Kluwer Copyright Blog

German Federal Supreme Court defends press freedom in two high-profile copyright cases, no resolution of sampling dispute

Felix Reda (GFF (Society for Civil Rights)) · Friday, May 1st, 2020

Yesterday the German Federal Supreme Court (Bundesgerichtshof) published its rulings on three long-standing copyright disputes involving fundamental rights. All three cases had been the subject of preliminary rulings by the CJEU last year, case C?469/17 (Funke Medien), case C?516/17 (Spiegel Online) and case C?476/17 (Pelham). In the two press freedom-related cases, the German Federal Supreme Court found that the publications were lawful. For the Pelham case, which concerns the legality of a sample included in a song released in 1997, the Federal Supreme Court ruling has still not led to a resolution. The case was referred back to the regional appeal court, continuing a 20-year court battle.

Press freedom preserved, yet no answer on copyright status of official works

Following the preliminary ruling by the CJEU in the Funke Medien case, the German Federal Supreme Court found that the publication of military reports by the German press did not infringe the copyright of the German state. The court found that the publication was lawful under the exception for reporting of current events by the press (§ 50 UrhG, implementing Article 5 (3) c) InfoSoc Directive).

The court explicitly left open the question whether or not the military reports were subject to copyright protection in the first place, arguing in its press release that this question does not change the result of the ruling. Unfortunately, this limits the generalizability of the judgment to other German copyright cases related to freedom of communication. The German state has been known

to rely on copyright to suppress the publication of information obtained through a freedom of information request, a practice that has been referred to as "Zensurheberrecht" (a neologism combining censorship and copyright) by German freedom of information activists. Demands to use the ongoing copyright reform to clarify that official government works fall in the public domain have so far fallen on deaf ears with the responsible Justice Ministry. The ruling by the German Federal Supreme Court guarantees the non-infringing status of publication of such documents as part of press reporting, but leaves open the question whether the publication of state documents for other purposes is lawful under German copyright law.

In the Spiegel Online case, the German Federal Supreme Court confirmed the legality of the publication of a book chapter in connection with press reporting, finding that the exception for reporting of current events by the press also applied in this case. As the Spiegel Online case concerned a book chapter written by a German politician, rather than an official work of the state, there was no dispute over the copyright protection of the work in question.

Two seconds of sound, 20 years of litigation, no end in sight

In the third and perhaps most prominent case, which pitted the 70s electronic band Kraftwerk against German hip-hop producer Moses Pelham, the German Federal Supreme Court ruling did not lead to a decision on the legality of sampling. Rather, the Federal Supreme Court referred the case back to the regional appeal court (Oberlandesgericht). The genesis of this marathon case is astounding: In its 20 year history, it has been referred to the regional court, the regional appeal court, the German Federal Supreme Court, the regional appeal court (again), the Federal Supreme Court (again), the German Constitutional Court (BVerfG), the Federal Supreme Court (third time), the CJEU, and was now before the Federal Supreme Court for the fourth time.

Those who hoped that the fourth time's the charm will be sorely disappointed. In its press release, the German Federal Supreme Court limited itself to general observations and referred the case back to the regional appeal court. However, the journey is unlikely to end there.

Interaction of EU and national law complicates application of exceptions

In order to judge whether the rightsholders' related right in the sound recording of the Kraftwerk song Metall auf Metall had been infringed, the Federal Supreme Court found that a distinction needs to be made between the period preceding the application of the 2001 InfoSoc Directive and the time period following it.

During the time period preceding 22 December 2002, the reproduction right was a matter of national copyright law and the InfoSoc Directive did not apply. According to the Federal Supreme Court, it is therefore possible that the sampling of two seconds of sounds from the Kraftwerk recording was permissible under the German provision for free use (§24 UrhG). The Federal Supreme Court justifies this view by finding that the sample in question did not include a melody, which would have excluded it from the application of the free use exception. As copyright law was not harmonized at the time, the Federal Supreme Court found that the regional appeal court will have to rule over the legality of the sample during that time period on the basis of the judgment by the German Constitutional Court, interpreting the fundamental rights in the German constitution. The Constitutional Court had highlighted that the freedom of the arts would not be sufficiently respected if the sampling of sound recordings was generally subject to permission from the rightsholder. In this context, the German Federal Supreme Court reversed its previously held view

that the legality of sampling was dependent on whether the defendant could have re-recorded the sound recording by his own means.

