

Chapter 1: On how to deal with Pandora's Box – copyright in works of Nazi leaders

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Abstract

The question on how to deal with works that promote hate has resurfaced after Hitler's "Mein Kampf" and Josef Goebbels' diaries have entered the public domain in the beginning of 2015. While copyright still subsisted in these works, it was applied in two contrasting ways: On the one hand, it was applied as a tool to restrict access and dissemination like with "Mein Kampf" but was applied to generate income as seen with respect to the Goebbels diaries on the other.

The chapter will trace the publishing history of Hitler's "Mein Kampf" and how copyright law was applied in the different stages. It will then contrast this to the fate of Josef Goebbels' diaries. After this historical account, it will look at how copyright law applies to such works more generally and address other regulatory responses, such as criminal law. Finally, it will assess the suitability of copyright to regulate these forms of works.

i. Introduction

January 1st does not just commonly mark the beginning of the New Year according to the Gregorian calendar but is often celebrated as the Public Domain day. 1 January 2016 saw a particularly controversial work entering the public domain: Adolf Hitler's "Mein Kampf". The lapse of copyright protection in this particular work means that anyone is able to reproduce or disseminate the work without being liable for copyright infringement. Before this date the Free State of Bavaria, who held the ownership of the copyright, vigorously challenged any form of further reproduction and dissemination by applying the tools of copyright law.

The loss of copyright law as a mechanism to restrict the use and dissemination of "Mein Kampf"—"the unread bestseller"¹—triggered the question as to what regulatory measures could replace copyright to restrict the further diffusion of its contents. With this regard, a formal query in the German Parliament, the Bundestag, has been posed by the Parliamentary Group of the Social Democratic Party in Germany (SPD) to the German Government as to what options would remain available.² A starkly different approach to address this particular text was taken by the Munich-based Institute of Contemporary History (Institut für Zeitgeschichte). It published an

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¹ See, Othmar Plöckinger, *Geschichte eines Buches: Adolf Hitlers "Mein Kampf" 1* (2nd ed. 2011).

² See, *Kleine Anfrage der SPD Bundestagfraktion, BT-Drucksache 17/12426, 1* (Feb. 20, 2013).

annotated version of “Mein Kampf” in 2016³ which was controversially discussed in the domestic and international media.⁴ The head of the Jewish community in Munich, Charlotte Knobloch, stated that the re-publication of the book would constitute the opening of Pandora’s box that “once opened cannot be closed”.⁵

“Mein Kampf” is arguably the most prominent example for such “literature” but other works of leaders of the “Third Reich” like Joseph Goebbels diaries and Alfred Rosenberg’s “Der Mythus des zwanzigsten Jahrhunderts“ have to be mentioned in this context as well. The controversies surrounding the treatment of such works with their inhuman and racist contents are obvious. Should such works be freely available in order to educate the public? Or should such contents be erased from the face of the earth to eradicate its inflammatory rhetoric and contents—a rather futile attempt in the days of the internet. Another important aspect of this debate—wonderfully demonstrated by the discussions surrounding the Goebbels diaries—is how the income generated from such works enabled through copyright is distributed. This chapter will trace how copyright operates with regards to such works; in particular, how it has been used to restrict their access and dissemination.⁶ The focus here will lie on the analysis over the issues surrounding “Mein Kampf” due to the current debates surrounding its recent entry into the public domain. The chapter will then outline which other regulatory responses are currently applied to counteract the further dissemination of such works with a focus on German criminal law. Finally, the chapter will discuss whether copyright law is a suitable regulatory tool to restrict access and the dissemination of such works and its contents.

³ See, Hitler, *Mein Kampf. Eine kritische Edition*, Institut für Zeitgeschichte, <http://www.ifz-muenchen.de/publikationen/einzelwerke/ea/publikation/hitler-mein-kampf/> (last access Oct. 19, 2017).

⁴ See Neil Gregor, *Mein Kampf: Eine Kritische Edition review – taking the sting out of Hitler’s hateful book*, *The Guardian* (Feb. 4, 2016, 7:30 PM), http://www.theguardian.com/books/2016/feb/04/mein-kampf-hitler-eine-kritische-edition-review?CMP=fb_gu; Björn Hengst, *3700 Fußnoten gegen Hitlers Hass*, *Spiegel Online* (Dec 21, 2015, 4:20 PM), <http://www.spiegel.de/kultur/gesellschaft/mein-kampf-in-kritischer-edition-3700-fussnoten-gegen-adolf-hitlers-hass-a-1068562.html>.

⁵ See Anthony Faiola, ‘Mein Kampf’: A historical tool, or Hitler’s voice from beyond the grave?, *Washington Post* (Feb. 24, 2015), https://www.washingtonpost.com/world/europe/mein-kampf-a-historical-tool-or-hitlers-voice-from-beyond-the-grave/2015/02/24/f7a3110e-b950-11e4-bc30-a4e75503948a_story.html?utm_term=.121e606c9632.

⁶ For a more general discussion on copyright protection of illegal works see the analysis offered by Eldar Haber in Chapter

ii. Short story of “Mein Kampf”

Adolf Hitler’s “Mein Kampf” is devised into two volumes. The first volume was developed and finalized during Hitler’s prison sentence in Landsberg am Lech. The sentence of high treason was awarded due to Hitler’s leadership in the unsuccessful Munich or Beerhall Putsch of November 1923 in which he sought to overthrow the Bavarian government. The first volume was published after Hitler’s release in 1925 and contains mainly autobiographical elements and elaborates on the beginnings of the National-Socialist party in Germany. The second volume, which contains more programmatic statements, was written after Hitler’s release from prison and was published in 1926. Both volumes were published by Franz-Eher Verlag, the publishing house of the National Socialist German Workers' Party (NSDAP) and were eventually combined into one tome in 1930.⁷

