A DISCUSSION ON THE AMENDMENT, FINALLY THE DESTRUCTION OF PROTECTED MONUMENTS AND ITS SPECIAL STANDING AS COPYRIGHTES WORK IN GERMANY

1. Introduction

The destruction of a copyrighted work may be an impairment within the meaning of § 14 of the German Federal Copyright and Related Rights Act (Copyright Act, following "UrhG"). In order to determine whether demolition is likely to jeopardise the justified personal and intellectual interests of the architect in the protected work, the "author", a comprehensive consideration must be made of the interests of the author and the owner of the building.

Pursuant to § 14 UrhG, the author has the right to prohibit any distortion or other impairment of his work which is liable to endanger his legitimate intellectual and personal interests in the work. However, it is questionable whether a destruction of a work can be an impairment within the meaning of § 14 UrhG. So far, this has been largely denied in the German jurisdiction and legal literature. However, following another opinion, the destruction of a work is also an impairment.

The Federal Supreme Court (Bundesgerichtshof [BGH]), the highest German Court in Civil law, now agreed. Annihilation or destruction is really an even greater impairment than the mere modification of a work. In addition, the purpose of § 14 UrhG requires the protection of the author's legitimate intellectual or personal interests in his work. This is especially true if the destruction can thwart or complicate the continuation of the work as an expression of the personality of its creator. In weighing up the interests of the

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author, account must be taken of whether the destroyed work is the only copy or whether there are other copies. It is also necessary to take into account the height of the design of the work and whether it is an object of purposeless art or serves as an applied art for a purpose. On the part of the respective owner, if a building or art in or on such a structure is affected, structural reasons or the interest in a change of use may be important. In the case of works of architecture or works of art inextricably linked to buildings, the interests of the owner in any other use or development of the land or building will normally be preferable to the interests of the author in the preservation of the work, provided other circumstances of the individual case.

In its decision of February 21st, 2019[2], the Federal Supreme Court decided, that the interest of the owner of a building in the redevelopment or of a part of the building prevails. Moreover, in the context of weighing up the interests of a work of architecture, it is not necessary to examine whether other planning alternatives would have led to a more less impair-ment of the interests of the author. It is true that, at the first modification, the owner of such a building must, in principle, seek a solution which does not affect the author concerned as much as possible. However, if he has opted for a particular plan, the only question in the balance of interests is – due to civil and copyright law! – whether the author concerned is to be expected to accept the concrete changes to the structure he has created.

The decision is of enormous importance for the entire construction industry, as it has been assumed that the destruction of a work including protected monuments is – in the view of the civil and copyright law – not an impairment, an opinion that had been taken for granted in the German copyright law for more than hundred years. Admittedly, this does not lead to a "museum guarantee of eternity" in artistic works. In practice, however, a highly complicated balance of interests is needed, the outcome of which cannot always be foreseen. Owners of buildings which are subject to the protection of copyright must therefore also ask themselves, even in the event of demolition, whether they have sufficiently balanced the interests of the former architect as the author.

Now, let us consider the question of a possible prohibition of copyright changes to works of architecture using the example of an epochal German railway planning case, the partial demolition of Stuttgart Central Station as part of the complete redevelopment of Stuttgart's city centre (so-called "Stuttgart 21"[3]).

[2] BGH, Decision of February 21st, 2019 – I ZR 98/17, NJW 2019, 2322, online: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=94479&pos=0&anz=1.

[3] see http://www.bahnprojekt-stuttgart-ulm.de/en/ (access: December 10th, 2019).

2. The Facts

The architectural firm Bonatz and Scholer won the architectural competition for the station building of the then new Stuttgart Central Station on June 20th, 1911. The design was called "umbilicus sueviae" (e. g. the navel of Swabia). The architect's contract was signed in May 1913). Paul Bonatz was mainly responsible for the design, while Friedrich Eugen Scholer, who died in 1949, was responsible for elaborations and technical questions.

The station was built between 1914 and 1928, due to construction delays during the First World War. After considerable destruction in the Second World War, the reconstruction was also carried out with the participa-tion of Paul Bonatz. After the death of Paul Bonatz on December 20th, 1956, further reconstruction work had been carried out.

