Headnotes

to the Judgment of the First Senate of 31 May 2016

–1 BvR 1585/13 –

1. **The consideration of specific artistic criteria required by Article 5(3) first sentence of the Basic Law demands recognising the use of parts of works protected by copyright as a means of creative expression and creative design. If this freedom of creative expression is measured against an interference with copyrights or related rights that only slightly limits the possibilities of exploitation, the exploitation interests of the copyright holders may have to cede in favour of artistic freedom.**

2. **The protection of property cannot lead to a requirement that the use of samples that can be reproduced so as to sound like the original of a phonogram generally require a licence of the phonogram producers as this would not take the artistic creative process into sufficient account.**

3. **In its review of the regular court's application of the law of the European Union, the Federal Constitutional Court examines in particular whether the regular court has averted potential violations of fundamental rights by requesting a ruling by the European Court of Justice, and whether the unalienable minimum standard of fundamental rights under the Basic Law is maintained.**

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 1585/13 –

Pronounced
on
31 May 2016
Ms Wagner
Amtsinspektorin
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

1. of P… GmbH,

2. of Mr P…,

3. of Mr H…,

4. of Ms S…,

5. of Mr G…,

6. of Mr O…,

7. of Mr H…,

8. of Mr S…,

9. of Mr F…,

10. of Ms W…,

11. of Mr K…,

12. of Ms T…,

– authorised representatives: Rechtsanwälte Schalast & Partner,
Mendelssohnstrasse 75 – 77, 60325 Frankfurt –

against a) the Judgment of the Federal Court of Justice (*Bundesgerichtshof*) of 13 December 2012 – I ZR 182/11 –,

b) the Judgment of the Hanseatic Higher Regional Court (*Hanseatisches Oberlandesgericht*) of 17 August 2011 – 5 U 48/05 –,

c) the Judgment of the Federal Court of Justice of 20 November 2008 – I ZR 112/06 –,

d) the Judgment of the Hanseatic Higher Regional Court of 7 June 2006 – 5 U 48/05 –,

e) the Judgment of the Hamburg Regional Court (*Landgericht Hamburg*) of 8 October 2004 – 308 O 90/99 –

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Kirchhof,

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz

held on the basis of the oral hearing of 25 November 2015:

Judgment:

1. **The constitutional complaint of complainants no. 4) through no. 12) is dismissed.**

2. **The Judgments of the Federal Court of Justice of 13 December 2012 – I ZR 182/11 – and 20 November 2008 – I ZR 112/06 –, the Judgments of the Hanseatic Higher Regional Court of 17 August 2011 – 5 U 48/05 – and 7 June 2006 – 5 U 48/05 – and the Judgment of the Hamburg Regional Court of 8 October 2004 – 308 O 90/99 – violate the fundamental right of complainants no. 1) through no. 3) under Article 5(3) first sentence, alternative 1 of the Basic Law (*Grundgesetz* – GG). The Judgments of the Federal Court of Justice of 13 December 2012 – I ZR 182/11 – and 20 November 2008 – I ZR 112/06 – and the Judgment of the Hanseatic Higher Regional Court of 17 August 2011 – 5 U 48/05 – are reversed. The matter is remanded to the Federal Court of Justice.**

3. **The Free and Hanseatic City of Hamburg and the Federation are each to reimburse complainants no. 1) through no. 3) for half of the necessary expenses incurred in these proceedings.**

Reasons:

A.

I.

The constitutional complaint concerns the extent to which musicians can invoke artistic freedom when facing copyright-related claims of phonogram producers in which they challenge that parts of their phonogram are used by way of what is known as sampling. The complainants challenge the regular courts' finding that incorporating a two-second sequence of rhythms from the soundtrack of the composition "Metall auf Metall" by the band "Kraftwerk" into two versions of the song "Nur mir" constitutes an interference with the phonogram producer's rights that is not justified by the right to free use. 1

[*Excerpt from press release no. 29/2016 of 31 May 2016*]

[Translator's note based on the German press release no. 77/2015 released on 28 October 2015: Sampling is a music design element by means of which sounds from different audio sources are recorded and processed for the purpose of using the sound when creating a new piece of music. The use of sampling plays an important role particularly in the field of hip-hop and electronic music.

Complainants are, among others, two composers and the singer of the song "Nur mir", which was published in 1997 in several versions on the album "Die neue S-Klasse" and on an EP ("extended play"), as well as the music production company that produced the album and the EP. According to the facts established in the civil court proceedings, to produce two versions of the song "Nur mir", a two-second rhythm sequence from the soundtrack of the composition "Metall auf Metall" from the "Trans Europa Express" album by the German band "Kraftwerk" from 1977 was sampled from the original and embedded, with minor changes only, in the two versions as

continuously repeated rhythm (“loop”).

Following an action brought by two founding members of the band “Kraftwerk”, the composers and the music production company were ordered to cease and desist from producing and selling phonograms with the two concerned versions of the song “Nur mir” and hand over already existing phonograms to the plaintiffs for destruction. In addition, the complainants (in the present constitutional complaint proceedings) were found liable to pay damages to the original plaintiffs. The Federal Court of Justice, which dealt with the matter twice, upheld the decision (Judgment of 20 November 2008 – I ZR 112/06, Metall auf Metall I – and Judgment of 13 December 2012 – I ZR 182/11, Metall auf Metall II –). It held that even the use of extremely short parts of a soundtrack produced by another party constituted an interference with the phonogram producer’s right to protection of his work pursuant to § 85(1) first sentence UrhG and generally required the latter’s approval. By applying the provision of § 24(1) UrhG, the court recognised free use as an exception to this requirement. But the prerequisite for such free use was that the sequence concerned could not be reproduced in a way that sounded like the original. According to the findings by the Hamburg Higher Regional Court (*Oberlandesgericht*) (Judgment of 17 August 2011 – 5 U 48/05 –) this was, however, possible in the present case so that the complainants could not invoke the right to free use.

