practices in the context of a court case. As I am interested in regulatory uncertainty about copyright and the issue of balancing dissemination and exploitation, I want to understand the justifications the actors utter in context-related terms. Thus, for my research about creative practice, it is central to track conventions on a more basic level of abstraction referring to the case itself. Through the inductive coding of justifications, interpreting their underlying mode of valuation and aggregating the justifications around comparable valuations, I found six conventions that the justifications in "Metall auf Metall" refer to. Shown in Table 4, they are the coordinating logics (Diaz-Bone, 2011, 2015a) of the justifications.

Convention	Art	Market	Labor	Moral	Law	Science
Mode of Valuation	Aesthetic Difference	Price	Effort	Decency	Legality	Truth

Table 4: Conventions and modes of valuation in "Metall auf Metall"

When actors refer to the convention of art, they justify sampling as either in line or not in line with copyright regulations and invoke aesthetic differences as the mode of valuation. In the market convention, value is connected to price, and when actors argue with the convention of labor, effort is the central mode of valuation. The moral convention builds on decency, law on legality and science on truth. There is overlap with Boltanski and Thévenot's approach, but also with other conventions that I want to discuss. The convention of art resembles the inspired convention that deals with "holiness, creativity, artistic sensibility, imagination, etc." (Boltanski & Thévenot, 1999, p. 370). Yet, the authors depict the inspired convention as very personal and emotional, connected to a transcendent grace. In analyzing "Metall auf Metall", however, I find a discursive justifying of art. This can be related to art as a practice in general, but also to the creative practice in question. Sampling builds on referentiality (Fischer, 2020) and thus on discourse between artists and artefacts. The actors at court evaluate what happens between artefacts. I term this mode of valuation "aesthetic difference". The inspired convention, in contrast, is concerned with individuals and their personal creativeness. The convention of art may be partly "inspired", but it goes beyond a personal understanding of creativeness and adds a discursive, practical one. The convention of the market is in line with the original depiction and uses the same mode of valuation, namely price. The convention of labor is more difficult. The EC has historically focused on it and has thus developed a few conventions connected to work (Salais, 1989), but also to what they term "worlds of production" (Storper & Salais, 1997). They deal with productivity, unemployment and also recruitment (Diaz-Bone, 2015a). Within the six original conventions, the industrial one might relate to work, yet it mainly values efficiency. In contrast, my depiction of a convention of labor stresses an actor's effort without any maximizing requirement. It surely builds on the EC's insights about production yet stresses a very material and practical sense of a physically involved actor. Furthermore, for the analysis of a court case, it is important to put weight on how actors refer to law. Though the civic convention of Boltanski and Thévenot incorporates citizen rights, it is not a good match for

what I find. The civic convention stresses the value of collective interest, which might be, but must not necessarily be, what legality evaluates. Additionally, the convention of law helps to track if and to what extent law is important when justifying music practices at court. Next, the moral convention shows a proximity to the domestic convention. Both deal with tradition, yet the domestic convention stresses reputation and esteem, the political link between individuals and thereby a traditional hierarchy (Boltanski & Thévenot, 1999). With the moral convention I want to indicate the importance of an expected decency in relationships between actors that does not fit the original depiction. Finally, science could be related to the convention of opinion, since renown surely plays a role in science, but also to the domestic convention that evaluates reputation. In my analysis, the convention of science values truth in a positivistic sense. The case shows the significance of musicologists' assessments in justifying sampling as either in line or not in line with copyright regulation. I therefore emphasize their position and integrate a science convention.

As convention theory does not provide an operationalization for detecting justifications, I proceeded by inductively analyzing the material for causal clauses that link sampling as either in line or not in line with copyright and a certain applied justification in the written verdicts. These causal clauses can be more or less explicit in the data, but it is always possible to transform them to a causal form either as "Sampling is in line with copyright, because … (justification A)" or "Sampling is not in line with copyright, if … (justification B)". There are only few justifications that cannot be aligned positively or negatively to sampling, as the tables below show. The justifications themselves then take the form of short condensations of arguments that I aim to embed in the verdicts' wording, if possible. For the visual representation of my results, the relation between conventions and justifications is central. In the following table, I show how I code justifications and how I link justifications to conventions. To do this I refer to some of the justifications I found in the BVerfGH verdict of 2016:

Quote	**Justification**	**Convention**	**Sampling (not) in line with copyright**
"The art-specific consideration requires to recognize in the interpretation and application of the copyright exceptions the adoption of foreign pieces of work in own works (…)."[6] (paragraph 86)	art and genre specificities	art	in line
"They [the plaintiffs, KH] did not think about the importance of sample licensing revenue at the time of the creation of 'Metall auf Metall'; in the meantime, these revenues play a significant role." (paragraph 55)	economic value of samples	market	not in line
"The plaintiffs in the main proceedings assume that the sequence from the track 'Metall auf Metall' in the track 'Nur mir' has a purely material function, which only serves the purpose of avoiding the temporal and financial effort for an own production." (paragraph 49)	material function of sampling	labor	not in line
"The complainants are not asking not to pay for the use of samples in principle, but instead not to ask permission from the recording producers in advance." (paragraph 54)	no general seeking of permission	moral	in line

[6] All quotes translated by the author.

"As far as utilization activities are concerned from 22 December 2002, the Federal Court of Justice as the competent court has to examine the extent to which priority of EU law leaves room for the application of German law at first." (paragraph 112)	need to consider EU law	law	-
Since the BVerfGH 2016 does not justify based on the scientific convention, I insert here an example from the verdict OLG 2011: "The private expert witness H. followed the path of producing a rebuild using a digital sampler and pre-made samples shown by the court expert witness M. and convincingly demonstrated that a rebuild of the 'Metall auf Metall' sequence would have been possible by using finished samples in connection with an in-house production of the metal beats as well as by using only finished samples." (p. 8)	rebuild by expert	science	not in line

Table 5: Analysis of "Metall auf Metall"

The causal form introduced above looks like this for the art convention: "Sampling is in line with copyright, because of art and genre specificities." For a better understanding, one could add "of hip-hop music", which is not uttered in the quote above. By justifying sampling in that way, the justification aims at art and the freedom of art as a public value. For the market convention: "Sampling is not in line with copyright, because of the economic value of samples." One has to remember that samples can be the smallest audio snippets, which might not be understood as economically valuable at all. Still, in this justification, music samples have a price on the market that sampling producers have to pay if they want to sample. On the other hand, the payment incentivizes the producers of the original material to agree upon further usage. The causal transformation is rather easy for most justifications. For each verdict, I link all justifications I find in the verdict to their respective conventions. The following exemplary table shows how my basic table looks like and how it connects the information coded above into one visualization. Each verdict is summarized in one table, which helps lend a visual impression of the emergence and changes of justifications and applied conventions over time. Each justification denotes sampling as either in line with (green-colored boxes) or not in line with (yellow-colored boxes) copyright. For the BVerfGH 2016 verdict, the table would look like this (leaving out the scientific justification from the OLG 2011, because it belongs to its own table):

Convention	Art	Market	Labor	Moral	Law	Science
Justifications	art and genre specificities	economic value of samples	organizational economic, technical effort	no general seeking of permission	need to consider EU law	

Table 6: Exemplary findings table

Table 6 displays justifications connected to each convention. I did not encounter justifications that were part of more than one convention. However, due to the complex written construction of verdicts, especially long sentences can contain more than one justification and relate to more than one convention. Sometimes a verdict might not refer at all to a convention that had been of importance before, like science in the case above. Generally, there are only a few uncolored justifications. The "need for EU law" is a justification of importance, however, in a neutral sense. When looking at the tables, the overall quantity of justifications does not need to be the center of attention. I rather stress the changing distribution of justifications across the

conventions itself, and the distribution between justifications aiming to describe sampling as in line or not in line with copyright regulation. The quantity itself might tell something about the differentiation and diversity of justifications. That a court case consisting of 2,000 words is less likely to produce as many justifications as another one with 15,000 words does not imply that something within the two verdicts has changed substantially. Furthermore, it is not the aim here to show "how many" justifications there are but rather to provide insights into the diversity of justifications that evolves in the regulatory uncertain case of music sampling.

