Superior Court

In the name of the people

Business number:
24 U 92/08 -
16 © 574/05 Berlin Regional Court

announced on : December 16, 2009
Bels.
Justice Secretary

In the litigation

. of Um mm GmbH,
represented by the CEO,
SEE,

Defendant and appellant,

- Representative:
Lawyers Sum,
MARRIAGES-

against

the Lord WM,
BEHRBHE: M,

Plaintiffs and appellants,

- Representative:
Lawyers Wammm,
MEBENEN, -

the 24th civil senate of the higher court in Berlin-Schöneberg, Elßholzstr. 30-33, 10781 Berlin,

to the oral hearing on December 16, 2009 by the presiding judge on

Kammergericht Harte, the judge at the Kammergericht Einsiedler and the judge at the regional court Lickleder.

Final Decision:

. The defendant's appeal against the judgment of July 1, 2008 Berlin Regional Court - 16 © 574/05 -, corrected by order of January 27, 2009, will be rejected at your expense.

1. The judgment is provisionally enforceable. The defendant can enforce the plaintiff avert by providing security in the amount of 110% of the amount to be recovered, if the plaintiff does not provide security in the same amount before enforcement.

IN. The revision is not permitted.

Reasons:

According to Section 540, Paragraph 1, No. 1 ZPO, the findings of the

contested judgment taking into account the rectification decision of January 27, 2009

(Ba. II Bl. 108f.) Reference is made. The following is also stated:

The plaintiff is the composer of a musical work published in 1987 by the GEM under the title "Love Song"

was registered and later received the subtitle "Heartbeat". According to his claim it was
the song in the framework of the "art disco" organized by the Federal Republic of Germany at the

Olympics in Seoul and was released on LP record in 1989

“Art Disco Seoul”, which was displayed in the branches of the GEHE Institute and over

it could be requested but was not available in the trade.

The defendant is the German sub-publisher for the author's copyright rights of use

Ruus on the title “Get

Over You ”, created by BHue, RunE, Kum, \ VEmE and VVEmM and by

BERBM was sung.

Both pieces use the same sequence of notes in the first two and a half bars of the chorus, the

is partially repeated in the fifth to seventh measure.
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In October 2002, the plaintiff warned the defendant unsuccessfully and requested before the

District Court Munich I, the defendant by preliminary injunction the reproduction,

Distribution and other exploitation as well as the promotion of the work "Get Over You"

to forbid. The court rejected the application by judgment of November 7, 2002 (reference number: 7

O 19257/02) because it was not sufficiently credible that the tone sequence from the

Work "Love Song / Heartbeat" show the required level of design and: that they

Composer of the work "Get Over You".

The plaintiff has requested in the first instance that the defendant should be ordered to avoid it

of the statutory means of regulation, the work "Get Over You" according to the CD "SHHEH

Emm -Buum, Get Over You ”(No. 570 894-2) to manufacture, sell or sell.

He also has the condemnation of the defendant for information and accounting about origin

and distribution of this piece of music for the destruction of those in your possession or property

Copies as well as the determination of their obligation to pay compensation for future damage and

his authority to publish the final judgment at their own expense.

The district court ruled over the plaintiff's claim that the three-bar refrain melody of the song

"Heartbeat" represents a work whose essential individual characteristics are in the song "Get Over

You ”was taken over by an expert opinion of Prof. Dr. Remus

of May 2, 2007, his supplementary opinion of February 19, 2008 and his personal

Hearing at the date on March 18, 2008 evidence collected. For details, refer to the
Files submitted copies of the expert statements and the minutes of the appointments
Referenced.

The district court has dismissed the action, insofar as it relates to the determination of the authority to
Publication of the judgment is aimed at, and the defendant is otherwise sentenced as requested. To
| Justification stated in particular that the first two and a half bars of the refrain come
according to the result of the taking of evidence. For one
Unintentional borrowing suffices to infringe copyright; evidence of the
The existence of an accidental double creation was not caused because the defendant did not
have presented sufficiently.

