

Reference book: yes

BGHZ: No

UrhG § 24 Abs. 2

Magdalen aria

On the question of prima facie evidence of the melody

Withdrawal.

BGH, ruling v. June 5, 1970 - I ZR 44/68 - KG Berlin

LG Berlin

FEDERAL COURT OF JUSTICE

IN THE NAME OF THE PEOPLE

TO 44/68

JUDGMENT

Announced on

5th June 1970

Werner,
Chief of Justice Secretary

as a clerk
the Geachtaatelle

in the legal dispute

the JJB 4 Bo® l Musirv and lühne averlag KG-,
represented by the personally liable ii

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B (cBHHBBBIV) '

Plaintiff and appellant,

_ Procetbevoliro affiliates

Law enforcement roi
and Dr

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Commonly holding Jece i; so eleventh
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and kevisions complained

_ Pr oze 71, evo 11 is a lawyer. JV

the oral hearing on May 15, 1970 with Mit
Effect of Senate President Dr. Kruger-Nieland and
the federal judge A Iff, Dr. Sprentonann, Dr. Merkel
and Dr. Mr. v. Gamm

recognized for right:

Note: Parts of the collection of judgments are :

The appeal against the judgment of the 5th civil
Senate of the Court of Appeal in Berlin from
February 2, 1968 is at the expense of the applicant
rejected.

By law

Facts:

The plaintiff is the owner of the copyright and world
distribution rights to the opera "Der Evangelimann" by
Wilhelm Kienzl. The über was premiered in 1895,
the composer died in 194J. The most famous aria
is "Blessed are those who suffer persecution". Basis of
Kj.ageansprache is the Magdalena song from the two
th elevator "0 beautiful youth days". It stent in D major and
has the form of a three-part song sentence (main sentence /
Intermediate sentence / riaout sentence). In addition, the applicant gives
a version of the song in F major.

In 1961 the defendant publishes the Tango "Tanze
appeared with me in the morning " ^ " midnight tango ").
The text of the tango claim, by Kurt aerth.i. The music
has L r GoL>; koao im .; ' . om IS in F major t.i. A

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Schailplatte recording of the tango with Gerhard Wendland
as a vocalist had great success. The recording is
still in trade.

The refrain of the midnight tango is similar
pages with the main clause of the Magdalene aria. aria
and refrain each consist of four parts. The first
Motive that in the aria the words "0 beautiful youth days",

includes the sentence "dance with me in the morning" in tango, consists in the? major race of the aria from the tone sequence:

cchcaffe, in tango from the notes: chcagffe.

For Kienzl, the second motif includes the words "with yours Stillen Gluck ", with Götz the text " Dance with me in that Glück ". The melody is continued as follows:

in the aria cchcba-gis-gis-a, in the tango chcb ~ a-gis-a.

The text of the third motif of the aria "in wistful

Tendons "is set to music by Kienzl with es-es-cis-dcedb,

in tango belongs to the words "to dream in your arms"

the tone sequence ffaccddb. The last motif of the aria

(Text: "I think back to you") contains the tones bag-

fga, that of the tango wi'ext: "is so beautiful with lovers

Music ") the tones cba-gis-abagf.

By letter of August 13, 1962, the plaintiff shared the defendant agrees that they believe the refrain is the midnight tango is a replica of the Magdalen aria. The reproduction of the tango is therefore a copyright infringement. Since there was no agreement between the parties came, the plaintiff filed J.963 in July raised.

The applicant, the composer Gotz have the main clause of Magdalen aria improperly used by his

Melody clearly removed and the refrain was based on.

of his tango

The similarities in melody and composition However, there is a different tact.

The formative effect of the aria as well as the tango chorus do not start from the rhythm, but from the melody.

