[DE] Metall auf Metall – Federal Court of Justice rules on illegality of phonogram samples

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In a judgment of 30 April 2020, the *Bundesgerichtshof* (Federal Court of Justice – BGH), Germany's highest civil court, in a longstanding dispute between music producer Moses Pelham and members of the group Kraftwerk, decided in what circumstances a phonogram producer's rights are infringed. The BGH explained that the use of a short sequence from a song can violate a producer's right of reproduction in accordance with the principles laid down by the CJEU (Case no. C-476/17). However, the judges referred the matter back to the *Oberlandesgericht* (higher regional court) for clarification.

The case, which began almost 22 years ago, concerns the use of two excerpts from the song 'Metall auf Metall' by the group Kraftwerk. In 1997, hip-hop producer Moses Pelham had electronically copied (sampled) two seconds of a rhythm sequence from the song and used the sample in a continuous loop in the song 'Nur mir'. The Kraftwerk members claimed that their copyright had been infringed and brought an action against Pelham seeking a prohibitory injunction, damages, the disclosure of information and the surrender of the phonograms for the purposes of their destruction.

After the original action was upheld by the regional court, numerous appeals followed. Finally, in 2016, the German *Bundesverfassungsgericht* (Federal Constitutional Court) overturned several appeal judgments and referred the case back to the Bundesgerichtshof. The latter then referred to the Court of Justice of the European Union (CJEU) some questions on the interpretation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society and Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property. In a judgment of 29 July 2019, the CJEU decided that the use of short sound samples does not constitute reproduction for copyright purposes if they are used in a new work in a modified form unrecognisable to the ear.

The BGH explained that a distinction should be made between activities prior to 22 December 2002 and those subsequent to the entry into force of Directive 2001/29/EC. A breach of the plaintiffs' reproduction rights could only be considered a possibility since 2002. In the case at hand, the rhythm sequence had been recognisable. Under the criteria established by the CJEU, the hip-hop

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producer could not rely on the ‘right to free use’ laid down in Article 24(1) of the German *Urheberrechtsgesetz* (Copyright Act). In addition, there was no relevant exception and the sample did not constitute a quotation. Nevertheless, the appeal court now needed to check whether the music producer had carried out reproduction or distribution activities after 22 December 2002 or had been seriously expected to do so. The case was therefore referred back to the *Oberlandesgericht Hamburg* (Hamburg Higher Regional Court).

Pressemitteilung des Bundesgerichtshofs zum Urteil vom 30. April 2020 - I ZR 115/16 - Metall auf Metall IV

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020046.html?nn=10690868

Federal Court of Justice press release on the judgment of 30 April 2020 - I ZR 115/16 - Metall auf Metall IV

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