

Reference book: Yes

BGHZ _____: no

UrhG § 24 Abs, 2

- Fantasy -

On the question of melody extraction.

BGH , ruling v. February 3, 1988 - I ZR 143/86 - Supreme Court

LG Berlin

FEDERAL COURT OF JUSTICE

IN THE NAME OF THE PEOPLE

JUDGMENT

I ZR 143/86

Announced on:
3rd February 1988
Kalus
Legal Clerk
as a clerk
the office

in the litigation

A4HH Musikverlag & Production Anneliese
through its personally liable partner
publisher Anneliese

S@BHstrasse 2, Bad

KG
, the music-

Plaintiff and appellant,

Attorneys at Law: Lawyers Dr.

and

against

Music publisher G | ^ HB & Co
managing director Götz K0B,

GmbH, represented by its company
H ^ Bstiraße 140, HafHIIP 0 /

Defendants and defendants,

- Legal counsel:

Lawyers Prof.
and Dr.

Dr.

WII

The first civil senate of the Federal Court of Justice has on the oral hearing on February 3, 1988 by the Presiding judge Prof. Dr. Mr. v. Gamm and the judges Dr. Piper, Dr. Erdmann, Dr. Teplitzky and Dr. Mees

recognized for right:

The appeal against the judgment of the 5th civil senate of the Court of Appeal of July 4, 1986 is on Ko most of the plaintiff rejected.

Note: Parts of the collection of judgments are als

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Facts:

The parties are music publishers. The applicant is Inhaberin the rights to the song "Like a child". The parties argue about whether the chorus melody of this song is at the composition of the song "Fantasy", on which the defendant owns the rights for the Federal Republic of Germany, in

has been used improperly.

Composer and lyricist of the song "Wie ein Kind" is Berd Plato (real name Günter Engel). The plaintiff has the rights to the song based on the contract dated 1/29. Acquired December 1975. The piece of music has been around since 1977 registered with the G I ^ i.

The title "Fantasy" is from the American Kompo nest Maurice White, Eddy del Barrio and Verdine White kom been posted. This title appeared on one in November Gfl l long-playing record released in 1977 in

Both titles indicate as far as matches are claimed after transposition into the same key (E minor), the following note image on:

The plaintiff takes the defendant because of copyright infringement
Failure to do so, (GfIB) declaration of consent,
Provision of information, surrender for the purpose of destruction
and determination of the obligation to pay damages in An
saying.

She has argued that the title "Fantasy" is too
Text passage "Ev'ry man has a place" repeated several times
The tone sequence is that of the chorus melody of the song "Wie
a child ". The chorus melody provides
is a copyrighted work that the composer
Most of the title "Fantasy" known and their music - aware
or unconsciously - would have based it.

The defendant opposed this. she has a
Copyright infringement contested and brought forward, the Re
In terms of structure and rhythm, Plato's frain melody is not
copyrightable; it is a mere one
Motif or at least a public domain wandering melody.
In addition, the melody was not adopted. The
The two-sided tone sequences were only partially correct
match. At least there was a coincidental double creation.
For the composers of the title "Fantasy" the song "Wie ein
Kind "not known. The recordings for the title
"Fantasy" started in June 1977, the Komposi
tion had been created several months beforehand.

The regional court has the action by judgment of
Rejected July 14, 1981, referring to the position
put, the tone sequence in question from the song "Wie
a child "don't put a copyrighted melody
The appeal led by judgment of June 8, 1982 to
Repeal and Remittal. The district court has on it
after taking evidence, the action by judgment of
Rejected July 3, 1984 and expelled as grounds
leads, the composer of the title "Fantasy" is the song
"Like a child" had not been known. The renewed calling

has remained unsuccessful as a result.

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With the one directed against the second appeal judgment
The plaintiff is pursuing her last complaint on appeal
requests continue. The defendant requests the appeal
to reject.

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Decision reasons:

**I. The court of appeal has violated copyright law
tion denied because there was no inadmissible melody extraction
let determine.**

The appeals court first made a comparison of the
opposite tone sequences made and to do so
led: The comparison shows deviations in the structure.
In the tone sequence of "Like a child", a short motif becomes
repeated twice, followed by a final part;
the structure is A + A + A + B. With "Fantasy" the first one
Motif repeated once identically, a second time in easy
modified form, followed by a final part; the structure
let A + A + A + B. Deviations would also occur in the
Show note values. Both tracks are in 4/4 time,
however, the plaintiff's tone sequence is more leisurely
Expiration set the defendant at a faster pace. over
Attunements would only be given for motives A.
exist than they are with a small ascending from the note E.
Third would begin. The further course is however ver
divorced. There would also be differences in the final part B.
Finally, the rhythmic course also softens considerably
from each other.