Findings

I present my findings in chronological form and follow the court case through all its stages. This allows not only for an account of the central justifications and conventions of each verdict, but also for comparability over time. Each verdict is initially represented by a table as described above, providing a detailed insight into the applied justifications, related conventions and whether sampling is considered in line or not in line with copyright. However, due to the diversity of actors' justifications, I do not explicitly explain every single justification. An alphabetical list of all justifications and their respective causal clauses with additional information is in the appendix. The number in the brackets next to each justification refers to its position in this list.

Though the case of "Metall auf Metall" was already filed at the end of 1999, it took more than four years until the regional court in Hamburg (table LG 2004) reached a verdict. The actors justify sampling across all conventions I found in later verdicts, yet mainly depict justifying sampling as not in line with copyright. In this verdict, there is very little evidence of sampling's possible legality.

Convention	Art	Market	Labor	Moral	Law	Science
Justifications	taking formative parts of another's song (80)	protection of recording producers' investment (55)	effort of original producers (17)	danger of repetition (12)	framework of current rules (27)	convincing expert knowledge (9)
	lack of ability to create sounds (36)	exclusive rights to exploit, distribute and authorize (25)	replay sample (62)	negligence and due diligence (45)	questioning plaintiffs' legal legitimation (57)	measuring and comparing music (39)
		protection of the whole, but also parts of a record (54)		seeking permission of rightsholder (73)	missing statutory regulation (41)	
		promotional game with similarity (50)				
		no financial interference (47)				

Table 7: LG 2004, conventions and justifications[7]

After gathering evidence in 1999, obtaining musical experts' opinions was responsible for the lengthy proceedings. One opinion was furnished in 2001 and a second one in early 2004 after a request by the court in September 2003. Thus, the verdict's brevity of eight pages does somewhat conceal the time-, court- and expert-effort it took in reaching it. Justifications often refer to the market and labor convention, though experts' opinions also add a scientific perspective to the case. The "protection of investment of original producers", thus the plaintiffs of the case, paired with the "exclusive right to exploit, distribute and authorize" usage for music

[7] Source for this verdict: https://research.wolterskluwer-online.de/document/ece7e137-7b4a-4753-9a23-f703c7616c6b Visited: 09.11.2019 (no free-version available online)

justifies sampling as not in line with copyright from a market perspective. Another justification legitimizes the illegality of sampling, because this music practice takes advantage of the effort of the original producers". The practice is also not in line with copyright, because artists could "replay the sample". This is possible because very short music samples might be protected by recording rights alone, as the compositional creation threshold is missing. Replaying a sample circumvents recording rights and makes legal the use of a piece of music as a sample. Initially, the plaintiffs also sought compositional rights, but the court left it aside and focused on recording rights. Thereby, the court paved the way for the dominance of discussions about recording rights in the entire case. A short passage summarizes how the verdict justifies sampling as not in line within 'the framework of current rules':

> Limiting the manufacturer's protection where there is no measurable impairment of the phonogram producer evaluation[8] due to the brevity of the section used (...), does not seem justified without explicit statutory regulation. ("Metall auf Metall", LG 2004, p. 7)

The court decided in favor of the protection of property instead of allowing the music practice of sampling to happen, even though the quantity of the sample taken does not impair or diminish the market value of the sampled music (which could be a justification for allowing sampling). The artistic or musical side of the issue in the form of the art convention is very much neglected. "Taking formative parts of another's song", referring to art as the sample, is evaluated as a piece of music that makes an aesthetic difference. Also, the court mentions the sampling producers' lack of ability to replay. On the contrary, relating the verdict to a moral convention justifies the illegality of sampling by referring to the "danger of repetition". However, the quote points to a possible lack of legal regulation. This justification – that regulation is lacking – has been part of the court case in different forms and is presumably the centerpiece of the defendants' engagement in further appeal stages as the case has progressed to the higher regional court.

Convention	Art	Market	Labor	Moral	Law	Science
Justifications	taking formative parts of another's song (80)	protection of recording producers' investment (55)	spare effort (77)	negligence and due diligence (45)	framework of current rules (28)	convincing expert knowledge (9)
	listening to and comparing the pieces of music (38)	protect music producers from piracy (51)	organizational responsibility (49)		questioning plaintiffs' legal legitimation (57)	measuring and comparing music (39)
	evaluating significance for new creation (23)	no promotional game with similarity (50)	replay sample (62)		trust current case law (82)	
		no financial interference (47)			missing high court decisions (42)	
		advances lower investment risk of producers (1)				

Table 8: OLG 2006, conventions and justifications[9]

In 2006, the verdict of the higher regional court Hamburg (table OLG 2006) confirmed the decision of the regional court, which entailed a withdrawal of all infringing material (CDs) for the purpose of destruction and determination of compensation. A couple of justifications referring to the market argued that sampling was in line with copyright, especially considering that sampling in this case does not entail "financial interference" or a "promotional game with

[8] "Tonträgerherstellerauswertung" in the German original, which is the financial performance of the original record.
[9] Source for this verdict: https://www.judicialis.de/Oberlandesgericht-Hamburg_5-U-48-05_Urteil_07.06.2006.html Visited: 09.11.2019

similarity". However, the "protection of investment" line, broadened by the "protection form piracy", strongly considers sampling as not in line with copyright. Obviously, justifying sampling from a market perspective became more diversified. Expert opinions are noticeably gaining importance, although one gets the impression that the verdict tends to follow one specific expert's opinion more than others, which is justified as "convincing expert knowledge". One expert witness evaluates the sampled part of "Metall auf Metall" and baptizes it as the "Keimzelle" ("Metall auf Metall" OLG 2006, p. 5). The court embraces this nomination of "Keimzelle", which will accompany the case through many stages of appeal and relates to the art convention as it strengthens the justification of sampling "formative parts". As a further term for sampling small pieces of music, they refer to "Tonpartikel" ("Metall auf Metall" OLG 2006, p. 5), sound particles – a term that already had some history in German courts at that time, which led the defendants to justify sampling as "trusting in current case law". With sound particles, the defendants try to find a quantitative and qualitative justification for evaluating the usage of the shortest pieces of music as in line with copyright. However, the expert witness juxtaposes the sound particles with the notion of the sample as gamete of the original, the formative part of the piece of music. While in the foreground there is a lot of economic justification about risk, cost saving, competition and fewer copies sold by the plaintiffs, an underlying thread provides justification for sampling in aesthetic terms by referring to the convention of art and tries to evaluate how sampling is stealing art. From that perspective the culprits have taken

> (…) not only (…) the formative part, but in the result the entire sound recording, which consists of the constant repetition of this formative part, appropriated and spared own effort for this. ("Metall auf Metall" OLG 2006, p. 5)

It is in this higher regional court verdict that music experts introduce the aesthetic evaluation of music to the case "Metall auf Metall". From a legal perspective, the verdict elaborates on missing legal regulation and states that a "high court decision" is missing.

