Federal Court of Justice

Message from the press office

No. 46/2020

Federal Court of Justice decides on illegality of the sound carrier sampling

Judgment of April 30, 2020 - I ZR 115/16 - Metal on Metal IV

The First Civil Senate of the Federal Court of Justice, which is responsible, among other things, for copyright law, decided today under which conditions the rights of the sound carrier manufacturer are violated by sampling.

Facts:

The plaintiffs are members of the music group "Kraftwerk". In 1977 they released a sound carrier on which the piece of music "Metal on Metal" is located. Defendants 2 and 3 are the composers of the title "Nur mir", which defendant 1 recorded with the singer Sabrina Setlur on sound carriers released in 1997. To produce the title, the defendants had electronically copied ("sampled") two seconds of a rhythm sequence from the title "Metal on Metal" and underlayed the title "Nur mir" in continuous repetition.

The plaintiffs see their rights as a phonogram manufacturer being violated. You have claimed the defendants for omission to produce sound carriers with the recording "Nur mir" and to bring them into circulation. In addition, they demanded that the defendant be liable for damages, information and the release of the sound carriers for the purpose of destruction.

Previous process:

The regional court upheld the lawsuit. The defendant's appeal has been unsuccessful. On the appeal of the defendant, the Federal Court of Justice overturned the appeal judgment and referred the matter back to the Higher Regional Court for a new hearing and decision (see press release of November 20, 2008). The higher regional court again rejected the defendant's appeal. The Federal Court of Justice rejected the defendant's renewed appeal. The Federal Constitutional Court overturned the revision judgments and the second appeal judgment and referred the matter back to the Federal Court of Justice.

Decision of the Federal Court of Justice:

The Federal Court of Justice has now overturned the first appeal judgment and referred the matter back to the Higher Regional Court.

With the reasons given by the Higher Regional Court, the claims asserted by the plaintiffs can neither be granted in relation to the production nor in relation to the placing on the market of phonograms.

1. With regard to the production, a violation of the right of reproduction of the plaintiff as the sound carrier manufacturer in accordance with Section 85 (1) sentence 1 case 1 UrhG is to be examined. In this respect, it should be noted that Directive 2001/29 / EC, which in Art. 2 Letter c the reproduction right for phonogram producers with regard to their phonograms and in Art. 5 Para. 2 and 3, exceptions or

restrictions with regard to this right regulates, according to Art. 10 which is applicable to acts of use from December 22nd, 2002, to distinguish between the production of sound carriers with the recording "Nur mir" before December 22nd, 2002 and from the aforementioned date.

a) For acts of reproduction prior to December 22, 2002, an infringement of the plaintiff's reproduction right as a phonogram manufacturer in accordance with Section 85 (1) Sentence 1 Case 1 UrhG cannot be conclusively assessed on the basis of the findings made in the first appeal judgment. As a result of the repeal by the Federal Constitutional Court, consideration of the findings in the second appeal judgment is out of the question. However, in its instructions for the new appeal procedure, the Senate indicated that the plaintiffs' right of reproduction should not have been violated, because it is obvious that the defendants can invoke free use within the meaning of Section 24 UrhG, which is applicable here. With the piece of music "Nur mir" you are allowed to be an independent work within the meaning of § 24 Para. 1 UrhG. Since the rhythm sequence taken from the defendant is not likely to be a melody within the meaning of Section 24 (2) UrhG and a corresponding application of this provision is out of the question, the prerequisites for free use should be met. In view of the fact that, in the opinion of the Federal Constitutional Court, the artistic creation process would not be adequately taken into account if the admissibility of the use of equally playable samples of a sound carrier were generally made dependent on the permission of the sound carrier manufacturer, the Senate does not hold to its view that a corresponding application of Section 24 (1) UrhG is ruled out if it is possible to record the sequence of notes recorded on the sound carrier yourself. Since the rhythm sequence taken from the defendant is not likely to be a melody within the meaning of Section 24 (2) UrhG and a corresponding application of this provision is out of the question, the prerequisites for free use should be met. In view of the fact that, in the opinion of the Federal Constitutional Court, the artistic creation process would not be adequately taken into account if the admissibility of the use of equally playable samples of a sound carrier were generally made dependent on the permission of the sound carrier manufacturer, the Senate does not hold to its view that a corresponding application of Section 24 (1) UrhG is ruled out if it is possible to record the sequence of notes recorded on the sound carrier yourself. Since the rhythm sequence taken from the defendant is not likely to be a melody within the meaning of Section 24 (2) UrhG and a corresponding application of this provision is out of the question, the prerequisites for free use should be met. In view of the fact that, in the opinion of the Federal Constitutional Court, the artistic creation process would not be adequately taken into account if the admissibility of the use of equally playable samples of a sound carrier were generally made dependent on the permission of the sound carrier manufacturer, the Senate does not hold to its view that a corresponding application of Section 24 (1) UrhG is ruled out if it is possible to record the sequence of notes recorded on the sound carrier yourself. 2 UrhG and a corresponding application of this provision is out of the question, the conditions for free use should be met. In view of the fact that, in the opinion of the Federal Constitutional Court, the artistic creation process would not be adequately taken into account if the admissibility of the use of equally playable samples of a sound carrier were generally made dependent on the permission of the sound carrier manufacturer, the Senate does not hold to its view that a corresponding application of Section 24 (1) UrhG is ruled out if it is possible to record the sequence of notes recorded on the sound carrier yourself. 2 UrhG and a corresponding application of this provision is out of the question, the conditions for free use should be met. In view of the fact that, in the opinion of the Federal Constitutional Court, the artistic creation process would not be adequately taken into account if the admissibility of the use of equally playable samples of a sound carrier were generally made dependent on the permission of the sound carrier manufacturer, the Senate does not hold to its view that a corresponding application of Section 24 (1) UrhG is ruled out if it is possible to record the sequence of notes recorded on the sound carrier yourself.

