

**„A discussion on the amendment, finally the destruction of protected monuments and its special standing as copyright work in Germany“**

→ File 1

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[\(http://w-goehner.de/\)](http://w-goehner.de/)

Dear President,  
Dear Colleagues,

Thank you, Dear Colleagues, for giving me the opportunity to be with you at an ICLAFI Conference as a Member of ICLAFI for the very first time since 2014.

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Due to the main topic of the originally Gliwice-Conference, I delivered a meanwhile published report – many thanks to you, dear Wojciech!<sup>2</sup> – about **“The Amendment, finally the destruction of protected monuments and its special standing as copyright work in Germany”**. Today, I will only be able to give you some impressions about the discussions and my thoughts about this item. I have just linked my whole lecture, which became part of the amazing and fascinating commemorative publication for Professor Wojciech Kowalski.

→ **File 2** The destruction of a copyrighted work may be an impairment within the meaning of → **File 3** Section 14 of the German Federal Copyright and Related Rights Act (Copyright Act). 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 Section 14 Copyright Act, 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 Section 14 Copyright Act. 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.

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<sup>2</sup> 1.285 Wolfgang Karl Göhner "[A discussion on the amendment, finally the destruction of protected monuments and its special standing as copyright work in Germany](#)", in: Marlena Jankowska, Paulina Gwoździwicz-Matan, Piotr Stec (Wissenschaftliche Redakteure) „[Własność Intelektualna a Dziedzictwo Kulturowe – Księga jubileuszowa dedykowana Profesorowi Wojciechowi Kowalskiemu](#) (Geistiges Eigentum und Kulturerbe - Festschrift für Professor Wojciech Kowalski)" zum Symposium (Web-Conference) des ICOMOS International Scientific Committee on Legal, Administrative and Financial Issues in January 20<sup>th</sup>-21<sup>st</sup>, 2021, Wydawnictwo IUS PUBLICUM, Instytut Prawa Gospodarczego Sp. z o.o., Warszawa, 8. Februar 2020, 984 Seiten, Seiten 432-447, ISBN 978-83-955355-3-6 (Author & ICLAFI-Member)

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 Section 14 Copyright Act 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 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 as well as 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 → **File 4** of February 21<sup>st</sup>, 2019<sup>3</sup>, 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 less impairment of the interests of the author. It is true that, at the first modification, the owner of such a building must seek a solution, in principle, 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

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<sup>3</sup> BGH, Decision of February 21<sup>st</sup>, 2019 – I ZR 98/17, NJW 2019, 2322, online: <https://openjur.de/u/2170418.html>.

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.

→ **File 5** The very first time, I was confronted with our Conference topic, came up out of the legal consequences that the main architect of the venues of the XXth Olympic Games 1972 in Munich, Prof. Dr. h. c. Günther **Behnisch**, was successful in gaining the personnel → **File 6** copyright for his construction plans including future developments and amendments. In particular, for my father Werner **Göhner**<sup>4</sup>, the first managing director of the management company, founded for the post-Olympic use of the → **File 7** Olympic sports facilities, it was an ongoing burden from the end of 1972 on. My father was always seeking for new uses of the buildings and the parc. So he had always to find the balance in handling the necessities of progress and change especially in the use of the buildings, constructed for big sport events, → **File 8** as well as new green lung for the city of Munich, the Olympic parc, on the one hand, and the copyright of the architect, who had to be asked for his permission for rather everything. Finally, they both found good solutions, so, today, I cannot present legal struggles or decisions!

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<sup>4</sup> see [Werner Göhner – Wikipedia](#)

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 → **File 9** as part of the complete redevelopment of Stuttgart's city centre (so-called "Stuttgart 21"<sup>5</sup>).

→ **File 10** The architectural firm **Bonatz and Scholer** won the architectural competition for the station building of the then new Stuttgart Central Station on June 20<sup>th</sup>, 1911. → **File 11** The design was called "umbilicus sueviae" (e. g. the navel of Swabia).

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, → **File 12** the reconstruction was also carried out with the participation of Paul **Bonatz**. After his death on December 20<sup>th</sup>, 1956, further reconstruction work had been carried out.

In the course of the "Stuttgart 21" rail project, → **File 13** it was planned to demolish significant parts of the Stuttgart Central Station building<sup>6</sup>, a legally protected monument by the Cultural Heritage Code of the German State Baden-Württemberg.

