WEH v. Ellis-Bextor

District Court Munich I

7 O 19257/02

07/11/2002

FINAL JUDGMENT:

1. The application for a temporary injunction dated October 25, 2002 is rejected.

2. The plaintiff bears the costs of the legal dispute.

3. The judgment is provisionally enforceable. The plaintiff can avert enforcement by providing security in the amount of € 2,500, unless the defendant provides security in the same amount prior to enforcement.

4. The amount in dispute is set at € 50,000.

FACT

The parties dispute the question of whether the record of the defendant (hereinafter: the defendant) as CD sound carrier No. ... Polydor Ltd. The misplaced track "Get Over You" is an illegal takeover of the song "Heart Beat".

The plaintiff (hereinafter: the plaintiff) is the composer of the song "Heart Beat", which he wrote in August 1987 under the title "Love Song" with a total playing time of 6 minutes. Has registered with GEMA for 15 seconds (Appendix Ast. 1). The work was presented for the first time as part of the so-called "Art Disco Seoul", the official German cultural contribution to the 1988 Olympic Games in Seoul (organized by the Goethe Institute); In 1989 the title appeared on the LP "Shake Your Seoul" (Annex Ast. 4), which the Goethe-Institut published in a limited special edition, not intended for sale. As a result of an oversight, the piece is not mentioned on the outer plate sleeve or on the label.

The defendant, a music publisher, publishes the music track "Get Over You" (Annex Ast. 5) as a single CD No. ... which was published in October 2001 by the composers Robert Davis, Nina Woodford, Henrik Korpi, Mathias Johansson and Sophie Ellis Bextor was created (AG 5). The sound carrier was first published in England in June 2002, interpreted by Sophie Ellis Bextor. Thanks to extensive radio broadcasts, the title was already in the 35th calendar week (August 26th to September 1st, 2002), ie before the domestic release of the sound carrier on September 2nd. 2002, number 41 on the official German “Airplay” charts (Appendix AG 4). The plaintiff did not give consent to the exploitation of the CD, which is also sold in the local court district.

The refrains of the two pieces appear as follows in the notational transcription of the plaintiff's private expert ..., which the defendant did not object to:

The plaintiff asserts that the piece "Get Over You", of which he first became aware at the beginning of October 2002, represents an unauthorized takeover of parts of his work "Heart Beat": as the expert Dr. Edelmann in his expert opinion of October 9th, 2002 (Annex Ast. 6) and October 24th, 2002 (Ast. 11), the two-bar phrase can be found at the beginning of the plaintive refrain, with the three-note descent with secondary tones, the even rhythmization in quarters which could be interpreted as a heartbeat, as well as the lead effect of the second bar already embody the individual, creative peculiarity, which therefore makes up the core of the chorus, identical in terms of melody and rhythm in the beginning of the chorus of "Get Over You". It is irrelevant that the original was transposed from C minor to A minor and that the harmonization also differs. Contrary to the opinion of the expert brought in by the defendant, the protectability of the chorus part at issue does not fail because the phrase, as a mere descending pentatonic scale, belongs to the musical common property. Because the piece “Heart Beat” does not use the pentatonic scale, but is held in modal (so-called “natural”) C minor. Minor keys and pentatonic scales were mutually exclusive. If the use of the phrase in the challenged title had therefore required the plaintiff's consent, its publication would have been found to be in breach of copyright and anti-competitive.

In response to an unsuccessful warning from 10/17/2002 (Annex Ast. 3), the plaintiff now requests that the defendant (in avoidance of more detailed regulatory means)

to forbid to evaluate the work "Get Over You" according to the CD "Sophie Ellis-Bextor, Get Over You" (No. ...) (interpreter: Sophie Ellis-Bextor) attached as Annex 1 or to have it evaluated.

The defendant requests

reject the application.

As already stated in her protective pamphlet, she believes that the correspondence between the two pieces in the first two bars of the chorus only relates to a phrase inaccessible to copyright: According to the explanations of the expert Dr. In his reports (Appendices AG 3 and AG 6), Sauter said the pentatonic minor scale used in the unrhythmic descending tone sequence was a common musical asset, which had become a common design element, particularly in the second half of the 20th century. Incidentally, the accusation of having removed a melody also fails because the two bars that were criticized as being in agreement did not represent a self-contained sequence of tones and therefore, in the legal sense, did not represent a melody. Finally - based on the decision of the Higher Regional Court of Munich, ZUM 2000, p. 408 ff. - the conceivably simple, even quarter-metrization, which, like the tone sequence, only represents basic musical material, cannot give the phrase the required individual character.

