

## WINTER v. MOORE

Decision of December 3, 2008

File number: 21 O 23120/00

### **PARTIAL AND FINAL JUDGMENT:**

*I. Defendant 1) is sentenced to provide the plaintiff with information on the extent to which the work "Still got the Blues" was copied and distributed, stating the number of copies, the copies ordered and delivered, the names and addresses of Suppliers and buyers of the sales copies as well as the turnover made, broken down according to DM or € values and calendar months as well as the profit made.*

*II. It is determined that the defendant to 1) is obliged to compensate the plaintiff for any damage that the plaintiff has suffered and / or will suffer as a result of actions referred to in item I. since May 30, 2000.*

*III. The second defendant is sentenced to provide the plaintiff with information about the amount of the remuneration granted to him as an interpreter and composer with regard to the work "Still got the Blues".*

*IV. It is established that the defendant 2) is obliged to compensate the claimant for any damage suffered by the claimant from the participation of the defendant 2) as a musician in the public performance of the music track "Still got The Blues" since 30 May 2000 was created and / or will be created.*

*V. Defendant 2) is sentenced to instruct the ... with regard to the title "Still got the Blues" to lead the plaintiff as a co-composer of this work.*

*VI. The more extensive lawsuit regarding applications I.1., I.2., I.4., II.1, II.5. and II.6. is rejected.*

*VII. The decision on costs is reserved for the final judgment.*

*VIII. The judgment is with regard to items I. and III. provisionally enforceable against security in the amount of € 10,000.00 each and with regard to item V. against security in the amount of € 100,000.00.*

### **FACT**

The parties argue about whether the second defendant took over the guitar solo of his world-famous song "Still got the Blues" from the piece "Nordrach".

Defendant 1) produces sound carriers from artists under contract with her. In 1990 she published a recording of the second defendant with the title "Still got the Blues". This album also contains the song of the same name "Still got the Blues", which the second defendant recorded. Defendant 2) is indicated as the author on all copies of this album. "Still got the Blues" was a huge success. It is therefore included on numerous compilations and was used in advertising. The defendant to 1) has paid the mechanical license fee, which is to be paid for the use of a work on sound carriers, to ...

At the time, the plaintiff was (along with Messrs. Oehler, Siebert and Winterhalter) a musician in the band "... " and as such was at least involved in the creation of "Nordrach", a piece of music about twelve minutes long. An excerpt from the... archive submitted by the plaintiff indicates the entire group "... " as the composer of "Nordrach". "Nordrach" was not released on phonograms before "Still got the Blues" was released. On August 4, 2000, the plaintiff registered "Nordrach" with the ... The piece was first published on CD (... ") in 2000.

In a registered letter dated May 29, 2000 (return receipt as attachment A 10), the plaintiff first accused the defendant 1) of having taken over the guitar solo from "Nordrach". The plaintiff did not claim any further matches between the two pieces.

According to an advertisement in the magazine "Good Times" (issue ...), "Still got the Blues" was reproduced and distributed again after a lawsuit was filed ("digitally remastered").

"Still got the Blues" was the subject of a plagiarism lawsuit once before - namely in the early 1990s. The regional court Munich I denied taking over the piece of music "Dana" by R. Kovac (LG Munich I 7 O 11024/91).

The plaintiff alleges that the title "Still got the Blues" published by the defendant is essentially a plagiarism of the plaintiff's composition "Nordrach". Accordingly, the asserted injunctive relief, information, compensation and destruction claims would exist.

"Still got the Blues" is based on the copyrighted final passage (from 8:15 minutes) of the piece of music "Nordrach" composed by himself. Style and basic rhythmic structure, phrasing, tempo and beat, key, sound, melody and harmony and even the instrumentation are identical or at least almost the same. The spontaneous listening impression confirms this. The guitar melody that creates identity in both titles is the artistic core of the work, the "key melody", yes, the "melodic identification seal". The melody is said to have a musical psychological signal quality and an extremely high recognition value. The similarities that could be perceived just by listening justified the allegation of plagiarism. Both works are based on the music-historical "rush" of the fifth step model, which the plaintiff does not want to monopolize for himself either. This harmony scheme gives the "Nordrach" melody with which this harmony scheme is loaded meaningfully, but not necessarily.

On March 29, 1974, the plaintiff and his group "... " recorded the title "Nordrach", composed in early 1973, for Südwestfunk. It is also the sole composition of the plaintiff. According to the archive extract, the music group as a whole is given as the composer of "Nordrach"; However, this is based on an error or incorrect information from the archivist responsible. The other group members only made suggestions about the arrangement. "Nordrach" was said to have been played at least on November 27, 1974 in the radio program "20: 1" of the..., but probably also one more time, namely at the end of July / beginning of August 1974 in.... In addition, the title - usually the highlight - was numerous public appearances of "... " throughout Germany.

The second defendant must have known "Nordrach" when he composed "Still got the Blues". Between 1974 and 1975 he lived for at least one to one and a half years in the Bonn area, the catchment area of ... During this time he was often a guest in the locality "... " in ... In addition to many well-known national and international groups, "... " also performed there in July / August 1974. During their time together with the second defendant, the witnesses ... had visited the club "... " in ... at least three times a week. Ultimately, the knowledge of the work Nordrach by the defendant to 2) already results from the design of "Still got the Blues"; such a correspondence, as it prevails here between the two pieces, could absolutely not be a coincidence.

The defendants also acted culpably. The defendant to 1) must be responsible for the fault of the defendant to 2). This is at least to be accused of negligence. At the latest since the plaintiff's letter of May 29, 2000, the defendant 1) has acted at least negligently.

The second defendant violated the plaintiff's copyright at least negligently. There are considerable indications that the plagiarism was deliberately, at least negligently, created. The full identities in the various areas of the work and also the awareness of defendant 2) when he had to state who was the author of the work when registering the work would speak for this. In no case could it be due to chance or unconscious borrowing that harmony and melody matched. This also contradicts the thesis that hearing the melody once can evoke multiple identities.

The claims are neither forfeited nor time-barred. The plaintiff had not remained inactive for more than ten years despite knowledge of the copyright infringement. The plaintiff was only made aware of the plagiarism by a third party in 1999. He himself didn't remember "Nordrach" at the time. For the first time in the spring of 2000, the plaintiff was able to hear "Nordrach" again after more than 25 years due to a... research. "Nordrach" was also not the key work of the group "...", but one of many works in the band program, which included well over 20 titles. However, it was one of the titles that were enthusiastically received by the audience.

Finally, the plaintiff also asserts reasonable compensation for pain and suffering, since the present case is a significant violation of the law.

Since Defendant 2) is listed as a composer of "Still got the Blues" with the collecting societies ... etc., he receives fees which, due to the copyright infringement, are mainly due to the plaintiff who composed the defining melody of the title. The melody gives the title the "catchy character" and is accordingly responsible for the success of the song. The second defendant is therefore obliged to notify the plaintiff of all income for the title "Still got the Blues" that he has earned as a composer and performer, so that a corresponding compensation / compensation payment can be calculated in his favor.

Due to his position as - at least - co-composer of "Still got the Blues", the plaintiff had the right to claim against defendant 2) to be listed as a composer by the ancillary protection companies. The defendant is obliged to instruct the relevant performance protection / performance collecting societies to list the plaintiff as a (co-) composer of the title "Still Got The Blues".

The second defendant was not allowed to perform "Still got the Blues" at public appearances; otherwise he would make himself liable for damages.

The plaintiff recently requested

I. To sentence the defendant to 1),

I. 1. In avoiding a fine of up to € 250,000, which is due for each case of the infringement, or as a substitute for regular or regular detention for up to 6 months, to refrain from copying the music track "Still got the Blues" and putting it on the market.

I. 2. the CDs and videos in the possession of the defendant 1), which correspond to item I.1. contain the mentioned music title.

I. 3. to provide the plaintiff with information on the scope of the in number I.1. designated action, stating the number of copies, the copies ordered and delivered, the names and addresses of the suppliers and customers, the sales copies and the sales made, broken down by DM values and calendar months as well as the profit made.

I. 4. to determine that the defendant 1) is obliged to compensate the plaintiff for any damage resulting from the in number I.1. designated act has occurred and / or will still occur.

I. 5. after completion of the claim, item I.3. the statement of claim to make payment in an amount to be determined.

II. To convict the second defendant,

II. 1. In avoiding a fine of up to € 250,000.00, which is due for each case of infringement, or as a substitute for custody for up to 6 months, to refrain from performing the music track "Still got the Blues" publicly with his participation as a musician.

