The Use of Samples for Artistic Purposes May Justify an Interference with Copyrights and Related Rights

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1 BvR 1585/13

If the artist's freedom of creative expression is measured against an interference with the right of phonogram producers that only slightly limits the possibilities of exploitation, the exploitation interests of the phonogram producer may have to cede in favour of artistic dialogue. In its judgment pronounced today, the First Senate of the Federal Constitutional Court came to this conclusion. Thereby, it granted a constitutional complaint lodged against a regular court decision according to which the adoption of a two-second sequence of rhythms from the soundtrack of the composition "*Metall auf Metall*" by the band "*Kraftwerk*" in the song titled "*Nur mir*" by way of so-called sampling constituted an interference with the right of phonogram producers. In the regular court decision, such use was not deemed to be justified by the right to free use (§ 24 sec. 1 of the Act on Copyright and Related Rights, *Urheberrechtsgesetz* – UrhG). For § 24 sec. 1 UrhG to be applicable with regard to interferences with the right of phonogram producers, the Federal Court of Justice (*Bundesgerichtshof*) had introduced the additional criterion that the used sequence could not be reproduced so as to sound like the original. This additional criterion, however, is not suitable for establishing a proportionate balance between the artistic interest in creativity and the property interests of the phonogram producer.

Facts of the Case:

The constitutional complaint concerns the question to what extent musicians can invoke artistic freedom when facing copyright-related claims of phonogram producers in which they challenge that parts of their phonogram are used by way of the so-called sampling.

[Translator's note based on the German press release no. 77/2015 released on 28 October 2015: Sampling is a music design element by means of which sounds from different audio sources are recorded and processed for the purpose of using the sound when creating a new piece of music. The use of sampling plays an important role particularly in the field of hip-hop and electronic music.

Complainants are, among others, two composers and the singer of the song "*Nur mir*", which was published in 1997 in several versions on the album "*Die neue S-Klasse*" and on an EP ("extended play"), as well as the music production company that produced the album and the EP. According to the facts established in the civil court proceedings, to produce two versions of the song "*Nur mir*", a two-second rhythm sequence from the soundtrack of the composition "*Metall auf Metall*" from the "Trans Europa Express" album by the German band "*Kraftwerk*" from 1977 was sampled from the original and embedded, with minor changes only, in the two versions as continuously repeated rhythm ("loop").

Following an action brought by two founding members of the band "*Kraftwerk*", the composers and the music production company were ordered to cease and desist from producing and selling phonograms with the two concerned versions of the song "*Nur mir*" and hand over already existing phonograms to the plaintiffs for destruction. In addition, the complainants (in the present constitutional complaint proceedings) were found liable to pay damages to the original plaintiffs. The Federal Court of Justice, which dealt with the matter twice, upheld the decision (Judgment of 20 November 2008 – I ZR 112/06, Metall auf Metall I – and Judgment of 13 December 2012 – I ZR 182/11, Metall auf Metall II –). It held that even the use of extremely short parts of a soundtrack produced by another party constituted an interference with the phonogram producer's right to protection of his work pursuant to § 85 sec. 1 sentence 1 UrhG and

reproduced in a way that sounded like the original. According to the findings by the Hamburg Higher Regional Court (*Oberlandesgericht*) (Judgment of 17 August 2011 – 5 U 48/05 –) this was, however, possible in the present case so that the complainants could not invoke the right to free use.

With their constitutional complaint the composers and the music production company claim in particular a violation of their fundamental right to artistic freedom under Art. 5 sec. 3 sentence 1 of the Basic Law (*Grundgesetz* – GG).]

Key Considerations of the Senate:

The challenged decisions violate the freedom of artistic activity of three of a total of twelve complainants (Art. 5 sec. 3 sentence 1 of the Basic Law, *Grundgesetz* – GG).

1. The legal provisions governing the right of phonogram producers (§ 85 sec. 1 sentence 1 UrhG) and the right to free use (§ 24 sec. 1 UrhG), on which the challenged decisions are based, are compatible with the artistic freedom guaranteed under Art. 5 sec. 3 sentence 1 GG and the protection of property under Art. 14 sec. 1 GG. They provide the courts entrusted with interpreting and applying them with sufficient discretion to give constitutionally appropriate consideration to the freedom of artistic activity on the one and to the protection of the phonogram producer's property rights on the other hand. The general recognition of a copyright-related right of the phonogram producer, pertaining to the protection of his economic, organisational and technical performance, is unobjectionable under constitutional law also with regard to the restriction of the freedom of artistic activity. *Vice versa*, the mere possibility for artists to invoke a right to free use of a phonogram under certain circumstances does not generally entail a disproportionate restriction of the core of the phonogram producer's right protected under Art. 14 sec. 1 GG.

The fact that § 24 sec. 1 UrhG does not provide for a respective remuneration and thereby also restricts the exploitation rights of the authors or phonogram producers is also in compliance with Art. 14 sec. 1 GG. The legislative decision not to supplement the restrictive exception by including an obligation to pay royalties that would entitle the author or phonogram producer to a share in the returns for the free use of his work or phonogram within the creative work of another party, is within the limits of legislative discretion. However, the legislature would not be generally prevented from subjecting the free use to an obligation to pay appropriate royalties. In doing so, it could take into account the artistic freedom by introducing, for instance, follow-on obligations to pay royalties based on the commercial success of a new work.