Even if the protectability of the disputed chorus part were to be affirmed, there would still be no (even if it was unconscious) adoption. Because the plaintiff's piece was not known to the composers of “Get Over You”, who were born in England and Sweden and also live there. Against the background that the work was never broadcast or otherwise made available to the public in either England or Sweden , they could not have known it either. Insofar as the plaintiff claims an “international” publication of “Heart Beat” on the sampler “Shake Your Seoul” (Ast. 4), this is to be disputed; because this LP is completely unknown in media circles, there have obviously been no other releases of "Heart Beat".

After all, the matter is not urgent. If the plaintiff claims to have only found out about the track "Get Over You" at the beginning of October, this is in view of the massive domestic radio presence with more than 90 broadcasts per week, as a result of which the CD quickly ranks 41st on "Airplay" - Charts had climbed, not very plausible.

Because of the submissions by the parties, reference is made to the written submissions (including the protective letter) and annexes, in particular the private reports of the experts Dr. ... and Dr. ... (Annexes Ast. 6 and Ast. 11 or AG 3 and AG 6) as well as on the documents handed over in the parallel proceedings Az. 7 O 19256/02 (affidavit of the plaintiff from 05. and 07.11.2002; affidavit of Mr. ... dated 05/11/2002; letter dated 09/21/1989 to Mr ... along with video cassette; ... "Ray of Light", pp. 9 and 17 - each taken as a photocopy of the local files).

REASONS FOR DECISION:

The admissible application for injunction is unsuccessful in the matter: the plaintiff is not entitled to the coveted prohibition either under copyright regulations or under competition law aspects.

I.

On an injunction according to § 97 Abs. 1 i. V. m. The plaintiff cannot appeal to §§ 15 ff. UrhG. Because this continued the unauthorized takeover of a work protected for the plaintiff i. S. d. § 2 para. 2 UrhG by the defendant. The Chamber was not able to convince itself of this.

1. The plaintiff's active legitimation (which the defendant has not complained about) does not meet any major concerns: Although the title initially registered with GEMA as a “Love Song” with a total playing time of 6 min. 15 sec. While the recording is recorded according to Annex Ast. 4 or branch. 7 as well as the video handed over by the plaintiff at the hearing, only a playing time of 4 minutes. 2 sec. However, despite this divergence in time, the Chamber considers doubts about the identity of both pieces to be dispelled, especially as it has been resolved on the basis of GEMA's confirmation of October 16, 2002 (Annex Ast. 1), according to which the original title was expanded to include the subtitle "Heart Beat" the recordings may be an abridged version of the registered title.

2. There is no dispute between the parties that the two opposing titles in the stanzas show no similarities. Exclusively the first two refined measures of the older work "Heart Beat", namely

or in the repetition

can be found in the attacked song (although it is set a third lower and harmonized differently , see the report by Dr. ..., Annex Ast. 6, p. 5)

almost identical again; because both phrases are not only metrised in four-quarter time, but the tone sequences also initially descend over an octave in the same intervals (cbgf-es-c for "Heart Beat" or agedca for "Get Over You"), to then circle around the lower note of the octave in a “lookup” (bc-es-c or gaca) . However, this parallel alone permits the establishment of an unauthorized exploitation of the plaintiff's piece

"Heart Beat" (whose protectability within the meaning of Section 2 (2) UrhG is rightly not in dispute between the parties) does not. From a copyright point of view, such a match would only be if either the two titles were equally shaped by the contested phrase, so that the challenged piece could be seen as an unfree adaptation of the previously known work i. S. d. 23 UrhG (see lit. a. Below), or if the two-bar opening phrase of the chorus of “Heart Beat” as a borrowed part is what qualifies as a musical work i. S. d. Section 2 Paragraph 1 No. 2; Paragraph 2 UrhG, for example, from the point of view of the protection of melodies in accordance with Section 24 Paragraph 2 UrhG. If, on the other hand, parts of the work do not represent a personal intellectual creation, their use is permitted under copyright law (see evidence of case law at Schricker / Loewenheim, UrhG, 2nd edition, § 2 No. 66).