b) For acts of reproduction from December 22, 2002, however, a violation of the plaintiff's right of reproduction may be considered.

aa) Since that point in time, the right of the sound carrier manufacturer to reproduce the sound carrier regulated in Section 85 (1) sentence 1 case 1 UrhG has to be interpreted in accordance with the directive with regard to Art. 2 letter c of Directive 2001/29 / EC. Art. 2 letter c of Directive 2001/29 / EC represents a measure for the complete harmonization of the substantive content of the law regulated in it, which does not leave the Member States any scope for implementation, but makes mandatory requirements, so that the provision of § 85 para. 1 sentence 1 case 1 UrhG, according to the case law of the Federal Constitutional Court, is in principle not to be measured against the standard of the fundamental rights of the Basic Law, but solely against Union law and thus also against the fundamental rights guaranteed by Union law. According to the decision of the Court of Justice of the European Union issued on presentation of the Senate, the reproduction of an audio fragment - even a very short one - by a user is basically a partial reproduction within the meaning of Art. 2 Letter c of Directive 2001/29 / EC to watch. This interpretation is in line with the aim of the directive to achieve a high level of protection for copyright and related rights and to protect the considerable investments that phonogram producers have to make in order to be able to offer products such as phonograms. However, according to the case law of the Court of Justice, a reproduction within the meaning of Art. 2 Letter c of

Directive 2001/29 / EC does not exist if a user extracts an audio fragment from a sound carrier in the exercise of artistic freedom, in order to use it in a new work in a modified form that cannot be recognized when listening to it. From a weighing of the freedom of art (Art. 13 EU Charter of Fundamental Rights) and the guarantee of intellectual property (Art. 17 para. 2 EU Charter of Fundamental Rights) it follows that in such a constellation there is no sufficient impairment of the interests of the record producer.

bb) According to these standards, the removal of two bars of a rhythm sequence from the plaintiff's sound carrier and their transfer to the defendant's sound carrier constitutes a reproduction within the meaning of Art. 2 Letter c of Directive 2001/29 / EC and thus also Section 85 Paragraph 1 sentence 1 case 1 UrhG. When examining the question of whether an audio fragment taken from a sound carrier is used in a new work in a modified form that is not recognizable when listening, the listening comprehension of an average music listener must be taken into account. According to the findings of the appellate court, the defendants have adopted the rhythm sequence in their new sound carrier in a slightly modified form, but in a form that is recognizable when listening.

cc) In this respect, the defendants cannot invoke free use within the meaning of Section 24 (1) UrhG. The Court of Justice of the European Union ruled on a submission by the Senate that a Member State may not provide for any exception or restriction in its national law with regard to the right of the phonogram manufacturer from Art. 2 Letter c of Directive 2001/29 / EC that is not included in Art. 5 of this guideline is provided. Art. 5 of Directive 2001/29 / EC does not provide for any (general) exception or restriction with regard to the exploitation rights of the right holder from Art. 2 to 4 of Directive 2001/29 / EC in the event that an independent work is in free use of the work or the service of a right holder has been created. Thereafter it is no longer permissible, in such a case, regardless of

dd) The defendants cannot successfully invoke a limitation regulation either. The prerequisites for a quotation within the meaning of Section 51 Clause 1 and 2 No. 3 UrhG in conjunction with Art. 5 Para. 3 Letter d of Directive 2001/29 / EC do not exist because there is no indication that the listeners - as required for a quotation - could assume that the rhythm sequence underlying the piece of music "Nur mir" was taken from another work or sound carrier. The audio fragment taken over is also not an insignificant accessory within the meaning of Section 57 UrhG in conjunction with Article 5, Paragraph 3, Letter i of Directive 2001/29 / EC. The prerequisites for a caricature or parody within the meaning of Section 24 (1) UrhG in conjunction with Article 5 (3) (k) of Directive 2001/29 / EC are also not met because there is no evidence that that the piece of music "Just me" is an expression of humor or a mockery. The barrier for pastiches within the meaning of Art. 5 Paragraph 3 Letter k of Directive 2001/29 / EC is not relevant because the German legislature has the option of setting up an independent barrier regulation for the use of works or other subject matter for the purpose of pastiches has not made use of it.