With their constitutional complaint the composers and the music production company claim in particular a violation of their fundamental right to artistic freedom under Art. 5(3) first sentence of the Basic Law (*Grundgesetz* – GG).]

[*End of excerpt*]

[…] 2-8

II.

1. The plaintiffs in the initial proceedings are two founding members of the band “Kraftwerk”. Complainant no. 1) is a music production company; complainant no. 2) is a singer, composer and music producer; complainant no. 3) is a composer and music producer. Complainant no. 4) is a singer. Complainants no. 5) through no. 12) are artists, particularly composers, producers and singers, in the field of popular music. Unlike complainants no. 1) through no. 4), they were neither involved in the initial proceedings nor in the production and marketing of the song “Nur mir”. 9

[…] 10-11

2. […] 12-14

3. […] 15-18

4. […] 19

5. […] 20-24

III.

In their constitutional complaint, the complainants essentially claim a violation of their fundamental rights under Art. 5(3) first sentence GG (artistic freedom) and Art. 3(1) GG (principle of equality before the law). 25

1. […] 26-31

2. In addition, the complainants claim a violation of their fundamental right to equality before the law under Art. 3(1) GG, alleging that the courts established and applied new, unwritten essential criteria for copyright-related rights (*Leistungsschutzrechte*) with no factual reason that do not apply to copyrights. 32

IV.

Statements on the constitutional complaint were submitted by the Justice Authority of the Free and Hanseatic City of Hamburg (*Justizbehörde der Freien und Hansestadt Hamburg*), the German Association for Industrial Property Rights and Copyright (*Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht e.V.*), the Federal Bar Association (*Bundesrechtsanwaltskammer*), the German Lawyers' Association (*Deutscher Anwaltverein e.V.*), the German Music Council (*Deutscher Musikrat e.V.*), the German Rock & Pop Musicians' Association (*Deutscher Rock & Pop Musikerverband e.V.*), the German Association of the Music Industry (*Bundesverband Musikindustrie e.V.*), the Association of Independent Music Companies (*Verband unabhängiger Musikunternehmen e.V.*), the Digital Society (*Digitale Gesellschaft e.V.*), and the plaintiffs in the initial proceedings. 33

[…] 34-51

V.

The complainants and the plaintiffs in the initial proceedings submitted arguments at the oral hearing; the Federal Government also presented an opinion. As experts, the German Association for Industrial Property Rights and Copyright, the German Association of the Music Industry, the Association of Independent Music Companies and the Digital Society amplified and supplemented their written submissions; Professor S. from the Popakademie Baden-Württemberg also submitted his opinion. 52

[…] 53-57

B.

The constitutional complaint of complainants no. 1) through no. 3) is admissible; the constitutional complaint of complainants no. 4) through no. 12) is not. 58

I.

Complainants no. 1) through no. 3) admissibly complain of a violation of their artistic freedom. In addition to complainants no. 2) and no. 3), who are composers, complainant no. 1), a music production company, may also invoke the fundamental right of artistic freedom. To the extent that publishing media are needed in order to establish the relation between the artist and the public, the guarantee of artistic freedom also protects those persons who act as intermediaries (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 119, 1 <22>). This specifically involves an intermediary function that can also be performed by a company; thus, pursuant to Art. 19(3) GG, the nature of artistic freedom permits to apply it also to complainant no. 1) as a domestic legal person governed by private law. 59

Insofar as complainants no. 1) through no. 3) claim a violation of their fundamental right to equal treatment by favouring phonogram producers over authors, this does not relate to them individually, because the challenged decisions do not affect them in their capacity as copyright holders (cf. BVerfGE 129, 49 <68 and 69>; 132, 72 <81 and 82 para. 21>). 60

II.

The constitutional complaint of complainants no. 4) through no. 12), on the other hand, is not admissible. 61

Complainant no. 4) has not adequately shown that she has met the requirements of the principle of subsidiarity by pursuing all procedural options available in the matter as it then stood – in particular options such as joining the initial proceedings as a third-party intervener as provided under §§ 66 and 67 of the Code of Civil Procedure (*Zivilprozessordnung* – ZPO) – so as to prevent a violation of fundamental rights by the regular courts (cf. BVerfGE 73, 322 <325>; 112, 50 <60>; 134, 106 <115 para. 27>; 138, 261 <271 para. 23>). 62

The constitutional complaint of complainants no. 5) through no. 12), who did not join the initial proceedings either, is inadmissible because the challenged decisions do not individually and directly affect their rights. A *de facto* encroachment as a mere reflex is insufficient in that respect (cf. BVerfGE 13, 230 <232 and 233>; 78, 350 <354>; 108, 370 <384>). […] 63

C.

To the extent that the constitutional complaint is admissible, it is also well-founded. 64

The statutory provision in § 85(1) first sentence and § 24(1) of the Act on Copyright and Related Rights (*Urheberrechtsgesetz* – UrhG) is in conformity with the Constitution. In particular, it provides the courts with adequate leeway in interpreting the law and applying it to sampling to strike a proportionate balance between the right to engage in an artistic dialogue with existing phonograms, on the one hand, - which is protected by artistic freedom - and the property rights of the phonogram producers, on the other hand, - protected by Art. 14(1) first sentence GG (I). However, in the initial proceedings the court did not factor this in to the necessary extent; thus, the interpretation and application of the law's provisions in the challenged decisions do not take sufficient account of the complainants' artistic freedom (II). 65

I.

