[DE] Federal Supreme Court rules on tribute show advertisement

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In a ruling of 24 February 2022 (not yet published), the *Bundesgerichtshof* (Federal Supreme Court – BGH) examined the legal boundaries of advertising for a tribute show in which cover versions of an artist's songs are performed. The case concerned whether an event at which a Tina Turner lookalike sings Tina Turner hits can be advertised in a way that might create the impression that Turner herself is involved in or at least supportive of the show.

Tina Turner had filed a lawsuit against the producer of a show in which the singer F. performed Turner's greatest hits, asking for an injunction against the use of posters advertising the event. The posters contained a photograph of F. and the text "SIMPLY THE BEST - DIE TINA TURNER STORY". Turner claimed that, since F. looked so similar to her, the public might think that she herself was depicted on the posters and involved in the show. She had not given permission for her image or name to be used. After the *Landgericht Köln* (Cologne regional court, case no. 28 O 193/19) had upheld her complaint, the *Oberlandesgericht Köln* (Cologne appeal court, case no. 15 U 37/20), hearing an appeal filed by the defendant, rejected it on the grounds that Turner was not entitled to injunctive relief.

In the latest proceedings, the BGH dismissed a further appeal lodged by Turner. It was true that the defendant had infringed Turner's own image and name rights. If someone impersonated someone else, e.g. an actor, the latter's own image rights were infringed if a significant proportion of the target audience was deceived into thinking that it was the actual person. The advertisement in this case did create the impression that Turner herself was pictured on the posters.

However, the use of Turner's image on the defendant's disputed posters could be considered permissible under Articles 22, 23(1)(4) and (2) of the *Kunsturhebergesetz* (Art Copyright Act). Under the act, images could only be disseminated or publicly displayed with the permission of the person depicted. However, exceptions applied, for example, to "images linked to contemporary history" and "images that are not made on request, the dissemination or display of which lies in the higher interests of art". Here, a limitation applied to the "dissemination and display of an image that breaches a legitimate interest of the person depicted".

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The BGH ruled that, in the case of an image made on request – such as in the current case – the use of the image could only be contested by the person actually depicted (i.e. F. in this case), but not by the person they were impersonating. Turner therefore could not use the argument that the image in question had been made on request. Furthermore, in view of the broad protection offered by artistic freedom under Article 5(3) of the *Grundgesetz* (Basic Law – GG), it was irrelevant that the defendant had used an image of Turner to advertise a different art form – in this case, a tribute show. An advertisement for a show in which the songs of a famous singer were performed by a lookalike, featuring an image of the lookalike that created the false impression that it was the famous singer herself was, in principle, covered by artistic freedom.

Nevertheless, the BGH stressed that an unjustified intrusion into the famous singer's general personality rights would be committed if an advertisement for such a tribute show created the false impression that the famous singer supported or was even involved in the show. However, the defendant's posters did not falsely claim that Turner supported or was involved in the defendant's show. Since they did not expressly mention such a claim, they were not ambiguous.

Pressemitteilung des Bundesgerichtshofes

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2022/2022024.html?nn=17194694

Federal Supreme Court press release

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