The six-eight time measure of the aria is in the tango rhythm corresponding four-four time has been converted by every measure halves and then the first quarter of one every measure had been doubled. Apart from that

G-ötz consciously adopted the melody from the "Evangelimann" the unconscious removal is also illegal. Ent

What is decisive is that the tango chorus without knowledge of the Magdalen aria and the recognition scene not in the present eorm could have arisen. That G-ötz die

Magdalen aria known when composing the chorus can be assumed with certainty. The "Evangelimann" belong to the most popular German operas and become frequent listed. The Magdalen aria is particularly popular. she will always be in the broadcasters' wish concerts requested again. The recordings of the song would have high print runs achieved. The defendant also had in their Copyrights to your "Evangelimann" intervened. As Music winner she has the originality of her have to examine the tango and its extensive recognize upper affinity with the well-known Magdalen aria can * you therefore at least have your duty of care FahrldMig injured. She was obliged to the sales des Ta ^ os in the future and their grades as well to use the devices intended for reproduction smell. You must also have your income from the Ver evaluation of the tango and a reasonable Pass on a share of the net profit to you, the applicant.

With the action, the [seller] demands' that the Be sued the reproduction, distribution and the other Copyright utilization of the Mitter's refrain melody night tangos are prohibited. Next night the plaintiff assert a right to destruction. Finally be it belongs by way of step action accounting and Payment.

The defendant has submitted that the similarity between between the tango and the aria is not as important as the plaintiff represent it. Already the different one Rhythm vsrattle the listener a different impression. On But this is what matters, not on the other hand the Hotenschrift- bild or the results of a musicological Ana lysis. Incidentally, if one is at all from - at most fractionally- more piecemeal - agreement of melodies could speak, so they are not protected melodies ments, but about musical common property. Kienzl got in the "Evangeliaanm" popular and well-known melodies ver applies »The similarity between tango and aria can therefore based only on chance. It is denied that Gütz even knew the aria, Götz had the tango refrain in the presence of the text author Kurt Hertha kompo ned. Hertha came to Götz with the finished text.

He immediately sat down at the piano, according to motifs searched for the setting and then the chorus melody written down. The defendant thinks that a For that reason alone, there would be no claim against them into consideration because she is not at fault. She may As a publisher, rely on a recognized Pop composer like Karl Götz doesn't talk about foreign music take.

The regional court has an expert opinion
digen Prof. Dr. Siegfried caught up. This one has that
Expert opinion explained at the hearing.

6th

The regional court dismissed the lawsuit.

The Karamer Court has the plaintiff's appeal rejected.

With the appeal, the plaintiff is pursuing her action applications continue. The defendant asks for rejection of appeal.

Reasons for the decision:

Both the Magdalen aria from the opera "Der Evangelimann" as well as the midnight tango have melodies. A work of music that uses the work of a which has been created, may without the consent of Author of the used 'work not published and recovered when a melody is recognizable to the older one Work taken and used as the basis for the new work is (§ 24 UrhG). The regulation in § 13 hereby agrees Paragraphs 1 and 2 of the LitUrhG, which up to In came into force of the Copyright Act. Would come the aria would be subject to copyright protection and would be one Melody clearly taken and taken as the basis for the tango would therefore have been published and exploited of the tango until the copyright law comes into force according to § 13 LitUrhG and since then according to § 24 UrhG only with Consent of the applicant may take place.

I. 1. Arrived in accordance with the regional court also the court of appeal to the result that the

7th

first three motifs with the text lines 1. "0 beautiful youth
days ", 2." with your silent happiness ", 3." in wistful
Tendons "that are necessary for copyright protection
show such self-creative performance.

The appeals court will sit down with the
Arguments of the defendants apart who are an author
legal protection of this aria with reference to older
Has cast doubt on works. It relies on that
written reports from the judicial expert
and its explanation of the report in the oral
Hearing before the regional court as well as on your own
listening to the aria, the tango and the countered
Musical works and folk songs.

2, Let these statements of the appellate court
recognize no legal error. They are largely based on
a judicial assessment. There are no clues
points given that the court of appeal in the examination,
whether the Magdalen aria is a work of music in the sense of
Section 2 (1) no. 2 UrhG is the legal term
would have misunderstood the work, which according to § 2 Abs. 2 UrhG
Presence of a personal spiritual creation ahead
puts.