Convention	Art	Market	Labor	Moral	Law	Science
Justifications	sampling of a melody (70)	protection of recording producers' investment (55)	organizational, economic, technical effort (48)	seeking permission of rightsholder (73)	qualitative or quantitative evaluations would lead to legal uncertainty (56)	
	taking formative parts of another's song (80)	exclusive rights to exploit, distribute and authorize (25)	organizational responsibility (49)		different objects of protection for recording and author's rights (14)	
	waiving of recording rights for artistic freedom not reasonable (86)	protection of the whole, but also parts of a record (54)	replay sample (62)		small amount of sampling court cases (75)	
	musical development will not suffer (43)	economic value of smallest sound snatches (16)			missing evaluation of "free use" (40)	
	creation of an original work (10)				regulation of "free use" the same for authors and recording producers (59)	

Table 9: BGH 2008, conventions and justifications[10]

The third verdict of the case (table BGH 2008) is the first one reached by Germany's federal court of justice. It very strongly relates to the market convention when it justifies the "economic value of smallest snatches" and evaluates as well the "protection of the whole, but also parts of a record", thus circumventing arguments referring to sound particles. The term "smallest particles" caused further regulatory uncertainty in the prior verdict. To deal with that, the term

[10] Source for this verdict: https://openjur.de/u/73903.html Visited: 09.11.2019

"Tonfetzen" ("Metall auf Metall", BGH 2008, paragraph 14), "sound snatches", is introduced. Where it exactly emerged remains unclear. Importantly, the federal court of justice justifies here the protection of sound snatches without originality in any form, which was not possible within the wording of sound particles. Recording rights exist generally; it does not matter if a classical sinfonia or birds' chirrups are recorded. To the court, all sound snatches are protected under the recording rights. The argument rests on justifications within the labor convention and mainly on the "organizational responsibility" and the "organizational, economic, and technical effort" associated with the sound recording. In contrast to the earlier verdicts, however, the BGH 2008 was the first to intensively justify sampling by referring to it as art. Also, the actors justify sampling in relation to artistic freedom. Thus, while protection of property has been central for the involved actors from the beginning, the relation to artistic freedom was established nearly ten years after the court struggle started. It will become of great importance for the further development of the case, even though the BGH does not see a "waiving of recording rights for artistic freedom" as a possible justification for sampling and justifies that "musical development will not suffer" when sampling is evaluated as not in line with copyright. Not yet in the terminology of artistic freedom the court justifies against culprits' arguments:

> Contrary to the opinion of the revision, it is unreasonable for the phonogram producer to forego performance protection for the smallest parts of sound recordings in the interests of free musical development. ("Metall auf Metall", BGH 2008, paragraph 20)

To allow art to flourish, the federal court of justice offers several possible approaches: "replay the samples" or "seeking permission". Additionally, the "creation of an original" work gains importance as a justification that is connected to the legal practice of "free use". Since the federal court of justice in its final analysis orders the higher regional court to evaluate the legal question of "free use", it does not reach a final verdict. Though the BGH argues that sampling is not in line with copyright regulation, it makes a legal loop back to the higher regional court necessary. The verdict does not consider justifications from a scientific perspective, as no further expert witnesses appear and no further experts furnish opinions.

Convention	Art	Market	Labor	Moral	Law	Science
Justifications	equal aesthetic value of reproduction (20)	sound identity of replay and original commercially evaluated by consumers (76)	replay sample (62)		protection of melody legally disputed (52)	historic knowledge (31)
	invoking free use (35)		spare effort (77)		missing high court decisions (42)	convincing expert knowledge (9)
	creation of an independent work (11)		effort of original producers (17)			factual possibility to rebuild sample (26)
	sufficient distance between works (79)					
	genre specificities (29)					

Table 10: OLG 2011, conventions and justifications[11]

The decision of the higher regional court Hamburg in 2011 (table OLG 2011) then provided the legal evaluation, whether or not the culprits could justify their usage of sound material by "invoking free use". This could render sampling as in line with copyright. Generally, the verdict reaffirms the first court decision from the year 2004, is again in favor of the plaintiffs and understands the music practice of sampling as infringing copyright regulation. Yet, while the ruling seemingly strengthens the previous ones, it prepares the path to look deeper into the

[11] Source for this verdict: https://openjur.de/u/172802.html Visited: 09.11.2019

artistic questions of sampling. Instead of mainly depicting the market convention, the verdict touches upon distinct aspects of musical practices and justifies sampling from an art perspective. One could refer to this verdict as the "artistic" or the "musical" one, because it stresses the artistic practices around sampling and the protectability of a sampling work as a piece of art. While the judges ruled that the track produced by the culprits cannot be justified with free use, it was determined that it is an "independent work" ("selbständiges Werk", "Metall auf Metall", OLG 2011, page 4), since there was "sufficient distance between the works". Thus, the verdict positively evaluates the possibility that sampling material of third parties can lead to the creation of a piece of art itself. To do that, the appeal stage questioned the distance between the music pieces and asked whether or not the chronologically earlier work "fades" ("verblassen", "Metall auf Metall", OLG 2011, pages 4) when listening to the latter one. Further experts were asked to offer their opinion, which helped rendering the music piece "Nur mir" as an independent work. Additionally, the court considers "genre specificities" and the meaning of genre for the artistic practice of sampling for the first time. The judges justify less "fading" and thus "distance" of the rhythmic parts as typical for the genre of hip hop. The parts taken from "Metall auf Metall" do not fit conceptualizations of melody in the eyes of the court, so they do not fall under the strict melody protection. However, all these justifications still played an insignificant role in the final decision making, since the court considers the possibility of "replaying the sample" as the central piece of justification and again relied on the evaluation of "effort". Expert witnesses engage with this question and even "rebuild" the sample, which justifies scientifically "the factual possibility to rebuild a sample". The existence of digital samplers and sample libraries in the year 1996 justify in the form of "historic discourse knowledge" that a music producer with average skills and equipment would be able to replay the sample. This rebuild was done in two days, which the court determined a fair amount of time:

> An effort of two days, however, is reasonable in any case, before being allowed to intervene in foreign rights without asking and free of charge. It should also be noted that the measure taken from the defendant from "Metall auf Metall" continuously underlays the piece "Nur mir" is and represents an integral part of the rhythmic structure of "Nur mir ". ("Metall auf Metall", OLG 2011, p. 11)

The verdict ends with a hint about the still "missing federal court of justice decision". The following BGH 2012 verdict is the revision of the first BGH verdict from 2008 and its second OLG revision. The case has already grown significantly in complexity.

