[DE] Unauthorised Production of Audio CDs for Foreign Customers Punishable Under German Copyright Law

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In its judgment of 3 March 2004, the Bundesgerichtshof (Federal Supreme Court - BGH) ruled that the manager of a company that burns CDs is punishable under German copyright law if he participates in the unauthorised manufacture and exportation of audio CDs for a foreign customer.

The proceedings concerned a judgment by the Landgericht Frankfurt (Frankfurt District Court), sentencing the manager of a German limited company to 15 months in prison with probation for violating Section 85 of the Gesetz über das Urheberrecht und verwandte Schutzrechte (Act on Copyright and Related Rights - UrhG). On behalf of a Bulgarian firm, the company had manufactured and sent a total of 268,090 audio CDs by air freight to Bulgaria between May 1994 and January 1996.

The BGH dismissed the defendant's appeal against the first instance ruling of the Landgericht Frankfurt as unfounded. It accepted that the following facts were true: the copied CDs were recordings of internationally renowned pop singers. However, neither the Bulgarian customer nor the defendant had obtained from the relevant rightsholders for the Federal Republic of Germany the necessary permission to produce the CDs in question. In the Court's opinion, the defendant, who was aware that he did not have the necessary permission, knowingly accepted that the rights of foreign manufacturers were being infringed. The BGH therefore agreed with the opinion of the court of first instance that the defendant had, by his conduct, breached Section 108.1.5 UrhG. The law provides for sanctions for persons who manufacture or distribute phonograms without the permission of the rightsholder. The Court also held that the performance protection rights of phonogram manufacturers also applied to foreign rightsholders under the terms of Section 126 UrhG in connection with the 1973 Geneva Phonograms Convention. However, in the BGH's view, only actions carried out in Germany were relevant under criminal law. The defendant had committed criminal offences by manufacturing phonograms without permission and also by sending them abroad, which represented a form of marketing that breached German copyright law.

Through this ruling, the BGH has for the first time imported legal principles that have been generally recognised in patent and trademark law for many years into the domain of criminal law protection for phonogram manufacturers.

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Urteil des Bundesgerichtshofs vom 3. März 2004, Aktenzeichen 2 StR 109/03

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