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**OLG Munich, judgment of September 26th, 1991 - 29 U 3929 / 91LG Munich
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Munich Higher Regional Court: judgment of September 26th, 1991 - 29 U 3929/91

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Delivered September 26, 1991

Higher Regional Court of Munich

judgment

the 29th civil senate of the Munich Higher Regional Court has its chairman

Judges ... and the judges ... and ... based on the hearing on

September 26, 1991

recognized for right:

I. The appeals of the respondents against the judgment of the Regional Court of Munich
chen I of March 13, 1991 are rejected.

II. The respondents are charged the costs of the appeal process.

The parties are arguing about the right of the respondents to use sound carriers with copying wrinkles of the title "Ph." expel.

The applicant is the publisher of the title "S.", which was released in autumn 1990 as a sound carrier (sound plate) came on the market (Annex K 4).

The respondent to 1) operates a music publisher, the respondent to 2) the evaluation of sound recordings. The latter sells the music title Ph., Whose The composer who is the managing director of respondent 1 is. The publishing rights to the tel are with the respondent to 1).

The applicant submitted: Ph. Is an unfree adaptation of S. Both titles are almost identical in their musical part. Ph. Be an immediate melodic, harmonic and rhythmic adoption of the chorale contained in S. in combination with a modern music part. Ph. Do not create a new, independent work, but one unfree processing within the meaning of § 23 UrhG.

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With a ruling of February 18, 1991, the District Court of Munich I imposed interim measures Order of the respondents forbidden to use the musical part of the work "Ph." to recycle or have recycled.

The respondents objected to the decision and presented: C. and P. are not authors of the music contained in S. It acts not a protectable work. Ph. Be a parody of current fashion, Gregorian-between chorale and pop music. In this parody, at best, will be in the frame of the admissible from p. However, no part of this title that can be protected is turns.

The respondents have requested to revoke the temporary injunction of February 18, 1991 and to apply for a an injunction.

The applicant has requested uphold the injunction.

Due to the further submissions of the parties, a change is made to the first instance seldom referred to pleadings including the submitted annexes.

With judgment of March 13, 1991, the regional court issued the preliminary injunction of February 18 Maintained until 1991. Because of the justification, reference is made to the reasons for the decision

regional court judgment. Against the decision of the regional court the respondents turn with their appeal.

You submit: There is no urgent need to issue an injunction opportunity. The application was only made on February 15, 1990, although the title of Respondents had already been successful at the beginning of January 1990. Since the warning letter dated January 16, 1990, must be known at an earlier point in time of the title Ms.

The defining elements of the title S. are the Gregorian chant and the main rhythm. However, this is not a matter of self-creative achievements, but with long-known elements. The applicant's work cannot be copyrighted be eligible for legal protection, as only elements that have been known for a long time have been adopted en. The applicant's expert F. does not have the required expertise.

In the title S. a recording of the Capella Antiqua was used without permission. In front The creation of the applicant's title had already been experimented with with Gregorian chant. To the creators of the title is the demo tape by music producer G. Sc. known-sen. You would only have an unfree processing of G. Sch. created work performed.

The respondents request

to amend the judgment of the Regional Court of Munich I of March 13, 1991 and the provisional the order of February 18, 1991 to be repealed and the applicant's application to be repealed Reject the issuance of an injunction.

The applicant requests
dismiss the appeal.

She submits: It was only in mid-January that she learned of the title Ms. Deciding dend is the specific design of the created work. Even if individual ele- are not subject to copyright protection, the specific title contains an individual viduality, which is subject to copyright protection. Only the work in his is decisive

specific design. The expert F. had shown in detail what the Copyrightable performance of the title S. lie. He is an experienced expert diger, who regularly acts in copyright disputes in the field of music. The Use of Gregorian chant from the work "P." be in agreement with the rightful takes place. The production of G. Sc. was not known to the authors of Ss being; Otherwise, there is nothing in S. that can be protected from the demo tape by G. Sch. use det. Ms is a non-free processing of S .. This results from the agreement-

the overall impression, which is decisive. M. is also not a permissible parody of S .. The limits of a permissible parody are due to the comprehensive takeover of parts far exceeded the title S.

Because of the further submissions of the parties, a change is made to the seldom submissions including the annexes, especially the expert reports F. and Dr. E. As well as referring to the court record.

The respondents' appeal is unfounded.

I.

The defendants' concerns about the urgency do not apply by. Already in the warning letter the legal representative of the applicant was declares that the applicant learned of the title M on January 15, 1991. Thieves-allegation of the respondents that the applicant had already Had knowledge of M., is based on the assumptions of the respondents who did not are made credible. The Senate cannot assume that they are present.

II.

The regional court rightly has a claim for the applicant to cease and desist according to § 97 para. 1 UrhG in conjunction with § 23 UrhG affirmed.

1.

It can be assumed that for musical works to obtain copyright protection too high demands are not placed on the creative idiosyncrasy allowed to. For a long time the so-called "small coin" has been used in the field of music creation. recognized, which covers simple but just protected intellectual achievements. It is enough hence from the fact that the composer's formative activity - as with pop music regularly - only has a relatively low peculiarity, without that it depends on the artistic value (BGH GRUR 88, 812, 814 - a little peace). This applies to both originally created works and adaptations. The protection requirements are the same (BGH GRUR 68, 321, 324 - Haselnut).