II. Like the main clause of the Magdalen aria, so exists
also the refrain of the midnight tango with four motifs.
According to the findings of the court of appeal, the
Refrain of the tango according to the overall acoustic impression
in the tone sequence of the first two motifs (1. "dance with
me in the morning ", 2." dance with me into happiness ") one
considerable agreement and in the tone sequence of the third
Motives ("to dream in your arms") still have a certain

Similarity to the first three motifs of the Magdalene aria on.

In the opinion of the court of appeal, the Matches and Similarities .but not with with sufficient certainty that the composer Götz den Refrain of the midnight tang03 under conscious or unconscious knowledgeable use of the Magdalene aria.

1. In this regard, the appellate court stated that although the coincidence that exists over a longer melody arc mood in the first two motifs and the next posed similarity in the third melody phrase of the two works for one of which the composer remained unconscious Use of the Magdalen aria in creating the middle night tangos could speak. However, this conclusion is therefore not necessarily because a different sequence of events obvious. It could not, as the defendant put forward gen, it can be assumed that Götz had the first two Motifs of the chorus immediately one of the taken against older works. However lie it is very close that Götz is due to the in his subconscious his decreased knowledge of several of the countered Musical works and thus from generally accessible musical works Shem cultural property was inspired to the refrain. Of the Beginning of the melody on the fifth level with the lower one Weeheinote, the sex jump in the first motif and the Seventh in the second motif, which is both the beginning of the Magdalene aria as well as the beginning of the tango chorus decisive characteristics are not only in the given performed folk songs line of text: "My darling, that's staying in the distance "and" I stood on a high mountain "included, but also in "Sehnsuchtswa ^ zer" by Schubert, Sext-

jump and seventh also in the finale of the fourth act
 of the opera "The Marriage of Figaro" by Mozart (melody
 of the count to the portes "Contessa perdono"), and in
 the first two motifs of Weber's "Call for
 Dance ". The melody begins with the lower alternating note
 and the following sext jump can be found in the
 "Impromptu" in A flat major by Chopin and in "Waldweben"
 Wagner's ring drama "Siegfried". However, these are
 Melody elements in the aforementioned, to the musical
 Works belonging to cultural property in a self-creative way
 into melodies, which are in the acoustic
 Overall impression of both the Magdalen aria and
 noticeably different from the midnight tango. The
 nor does it suggest that the frequent use of this
 Memorize elements of a music professional, even if they are for him
 encountered in the most diverse forms,
 that this was also the case with the composer Karl Götz
 and that he was in this way and not because of
 an immediate one - even if it remained unconscious
 Suggestion by the Magdalen aria on the first two
 Motifs of the refrain of the midnight tango came.
 In this context it should also be taken into account that
 the repetition of the beginning of the first melody phrase
 (chc) at the beginning of the second melody phrase, both
 appear in the aria as well as in the tango chorus, no be
 show special compositional originality, but
 that such repetitions of individual melody parts both
 for the hit as well as for the folk song
 are typical, because both should, if possible, already at the first
 should impress on one-time listening. But now I find myself
 also in the third melody phrase of the Magdalen aria and
 des Taugore fra.ins ("In melancholy 'longing" and "In yours
 Poor to dream ") by the simultaneous swinging up
 and falling off the melody an him] iclūcei t, as in

including the opposed works; 31 I the people
 songs are not available. Just about this
 The judicial experts have part of the tango refrain
 constant but stated that Götz agreed after that
 correct melodic beginning "very simple all-world
 forms "(GA I Bl. 108). That also appears
 Swinging up and down this melody arc similar - but
 copyright harmless - already in the first

both motifs of the aria and the tango chorus. It act
in this respect also essentially a
Repetition, the hit from the outset and without
Falling back on individual models is peculiar.

