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What happens now after the German Federal Constitutional Court's Metall-auf-Metall Decision?

Martin Schaefer (Boehmert & Boehmert) · Monday, August 8th, 2016

German Federal Constitutional Court's decision of 31 May 2016, (ref.: 1 BvR 1585/13): Metall-auf-Metall

Sampling technology has become an integral part of today's music production. It is not unusual in recording studios for artists and producers to recall sounds from other artist's productions which they particularly liked, copy them from the original recordings and use them in their own productions via sampling software. The borrowed sound is used as a musical instrument. Often the particular fragment is so characteristic that it is meant to be recognised. A famous example is the production of "Hung Up" by Madonna who sampled the characteristic beginning of "Gimme! Gimme! Gimme" from ABBA – under licence from ABBA – as a leitmotif.

This decision of the Federal Constitutional Court dealt with a non-licensed sample, namely the copying of a two-second rhythm sequence from the recording "Metall auf Metall" by the band "Kraftwerk" which was played on a loop in two versions of the work "Nur mir" by Sabrina Setlur. The plaintiffs in the main proceedings were the two founders of the band "Kraftwerk", pioneers of electronic music, and the case only concerned the neighbouring rights in sound recordings. In the "Metall auf Metall" decisions I and II (GRUR 2009, 403 and GRUR 2013, 614) the Federal Supreme Court of Justice held that the unauthorised use was not lawful.

The Federal Constitutional Court has now reversed these decisions. The standards which are specific to art required by Art. 5 Para. 3 Sec. 1 of the Federal Constitution stipulate that the use of an excerpt of copyright-protected subject matter can be recognised as a means of artistic expression and artistic design. If there is a conflict between artistic freedom on the one hand and an infringement of copyright or neighbouring rights on the other – an infringement which only slightly impairs the exploitation of those rights – the rightholder's interest in exploiting those rights may have to give way to artistic freedom.

However, the verdict of the court is not the end of the matter. Although the Federal Constitutional Court can reverse laws or court decisions, it cannot enact laws or rewrite decisions.

One thing is certain: the contested Federal Court of Justice's decisions on the "Metall-auf-Metall" case have been repealed. The Federal Court of Justice must now redetermine the case and navigate a middle course between the two sides which the Federal Constitutional Court has established. This corridor is still relatively wide. The Federal Constitutional Court literally said: "*the permissibility*

of a free use of sound recordings for artistic purposes is not synonymous with the general permissibility of consent-free and free-of-charge sampling. A licensing requirement remains in cases of non-artistic use. Furthermore, Art. 24 Para. 1 German Copyright Act only allows a free use if a sufficient distance is kept to the extracted sequence or to the original recording."

In fact, the Federal Constitutional Court describes two possibilities in its decision whereby the Federal Court of Justice could strike the requisite balance between artistic freedom on one hand and the rights of ownership of the recording companies on the other:

- On the one hand, the Federal Supreme Court could carry on as it started and, within the framework of the right of "free use" (which is regulated in Art. 24 German Copyright Act), create the possibility of using samples without the consent of the recording company if to do so is necessary in the interest of artistic freedom. At any rate, in a case like this an artist would not be obliged to first try to recreate the sound himself (as the Federal Supreme Court had held in the contested decisions). Furthermore, he would not have to obtain a licence from the rightholder.
- The Federal Supreme Court of Justice could alternatively start from a completely different point, in that it defined the scope of the neighbouring right of the producer of sound recordings more narrowly than it has been doing up to now, thus rendering the use of small fragments no longer an infringement of the right. In this case, however, and the Federal Constitutional Court has left no room for doubt, the Federal Court of Justice would have to call upon the European Court of Justice, as the scope of neighbouring copyright of producers of sound recordings is a subject matter harmonised throughout Europe.

One consideration which had already taken a prominent position in the press release of the Federal Constitutional Court is interesting: the court repeatedly emphasises that – even if the producer from whose recording the sample originates does not suffer a decline in sales because of the sampling – the legislator is not "barred at the outset" from linking the right to free use with a duty to pay a reasonable fee. Here, according to the Federal Constitutional Court, he could accommodate artistic freedom for example via "a subsequent obligation to pay a remuneration linked to the commercial success of a new work".

It will certainly be worth keeping an eye on future developments in this case.

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