On February 28<sup>th</sup>, 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. → **File 14**

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<sup>5</sup> see <http://www.bahnprojekt-stuttgart-uhl.de/en/> (access: December 10<sup>th</sup>, 2019).

<sup>6</sup> Photo, see in no. 5 of OLG Stuttgart, Decision of October 6<sup>th</sup>, 2010 – 4 U 106/10, online: [http://lrbw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2](http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2) (access: February 24<sup>th</sup>, 2020).

The copyright of Paul **Bonatz** was not addressed in the competition and in the → **File 15** 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 4<sup>th</sup>, 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.

This planning approval decision of February 28<sup>th</sup>, 2005 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, Peter **Dübbers**, 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.

→ **File 16** 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 Section 28 Copyright Act, Sections 1922 *para. 1*, 1942 *para. 1* of the Federal Civil Code ("*Bürgerliches Gesetzbuch*" [BGB]).

→ **File 17** By judgment of May 20<sup>th</sup>, 2010, the Regional Court (Landgericht) Stuttgart<sup>7</sup> dismissed the action, the appeal was dismissed by the Higher Regional Court (OLG) Stuttgart by judgment of October 6<sup>th</sup>, 2010<sup>8</sup> and finally, the appeal against this decision was rejected by the Federal Supreme Court by order of November 8<sup>th</sup>, 2011<sup>9</sup>.

→ **File 18** All three instances correctly considered the prohibition of changes under copyright law, which is recognized as the basis of the claim by the German jurisdiction, in accordance with → **File 19** Section 97 *para. 1* Copyright Act. This prohibition of amendment is equally reflected in Sections 14 and 39 Copyright Act<sup>10</sup>. 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<sup>11</sup>.

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<sup>7</sup> LG Stuttgart, Decision of May 20<sup>th</sup>, 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).

<sup>8</sup> OLG Stuttgart, Decision of October 6<sup>th</sup>, 2010 – 4 U 106/10, online: [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2) (access: February 24<sup>th</sup>, 2020).

<sup>9</sup> BGH, Order of November 9<sup>th</sup>, 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).

<sup>10</sup> LG Stuttgart, Decision of May 20<sup>th</sup>, 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 6<sup>th</sup>, 2010 – 4 U 106/10, online: [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2), no. 122 (access: February 24<sup>th</sup>, 2020).

<sup>11</sup> LG Stuttgart, Decision of May 20<sup>th</sup>, 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; OLG Stuttgart, Decision of October 6<sup>th</sup>, 2010 – 4 U 106/10, online: [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2), no. 125 (access: February 24<sup>th</sup>, 2020).

Both courts correctly assessed Stuttgart Central Station as a copyrighted work of architecture resp. “Baukunst” in accordance with → **File 20** Section 2 *para. 1 No. 4, para. 2* Copyright Act<sup>12</sup>. The overall structure had a high degree of self-creativity. It was recognized far beyond the borders of Stuttgart as an architectural masterpiece<sup>13</sup>.

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.<sup>14</sup>

All courts correctly weighed the Conservation interest of the author and the high degree of design of the copyright work in question as an important criterion<sup>15</sup>.

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<sup>12</sup> LG Stuttgart, Decision of May 20<sup>th</sup>, 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 6<sup>th</sup>, 2010 – 4 U 106/10, online: [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2), no. 109 (access: February 24<sup>th</sup>, 2020).

<sup>13</sup> LG Stuttgart, Decision of May 20<sup>th</sup>, 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 6<sup>th</sup>, 2010 – 4 U 106/10, online: [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2), no. 114 (access: February 24<sup>th</sup>, 2020).

<sup>14</sup> LG Stuttgart, Decision of May 20<sup>th</sup>, 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 10<sup>th</sup>, 2019); OLG Stuttgart, Decision of October 6<sup>th</sup>, 2010 – 4 U 106/10, online: [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2), no. 133 (access: February 24<sup>th</sup>, 2020); see BGH, Decision of October 1<sup>st</sup>, 1998 – I ZR 104/96, GRUR 1999, 230, 231- »Treppenhausgestaltung“; BGH, Decision of March 19<sup>th</sup>, 2008 – I ZR 166/05, GRUR 2008, 984, 986, »St. Gottfried“.