Convention	Art	Market	Labor	Moral	Law	Science
Justifications	equal aesthetic value of reproduction (20)	exclusive rights to exploit, distribute and authorize (25)	replay sample (62)	seeking permission of rightsholder (73)	weighing of exceptions and limitations (87)	convincing expert knowledge (9)
	reproduction allows cultural development (63)	sound identity of replay and original commercially evaluated by consumers (76)	organizational responsibility (49)	if you can't get permission: don't sample (32)	different objects of protection for recording and author's rights (14)	
	enter a dialog with work (19)		organizational, economic, technical effort (48)	sampling widespread (72)	regulatory uncertainty? - deal with it! (60)	
	sampling as a musical style and a means of artistic expression (67)					

Table 11: BGH 2012, conventions and justifications[12]

[12] Source for the verdict: https://openjur.de/u/623989.html Visited: 09.11.2019

Up to this point, the plaintiffs have lost at every stage and the music practice of sampling has consecutively been evaluated as not in line with copyright. This does not change here. The whole verdict depicts defendants' attempts to argue against the evaluation of "free use" by the higher regional court, which they do in justifying from a moral convention that "sampling is widespread", but even more so based on the art convention. The defendants justify "sampling as a musical style and a means of artistic expression", yet the possibility to rebuild a sample with the connected justification that a "reproduction allows cultural development" finds it roots in an art convention background with the evaluation of sampling as in line with copyright. In general, the BGH has a very clear position to sampling as 'free use':

> The attacks of the revision directed against this assessment have no success. ("Metall auf Metall", BGH 2012, p.4)

The verdict argues about the relationship between the basic rights of artistic freedom and the basic right of property protection for the first time. Legally, this is understood as a "weighing of exceptions and limitations" between the art and the market, but also the labor convention. This weighing becomes the center piece of the discussion at the federal constitutional court. In the reading of the BGH 2012, though also the court can justify sampling as a "widespread practice", it does not see the interference with the "organizational, economic, and technical effort" as justified. Rather it justifies morally that actors who cannot obtain a license and thereby permission to sample, should not sample at all. The regulatory uncertainty that this might entail is justified, astonishingly, as something actors need to "deal with". The legal evaluation of sampling changed, however, dramatically in the sentence of the federal constitutional court (table BVerfGH 2016) that is actually a weighing of an art and a market/labor convention leaning towards art.

Convention	Art	Market	Labor	Moral	Law	Science
Justifications	taking parts of copyrighted work as means of creativity (81)	usual market constraints (85)	organizational, economic, technical effort (48)	simple appropriation through digitalization (74)	weighing of perspectives - striking a fair balance (88)	
	art and genre specificities (29)	economic value of samples (16)	replay fosters performing artists (61)	no general seeking of permission of rightsholders (73)	factual prohibition of sampling through BGH (27)	
	engaging musically with prior recordings (18)	different possible forms to pay remuneration (15)	samples function as music material (64)	illegalization of established digital practices (33)	sampling as "free use" as law development (68)	
	uncertainty about replay deters from creating (83)	licensing obligation for non-artistic use (37)	clearing rights restricts music productions (7)		need to consider EU law (44)	
		no commercial competition (46)				
		exclusive rights can stand behind artistic freedom (24)				

Table 12: BVerfGH 2016, conventions and justifications[13]

[13] Source for this verdict: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/05/rs20160531_1bvr158513.html Visited: 09.11.2019

In this verdict, "taking parts of copyrighted work" is actually justified as a "means of creativity", which turns the arguments prior to this verdict around. The legal music practice of replaying short samples offered by the courts until this point evaluates the BVerfGH as impeding the creative process. Sampling is justified as in line with copyright, because there is "uncertainty about replaying that deters from creating". Even typical justifications of the market convention are put into a new perspective, when the court justifies that "exclusive rights can stand behind artistic freedom". Generally, artistic freedom is very much pushed to the fore. A numerical side-note: up to this point, the term "artistic freedom" was employed only twice by the BGH verdict of 2012. The federal constitutional court uses it 45 times. The main development in the applied justifications is called a "kunstspezifische Betrachtung" (art-specific consideration), a view on the matter that values "art and genre specificities":

> The art-specific consideration required by Article 5 (3) sentence 1 GG demands that the adoption of pieces of copyrighted objects be recognized as a means of artistic expression and artistic design. If this freedom of development conflicts with an infringement of copyrights or ancillary copyrights, which only marginally limits the possibilities of exploitation, the exploitation interests of the right holders may have to stand back in favor of artistic freedom. ("Metall auf Metall", BVerfGH, p. 1)

Though this sentencing only covers small pieces of music and their connection to recording rights, the verdict has been interpreted as a breakthrough for a culturally and musically informed justification of the sampling issue. Based on the value judgments of the involved evaluators in this constitutional complaint, a variety of justifications appear rendering sampling legal. The art convention outperforms the market or the labor convention. Justifications also engage with other conventions, especially with the market, while arguing in favor of sampling. For instance, "different possible forms to pay remuneration" or licensing as only an "obligation for non-artistic use" shows as much. Even for the labor convention, which surely is the stronghold of justifying sampling as not in line with copyright, the verdict points out how uncertainties about "clearing of rights restricts creation", links the practice directly with music production and musical labor. Still, the labor convention justifying with "organizational, economic and technical efforts" remains of noticeable importance. Other justifications relate to the moral convention, argue against a default state of "general seeking of permission" and evaluate that justifying sampling as not in line with copyright is actually an "illegalization of a whole digital practice". The most relevant justification for the recent development of the case, however, is to connect the question of sampling to the ECJ, as there is a "need to consider EU law" in this matter, because EU law precludes national law. The federal constitutional court is uncertain whether or not German courts are even able to justify sampling within their legal boundaries at all.

Convention	Art	Market	Labor	Moral	Law	Science
Justifications	barriers of copyright for parody, caricature, pastiche (5)	exclusive rights to exploit, distribute and authorize (25)	organizational, economical, and technical effort (48)	sampling of public interest (71)	threatening copyright harmonization (81)	
	quotation exception (58)	protection of the whole, but also parts of a record (54)	organizational responsibility (49)		harmonized exploitation rights (30)	
	sample not circumstantial part of the created work (65)	protection of property (53)			EU directive already weighs exceptions and limitations (21)	
	invoking free use (35)	barriers of property protection (6)			implementation of EU law with room to maneuver for nation states (34)	
	sufficient distance between works (79)				need to consider EU law (44)	
	artistic freedom as fundamental right (2)					
	art and genre specificities (29)					

Table 13: BGH 2017, conventions and justifications[14]