While the book sold reasonably well before the Nazi seizure of power in January 1933⁸, the sales significantly increased to around 1,080,000 copies in that year alone.⁹ Various editions of the book were available - among them a wedding edition which was given to couples on their nuptials from 1936 onwards.¹⁰ Around 10 Million copies have been circulating in Germany in the years from 1933 and 1945.¹¹ Hitler’s stake in the sales of the book was considerate: Until 1932, he earned 10% of royalties and from 1 January 1933 on 15%.¹² In order to maintain the stream of income from the tome, the President of the “Reichsschrifttumskammer”, the state chamber for literature, instructed German book sellers only to sell new copies of “Mein Kampf”.¹³ Additionally, Hitler’s income from the royalties became tax free since he generally did not pay any taxes on his income from spring 1935 on.¹⁴

Along with the editions sold in Germany, “Mein Kampf” was also published abroad. Interestingly, copyright law was either used as a tool to facilitate its dissemination or used as a method to restrain unauthorized translations. On the one hand, the Franz-Eher Publishing House promoted the book in English-speaking nations since Hitler sought to establish an alliance with

⁷ See Plöckinger, supra note 1, at 182.

⁸ The book outsold those of other “Nazi” authors such as Ernst Röhm’s “Geschichte eines Hochverrätters” or Rosenberg’s “Mythus des 20. Jahrhunderts”. Only Joseph Goebbels’ booklet “Wege ins Dritte Reich” was able to keep up with the sales of “Mein Kampf”; See, Othmar Plöckinger, supra note 1.

⁹ See Plöckinger, supra note 1, at 185.

¹⁰ See, Jürgen Seul, Hitlers “Mein Kampf” im Spiegel der Justiz - Zum juristischen Umgang mit dem wohl umstrittensten Buch deutscher Sprache, 14 Medien und Recht Int. 131, 134 (2014).

¹¹ See, Sascha Sebastian & Robert Briske, Die Verwertung von Hitlers „Mein Kampf“ – Eine urheber- und strafrechtliche Analyse, Zeitschrift für Medien-und Kommunikationsrecht 101, 101 (2013); See also, Andreas Heldrich, Das Territorialitätsprinzip im Internationalen Urheberrecht: Ein Freibrief für ein entsetzliches Buch, in Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag, Vol 2, 645, 645 (Andreas Heldrich ed., 2007).

¹² See, Seul, supra note 10, at 134. It has been said that the income from the royalties were used to acquire Hitler’s Mountain residence on the Obersalzberg near Berchtesgaden; see Heldrich, supra note 11, at 645-46.

¹³ See, Roland Aegerter, Ein Machwerk und seine Wirkung im Spiegel der Zeiten - Vor 75 Jahren erschien Hitlers «Mein Kampf», Neue Zürcher Zeitung (Jan. 5, 2002), <https://www.nzz.ch/article7vitg-1.354185>.

¹⁴ See, Sven Felix Kellerhoff, “Mein Kampf” brachte Hitler Millionen. Steuerfrei, Die Welt (Sep. 25, 2015), <https://www.welt.de/geschichte/zweiter-weltkrieg/article146837543/Mein-Kampf-brachte-Hitler-Millionen-Steuerfrei.html>.

England against the Soviet Union.¹⁵ Therefore, an English translation was published in the UK at the publishing house of Hurst & Blackett in October 1933.¹⁶ This version was heavily abridged as it excluded certain references to Anti-Semitism¹⁷ and to some of Hitler's foreign policy ambitions.¹⁸ The English publisher was positively surprised by the volume of the sales; around 90,000 copies were sold until the end of 1938.¹⁹ A slightly altered version was published in the United States in 1933.²⁰ Its apparent abridgements were noticed within the highest circles of the US government.²¹

A starkly different approach was applied in France, where copyright was used to restrict an unauthorised translation of "Mein Kampf". The French publisher Fernand Sorlot published an unauthorized, full French translation at his publishing house "Editions Nouvelles Latines". Hitler's publishers, however, wanted to avoid a full French translation of "Mein Kampf"²² and successfully sued for copyright infringement in the French Courts. Hitler himself sanctioned this since he did not want to have a comprehensive reading in the country which he harshly attacks in his book.²³

The publication history of "Mein Kampf" in Germany shared a similar fate as its author at the end of the Second World War: its publication forbidden by the Allied Commission;²⁴ its printing plates held by the Franz Eher Verlag melted and destroyed.²⁵ Some of the published editions were used for heating purposes along with other devotional material of the Nazis, as Heldrich suggests.²⁶ Abroad, the book was still being published and disseminated²⁷ while the Free State of Bavaria has eagerly fought to restrict publication there.²⁸ Based on the already wide distribution of the book and the inception of the internet – the world's largest copy machine - this resembled a Sisyphian task. Now, after the lapse of copyright protection, it appears that the "genie" cannot be placed into the bottle again, that Pandora's box has irrevocably been

¹⁵ See Plöckinger, supra note 1, at 461.

¹⁶ See, Heldrich supra note 11, at 645, 652; See also, Plöckinger, supra note 1, at 462.

¹⁷ See Plöckinger, supra note 1.

¹⁸ Dan Stone, The 'Mein Kampf Ramp': Emily Overend Lorimer and Hitler Translations in Britain, 26 German Hist. 504, 508 (2008).

¹⁹ See Plöckinger, supra note 1, at 463.

²⁰ See Plöckinger, supra note 1, at 462.

²¹ A hand-written note within President Franklin D. Roosevelt's copy of "Mein Kampf" stated: "this translation is so expurgated as to give a wholly false view of what Hitler really is or says – The German original would make a different story."; See Plöckinger, supra note 1, at 499.

²² See Plöckinger, supra note 1.

²³ See, Le Monde, Pour une édition critique de "Mein Kampf" (Oct. 6, 2011, 4:30 PM),

http://www.lemonde.fr/livres/article/2011/10/06/pour-une-edition-critique-de-mein-kampf_1582887_3260.html.

²⁴ See Caesar C. Aronsfeld, Mein Kampf, 1945-1982, 45 Jewish Soc. Stud. 311, 311 (1983).