The court of appeal supports its view that
the similarities between the two works
without resorting to the composer Götz
Magdalenenarie explain, with reference to the
Judgment "Mecki-Igel I" (BGH GRUR 1958, 500, 502) also on
the principle, the more striking the character of the model
the more cautious one becomes in the assessment
of the recreated work as an independent own
ancient creation. It states that the
Beginning of the folksong-like Magdalen aria as well as the
The refrain of the midnight tango are musical works that are not
especially large Peculiar exhibited.
Kienzl also considered the basis for a claim
coming three initial phrases of the aria essentially
well-known melodic turns (lower alternating note,
Sext jump, identical lower alternating note / repetition / »
Seventh and in the third phrase the swing up and down
the melody arc, as it was in the first two
Motifs), ri used in a way that
to be regarded as an Eigenoehöpferis anyway, but only one

just enough small
opportunity. There are the same moods and feelings
also expressed the same or similar and artistically
Could take shape, is in the field
the simple one musical composition not
to rule out that two composers are independent of one another
others have a similar mood in a similar way
put it melodically. While with compositions by
of deep originality, however, an extensive match
mood would suggest in a later work that
that at least an unconscious use has taken place,
be with the disputed here, especially in the respective
third motifs of very simple melodies this conclusion
not justified. Götz had his in the third motif
Tangorefrains the line of text "To dream in your arms"
had to set to music, so a feeling to be represented musically

Property

len, which corresponds to the statement of the Magdalen aria
 At the right place "I think of you with wistful longing
 back "(third and fourth motif) is quite related.
 It cannot be ruled out that the simple,
 Up and down swinging melodies of the third phrase
 just like Kienzl on the corresponding steep but independent
 dependent on the Magdalen aria by way of accidental
 Double creation had occurred independently after
 Gotz with the first two motifs already similar
 and declining melodically have found.

Newts to common double creations are also straight <
 in the field of light ³mLa, die sicU e infac her,
 catchy forms, particularly obvious. Mo have
 in the year 1950 the composer Lutz Helgen den Wendlinger
 Schrammelfiarsoh created for you in the first seven bars
 almost identical the 1-01 midnight

tango was said to have been without a removal
 (judgment of the Munich Regional Court I of March 13, 1963,
 9A I 131. 80 ff). Let the initial motif be cchca (sixth)
 also in Peter Igelhoff's "Mein Name ist Hase" from the
 1954 included. In addition, the prelude can be found
 etc with the sixth in the first motif and the same
 Start cho with the '-ieptime in the second motif in the
 Pop melody "Sumatra", which the pop composer
 Werner Müller *created* in 1958. It ent
 but do not speak of life experience that all of these
 Composers have the same musical idea - consciously
 or unconsciously - directly from the Magdalen aria or
 would have taken from the previous hits. Out
 On the contrary, it is obvious to the reasons given that it
 insofar as they are simple musical ideas,
 the different composers independently
 kept popping up. Liese would be less
 Process originality into similar-sounding musical works
 tet, as the folk songs and hits showed, is called
 greater creative power but too very peculiar,
 in the (Jesam effect of strongly differing music,
 like the countered works by Mozart, Schubert,
 Chopin, Weber and Wagner would give (see also Ulmer loc

P. 222 "Wandering Melodies").

2. These statements are legal examination stood. Of "taking" a melody from one Work and its "basis" in a new work can only be the subject of when the composer of the new work the older work was known and consciously or unconsciously in his Make it back. { . Has grabbed. Because matches the single] I based on chance, do not represent authors right violation.

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When assessing the question of whether in individual cases existing matches between two works
Coincidence or based on the fact that the older work dem
The author of the new work served as a model
assume that given the diversity of indi
visual creative possibilities on artistic
Areas of extensive agreement between works,
which are based on independent creation, after human
Experience seems almost impossible (BGHZ 50, 340,
350 f - frilled hood). Extensive matches
therefore usually suggest that the author
of the younger work has used the older work. So far
it 3icb in the fields of the fine arts and the
Design is the question of whether sub
In a perspective view, the fact of replication is fulfilled
is, from the existence of an essential correspondence
mation between the older and the new plant according to the Re
based on prima facie evidence, it is concluded that the
older work was used when the new work was created
is (so betxv §§ 15, 16 KunstUrhG: BGH GRUR I960, 251 f -
Mecki-Igel II; 1961, 655, 639 - tubular steel chair; re.
§ 5 GeschmMG: BGH GRUR 1961, 640, 642 f - street lamp).
It is regularly assumed that the offense is a
Imitation is also fulfilled when the Creator of the
later work the older work at the moment of reproduction
fens does not consciously intend, but when he gets through it
one possibly no longer present to him
had recorded previous perceptions in his memory
and if he is then unconscious in his own creation
was influenced by it (BGH GRUR I960, 252; 1961,
643; Ulmer loc. Cit. 3-14; v. Gamm § 24 UrhG note 8; Möhring-