The appellate court has then on the basis of
Presentation by the expert Prof. Dr. Rough the overall
tone sequence of the refrain of "Wie ein Kind" (A + A + A + B) ur
Melody protection granted under copyright law. It is true
Motive A taken alone cannot be protected because it

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is a sequence of tones of the simplest kind without creatori act like a peculiarity. The double repetition of the motif A, on the other hand, gives the sequence of tones a noticeable haunting and leave the overall tone sequence in conjunction with the The final part becomes the melody.

The Court of Appeal also assumed that a prima facie evidence of an at least unconscious melody taking in favor of the claimant disputes. Given the tight Protected area of the exhibiting only a slight individuality Refrain melody, would come from the common features of both tone sequences however only a light weight too. But it can be done do not deny that when listening to both pieces of music similar can be determined.

The prima facie evidence was shaken in the event of a dispute. The invalidation of this evidence is not too great Requirements to be made when the options, the older To have heard the melody was only slight. That is the case here. It is true that in the present case there is an opportunity to listen to go out; because it is to be assumed that already in 1976 Demo tapes with the title "Wie ein Kind" various US Companies. However, it would only come by chance and then only listening once. Under these Under certain circumstances, the deviations of the two tone sequences are greater To attach weight. The - initially highlighted - Ab In the event of a dispute, deviations are so serious that they - in Connection with the low creative peculiarity of Chorus melody, the only insignificant matches and the low hearing - the assumption of a just un made conscious borrowing impossible. Be it

rather with the expert Prof. Dr. Rfl II a dop
to accept pel creation.

II. This assessment holds up the legal review
in the result.

The acceptance of a copyright infringement according to §§ 97,
24 para. 2 UrhG requires the determination that (objectively)
the extraction of a copyrighted melody
lies and that (subjectively) the composer of the new melody
the older melody was known and consciously or unconsciously with it
has resorted to it in his work (see BGH, ruling v.
5.6.1970 - I ZR 44/68, GRUR 1971, 266, 268 - Magdalenen-
aria). The appellate court rightly ruled this out
went.

1. The decision of the court of appeal that the Ge
Velvet sequence of the chorus of the song "Wie ein Kind" which for
a copyright protection of melodies required
creative peculiarity within the meaning of § 2 Paragraph 2 UrhG
is not objectionable for legal reasons.

The appellate court assumes no violation of the law
gone that with musical works the requirements are not too high
may be placed on the creative peculiarity
fen. For the field of musical creation is since
long recognized the so-called small coin, the simple,
but just grasped protected spiritual creations. It
is sufficient that the composer's formative activity
- as with the pop music regularly - only a small one
Degree of creation, without it being on the artificial

leric value arrives (BGH, ruling of September 26, 1980 - I ZR 17/78, GRUR 1981, 267, 268 - Dirlada). As far as - like here - not about copyright protection for the whole song, but about who goes for the melody contained in the song, the individual aesthetic content in the melody itself, that is called in a self-contained and orderly tone sequence, express.

According to the Court of Appeal based on the expert statements by the expert Prof. Dr.

Rmm made statements is not motive A of the refrain (consisting of the first eight notes of "Wie a child ") can be protected by itself, as both the sound follow (ascending third, descending to tonic and fading in the second) as well as the rhythmic structure (twice preferred accent on the last eighth of a measure, so-called offbeat) belong to the musical common property. The motif contains a sequence of tones of the simplest kind, which in the narrow range of three tones moving with one "Everyday phrase", the ascending third, begin and at the continuation with the fading away on the second itself almost imposing on the listener. The double repetition of the Motif A, on the other hand, gives the tone sequence a noticeable one urgency and leave in connection with the final part B the overall tone sequence become a melody. This corresponds to the Opinion of the judicial expert who added a motive assembly of motif A and connecting the Final part B ascribes a certain originality. The celebration Appeals by the court of appeal are subject to the revision - as favorable for them - not complained about and also from the Defendant not in question in their response to the appeal represents.

However, the revision is against the fact that the Beru appellant's melody only a relatively ge rings creative peculiarity and therefore attributed has narrowed the protected area. The so far from Beru Findings made by the appeals court leave one Failure to recognize legal errors. The court of appeal has - ge

is based on the statements of the judicial expert
gen - executed that the beginning of the motif A and its
rhythmic structure anyway musical common property
and that the second part of the motif also has little character
be teristic. Finally, the thought of a be
agreed to repeat the tone sequence several times in the hit song
music known and therefore not very original. The revision
in view of these statements wrongly objects that
Court of Appeal have more to the - for the protection area
insignificant - musical quality and less on that
only decisive originality lifted off.