²⁵ The melted printing plates were allegedly reused to make the printing plates of the Süddeutsche Zeitung, a very reputable broadsheet published in Munich since October 1945; see, Marita Krauss, Amerikanische Besatzungskultur und »konstruktive« Transformation im Jahr 1945. Das Beispiel Bayern, in Die lange Stunde Null: Gelenkter sozialer Wandel in Westdeutschland nach 1945, 59, 80 (Hans Braun, Uta Gerhardt, Everhard Holtmann eds., 2007); see also, Herbert Hess, 50 Jahre Süddeutsche Zeitung 4 (1995).

²⁶ See Heldrich, supra 11, at 645, 652-653.

²⁷ See generally, Aronsfeld, supra note 24.

²⁸ See, Owen Bokott, Charity returns £250,000 royalties for Hitler's credo, The Guardian (Jun. 18, 2001, 2:14 PM), <https://www.theguardian.com/uk/2001/jun/18/books.humanities>.

opened. This then begs the question whether the lapse of the copyright term will be of much relevance with all these tangible and intangible versions already in circulation.

iii. Copyright in Nazi Literature

The existence of copyright is commonly based on natural law approaches or on its utilitarian function to incentivize the creation of new works.²⁹ Both of these justifications are often challenged for various reasons.³⁰ But, as this chapter will outline and discuss, copyright may serve yet another purpose: it was used to inhibit any further dissemination of the Nazi propaganda contained within “Mein Kampf”—a legislative aim enshrined within the preamble of the constitution of the Free State of Bavaria.³¹ Thus, copyright with its exclusionary function can be applied to restrict access and dissemination of works. With regards to the Goebbels diaries, a more classical justification for copyright and its term, however, may prevail—to provide income for the estate of the author³²—though the question arises whether income should be generated from such works.

The following analysis will assess the protectability of works of Nazi leaders by German copyright law. It will discuss copyright subsistence, duration, ownership as well as the infringement of copyright in such works as well as possible exceptions and limitation which may enable an otherwise unauthorized use of such works. The discussion of the copyright aspects will be led from the perspective of German copyright law as codified within the Urhebergesetz (UrhG).

²⁹ See Gehard Schricker & Ulrich Loewenheim (ed), *Urheberrecht: Kommentar*, Einleitung 9 (7th ed. 2017).

³⁰ *Id.*, 10.

³¹ “In the face of the scene of devastation into which the survivors of the 2nd World War were led by a godless state and social order which lacked any conscience and respect for human dignity, with the firm intention of permanently securing for the future generations the blessings of peace, humanity and justice and mindful of its history of more than a thousand years, the Bavarian people herewith bestows upon itself the following Democratic Constitution”; Bayerischer Landtag (Dec. 15, 1998),

https://www.bayern.landtag.de/fileadmin/Internet_Dokumente/Sonstiges_P/BV_Verfassung_Englisch_formatiert_14-12-16_neu.pdf.

³² See Eugen Ulmer, *Urheber- und Verlagsrecht* 340-341 (3rd ed. 1980).

iv. Copyright subsistence

Any work within the literary, artistic, or scientific domain can qualify for copyright protection under German law.³³ § 2(1) UrhG specifies the categories of works that may be protected by copyright law. The catalogue is, however, non-exhaustive³⁴ meaning that the German Copyright Act provides an open list system. Additionally, only works that contain the author's own intellectual creation can qualify for copyright protection according to § 2(2) UrhG. While the level of originality may be higher than in other jurisdictions, a work like "Mein Kampf" will generally overcome this threshold.³⁵

Copyright subsistence for diary entries such as those by Joseph Goebbels, however, may be questionable under German copyright law. Such personal records often display trivial daily occurrences which may not constitute the author's own intellectual creation pursuant to § 2(2) UrhG³⁶ even if their author has some form of prominence.³⁷ Bogedain, however, holds that the Goebbels diaries would surpass this threshold: While Goebbels refers to occurrences such as the landing of the Allies in Normandy in 1944, Goebbels often displays his sentiments in a stylistic manner.³⁸ Hence, such diary entries may qualify as original works and be protected under German copyright law. Furthermore, the disputes surrounding the copyright of Goebbels diaries underline that courts acknowledged that copyright subsisted in them.³⁹

In comparison to other intellectual property rights, considerations of *ordre public* or morality do not affect copyright subsistence.⁴⁰ Patent and Trade Mark law⁴¹, on the other side, provide for provisions that enable the competent authorities to reject an application for a patent or trade mark based on morality or *ordre public* considerations.⁴² Such thresholds would seem unreasonable due to copyright being an IP right that comes into existence without examination. This means that even works containing national-socialist contents can qualify for protection⁴³ as along as the criteria of copyright subsistence are met.

³³ § 1 UrhG.

³⁴ See Artur-Axel Wandtke & Winfried Bullinger, *Praxiskommentar zum Urheberrecht* § 2 [2] (4th ed. 2014).

³⁵ This was confirmed by the Higher Regional Court of Munich that held that excerpts of "Mein Kampf" would qualify as literary works pursuant to § 2 (1) Nr. 1, (2) UrhG; see, OLG München ZUM-RD 2012, 479, 480.

³⁶ See Gehard Schricker & Ulrich Loewenheim (ed), *Urheberrecht:Kommentar*, § 2 [136] (7th ed. 2017).

³⁷ Furthermore, Goebbels increasingly dictated his remarks for his diary which leads Winkler to speculate whether they have actually originated from him or were rather produced by this staff; see, Willi Winkler, *Der Schattenmann: Von Goebbels zu Carlos: Das mysteriöse Leben des François Genoud* (Rowohlt Digitalbuch, 2011).

³⁸ See, Clemens Bogedain, "Mein Kampf", der "Mythus des 20. Jahrhunderts" und die „Goebbels-Tagebücher“: Werke früherer NS-Größen im Spannungsfeld von Strafrecht, Urheberrecht und künftiger Gemeinfreiheit, 59 *Die Zeitschrift für Urheber- und Medienrecht* 205, 208 (2015).