The sentence of the federal court of justice in 2017 (table BGH 2017) announces a stay of proceedings and comes up with six questions in need of clarification from the ECJ. By doing so, the verdict, however, reestablishes a restrictive view on sampling and justifies it in various ways as not in line with copyright regulation. In particular, it argues from a market and labor perspective, but it also invokes the "barriers of parody, caricature and pastiche" as already existing justifications for artistic freedom that do not fit music sampling. Yet, it acknowledges that "sampling is of public interest" and that there is a fundamental right of users in the legality of sampling from a moral point of view. The art convention also remains a stronghold for justifying sampling as in line with copyright. Three of the six questions then ask the ECJ about the relationship between recording rights and sound snatches of recordings, two are about the relationship between EU regulations and the regulation of national states, and one question deals with categorizing quotations of pieces of art as a "quotation exception". At least partially, the goal of this verdict appears to be translating constitutional artistic freedom into copyright terms. The federal court not only develops questions for the ECJ, but adds some elaborate answers, as well. Some of them reappear in the advocate general's opinion, the court case's next stage. The verdict evaluates whether it is possible to describe sampling within the boundaries of the quotation exception, and denies it. Still, artistic freedom might make an exception necessary:

> Furthermore, an art-specific view demanded by artistic freedom may require that the barriers of the law be extended by way of interpretation to a field of application which is wider for works of art than for a non-artistic use. ("Metall auf Metall" BGH 2017, paragraph 21)

In the end, the verdict depicts three ways how law could render sampling as in line with copyright regulations: "free use" connected to the creation of an independent work through "sufficient distance between works", "barrier regulations of property" and the "fundamental right of artistic freedom". The court states that a rule for free use is missing in the EU regulation and reminds in an appellative manner that distance between pieces of art is the important term to distinguish transformation in Germany's copyright law.

[14] Source for this verdict: https://openjur.de/u/2117810.html Visited: 09.11.2019

Convention	Art	Market	Labor	Moral	Law	Science
Justifications	quotation exception (58)	exclusive rights to exploit, distribute and authorize (25)	replay sample (62)	awareness of limits life imposes (4)	EU law precludes national law (22)	sampling as multifaceted (66)
	artistic freedom less extensive than property of thirds (3)	protection of the whole, but also parts of a record (54)			different objects of protection for recording and author's rights (14)	
	censorship threatens freedom (8)	protection of recording producers' investment (55)			weighing of exceptions and limitations (87)	
	creation of an independent work (11)	usual market constraints (85)			framework of current rules (27)	
					threatening harmonization (81)	
					degree of originality for recordings in US (13)	

Table 14: AGO 2018, conventions and justifications[15]

The advocate general's opinion (table AGO 2018) is, unsurprisingly for an opinion, filled with justifications but not a verdict, in itself a very interesting document. The opinion generally follows the restrictive justifications outlined by the federal court of justice and even strengthens several points. Looking at the justifications, one gets the impression that a reset button has been pushed. Justifications formerly connecting sampling to artistic freedom and understood as pro-sampling are again re-formulated and show a highly impedimental picture of the relationship between sampling and copyright law. The "replay sample" justification reappears and the "protection of investment" is strengthened again. The opinion justifies sampling as not in line with copyright regulation from a market convention, and even again from an art convention. In particular, justifying in detail why sampling is not covered by the "quotation exception" and relativizing the need for a sampling exception by referring to "censorship" as the real threat for freedom establishes a highly restrictive general view on sampling. The only solution to render the usage of sound recordings of third parties as legal within copyright, the advocate general suggests between the lines, is a change in regulation. He asks for a copyright law that demands a "degree of originality for the granting of recording rights" like how the US copyright system handles it.

Finally, the verdict of the ECJ (table ECJ 2019) answers the questions of the BGH and seemingly strives for "striking a fair balance" by integrating the justification of "substantiality as a basis for evaluating" whether or not sampling is in line with copyright regulation.

[15] Source for this opinion: http://curia.europa.eu/juris/document/document.jsf?text=&docid=208881&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1 Visited: 09.11.2019

Convention	Art	Market	Labor	Moral	Law	Science
Justifications	quotation exception (58)	exclusive rights to exploit, distribute and authorize (25)			EU law precludes national law (22)	
	unrecognizable transformation no copying (84)	protection of recording producers' investment (55)			weighing of exceptions and limitations (87)	
	creation of an independent work (11)				harmonizing exploitation rights (30)	
	sampling as means of artistic expression (67)				striking a fair balance (88)	
	sampling as quotation only when entering a dialog with sampled work (69)				substantiality basis for evaluating copy/no copy (78)	

Table 15: ECJ 2019, conventions and justifications[16]

From a general perspective, the verdict does not follow the restrictive justifications the AGO proposed. In fact, the verdict tries to make as few justifications as possible. By avoiding several of the conventions presented up to this verdict, the ECJ argues in a very slim manner. It avoids any justifying of effort, does not mention morals, and also scientific justifications are not uttered. "Striking a fair balance" may be an attempt to find the fewest amount of justifications necessary. Thereby the verdict evaluates sampling as not in line with copyright based on market justifications. Though the verdict justifies that sampling can be seen as a "means of artistic expression", it only offers an ambiguous justification for legalizing sampling. Sampling can be legal if it is transformed to a point where the original material is not recognizable any more. If you cannot hear that a certain song has been sampled, it is not copying and thus in line with copyright. The bbottom line of the ECJ verdict states that sampling may be an interference with the rights of the recording producer, if it is done without its consent and if the sample is recognizable. That the sample in "Nur mir" is evaluated as "unrecognizable" seems improbable, but the BGH will re-evaluate the case in April 2020. If the court evaluates the two-second sample as recognizable and sides with the plaintiffs Kraftwerk again, this could even mean going back to the BVerfGH to submit a claim for "artistic freedom" again. The future is quite unclear for this "never-ending" struggle of sampling as a creative music practice under regulatory uncertainty.

Discussion

The analysis of "Metall auf Metall" shows how regulatory uncertainty unfolds over time. I investigated how actors justify the creative practice of sampling from a temporal perspective and collected justifications on a very granular level. These collections visualize that dealing with the regulatory uncertain practice at court is not a linear development, but is rather a tortuous process (Fortwengel, Schüßler, & Sydow, 2017). Instead of clear regulatory boundaries, I noticed how justifications branched out and blossomed vividly. Regulatory uncertainty is more complex than its typical understanding as uncertainty about the future development of regulation suggests (Hoffmann et al., 2008). But what I find also goes beyond a practice-oriented suggestion of actors' inability to align their practice with regulation (Dobusch et al., 2018) and stresses that actors might even be uncertain about how to evaluate a creative practice like sampling. Thus, regulatory uncertainty is also about being uncertain about what is valuable in a certain critical moment. The EC offered a framework to show that and how actors are uncertain, which convention should be aimed at when justifying the regulatory uncertain practice of music sampling.

[16] Source for this verdict: https://openjur.de/u/2177465.html Visited: 09.11.2019

When we look at the tables presented comparatively, we see significant changes over time in the distribution of justifications and the related conventions. This is especially the case for the art convention and, connected to this, the emergence of artistic freedom as a justification for music sampling. While in the first verdict of the regional court, art as a convention for justifying sampling was virtually non-existent, its significance grew over time. Other conventions might lose – at least temporarily – influence, as is the case with the science convention that importantly paved the way for justifying sampling as art, but was subsequently more and more neglected. Yet, it was the restrictive opinion of the general advocate that evaluated sampling as a "multifaceted phenomenon" ("Metall auf Metall" AGO 2018, p. 1), with its diverse layers impeding legal classification: a position based on close reading of at least some scientific research about sampling that itself required time to evolve around the music practice and is a still-growing body of literature (Czernik, 2009; Fischer, 2020; Salagean, 2008; Schuster, 2014). This points to justifying at court a practice that is very much in temporal flux and based on situational developments. The analysis of "Metall auf Metall" adds to research that opposes a perspective of linear decision-making at court (Scheffer, 2003a, 2003b; Scheffer, Hannken-Illjes, & Kozin, 2009). Apparently justifying at court depends on cultural knowledge about sampling practice that enters the argumentation incrementally.