With the appeal, the defendant is attacking the judgment insofar as it has recognized it to be disadvantageous. she
complains that the regional court did not, without taking evidence, of a publication of the
Plaintiff's composed work. Furthermore, it did not specifically specify what the
Self-creative share of the plaintiff existed, through which the melody part on the use
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In the assessment of evidence, it was not critical
the expert's report, but rather his assessment without
own justification adopted. In addition, the burden of proof was erroneous in law
for the fact that no extraction prohibited according to § 24 Abs. 2 UrhG has taken place.
Even the prima facie evidence in favor of the plaintiff was shaken because it was as good as
it is excluded that the composers of the piece “Get Over You” are aware of his work
would have attained. Apart from that, a double creation is mostly likely because
the melody part common to the two pieces is merely common motifs from the public domain
. Combine sound material in the simplest rhythm. You don't need one either
To be accused of fault. According to the judgment of the Munich Regional Court | in the procedure of
interlocutory legal protection she was entitled to assume that she had no rights of the plaintiff
hurt. Incidentally, the asserted claims should not be directed against them because they
not a record company, but a music publisher that neither produces nor produces recordings
spread; The producer and distributor of the sound carrier is Pamm Ltd.

The defendant requests

and dismiss the complaint in its entirety and also the plaintiff's auxiliary request

to reject

also as a precaution in the event of failure,

The plaintiff requests

dismiss the defendant's appeal,

as an alternative to the application for cease and desist re 1.,

to convict the defendant of avoiding the legal means of regulation
refrain from using the “Get Over You” work in accordance with the Appendix 1 to
CD "Sume EHEM BEHE, Get Over You" attached to the draft application (No. 570
894-2) (interpreter: Sum EHmm BEHm) produce, sell or put into circulation
allow bring.

For the further presentation of the parties in the appellate instance, reference is made to the grounds of appeal (BI. 131-148 II), the response to the appeal (Bl. 166-170Il) and the defendant's pleadings from December 30, 2008 (Bl. 157-159 II) and April 28, 2009 (Bl. 182-189 Il) and the plaintiff of July 27, 2009 (p. 204-205Il) and to the minutes of the appeal hearing from 16. . December 2009 (Bl. 1-2 III) referenced.

In the appeal hearing on December 16, 2009, the song "Love Song / Heartbeat" is from the Long-playing record "Shake Your Seoul / Art Disco Mix Seoul" published by the GEHE Institute

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1988 ”(addendum to the file). Furthermore, from the CD submitted as Annex K2 the aforementioned piece on the one hand and the title "Get Over You" (Annex K2) on the other . excerpts have been played.

The defendant's appeal has been lodged in due time and is otherwise permissible. but she is not justified.

The district court correctly gave the plaintiff the claims against the defendant from 88 97 paragraph 1, 98, 101 UrhG awarded, the defendant's liability for damages according to Section 97 (2) UrhG

established and granted the right to billing.

A. Claim for injunctive relief (8 97 para. 1 UrhG)

The plaintiff can demand that the defendant cease and desist under Section 97 (1) of the Copyright Act. The
The district court rightly assumed that the defendant infringed the plaintiff's copyright,
because the work "Get Over You", which she has sub-published, is a protected part of his work
"Love Song / Heartbeat" takes.

1. Contains the first two and a half bars from the chorus of the track "Heartbeat / Love Song"
a protectable tone sequence within the meaning of copyright law.

A piece of music is protected by copyright according to Section 2 Paragraph 1 No. 2, Paragraph 2 of the Copyright Act if it is
personal spiritual creation. This also applies to works or parts of works that only consist of a few
Bars exist. The creative achievement can result from the melody, but also from the
Use of musical means of expression such as rhythm, harmony or instrumentation
in processing the melody. In the case of musical works, no too high
Requirements are placed on the creative idiosyncrasy. For music, the “little one
Coin "recognized that also simple, but just protected creative achievements
detected. It is sufficient if the shaping activity is only to a relatively low degree
exhibits peculiarity; the artistic value does not matter (BGH, GRUR1981,
267 [268] - Dirlada; BGH, GRUR 1988, 812 [314] - A little peace).

However, the use of material that is part of the musical common property is not protected
heard. The author of a work can only invoke the protectable tone sequences

which he himself created and which he did not find in earlier works. “'Wanderer
Melodies ”that appear again and again in new compositions in music history are just
Protected insofar as the underlying public domain material has been processed individually
is.