<sup>15</sup> LG Stuttgart, Decision of May 20<sup>th</sup>, 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 10<sup>th</sup>, 2019); OLG Stuttgart, Decision of October 6<sup>th</sup>, 2010 – 4 U 106/10, online: [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2), no. 133 (access: February 24<sup>th</sup>, 2020).



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!<sup>16</sup> 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<sup>17</sup>.

According to → **File 21** Section 64 Copyright Act, 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 (Section 64 Copyright Act), the interest in copyright conservation would weaken as a result of the increasing passage of time (in this case 54 years)<sup>18</sup>. Both courts referred to the Supreme

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<sup>16</sup> LG Stuttgart, Decision of May 20<sup>th</sup>, 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 10<sup>th</sup>, 2019); OLG Stuttgart, Decision of October 6<sup>th</sup>, 2010 – 4 U 106/10, online: [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2), no. 200 (access: February 24<sup>th</sup>, 2020).

<sup>17</sup> OLG Stuttgart, Decision of October 6<sup>th</sup>, 2010 – 4 U 106/10, online: [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2), no. 200 (access: February 24<sup>th</sup>, 2020).

<sup>18</sup> LG Stuttgart, Decision of May 20<sup>th</sup>, 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 10<sup>th</sup>, 2019); OLG Stuttgart, Decision of October 6<sup>th</sup>, 2010 – 4

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<sup>19</sup>.

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 has elapsed.

However, it has never been decided by the Supreme Court what evidence might be used to create such a weakening.

Surprisingly, the courts did not mention the fundamental legal significance of the case. The right of personality is protected by → **File 22** art. 2 *para. 1* in connection with art. 1 *para. 1* of the Constitution of the Federal Republic of Germany (*the so-called "Basic Law" [GG]*) as a special manifestation of the general right of personality<sup>20</sup>. The interference with that fundamental right should have been taken into account in the balance of interests.

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U 106/10, online: [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/docu-ment.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/docu-ment.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2), no. 204 (access: February 24<sup>th</sup>, 2020).

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

<sup>20</sup> **SCHULZE** G. [in:] T. Dreier, G. **Schulze**, Urheberrechtsgesetz: Copyright Act, C. H. Beck, München, 6th edition 2018, before Sections 12 ff., Rn 5; **DREIER** T. [in:] Urheberrechtsgesetz..., Introduction, Rn. 39; W. **BULLINGER** W., Praxiskommentar..., before Sections 12 ff., Rn. 16.

Fundamental rights bind the German Federal Railway Authority, as the project promoter. The Higher Regional Court Stuttgart was rejecting this.<sup>21</sup>

→ **File 23** 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. In accordance with the purpose of his commission, an author must tolerate such changes in good faith, 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<sup>22</sup>.

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<sup>23</sup>.

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 archaeological) cultural heritage for every self-called "Cultural State".

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<sup>21</sup> OLG Stuttgart, Decision of October 6<sup>th</sup>, 2010 – 4 U 106/10, online: [http://lrbw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2](http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2), nos. 159 ff. (access: February 24<sup>th</sup>, 2020).

<sup>22</sup> OLG Stuttgart, Decision of October 6<sup>th</sup>, 2010 – 4 U 106/10, online: [http://lrbw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2](http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2), no. 224 (access: February 24<sup>th</sup>, 2020).

<sup>23</sup> LG Stuttgart, Decision of May 20<sup>th</sup>, 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 10<sup>th</sup>, 2019).

It is undisputed in German Copyright law that the promoter has to choose the gentlest variant for the copyrighted work.<sup>24</sup> That obligation would be completely void if the Courts do not want to verify if this duty might have been fulfilled.

→ **File 24** 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.

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<sup>24</sup> BGH, Decision of March 19<sup>th</sup>, 2008 – I ZR 166/05, GRUR 2008, 984, 986, „St. Gottfried“; OLG Stuttgart, Decision of October 6<sup>th</sup>, 2010 – 4 U 106/10, online: [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&sid=6b6d0be2a45a0483b333161bf1f0fe3f&nr=13277&pos=1&anz=2), no. 175 (access: February 24<sup>th</sup>, 2020).

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”.

→ **File 25** Thank you for your attention!

***Assessor iuris Wolfgang Karl Göhner, München***

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Cultural Heritage Laws, Publications)