2. The challenged decisions, on the other hand, violate the freedom of artistic activity of the two composers and the music production company of the song "*Nur mir*" guaranteed by Art. 5 sec. 3 sentence 1 GG.

a) When interpreting and applying copyright laws, civil courts must reproduce the balance struck in the Act between the property interests of phonogram producers and the conflicting fundamental rights, thereby avoiding that fundamental rights are disproportionately restricted. The point at which the Federal Constitutional Court has to rectify a violation of constitutional law is reached only if the interpretation by the civil courts reveals errors that are, also due to their substantial significance, of considerable relevance for the specific case.

b) In a legal assessment of the use of works protected by copyright, the copyright holders' interest to prevent commercial exploitation of their works by third parties without their consent conflicts with the interest of other artists to induce a creative process by an artistic dialogue with existing works without being subject to financial risks or restrictions in terms of content. If the creative development of an artist is measured against an interference with copyrights that only slightly limits the possibilities of exploitation, the exploitation interests of the copyright holders may have to cede in favour of the freedom to enter into an artistic dialogue. These principles are also applicable if phonograms protected under § 85 sec. 1 sentence 1 UrhG are used for artistic purposes.

c) The presumption by the Federal Court of Justice that even the inclusion of very brief sound sequences constitutes an interference with the plaintiffs' right to protection as phonogram producers if the used sequence can be reproduced so as to sound like the original, does not take sufficient account of the right to artistic freedom. Where a musical artist who intends to use samples to create a new work does not want to refrain from including a sample in his new piece of music, the strict interpretation of free use by the Federal Court of Justice puts him in the position of having to decide whether to obtain a sample license from the phonogram producer or to reproduce the sample himself. In both cases, however, the freedom of artistic activity and hence also the further cultural development would be restricted.

artistic activity. It ought to be granted a license to use the sample does not exist, due to his right of disposal, the phonogram producer may deny a licensing without having to give reasons and irrespective of the readiness to pay for the use of the sample. The phonogram producer is entitled to demand the payment of a license fee for the use of the sample, the amount of which he is free to determine. The process of granting rights is extremely difficult in case of works which assemble many different samples in a collage-like manner. These problems are only solved insufficiently by existing sample databases and service agencies that assist musical artists in the process of sample clearing.

Nor is the reproduction of sounds by the artist himself an equivalent substitute. The use of samples is a typical style element of hip-hop. The necessary consideration of specific artistic criteria requires that such aspects defining this music genre not be ignored. In addition, reproducing a sample cover by the artist himself can be very laborious, and the assessment whether such a sound is equivalent to the original leads to considerable insecurity among artists.

d) In the present case of a license-free use of sampling, these restrictions of the freedom of artistic activity are measured against an only minor interference with the claimants' rights as phonogram producers, which does not entail considerable economic disadvantages. There is no evident risk that the plaintiffs in the initial proceedings will suffer from a decline in sales through the adoption of the sound sequence into the two versions of the song "*Nur mir*" that are at issue here. Such a risk might possibly occur at most in individual cases in which the newly created work shows such similarity to the phonogram with the original sound sequence that one could actually presume that the new work will compete with the original phonogram. In this context one must consider the artistic and temporal distance to the original work, the significance of the borrowed sequence, the impact of the economic damage for the creator of the original work as well as its prominence. The fact that § 24 sec. 1 UrhG deprives the phonogram producer of the possibility to charge license fees does not automatically - and particularly not in the case at hand - entail a considerable economic disadvantage for the phonogram producer. The Constitution does not require the protection of small and tiny (sound) elements by a copyright-related right, which in the course of time could further complicate or even render impossible the use of existing cultural assets.

e) As a consequence, the exploitation interests of the phonogram producers must stand back when measured against the interests of free use for artistic activity. The additional criterion that a used sequence cannot be covered in a way that it sounds like the original, which was introduced by the Federal Court of Justice for the applicability of § 24 sec. 1 UrhG to interferences with the rights of rights as phonogram producers, is not suitable for achieving a proportionate balance between the interest of an unrestricted continuing development of artistic activity and the property interests of the phonogram producers.

3. When adopting a new decision of the case, the Federal Court of Justice can, by application of § 24 sec. 1 UrhG, ensure that the artistic freedom is sufficiently taken into account. However, the court is not limited to such an approach. Application of the law in compliance with the Constitution permitting the use of phonograms for sampling without prior licensing both in the case at hand as well as in similar contexts could, for instance, also be achieved by applying a restrictive interpretation of § 85 sec. 1 sentence 1 UrhG. Insofar as acts of exploitation that occurred from 22 December 2002 onwards are concerned, which are subject to the European Union Directive on Copyright, the Federal Court of Justice, as the competent regular court, must first of all assess whether, due to the primacy of application of Union law, there is still leeway to apply German law. If the provisions of the European directive prove to be exhaustive, the Federal Court of Justice must guarantee effective protection of fundamental rights by interpreting the provisions of the Directive in conformity with the European fundamental rights and, in case of doubts regarding the interpretation or validity of the Copyright Directive, by requesting a ruling by the European Court of Justice in accordance with Art. 267 TFEU. It is upon the Federal Constitutional Court to review whether thereby the regular court averted potential violations of fundamental rights and whether the unalienable minimum standard of fundamental rights under the Basic Law is maintained.