Here the plaintiff does not derive his claims from the entire piece of music “Love
Song / Heartbeat ', but only from the phrase, the first two and a half bars of the
Refrains. The district court found that this part of the work also

when viewed in isolation, has the degree of individuality necessary for protection.

The musical theme or motif of a work is protectable insofar as it is one in itself
forms a closed and ordered sequence of tones in which the individual aesthetic content is
expresses (BGH, GRUR 1988, 810 [811] - Fantasy). The district court is without on this point
Violation of $ 286 ZPO of the opinion of the expert Prof. Dr. Ram followed. Of the
The expert has presented his carefully compiled report in a comprehensible manner
in particular against the objections of private appraisers engaged by the defendant
defended convincingly. In detail he stated that the phrase consists of an im
Rafimender's C minor tonality downward pentatonic scale (= five-note without
Semitones) in quarter notes and one of the main tones emphasizing the root tone
existing final turn in eighths. The melody gains its conciseness and urgency
from their structural simplicity, which the refrain from the richer tonal material of the stanzas
take off. This gives her “catchy tune quality” that invites you to sing along. The one in the melody
The pentatonic ladder used belongs to the compositionally unformed state
public domain material. But you win together with the - in itself also
customary - final turn through integration into the overall compositional plan
specific structural function. The rhythm is easy, but again mainly in
The contrast to the variable rhythmic structure of the stanzas is particularly striking.

The expert describes convincingly that it is the plaintiff with his composition
of the refrain succeeded, from simple, generally accessible means an individual and
to create an effective result. This result is within the framework of the "small coin"
worthy of protection, even if it can not necessarily make a claim to art. The objection
the defendant, the tone sequence came entirely from material in the public domain, is beside the point.
The descending pentatonic scale and the final turn are both undisputed
elements in the public domain. But this applies to the components of every melody, if only the melody
is sufficiently dissected; because at least single tones and intervals are made up of two tones
mandatory in the public domain. In this respect, the compositional achievement can only ever be in one combination

elements in the public domain exist with one another or with a specific context. The
The creative peculiarity here lies in the connection between the pentatonic tone sequence and the
through the motivically prepared final turn to a - also through the rhythmization -
memorable, self-contained whole.

The district court rightly denied that the plaintiff's work was musical
Common good or part of the common and average musical treasure trove.
In particular, it is not a case of the “wandering melody” (cf. BGH, GRUR 1971, 266 [268f.] -
Magdalene aria). The prerequisite for this would be that the musical form in question is always
is a recurring basic pattern in composed music. It is not enough for this that
Pentatonic tone sequences already appear in older folk and art music (see the examples:
the private appraiser Dr. Summ - Annex B9 - and Dr. Edelmann- Bl. 151 I -) and in the jazz and
Rock music are a common design element. The refrain gains its effect through the
Connection of the descending pentatonic ladder and the final turn to the phrase beginning with
the rest is completed in the third measure. In this form, the tone sequence is not previously known.
The pentatonic scale alone does not produce a corresponding effect. As far as older
Pieces like the one from private appraiser Dr. Summed up folk song "Maud Millar" the whole series
or partly contained, they do not know the final turn, but become fundamental
continued in a different way, as the expert in his supplementary opinion of February 19, 2008
emphasized.

In view of this, there can be no question of the plaintiff's found material only being pure
. handcrafted. Incidentally, those submitted by the defendant also result
Textbook excerpts that pentatonic scales are not themselves traditional melodies,
but only a basic framework extrapolated from music theory for the creative composition
and improvisation.

2. The district court also correctly stated that the piece "Get Over You" under
Violation of $ 24 (2) UrhG on the protectable tone sequence from the plaintiff's work
falls back. According to this regulation, the use of a melody is not permitted if it corresponds to the
older work is recognizably taken and used as a basis for the younger work.

a) A removal requires objectively that the two works match in terms of characteristics,
which make up the creative peculiarity of the older work
Agreement only in points that belong to the musical common property,
it does not affect the scope of protection of the: older melody. This is the case, for example, when

the correspondence to elementary compositional motifs such as the ascending third
limited (BGH, GRUR 1988, 810 [811] - Fantasy).