In the course of the "Stuttgart 21" rail project, the demolition of significant parts of the Stuttgart Central Station building[4], a legally protected monument by the Cultural Heritage Code of the German State Baden-Württemberg, is planned.

On February 28th, 1997, the German Federal Railway Authority with the participation of the City of Stuttgart and the Land of Baden-Württemberg, put out an architectural competition for the conversion of the Stuttgart Central Station, calling, among other things, for the preservation of the stair structures. Let us have a view upon the question of a demolition of the side wings, which was carried out as follows:

> "[...] The station building will be used in all drafts of the cooperative expert procedure in accordance with the specifications of a modern transport station. The functionality of Stuttgart Central Station was an essential requirement for the architect Paul Bonatz. It is supported by the large and small counter hall, the central aisle, the ground-level north exit and the large overhead platform hall. These room constructions with their stair connections are mandatory to preserve[5].
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> As the result of the cooperative report shows, a meaningful urban development of the core city seems possible only if the side wings are demolished. Should these urban planning requirements be supported by the planning authors, the public interests of the preservation of the

[4] Photo, see in no. 5 of OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=13575 (access: December 10th, 2019).

[5] Remark: THIS was the main legal fault in the whole planning process! Not the whole protected monument should be mandatory to preserve, only small parts of it!

Stuttgart Central Station cultural monument must be protected by the public interest of a functioning urban expansion with an associated modern traffic situation.

The preservation of the wing buildings is to be demanded. With a convincing presentation and presentation of the overarching reasons for a functioning urban expansion with a modern traffic situation, the planning authors are free to demolish the wing structures. [...]

The aim is to combine the essential parts of the listed central station and the architectural elements resulting from the requirements of the present into a new, structurally design unit. [...]".

The copyright of Paul Bonatz was not addressed in the competition and in the subsequent planning approval procedure. The grandson of the author Paul Bonatz concluded from this and from the further processes in the competition and in the authorization procedure that the German Federal Railway Authority and the City of Stuttgart were concerned only with further urban development, therefore the wing structures would not hinder the changed function. At the very beginning of the process at the first Court level, it became very clear, that neither the German Federal Railway Authority nor the City of Stuttgart or the Land Baden Württemberg ever were aware of the inherited copyrights of the author!

After jury meetings in April and June 1997, the proposal of the office Ingenhoven, Overdiek, Kahlen and Partner (later: Ingenhoven architects) was selected as the winning design on November 4th, 1997. After that, the side wings and the stairway in the large counter hall had to be demolished, the floor level of the overhead platform hall has to be lowered. The planning approval application of October 30th, 2001 and the subsequent planning approval procedure of the German Federal Railway Authority ended with the planning approval decision of January 28th, 2005, which was made public on February 28th, 2005.

This planning approval decision granted the demolition permit for the north and south wings, the main staircase in the large counter hall and the floor of the overhead platform hall. During the hearing of the Planning approval process, one grandson of the architect of the Stuttgart Main Station building, Paul Bonatz, raised objections to those measures. These objections were rejected without dealing with the copyright issue.

After the long-running political discussion on the costs and financing of the project was completed, the grandson of the architect decided to enforce the prohibition of amendment under the copyright law which had been transferred to him by universal succession under § 28 UrhG, §§ 1922 para. 1, 1942 para. 1 of the Civil Code ("Bürgerliches Gesetzbuch" [BGB]).

By judgment of May 20th, 2010, the Regional Court (Landgericht) Stuttgart[6] dismissed the action, the appeal was dismissed by the Higher Regional Court (OLG) Stuttgart by judgment of October 6th, 2010[7] and finally, the appeal against this decision was also rejected by the Federal Supreme Court by order of November 8th, 2011[8].

3. The Court decisions

3.1. Exclusion of copyright injunction claims by the railway planning approval decision

A legal question, which has not yet been expressly decided, was the question, whether the toleration effect of a planning approval decision contained in § 75 para. 2 sentence 1 of the Administrative Procedure Act (VwVfG), which, finally, provides the possibility of the demolition of a copyrighted work, excludes the assertion of a civil right of injunction.