II. 2. To provide the plaintiff with information on the scope of the remuneration granted to him as an interpreter and composer with regard to the items listed under II.1. named track.

II. 3. to affirm in lieu of oath that the information in accordance with section II.2. of the claim are correct.

II. 4. after information has been given about the remuneration in accordance with Section II.2. of the claim to the plaintiff to pay compensation to be calculated therefrom.

II. 5. to determine that the defendant is obliged to compensate the plaintiff for any damage resulting from the in number II.1. designated act has occurred and / or will still occur.

II. 6. to instruct the performance protection and performance collecting societies with regard to the title "Still got the Blues" to list the plaintiff as a (co-) composer of this work.

The defendants have requested

reject the complaint.

The defendants countered the lawsuit - in a nutshell - with the following arguments: The plaintiff was not actively legitimized because he did not create "Nordrach" alone. In addition, the passage from "Nordrach" at issue is not protected by copyright at all. Furthermore, nothing from "Nordrach" is taken over in "Still got the Blues", especially since the second defendant did not even know "Nordrach" at the time. Even if he should have heard it, he had

not been able to store it in long-term memory for over sixteen years. The defendants had not acted culpably and were in any case not enriched. Ultimately, the asserted claims are also statute-barred or forfeited.

In detail, the defendants submitted the following:

The plaintiff had already not conclusively demonstrated his active legitimation. Although the extract from the ... archive identifies the entire music group "... " as the composer, the plaintiff asserts claims as the sole author. To prove his sole authorship, he also did not name all band members; for that reason alone, the lecture is inconclusive. If there is no sole authorship, the plaintiff can only demand performance from all co-authors (Section 8 (2) sentence 3 UrhG). The claim does not correspond to this. In addition, the website 'www ... com' mentions that the ... had granted the rights to Nordrach to a third party.

The action is also inconclusive because the plaintiff is asserting his claims in relation to the complete work "Still got the Blues", which consists of text and music. According to the plaintiff's presentation, however, only a part of the entire work is in dispute regarding the composition. This is also not reflected in the claim.

The defendants also countered the lawsuit by stating that the guitar solo at issue from Nordrach was not protected by copyright at all. In the disputed tone sequence in "Nordrach", the plaintiff only uses a gradually falling sequence three and a half times ("third pendulum"), which forms the melody tone sequence in constant seconds. This juxtaposition is characterized by a formal "lack of imagination". Such gradually falling sequences can be found in innumerable melodies from all epochs and genres (for example the chorales "Oh holy spirit", the songs from the evangelical church hymn book EKG 1950 "With Ernst", "Rejoice", "Werde Licht" and "Herr J ....; "As well as the folk songs "Es pulled ", "Es blew ", "Ein Tiroler ", "Zum Tanze ", "Wideler ", "Probably still today ", "Es, es, es ", "Alle Weil a little " ", "All because he came" and "It's a reaper"). With regard to the harmony sequence and the course of the melody, there would also be broad agreement with "Les feuilles mortes" ("Autumn Leaves"). The famous Volga song from the operetta "Der Zarewitsch" by Franz Lehár, when it says: "The youth rushes past in long, anxious loneliness", is corresponding in tone sequence including harmony. Reference is also made to the C sharp minor Prelude by Rachmaninoff. The plaintiff took the model in question harmoniously and melodically directly from Vivaldi's "Spring" of the "Four Seasons". Everyone heard that the plaintiff was after Vivaldi. The adoption of the sequence in the disputed tone sequence also results from the music examples submitted to the court by Corelli (Concerto Op. 6) and Telemann (Tafelmusik III). Schumann's "Kinderszenen" and Lionel Richie's "Hello" are also reference melodies. Parallels to Smetana's "Moldau" are also unmistakable.

The harmonics on which the two disputed works are based, with the model of the so-called "fifth step sequence", which is often found in music, is a standard musical formula that has belonged to the general public since the Baroque, so it is not a protectable compositional achievement. The design of the chord progression in question is a knitting pattern that is in the public domain and can be attributed to purely craftsmanship. For this reason, the Munich District Court I also dismissed the lawsuit with which the composer of the song "Dana" (R. Kovac) in 1991 against the second defendant, also because of the guitar sequence from "Still got the Blues" at issue here Had raised plagiarism allegations (LG Munich I, Az. 7 O 11024/91). With this decision, the court also confirmed that that when using this harmony model, the melody is determined by the applied harmony scheme. The five-step sequence on

which all three works (“Dana”, “Nordrach” and “Still Got The Blues”) are based - but not monopoly due to their general nature - characterize these works in terms of melody and overall impression.

Insofar as agogic decorations are to be found in “Nordrach”, these are purely interpretative elements that do not affect the work and its ability to be protected, but only its presentation, the interpretation. The sound or the arrangement of the works are irrelevant in terms of their ability to be protected by copyright.

“Still Got The Blues” is definitely not a plagiarism of “Nordrach”. The two works at issue are not confusingly similar. Due to numerous differences between the two works, the matches required for the allegation of plagiarism are not present. This is particularly evidenced by the opinion of ... submitted by the defendant 1). The report by ... also confirms that.

The only thing to be compared is the guitar melody of the musical introduction to “Still got the Blues”, which is also used as an interlude, with the final part of the title “Nordrach”. In the melody area, both works are conceptualized completely differently.

Insofar as matches can be found at all, these refer only to individual so-called "lying tones" (= longest tones, e.g. after the bar line), which are the same in both works in the sounding pitch due to the harmony model of the fifth step sequence chosen in both cases . In the report ... it is expressly pointed out that the recumbent tones caused by the harmony model are given and that the fifth-step sequence almost necessarily determines the pitch of the melody voice. The harmony scheme underlying both works enforces both titles with the spirit of the title melody. This pre-existing, public domain harmony scheme also dictates the melody of both works and thus creates a similar sound impression for the listener.

“Still got the Blues” cannot be a plagiarism of “Nordrach” in terms of harmonics, since the even older “Dana” already shows this formative harmony. Like “Nordrach”, “Dana” already works with the same melody tones given by the harmony of the fifth step sequence. Since “Dana” was already written in 1971 and “Nordrach” three years later, “Still got the Blues” cannot be a plagiarism of “Nordrach”, since both works are based on a third, even older work with a common tone sequence. The familiarity of the melody sequence is also proven by the work "Mädel sag, Igen '" by Heinrich Strecker, Opus 160, which contains a tone sequence corresponding to the work "Nordrach" and "Dana".

Despite the harmony model chosen in both works, the melody of the works is obviously completely different. While in "Still got the Blues" ladder-specific tones (i.e. tones specified by the scale of the key of A minor) were used as a connection of the reclining tones given by the harmony model, the plaintiff chose semitones so that his melody was in the smallest possible interval , namely semitones, progress. In “Still got the Blues” this has the effect that the melody is catchier and, above all, more vocal, since semitones are extremely difficult to sing. In “Still got the Blues” the melody moves linearly from one note to the next, either (only) upwards or (only) downwards, while the melody on “Nordrach” runs in small secondary notes in a wave movement, which also leads to the fact that the individual melody sections differ in scope. The plaintiff had more and at the same time set different melody tones than the defendant to 2) and thus documented his deviating compositional attitude. Both melody runs also differ noticeably with regard to the note values. In “Still got the Blues” the opening notes are shorter than in “Nordrach”, while the reclining notes are longer. The pauses in the melody in “Still got the Blues” also structured the melody differently. In contrast, the melody of “Nordrach” does not contain any pauses at all. The different uses of the pauses let

the melody in "Still got the Blues" fall apart into short, declamatory phrases, which underlines the vocal character of the entire work in the continuation of the vocal part, whereas in "Nordrach" the uninterrupted melodic flow dominates, corresponding to a purely instrumental composition. The two guitar melodies also had a different overall structural length ("Nordrach": 8 bars; "Still Got The Blues": 4 bars). In "Still Got the Blues" the guitar melody was self-contained, while the plaintiff let his "Nordrach" end formally "openly". In addition, Nordrach has a significantly higher tempo with 180 bpm than "Still Got The Blues" (160 bpm). The total length of the works ("Nordrach": 12 minutes, "Still Got The Blues": 6:10 minutes) is also very different. Both melody sequences are consequently rhythmized differently ("Nordrach": exclusive use of eighth notes and dotted quarter notes, no rests; on the other hand "Still got the Blues" sixteenth notes, eighth notes, dotted quarter notes, dotted half notes, several quarter, sixteenth, eighth and half rests). Furthermore, the connecting tones are different, namely chromatic in "Nordrach" and in whole tone steps in "Still got the Blues".