³⁹ i.e. LG München I, Urt. v. 19.09.2014, Az: 21 O 28238/13.

⁴⁰ BGH, Urt. V. 23.02.1995 – I ZR 68/93; See also, Clemens Bogedain, *supra* note 38, at 435.

⁴¹ See, Lisa P. Ramsey, *A Free Speech Right to Trademark Protection*, 106 *Trademark Rep.* 797 (2016).

⁴² § 2(1) of the German Patent Act; § 8 (2) Nr. 5 of the German Trade Mark Act.

⁴³ Artur-Axel Wandtke & Winfried Bullinger, *Praxiskommentar zum Urheberrecht* § 2 [31] (4th ed. 2014); Clemens Bogedain, "Mein Kampf", der "Mythus des 20. Jahrhunderts" und die „Goebbels-Tagebücher“: Werke früherer NS-Größen im Spannungsfeld von Strafrecht, Urheberrecht und künftiger Gemeinfreiheit, 59 *ZUM* 205, 208 (2015).

v. Copyright duration

The German Author's Right Law applies a 70 years post mortem auctoris rule according to § 64 UrhG. In addition, § 69 UrhG clarifies that the calculation of the 70-year period commences "at the end of that calendar year in which the event giving rise to them (i.e. the death of the author) occurs." Previously, the German Copyright Act for Literary Works (LUG)⁴⁴ provided for a 30 years post mortem auctoris rule within § 20.⁴⁵ This rule applied until 1934 when the term for copyright protection was extended to 50 years post mortem auctoris.⁴⁶ In 1964, § 64 UrhG introduced the present rule, which also applied to works that were created before 1965 according to § 129(1) UrhG.

With regards to "Mein Kampf", copyright protection lapsed on January 1st of 2016, as already mentioned. Similarly, Joseph Goebbels' diaries have fallen into the public domain on the same day since Goebbels committed suicide with his wife Magda on 1st May 1945, a day after Hitler's death. Alfred Rosenberg, the author of "Der Mythus des 20ten Jahrhunderts" was sentenced to death during the Nuremberg Trials of 1946. The sentence was executed in the morning of 16 October of that year. This means that copyright in "Der Mythus des 20ten Jahrhunderts" lapsed on 31st December 2016 at midnight. Due to the fact that the Nazi dictatorship ended in 1945, most leading protagonists have deceased already. Thus, most of these works written by Nazi leaders are in the public domain.

The fact, that copyright was used to restrict access and further dissemination of "Mein Kampf" leads to the question whether the term could be extended to maintain control over such work. Other jurisdictions provide significantly longer copyright terms. Mexico, for instance, provides a 100 years post mortem auctoris rule within its Copyright Act.⁴⁷ European Union law, however, prohibits an extension.⁴⁸ Article 1 of the Term Directive⁴⁹ stipulates a 70 years post mortem auctoris rule. The provision is mandatory as Recital 12 of the Term Directive suggests thus making a unilateral extension of copyright law protection by Germany not possible.⁵⁰ In any event, any form of extension usually begs the question how long copyright should extend for such works which would become an arbitrary exercise and politically difficult to deliver.

⁴⁴ See Gesetz betreffend das Urheberrechts an Werken der Literatur und Tonkunst vom 19. Juni 1901 (LUG).

⁴⁵ See Sebastian & Briske, supra note 11 at 104.

⁴⁶ Gehard Schrickler & Ulrich Loewenheim (ed), Urheberrecht: Kommentar, Einleitung [135] (7th ed. 2017).

⁴⁷ Ley Federal del Derecho de Autor, art. 29 (1), Diario Oficial de la Federacion [DO], 12 de diciembre de 1996 (Mex.).

⁴⁸ Hannes Ludyga, Der Vertrieb von Adolf Hitler's Hetzschrift „Mein Kampf“ - Urheber- und strafrechtliche Aspekte, 59 Die Zeitschrift für Urheber- und Medienrecht 435, 436 (2015).

⁴⁹ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, 2006 O.J. (L 372) 12.

⁵⁰ As held by the German Government in response to the query of the Parliamentary Group of the Social Democratic Party in the German Parliament (see Fn. 2) – Antwort der Bundesregierung auf die Kleine Anfrage der Fraktion der SPD – BT Drucksache 17/12426 (Mar 11.2013).

vi. Copyright ownership

Copyright ownership played a crucial role in relation to the works discussed in this chapter. On the one hand, the works of Nazi leaders were used to generate income like the example of the diaries of Joseph Goebbels show.⁵¹ On the other, it was used to restrict the dissemination of such works, as seen with “Mein Kampf”, where the Freestate of Bavaria acted more like a custodian over the work to contain its contents. Copyright protection was therefore applied in totally different ways depending on who had control over the work in question.

Under German Law, copyright is originally vested with the creator of the work⁵² and is generally not transferable⁵³ but is inheritable.⁵⁴ Ownership of the copyright of deceased authors is held by their estates according to § 30 UrhG.⁵⁵ Primarily, the successors in title of the author are determined through the last will of the deceased. In absence of such will, statutory succession will apply under German law. Since the Third Reich ended in 1945, the works of many Nazi authors would have been held by the estates of the deceased. The copyright in Hitler’s “Mein Kampf”, however, was held by the Bavarian Freestate. This begs the question how this was possible.