14 -

There is no concern taking these principles
Consideration in the field of musical
Creation given peculiarities also with assessment
the emboss to apply whether a melody is recognizable to one
Work taken and used as a basis for a new work
(Möhring-Nicolini loc. cit. § 24 note 7; v. Gamm loc. cit. § 24
Note 19 in conjunction with Note 8). The case law according to which the
The fact of a replica can also exist if
an author unconscious of his work an older one
Based on the work, when the copyright law was issued
set present. Since the provision of Section 13 Paragraph 2
LitUrhG according to their factual content in Section 24 (2) UrhG
has been adopted unchanged, cannot be accepted
be that the legislature assumed only
the conscious Extract a melody from a
older work and its basis in a new work
meet the criteria of § 24 Abs. 2 UrhG.

The appeals court has observed these principles.
It assumes the matches and similar
between the two works for the composer
Götz's use of the Magdalen aria remained unconscious
speak in creating the midnight tango. There
emphasizes it expressly (BU 29), the judicial
Experts have stated that the agreement
a chance improvisation and that he "transcends it
could not imagine otherwise than that at least one
there was unconscious recourse as far as the
compositional execution acts ". With this statement of the
The appellate court has therefore entrusted experts
apart against the objection of the revision.

The Court of Appeal has given the following reasons
why cs deni> u ci i vors t-aid i gen not geleigt is. This one

- 15 -

Justification, as will be explained later, not an error of law can be seen, there is no need to obtain a supplement appraisal.

The presumption of the creator of the more recent work got back to an older work when it was created grasped, is based on the fact that in both works features agreed for no explainable reason, because of their Eigenart or hardly of different in this combination which people can be so coherently created if they were active independently of each other (see Möhring-Nicolini loc. cit. § 2 note 10 d). For however, this conjecture is no room if after the order there would be a different course of events, after which the matches can also be found in other ways than through a recourse of the creator of the new work to that have older work explained.

In the event of a dispute, the court of appeal has no rights error arrives at the determined over attunements and similarities do not necessarily speak for Götz to model the refrain of the tango who created the aria. This justified it with that those melodic elements in which both works are in the interception motifs matched, already in several older works are included. So that settles Appeals court not, as the appeal points out, in contradiction verdict with the statements of the judicial expert standing on the insofar; existing miscellaneous between the older works and the tango has meadows. Rather, it expressly emphasizes (BÖ 34/35), that these melody elements in the aforementioned, for musika Older works belonging to cultural assets in their own

have been creatively shaped into melodies,
which differ in the overall acoustic impression of the aria and
clearly differentiated from tango. But that the use
use of these melodic elements in the tango's chorus
has a similar overall acoustic impression as in the
Aria, based on the statements of the court of appeal
in their cohesion that these two works
have a song-like character and that both of them
are not of particular character. So much for that
simultaneous rising and falling of the melody
a similarity in the third motifs of both works
exists, this takes place after the correct assumption of the
Appeals court their statement is that the respective
Lines of text have a similar mood and
that Götz, as the expert has stated,
"served very simple commonplace forms".

But there is a correspondence between the tango
refrain and the Magdalen aria in melody elements, the
are already contained in several older works and
these melody elements are not one in the aria
It is not a melody with a strong peculiarity
Legal error if the judge under the given order
would see the prima facie evidence as shaken
which the matches initially for a composer
of the tango, which remained unconscious as the basis of the aria
talk about the creation of tango. In this situation
it is therefore not legally open to challenge if the Beru
appeals court denied a copyright infringement because
the applicant did not provide the evidence incumbent on it,
that Götz played the melody of the tango chorus of the Magdalen aria
and based his work on it.

III. Since the action was hereafter rightly dismissed
is, was the appeal of the plaintiff with the consequences of costs
to be rejected from § 97 ZPO.