The legal provisions on which the challenged decisions are based, and which govern the right of phonogram producers (§ 85(1) first sentence UrhG) and the right to free use (§ 24(1) UrhG), are compatible with the artistic freedom guaranteed under Art. 5(3) first sentence GG and the protection of property under Art. 14(1) GG. As general provisions, they take sufficient account of phonogram producers' rights to their intellectual property, on the one hand, and the freedom of artistic activity in using phonograms, on the other hand. 66

1. The provisions on the phonogram producers' right and on free use, in their interaction, concern both the property right of the phonogram producer and the artistic freedom of those using phonograms. 67

Artistic freedom protects artistic activity itself (the "work produced"), but also the presentation and dissemination of the artwork, which are essential in order for the public to encounter the work (the "effect produced", cf. BVerfGE 67, 213 <224>; 119, 1 <21 and 22>). It may affect the freedom of musicians' artistic activity if phonogram producers are accorded an intellectual property right under § 85(1) first sentence UrhG that extends to the reproduction and distribution of the phonogram they produce, and due to which third parties producing works of art can thus use the phonogram only subject to the legal requirements – which, according to the challenged decisions, include § 24(1) UrhG. 68

Conversely, the possibility that the law provides for using phonograms without their producers' authorisation restricts the producers' freedom of property. Art. 14(1) GG protects intellectual property, particularly copyright (cf. BVerfGE 31, 229 <240>; 129, 78 <101>; 134, 204 <224 and 225 para. 72>), and thus also the phonogram producers' right to the protection of their work pursuant to § 85(1) first sentence UrhG (cf. BVerfGE 81, 12 <16>). 69

2. As provisions governed by private law, a conferral of copyright-related rights and the definition of the reach and limits of those rights serve to balance conflicting interests. To that extent, this does not constitute a unilateral interference by the state in private persons' exercise of their freedoms, but rather a balancing in which the free- 70

dom of one person is to be reconciled with the freedom of another. For this purpose, conflicting fundamental rights positions must be considered in terms of how they interact and must be balanced, in accordance with the principle of practical concordance, in such a way that their effect for all persons involved is as broad as possible (cf. BVerfGE 89, 214 <232>; 129, 78 <101 and 102>; 134, 204 <223 para. 68>).

Accordingly, the required examination of proportionality and balancing of interests cannot be carried out here solely from the viewpoint of a single fundamental right, but rather must focus on striking a balance between equally entitled holders of fundamental rights. If the legislature chooses to entrust the courts with achieving such a balance in a particular case, it is sufficient if the relevant provisions provide the courts with the possibility of allocating the conflicting legal interests in a way that is consistent with the Constitution (cf. BVerfGE 115, 205 <235>; 134, 204 <223 para. 69>). A legal provision can be found to violate fundamental rights only if one fundamental rights position is subordinated to the other side's position in such a way that, considering the significance and reach of the fundamental right concerned, it can no longer be found that an appropriate balance has been achieved (cf. BVerfGE 97, 169 <176 and 177>; 134, 204 <224 para. 70>). 71

The legislature has allotted to phonogram producers, just as to authors, the assets resulting from their creative work i.e. the right to reproduce and disseminate the phonogram by way of private law. The constitutionally protected core of this copyright-related right is the producers' freedom to dispose of this right on their own responsibility while excluding others (cf. BVerfGE 81, 12 <16>). It is for the legislature, in designing the content of the copyright-related right under Art. 14(1) second sentence GG, to set detailed appropriate standards that ensure that its use and exploitation are appropriate to its nature and social significance (cf. BVerfGE 31, 229 <240 and 241>; 79, 1 <25>; 129, 78 <101>). The legislature has broad leeway for assessment and design in this regard (cf. BVerfGE 21, 73 <83>; 79, 1 <25>; 79, 29 <40>; 129, 78 <101>; 134, 204 <223 and 224 para. 70>). 72

To that extent, one must distinguish between restrictions of the author's or phonogram producer's right of disposal, which can more easily be justified by reasons of public interest, and restrictions of exploitation rights, which can be justified only if there is an increased public interest (cf. BVerfGE 31, 229 <243>; 49, 382 <400>; 79, 29 <41>). This, however, does not mean that the legislature can revoke the right of disposal for the sake of any kind of state or political interest whatsoever. Historically and economically, this right represents the means by which the holder can negotiate a fee with interested parties before use. If the use has already taken place, the rights holder's negotiating position is weakened. Therefore any subsequent entitlement to remuneration provided for by law serves only as substitute (cf. BVerfGE 31, 229 <243>; 79, 29 <41>). 73

However, the guarantee of property neither requires the phonogram producer to be endowed with every conceivable possibility for economic exploitation (cf. BVerfGE 74

81, 12 <17>; 129, 78 <101>). Instead, it is for the legislature to define the content and limits of property; the Constitution only requires that on the “bottom line”, whatever the legislature provides the holder of the copyright-related right can still be considered an appropriate reward for his or her creative work (cf. BVerfGE 79, 29 <42>).