The transcripts of the relevant passages from both works also prove that the two works did not match the allegation of plagiarism (see expert opinion ..., Annex B 2, p. 7). Just looking at the melody and the accompanying voice in the notes made it clear that the plagiarism allegation could not be upheld. The melodies are significantly different. The course of the bass voice also differs in a striking way.

The supposedly psychologically similar hearing impression is caused exclusively by the harmonics shared by the two works, but not protectable by copyright and therefore not monopoly, as well as identical - but also not protectable - third-octave sequences and sixth leaps (prelude); Especially the ascending sixth can be found in a myriad of works in the public domain. The structural tones of both melodies are given by common rules of harmony. The mere sound similarity of the two works in dispute stems exclusively from the fact that they move in the same "typical guitar key", the same harmony model and similar instrumentation typical of rock bands, which, however, cannot be assigned to the scope of copyright protection.

The second defendant composed "Still Got the Blues" in 1990 without having had any knowledge of "Nordrach". Therefore a conscious or unconscious borrowing is ruled out. In this respect, there is no substantiated presentation of a corresponding knowledge. Even after the plaintiff's presentation, "Nordrach" was only perceptible in a fleeting form; there was only one radio broadcast of the work on ... and a few live performances. To the knowledge of the second defendant, the plaintiff only submits hypothetical and admits that there is only a certain probability that the second defendant was aware of "Nordrach".

The plaintiff's claim that the alleged knowledge of the second defendant already follows from the design of his work "Still Got The Blues" is not tenable. Otherwise the generally recognized so-called "double creation", which does not constitute a copyright infringement, would have no right to exist.

The second defendant did not live for at least one year in the room between 1974 and 1975, especially since he was on tours with the bands "... " and "... " in the years in question. Even if he was in the room at the time ..., that was no prima facie evidence of knowledge of the play "Nordrach". He had been in since July 29, 1974; there he lived in the apartment of the witness's mother ...; he also spent a few nights in the witness's apartment. about a week after his arrival in ... he and the witnesses ... started a two-week camping holiday in ...; At the end of August 1974 he returned to ... Between July 29th and the end of August 1974 he only

visited the club "... " in ... twice; the plaintiff or his group "... " did not appear on these occasions. Since his return to ... he has not been seen by the witnesses ... in ...; since there was still contact with the witness ..., he should have been aware of a further stay of the defendant 2) in ...,

Even if one assumes that Defendant 2) had a one-off, fleeting listening impression of the piece "Nordrach", it is impossible that Defendant 2) had preserved the piece "Nordrach" in memory for a period of fifteen years and was able to preserve the composition of "Still Got the Blues" was guided by this hearing impression that was long ago. A storage in the long-term memory over sixteen years could not have taken place due to an ephemeral live hearing impression. The deliberate presumption of foreign authorship required for the allegation of plagiarism is therefore lacking.

This is also confirmed by the opinion of ... (Annex B 13) submitted by the defendant to 1), according to which it can be ruled out that the guitar solo from Nordrach was anchored in the (implicit) long-term memory of ....

A conscious or unconscious borrowing stands in the way of the work "Dana" from 1971, which in its core content - like "Nordrach" and "Still got the Blues" - is based on the public domain harmony model of the fifth step sequence.

In addition, the second defendant could also rely on the presumption of his authorship according to § 10 UrhG. Thus, the plaintiff had to prove that the second defendant named as the author of "Still got the Blues" is not the true author

The sound recording "The William and Caroline Suite" (Annex S 16) submitted by the second defendant was a piece that the second defendant composed in 1969 - before "Nordrach" - and that, among other things, during a Presentation of the "... " at which ... was publicly performed in 1972. The sound recording makes it clear that the sequence is very similar in terms of melody, melody line, structure, tonal design and harmonics, and that it is a reference work for "Still Got the Blues". This is confirmed by the reports from... (Appendix S 21) and... (Appendix S 22). The reports proved that "The William and Caroline Suite" could be considered a forerunner of "Still Got The Blues" because of the strong harmonic and melodic similarity.

The defendant to 1) is also not at fault. She had no reason to doubt the sole authorship of the second defendant in her exploitation acts, especially since the work "Nordrach" was to be classified as an "unknown work".

The claim to enrichment alleged by the plaintiff does not exist. The defendant to 1) did not save a license fee for the composer's rights. You have properly paid the mechanical license fee, which is to be paid for the use of the work on sound carriers, to ... Therefore, Defendant 1) did not make any profits from the use of the work, but only from the use of the sound recording, interpreted by Defendant 2). The ... have duly distributed the collected funds to the publisher and the author of the work "Still got the Blues". Defendant 1) did not achieve any profits that were achieved in violation of the plaintiff's copyright. They only evaluated master recordings, i.e. the ancillary copyrights of the performing artist and the producers. The object of the company and the activity of defendant 1) in the present case is not the generation of profit from the marketing of copyrights. They paid the mechanical reproduction fees incurred for the reproduction of the phonograms to ..., so they did not save or obtain anything. Purely as a precautionary measure, the defendant 1) therefore raised the objection of depletion.

In any case, the asserted claims are statute-barred and forfeited. Despite the immense success and the resulting great popularity of “Still got the Blues”, the plaintiff first asserted his claim in the middle of 2000, more than 10 years later. It is unbelievable that the plaintiff had no knowledge of the alleged infringement. In view of the worldwide success of “Still got the Blues”, the second defendant should at least have to know the work if he did not even know it. The plaintiff’s admission that he allegedly had no memory of the main work he composed at the beginning of the 1970s and the high point of his repertoire until 1999 is completely ruled out and is contested.

The lawsuit was also unfounded because the plaintiff coveted his claims with regard to the total exploitation of the work “Still got the Blues” (consisting of text and music), while according to his own lecture only the musical composition was affected and this was not either as a whole, but only in a temporary part of the complete work, namely its introduction and interlude.

According to the decision of January 16, 2002, the Chamber recovered an expert opinion on the question of the takeover of the guitar solo from “Nordrach” in “Still got the Blues”. At the suggestion of the second defendant, Mr. ... was commissioned to carry out the assessment. He submitted his written opinion on April 28, 2003. The defendants thereupon rejected the expert without success due to concerns about partiality (rejection decision of the regional court of September 15, 2003, rejection decision of the higher regional court of March 4, 2004, Az. 6 W 2557/03). The expert ... added his expert opinion on August 20, 2003, January 19, 2004 and May 9, 2004 in writing. On November 3, 2004, he was heard orally.

According to the decision of December 9, 2005, the Chamber took evidence on April 12, 2006 on the question of the sole authorship of the plaintiff and on the question of whether the second defendant could have knowledge of "Nordrach".

According to the decision of August 9, 2006, the expert ... issued an expert opinion on January 30, 2008 on the question of whether it is possible to store a musical sequence over sixteen years in long-term memory based on an ephemeral hearing impression. The defendants thereupon rejected the expert without success due to concerns of partiality (rejection decision of the regional court of June 6, 2008, rejection decision of the higher regional court of July 22, 2008, Az. 6 W 1840/08). In the meeting on September 17, 2008, the expert was heard orally.

## **REASONS FOR DECISION**

The action is admissible. With the exception of the claims I.5., II.3. and II.4. (2nd or 3rd stage of the step action) the action is ready for decision and justified to the tenorized extent; otherwise the action was to be dismissed.

### **I.**

The lawsuit is conclusive.

In particular, the plaintiff claims to be the sole author of "Nordrach"; accordingly, he did not demand performance from all members of the group "...", but from himself.

It is also not objectionable that the plaintiff asserts his claims in relation to the complete work “Still got the Blues”. It is true that “Still got the Blues” does in fact consist of text and music,

with the plaintiff claiming only part of the music for himself. Nevertheless, the asserted claims affect the entire work, as long as the disputed passage is found in it.

II.

The injunctive relief asserted against the defendants do not exist.