However, the Stuttgart Regional Court is taking a different and legally preferable view, while the Higher Regional Court Stuttgart and the Federal Supreme Court (BGH) did not see the necessity for clarification.

The Regional Court Stuttgart states that the planning approval decision of the project promoter German Federal Railway Authority did not confer the rights of use of copyright. Copyright should not be taken into account in the planning approval procedure. On the contrary, the promoter of the project, German Federal Railway Authority, had to be able to transfer that right of use only by a separate procedure. The right to injunctive relief is precisely intended to implement the right of Copyright law. In that regard, the implementation of the established plan by partial demolition of the architectural Cultural heritage means partial expropriation in relation to the right of authorship embodied in the work and not merely an impairment of a continuing right[9].

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[6] LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: https://web.archive.org/web/20111113044840/http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294 (access: December 10th, 2019).

[7] OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online: http://lrbw.juris.de/cgi--bin/laender_rechtsprechung/document.py?Gericht=bw&nr=13575 (access: December 10th, 2019).

[8] BGH, Order of November 9th, 2011 – I ZR 216/10, online: http://juris.bundesgerichtshof. de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=7f9e17d803cf8e-387b8e3e75935d2fec&nr=58305&pos=0&anz=1 (access: December 10th, 2019).

[9] LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: https://web.archive.org/web/20111113044840/http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294, no. II 4 (access: December 10th, 2019).

3.2. Legal basis for the claim for injunctive relief

All three instances correctly considered the prohibition of changes un-der copyright law, which is recognized as the basis of the claim by the German jurisdiction, in accordance with § 97 para. 1 UrhG. This prohibition of amendment is equally reflected in §§ 14 and 39 UrhG[10]. For this reason, the civil courts did not make a final decision on the relationship between those provisions. Moreover, both standards required a balance of interests between the interests of owners and authors, which is why a decision – unfortunately from the point of view of monument protection law – could remain open[11].

3.3. The Stuttgart Central Station as work of architecture ("Baukunst")

Both courts correctly assessed Stuttgart Central Station as a copyrighted work of architecture in accordance with § 2 para. 1 No. 4, para. 2 UrhG[12]. The overall structure had a high degree of self-creativeness. It was recognized far beyond the borders of Stuttgart as an architectural masterpiece[13]. For the assessment of the artistic range required for the legal evaluation as a work of architecture, both courts waived the involvement of an expert in accordance with the BGH jurisdiction, but determined the amount of creation from the view of a person receptive to art and somewhat familiar with art things[14].

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[10] LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: https://web.archive.org/web/20111113044840/http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294, no. II 7a aa; OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=b-w&nr=13575, no. 122 (access: December 10th, 2019).

[11] LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: https://web.archive.org/web/20111113044840/http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294, no. II 7a dd (access: December 10th, 2019); OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online:http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=13575, no. 125 (access: December 10th, 2019).

[12] LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: https://web.archive.org/web/20111113044840/http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294, no. II 3a f (access: December 10th, 2019); OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=13575, no. 109 (access: December 10th, 2019).

[13] LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: https://web.archive.org/web/20111113044840/http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294, no. II 3a f; OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=b-w&nr=13575, no. 114 (access: December 10th, 2019).

[14] see e. g. BGH, Decision of March 29th, 1957 – I ZR 236/55, GRUR 1957, 391, 394, "Ledigenheim"; BGH, Decision of March 19th, 2008 – I ZR 166/05, GRUR 2008, 984, 986 , „St. Gottfried".

Such an approach, although confirmed by the jurisdiction, does not do justice to the purpose of the right of personality. It is precisely the personal element of this right that gives it a special, constitutionally secured weight (see below no. 3.5 lit. c). A court only shall fulfill this weight in subsuming if it leaves the answer to the question of the artistic rank to an expert.

By adjusting to the point of view of a person who is reasonably familiar with art things, i. e. a layman, a very subjective element is introduced into the assessment of artistic significance, which is characterized by legal un-certainty of a considerable degree.

However, the lack of involvement of experts in terms of artistic rank has not changed the correct legal assessment that a work of architecture exists here. However, it has a negative impact on the determination of the intensity of intervention to be discussed below (see no. 3.5 lit. b).