In addition to the property interests of authors and holders of a copyright-related right, in designing the reach and limits of copyright and related rights, the legislature must take sufficient account of the freedom of artistic activity enshrined in Art. 5(3) first sentence GG, which it must also consider in the relationship between one private person and another. This is particularly the case with regard to the author’s or phonogram producer’s right of disposal, because that right endows the holder with the legal power under § 97(1) UrhG to bring an action for injunction against the wrongful use, and to eliminate the infringement, as well as thereby to induce the courts to prohibit works of art (cf. BVerfGE 119, 1 <21>). 75

3. These requirements are met through the interaction of § 85(1) first sentence UrhG, and § 24(1) UrhG, which the challenged decisions applied to restrict the provision of § 85(1) first sentence UrhG. These provisions provide the courts entrusted with interpreting and applying them with sufficient discretion to give constitutionally appropriate consideration to the freedom of artistic activity, on the one hand, and to the protection of the phonogram producer’s property rights, on the other. 76

[…] 77-78

The fact that § 24(1) UrhG does not include any corresponding provision for remuneration limits not only the author’s or phonogram producer’s right of disposal but also their exploitation rights; this is compatible with the requirements set out in Art. 14(1) GG. The legislature was acting within its discretion when it decided not to supplement the restrictive exception under § 24(1) UrhG with an obligation to pay royalties that would entitle authors or phonogram producers to a share in proceeds that may arise from the free use of their work or phonogram only in connection with another's creative work. 79

However, to strengthen exploitation interests, the legislature would also not be generally prevented from subjecting free use to an obligation to pay appropriate royalties. In doing so, for example, it might take due account of artistic freedom by introducing follow-on obligations to pay royalties based on a new work’s commercial success. Even without such a requirement, however, the provision leaves sufficient leeway to take account of the phonogram producer’s exploitation interests in defining the scope of the right to free use, and on the “bottom line” – irrespective of the particular case – give phonogram producers an appropriate reward for their work (cf. BVerfGE 79, 29 <42>). The permissibility of a free use of phonograms for artistic purposes does not amount to a general permissibility of sampling without an authorisation or without obligation to pay royalties. Hence the licencing obligation persists in the case of non-artistic uses. Furthermore, § 24(1) UrhG permits free use only if the work keeps a sufficient overall distance from the extracted sequence or from the original phonogram 80

(cf. Federal Court of Justice, Judgment of 20 November 2009 – I ZR 112/06, Metall auf Metall I –, *Neue Juristische Wochenschrift* – NJW 2009, p. 770 <773>; concerning the distance for moving images, Decisions of the Federal Court of Justice in Civil Matters, *Entscheidungen des Bundesgerichtshofs in Zivilsachen* – BGHZ 175, 135 <143> – TV Total).

II.

On the other hand, the challenged decisions violate the freedom of artistic activity of complainants no. 1) through no. 3), which is guaranteed by Art. 5(3) first sentence GG. 81

1. a) When interpreting and applying copyright laws, civil courts must reproduce the balance struck in the law between protecting the phonogram producers' property and the conflicting fundamental rights, while at the same time avoiding disproportionate restrictions of fundamental rights (cf. BVerfGE 89, 1 <9>; 129, 78 <101-102>). If multiple interpretations are possible in interpreting and applying provisions of ordinary law, preference must be given to the interpretation that corresponds to the values enshrined in the Constitution (cf. BVerfGE 8, 210 <221>; 88, 145 <166>; 129, 78 <102>) and that maintains so far as possible the parties' fundamental rights in practical concordance. The influence of the fundamental rights on the interpretation and application of civil-law norms is not limited to general clauses, but extends to all constituent elements of civil-law provisions that is open to and in need of interpretation (cf. BVerfGE 112, 332 <358>; 129, 78 <102>). 82

At the same time, the Basic Law does not regularly prescribe the civil courts a particular decision. The threshold of a violation of constitutional rights that the Federal Constitutional Court needs to correct is not reached until the interpretation of the civil courts reveals errors that are based on a fundamentally incorrect view of the significance of fundamental rights, in particular of their scope of protection, and which are also of some weight in their substantive significance for the case at issue, in particular because the balancing of the conflicting legal positions in the private law context is adversely affected by these errors (cf. BVerfGE 129, 78 <102>; 134, 204 <234 para. 103>). 83

b) Artistic freedom under Art. 5(3) first sentence GG is guaranteed without reservation, but not without limits. The limits derive in particular from the fundamental rights of other persons, but also from other legal interests that enjoy constitutional rank (cf. BVerfGE 30, 173 <193>; 67, 213 <228>; 83, 130 <139>; 119, 1 <23 and 24>). The protection of the phonogram producer's property rights under § 85(1) first sentence UrhG (cf. BVerfGE 81, 12 <16>) constitutes such a limit. 84

However, even in the interpretation and application of this provision of private law, Art. 5(3) first sentence GG requires the consideration of specific artistic criteria (cf. BVerfGE 119, 1 <27>). Here, the intensity and extent of the impact of the various possible interpretations and applications on the affected legal interests of both parties 85

must be determined and taken into account in the decision.

A consideration of specific artistic criteria requires that in interpreting and applying the exceptional provisions of copyright law, the inclusion of excerpts of others' work into one's own must be recognised as a means of creative expression and creative design, and thus these provisions for works of art must be provided with a scope of application that is broader than that of a different, non-artistic use (cf. Federal Constitutional Court, Order of the Second Chamber of the First Senate of 29 June 2000 – 1 BvR 825/98, Germania 3 –, NJW 2001, p. 598 <599>). In a legal assessment of the use of works protected by copyright, the copyright holders' interest in preventing unauthorised commercial exploitation of their works comes into conflict with other artists' interests protected by artistic freedom, in being able to induce a creative process by an artistic dialogue with existing works, without being subject to financial risks or restrictions in terms of content. If an artist's creative development is measured against an interference with copyrights that only slightly limits the possibilities of exploitation, the copyright holders' exploitation interests may have to stand back in favour of the freedom to enter into an artistic dialogue (as was already found by the Federal Constitutional Court, Order of the Second Chamber of the First Senate of 29 June 2000 – 1 BvR 825/98, Germania 3 –, NJW 2001, p. 598 <599>). These principles are also applicable if phonograms protected under § 85(1) first sentence UrhG are used for artistic purposes. 86

c) Thus the constitutional protection of intellectual property first of all does not require that phonogram producers be accorded every conceivable possibility for economic exploitation; rather, it is intended only to ensure that phonogram producers on the whole still receive an appropriate reward for their work. On the other hand, once a work is published it is no longer at its owner's sole disposal, but enters the social sphere, just as it was intended to do, and can thereby become an independent factor that helps define the cultural and intellectual scene of its era. As over time, the work is no longer only subject to disposal under private law and becomes common intellectual and cultural property, the author must accept that it will increasingly serve as a link to an artistic dialogue (cf. BVerfGE 79, 29 <42>; Federal Constitutional Court, Order of the Second Chamber of the First Senate of 29 June 2000 – 1 BvR 825/98, Germania 3 –, NJW 2001, p. 598 <599>). This must apply just as well for the phonogram producer's right to protection by copyright. It is an expression of the social commitment of intellectual property under Art. 14(2) GG (cf. BVerfGE 79, 29 <40>; 81, 12 <17 and 18>). 87