Contrary to the view of the respondents, it is not decisive whether the individual Elements of the piece have a peculiar character. It is decisive that the Issue of editing a public domain work usually the type of musical Processing with the stylistic devices used will come to the fore, so that therefore already in the instrumentation and orchestration a protectable achievement can lie (ibid - hazelnut). Even an arrangement that uses the usual stylistic devices serves, can be self-creative, because in the connection that creative form lies gen, which does not have to be excessively large, especially with pop music, to use it anyway to bring them into the area of protection of copyright. The overall impression is decisive. Especially in cases of the present kind, in which it is a matter of defining the limits of a free editing of the edited version of a public domain work goes, it comes

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on a comprehensive assessment of all design elements that characterize the work (BGH GRUR 1991, 533 - Brown Girl II).

2.

The Senate - after hearing the title - comes with the Regional Court, taking into account submission of the expert F. to the conviction that the title Ss overall has a degree of peculiarity that copyright protection does not deny can be.

a)

The specific design of the title is characterized by the following features: The structure is characterized by the interplay between a cappella singing, pure rhythm, Choir with rhythm and chanting. After 2 bars, with a lead singer in the first, in the second several voices can be heard, 4 bars only rhythm follow, then another 4 Beats choir with rhythm. The subsequent bars are marked with a so-called "Tep-pich" underlaid, ie with background harmonies, obviously played by a synthesizer in the string style, with a focus on amoll, alternating from 4 Bars on the one hand in A minor and on the other hand in A minor combined with G major appears.

In the parts of the work with choir, "carpet" and rhythm sounds in the beats in which the Choir pauses, a little celesta or carillon-style melody. As

The only supporting melody instrument appears to be a pan-flute type of flute. In the Parts of spoken chant are interjections, blocks are used like by electric guitars. The work contains a continuous rock rhythm. The recording was made while mixing with a strong "reverb" occupied. The reverberation creates the acoustic impression of ca theater music.

In the opinion of the expert, F. results from the combination of these elements a work with strong musical expressiveness. The underlay of the Gregorian Melodies with calm, little changing harmonies create a melodious sound that remember meditative or psychedelic sounds. Although the hard rock rhythm to it contrast, if it does not destroy this impression, on the contrary, it promotes it through his Suggestive power. The choice of the pan flute-like instrumental part as the only supporting part Melody instrument fits very well into this mood, as does the small "Celesta figure", which always appears the same, is somewhat withdrawn and thus On the other hand, do not destroy the basic mood, but supplement it. Overall, the output choice of instruments or synthesizer sounds in connection with the Gregorian melody and the strong reverberation a musical sound of high originality and muscular sical aesthetics.

The Senate, which heard the title, agrees with this view. From the material

the impression made by the members when they listened to the title. divided. The work as a whole shows a high degree of peculiarity, the Copyright protection is not to be denied.

b)

The objections raised by the respondents cannot change this assessment. change. You don't convince.

The expertise of the expert F.

is beyond doubt. It does not need any further discussion. To avoid re-

References can be made to the statements in the submitted judgment of the Chamber Court of 6. October 1989 (5 U 3459/88).

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The expert Dr. E. The objections raised cannot be accepted. Though it is true that Gregorian chant is not protected by copyright. Also is that Respondents admit that the idea of Gregorian chant by way of pop Editing music is not copyrightable. The same applies to the rock rhythm. It cannot be protected because it has been known for a long time and is used frequently becomes. That the so-called "carpet" is nothing new in pop music is denied by the not the sponsor. Whether the celesta voice is a melody within the meaning of § 24 Paragraph 2 UrhG acts, which the law grants the so-called melody protection remain open. It is also irrelevant whether the "Hall", through the acoustically the impression of cathedral music is created, in pop music regularly is used. However, the - possibly - unprotected parts carry through their concrete assembly to create a memorable, peculiar musical piece, as well as the flute melody, which in the opinion of the respondent as the only element of copyright protection. Through the specific use of the individual elements, which may not be protectable, result in a complete work that is on the other hand, enjoys copyright protection. The individuality of the entire work is shapes. The work clearly stands out from what is regularly done in this field. will create. Their peculiarity cannot be considered small. For that is also an indication of the success of the title, which took first place in a very short time Has reached single charts.

In the opinion of the expert Dr. E. not to follow that here there was only an assembly of non-protectable parts like a collage and that The result is only the sum of the individual parts. This may be from a musicological point of view View, but does not take sufficient account of the fact that copyright protection is the ability of music works in the hit industry not to have high requirements;

otherwise most of the pop music works could not be granted copyright protection. become known with the result that any work could be adopted at will. After of the case law of the Federal Court of Justice are the requirements for the design height, as mentioned earlier, not high. Popular music works are often made up Assembled elements of previously known musical good. The opinion of the expert digen Dr. E. would have the consequence that light music - as long as the in § 24 Abs. 2 UrhG specially protected melody is not adopted - can be cannibalized at will could. Applied to the present case, this would mean that the title S. table could be adopted, as the Gregorian melody is not copyright enjoy protection. Only the flute melody, which can only be protected, would have to be left out will. But this would not take into account that musical works - regardless of the Melody - also through its structure, through the instrumentation, orchestration, rhythm must, among other things, the peculiarities required to obtain copyright protection be able to acquire a character. Ultimately, the expert Dr. E. on, that S. stands out from the dozen items of the modern hit market when he goes by it speaks that the title has a "mysterious esoteric effect" that "simplicity with a certain gag "there is that" something different "was created.