3.4. Weighing up interests

In accordance with the previous supreme court jurisdiction on the prohibition of copyright amendment, all court instances assumed that the prohibition of amendment is not unrestricted, but – especially in the case of a building – must be determined on the basis of a consideration of interests whether the owner's interests in change are displacing the conservation interests of the author.[15]

3.5. Conservation interest of the author

a) Creation height of the work

All courts correctly weighed the high degree of design of the copyright work in question as an important criterion[16].

[15] LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: https://web.archive.org/web/20111113044840/http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294, no. II 7a bb (access: December 10th, 2019); OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online:http://lrbw.juris.de/cgi-bin/laender_recht-sprechung/document.py?Gericht=bw&nr=13575, no. 133 (access: December 10th, 2019); vgl. BGH, Decision of October 1st, 1998 – I ZR 104/96, GRUR 1999, 230, 231- „Treppenhausgestaltung"; BGH, Decision of March 19th, 2008 – I ZR 166/05, GRUR 2008, 984, 986 , „St. Gottfried".

[16] LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: https://web.archive.org/web/20111113044840/http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294 , no. II 7a bb (access: December 10th, 2019); OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online: http://lrbw.juris.de/cgi-bin/laender_rechtspre-chung/document.py?Gericht=bw&nr=13575, no. 133, (access: December 10th, 2019).

b) Impairment of the author's work

In determining the intensity of intervention, the considerable problem, the jurisdiction with regard to the artistic evaluation of the work is reflected in the judgment of a person somewhat familiar with art matters. The Regional Court Stuttgart had concluded that the essential parts of the building would remain standing. Gradations between the individual parts of the building are possible as part of a comprehensive balance of interests. The side wings of the main station were clearly subordinated to the remaining components, although there is no legal competence for Courts to decide about the existence or demolition of a protected monument![17] The legal uncertainty, that comes with such amateur assessments is shown by the fact that the Higher Regional Court Stuttgart was much more cautious on this issue. In its view, not "the essential", but "also essential" parts of the structure should remain[18].

c) Weakening of the conservation interest due to the passage of time

According to § 64 UrhG, the term of protection of the author in his work is limited to 70 years after his death "(post mortem auctoris"). With the expiry of the protection period of 70 years, copyright ends by law.

The Regional Court Stuttgart as well as the Higher Regional Court Stuttgart, on the other hand, took the view that even before the expiry of the statutory period of protection (§ 64 UrhG), the interest in copyright conservation would weaken as a result of the increasing passage of time (in this case 54 years)[19]. Both courts referred to the supreme court jurisdiction of the Federal Supreme Court, according to that the copyright conservation interests no longer necessarily have the same weight years or decades after the death of the author as during his lifetime[20].

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[17] LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: https://web.archive.org/web/20111113044840/http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294, no. II 7b bb (3), (access: December 10th, 2019).

[18] OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=13575, no. 200 (access: December 10th, 2019).

[19] LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: https://web.archive.org/web/20111113044840/http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294, no. II 7b dd (access: December 10th, 2019); OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=13575, no. 204 (access: December 10th, 2019).

[20] BGH, Decision of October 13th, 1988 – I ZR 15/87, GRUR 1989, 106, 107 „Oberammergauer Passionsspiele II";BGH, Decision of March 19th, 2008 – I ZR 166/05, GRUR 2008, 984, 986 , „St. Gottfried".

However, such a weakening of copyright protection with increasing passage of time runs counter to the clear wording and the legal purpose of the period of protection of § 64 UrhG[21]. This period is based on the idea that, with in the time of 70 years after the death of the author, there are still close relatives to enable the use of the work[22]. The main legally motif for the acceptance of the end of such a period after 70 years was therefore not the fact that, at that time, the interest in copyright conservation had weakened to such an extent that the protection of protection no longer exists. The precise definition of such a period of validity is to provide clarity on the entire period of validity of the prohibition on copyright. Otherwise, the legislator could have taken a different wording of the copyright protection period. A weakening of copyright protection, to be determined by the courts, is precisely to be prevented by law. Due to this, such a constitutional training is no longer within the limits of permissible judicial training.