2. According to these standards, the challenged decisions violate the complainants' right to freedom of artistic activity. The complainants can invoke artistic freedom, which the challenged decisions interfere with (a). The challenged decisions' interpretation and application of the provisions on the phonogram producers' right under § 85(1) first sentence UrhG and the right to free use under § 24(1) UrhG are based on a fundamentally incorrect understanding of the significance of artistic freedom, which is not given its due weight in the necessary weighing against the phonogram produc- 88

ers' property interests (b).

a) The two versions of the song "Nur mir" that are at issue constitute works of art within the meaning of Art. 5(3) first sentence GG, because they are free, creative products that present the artists' impressions and various experiences through the medium of a particular formal language, in this case music (cf. BVerfGE 30, 173 <188 and 189>; 67, 213 <226>; 75, 369 <377>; 119, 1 <20 and 21>). 89

The challenged decisions directly affect the complainants in terms of the "effect produced" by these works of art, particularly in that the sale of the two versions of "Nur mir" is prohibited. However, they also have repercussions on the "work sphere", because the conviction is founded specifically on the artistic use of sampling as a means of musical composition that was used in producing both versions (cf. BVerfGE 67, 213 <224>; 119, 1 <21 and 22>). It cannot be argued against this that the scope of artistic freedom intrinsically does not extend to the unauthorised use or impairment of others' intellectual property for the purpose of an artist's creative development. It cannot be derived from the Constitution that the guarantee of property always takes priority over the guarantee of artistic freedom; neither does the Constitution suggest that artistic freedom should, as a matter of principle, take priority over property. Any artistic activity, however, is initially covered by the scope of protection of Art. 5(3) first sentence GG, no matter how or where it takes place (cf. differently Federal Constitutional Court, Order of the Preliminary Examination Committee (*Vorprüfungsausschuss*) of 19 March 1984 – 2 BvR 1/84, Sprayer of Zurich –, NJW 1984, p. 1293 <1294>). Only subsequently, one can decide whether artistic freedom must cede due to an impairment of third parties' fundamental rights. 90

b) The impairment of the complainants' artistic freedom is not justified under constitutional law. The assumption that even the inclusion of very brief sound sequences constitutes an impermissible interference with the plaintiffs' right to protection as phonogram producers under § 85(1) first sentence UrhG, insofar as the used sequence can be reproduced so as to sound like the original, does not take sufficient account of the right to artistic freedom guaranteed by Art. 5(3) first sentence GG. 91

It is true that the assumption that very brief rhythmic sequences interfere with the phonogram producer's rights does not *per se* violate the right to artistic freedom (aa). However, in striking a balance between the constitutionally protected interests concerned (bb), the effects of the challenged decisions on the borrowing artist's artistic freedom (<1>) must be measured against the effects of allowing a more extensive use of sampling upon the phonogram producers' property interests (<2>). Ultimately, in an approach considering specific artistic criteria, the use of samples must generally also be possible irrespective of reproducibility (<3>). 92

aa) Affirming that even the borrowing of a brief rhythmic sequence interferes with the phonogram producer's rights under § 85(1) first sentence UrhG does not in itself constitute an unjustified interference with artistic freedom. As the Federal Court of Justice itself held in the challenged decisions, this does not exclude the possibility 93

that such an interference might be lawful when interpreting and applying the relevant statutory law in accordance with artistic freedom.

The presumption that this interference might be justified by an analogous application of the right to free use under § 24(1) UrhG does not exceed the bounds of permissible development of the law. […] 94

bb) However, in interpreting and applying the copyright-related right under § 85 UrhG, the regular court must take account of the protection of artistic freedom, which has found legislative expression in § 24 UrhG. In this case, the impediment that the phonogram producers' right to protection of their work poses to an artist's freedom weighs more heavily than the protection of the phonogram producers' property and artistic freedom. 95

(1) The requirements that the courts set in the challenged decisions for the permissibility of sampling may have far-reaching consequences for other artists, particularly as is the the complainants' case with regard to the field of hip-hop. The phonogram producer's right not only endows its holder with a claim for royalties from users of the phonogram, but also includes a right of disposal that gives the holder the power to prohibit uses that the holder has not authorised. Yet in this way the holder of those rights might prevent the creation of new works of art, which is protected by artistic freedom. Sampling for the purpose of music composition is protected by artistic freedom in such cases just as fully as if the sampling were done for purposes of engaging in a critical dialogue with the original (cf. Federal Constitutional Court, *Bundesverfassungsgericht* - BVerfG, Order of the Second Chamber of the First Senate of 29 June 2000 – 1 BvR 825/98, Germania 3, NJW 2001, p. 598 <599>). 96

Where musical artists who intend to use samples to create a new work do not want to refrain entirely from including a sample in their new piece of music, the Federal Court of Justice's strict interpretation of free use puts them in the position of having to decide whether to obtain a sample licence from the phonogram producer or to reproduce the sample themselves. In either case, however, the freedom of artistic activity, and therefore also further cultural development, would be restricted, a consequence that the Federal Court of Justice did not take sufficiently into account in its examination of artistic freedom. 97