From a temporal perspective and in chronological order, the fluidity of justifying becomes very explicit. Motions within justifications could be compared visually to waves, as I would like to call it based on the visual representation of the justifications. A coming and going of justifications that can side with both sampling as in line or sampling as not in line with copyright. Arguments that already vanished may pop up again and change their orientation. The most important and recent example is the tentative solution the ECJ offers with its justification of "unrecognizability". In a different wording, the BGH 2008 argued that "qualitative or quantitative evaluations would lead to legal uncertainty", because boundary issues arise. Yet this is exactly what the ECJ proposes twelve years later: to qualitatively assess whether or not a sample is recognizable in the novel music created. Analyzing the temporal unfolding of "Metall auf Metall" thus adds to our understanding of how entangled justifying regulatory uncertain practices can be, and it may help to keep track of changes that pop up again.

Conclusion

In this paper, I investigated how justifying the regulatory uncertain music practice of sampling unfolds over time in the lengthy court case "Metall auf Metall". The court case offers a "burning glass" to observe how involved actors justify sampling and how they evaluate the uncertain practice referring to different conventions. With my study, I contribute to our understanding of regulatory uncertainty in general and of justifying creative music practices under regulatory uncertainty in particular. In conclusion, I want to stress three points:

Firstly, I find that justifying the practice of music sampling in a copyright court case is far more diversified than the literature on justifying IP suggests (Hettinger, 1989; Lemley, 2004; Sell & May, 2001). Justifying sampling as either in line or not in line with copyright refers to the conventions of art, market, labor, morals, law and science, with especial justifications aiming at the convention of labor as a recurring justification against the legality of music sampling. Justifying at court is thus obviously much more than an applying of clear rules and goes beyond justifying a rule itself. Instead, my research shows an active struggle on the part of involved actors for what is an applicable justification in a critical moment. This points to active actors that apply conventions with agency (Boltanski & Thévenot, 2006; Diaz-Bone, 2015a). Though music sampling can be connected to the justification opposition of the dissemination of ideas

and exploitation of property (Dobusch & Quack, 2010; May & Sell, 2006; Sell & May, 2001), my analysis of regulatory uncertainty illuminates that the historic opposition between individual exploitation and social dissemination is not present from the beginning of a court suit about music. Actors develop these perspectives through their justifications at court over time.

Secondly, I observe that this process of justifying sampling at court is by no means linear, and the applied justifications are not fixed. Far more, a great diversity of justifications appears, diversely evaluating the phenomenon, with changing emphases between single verdicts. In line with the observation of May and Sell (2001), who understand the relationship between individual exploitation and social dissemination as historically contingent justifications of copyright, I find that this relationship is not clear at all even within singular court cases. It is, thus, not only a historic but also a present-day observation that actors can challenge a strengthening of rightsholders' positions in creative practice, fostering for instance an art convention in their justifications. However, it also became clear that legal evaluations can be quite temporary and balancing acts might well look like swinging moods of justice. This volatility of justifications and relevant conventions can be understood as having been fostered through living law dynamics (Ehrlich, 1888, 1989 [1913]; Raiser, 1995). The cultural practice of sampling is increasingly perceived by the courts but also the immanent dynamics of law (Scheffer, 2003a), and referencing prior cases and searching for legal arguments like "artistic freedom" and "free use" add to the volatility. Court verdicts are themselves sources of regulatory uncertainty as they introduce novel justifications with often uncertain consequences for the case. The balancing of the verdict ECJ 2019, for instance, is very likely to provide exactly that in suggesting the justification of "unrecognizability" to separate legitimate from illegitimate sampling. The case of "Metall auf Metall" shows that regulatory uncertainty can prevail in court cases, even if eight verdicts have been reached, pointing out how volatile legal evaluations of creative and novel practices can be. Considering that the creative industries and not least the music business are searching for novel practices on a continuous basis (Parmentier & Mangematin, 2014) and the accelerating effects of digitalization on creativity (Leyshon, 2009), this might become of even greater importance in the future. On the one hand, courts negotiate existing uncertainty, but on the other, their "swinging" decisions add again to regulatory uncertainty about music practices.

Thirdly, my study offers insights into the relationship between regulatory uncertainty and creativity. I showed that the creativity of sampling is a central justification for the music practice at court and has fueled the struggle. Creativity, thus, matters at court. This adds to the scarce analysis of creativity and how it is dealt with at court (Frimmel & Traumane, 2018). However, creativity in the form of justifying art was not an issue from the beginning of the struggle. It was rather uncertain whether music sampling was creative at all. Thus, the creativity of sampling had to be developed at court over time. This stresses the difficulties of law in handling innovative creative practices, but also actors' unawareness of the value creativity might present in front of courts. Still, whether or not sampling is creative in a legal sense is still a major issue, noticeable in the unsuccessful attempts to subsume sampling among already legally "known" creative practices like parody, caricature, pastiche or also the practice of quoting.

There are limitations to my study that might also offer direction for further scientific investigation. Firstly, to analyze a case neither a final decision nor distinct boundaries could be seen as problematic. However, to be interested in regulatory uncertainty renders those cases especially valuable in the struggle to reach a final decision. Secondly, because of the constructed nature of the data material, summarizing the central aspects emerging during court hearings, and the provision of anonymity, it was not possible to relate justifications directly to the

different court actors involved. Getting access to the complete court files or interviews with involved actors could help here. Finally, it would be interesting to compare the results of this particular case with other cases of regulatory uncertainty, either those also concerned with copyright, IPR in general or even going beyond intellectual property. This could show how diversely or similarly actors in lengthy court cases justify regulatory uncertainty.

Lastly, with a brief view beyond my studied case, I want to show that courts applied artistic freedom as a justification for sampling soon after the federal constitutional court offered this possibility. I want to suggest that this justification has become of distinct importance in the contemporary legal discourse in Germany, even though the ECJ decision imposes new directions. In 2017, the regional court Munich's decision "Schwung in der Kiste" (LG München, 33 O 15792/16) repeatedly justified sampling as protected by the boundaries of artistic freedom. A German hip-hop band prominently sampled the exclamations of a carny, who sued for infringing her author's rights, since she did not have the recording rights. Referring to the federal constitutional court's verdict, the court decided to dismiss the case entirely. While the case of "Schwung in der Kiste" was structured more easily than "Metall auf Metall" since ancillary copyright was of no concern, it is still remarkable how a preliminary verdict was applied to reach a decision in a similar case based on the basic right of artistic freedom.

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Appendix

This alphabetically ordered appendix offers for each individual justification a reformulation in the form of a "causal clause" that contextualizes the short justifications.