Moreover, even with the application of the Federal Supreme Court's jurisdiction, the mere fact of the passage of time does not constitute a sufficient reason for the weakening of copyright conservation interests. The Federal Supreme Court merely determines the passage of time as a prerequisite for the fact that the conservation interests no longer have the same weight "necessarily".

The Federal Supreme Court therefore assumes that, in individual cases, evidence can be found for the weakening of conservation interests when a certain period of time has elapsed.

However, it has never been decided by this Supreme Court what evidence might be used to create such a weakening. The case is therefore also of fundamental importance in accordance with § 543 para. 2 sentence 1 of the Civil Procedural Code (Zivilprozessordnung [ZPO])[23].

The courts have not found any such indications of the weakening, with the exception of the passage of time in themselves. The fact that the author's grandson had already raised objections to the demolition of the side wings during the planning approval procedure and, secondly, the fact that Stuttgart Central Station was the undisputed main work of the author, Architect Paul Bonatz, which first created worldwide fame, rather argues, that in this case, even if the jurisdiction of the Federal Supreme Court is

[21] also BULLINGER W. [in:] A.-A. Wandtke, W. Bullinger, *Praxiskommentar Urheberrecht*, C. H. Beck, München, 5th edition 2019, Introduction Vor §§ 12 ff. Rn 10.

[22] LÜFT S. [in:] A.-A. Wandtke, W. Bullinger, *Praxiskommentar Urheberrecht*, C. H. Beck, München, 5th edition 2019, § 64 Rn.1.

[23] See THOMAS H., PUTZO H., *Zivilprozessordnung: ZPO*, C. H. Beck, München, 40th edition 2019, § 511 Rn. 20.

taken into account, a weakening of the copyright interests cannot be assumed. The courts themselves also basically assumed that the higher the degree of design, the greater the link between the author and his work[24]. In view of the observed high degree of design, it seems contradictory in this respect that the conservation interests should then supposed to have weakened.

d) No consideration of the constitutional range of copyright

Surprisingly, the courts did not mention the fundamental legal significance of the case. The right of personality is protected by art. 2 para. 1 in connection with art. 1 para. 1 of the Constitution of the Federal Republic of Germany (Grundgesetz [GG]) as a special manifestation of the general right of personality[25]. The interference with that fundamental right should have been taken into account in the balance of interests.

The German Federal Railway Authority, as the project promoter, is bound by fundamental rights. The Higher Regional Court Stuttgart was rejecting this.[26] In support of its argument, it states that, with the conversion of the railway into a privately held company – nevertheless, owned by the Federal Republic of Germany for 100 %! – it would be no longer subject to the public interest mission, which is otherwise owned by the State administration. On the contrary, the German Federal Railway Authority would now be entitled to fundamental rights (against the State power) like a private person[27].

This argument is extremely shortened, since it refutes itself as the constitutional right to protection from the state also by the way of privatization cannot really be granted by the state itself. In addition, a deposition solely on the legal form would mean that whenever the executive acts in the form

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[24] LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: https://web.archive.org/web/20111113044840/http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294, no. II 7 b aa (1) (access: December 10th, 2019); OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=13575, no. 136 (access: December 10th, 2019).

[25] SCHULZE G. [in:] T. Dreier, G. Schulze, *Urheberrechtsgesetz: UrhG*, C. H. Beck, München, 6th edition 2018, before §§ 12 ff., Rn 5; DREIER T. [in:] *Urheberrechtsgesetz*..., Introduction, Rn. 39; W. BULLINGER W., *Praxiskommentar*..., before §§ 12 ff., Rn. 16.

[26] OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=13575, no. 159 ff (access: December 10th, 2019).

[27] OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=13575, no. 160 (access: December 10th, 2019).

of private law, the binding of the State power to fundamental rights would be eliminated. In view of the fundamental freedom of choice of the legal form of action by the administration, this would lead to a circumvention of the binding of all state powers to fundamental rights, which is incompatible with the basic idea of art. 1 para. 3 of the German Constitution (GG).