Emphasising the possibility of obtaining a licence does not provide an equivalent degree of protection of the freedom of artistic activity: There is no entitlement to a licence to use the sample; phonogram producers can refuse a licence on the basis of their right of disposal, without having to give reasons and irrespective of any readiness to pay a fee for the licence. The phonogram producer is entitled to demand the payment of a licence fee for the use of the sample, in an amount that the producer can set at will, subject to the general legal limits, i.e., particularly the prohibition of usury under § 138(2) of the Civil Code (*Bürgerliches Gesetzbuch* – BGB). The process of granting rights is particularly difficult in the case of works which assemble many different samples like a collage. The existence of sample databases where 98

samples can be acquired together with their rights of use, and of service providers who support musicians in clearing samples, only partially resolves these problems, because using those databases or services may entail substantial transaction costs and a rather extensive search effort. Furthermore, the limitation to these options significantly limits sampling opportunities – namely to those samples that are actually offered for use.

Nor is reproducing sounds oneself an equivalent substitute. The use of samples is a distinctive stylistic component of hip-hop. Direct access to the original sound document – similarly to the art form of collage – is a medium for the "aesthetic reformulation of the collective memory of cultural communities" (Großmann, Die Geburt des Pop aus dem Geist der phonographischen Reproduktion, in Bielefeldt/Dahmen/Großmann, PopMusicology, Perspektiven der Popmusikwissenschaft, 2008, p. 119 <127>, original quote in German) and an essential element of an experimentally synthesising creative process. The required consideration of specific artistic criteria demands that such genre-defining aspects are not to be ignored. The fact that in other fields, samples are also, or primarily, used to save money may not result in a situation in which the use of this creative medium is impeded unreasonably in cases in which it is a distinctive feature of the style. 99

In addition, reproducing a sample oneself can be very laborious and the assessment of whether such a sound is equivalent to the original leads to considerable insecurity among artists. In the initial proceedings, the Higher Regional Court needed several experts and several days of hearings to clarify the matter of reproducibility. It must be feared that even in those cases where a reproduction equivalent to the original is not possible, artists will refrain from incorporating passages – which in such a case would be permissible even in the opinion of the Federal Court of Justice – because of concerns about the overly great effort and expense, as well as the legal risk, involved in proving that reproducibility was impossible. The criterion of equivalent reproducibility therefore has a deterrent effect that necessitates an especially effective constitutional review (cf., for the case of criminal liability for publications, BVerfGE 81, 278 <290>). 100

(2) In the present case concerning the permissibility of the complainants' licence-free use of sampling, these restrictions of the freedom of artistic activity are measured against only a minor interference with the plaintiffs' rights as phonogram producers – and corresponding rights of other phonogram producers, – an interference that does not entail considerable economic detriment. 101

There is no evident risk that the plaintiffs in the initial proceedings will suffer from a decline in sales of their album "Trans Europa Express" or even just the song "Metall auf Metall" through the incorporation of the sound sequence into the two versions of the song "Nur mir" that are at issue here. Such a risk might possibly occur at most in individual cases in which the newly created work resembled the phonogram with the original sequence so closely that one might realistically expect the new work to compete with the original phonogram […]. In this context one must consider the artistic 102

and temporal distance from the original work, the significance of the borrowed sequence, the economic impact of the damage to the creator of the original work, and the prominence of that work.

Likewise, even though permissibility under § 24(1) UrhG deprives the phonogram producer of the option of charging licence fees for the use of samples, this does not automatically – and particularly not in the case at hand – entail a considerable economic detriment to the phonogram producer. 103

The reason for granting the phonogram producer a special statutory right of protection was not to ensure that the producer would receive revenues from licences for the inclusion of segments in other phonograms, but to protect the producer's economic investment against the threat of phonogram piracy (cf. Bill for an Act on Copyright and Related Rights – *Entwurf eines Gesetzes über Urheberrecht und verwandte Schutzrechte* of 23 March 1962, *Bundestag* Document, *Bundestagsdrucksache* – BT-Drucks IV/270, p. 34; BVerfGE 81, 12 <18>). In any event, the Constitution does not require the protection of brief and extremely brief elements by a copyright-related right that in the course of time could make it more complicated or even impossible to use existing cultural assets […]. 104

Finally, a substantial economic detriment also cannot be based on avoiding the costs of reproduction (cf. in this sense the challenged decision of the Hanseatic Higher Regional Court of 7 June 2006 – 5 U 48/05 –, *Gewerblicher Rechtsschutz und Urheberrecht, Rechtsprechungs-Report* – GRUR-RR 2007, p. 3 <4>). To begin with, this constitutes an economic advantage to the user of the sample only because of the achieved savings. This, however, does not automatically equate to a corresponding detriment to the producer of the original phonogram […]. 105

To the extent that the plaintiffs in the initial proceedings do not seek to have the use of the sample prohibited so that they can exploit their achievement economically, but rather intend to keep their musical work from appearing in other contexts, their fundamental right under Art. 5(3) first sentence GG is not of material weight. Furthermore, the decisions in the initial proceedings concern them only in respect of their interests as phonogram producers, and thus in their capacity as mediators between the artists and the public, rather than in their capacity as artists and authors. 106

(3) Accordingly, here a minor interference with the phonogram producer's right, an interference without material economic detriment, is measured against a material impairment of an artist's freedom of creative activity and expression. 107

Even if one were to recognise in general, based on Art. 14(1) GG, that sampling licences are economically significant to phonogram producers, the protection of property cannot lead to a requirement that the use of samples that can be reproduced so as to sound like the original of a phonogram generally requires a licence from the phonogram producer, for this does not take sufficient account of the artistic creative process. Conversely, it neither leads to a disproportionate restriction of the possibili- 108

ties of exploiting the phonogram. It still remains possible to grant such licences, and in many cases such a licence is still required in order to use the samples – for example, for uses that are not covered by artistic freedom, or that pose unacceptable economic risks to the producer of the original phonogram because of their size or their proximity to that phonogram in terms of time and content. To that extent, therefore, the exploitation interests of the phonogram producers must cede when measured against the interests of use for artistic activity. The additional criterion that a used sequence is not reproducible in such a way that it sounds like the original, which the Federal Court of Justice introduced for the applicability of § 24(1) UrhG to interference with the rights of phonogram producers, is not suitable for achieving a proportionate balance between the interest of an unrestricted continuing development of artistic activity, on the one hand, and the property interests of the phonogram producers, on the other.