No	Justification	Causal clause	Applied in
(1)	advances lower investment risk of producers	Sampling is in line with copyright, because advance money from labels lowers the investment risk of the original music producers.	OLG 2006
(2)	artistic freedom as fundamental right	Sampling is in line with copyright, because artistic freedom is a fundamental right.	BGH 2017
(3)	artistic freedom less extensive than property of thirds	Sampling is not in line with copyright, because artistic freedom is less extensive than property of thirds.	AGO 2018
(4)	awareness of limits life imposes	Sampling is not in line with copyright, because artists need to be aware of limits life imposes.	AGO 2018
(5)	barriers of copyright for parody, caricature, pastiche	Sampling is not in line with copyright, because it does not fit to the creative practices of parody, caricature and pastiche that copyright allows.	BGH 2017
(6)	barriers of property protection	Sampling is in line with copyright, because there are barriers of property protection.	BGH 2017
(7)	clearing rights restricts music productions	Sampling is in line with copyright, because clearing rights restricts new music productions.	BVerfGH 2016
(8)	censorship threatens freedom	Sampling is not in line with copyright, because only "real" censorship of artistic works threatens artistic freedom.	AGO 2018
(9)	convincing expert knowledge	Sampling is not in line with copyright, because of convincing expert knowledge that frames the sample as infringing.	LG 2004, OLG 2006, OLG 2011, BGH 2012
(10)	creation of an original work	Sampling is in line with copyright, if an original work is created.	BGH 2008
(11)	creation of an independent work	Sampling is in line with copyright, if an independent work of art is created.	OLG 2011, AGO 2018, ECJ 2019
(12)	danger of repetition	Sampling is not in line with copyright, because of the danger of repetition of the sampling producer.	LG 2004
(13)	degree of originality for recordings in US	Sampling is in line with copyright, if there was a degree of originality for recordings like in the US copyright system.	AGO 2018
(14)	different objects of protection for recording and author's rights	Sampling is not in line with copyright, because authors and recording rights have different objects of protection.	BGH 2008, BGH 2012, AGO 2018
(15)	different possible forms to pay remuneration	Sampling is in line with copyright, because there are different possible forms to pay for the usage of the sample.	BVerfGH 2016

(16)	economic value of smallest snatches (samples)	Sampling is not in line with copyright, because there is economic value even in smallest snatches of music recordings.	BGH 2008, BVerfGH 2016
(17)	effort of original producers	Sampling is not in line with copyright, because it takes advantage of the effort of the original music producer.	LG 2004, OLG 2011
(18)	engaging musically with prior recordings	Sampling is in line with copyright, because it engages with historic recordings in a musical and creative manner.	BVerfGH 2016
(19)	enter a dialog with work	Sampling is not in line with copyright, if the sampling work does not enter a dialogue with the sampled work.	BGH 2012
(20)	equal aesthetic value of reproduction	Sampling is not in line with copyright, because the original and the reproduction have equal aesthetic value allowing artistic freedom.	OLG 2011, BGH 2012
(21)	EU directive already weighs exceptions and limitations	Sampling is not in line with copyright, because the EU copyright directive already weighs exceptions and limitations of property protection.	BGH 2017
(22)	EU law precludes national law	Sampling is not in line with copyright, because EU law precludes national law.	AGO 2018, ECJ 2019
(23)	evaluating significance for new creation	Sampling is in line with copyright, because the significance of the sample for the new creation is very low.	OLG 2006
(24)	exclusive rights can stand behind artistic freedom	Sampling is in line with copyright, because exclusive rights to exploit, distribute and authorize can stand behind artistic freedom.	BVerfGH 2016
(25)	exclusive rights to exploit, distribute and authorize	Sampling is not in line with copyright, because it infringes the exclusive rights to exploit, distribute and authorize of the producers of the original music material.	LG 2004, BGH 2008, BGH 2012, BGH 2017, AGO 2018, ECJ 2019
(26)	factual possibility to rebuild sample	Sampling is not in line with copyright, because of the factual proof that a rebuild of the sample is possible.	OLG 2011
(27)	factual prohibition of sampling through BGH	Sampling is in line with copyright, because the verdict of the BGH is a factual prohibition of sampling in general.	BVerfGH 2016
(28)	framework of current rules	Sampling is not in line with copyright, because of the framework of current rules.	LG 2004, AGO 2018
(29)	(art and) genre specificities	Sampling is in line with copyright, because of (art and) genre specificities of hip-hop music.	OLG 2011, BVerfGH 2016, BGH 2017
(30)	harmonized exploitation rights	Sampling is not in line with copyright, because of already harmonized exploitation rights on EU level.	BGH 2017, ECJ 2019
(31)	historic knowledge	Sampling is not in line with copyright, because of historic knowledge that demonstrates the truth about music creation processes.	OLG 2011
(32)	if you can't get permission: don't sample	Sampling is not in line with copyright, because if a musician cannot get a permission, she should not sample.	BGH 2012
(33)	illegalization of established digital practices	Sampling is in line with copyright, because if not, law renders an established digital practice illegal.	BVerfGH 2016
(34)	implementation of EU law has room to maneuver for nation states	Sampling is in line with copyright regulation, if the implementation of EU law uses the nation states' room to maneuver.	BGH 2017
(35)	invoking "free use"	Sampling is in line with copyright, if "free use" is invoked.	OLG 2011, BGH 2017
(36)	lack of ability to create sounds	Sampling is not in line with copyright, because the reason for sampling is a lack of ability to create sounds on one's own.	LG 2004
(37)	licensing obligation for non-artistic use	Sampling is in line with copyright, if there is a licensing obligation for non-artistic use of samples.	BVerfGH 2016