Something else could result from the fact that the basic decision of the railway reform is being taken, namely that not only an organizational privatization has been carried out, but also a privatization of the task of the transport company German Federal Railway Authority. It is concluded from this that the railways are thus relieved of all public interest and also of the binding of fundamental rights[28].

However, this must be rejected[29]. On the one hand, it should be noted that, in accordance with the wording of art. 87e of the Federal Constitution (GG), these are still "federal railways". As a result, the wording of the provision makes it clear that full privatization of tasks is not desirable.

An interpretation of art. 87e para. 3 GG in conjunction with art. 87e para. 4 GG also shows that such a privatization of tasks did not mean that the railways were exempt from public interest. In accordance with art. 87e para. 4 GG, the Federal Republic of Germany guarantees the public interest of the railways. The addressee of this warranty obligation is, in terms of wording, the Federal Republic of Germany resp. the Confederation. However, the fact that the Confederation can fulfil this guarantee, presupposes that the railways are still subject to the common good. If it did not, the federal government would not be able to guarantee the common good, because it could not oblige the railways to do anything from which it is exempt from the constitution.

This applies especially to the construction and maintenance of rail-way lines, including the construction of the station. The undertakings concerned in this sector must remain in the majority ownership of the Confederation in accordance with the clear provisions of art. 87e para. 3 sent. 2, 3 GG. If the constitutional legislator did not want to achieve a special public interest in those companies relating to the construction and maintenance of railway lines, he would not have regulated such a compulsory majority of the Confederation. The Constitutional Legislator, the public, wants to achieve that the Confederation is enabled to fulfil its duty to ensure the common good orientation of the railways (art. 87e para. 4 GG) in particularly effective way.

[28] MÖSTL M. [in:] T. Maunz, G. Dürig, *Grundgesetz*, 86. Suppl. 2019, C. H. Beck München, Art. 87 e GG, nos. 80 ff.

[29] see REMMERT B. [in:] *Grundgesetz*..., Art. 19 para. GG, nos. 59 f.

However, as has been shown, this presupposes that there is a special public interest of the railways in the areas referred to in art. 87e para. 3 sent. 2 GG. There is no other way to do that, if the relevant jurisdiction on German Telekom's ability for own fundamental rights is taken into account.

In this case, the German Federal Administrative Court (BVerwG) has held that Telekom's capacity for fundamental rights (and therefore its lack of commitment to fundamental rights) must be assumed in view of its private sector activities and the status of tasks[30].

A comparison of the provision of art. 87e and art. 87f lit. f) GG, which regulates postal services and telecommunications, shows that art. 87f lit. s) GG does not contain a public interest clause comparable to art. 87e para. 4 GG. Moreover, Telekom is no longer wholly owned by the State (in the very difference to the German Federal Railway Authority, see above).

Even, if one sees this differently and considers a complete separation of the federal railway transport Companies from the common good and fundamental rights binding as constitutionally desired, this is still not to be assumed at present. The economic position of the railways, which was intended by the constitutional legislator, has still not been achieved. All railway companies in the German Federal Railway Succession are still 100% owned by the Federal Republic of Germany. The objective of the railway reform, i.e. a complete private sector position of the railways, has not yet materialized. Consequently, its effects on public interest cannot yet be fully expressed. In view of the state's exclusive ownership, there is still no link between the railway and the freedom of natural persons. Only then, however, could one speak of an independent right of fundamental rights of the railways and thus a detachment from the obligation to fundamental rights.

Even if, however, one were already allowed to assume that the railways were completely detached from the fundamental right binding, the courts have nevertheless failed to recognize that the copyright balance between private legal entities is also strictly related to the value system of the federal Constitution (GG). The individual legal assets must be honoured in the spirit of their constitutional status, in particular fundamental rights[31]. If the fundamental position of the right of personality had been taken into account, it would have been given a much stronger position in the context of the weighing.

[30] Federal Administrative Court (Bundesverwaltungsgericht [BVerwG]), Decision of April 25th, 2001 – 6 C 6/00, BVerwGE 114, 160 (189).

[31] See in general: Federal Constitutional Court (Bundesverfassungsgericht [BVerfG]), Deci-sion of January 15th, 1958 – 1 BvR 400/51, BVerfGE 7, 198 [205] "Veit Harlan".