D.

I.

The challenged decisions violate the right of complainants no. 1) through no. 3) to freedom of artistic expression. The Judgments of the Federal Court of Justice and the Judgment of the Higher Regional Court of 17 August 2011 must be reversed and the matter must be remanded to the Federal Court of Justice. 109

II.

In its new decision, the Federal Court of Justice can ensure that artistic freedom is sufficiently taken into account by an analogous application of § 24(1) UrhG. However, the court is not limited to such an approach. An application of the law in compliance with the Constitution, that permits phonograms to be used for sampling without prior licencing both in the case at hand and in similar contexts, might for instance also be achieved by applying a restrictive interpretation of § 85(1) first sentence UrhG according to which sampling does not constitute an interference with the phonogram producer's rights unless the phonogram producer's economic interests are materially affected […]. It also seems conceivable that one might make use of the right of citation under § 51 UrhG. 110

Nor do requirements of public international law contradict such an interpretation. According to Art. 1(c) of the Geneva Phonograms Convention, duplication implies embodying a substantial part of the sounds fixed in the phonogram. The term "substantial part" leaves sufficient room for the requirements of constitutional law developed above (see also Leistner, *Juristenzeitung* – JZ 2014, p. 846 <849>). 111

III.

Insofar as acts of use that occurred from 22 December 2002 onwards are concerned, the Federal Court of Justice, as the competent regular court, must first of all assess whether, due to the precedence of Union law, there is still leeway to apply 112

German law (1). If the provisions of the European Directive prove to be exhaustive, the Federal Court of Justice must guarantee effective protection of fundamental rights primarily by interpreting the provisions of the Directive in conformity with European fundamental rights, and in case of doubt regarding the interpretation or validity of the Copyright Directive, by requesting a preliminary ruling from the European Court of Justice in accordance with Art. 267 TFEU (2).

1. The Copyright Directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society), according to its Art. 10(2), is applicable to acts of use as from 22 December 2002. 113

The Federal Court of Justice must examine whether, even within the Directive's temporal scope of application, German fundamental rights remain applicable, and for that purpose must first of all examine how much leeway the relevant provisions of the Copyright Directive leave for implementation under national law; this examination is subject to review by the Federal Constitutional Court. 114

a) Provisions of domestic law that transpose a Directive of the European Union into German law are generally not to be measured by the standard of fundamental rights under the Basic Law, but by Union law, and thus also by the fundamental rights guaranteed by that law, insofar as the Directive does not leave leeway for implementation to the Member States, but instead contains mandatory requirements (cf. BVerfGE 73, 339 <387>; 118, 79 <95>; 121, 1 <15>; 125, 260 <306 and 307>; 129, 186 <198 and 199>; 133, 277 <313 et seq. para. 88 et seq.>; on the ongoing identity review, most recently BVerfGE 140, 317 <337 para. 43 et seq.> on the limits of applicability of fundamental rights of the European Union, European Court of Justice – ECJ – Judgment of 10 July 2014, Hernández, C-198/13, EU:C:2014:2055, para. 35; Judgment of 6 October 2015, Delvigne, C-650/13, EU:C:2015:648, para. 27). The leeway for implementation must be determined by interpreting the Union law that underlies the national implementing law. At the national level, interpreting acts of secondary law under Union law is, first and foremost, the responsibility of the regular courts. These courts must, if applicable, consider the necessity of a request for a preliminary ruling under Art. 267 TFEU – also with regard to the protection of fundamental rights (cf. BVerfGE 129, 78 <103>). 115

If the regular courts find that the case is comprehensively within the scope of European Union law, even without a request for a preliminary ruling from the European Court of Justice, that finding is subject in full to review by the Federal Constitutional Court, because of the significance of this matter for the applicability of German fundamental rights (cf. BVerfGE 129, 78 <103>). In affirming or denying that there is leeway for implementation under European Law, the regular courts decide at the same time whether fundamental rights under the Basic Law must be taken into account, and whether the Federal Constitutional Court, according to its case-law, has declined to review national acts of implementation against the standard of the Basic Law so 116

long as the European Union, including the case-law of the European Court of Justice, guarantees an effective protection of fundamental rights which is substantially equivalent in terms of content and effectiveness to the protection of fundamental rights that is indispensable under the Basic Law (cf. BVerfGE 73, 339 <387>; 102, 147 <161>; 123, 267 <335>; 129, 78 <103>).

b) Within the scope of application of the Copyright Directive, it cannot be ruled out that the regular courts are still bound by the fundamental rights under the Basic Law. This is the case insofar as the Directive allows the Member States leeway for implementation. In that respect, the extent to which the Directive imposes binding requirements on the Member States or leaves them leeway for implementation must be distinguished with regard to each individual provision. In terms of the question of how German law is determined by the Copyright Directive, one must thus clarify to what extent that Directive exhaustively governs the interference with a phonogram producer's right. 117