On the one hand, the plaintiff would like the defendant to prohibit the reproduction, distribution and performance of "Still got the blues" (Claims I.1. And II.1.), And on the other hand, he would like the collecting societies, which are currently granting the aforementioned rights to third parties, are listed as a (co-) composer of this work (claim II.6.). Both are not possible at the same time, for the following reasons:

1. Is the right to reproduce, distribute and perform "Still got the Blues" from the plaintiff and the defendant to 2) - and thus from all possible authors of this work (for the authorship of "Nordrach" see II.1.c) - who ... (who represents the composers and lyricists in Germany) assigns the rights to exercise the rights. To the extent to which the author grants his rights to perception, he also loses all influence and control over who and how his work is used. For example, he cannot raise any reservations about the selection of those people who will use his work in the future; because due to the compulsory conclusion (§ 11 Perception Act; further reference is to § 42a Abs. 4 UrhG) the ... is obliged to

2. The plaintiff cannot object to the fact that he has not consented to the use of his guitar solo from "Nordrach" as part of "Still got the Blues" and thus to the exploitation of the arrangement of his work to this day.

An adaptation of the guitar solo from "Nordrach" results here (in addition to the simultaneous duplication) simply by embedding the passage in another work (cf. only Schricker / Loewenheim, UrhR, § 23 Rn. 6).

It is true that, as evidenced by the contract of authorization that it concludes with the composer, the ... does not exercise the editing right, so that this remains with the author (cf. only BGH GRUR 1998, 376 - cover version). With regard to moral rights, it would also be problematic if everyone were given the right by the collecting societies to redesign, change or edit a work. The collecting societies therefore generally only grant usage rights to the complete and unchanged original work, i.e. to the work in its specific form intended for the public by the author.

By the claim II.6. However, the plaintiff has clearly indicated that he is in agreement with the embedding of the guitar solo taken from "Nordrach" in the disputed and known version of "Still got the Blues" - that is, with the use of the edited version of the guitar solo by the.

3. The plaintiff has thus given himself the possibility of demanding that the defendant cease to reproduce, distribute and perform the work from both a material (exploitation rights) and an ideal (moral right) point of view. Because by convicting the defendant to register "Still got the blues" for both the plaintiff and the second defendant, he exposes himself to the objection of inadmissible exercise of rights with a view to the injunctions: *Dolo agit, qui petit, quod statim redditurus est*. As soon as the second defendant has registered with the ... in accordance with the judgment, the claims for injunctive relief no longer exist.

The Chamber assumes that for the plaintiff the further exploitation of "Still got the Blues" - insofar as he is to share in the proceeds - takes precedence over the injunction and the associated financial losses.

4. With the same reasoning was also the one under I.2. to reject asserted destruction claims. In addition, the destruction also appears disproportionate according to § 98 UrhG, since the plaintiff has indicated that he is interested in further exploitation of "Still got the Blues" through reproduction and distribution - insofar as he shares in the proceeds.

### III.

The claims to information asserted against the defendants exist to the tenorized extent. However, in the absence of a fault on the part of the defendant before May 30, 2000, they have only existed since the plaintiff's letter of May 29, 2000 in preparation for claims for damages due to a copyright infringement; up to this point in time, claims from unjustified enrichment (§ 812 BGB - interference conditions) are given.

1. The defendants violated the plaintiff's copyright by at least unconsciously taking over the passage at issue from the work "Nordrach" in the work "Still got the Blues". However, this happened unconsciously until May 30, 2000 - and therefore not at fault. At the same time, the mere unconscious violation of copyrights also means an encroachment on the rights of others and thus justifies a claim for unjust enrichment.

1. a. The disputed closing passage from the piece "Nordrach" (guitar solo from 8:15 minutes on the recording submitted by the plaintiff) is protected by copyright.

A piece of music - even if it is only for a few bars - can be protected by copyright if it represents a personal intellectual creation (Section 2 Paragraph 1 No. 2, Paragraph 2 UrhG). The creative achievement can result not only from the melody, but also from the selection and use of musical means of expression (rhythm, metrics, tempo, harmony, form, phrasing, instrumentation, sound) when processing the melody. The decisive factor is the overall impression resulting from the interplay of all these elements, the listening experience (see only Schricker / Loewenheim, UrhR, § 2 Rn. 119, with numerous examples from case law). The type of instrumentation and orchestration can regularly be protected, as they have a decisive influence on the tonal character of the piece of music and, in view of the innumerable different options, regularly represent an artistic decision by the composer (BGH GRUR 1968, 321, 324 f. - Hazelnut; 1991, 533, 535 - Brown Girl II; BGH UFITA 51 (1968) 315, 319 ff. - Gaudeamus igitur). However, the use of what belongs to the musical common property does not justify protection.

With regard to the height of creation, it should be noted that musical works must not place too high demands on the creative idiosyncrasy. The so-called "little coin" has long been recognized in the field of musical creation, with which even simple intellectual achievements are recorded as barely protected. It is therefore sufficient that the composer's formative activity - as is regularly the case with pop music - shows only a relatively low degree of peculiarity. The artistic value is irrelevant (see only BGH NJW 1989, 387 - A little peace). This applies both to originally created works and to adaptations. The protection requirements are the same (see BGH NJW-RR 1991, 812 - BrownGirl II).

The disputed passage from "Nordrach" is not a piece of music that is simply composed of certain melodic, rhythmic and harmonic basic patterns that have grown and been handed

down over the centuries - and which is therefore not eligible for protection (§ 3 sentence 2 UrhG). The chamber assumes with the parties and the 7th civil chamber of the Munich Regional Court I (judgment in the case 7 O 11024/91 - Dana) that the harmonious basic structure of the fifth step frequency - which is also the basis for the passage in question in "Nordrach" - is in the public domain is; this was also confirmed by the court-appointed expert ...:

“The five-step sequence has been in the public domain since the 17th century and is used equally in classical, jazz and pop in numerous compositions and improvisations. You can see it ... as a harmonious basic model. ”

To reduce the disputed passage from "Nordrach" to its basic harmonic pattern falls short musically and in terms of copyright law. The passage in question has elements that can be characterized as creative and peculiar.

The expert ... has described the creative peculiarity of the passage as follows:

“Due to its instrumental-specific form as a guitar melody, this passage... achieves a high degree of unique individuality and recognizability. The melody created in this way can neither be confused with another popular hit melody, nor is it derived from a clearly identifiable template. ... The peculiarity of the melodic invention of Nordrach consists in particular in the combination of sequential melodies, which is common in sentimental hit melodies, ... combined with the sound of the rock guitar in the tradition of great rock legends such as the aforementioned artists Clapton and Hendricks. ”(Expert opinion from April 28, 2003)

And further:

"It is above all this guitar solo that gives the piece of music" Still got the Blues "its unmistakable character."

In doing so, the expert - in line with case law - emphasized a feature that is particularly important for the protection of the passage in question, namely the instrumentation: it is precisely the way in which the composer uses the guitar and the possible sound effects with it , which significantly shapes the tonal character of the piece. The expert also explains:

“The... passage is... a self-contained... invention. The decisive factor for the creative peculiarity of the pop music piece in question is the melody in combination with the secondary and tertiary components that are particularly characteristic of popular music. ”(Expert opinion of August 20, 2003)

In particular, the expert also commented on the listening experience considered relevant in the case law and in this context also dealt with the meaning of the notation for the assessment:

“... the relevance of hearing psychological factors [is] undisputed in popular music research. It is not the subject of general psychology, but is one of the indispensable analytical foundations of musicologists who conduct research in the field of popular music.... It is precisely the “appearance of the known” that the successful authors of popular music strive for.... It is the reception-psychological factor that is decisive for the popularity of a melody. But that doesn't mean that all pop melodies based on common melody models can be

assigned to the public domain. The creative peculiarity and effect is significantly reinforced by so-called secondary and tertiary components (arrangement, sound, etc.). These can only be reproduced to a limited extent in a musical transcription. But they are fixed by the sound carrier and can be measured as a listening experience. "(Expert opinion of August 20, 2003)

In the course of his hearing, the expert further stated:

“In my opinion, this kind of connection of sounds is not a routine musical craft, but an art. In rock and pop music, as I have already mentioned several times, these elements are not marginal but central. Of course, the core notes also play a role, but you have to see everything together.

The ability to protect is justified by what is recorded on the sound carrier and what creates the impression. I have already formulated it in such a way that the score of jazz and pop music is the sound carrier. This is also because there is no method of notation for these elements.

The basis for the controversial titles are ancient sequences that were already known in pop music, but what matters here is the current, original, creative design.

My view, according to which popular music depends on the auditory impression and not on the notation, is the prevailing view.

There are specific ways to play the electric guitar used here, but the way in which these two pieces are played is... a special one.