a. The plaintiff rightly does not refer to the first-mentioned constellation, according to which the overall impression of the plaintiff's title would be largely determined by the refrain bars 13 and 14, a phrase that would also give the piece “Get Over You” its creative peculiarity. Because the works show, like the expert Dr. ... carries out elements that are largely divergent in terms of structure (change of stanzas, transitions and refrain, see Annex Ast. 6, pp. 1 and 5), harmonics, metrics and melody (see p. 6 of the expert report, Ast. 6) and accordingly convey a completely different sound impression to the ear. Incidentally, the fact that the older piece, as evidenced by the affidavit of November 5, 2002 (handed over at the hearing), was presented to the public in 1988 at mass events in Seoul with up to 1,500 visitors a day, argues against the assumption that the two compositions have the same design characteristics is without this having led to a noticeable response from the audience; even several record labels - companies which, as is well known, do not tend to

To leave “hit suspect” titles to the competition - at the end of 1989 they were not interested in the plaintiff's offer, as the letter to the company ... that was handed over at the hearing shows; on the other hand, the song that has now been attacked has become - as not only the massive radio presence (made credible by Appendix AG 4) proves, but also members of the judging court (even those who are only partially familiar with current light music) are familiar from their own experience - developed into a catchy tune within a few weeks. Such a different reception would hardly seem plausible if one wanted to assume that both pieces would appear essentially the same.

b. However, the plaintiff is also not entitled to a copyright injunctive relief from the point of view of borrowing a part of the work.

Admittedly, it is recognized in jurisprudence and literature (see references in Möhring / Nicolini, UrhR, 2nd edition, § 2 marginal number 160 et seq.) That not only the adoption of another work as a whole constitutes an interference with the copyright of the creator can; rather, it is basically also the

Exploitation of parts of the intellectual achievement of another suitable to violate his absolute right. The prerequisite for this, however, is that the borrowed part as such meets the requirements set out in Section 2 (2) UrhG for a work that is eligible for protection (BGH Z 28, p. 234, 237 - Verkehrskinderlied), i.e. that the work part, even when viewed in isolation, is the shows the necessary degree of individuality (see Wandtke / Bullinger, UrhR-Praxiskommentar, 2002, § 2 No. 41).

However, the Chamber was able to use the means of credibility available to it, in particular the private expert opinion of the musicologist Drs (to be evaluated as a substantiated party presentation). ... and Dr. ... do not convince you that the 10-note phrase formed from bars 13 and 14 of “Heart Beat” is repeated in bars 17 to 18 with a modified follow-up (tone sequence bcc instead of bc-es-b) and how it is used largely the same in the refrain of "Get Over You" with regard to the sequence of tones, stands out in a peculiar way from common compositional means and principles or from the previously known treasure trove of forms and is thus shaped by the handwriting of its creator:

As the Federal Court of Justice has repeatedly emphasized (cf. GRUR 1981, pp. 267, 268 - Dirlada; GRUR 1988 pp. 810, 811 - Fantasy), the requirements for the level of design must not be set too high in the field of musical creation. From the point of view of the so-called small coin, a low degree of formative activity on the part of the composer is usually sufficient to affirm the creative performance required for the lower limit of protection. Thus, for example, the musical theme or motif of a work can in principle also be considered independently eligible for protection (Schrikker / Loewenheim, UrhR, 2nd edition, § 2 No. 122) if it can be ascribed a formative expressiveness. In contrast, tone sequences that consist of only a few tones will mostly lack the required individuality (v. Gamm, UrhG, 1968, § 2, No. 19).

In the present case it can first be seen that the simple four-quarter time alone, which the expert Dr. ... (despite the syncopated deviation in the "look-up" of the repetition, bar 18) does not even want to see it qualified as a rhythm, even after the plaintiff's explanations cannot justify any peculiarity of the phrase, it is merely a generally common musical one Basic means. If the required level of design could only be based on the character of the borrowed tone sequence as a melody i. S. d. § 24 Abs. 2 UrhG are supported, in the opinion of the Chamber, the question discussed with commitment between the party appraisers whether this tone sequence must be correctly described as "held in C minor" (according to the plaintiff) or whether it is a - contrary to the plaintiff's view, quite common in musicology (see Appendix 1/1 to AG 6) -

