

## Germany

### COPYRIGHT

District Court of Cologne

July 12, 2006

28 O 559/03

Copyright; Drawings; Germany; Infringement; Musical works; Stamps

**Law:** German Copyright Act:

"Article 2. Protected Works

- (1) Protected literary, scientific and artistic works shall include, in particular: . . .
  2. musical works; . . .
  7. illustrations of a scientific or technical nature, such as drawings, plans, maps, sketches, tables and three-dimensional representations.

- (2) Personal intellectual creations alone shall constitute works within the meaning of this Act.

**Facts:** The plaintiff, Michael Bach Bachtischar, is an artist in the field of new music, and he is well known as a cello player. He works also as a composer and artist.

In 1996 Art.43 of the German Post Act regulated the procedure applicable to the grant of the reproduction and distribution rights concerning stamps. This grant had to be issued by the Federal Minister for Post and Telecommunications and, later, by the Federal Minister of Finance. Based on such a grant the defendant distributed a stamp, which contained in part a pictorial representation taken from the plaintiff's drawing book.<sup>1</sup> With the artist's consent this pictorial representation had been reproduced and distributed in the programme brochure of the Donaueschinger Musiktage 1994. The Donaueschinger Musiktage is a leading festival of new music in Germany.

The plaintiff had made this drawing on July 18, 1992, and therefore he called it "18-7-1992 Aufzeichnungen zu Ryoanji". The defendant had made more than 38 million copies. The plaintiff did not authorise the use of his drawing as a stamp. The plaintiff asked the court for an injunction, and he asked for an order that the defendant would have to provide information on the scope of the work's exploitation so that he would be able to calculate damages. The defendant denied copyright protection of the drawing.

**Held:** The plaintiff's drawing "18-7-1992" is a scientific work of music in the sense of Art.2(1) cl.7 of the German Copyright Act. In the case of scientific works copyright protection does not focus on the protectability of the represented work of art, but on the manner of representation. The protection of representations requires the subsistence of an original work of the mind, but the scope of originality may be low. The work "18-7-92" complies with these requirements. The particularity of the work lies in the sequence of notes, which the plaintiff depicted. The court held that the artist had achieved a creative visualisation of the musical problem: "the sequence of sounds, which is depicted by two notes, can be heard as a single sound only. This is sufficient to attract copyright protection." Even parts of a work which are so small that they can be reproduced on a stamp may be protected by copyright, provided that such a small part involves the artist's personal creativeness.

The court held that the defendant was not authorised to make use of the plaintiff's work. There was no assumption of the plaintiff's implied consent by silence, since a mere silence is not sufficient to show the unauthorised user that the right holder agrees with the exploitation. This might have been the case if the plaintiff had himself marketed the stamp. The interesting question concerning the amount of damages for copyright infringement through more than 38 million copies was not dealt with by the court, because preliminarily the defendant would have to provide information on the scope of the unauthorised exploitation.

1. See <http://bach.bogen.pros.orange.fr>.