(38)	listening to and comparing the pieces of music	Sampling is not in line with copyright, because listening to and comparing the pieces of music did not show sufficient aesthetic difference.	OLG 2006
(39)	measuring and comparing music	Sampling is not in line with copyright, because measuring and comparing music scientifically proves the takeover.	LG 2004, OLG 2006
(40)	missing evaluation of "free use"	Sampling is in line with copyright, because a legal "free use" evaluation is missing.	BGH 2008
(41)	missing statutory regulation	Sampling is in line with copyright, because statutory regulation is missing.	LG 2004
(42)	missing high court decisions	Sampling is in line with copyright, because a high court decision is missing.	OLG 2006, OLG 2011
(43)	musical development will not suffer	Sampling is not in line with copyright, because musical development will not suffer.	BGH 2008
(44)	need to consider EU law	Sampling is neither in line nor not in line with copyright law, because first EU law needs to be considered.	BVerfGH 2016, BGH 2017
(45)	negligence and due diligence	Sampling is not in line with copyright, because the sampling producer acted negligent and ignored due diligence.	LG 2004, OLG 2006
(46)	no commercial competition	Sampling is in line with copyright, because there is no commercial competition between the original and the sampling track.	BVerfGH 2016
(47)	no financial interference	Sampling is in line with copyright, because there is no financial interference between the original and the sampling track.	LG 2004, OLG 2006
(48)	organizational, economic, technical effort	Sampling is not in line with copyright, because of the organizational, economic, and technical effort of the record producer.	BGH 2008, BGH 2012, BVerfGH 2016, BGH 2017
(49)	organizational responsibility	Sampling is not in line with copyright, because of the organizational responsibility the plaintiffs had for recording the original music material.	OLG 2006, BGH 2008, BGH 2012, BGH 2017
(50)	(no) promotional game with similarity	Sampling is (not) in line with copyright, because the sampling music producer gains (does not gain) economically from a promotional game with similarity.	LG 2004, OLG 2006
(51)	protect music producers from piracy	Sampling is not in line with copyright, because music producers need to be protected from piracy.	OLG 2006
(52)	protection of melody legally disputed	Sampling is in line with copyright, because the protection of melody is legally disputed.	OLG 2011
(53)	protection of property	Sampling is not in line with copyright, because it violates the protection of property.	BGH 2017
(54)	protection of the whole, but also parts of a record	Sampling is not in line with copyright, because not only the record as a whole, but also every part of the record is protected.	LG 2004, BGH 2008, AGO 2018
(55)	protection of recording producers' investment	Sampling is not in line with copyright, because the investment of the record producer needs to be protected.	LG 2004, OLG 2006, BGH 2008, AGO 2018, ECJ 2019
(56)	qualitative or quantitative evaluations would lead to legal uncertainty	Sampling is not in line with copyright, because qualitative and quantitative evaluations would lead to delimitation problems and to legal uncertainty.	BGH 2008
(57)	questioning plaintiffs' legal legitimation	Sampling is (not) in line with copyright, because the plaintiffs have (no) legal legitimation to file the suit.	LG 2004, OLG 2006
(58)	quotation exception	Sampling is not in line with copyright, because it does not fit the quotation exception that rests on indicating source, enter dialogue and a distinguishable character of a quote.	BGH 2017, AGO 2018, ECJ 2019

(59)	regulation of "free use" the same for authors and recording producers	Sampling is in line with copyright regulation, if the regulation of "free use" is the same for authors (compositional rights) and recording producers (recording rights).	BGH 2008
(60)	regulatory uncertainty? - deal with it!	Sampling is not in line with copyright, because if regulatory uncertainty arises, you have to deal with it.	BGH 2012
(61)	replay fosters performing artists	Sampling is not in line with copyright, because replaying samples would foster performing artists who would replay the samples.	BVerfGH 2016
(62)	replay sample	Sampling is not in line with copyright, because it is possible to "do it yourself" and replay the sample.	LG 2004, OLG 2006, BGH 2008, OLG 2011, BGH 2012, AGO 2018
(63)	reproduction allows cultural development	Sampling is not in line with copyright, because reproduction allows cultural development.	BGH 2012
(64)	samples function as music material	Sampling is not in line with copyright, because samples regularly function solely as music material.	BVerfGH 2016
(65)	sample not circumstantial part of the created work	Sampling is not in line with copyright, because the sample is not a circumstantial, but a formative part of the created work.	BGH 2017
(66)	sampling as multifaceted	Sampling is in line with copyright, because it poses a multifaceted and complex phenomenon difficult to comprehend	AGO 2018
(67)	sampling as a musical style and a means of artistic expression	Sampling is in line with copyright, because it is a music style and a means of artistic expression	BGH 2012, ECJ 2019
(68)	sampling as "free use" as law development	Sampling is in line with copyright, because sampling as "free use" can be seen as a development of law.	BVerfGH 2016
(69)	sampling as quotation only when entering a dialog with sampled work	Sampling is in line with copyright, if the sampling work enters a dialogue with the sampled work	ECJ 2019
(70)	sampling of a melody	Sampling is not in line with copyright, if a melody is sampled.	BGH 2008
(71)	sampling of public interest	Sampling is in line with copyright, because it is of public interest.	BGH 2017
(72)	sampling widespread	Sampling is in line with copyright, because it is widespread in music culture.	BGH 2012
(73)	(no general) seeking permission of rightsholder	Sampling is in line with copyright, because the sampling producer has to seek the permission of the rightsholder. Sampling is in line with copyright, if there is no general seeking of permission of rightsholders.	LG 2004, BGH 2008, BGH 2012, BVerfGH 2016
(74)	simple appropriation through digitalization	Sampling is not in line with copyright, because of the simple appropriation made possible through digitalization.	BVerfGH 2016
(75)	small amount of sampling court cases	Sampling could be in line with copyright, because there has been only a small amount of sampling court cases so far.	BGH 2008
(76)	sound identity of replay and original commercially evaluated by consumers	Sampling is not in line with copyright, if it makes no commercial difference with the customers.	OLG 2011, BGH 2012
(77)	spare effort	Sampling is not in line with copyright, because the sampling producer spares effort to produce the musical material.	OLG 2006, OLG 2011
(78)	substantiality basis for evaluating copy/no copy	Sampling is in line with copyright, because substantiality is the basis to evaluate whether or not a copy of an artefact has been produced.	ECJ 2019
(79)	sufficient distance between works	Sampling is in line with copyright, if there is sufficient distance between the music works	OLG 2011, BGH 2017

(80)	taking formative parts of another's song	Sampling is not in line with copyright, because (but also if) it takes formative parts of another's song.	LG 2004, OLG 2006, BGH 2008
(81)	taking parts of copyrighted work as means of creativity	Sampling is in line with copyright, because it takes a part of a copyrighted work as means of further creativity.	BVerfGH 2016
(81)	threatening copyright harmonization	Sampling is not in line with copyright, because it threatens the harmonization of EU copyright regulation.	BGH 2017, AGO 2018
(82)	trust current case law	Sampling is in line with copyright, if one trusts current case law.	OLG 2006
(83)	uncertainty about replay deters from creating	Sampling is in line with copyright, because uncertainty about aesthetic value of a replay deters from creating.	BVerfGH 2016
(84)	unrecognizable transformation no copying	Sampling is in line with copyright, because an unrecognizable transformation of a sampled piece of music is not an act of copying.	ECJ 2019
(85)	usual market constraints	Sampling is not in line with copyright, because being not allowed to use music material of others is a usual market constraint.	BVerfGH 2016, AGO 2018
(86)	waiving of recording rights for artistic freedom not reasonable	Sampling is not in line with copyright, because waiving of recording rights for artistic freedom is not reasonable.	BGH 2008
(87)	weighing of exceptions and limitations	Sampling is not in line with copyright, because the weighing of exceptions and limitations cannot put freedom of art over protection of property.	BGH 2012, AGO 2018, ECJ 2019
(88)	weighing of perspectives - striking a fair balance	Sampling is in line with copyright, because the weighing of perspectives needs to strike a fair balance between artistic freedom and protection of property.	BVerfGH 2016, ECJ 2019

ORGANIZED CREATIVITY

Organized Creativity - Practices for Inducing and Coping with Uncertainty

The aim of this DFG-sponsored Research Unit (FOR 2161) was to examine different dimensions of uncertainty in several practice areas and investigate what role they play in creative processes in different contexts and over time. Therefore, four different projects were conducted in which the dynamics in both the music and pharma industries were compared. The focus of all these projects was thereby the creative process both in organizations and in interorganizational networks.

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For further information

http://www.wiwiss.fu-berlin.de/forschung/organized-creativity/

Organized Creativity Discussion Paper