There is no doubt here that the correspondence encompasses the realm of creativity, there
Notation and rhythm of the two tone sequences except for the key ('Heartbeat' in C minor; 'Get Over
You “A minor) are identical in every way. The key alone does not make the melody essential
Characterized because it cannot be identified by most listeners. Like the expert
'in particular in his supplementary position
Harmonization and sound of the two pieces are different, but do not change anything about that
both tone sequences - in the opinion of the expert, but also for the
musicological laypeople - are congruent in their hearing impression. From the extensive
The Senate ensured that the sound images were similar by playing the two pieces in the
Appeal negotiation convinced.

b) The objectively ascertainable removal of a melody from a work only justifies one
Violation of 8 24 sentence 2 UrhG, if the author of the other work also subjectively in
replicates this work. The replica does not imply any conscious action with the intention of plagiarism
but only requires that the author of the more recent work - be it unconsciously -
has resorted to a knowledge of the older work conveyed through his own perception.
The district court rightly assumed that this requirement was here by a
Prima facie evidence is established.

Extensive correspondence between two works usually suggests that
that the author of the younger work used the older work. Are both works like
here in weighty protectable features, is according to the rules on the proof of
first appearances concluded that also in a subjective sense the fact of the replication
is given (BGH, GRUR 1971, 266 [268f.] - Magdalenenarie; BGH, GRUR 1981, 267 [267] -
Dirlada; BGH, GRUR 1988, 812 [815] - A little peace). The prima facie evidence for that
Recourse to the older work follows from the fact that in view of the
Can't explain other creative possibilities in the artistic field; why those
Features of the two works match; it does not require additional evidence
that the older work is generally familiar, widespread or even only to a significant extent
was known (also in the PKH proceedings of the 5th civil senate, decision of March 7, 2006; different
still in interim legal protection proceedings LG Munich |, decision of November 7, 2002 -
70 19257/02, p. 13).

The prima facie evidence would only be shaken if a different course of events suggested itself, who could explain the agreements (see BGH, GRUR 1971, 266 [268f.] - Magdalene aria). However, strict requirements must be placed on this. Even if in a relatively small degree of peculiarity for one independent creation is sufficient, remains with the application of the existing teachings and Means of creation a wide scope for individual expression, the random one Double creation of the same result as an exception (BGH, GRUR 1988, 812 [815] - A little peace).

Here the defendant relies on the fact that it is practically impossible that one of the five authors of “Get Over You” I have ever known “Heartbeat” from my own perception. The prima facie evidence would only be invalid if the defendant at least all Could eliminate opportunities for information that the plaintiff has mentioned. That's enough but their argument does not end. In particular, the plaintiff submitted that his piece was marginal at the Olympic Games in 1988 in the “Art Disco Seoul” and later in several concerts Germany publicly listed, on the long-playing record produced by the GEM Institute - like has also confirmed the playing in the local negotiation date - published and in one Europe-wide broadcast digital channel with the name "Sam" has been played several times. Further he had TE Ruus, the later and now resigned managing director of Defendant, sent a demo band of his work in September 1989.

The defendant disputed the plaintiff's arguments either simply or with ignorance and furthermore replied that the authors never had the GmmM Institute's long-playing record there or heard from third parties that they did not know about the SuM radio station and that they had the piece never heard of the plaintiff on this station or anywhere else; as proof she has to rely on the testimony of the authors appointed. The regional court rightly considered this lecture to be inadequate, because the authors could only attest to their lack of recollection of having already heard the piece to have. As the regional court correctly stated, this could at best be a conscious one 'Exclude the use of the melody by the authors. The defendant would have to be facts explain and prove from which it would follow that a perception of the piece by the Authors was objectively not possible or entirely unlikely. To that extent it would be their business to provide evidence that the GmmMm Institute's long-playing record, for example, has no distribution whatsoever found and the station Smm in truth did not exist, not in the countries of residence of the authors broadcast or did not broadcast the plaintiff's piece. As long as this evidence is not provided are, the possibility cannot be ruled out with certainty that the piece is at least in the

It was circulated and noticed in professional circles. In view of this, the
Prima facie evidence of the subjective fact of removal has not been removed.