After Hitler’s suicide in the bunker of the Reichskanzlei on the 30th of April 1945, the question of ownership of the copyright of “Mein Kampf” became an issue. In absence of a testament, the copyright would have been transferred to Hitler’s next of kin⁵⁶. Hitler’s private testament, however, stipulates that any of his assets would fall to into the Party’s, i.e. the NSDAP’s possessions.⁵⁷ He added that in case the party would not exist anymore, copyright would fall to the state.⁵⁸ At Hitler’s point of death, the NSDAP still existed. This means that if this testament would have been held to be valid, all of Hitler’s possessions and the copyright in “Mein Kampf” would have been fallen into the Party’s possession. The Allied Command, however, issued Control Council Law No. 2. Its Article 2 prescribes that that all possession of Nazi organizations, such as the NSDAP, would have been confiscated which would include the copyright over “Mein Kampf”.⁵⁹

Ownership of the Free State of Bavaria of the copyright over “Mein Kampf”, however, took another route. This requires some explanation of the particular historical context of the aftermaths of the Second World War. After the defeat of Germany, the Allied Forces sought to

⁵¹ Peter Maxwill, Steinreich dank Goebbels' Tagebüchern, Spiegel Online (Jan. 10, 2014), <http://www.spiegel.de/einestages/fran-ois-genoud-und-joseph-goebbels-tagebuecher-a-953258.html>.

⁵² § 7 UrhG.

⁵³ § 29 (1) UrhG.

⁵⁴ § 28(1) UrhG.

⁵⁵ “The author’s successor in title holds the rights to which the author is entitled according to this Act, unless otherwise provided for.”

⁵⁶ Hitler’s sister made claims with regards to the copyright of “Mein Kampf” – Spruchkammer München I, Spruch v. 15.10.1948 – I-3568/48.

⁵⁷ Der Spiegel, Verlagsrechte – Hilters Erben (Dec 3. 1952), <http://www.spiegel.de/spiegel/print/d-21978350.html>.

⁵⁸ Heldrich, supra note 11, at 645, 652-646.

⁵⁹ Heldrich, supra note 11, at 645, 652-646.

eradicate Nazism from German society. For these purposes, many instruments were applied. While many of these tasks were completed by the Allied Forces within their respective zones of occupation themselves, some tasks were bestowed onto the self-governance of the German people. One of the measures was the passing of the Act Nr. 104⁶⁰ which was signed by the three German states of the US occupied zone (Bavaria, Württemberg-Baden and Greater Hesse) in the city hall of Munich on 5 March 1946. All persons who actively supported the Nazi dictatorship and its sympathizers or profiteers were required to be registered and classified within 5 groups pursuant to Article 4 of the Act: Major Offenders, Offenders, Lesser Offenders, Followers, and Exonerated Persons. The Act also provided for measures of atonement which could be bestowed on such individuals. For instance, the sanction for major offenders foresaw the confiscation of all their assets according to Article 15 Nr. 2 of Law 104.

The process of qualifying an individual into the categories of Article 4 of Act Nr. 10 was determined by a judicial sentence. Hence, special panels were established to adjudicate on this matter and on the corresponding sanctions. Since Hitler had his last domicile in Munich's Prinzregentenplatz 16, the judicial panel in Munich, Bavaria, was competent pursuant to Article 29 (a) of Act Nr. 104. In its decision from the 15 October 1948, the panel unsurprisingly declared that Hitler was a major offender holding that this would not require any further explanation.⁶¹ Since Hitler was already deceased, Article 37 of Law 104 was applicable. This provision states that proceedings to confiscate the assets against a deceased person could be initiated by the competent Minister. Such confiscations were only available against major offenders and would overrule any rules on testamentary disposition or statutory succession. The confiscation would include all assets, rights and other assets which are situated within the State of Bavaria according to Article 3 of the Regulation on the confiscation, administration and exploitation of assets according to Law 104. This included the copyright over "Mein Kampf".⁶² Hence, the Free State of Bavaria became the owner of Hitler's assets and the copyright over "Mein Kampf". This enabled it to exercise the economic rights deriving from the copyright over the book. The Bavarian Ministry of Finance was declared as the competent authority to exercise the rights in practice.

The situation with regards to the diaries of Joseph Goebbels is a different one. Goebbels originally wanted his diaries to be released 20 years after his death and the copyright to be exercised by the Franz Eher publishing house.⁶³ After his death, the diaries remained unpublished though some excerpts which were discovered in the courtyard of Goebbels' ministry of propaganda in 1945 were published in the US and Switzerland in 1948.⁶⁴ With regards to the situation of ownership of the copyright, it needs to be pointed out that in contrast to Hitler's

⁶⁰ Gesetz Nr. 104 zur Befreiung von Nationalsozialismus und Militarismus vom 5. März 1946 (bayerisches Gesetz – und Verordnungsblatt – GVBl. – 1946 S. 145).

⁶¹ Spruchkammer München I, Spruch v. 15.10.1948 – I-3568/48.

⁶² Supra note 11 at 102.

⁶³ Willi Winkler, *Der Schattenmann: Von Goebbels zu Carlos: Das mysteriöse Leben des François Genoud* (Rowohlt Digitalbuch, 2011).

⁶⁴ id.; Der Spiegel, *Goebbels-Nachlass - Der Stenograf muß es wissen* (Jan 14. 1951), <http://www.spiegel.de/spiegel/print/d-29191941.html>.

possessions, the possessions of Goebbels were not confiscated.⁶⁵ Hence, the diaries of Joseph Goebbels apparently fell to his heirs.⁶⁶ Goebbels' estate subsequently authorized the Swiss businessman François Genoud with the administration of exclusive rights over the diaries. Genoud, who has been a glowing admirer of Hitler since he met him as a teenager in the 1920s,⁶⁷ agreed with Goebbels' estate that half of revenues created from exploiting the copyright would fall to them while he could keep the other half after the administrative costs were deducted.⁶⁸ Additionally, Genoud's position as administrator of the exclusive rights in Goebbels' published and unpublished literary works was confirmed by contractual arrangement with the executor of Goebbels' estate in 1955.⁶⁹