4. Interest in change of the promoter German Federal Railway Authority

a) Change in the use of buildings

The courts considered the change in the purpose of the Stuttgart Central Station to be of serious concern on the part of the project promoter German Federal Railway Authority. Every building, in particular a purpose-built building, such as a railway station, is also characterized by its intended use. An author must, in accordance with the purpose of his commission, tolerate in good faith such changes which are necessary for the preservation and improvement of the intended use. The two side wings essentially lose their function by converting the terminal station into a through station[32].

In the case of a station building, which is more than 90 years old, the interest in modernization must also be given a very high weight. It is precisely the adaptation to new traffic needs that weakens the interest in copyright conservation in station buildings more than in other purpose-built buildings[33].

The court's view that changes requiring the purpose of use must be tolerated, is correct in principle. Nevertheless, as will be shown in the consequences, the courts have given too much weight to the modernization interests of the project promoter. The duty, to seek intensively for an alternative solution, should have been taken into account solely out of the great constitutional weight of architectural (and for sure also archaeological) cultural heritage for every self-called "Cultural State".

b) No check for alternatives

In accordance with the jurisdiction of the Federal Supreme Court (BGH),[34] both instance courts take the view that it does not diminish the weight of the promoter's interests if a variant seems to be realistic, which is less inconsistent with the interests of the author than the selected planning.

That jurisdiction must, in principle, be rejected.

It is undisputed in German Copyright law, that the promoter has to

[32] OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online: http://lrbw.juris.de/cgi-bin/laender_recht-sprechung/document.py?Gericht=bw&nr=13575, no. 224 (access: December 10th, 2019).

[33] LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: https://web.archive.org/web/20111113044840/http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294, no. II 7 c bb (2) (access: December 10th, 2019).

[34] BGH, Decision of May 31st, 1974 – I ZR 10/73, GRUR 1974, 675, 678, "Schulerweiterung"; BGH, Decision of March 19th, 2008 – I ZR 166/05, GRUR 2008, 984, 986, „St. Gottfried".

choose the most gentle variant for the copyrighted work.[35] That obligation would be completely void if the Courts do not want to verify if this duty might have been fulfilled. This is all the more true, if the non-gentle alternative chosen by the promoter is still used as an argument for the promoter's interests to outweigh those of the author: Thus, in its judgment, the Higher Regional Court Stuttgart states that the incompatibility of the preservation of the side wings with the decisive planning variant must be taken into account in favour of the promoter German Federal Railway Authority[36].

As a result, the infringement of copyright by the promoter in form of the choice of the most non-constrictive variant is thus set aside twice in favour of the latter: on the one hand, the fact that the court does not check the possibility of an assessment seaking for a more weak alternative to "rescue" as much as possible of the monument, on the other hand by the fact that the incompatibility of the chosen alternative with the conservation interest under copyright law is also assessed in favour of the promoter.

This does not do justice to the fundamental legal status neither of the copyright law in art. 2 para. 1 GG and art. 1 para. 1 GG nor to the also constitutional protected Cultural Heritage including monuments, which has already been mentioned.

The present case of a previous planning approval procedure does not arise another result due to the fact that an alternative examination has already been carried out there[37]. According to the correct statements of the Regional Court Stuttgart, copyright law is not part of the planning approval procedure. In that case, it cannot have been the subject of the alternative examination there. Although, in fact, copyright matters were dealt with on the basis of the objections given by the author's grandson, they have not been taken into account with the rank they are constitutionally entitled to.

If copyright had already been the subject of the planning approval procedure, the alternative examination would have taken place against the background of its constitutional status and would therefore have had to be carried out much more strictly.

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[35] BGH, Decision of March 19th, 2008 – I ZR 166/05, GRUR 2008, 984, 986 , „St. Gottfried"; OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online: http://lrbw.juris.de/cgi-bin/laender_recht-sprechung/document.py?Gericht=bw&nr=13575, no. 175 (access: December 10th, 2019).