The interpretation, the articulation result in a very special sound result. "

Based on the expert report, the Chamber comes to the conclusion that the interplay of instrumentation, melody, rhythm, tempo, harmony, sound effects, i.e. the specific arrangement of the melody - not the melody itself - to be heard in the guitar solo at issue from "Nordrach" represents personal spiritual creation. The Chamber assesses the tone sequence and harmony of the passage in question - taken individually - as musical common property. Nevertheless, it can be assumed with the expert that on the basis of a traditional melody line and harmony sequence - as happened here - a new, independent and protectable musical work can be arranged. The Chamber assumes that a musicological analysis based on the notation - as it is consistently favored and practiced by the defendants - is of secondary importance for the assessment of the listening experience. Because looking at the notation and analyzing it does not result in a sound or hearing experience, but at most a description that, given the limited possibilities of verbalising a piece of music, must remain inadequate and abstract. In the fine arts, too, a description of an image - no matter how accurate, precise and successful - does not create the described image in its concrete form before the human eye and in the human imagination. Because looking at the notation and analyzing it does not result in a sound or hearing experience, but at most a description that, given the limited possibilities of verbalising a piece of music, must remain inadequate and abstract. In the fine arts, too, a description of an image - no matter how accurate, precise and successful - does not create the described image in its concrete form before the human eye and in the human imagination. Because looking at the notation and analyzing it does not result in a sound or hearing experience, but at most a description that, given the limited possibilities of verbalising a piece of music, must remain inadequate and abstract. In the fine arts, too, a description of an image - no matter how accurate, precise and successful - does not create the described image in its concrete form before the human eye and in the human imagination.

The Chamber has entrusted the expert proposed by the second defendant ... with the rendering of the music report because the lawyer of the second defendant had recommended Mr. Mr ... was president of the University of Music and Performing Arts in ... at the time, he has a doctorate in musicology. In the opinion of the second defendant, he is - or was (until his expert opinion was given)

"Excellent connoisseur of popular music as well as (especially in a compositional comparison) serious music. He emerged through special knowledge in the field of rock, pop, jazz, musical, chanson, Schlager and songwriting as well as improvisation in D-music. "

In addition, ... - so the representative of the defendant to 2) -

"A series of model tests with multi-week compact courses carried out by well-known practitioners under his direction at the Hamburg University of Music and Performing Arts in the areas of rock, pop, jazz, musical, chanson, hit songs and songwriting."

Lord ... be

"Thus extraordinarily qualified to take a well-founded position on the subject matter of evidence."

and stand

"Completely objective about the legal dispute."

In the opinion of the Chamber, the expert has confirmed this advance praise through his work during the proceedings. The expert ... has worked out - in writing and orally - detailed and knowledgeable the characteristics of the guitar solo from "Nordrach" that justify protection.

The results of the expert ... are also confirmed by the expert dealing with a further question .... He summed up the protective ability of the guitar solo as follows:

"I am sticking to the fact that the controversial sequence is also unique in its way of playing, rhythm, agogic, tone and attack."

The objections of the representative of defendant to 2), who - after he had warmly recommended to the chamber ... as an expert - dismissed the same as completely incapable and unusable after the report had been given, are just as little followed by the chamber as the objections of defendant to 1). The representative of the defendant 2) tries unsuccessfully to construct contradictions in the report if he considers it incompatible that the guitar solo in "Nordrach" is on the one hand within the framework of common templates (keyword quintessential sequence), but on the other hand through the instrumental-specific form as Guitar melody achieves a high degree of unique individuality and recognizability; The expert gave detailed reasons for the latter. The expert also dealt in detail with the subject of quintuple frequency in all the facets raised by the parties - including the works submitted by the defendant from all centuries; the statements in question are completely convincing and otherwise also agree with the findings from the "Dana" process. In view of this - in the opinion of all those involved in the process - not protectable harmony scheme, it is also not wrong to assess the importance of harmonizing the melody as a secondary component here. As a result, it means nothing else if the private reviewer ..., "... considers the consideration of the harmony sequence" fifth sequence "alone to be unproductive ...". The objection that the expert considers the guitar solo worthy of protection, Although he

described the characteristics that are decisive for determining creative peculiarity (fifth step sequence, third sequence, ascending sixth leap) as being traditionally traditional, handcrafted and adhering to the pre-existing treasure trove of forms, this does not apply to the fact that, according to the case law, the combination of several elements that cannot be protected can be new and peculiar. Thus, for example, the interplay in a rhythm and harmony that deviates from the original work can already represent a protectable arrangement (BGH GRUR 1981, 267, 268 - Dirlada), as can the accented rhythm in connection with the instrumentation or a choral setting (BGH GRUR 1968, 321, 324 - hazelnut). Also the accusation of the representative of the defendant to 2) that the expert had due to "hearing psychological" impressions, the "recognizability" and even argued with the listening comprehension of an "average lay listener" does not get caught: the expert has done nothing other than - according to the case law and thus according to his mandate - just the overall impression, the listening experience, the subject of his assessment do. The accusation that he did not put a single note of his own in his report and only mentioned the notations of the present party reports in a marginal and marginal manner was also countered by the expert - convincingly for the Chamber - with reference to the meaning of the notation in this case. Finally, the expert's lack of specialist knowledge should also be proven with a spelling error (Hendricks instead of Hendrix);

The attempt by the defense counsel for the second defendant to put the protective features of "Still got the blues" into words is inconclusive - measured against the standards applied by the defendant to the expert's report: With "Still got the blues" - so it is said - the building blocks from the commons would be further developed rhythmically and tonally in a subtle and worthy of protection form. This assessment is significant because it applies to the guitar solo in "Nordrach".

1. b. "Nordrach" is independent and not based on melodies known at the time of the composition (1974).

In response to the question of the extent to which the disputed passage from "Nordrach" is based on melodies known at the time of the composition (1974), the expert ... stated the following:

"The ... quoted melodies such as Schumann" From foreign countries and people "... have nothing in common with the melody sequence under discussion here. It ... is about parallels, which neither melodic nor harmonic ... can be identified with the melody sequence in question. "

"The 19 parallel melodies listed - composed melody excerpts from music history from baroque to romantic as well as song / folk song; Operetta / light music - do not in any case coincide with the passage improvised on the electric guitar under discussion. "(Report of August 20, 2003)

The expert stated the following specifically with regard to "Dana":

"Dana's analysis shows... decisive parallels to "Nordrach". Dana appears like a primitive basic model on which Nordrach is based. What both melodies have in common is an ascending and descending third octave, which is sequenced four times one step lower. This is harmonized with a bass line known from baroque music, which leads from the tonic (= I level) through the levels: IV-VII-III-VMI to the dominant (= 5th level). [A model that was] used as a basis for improvisational exercises as early as the Baroque period. "Nordrach"

extends this scheme by adding the sixth jump af. ... The original third figure def is transformed into a triplet prelude in "Nordrach" with the addition of a as the corner tone of the characteristic sixth jump af. The simple 4/4 time gets a much stronger groove due to the triplet pulsation. ... In no case will the Kleinterz sequence from "Dana" be used. The sixth jump remains the characteristic interval for this melody. The following sequences of thirds are more or less identical to Dana. ... The creation of variants at Nordrach leads to the introduction of chromatic sliding tones. This is how the triplet fe-es-d or e-es-dc and d-des-ch emerges from fed. The chromatic sliding tones also help transform the binary rhythmic structure into a tertiary one. ... The melodic similarity between Dana and Nordrach is much closer to, for example, the middle part of Schumann's Scenes from Children. Although Schumann uses a fifth case sequence in the left hand, which, however, is already transformed into a characteristic bass melody after the third chord d (dotted) ch, while the right hand sequences ascending seconds hc / ah / ga / fe-g four times in parallel thirds. In particular, these sequenced seconds hardly give off a characteristic melody that can develop a "catchy tune" as is the case with Nordrach. ...

In popular music, the most successful songs are those that are based on simple sequence patterns. ... In detail, every author in the field of popular music falls back on pre-defined patterns that are intended to create the "appearance of the known". ... A museum like the ascending sixth is so widespread that it cannot be protected as an individual component. The same is true for the fifth case sequence. The fourfold sequenced figure of thirds in "Dana" is to be seen melodically as very characteristic, but is not in itself a melody in the sense of an overall composition.... It is a musical component that, without a melodic context, has to be viewed as fragmentary and incomplete. "(Expert opinion of May 9, 2004)

Orally, the expert continued:

"I would almost consider " Dana "to be unprotectable because it is a cliché that exists on all three levels. The three levels are melody, harmony, rhythm. (Hearing)"

The sixth jump occurs in S 2 too, but the context is different. It is the way of using the sixth jump in combination with the third figure. This can be clearly demonstrated using the example of "Autumn leaves". There, in contrast to the case at issue, the melody always starts from below. The chromatic passages in "Nordrach" increase the emotionality and thus the attractiveness.