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As far as the defendant clearly denied in the appellate instance for the first time that she herself did
"Get Over You", their arguments are irrelevant. She explains that she is
not a record producer, but only as a German sub-publisher of the publisher
UmmmE Lid. The rights of use of the co-author Dam are true. In this role she has one
Authorization agreement concluded with GEM, which in turn holds a license to manufacture
Sound carriers to PHmmm Ltd. have forgiven. It follows from this argument that the
Defendant is nevertheless infringer within the meaning of $ 97 UrhG, even if the sound carrier is from a
Have been manufactured by third parties. Whoever has the _
Infringement is either adequately caused by itself or involved in it as a participant.
In particular, the perpetrator is also the person who did not carry out the unauthorized act of use
has undertaken, but to which it is attributed as a separate act because he initiated it
(BGH, GRUR 1954, 351 [354]; BGH, GRUR 1987, 37 [39] - video license agreement; BGH, GRUR
1994, 363 [364f.] - Timber Trade Program). The publisher of an infringer
According to these principles, liability to work is just as much a perpetrator as the author, because he
Measures taken in accordance with Section 1 sentence 2 VerlG to reproduce and distribute the work
independently set a cause for the violation of the law (see Fromm / JB Nordemann,
- UrhG, 10th edition, 8 97 marginal number 146; Schricker / Wild, Copyright, 3rd edition, UrhG 8 97 marginal number 36;
Dreier / Schulze, UrhG, 3rd ed., 8 97 marginal note 24). This also applies to the sub-publisher who is responsible for the work
concludes a management agreement with the collecting society operating in his country;
for it is the foreseeable consequence of this act that it leads to production and dissemination
comes from phonograms with the work by a licensee of the collecting society.

The risk of repetition arises from the injury, because the defendant on the
Warning of October 17, 2002 not the required cease and desist declaration with penalties |
has given up. Fault is not required for the injunction claim.

B. Claims for damages and invoicing (8 97 para. 2 UrhG

The district court also correctly stated that the defendant was liable for damages under Article 97 (2)
Sentence 1 UrhG established and the plaintiff the preparatory claim to accounting

awarded. The defendant is at least guilty of simple negligence. In this respect, "
reference should be made to the grounds of the judgment under appeal. This is not at fault.
with the rejection of the application for an injunction by the Munich Regional Court I
omitted. For that reason alone, the defendant could not rely on this after this decision
left, not to violate any rights of the plaintiff, because it was based essentially on the fact that the
Court can only provide a final clarification of the facts through an expert opinion
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considered possible, the obtaining of which would not have been permissible under temporary legal protection.
Apart from that, errors of law are generally not suitable anyway, the fault in
8 97 UrhG to be excluded (Fromm / JB Nordemann, UrhG, 10th ed., & $ 97 marginal note 65).

C. Claims to information about the origin and distribution channel as well as destruction of
Copies (88 98, 101 UrhG)

The district court also correctly gave the plaintiff the right to information about the origin
and the distribution channel of the piece of music 'Get Over You' and the destruction of those in their possession
or property to be reproduced.

The basis of the destruction claim is § 98 Abs. 1 UrhG. After that, his
Copyright infringers require the infringer to be in his possession or property
unlawfully manufactured, distributed or for unlawful distribution
destroy certain copies. Whether the defendant is actually over
Copies is not in the cognitive process, but only in the
To consider foreclosure.

The right to information results from Section 101, Paragraph 1, Clause 1 of the Copyright Act. Anyone in commercial
i The extent to which the copyright has been violated can then be requested from the violated party immediately
about the origin and distribution channel of the infringing copies and
other products are used. According to Directive 2004/48 / EC
(Recital 14), which is implemented by & 101 UrhG new version, leads to a violation of the law.
then commercial extent if it is made to an immediate or
obtain indirect economic or commercial advantage. This will be
in principle only acts of good faith by end users are excluded (cf.
Dreier / Schulze, UrhG, 3rd ed., $ 101 marginal note 6); in the event of an infringement by a publisher

or sub-publisher is regularly of a violation without any other evidence on a commercial scale.

The decision on costs is based on Section 97 (1) ZPO. The saying about the preliminary Enforceability results from 88 708 No. 10, 711 sentence 1 and 2 ZPO. The revision is not to be permitted because the requirements of Section 543 (2) ZPO are not met. The decision only applies the principles set out by. the case law of the Federal Court of Justice already have been worked out in detail.

Harte Einsiedler Lickleder

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