"Minor pentatonic" is (as the defendant explains), standing for the question of the protectability of this tone series as a melody: because it is undisputed that the descending sequence cbgf-es-c, which is not only quantitatively but also the essential part of the conveyed tonal impression The phrase makes up (during the look-up bc-es-c, especially since in view of the variation bcc in bar 18, only the meaning is assigned to ornament the pause on the last note of the octave), exactly the same intervals as they - around a minor third offset - with "es" sounding starting with the attack of the black keys on the keyboard and as they were already used (in excerpts) by Henry Purcell and Giaccomo Puccini (cf. Annex Ast. 6, p. 7). The Chamber was able to confirm that the tone series, despite this extensive foundation in the previously known treasure trove of shapes, would nevertheless have the individual creative character required for work quality. ... in view of the diametrically opposed statements by Dr. ... which in themselves do not seem less plausible, cannot be taken with sufficient certainty to form their convictions. The reservations raised by the defendant against

the character of the ten-note phrase as a melody i. S. d. Paragraph 24 (2) of the UrhG could not be eliminated on the plaintiff's side: A “rigid” melody protection according to the aforementioned regulation would only be considered if the tone series (regardless of the question of its individuality) presented itself as an ordered and self-contained sound structure (cf. BGH GRUR 1988, pp. 810, 811 - Fantasy). It is precisely this element of the coherence of the phrase, which is necessary for a melody in the legal sense (cf. Schricker / Loewenheim, op. Cit., § 24, paragraph 28), that the Chamber is also unable to determine: the listener picks up the end of the phrase Bar 15 is true as a (temporary) pause and lingering, but not as a logical conclusion to a closed whole; Instead, after the end of the phrase in the 15th bar (as well as in the repetition in the 19th bar), the ear expects a continuation of some kind (and also quite different in the two titles), in order to strive for completeness, ie unity , correspond to. The musicologist Dr. ... himself confirms this perception when he speaks of the "lead effect" of the second bar. If the phrase claimed to be peculiar should therefore be a mere melody fragment, no work quality could be ascribed to it from the point of view of the rigid melody protection according to Section 24 (2) UrhG.

3. Even if the two-bar tone sequence of the beginning of the chorus of "Heart Beat" was to be ascribed the height required for melodies, an injunction based on §§ 97 Abs. 1, 24 Abs. 2 UrhG set in addition to the (objective) removal of the protected melody as The subjective element also requires the statement that the composers of “Get Over You” knew the plaintive work and consciously or unconsciously resorted to the phrase when they were created (cf. BGH GRUR 1971, p. 266, “268 - Magdalenenarie). The board was also unable to convince itself of this subjective knowledge:

Admittedly, in the case law (see GRUR 1988, pp. 812, 814 f. - A bit of peace) in the case of an objective borrowing of a previously known work, proof of first appearance for the subjective fact of the takeover is recognized: in view of the diversity of individual creative possibilities (BGH Z 50, 340, 350 “f. - Rüschenhaube), especially in the musical area (BGH GRUR 1971, 266, 268 - Magdalenenarie), it appears, according to human experience, almost impossible that the existing correspondence between two works is due to chance is based. Rather, an actual assumption suggests that the older melody served as a model for the creator of the newer melody - even if it was unconscious, because the latter, in the belief that he was creating his own work, resorted to the older series of notes that he remembered. On the other hand, an independent double creation without recourse to the previously known work can only be accepted as an exception if the prima facie evidence is invalid - for example, because the overall circumstances suggest a course of events that allows another explanation of the correspondence (BGH GRUR 1971, p . 266, 269 - Magdalene aria).

In the opinion of the board, the conditions under which this prima facie evidence would argue for the plaintiff are not made credible. Because his older work is not well known (see Unger, Plagiate, in: Handbuch der Musikwirtschaft, 1993, p. 675 ff., 681):

First of all, it can be seen that the sound reproduction of the work “Heart Beat”, according to the plaintiff's own submission, is only preserved in a single recording, namely the 1989 LP “Shake Your Seoul” (Annex Ast. 4), while other publications of this recording (e.g. as a single, CD or MC) or recordings of the piece by other performers do not exist. Even this sound carrier (not published by a record company, but by the Goethe Institute) (Ast. 4) was never available on the market - even in the past; rather, as evidenced by the imprint on the record band, it is a limited special edition organized after the Olympic Games in 1988 (amount not disclosed in the Chamber), which was expressly not intended for sale but, as the then artistic director ... in his (Affidavit dated 05.11.2002, submitted by the plaintiff, states

that it is exclusively for the Goethe-Instituts in Germany and abroad for lending in their libraries or for distribution as