Whether by taking over Gregorian music from the title "MP" of the Capella Antiqua Third party rights have been violated, is responsible for the issue of copyright protection new work does not matter.

Likewise, it is not relevant to the decision whether the composers of S. use the demo tape "Gloria" by the producer G. Sc. have known. In the opinion of both experts the music created there is something "different".

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3.

As the Regional Court correctly stated, the defendant's title represents a unfree use within the meaning of § 23 UrhG.

a)

For the distinction between free and non-free use is according to the case law to be based on the following principles:

A free use exists, if not a reproduction of the earlier work is made, but according to the overall impression a self-creative, self-permanent work is created with sufficient distance to the work used. The used th characteristic elements of the previously known work must, as a result of the creative peculiarity of the new work fade. The design level of the user th work of importance. The more striking its peculiarity, the less its-

ne character traits in the copied work fade (BGH aaO - Brown Girl II).

b)

As already stated, the degree of individuality is quite pronounced. The Sa-
deness clearly stands out from what is regularly created in this field.

The individuality cannot be considered minor. The is accordingly
Protection area not narrow.

c)

With the expert F. the Senate comes to the conclusion that the title M.

Parts of the musical arrangement by S. that are subject to legal protection in non-free use
takes over.

The interplay between a capella singing, pure rhythm, choir with rhythm and

Chanting is identical. Two bars a capella, one bar from a lead singer

and the second is filled by several voices, four bars of pure rhythm follow.

mus, four bars of choir with rhythm, then eight bars of "carpet" and thirteen bars of choir
with "carpet" and "little melody".

The Gregorian melody is in at least the first three parts - at least the ear
after - of considerable similarity. The "carpet" conveys the same sound impression
(Strings or strings) and is also set in A minor.

The "Celesta" melody is identical and is used identically.

A kind of pan flute is used as the main melody instrument.

The synthesizer interjections are identical in terms of sound.

The rock rhythm is identical.

The recording has faded away.

d)

As a result of these takeovers, S.'s music does not fade in the title M.

which clearly shines through. To the listener of Ms, who knows the title Ss, this over-
immediately picked up clearly.

The fact that the texts are completely different, differences

de consist in the sung melody and ultimately the title Ms is primitive

ven beer song acts. According to the case law, the differences do not matter

but on the similarities (BGH GRUR 81, 267/269 - Dirlada). M. used

essential elements of S's unfree manner in such a way that the listener despite the completely different kind of text recognizes the music of S.

4th

The respondents cannot successfully plead that it is

M. is a permissible parody of S. It is based on the principle that it

there is no special copyright position for parodies (see BGH GRUR 1971, 569 -

Disney parody). From the recognizable parodistic aim of a work, nothing can

License for unfree borrowings can be taken from the parodied model. This

could lead to a significant breach of the legally enshrined exclusive rights

rights of the person whose work was chosen as the subject of the parody. The

The author of the parodied work would then have to himself, against his will, extensive,

accept unchanged borrowings from his work, which he did without the parodic

The tendency of the new work did not need to endure. It is obvious that this too

could lead to unpleasant abuses. That is why it always remains closed even with a parody

check whether they are within the limits of freedom when using the parodied work

of § 24 UrhG (loc. cit.). In applying the principle is that

There can only be talk of free use if, given the nature of the

new work, the borrowed personal features of the protected older work

"fade", to take into account the peculiarities inherent in the nature of the parody.

men. Since the parody is directed against certain idiosyncrasies that exist in the work of an artist

lers come to light, the parody by its nature presupposes that these peculiarities are here

are even recognizable as the subject of the dispute. However, this is not

Always the use of copyrighted parts of the parodied

Work required. To what extent a parody does the protected parts of the parody

th work may be borrowed to still be regarded as free use depends on

the circumstances of the individual case. In any case, however, the independent

created be of such peculiarity that the real meaning is assigned to it and the

borrowed part only as a point of contact for the parodic thought in appearance

occurs. On the one hand, this means that the borrowed part does not close to the point of fading.

needs to step back, but on the other hand an independent work must be created that

shows that the connection is only a necessary means of

leading the parody acts (loc. cit.).

The structure and arrangement were adopted identically here. About creating music

"Combination of Gregorian chant with pop music and spoken song" or des

to parody special title S., it would have been the identical takeover in the

th scope is not required. The takeover goes far beyond what the creators

the parodied music has to be expected. To get the required shortcut for a

To produce parody, there would have been a variety of, less drastic connection possibilities.

th given.

The decision on costs is based on Section 97 (1) ZPO.