[36] OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online: http://lrbw.juris.de/cgi-bin/laender_recht-sprechung/document.py?Gericht=bw&nr=13575, no. 211ff., 217, 237 (access: December 10th, 2019).

[37] So, however: LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294, no. II 7 c cc Rn. 3 (access: December 10th, 2019).

c) Public interest

The courts disagreed on the issue, whether public interests should also be included in the balance of interests.

The courts agreed on the approach that public concerns must be included in the copyright-law balance when the promoter have to take such public concerns into account[38].

However, the Regional Court Stuttgart and the Higher Regional Court Stuttgart came to different conclusions when it came to the question of whether the German Federal Railway Authority Bahn fulfils this condition. While the Regional Court Stuttgart assumed that public concerns must also be taken into account by the promoter of the project[39], the Higher Regional Court Stuttgart rejected this on the same basis as it denied a fundamental right binding of the German Federal Railway Authority[40].

In consequence, the view of the Higher Regional Court Stuttgart must also be rejected. Reference can be given to the comments on the binding of fundamental rights. Therefore, if one assumes a fundamental public interest of the railways, especially in the construction of railways, it remains to be asked whether aspects of the common good here speak in favour of the withdrawal of the copyright interest in conservation.

The District Court had answered in the affirmative[41]. The significant public interest is reflected in the planning approval decision.

It has to be admitted that traffic aspects have to be included in the balance, since rail transport is currently serving a public purpose. In this regard, however, as already stated in subchapter 4 lit. b) above, it would have had to be taken into account that traffic aspects do not require the demolition of the wing structures and thus an interference with the copyright interest of conservation.

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[38] LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: https://web.archive.org/web/20111113044840/http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294, no. II 7 c dd (access: December 10th, 2019); OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=13575, no. 50 (access: December 10th, 2019).

[39] LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: https://web.archive.org/web/20111113044840/http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294, no. II 7 c dd (2), (3) (access: December 10th, 2019).

[40] OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=13575, no. 159 ff. (access: December 10th, 2019).

[41] LG Stuttgart, Decision of May 20th, 2010 – 17 O 42/10, online: https://web.archive.org/web/20111113044840/http://www.landgericht-stuttgart.de/servlet/PB/menu/1254450/index.html?ROOT=1169294, no. II 7 c dd (2), (3), (access: December 10th, 2019).

The jurisdiction should have had agreed that urban planning concerns are not to be taken into account[42]. The German Federal Railway Authority, as the promoter of the project, did (and does) not have the task of operating urban planning. In contrast to the courts in this case, public interests must therefore be taken into account, but not of significant (e. g. dominant!) importance.

5. Summary

It is gratifying, that the Regional Court Stuttgart considered it possible to assert the claim for an injunction under copyright law, despite the toleration effect of the planning approval decision, with convincing arguments.

The judgments of the Regional Court Stuttgart and of the Higher Regional Court Stuttgart also correctly considered the outstanding height of the creation of the Stuttgart Central Station building as a decisive concern on the part of the grandson of the author, the modernization interests as a decisive reason on the part of the project promoter.

However, in weighing up these conflicting interests, the courts were not required to take account of the fundamental rights relevance of the case, in particular because of the lack of consideration of possible alternatives to the attainment of the modernization interests of the promoter. In consequence, the weighting of the Courts came to an unconstitutional result, finally at the expense of the author, his heirs and the civil society as a whole. If alternatives would have been taken into account, a solution could and would have been found that would meet both interests. The numerous participants in the planning competition, which provided for the preservation of the side wings, had shown that a change in the purpose of use, which must be possible for any owner, does not prevent the preservation of the side wings of the Stuttgart Central Station building.

In the event of a failure of the decisive court to examine the alternatives, this finally leads in this case to the fact that, contrary to the assertions made by the courts, only design (or other) reasons are decisive for the withdrawal of copyright interests and for the destruction of monuments. It was only the chosen design that did not permit the preservation of the entire copyrighted work".

[42] OLG Stuttgart, Decision of October 6th, 2010 – 4 U 106/10, online: http://lrbw.juris.de/cgi-bin/laender_rechtspre-chung/document.py?Gericht=bw&nr=13575, no. 165 (access: December 10th, 2019).