While Genoud's position with regards to his entitlement over the diaries has been disputed - it has been raised that he could not be owner of the copyright because of the expropriation of Nazi criminals by the laws of the Allied command⁷⁰ - he succeeded in exercising his claimed ownership of copyright in relation to Goebbels' works. For instance, he secured payment from the Hoffmann und Campe publishing house, which published fragments of the diaries in relation to its last entries before the downfall of the Third Reich. Additionally, he also was able to provide a post-script in this edition which was criticized for being apologetic.⁷¹ He also secured a settlement with the Federal Archive and the Institute for Contemporary History who received all records of the diary which the Hoffman and Campe publishing House held and did not seek to publish.⁷² After committing suicide in 1996, Genoud left the rights as literary executor over Goebbels' works to Cordula Schacht⁷³, the daughter of the former President of the Reichsbank and Minister of Economics during Hitler's rule. The diaries continued to provide a considerable but also arguably tainted stream of income. For instance, the German actress Iris Berben toured Germany, Austria and Switzerland in 2002 reciting passages of Goebbels' diary along with those from Anne Frank's diary together. While Goebbels estate received a payment negotiated by Cordula Schacht, no payment was made to the heirs of Anne Frank.⁷⁴

Recently, Cordula Schacht sued the publishing house Random House before the Courts of Munich over the use of extracts of Goebbels's diaries within a biography by the historian Peter

⁶⁵ supra, note 63.

⁶⁶ Martin Broszat, Zur Edition der Goebbels-Tagebücher , 37 Vierteljahrshefte für Zeitgeschichte 156, 157 (1989).

⁶⁷ id.

⁶⁸⁶⁸ Supra Willi Winkler, note 63.

⁶⁹ The Local Court of Zehlendorf in Berlin appointed the attorney and notary Kurt Leyke as executor of the estate of Goebbels in 1945; supra Willi Winkler, note 63.

⁷⁰ It was said that Goebbels left the rights to the Franz Eher Publishing House which would mean that the rights would have fallen to the Free State of Bavaria – Der Standard, Prozess über Tantiemen für Goebbels-Nachlass (Apr. 22, 2015) <http://derstandard.at/2000014642242/Gericht-entscheidet-ueber-Tantiemen-fuer-Goebbels-Nachlass>.

⁷¹ Martin Broszat, Zur Edition der Goebbels-Tagebücher , 37 Vierteljahrshefte für Zeitgeschichte 156, 157 (1989).

⁷² id, 156.

⁷³ Der Spiegel, Cordula Schacht (Jul. 14, 1997), <http://www.spiegel.de/spiegel/print/d-8743624.html>.

⁷⁴ supra, note 63.

Longerich on the former minister of propaganda published in 2010 by a subsidiary.⁷⁵ Schacht, a German attorney, demanded payment for the use of the excerpts based on a settlement agreement between her and the publishers. Random House, on the other hand, was adamant not to pay any amount, inter alia, disputing Schacht's right to exercise the exclusive rights over the diaries.⁷⁶ Another point raised by the defendants was the fact that the settlement agreement, which the publishers only committed to in order not to jeopardize the publication of the biography on Goebbels, was invalid. This was because it would relate to a legal transaction which would be void pursuant to § 138 of the German Civil Code since it would enable the commercialization of the thoughts and intentions of one of the greatest criminals of the Nazi Regime.

The District Court of Munich, however, acknowledged Schacht's position in relation to the diaries and held that the agreement between the parties would not be void as it would enable a critical evaluation of the texts within the diaries.⁷⁷ Furthermore, the request for remuneration by the Schacht would not render the agreement void since she would not commercialize the ideas of Goebbels but rather their critical examination.⁷⁸ The subsequent appeal to the Higher District Court of Munich was rejected based on formal reasons.⁷⁹ The Court, inter alia, found that the District Court was correct for not having declared the appeal of Random House as admissible pursuant to § 511 (4) Nr. 1 of the German Civil Procedure Rules. This provision mandates that a court of first instance shall admit an appeal which is of "fundamental significance" or serves "the further development of the law or the interests in ensuring uniform adjudication". The Court held that the case was not of fundamental significance as it would only relate to a dispute between the parties. The historical interest in Goebbels and his diaries would not render the dispute having fundamental significance due to the lack of connection with the case at hand – the obligation stemming from the settlement agreement. Furthermore, since copyright protection would lapse in the end of 2015, it could not be expected that many courts would have to adjudicate similar cases.

⁷⁵ Willi Winkler, Geld der Vergangenheit, Süddeutsche Zeitung (Jul. 31, 2014), <http://www.sueddeutsche.de/kultur/verhandlung-um-goebbels-tantiemen-geldder-vergangenheit-1.2069707>.

⁷⁶ LG München I, Urt. v. 19.09.2014, Az: 21 O 28238/13.

⁷⁷ id.

⁷⁸ supra, note 76.

⁷⁹ OLG München, Urteil vom 09.07.2015, Az. 6 U 3707/14.

vii. Copyright infringement

German copyright law provides the right holder with the exclusive rights of reproduction (§ 16 UrHG) and distribution (§ 17 UrHG) of the protected work. While this generally means that copyright holders may commercialise the work, they are also at liberty not to commercialise the work.⁸⁰ Furthermore, they can restrict these uses by third parties where no authorization is provided and no exception or limitation provision applies. Any unauthorised use therefore may constitute copyright infringement and may entail a claim for damages according to § 97(2) UrHG. Additionally, the copyright owner may also seek for injunctive relief pursuant to § 97 (1) UrHG.

The Free State of Bavaria used its position as right holder to forbid any reproduction or dissemination of “Mein Kampf”. This, for instance, has led to the removal of a pdf version of “Mein Kampf” which was hosted on a website of a higher education institution in Berlin after the Ministry of Finance of the Freestate of Bavaria requested so.⁸¹ Another example of the firm and litigious stance taken by the Bavarian Free State can be seen in a case before the Higher District Court of Munich in 2012.⁸² The British publisher Peter McGee sought to publish parts of the book with some commentary in his journal “Zeitzeugen” (“contemporary witnesses”). McGee’s publishing house advertised a supplement to the journal with the title “Das unlesbare Buch” (“The unreadable book”). This publication placed excerpts of “Mein Kampf” next to some commentary by a Professor of Journalism. The Free State of Bavaria successfully applied for a preliminary injunction before the District Court of Munich whose decision was upheld by the Higher District Court of Munich.

