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Copyrights/Music Works

German Supreme Court Overruled in Kraftwerk Copyright Case



By Jabeen Bhatti

June 3— In a decision expected to impact Germany's strict copyright laws, the country's supreme constitutional court overturned a supreme court ruling in a dispute over a two-second sample of a recording by German electronic band Kraftwerk (Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court), Az.: 1 BvR 1585/13, *ruling*, May 31).

Germany's Federal Constitutional Court ruled May 31 that sampling a piece of an artist's music for use in another work was justified as an act of artistic and creative freedom.

Attorneys said the ruling is important.

"The most interesting point of this verdict is that the strict copyright regime we have in Germany, with no kind of fair use exemption as a general clause, or a general limitation on IP rights—this is going to change quite a bit through this verdict," Urs Verweyen, a partner specializing in intellectual property law at KVLegal in Berlin, told Bloomberg BNA in a June 3 telephone interview.

The case arose more than 10 years ago when members of the electronic band Kraftwerk sued German music producer Moses Pelham for sampling a two-second snippet of their 1977 song "Metall auf Metall."

The band claimed that Pelham's use of the two-second sequence in the song "Nur mir" he produced for German singer Sabrina Setlur in 1997 was unauthorized and a violation of their rights as recording artists.

Germany's Federal Court of Justice (Bundesgerichtshof or BGH), the country's highest court for civil and criminal jurisdiction, sided with Kraftwerk in a Dec. 12, 2012, ruling. It found it was illegal for musicians to sample other artists' work in their own work "if it is possible for the average music producer to create an equivalent audio recording on their own" and declared the sampling a violation of copyright law.

But the constitutional court, which is the only court that can reverse the BGH, argued that copyright holders' commercial interests had to give way to artistic freedoms if the commercial interests of the original copyright holder were "only minimally impacted" as a result.

In a statement, the court criticized the BGH's position for "not sufficiently taking artistic freedom into account." Recreating sounds was not an equivalent substitute for sampling, which is "one of the defining elements of hip-hop," it said.

Decision Opens Door to More Copyright Exemptions

Some say the decision is interesting because of the restrictive nature of copyright laws in Germany.

"Germany has very strict copyright laws in favor of copyright holders with only a limited list of exemptions on the copyright, like for private use," Verweyen said. "But this is a strictly limited list, and if a certain use does not fall under one of those exemptions, you have a copyright infringement and copyright holders can go for damages; this is how the BGH has always ruled over the past few decades."

But the constitutional court said other factors need to be taken into account, he added.

"What the Constitutional Court says here is that we cannot stop at that list," Verweyen said. "We need to consider things like freedom of art, for example."

Attorneys said the constitutional court's reasoning comes very close to that of U.S. copyright law's fair use doctrine.

Rather than having a list of specific exemptions for copyright infringements as in Germany, U.S. copyright law permits fair use of copyright protected materials as long as no commercial harm is done to the copyright holders.

"This is what the constitutional court has done here as well," Verweyen said. "Basically, it says that if you use a

very small snippet of music in another work of art or a music, that does not really harm the original copyright holder. Therefore, it must be allowed under freedom of art and other constitutional rights. It's a discussion that is very close to the fair use doctrine, and it's probably the most significant aspect of this verdict."

Court to Look at Commercial Impact

As a next step, the supreme court will have to examine the verdict again and apply the factors laid out by the constitutional court.

"The supreme court will now have to determine whether the specific use of this two-second music sample in this other piece of music violates or harms the commercial interests of the producers of the original work of art," Verweyen added. "It will be interesting to see what the lower instance courts make of this verdict and how it develops. It's a bit too early to tell at the moment."

By Jabeen Bhatti

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For More Information

BVerfG full decision, May 31, in German at <https://goo.gl/U3LC7m>

BGH full decision, December 2012, in German at <http://goo.gl/cRI9Jb>

BGH statement in German at <http://goo.gl/Ef3cWi>

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