ee) However, the Federal Court of Justice is not able to make a final assessment because the Higher Regional Court has not made any determinations as to whether the defendants have undertaken acts of reproduction or distribution since December 22, 2002 or whether such acts were to be expected seriously and specifically. The fact that the defendants copied and distributed the sound carriers objected to by the plaintiffs before December 22, 2002 does not necessarily mean that such behavior was also seriously threatened after this point in time in the sense of a risk of first inspection. This applies in particular if - which was to be assumed in the appeal proceedings due to the lack of determinable findings by the Higher Regional Court - the reproduction and distribution before December 22, 2002 was lawful. The justification of the risk of first inspection by behavior of the defendant that was permissible in the past, which has only become inadmissible due to a later change in the law, only comes into consideration if further circumstances arise that make an infringement specifically expected in the future. The Higher Regional Court will have to make determinations in the newly opened appeal proceedings.

2. With regard to the placing on the market, a violation of the plaintiff's right of distribution as a phonogram manufacturer in accordance with Section 85 (1) sentence 1 Case 2 UrhG and a ban pursuant to Section 96 (1) UrhG in conjunction with Section 85 (1) sentence 1 Case 1 UrhG must be examined .

a) There is no violation of the plaintiff's right of dissemination in accordance with Section 85, Paragraph 1, Sentence 1, Case 2 UrhG, which serves to implement Article 9, Paragraph 1, Letter b of Directive 2006/115 / EC. The Court of Justice of the European Union ruled on a submission by the Senate that a phonogram containing music fragments transferred from another phonogram is not a copy of this other phonogram within the meaning of Article 9 (1) (b) of Directive 2006/115 / EC .

b) If, with a view to actions committed after December 22, 2002, the right of reproduction of the plaintiff as a phonogram manufacturer was violated in accordance with Section 85 (1) Sentence 1 Case 1 UrhG, this cannot be based on a ban on placing on the market in

accordance with Section 96 (1) UrhG . This provision is inapplicable in the event of a dispute because it leads to an expansion of exploitation rights that are fully harmonized under Union law and is therefore contrary to the guidelines. If only a violation of the reproduction right provided for in Art. 2 Letter c of Directive 2001/29 / EC and Section 85 Paragraph 1 Clause 1 Case 1 UrhG comes into consideration, the protection granted by these provisions may not go beyond the application of Section 96 Paragraph 1 UrhG in the area of Article 9 Paragraph 1 Letter b of Directive 2006/115 / EC and Article 85 Paragraph 1 sentence 1 case UrhG regulated distribution law can be extended. In the event of a dispute, there is at most a violation of the plaintiff's right of reproduction as a phonogram manufacturer, but not a violation of their right of distribution.

3. The Federal Court of Justice is also not allowed to make a final decision because the plaintiffs are alternatively asserting their claims to their ancillary copyright as performing artists (Section 77 (2) sentence 1 UrhG, Article 2 letter b of Directive 2001/29 / EC; Art. 9 (1) (a) of Directive 2006/115 / EC), as an alternative to the violation of the copyright of the first plaintiff on the music work (Section 15 (1) No. 1 and 2, Sections 16, 17 (1) UrhG ; Art. 2 Letter a, Art. 4 Paragraph 1 of Directive 2001/29 / EC) and, in the extreme alternative, based on performance protection under competition law (§ 4 No. 9 UWG old version, § 4 No. 3 UWG). In this respect, the Higher Regional Court has not yet made any determinations that must now be made by it. The Senate also gives some information in this regard: For claims based on ancillary copyright as a performing artist, nothing else should apply than for claims based on ancillary copyright as a phonogram manufacturer. With regard to the claims under copyright law, it is questionable whether the extracted rhythm sequence meets the requirements of a copyrighted work. In any case, it can be assumed that the defendants can also refer to the right of free use under Section 24 (1) UrhG for all acts of use before December 22, 2002. Claims from performance protection under competition law are likely to be far removed. whether the extracted rhythm sequence meets the requirements of a copyrighted work. In any case, it can be assumed that the defendants can also refer to the right of free use under Section 24 (1) UrhG for all acts of use before December 22, 2002. Claims from performance protection under competition law are likely to be far removed. whether the extracted rhythm sequence meets the requirements of a copyrighted work. In any case, it can be assumed that the defendants can also refer to the right of free use under Section 24 (1) UrhG for all acts of use before December 22, 2002. Claims from performance protection under competition law are likely to be far removed.