⁸⁰ OLG München ZUM-RD 2012, 479, 484.

⁸¹ VG Berlin: Beschluss vom 19. Dezember 2013, Az. 3 L 1220.13.

⁸² OLG München, ZUM-RD 2012, 479.

viii. Limitations and exceptions

The firm stance of the Free State of Bavaria meant that seeking for authorization for any otherwise restricted use would have been futile. Hence, anyone seeking to reproduce or distribute excerpts of “Mein Kampf” would have to rely on exceptions and limitations of copyright which would permit an unauthorized use of the work. In relation to “Mein Kampf“, the quotation rule enshrined in § 51 UrhG is particularly relevant:

§ 51 UrHG:

It shall be permissible to reproduce, distribute and communicate to the public a published work for the purpose of quotation so far as such exploitation is justified to that extent by the particular purpose. This shall be permissible in particular where

1. subsequent to publication individual works are included in an independent scientific work for the purpose of explaining the contents,
2. subsequent to publication passages from a work are quoted in an independent work of language,
3. individual passages from a released musical work are quoted in an independent musical work

This provision was central to the discussion of the already introduced decision of the Higher District Court of Munich in 2012. The purpose of the use of the third party is of particular relevance for determining whether the limitation is applicable. The citation used must be necessary for the analysis of the cited work and must be distinguishable of the work it is inserted into.⁸³ The Higher Court of Munich outlined previous case law on this issue: the citation would need to be accompanied with remarks of the citing person while a merely inner connection between the original and the cited work would not suffice.⁸⁴ Furthermore, the citation should not become the main part of the citing work and, by this, replace the work in which the citation is incorporated in.⁸⁵ This means that the citation must serve as basis for elaborations of the person citing the work; it cannot simply be the aim to make the cited work more accessible.⁸⁶ Importantly, the Federal Court of Justice has held that an entire citation would fall outside the scope of the limitation where only parts of it were not covered by the purpose of the citation.⁸⁷

The Higher District Court of Munich examined some of the passages of the defendant’s publication and held that the exception would not apply here. While the commentary part which

⁸³ Clemens Bogedain, ”Mein Kampf“, der “Mythus des 20. Jahrhunderts“ und die „Goebbels-Tagebücher“: Werke früherer NS-Größen im Spannungsfeld von Strafrecht, Urheberrecht und künftiger Gemeinfreiheit, 59 ZUM 205, 209 (2015).

⁸⁴ OLG München ZUM-RD 2012, 479, 480.

⁸⁵ id.

⁸⁶ id.

⁸⁷ BGH ZUM 2012, 981 [29].

included passages from “Mein Kampf” in inverted commas would be covered by the exception⁸⁸, the Court found that this was not given for the passages of “Mein Kampf” next to the commentary. These were rather being inserted to provide the reader with access to passages and not to support the commentary.

⁸⁸ Supra note 11 at 103.

ix. Other regulatory responses

Copyright law is not the only regulatory response available. The obvious tool is criminal law which has already been used in this context. Criminal law becomes even more relevant now due to the lapse of the copyright in “Mein Kampf” and the possible unrestricted dissemination of the book. Hence, criminal law has been mooted as a possibility by the Social Democratic Party in the German Parliament which also inquired whether new legislation would be required.⁸⁹ Particularly three provisions from the German Criminal Act are being applied against right-wing extremist propaganda:⁹⁰

§ 86(1) of the German Criminal Code sanctions, inter alia, the dissemination and production of propaganda material of political parties or organization held to be unconstitutional or such organizations which aim to usurp the constitutional order within Germany. The German Federal Constitutional Court has held that works, like “Mein Kampf” or Rosenberg’s “Mythus” that propagate a “Führerstate” based on racist parameters and which discard liberty, equality and democracy would easily fit within this category of such illegal works.⁹¹

The provision, however, does only apply to works devised after the German Basic Law entered into force. In a decision of 1979, the German Federal High Court (Bundesgerichtshof; BGH) held that the possession, purchase, and sale of antiquarian version of “Mein Kampf” would not violate § 86 of the German Criminal Code.⁹² The Court held that “Mein Kampf” could not violate against the constitutional order of the federal Republic of Germany since it predates the German Basic Law. This decision was criticized as being questionable from a political point of view.⁹³

Criminal liability could, however, still occur where someone would adapt or edit such a pre-constitutional work to create references to current affairs.⁹⁴ Such reference could, for instance be created in the text of the blurb.⁹⁵ Annotated academic editions would, however, escape criminal liability since they usually do not have the intention to further the aims or are advertising for unconstitutional organizations but rather provide a critical discussion of the work.⁹⁶ In such a scenario, the provision would not be applicable due to the lack of criminal intention.

⁸⁹ The Parliamentary Group specifically mentioned Sections 318 and 319 of the Canadian Criminal Code that sanction hate propaganda; Kleine Anfrage der SPD Bundestagsfraktion, BT-Drucksache 17/12426, 1. (Feb. 20, 2013).

⁹⁰ Supra note 11 at 104.

⁹¹ Clemens Bogedain, “Mein Kampf”, der “Mythus des 20. Jahrhunderts“ und die „Goebbels-Tagebücher“: Werke früherer NS-Größen im Spannungsfeld von Strafrecht, Urheberrecht und künftiger Gemeinfreiheit, 59 ZUM 205, 206 (2015).

⁹² Bundesgerichtshof, Urt. v. 25.07.1979, Az.: 3 StR 182/79 (S).

⁹³ Caesar C. Aronsfeld, Mein Kampf, 1945-1982, 45 Jewish Social Studies 311, 312.

⁹⁴ supra note 91; Timo Handel, Mein Kampf– Gilt ein Verbreitungsverbot auch nach 2015?, Juristische Rundschau 433, 434 (2016).

⁹⁵ Timo Handel, “Mein Kampf” – Gilt ein Verbreitungsverbot auch nach 2015?, Juristische Rundschau 433, 434 (2016).