2. As a result, the appellate court rightly also
the removal of the chorus melody from the song "Wie ein Kind"
negated by the composer of the "Fantasy".

a) It has been correctly assumed in the approach that
the assessment of the issue of removal is basically the
Examination presupposes which objective characteristics the
creative peculiarity of the original is determined.
Because for the question of removal only those in the protection area are
There are many similarities in the older melody
Significant under international law. The comparison of the matches
in the creative field it enables the boundary between
the usage acts relevant to copyright (in

Form of reproduction or processing) and the permissible
for free use (BGH GRUR 1981, 267, 269
- Dirlada). Only when such matches are established
ask, they should be checked to see if they
according to the rules of prima facie evidence
to allow the composer of the younger melody the ä
Another melody used, that is, known and conscious or un
consciously resorted to it in his work. The
However, this prima facie evidence is then to be dismissed
see if, according to the circumstances, another course of events
obvious after which the matches are also based on
any other way than by recourse to the Creator's
explain the new melody to the older one (see BGH GRUR
1971, 266, 268f - Magdalenenarie).

b) Contrary to the assumption of the court of appeal, im
Dispute objectively not from an injuring hand
can be assumed as the appeal court
made no relevant agreements
let out moods. The affirmed by the court of appeal
te question whether the plaintiff has prima facie evidence for a too
has led at least unconscious melody extraction, arises
not at all, so it does not affect the rest of the Beur
division of the court of appeal and those directed against it
Revision attacks arrive that the prima facie evidence therefore
should be regarded as exhausted, because due to serious Ab
deviations of both melodies from a random double
creation.

Based on a comparison of the
Note images executed that although the motifs A of both
Cover melodies to the extent that they are

begin a rising minor third. This match
is outside of the creative realm because the
ascending third belongs to the musical common property
(see above under II 1.). The continuation of the third shows
no more matches. The court of appeal has in
so far stated that the melody of the title "Wie ein Kind"
sink over the second to the tonic and end in the second;
the first and the second part of the motif are through one
Eighth-note break separated. In "Fantasy" the melody is about that
Third continued without pause to fourth (A) and climb from
there over the third to the second; the note A still received
special weight because it has the value of an oh
tel-Note and thereby differ from the short values of the
ascending and descending sixteenths take off. This
let the factual findings of the court of appeal
fail to recognize a revisable legal error. this is also valid
for the further statements of the appellate court on
construction of the overall tone sequence and its detailed design. in the
Structure there are certain similarities in that the
The plaintiff's tone sequence repeats the motif unchanged twice
is fetched before a final part follows
(A + A + A + B), while also with the title "Fantasy" the first

Motif is repeated, but only once identical and one second time in a slightly modified form, whereupon also a final part follows (A + A + A ' + B). Again, none can substantial agreement can be seen; because only that Thought of repeating a certain sequence of tones several times, is - like the court of appeal in another context (see above under II 1.) - known and little original. Regarding the grade values, the appeals court has no significant matches were found either.

Both tracks have the 4/4 time in common. But while the Melody of "Wie ein Kind" in quarter, eighth and half Notes are written in "Fantasy" on the other hand Sixteenth, eighth and quarter notes. From this the Be court of appeal to a slower tempo of the melody of the Plaintiff versus a faster pace in the tone sequence the defendant closed. This different process will rise by persisting on the last note the lower third in the applicant's melody; half the first full measure take half a note. The "Fantasy" melody has the se again at this point Reached a customer on which you remained until the third quarter be. The more leisurely course of the melody of the song "Wie ein Child "also comes in the longer breaks between Motives A express. They are three eighths, against which the separating pause in the title "Fantasy" is only one Sixteenths amount. Finally, there are also the finals B both melodies, which insofar a change of each two tones indicate no relevant matches remove. The appellate court has errors of law in this respect freely stated, the final part of "Wie ein Kind" begins and finish with the second (F sharp) and climb twice more down to the tonic. "Fantasy" begins and ends in the tonic E and go down to the G twice. Just like the motifs below Let each other in the song "Wie ein Kind" the final part B through a three-eighth break from the last repetition of Mon tiva A separated. "Fantasy" is again composed through; of the Final part B immediately follows motif part A. None The court of appeal also has similarities in rhythmi

only on the two tied notes F sharp. The rhythmic structure of "Fantasy" is due to a multiple change characterized by stressed and unstressed parts of the beat.

Without any errors of law, the court of appeal also passed the im Private report Prof. Dr. K fl ü highlighted together (ascending third, falling of the melody to the Second, no guiding tone in the final cadence, twice Repetition of the motif, rhythmic similarity on End of the melody) as irrelevant or at least as un judged essentially. This is evident from the foregoing Remarks that the appellate court still through the fest position has supplemented the fact that the Leittonlose, especially in pop music, is common knowledge.

c) The court of appeal due to the comprehensive Comparison of the note images and after the hearing impression found minor matches or similarities are after all outside of the creative realm the chorus melody of "Wie ein Kind". As above under II 1st executed, the scope of this melody is on because of the low creative peculiarity very narrow anyway. The findings of the court of appeal coincide in the rest also with the expert's statements in his oral report. The expert also has neither because of the written score nor the münd determine relevant matches based on the hearing impression can.

The lawsuit then turns out to be in the absence of a ver final act as unfounded.

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**III. The plaintiff's revision is thus with the
Reject the costs resulting from Section 97 (1) ZPO.**

v. Gamm

Piper

Erdmann

Teplitzky

Mees