For this purpose, one must decide whether a copy within the meaning of the Directive exists (cf. most recently, ECJ, Judgment of 1 December 2011, Painer/Standard, C-145/10, EU:C:2011:798, para. 36, 95 et seq.; Judgment of 22 January 2015, Allposters, C-419/13, EU:C:2015:27, para. 24 et seq.), whether that case-law is transferable to copies of phonograms, and whether the justification of an interference with the phonogram producer's rights is governed exhaustively (cf. ECJ, Judgment of 3 September 2014, Vrijheidsfonds, C-201/13, EU:C:2014:2132, para. 14 et seq.; Judgment of 27 February 2014, OSA, C-351/12, EU:C:2014:110, para. 36; on this point, Leistner, *Gewerblicher Rechtsschutz und Urheberrecht* – GRUR 2014, p. 1145 <1149>; von Ungern-Sternberg, GRUR 2015, p. 533 <536 et seq.>). 118

Insofar as for the issues to be decided here German copyright law is determined by the applicable provisions of the Copyright Directive, that does not necessarily also apply with respect to the further provisions of the Directive. For example, it seems likely that Member States have leeway particularly in respect of the provisions on technological measures under Art. 6 of the Copyright Directive (cf. Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 19, 278 <283> – AnyDVD), on access to rights-management information under Art. 7, and on sanctions and remedies for infringements of copyright and intellectual property rights under Art. 8 (cf. Ohly, Expert Opinion F (*Gutachten* F) for the 70th Meeting of the German Jurists' Association (*Deutscher Juristentag*), 2014, p. F 103; *contra* Obergfell/Stieper, in: Festschrift 50 Jahre Urheberrechtsgesetz, 2015, p. 223 <232>). 119

2. If the Federal Court of Justice comes to the conclusion that the Copyright Directive leaves the German legislature no leeway for implementation in the copyright questions relevant to the initial proceedings, it must act to arrive at an effective protection of fundamental rights under European Union law (a). Insofar as the Federal Court of Justice doubts the Copyright Directive's compatibility with European funda- 120

mental rights, it must refer the question to the Court of Justice of the European Union (b). This will be reviewed by the Federal Constitutional Court (c).

a) The obligation to encourage effective enforcement of European fundamental rights by way of the procedure for a preliminary ruling represents a necessary compensation for the forgone review of matters determined by European Union law on the basis of German fundamental rights, and for the essentially absent individual protection of rights under European law against legislative acts by the European Union. 121

In the event that German copyright law is determined by the Directive, the relevant provisions of national law must accordingly be interpreted in conformity with the Directive, ensuring an appropriate equilibrium between the various fundamental rights protected by Union law. In interpreting the Copyright Directive, the artistic freedom guaranteed under Art. 13 first sentence of the Charter of Fundamental Rights, on the one hand, and intellectual property protected under Art. 17(2) of that Charter, on the other hand, must then be weighed against each other (concerning the Copyright Directive in this context, cf. ECJ, Judgment of 29 January 2008, Promusicae, C-275/06, EU:C:2008:54, para. 68; Judgment of 27 March 2014, UPC Telekabel Wien, C-314/12, EU:C:2014:192, para. 45 et seq.). 122

b) As far as fundamental rights are concerned, a reference to the Court of Justice of the European Union may especially be necessary if the regular court has or should have doubts as to the compliance of a European legal act or a ruling of the European Court of Justice with the fundamental rights under Union law, which guarantee protection of fundamental rights equivalent to the fundamental rights under the Basic Law (cf. BVerfGE 129, 78 <104>). Irrespective of the entitlement to one's lawful judge under Art. 101(1) second sentence GG, which must be observed in the regular court's handling of the obligation for a referral under Art. 267(3) TFEU (on this cf. BVerfGE 82, 159 <192 and 193>; 129, 78 <105 et seq.>; 135, 155 <230 et seq. para. 176 et seq.>), this is required by the principle of effective legal protection, particularly the protection of fundamental rights (Art. 19(4) GG in conjunction with the relevant fundamental right under the Basic Law; cf. BVerfGE 118, 79 <97>; 129, 78 <103 and 104>). If, in interpreting and applying the Copyright Directive, the Federal Constitutional Court entertains doubts about the Directive's compatibility with the fundamental rights under Union law, particularly with artistic freedom under Art. 13 first sentence of the Charter of Fundamental Rights, it must refer the question of compatibility with European fundamental rights, and of an interpretation of the Directive in conformity with fundamental rights, to the Court of Justice of the European Union. 123

c) In reviewing the regular courts' reference practice in the sphere of fundamental rights, the Federal Constitutional Court fulfils its task of safeguarding fundamental rights in Germany, in respect of not only the German public authority but the European authority as well (cf. BVerfGE 89, 155 <156 7th headnote>). In particular, it will review whether the regular court has averted potential violations of fundamental rights by bringing the question of fundamental rights within its jurisdiction under Euro- 124

pean law before the Court of Justice of the European Union, and whether the indispensable minimum standard of the Basic Law has been met (on this point, cf. BVerfGE 133, 277 <316 para. 91>; 140, 317 <336 et seq., para. 40 et seq., 66>).

IV.

The decision on the reimbursement of expenses is based on § 34a(2) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). 125

Kirchhof Gaier Eichberger

Schluckebier Masing Paulus

Baer Britz

Bundesverfassungsgericht, Urteil des Ersten Senats vom 31. Mai 2016 - 1 BvR 1585/13

Zitiervorschlag BVerfG, Urteil des Ersten Senats vom 31. Mai 2016 - 1 BvR 1585/13 - Rn. (1 - 125), http://www.bverfg.de/e/rs20160531_1bvr158513en.html

ECLI ECLI:DE:BVerfG:2016:rs20160531.1bvr158513