"Giveaway" was made available. If this starting point already speaks - especially taking into account the environment, but primarily people who are interested in the German language or in sport should have come across the record - against a noteworthy distribution of the sound carrier (the defendant also submits, without being contradicted, that that it is completely unknown in media circles), other circumstances under which the composers of the title "Get Over You" (born and resident in England and Sweden) should have taken note of the plaintiff's work according to the probability of life are not obvious. Because it is not evident that they were performing “Heart Beat”, be it on the occasion of the “Art Disco” in Seoul in 1988, or during various concerts in Munich (not specified in terms of time) (see plaintiff's affidavit dated 05.11 .2002) would have been present. As far as the plaintiff with the statement (affidavit dated 07.11.2002) that he does not remember that the current managing director of the defendant, ..., a demo tape of "Heart Beat", which he gave him in 1989 as part of the initiation of a (If the exploitation contract did not come about, I would have sent it back, insinuated a course of events to the effect that ... I searched the archive of the then company in search of inspiration for the composers of "Get Over You" ..., this is at best theoretical , especially since the defendant, after her uncontested presentation at the hearing, sells the play under license from an English publisher and has no direct contact with the authors. So, based on the probability of life, it seems almost impossible that the composers would ever have heard the plaintive work and thus at least have the opportunity to use it from memory as a model for their own work (three of the composers also affirmed on oath, for the first time Having become aware of the existence of the title “Heart Beat” in connection with the present legal dispute, Annexes AG 8), prima facie evidence of unconscious removal, which is disputing for the plaintiff, is also out of the question.

Incidentally, the (assumed) peculiarity of the two-bar refrain phrase does not require the assumption of an unconscious reproduction: According to the decision of the Federal Court of Justice

"Magdalenenarie" (GRUR 1971, p. 266, 268) for the field of musical creation, the principle that is confirmed when qualifying an objectively recreated work as an independent, personally shaped (double) creation, the greater the restraint, the greater the Expressiveness of the model is. Here, however, the simple and short phrase that corresponds in both pieces could, in view of the previously known sequence of the tone series cbgf-es-c (in the intervals) and the common metrization in four-quarter time, at best show a low degree of personal design that justifies the protection - The plaintiff does not claim any further, particularly pronounced originality if the expert Dr. ... speaks of (albeit individually redesigned) musical common property at the hearing itself. Even with works with complex characteristics, it may regularly be indicated to derive the subjective element of an (unconscious) use of the older piece as a model from essential similarities, such a conclusion does not appear to be justified with the simple and simple line of the phrase in question here, especially since the marginal distance between the two refined strokes and the previously known treasure trove of forms does not reveal any particularly pronounced individuality.

II.

The request for an injunction can also not be based on the competition law provisions of Sections 1 and 3 UWG, the requirements of which the plaintiff does not specify.

1. Insofar as the dissemination of the attacked CD is to be criticized as immoral (§ 1 UWG) from the point of view of the direct assumption of services, it must be pointed out that anyone is free to imitate third-party results that are not subject to special legal protection. The imitation can only be qualified as immoral if special circumstances, defined in more detail by the case law in several case groups, arise that justify the unfairness of the behavior (cf. Baumbach / Hefermehl, UWG, 22nd edition, § 1 No. 440). However, the plaintiff has not presented any factual circumstances for this.

2. In what way the distribution of the title “Get Over You” is misleading i. S. d. Section 3 of the UWG does not open up to the Chamber. Insofar as the plaintiff would like to assert that the traffic was misled about the person of the author of the two-bar refrain phrase (the text “Go, go, go, go, go, I'll get over you”), the court could decide how stated above, do not convince of the work character of this excerpt - with the result that the plaintiff is not entitled to any copyright exclusive rights in this respect.

III.

If the plaintiff is not already entitled to a right of disposal, the question of urgency can be irrelevant to the decision.

IV.

As the unsuccessful party, the plaintiff has to bear the costs of the legal dispute, Section 91 (1) ZPO. The decision on the provisional enforceability corresponds to §§ 708 No. 6, 711 ZPO, whereby the assessment of the security deposit according to the information provided by the plaintiff, who quantified his interest in the desired decision in this amount, is based on an amount in dispute of € 50,000 was put.

Suggested citation:

LG Munich I ruling v. November 7, 2002 - 7 O 19257/02, BeckRS 2002, 12821