This chromatic passage is also missing in "Dana".

The connection between the third model and the ascending sixth is also present in "Autumn leaves", but the way this connection is made is different.

Also [with Vivaldi; Annex S 6, page 2]... the combination is available as such, but the chromatic continuity, the agogic of the interpretation and the other criteria mentioned are missing.

The decisive factor for me is the extraordinarily defined rhythm that is in the three tracks "Nordrach" "Still got the Blues" "Autumn leaves". Triplet rhythms appear in both of them - we're talking about triplet mum.

Lionel Richie's "Hello" is also further afield than "Nordrach" and "Still got the Blues".

The Chamber expressly follows the convincing statements of the expert. Here, too, it can be seen that there are limits to a purely musicological analysis based on the notation. Those who, like the musically trained and partly also musically active members of the Chamber, start with the listening experience, can hardly come to the conclusion that the guitar solo from "Nordrach" has only marginal additions compared to "Dana" and that "Nordrach" is used only stereotypically the tone sequence together (but the defendant to 2). It's not just that "Nordrach" comes out when you play "Dana" with the electric guitar. It may be correct in musicological terms that "Nordrach" and "Still got the Blues" are based on the melodic and harmonic model of "Dana", just as all other notation-analytical findings may apply. But if you listen to all three pieces once, it turns out that "Nordrach" and "Still got the Blues" have a completely different musical character and a completely different quality than "Dana". The direct impression of the listening experience shows how little the value of establishing a matching melodic and harmonic model is: Despite the similarities in these public domain characteristics, very different works are created.

In view of the expert's statements, the defendant's allegation that he dealt with the Dana issue completely incompletely and incompletely is not tenable. Overall, the expert commented in detail on the music examples presented by the defendant. The Chamber holds the corresponding statements convincing mainly because they correspond to the chamber members' own listening experience.

1. c. The plaintiff is also the author of "Nordrach".

The alleged participation of all members of the band ... in the disputed passage from "Nordrach" - possible other authors are not considered after the presentation of the parties - has not been confirmed by the defendant with reference to the excerpt from the ... archive.

First of all, it should be noted that this document does not originate from the band members, so that the question arises anyway, what evidential or explanatory value it should have. Ultimately, this document only says that an employee of the station (...) - for whatever reason - has registered the entire music group as the author. Contrary to the submission of the second defendant, other people are not registered as composers for the ... (see appendix S 26 submitted by the defendant; a music group is not a natural person).

However, none of the band members heard by the Chamber claimed to be involved in the piece - although this is not without financial value. This moment alone speaks for believing the witness on this point.

The witness ... testified that the plaintiff sang the disputed passage to the band and accompanied it with his instrument, the bass guitar.

The band then played and recorded the piece including this passage. The plaintiff sang exactly the melody that appears in the finished piece. Admittedly, the witness ... moreover - and this does not necessarily speak for his credibility - testified in response to a note image that the plaintiff at that time sang the entire tone sequence reproduced in this note image in order to then have to admit that he could not read notes at all. His explanation that he understood the question to mean that the melody was asked is not exactly convincing. Even if he wanted - which is obvious - to promote the interests of the plaintiff, the fact remains that he himself made no contribution. The Chamber believes him because there are indications that the witness subordinates his own interests to those of the plaintiff to such an extent that the chamber does not have. Since the authorization of specific other people outside the

band was not even claimed and is therefore not in question, it does not matter where the plaintiff had any fragments from.

The witness ... also testified that at the end of 1973 he had heard that the plaintiff had been singing or dueling something in the rehearsal room. That was the melody he could remember from Nordrach, which was always sung along at gigs and repeated at the end. In his opinion, this melody was composed by Mr ... He did not co-composed.

In the end, the defendants have also not shown that the plaintiff had surrendered his rights to "Nordrach" - for example against ...

1. d. In "Still got the Blues" the guitar solo from "Nordrach" is taken over.

The parties to the dispute agree that the parallel between the two pieces of music at issue only affects the guitar solos. Apart from the passages concerning the guitar solos, the two works have nothing in common.

The expert ... stated:

"The piece of music " Still got the Blues "consists of a vocal part that has no similarities or parallels to " Nordrach "and an instrumental prelude, interlude and aftermath, which is voiced by a solo electric guitar. This guitar solo can easily be identified as identical in a listening comparison with the guitar solo from the composition Nordrach. It is above all this guitar solo that gives the piece of music "Still got the Blues" its unmistakable character. ... In the piece Nordrach the mentioned guitar solo is the climax and conclusion of the piece. ... (Report from April 28, 2003)

I compared the musical excerpt in question (electric guitar solo) in its acoustic original form as well as in the two notated transcriptions and immediately found a striking agreement. ... Musical transcriptions of orally transmitted music must be viewed in a differentiated manner. The analysis methods of historical musicology can lead to distortions. Neither Jürgen Winter nor Gary Moore assumed a notated template, nor did they fix the melody and accompaniment in writing....

The composition "Still got the Blues" is characterized by the vocal part and the instrumental solo, whereby the "catchy tune" of the title is created in particular by the instrumental solo. Without the vocal part, however, the composition would be fragmentary. It forms the basis on which the solo can develop. The combination of these two elements creates a new, homogeneous whole. I can only repeat here once again that the electric guitar solo from "Nordrach" and the electric guitar solo in "Still got the Blues" are completely identical "(report from August 20, 2003).

"Still got the Blues" did not adopt these chromatic gliding tones, but instead converted the diatonic scale into the triplet rhythm by means of syncopations. "

At the hearing, the expert stated:

"Of course, the core notes of the three pieces or parts of pieces discussed here [Dana, Nordrach, Still got the Blues] are identical. That is the basis and it depends on how that is expressed.

It is correct that the chromatics are missing in “Still got the Blues”, it is different namely diatonic. Exactly in a scale of its own diatony. But this is a comparison of the transcriptions and I have already stated that the interpretation played on the sound carrier is decisive. I would also transcribe differently. Even then, no identical note images would come out.

The sequence of notes with the jump of quarters at the beginning could have occurred to Gary Moore even if he only knew "Dana". This is not a contradiction to my initial statement regarding the possibility of whether Gary Moore could have come to “Still got the Blues” only with knowledge of “Dana”.

In my opinion, such details cannot be assumed; it depends on the overall impression, the auditory impression. Even if there are no chromatic steps in Gary Moore, the auditory impression is so similar that I believe that he knew "Nordrach".

There are differences, but the similarity is so striking that I still have the impression that Gary Moore knew "Nordrach", "Dana" is in 3-quarter time, the other two in 4-quarter time .

A comparison of the melody lines - which I actually reject - shows a striking similarity.

I say again that the notation anyway does not correspond to what evokes the auditory impression and is fixed on the sound carrier. Therefore it doesn't matter whether it is set in three-quarter, four-quarter or six-quarter time.

These explanations are also understandable and convincing. They in turn coincide with the auditory impression of the chamber. The self-creative elements from “Nordrach” described above as essential can also be found in “Still got the Blues”; From the point of view of the musical form, the melody, the rhythm, the tempo, the harmony, the instrumentation and the arrangement, striking similarities can be heard. The differences noted by the defendants in terms of notation are not considered significant in view of the hearing impression. The Chamber therefore also shares the defendant's view that “Hello” and “Dana” served as reference melodies for the composition of “Still got the Blues” and that the work “Nordrach” was not required to “Still got the Blues” to compose, not. In view of the similarity of the guitar solos of "Nordrach" and "Still got the Blues", the Chamber and the expert consider the probability that the defendant was not familiar with "Nordrach" as very low, because "Nordrach" is clear in its creative peculiarity beyond the basic patterns known from "Hello", "Dana" and all the other works cited by the defendant. It is therefore ultimately irrelevant whether the second defendant made use of these basic public domain models. The works named as reference melodies by the complainant do not suggest any other course of events. because “Nordrach” in its creative peculiarity goes well beyond the basic patterns known from “Hello”, “Dana” and all the other works cited by the defendant. It is therefore ultimately irrelevant whether the second defendant made use of these basic public domain models. The works named as reference melodies by the complainant do not suggest any other course of events. because “Nordrach” in its creative peculiarity goes well beyond the basic patterns known from “Hello”, “Dana” and all the other works cited by the defendant. It is therefore ultimately irrelevant whether the second defendant made use of these basic public domain models. The works named as reference melodies by the complainant do not suggest any other course of events.