As regards the period after 22 December 2002, however, the Federal Supreme Court came to a different conclusion. Reproductions of the sound recording made after the application of the InfoSoc Directive could have infringed the newly harmonized reproduction right (the distribution right, on the other hand, was not infringed, following its interpretation by the CJEU). From that point on, the reproduction right should no longer be interpreted in light of the German Constitution and the fundamental rights enshrined therein, but based on the EU Charter of Fundamental Rights.

The CJEU, in its preliminary ruling in the Pelham case, had found that the German free use provision, which could establish the legality of the sample prior to 2002, was not compatible with the InfoSoc Directive, which includes a closed list of copyright exceptions, most of which are optional for member states to implement. The Federal Supreme Court did not consider that any of the national copyright exceptions would apply to reproductions made after 22 December 2002. In particular, it found that the sampling does not meet the requirements for application of the German exceptions for quotation or incidental inclusion. It discussed the possibility that sampling could be permissible under the exception for pastiche (Article 5 (3) k) InfoSoc Directive), but concluded that the defendant cannot rely on this exception, as it has not been implemented by the German legislator. Nevertheless, the Federal Supreme Court did not come to a final decision on the case, as the regional appeal court had not established whether distribution of the work including the sample had continued after 22 December 2002.

Pastiche as a basis for a right to remix

The Federal Supreme Court's reference to a possible compatibility of sampling with EU copyright law under the pastiche exception is especially relevant given that the European legislator has recently made this exception mandatory as part of its copyright reform. Article 17 of Directive 2019/790 on copyright in the Digital Single Market, which is pending implementation into national law, requires that Member States ensure that users can rely upon the exceptions for quotation, criticism, review, caricature, parody and pastiche when uploading material to certain online platforms. This provision does not just make those previously optional exceptions mandatory; in my view, it also establishes them as positive users' rights.

While the previously optional exception for parody has already been interpreted by the CJEU (see case C?201/13 Deckmyn), the pastiche exception has largely been ignored by legislators and the courts. Several recent academic studies and proposals for implementation of Article 17, both in the German debate and at an EU level by the European Copyright Society however, have proposed implementing the pastiche exception as a possible means of legalizing transformative uses such as sampling and remix. As dissatisfying as the latest German Federal Supreme Court ruling may be for finally resolving the pending Pelham case, it supports the compatibility of a transformative use exception, or even a positive right to remix, with European copyright law, under the pastiche exception.

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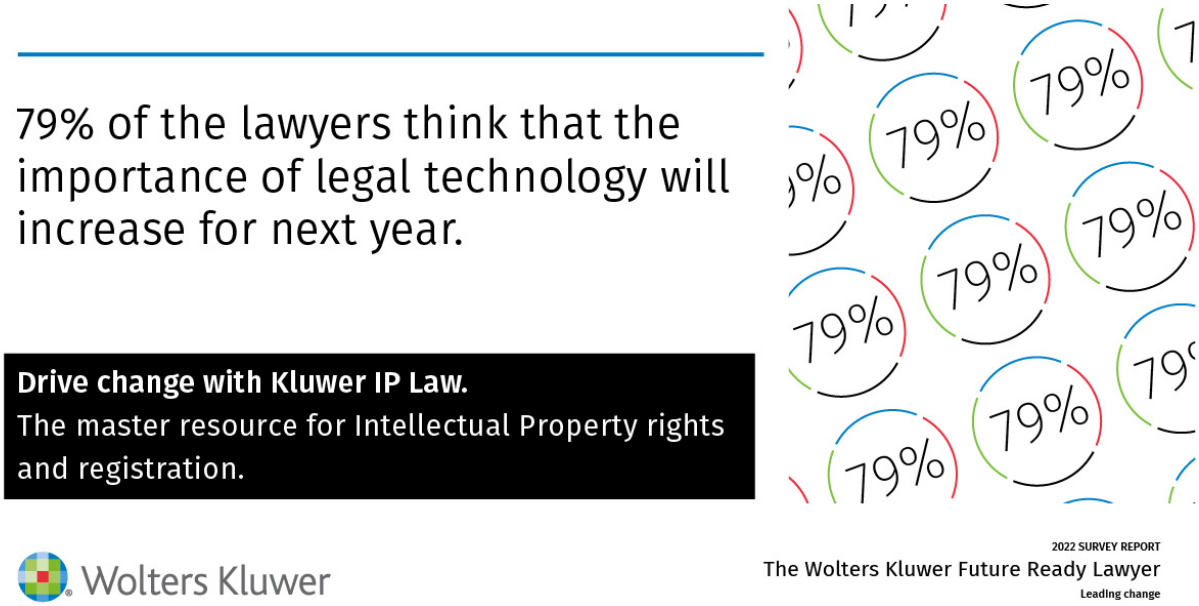

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