The relevant regulations are:

Section 15 (1) No. 1 and 2 UrhG (general)

The author has the exclusive right to use his work in physical form; the right includes in particular

1. the right of reproduction (§ 16),

2. the right of distribution (§ 17),

Section 16 (1) UrhG (right of reproduction)

The right of reproduction is the right to make copies of the work, regardless of whether it is temporary or permanent, in which process and in which number.

Section 17 (1) UrhG (distribution right)

The distribution right is the right to offer the original or copies of the work to the public or to bring them into circulation.

§ 24 UrhG (free use)

(1) An independent work that has been created with free use of another's work may be published and exploited without the consent of the author of the work used.

(2) Paragraph 1 does not apply to the use of a work of music through which a melody is recognizably taken from the work and used as the basis for a new work.

Section 51, sentences 1 and 2, no. 3 UrhG (quotations)

The reproduction, distribution and public reproduction of a published work for the purpose of quoting is permitted, provided that the scope of use is justified by the particular purpose. This is particularly permissible if

3. Individual passages of a published work of music are cited in an independent work of music.

Section 57 UrhG (insignificant accessories)

The duplication, distribution and public reproduction of works is permitted if they are to be regarded as insignificant accessories in addition to the actual object of the reproduction, distribution or public reproduction.

Section 77 (2) sentence 1 UrhG (reproduction and distribution)

The performing artist has the exclusive right to reproduce and distribute the image or sound carrier on which his performance was recorded.

Section 85 (1) sentence 1 UrhG (exploitation rights)

The manufacturer of a sound carrier has the exclusive right to reproduce, distribute and make publicly available the sound carrier.

Section 96 (1) UrhG (prohibition of exploitation)

Unlawfully produced copies may neither be distributed nor used for public reproduction.

§ 4 No. 3 UWG (protection of competitors)

Whoever acts unfairly

3. Offers goods or services that are an imitation of a competitor's goods or services if he

a) causes avoidable deception of the customer about the operational origin,

b) inappropriately exploits or impairs or affects the esteem of the counterfeit goods or services

c) has dishonestly obtained the knowledge or documents necessary for the imitation;

Art. 2 letter c of Directive 2001/29 / EC

Member States shall grant phonogram producers the exclusive right with regard to their phonograms to allow or prohibit direct or indirect, temporary or permanent reproduction in any form and in any form, in whole or in part.

Art. 5 para. 3 letters d, i and k of Directive 2001/29 / EC

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

d) for quotations such as criticism or reviews, insofar as they concern a work or other subject matter that has already been legitimately made available to the public, provided - except in cases in which this proves to be impossible - the source, including the The name of the author is indicated and provided that the use corresponds to decent custom and is justified in its scope by the particular purpose;

i) for the incidental inclusion of a work or other subject matter in other material;

k) for use for the purpose of caricatures, parodies or pastiches;

Art. 9 Paragraph 1 Letter b of Directive 2006/115 / EC

Member States shall grant phonogram producers the exclusive right with regard to their phonograms to make the phonograms and copies thereof available to the public by way of sale or otherwise.

Art. 5 para. 3 sentence 1 GG

Art and science, research and teaching are free.

Art. 13 Charter of Fundamental Rights of the European Union

Art and research are free. Academic freedom is respected.

Art. 17 para. 2 Charter of Fundamental Rights of the European Union

Intellectual property is protected.

Judgment of April 30, 2020 - I ZR 115/16 - Metal on Metal IV

Lower courts:

LG Hamburg - judgment of October 8, 2004 - 308 O 90/99

Hamburg Higher Regional Court - judgment of June 7, 2006 - 5 U 48/05

BGH - judgment of November 20, 2008 - I ZR 112/06, GRUR 2009, 403 = WRP 2009, 308 - metal on metal I

Hamburg Higher Regional Court - judgment of August 17, 2011 - 5 U 48/05

BGH - judgment of December 13, 2012 - I ZR 182/11, GRUR 2013, 614 = WRP 2013, 804 - metal on metal II

BVerfG - judgment of May 31, 2016 - 1 BvR 1585/13, BVerfGE 142, 74

BGH - decision of June 1, 2017 - I ZR 115/16, GRUR 2017, 895 = WRP 2017, 1114 - metal on metal III

ECJ - judgment of July 29, 2019 - C-476/17, GRUR 2019, 929 = WRP 2019, 1156 - Pelham et al

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