It cannot be assumed that “The William and Caroline Suite” was the inspiration for “Still Got the Blues”. In a direct listening comparison, the guitar solo proves to be something different from the guitar solo from "Still got the Blues", especially in sound and character. The

Chamber is unable to discern any similarity between the two guitar solos - despite the music reports submitted by the defendants.

1. e. It can also be assumed that the defendant to 2) knew "Nordrach" when composing "Still got the Blues". This is supported primarily by the tonal proximity of the two pieces to each other, but also that it is anything but impossible that the defendant 2) once heard "Nordrach" from.

1. e. A. The disputed guitar solos in "Nordrach" and "Still got the Blues" are striking in sound.

Which requirements have to be made in individual cases in order to determine the distance between two works depends on the level of design of the work used as a template. The more striking the peculiarity of the work used, the less its adopted peculiarities will fade in the work created afterwards. Conversely, a work of minor individuality is more likely to merge into the copied work than a work of particular character (cf. BGH GRUR 1981, 267 (269) - Dirlada). Extensive similarities usually suggest that the author of the newer work used the older work (see only BGH NJW 1989, 387 - A little peace).

The correspondences are so clear here that, according to the rules of prima facie evidence, a conclusion can be drawn that the second defendant knew the older work and consciously or unconsciously resorted to it in his work.

The expert stated:

“The authors of the compositions under discussion here have never published the corresponding melodies in writing. It can also be assumed that her musical practice is based on recording and playing musical repertoire through the ear without any reference to written notes. The question of the identity of these melodies must therefore be based on an analysis of the hearing impression, while the comparison of the transcriptions is only partially conclusive.

For the recognizability of the auditory impression, the characteristic framework tones of a melody play the decisive role and not the passage tones. Therefore the difference of diatonic and chromatic passage tones between the falling third FD determined by Mr. S.... is insignificant from a hearing-psychological perspective.

In addition to the characteristic melody structure and the identity of the key (in both cases A minor), the question of the identity of sound, tempo, instrumental gesture and phrasing is essential. These musical parameters are not reproduced in the score at all. The question of harmonizing the melody must also be classified as a secondary component. Here, the number of variants identified by Sauter (see Sauter's report on p. 4) is certainly overrated.

The melody model itself shows a multitude of parallels to the repertoire of sentimental love songs. Above all, this includes the initial sixth jump (a1-f2), which here in the instrumental version is guitaristically filled with the passage tones d2 and e2. This sixth jump forms the core of the catchy tune character of this melody and is in itself not eligible for protection under copyright law, because it is in folk songs such as “It was two royal children”, “In a cool reason” or the classic art song “I liked to cut it into everyone Rinden in” (Schubert), “I love you as much as you do me” (Beethoven) and hits like “Ramona, I'll shake hands with you” or “I know a miracle will happen one day” are universally spread<sup>3</sup>. The question is, is it

a recognizable melody? because even if “Ramona” or “I know a miracle will happen” use the same structural melody elements, they will not be confused with one another. However, if one compares the melody sequence of Winter and Moore under these criteria, one hears identities here. The average lay listener would also hear these identities and in no way confuse them with the hit “Ramona”, which could certainly be confirmed with an empirical comparison of listeners.

The likelihood that such a high degree of agreement between two melodies is due to chance must be assessed as very low, because the agreement relates not only to the melody, but also to the key, the instrumental habit of the guitar, phrasing, tempo, etc. The differences can easily be explained from the process of a melody played by the ear. These replica variants are known worldwide in the history of popular music because, as described above, the majority of young music groups traditionally had a great deal of practice in playing well-known rock music compositions by ear (compare the cover versions of the Rolling Stones by Chuck Berry and Muddy Waters Titles).

The melody in question is so simple in itself and follows a common pattern that even after listening to it once, it can be immediately stored in the memory and, in particular, played back immediately by a rock guitarist. The key and the skilful use of empty guitar strings make such an imitation child's play for every professional. It is precisely this simplicity and the high degree of recognizability, which is stored in seconds by the short-term memory and consolidated by the many repetitions of the same phrases after listening to it once, that makes the melody so popular and its resounding success with a wide audience. ...

However, the question of conscious borrowing remains open. Melodies based on a simple sequencing model (compare “Strangers in the Night”) lead to the assumption that anyone can invent them. But this is usually not the case. In the present case, too, it can be assumed that there is a clear originator who spontaneously invented a melody sequence in the context of an improvisational action. However, commercial success was only possible through a new work context. Gary Moore may have stored this melody sequence as one of hundreds in his subconscious. He then reused them in a new context. Whether he was aware of this borrowing will be difficult to prove. ... (main review)

My remarks required a differentiated statement, since there is no possibility of providing evidence for "known, conscious or" unconscious "when adopting orally transmitted music. This is a well-known phenomenon in popular music research. A professional pop musician usually has a considerable repertoire of melodies and melody set pieces stored in his memory. These provide the basis for improvising or composing new works. Since he has no written records, his own mixes with what he knows. It is only since sound recording that these creative processes can be partially understood empirically.

In the case of the guitar solos of “Nordach” and “Still got the Blues”, the similarities are so striking that the assumption that Gary Moore knew “Nordach” and that the guitar solo was played by ear cannot be ruled out. (Expert opinion 20.8.)

At the hearing, the expert stated:

“The ability to protect the sequence from Nordrach does not come from the elements, but from the way they are combined. Therefore I do not believe that the dispute agent could have come to "Still got the Blues" even if he had assumed knowledge of "Dana" without knowing "Nordrach". My assessment is based on the hearing impression and the comparison with

other combinations. I have never come across a similar combination. Harmonics, melodies and rhythms are decisive and there are special similarities here. There is agreement between all three in the harmony sequence and in the bass part, but not in the melody. The decisive factor is how the melody is played by the guitar with agogic ornamentation, play around, tone coloration in rock and Pop music. As with jazz, interpretation is basically what can be protected in contrast to classical music. Such things cannot be noted, so that the transcriptions in the field of music do not reproduce a complete picture of the music. With a corresponding reproduction, the new artist must have heard the old one.

The Chamber also considers these expert statements to be understandable and correct, especially since the expert Prof. Dr. Altenmüller, also a musicologist, confirmed this in his oral hearing:

*"I think that " Still Got the Blues " would not have been created in this form without Nordrach. The sequence of notes in both works, Nordrach and "Still got the Blues", is banal, it is the way in which he plays the piece that is so special. "*

1. e. B. The board can also not assume that the defendant to 2) did not know the guitar solo from "Nordrach".

Already because of the special circumstances described above ("Nordrach" was only heard at various live concerts on the European mainland and at least once on German radio, but was not distributed on sound carriers at the time; the second defendant is British), but also Due to the defendant's contract, it was necessary to clarify as far as possible whether the second defendant could even know the guitar solo from "Nordrach" when he composed "Still got the Blues". The defendants were burdened with evidence to the extent that, given the tonal matches of the two guitar solos, according to the case law, it appears that the second defendant knew the guitar solo from Nordrach. The chamber assumed that this question could hardly be answered with certainty after more than thirty years. It has therefore pointed out to the parties that in the case of the negative evidence to be provided by the defendants, the requirements for the evidence - especially with regard to the time that has passed - must not be overstated; The second defendant therefore did not need to exclude all conceivable ways of acquiring knowledge from the outset. The Chamber was accordingly inclined to be generous here.

Nevertheless, the defendants did not succeed in convincing the board that the second defendant did not know the guitar solo from "Nordrach". On the contrary: In the evidence test it became apparent that the second defendant and the witnesses he had named tried to deceive the court in an unprecedented way for the Chamber.

The witnesses ... sent the court - without being asked to do so by the court - in each case written notifications about the stay of the second defendant in Germany in 1974/1975 (Annexes S 17, 18, 19). Due to the location and date, these letters give the impression that they were produced independently of one another.

The witness ... explained to the court that he had not filed Annex S 18 with the witness ... that he had submitted to the court. In response to the court's allegation that there were already similarities in terms of the font to Annex S 19 written by the witness ..., the witness ... stuck to the fact that they had not been written together. He had no contact with the second defendant after 2003. The witness then lied to the court a third time when he said it was true that they had short-circuited on the phone, sir ..., sir and he. But he put it down alone. Only

after the chamber had urged the witness again to tell the truth and therefore even interrupted the session, the witness corrected his previous statement as follows: The second defendant informed me before the 6th Called May 2005. The defendant to 2), Mr. ... Mr. ... and I sat down and thought about what it was like then and then wrote these statements.

Such a witness is unbelievable.

It's not that the witness's sole idea ... was to deceive the court. The statements submitted by the witnesses ... before the date of the evidence (p. 17, 18, 19) show different dates and places - that the court believes that each of the three was completely independent and independent (and of course only committed to the truth, as the witness ... believed he was allowed to say at the hearing) sat down to tell the court where the second defendant was at that time.

In fact, the second defendant met with the witnesses in question. We then discussed it together. The court wanted to deceive about this cooperation not only with the appendices S 17, 18 and 19. This deception should of course also be maintained in the context of a possible hearing as a witness in court. And from all witnesses, not just from the witness ... who was unlucky enough to be the first to testify and get exposed. Given the prelude to this hoax, it would be completely alien to assume that the witness ... wanted to tell the court this lie, while the other two witnesses would then have contradicted it to tell the truth, so that neither of the witnesses can be believed.

Without it mattering - but for the sake of completeness - it should be pointed out that the testimony of the witness ... shows that the defendant 2) was in ... from spring to late summer 1974 and that the defendant was sometimes closed on weekends 2) was in the club ... which was a central point for musicians; because a lot of live bands played there - and where that is why you went more often. The witness ... has also confirmed that the second defendant was in ... in 1974 and that people were there regularly.

So after all it is anything but impossible that the defendant 2) heard "Nordrach" from ... at the time.

1. f. The guitar solo from "Still got the Blues" is not a double creation either

The defendants have not succeeded in proving that the second defendant was not familiar with "Nordrach", nor was it able to prove that it was impossible for the second defendant to be involved in the composition of "Still Got the Blues" by a hearing impression 16 years ago, since storage in long-term memory over sixteen years could not have taken place on the basis of an ephemeral live hearing impression.

1. f. A. The defendants - as shown above - could not prove that the defendant 2) did not know the guitar solo from "Nordrach"

1. f. B. Also the proof that it is impossible that the defendant to 2) was guided by a listening impression 16 years ago when composing "Still got the Blues", since storage in long-term memory over sixteen years is not due to a The defendants have not provided any ephemeral live hearing impression.

The Chamber obtained an expert opinion on this question. This report - as one of the few who are able to do this due to their vita as a scientist -.... The expert is a doctor for neurology and director of the Institute for Music Physiology at the University of Music and Theater

The board has no reason to question the expert's expertise with regard to the question of evidence. The expert has been dealing with emotions triggered by music since 1997, with goose bumps since 2000 and since 2004 with the influence of emotions on musical memory formation, including long-term memory. He has also published and supervised doctorates on these topics. Since 1994 he has dealt with the brains of music perception. According to his information - the accuracy of which there are no doubts - the examinations he carried out on music reception concerned a period of 14 days and thus long-term memory (in the neurogeological definition, a period of three days or more is used as well as a period - as here - from 16 years of long-term memory). ... assumes in his detailed, knowledgeable and just as comprehensible as convincingly justified report that the defendant to 2) was able to save the passage in question in long-term memory and that the composition "Still got the blues" is based on this hearing impression from "Nordrach" "Has been guided. However, the expert already pointed out at the beginning of his initial report that the question put to him

"... possibly due to fundamental considerations and a lack of substantial scientific research into the memory performance of professional musicians cannot be finally clarified" ... is.

The expert assumed that, according to current knowledge, the following factors are decisive for the storage of music in long-term memory:

**Musical expertise:** Professional musicians are better able to retain pieces of music than musical amateurs

**Musical way of learning:** Musicians who have learned to "listen" to pieces of music have practiced this form of memory formation. They succeed more precisely in keeping musical works in long-term memory.

**Musical familiarity:** Music that is perceived as melodic, familiar, not very complex and pleasant, is more likely to be retained in long-term memory. Redundancy and sequencing support memory formation....

**Repeated listening:** Frequent repetition of the pieces of music you hear support memory formation....

**Structural features:** All structural features can contribute to memory formation. So-called "pop-outs", that is, unusual and surprising twists, are particularly important. This includes sudden accents, unusual timbres, but also disappointed expectations

**Biographical and emotional involvement**

**Emotional evaluation**

Applied to the matter under review, the expert considered five of these factors to be met with detailed justification. Only the points "Repeated listening" and "Biographical and emotional involvement", about which the expert could not have any actual knowledge, was denied.

In doing so, the expert also took into account the private reports from and ... - in particular the doubts about such memory formation arising from the report ...

Ultimately, it is decisive that the expert - and this in scientific agreement with the private reviewer ... - has once again stated in his oral hearing that there are no systematic, scientifically sound studies with professional musicians on the question of the education,

reliability and stability of long-term musical memory. In his oral hearing he reiterated that it was

*“... there is nobody in the world who could answer the question posed here on the basis of scientific studies or corresponding own research. There is no memory psychologist who has worked on this question.*

*Mr. C. ... also did not publish on this particular question, although he is a memory psychologist of world renown. ”*

The Chamber is thus certain that the defendants were able to provide evidence that it is impossible that the second defendant was guided by a hearing impression 16 years ago when composing “Still Got the Blues”, since it was stored in the Long-term memory over sixteen years cannot, cannot, cannot have been achieved due to an ephemeral live auditory impression. In this respect, there are no scientific facts, only the possibility of a plausibility check. The judicial expert delivered such a case in a convincing manner.

1. g. For the decision, however, it can be assumed that the takeover of the guitar solo from "Nordrach" was unconscious. In any case, the Chamber has no evidence that Defendant 2) consciously resorted to "Nordrach" in his work. However, this is irrelevant for the existence of a copyright infringement. Claims for damages that require at least negligent action are excluded as long as there is no knowledge or need to be aware of the violation. A mere unconscious takeover should not be qualified as negligent action. The defendants have therefore only been accused of negligent action since May 30, 2000 - i.e. the notification by the plaintiff (receipt of the plaintiff's registered letter by the defendant 1) according to the acknowledgment of receipt).

1. h. The claim to enrichment that also exists against the defendant 1) - and thus the claim to information that prepares it - is not excluded because of depletion.

The defendant to 1) is not depleted by her payments to ... What is settled is namely - as long as the plaintiff is not registered with the ... as a composer involved in "Still got the Blues" - only the granting of the reproduction and distribution rights of the second defendant to the song. Any additional claims of the plaintiff from the use of the work are not fulfilled. A depletion does not occur if only one of two independently entitled creditors is satisfied, at least not if - as here - two different legal entities (who ... and the plaintiff) exercise the rights and the resulting claims.

1. i. The claims for damages and enrichment are also not statute-barred or forfeited. The defendants have not proven that the plaintiff had knowledge of the copyright infringement within the statute of limitations.

The board shares the defendant's astonishment that the plaintiff does not want to have noticed that his copyrights were infringed with the world success of “Still got the Blues” published in the early 1990s - he either did not hear “Still got the Blues” or had forgotten "Nordrach".

But it is also not the case that this can be ruled out, because according to the statements of the expert ... the corresponding lecture of the plaintiff can be explained with the known phenomenon that one forgets one's own works, that is, that these are "overwritten" in one's memory (so-called Interference); According to the expert, this also applies if the artist has dealt intensively with the work (rehearsal, performance, etc.).

In this context, the board can also understand that the defendants did not receive that the second defendant should have remembered a one-time auditory impression for sixteen years, while the plaintiff is assumed to have heard his own piece countless times should have so forgotten that not even the world hit "Still got the Blues" reminded him of this. While the plaintiff's presentation - and this is where the legal difference lies - cannot be refuted because of the expert's explanations, the striking sonic similarity of the two guitar solos at issue provides prima facie evidence that the second defendant knew "Nordrach". In addition, it must not be forgotten

2. The asserted claims for damages exist - as explained above - only from May 30, 2000, that is, since negligent action by the defendant can be assumed.

IV.

The claim of the plaintiff against the defendant 2) to be named as co-composer results from the adoption of the disputed, copyrighted work in the work "Still got the Blues" registered with ... Since only ... perceives the works of the composers and lyricists and there was no dispute over ancillary copyrights, the claim only exists in the tenorized version.

V.

The decision on provisional enforceability is based on Section 709 sentence 1 ZPO.