⁹⁶ id. 435.

Furthermore, such editions could be considered to fall into the proviso of § 86(3) since they “serve civil education, to avert unconstitutional movements, to promote art or science, research or teaching, the reporting about current or historical events or similar purposes” and would therefore escape criminal liability.⁹⁷

§ 86 a) of the Criminal Code sanctions the use of symbols of unconstitutional organizations. Such symbols could be Hitler’s image and the use of the Imperial- or Party Eagle along with the oak leaved swastika.⁹⁸ A book, however, cannot be such a symbol so this provision only gains relevance where the books in question show such symbols.⁹⁹ In many occasions, even the use of such symbols on a copy of “Mein Kampf” is not as such penalized. Here, the proviso of subsection 3 of § 86, which also applies to § 86a, could help again. The BGH has held that the small scaled sale of original editions of “Mein Kampf” which would contain the sanctioned symbols could fall within the proviso. Hence, both §§ 86 and 86a of the Criminal Act would not be applicable to restrict republications of “Mein Kampf”.¹⁰⁰

Finally, § 130 of the Criminal Code could be applicable in the discussed context. The provision sanctions the incitement of hatred against, inter alia, “a national, racial, religious group or a group defined by their ethnic origins”. The public display or dissemination of written material which incites such hatred is specifically mentioned as a sanctionable action. Passages of “Mein Kampf” would easily qualify as such written material.¹⁰¹ In comparison to the situation under Article 86, Article 130 also covers such works which predate the German constitution which means that a new edition of “Mein Kampf” and its digital dissemination could be penalized under this provision.¹⁰² However, scientific, and educational editions would not be sanctioned according pursuant to § 130(6) with Sec. 86(3) StGB.¹⁰³

⁹⁷ § 86 (3) German Criminal Act.

⁹⁸ supra note 91, at 207.

⁹⁹ supra note 95, at 437.

¹⁰⁰ Karl-Nikolaus Peifer, Urheberrechtlich Probleme um Hitlers “Mein Kampf“, (Issue 11 Anm. 2) jurisPR-WettbR 1, 3 (2012).

¹⁰¹ supra note 90, at 106; Hannes Ludyga, Der Vertrieb von Adolf Hitler’s Hetzschrift “Mein Kampf” - Urheber- und strafrechtliche Aspekte, 59 ZUM 435, 437 (2015).

¹⁰² supra note 90, at 109; supra note 91, at 210.

¹⁰³ Karl-Nikolaus Peifer, Urheberrechtlich Probleme um Hitlers “Mein Kampf“, (Issue 11 Anm. 2) jurisPR-WettbR 1, 3 (2012).

x. How suitable is copyright as a tool to regulate hate speech?

The manner in which the Freestate of Bavaria exercised its ownership over “Mein Kampf” demonstrates that copyright cannot only be used as a tool to disseminate works but also as a tool to restrict the dissemination of works and the information they contain.¹⁰⁴ This raises the question whether copyright law is an adequate tool for this purpose. While this question is of academic nature with regards to works of the Nazi dictatorship due to the lapse of copyright, works containing hate or discriminatory speech are still being produced and still may be inflammatory. The analysis within this chapter, however, has demonstrated that copyright has only limited use to restrict the creation and dissemination of works of racist or discriminatory nature.

The works of Nazi leaders and similar works created in present times will attract copyright protection in many jurisdictions. This leads to the question whether copyright should not be available for such works. As seen, Hitler accumulated substantial wealth through the royalties of the sales of “Mein Kampf”. Additionally, the disputes over the Goebbels diaries have generated criticism as to whether the estate of Goebbels should be monetizing from this particular work. Abolishing copyright protection for such works could substantially diminish the stream of income. Indeed, some jurisdictions have renounced copyright protection for illegal or immoral works.¹⁰⁵ But this begs the question how such works are qualified as immoral and by whom? Since copyright arises automatically, an ex-ante exclusion or ground of refusal similar to patent or trade mark law appears not possible due to the conflict with the Berne Convention. Even an ex-post assessment by courts in infringement proceedings appears not easy. Similar to the situation where the judge cannot easily evaluate the artistic value of a work to assess its protectability, the question arises whether works containing hate speech could be refused protection by copyright.

Let alone the doctrinal and practical problems with such approach, the denial of copyright just might lead to the opposite than its proposed purpose to restrict the creation and dissemination of such works. The absence of copyright protection does not hinder the dissemination of the information the work contains. Additionally, the economic argument behind copyright protection based on an incentive to create might not be of importance for the creator of such a work.¹⁰⁶ Often, the aim of hate speech is its wide dissemination to reach a wide audience. Control of the work, i.e. the essence of copyright protection, may often not be what the “author” seeks.

Finally, the term for copyright protection is limited, hence, the works created by Nazi leader in the public domain. A retroactive extension of copyright law over these works is not anymore viable nor possible. Furthermore, for similar works of present times, extending copyright protection would prove to be counterproductive. This is because the copyright would initially be vested in the authors of the work and after their deaths their estates which could exploit the work

¹⁰⁴ id, 2.

¹⁰⁵ See the discussion on US law within Chapter 7: “Copyright Protection of Illegal Works” by Eldar Haber.

¹⁰⁶ It should be borne in mind that Hitler generated substantial income from his book – supra.

for the extended period unless the copyright would be confiscated as seen with “Mein Kampf”. This, however, might lead to problems relating to expropriation of the property and having to justify this.

On a wider regulatory scale, the possible conflicts with fundamental or human rights need to be mentioned here. On the one hand, the restriction of dissemination of discriminatory or hate speech through copyright law can lead to a conflict with the fundamental right of freedom of expression or the freedom of science.¹⁰⁷ Freedom of expression is protected in various international and regional human or fundamental rights frameworks¹⁰⁸ and is also envisaged within the German Basic Law.¹⁰⁹ Importantly, the fundamental right does not only protect the freedom to actively express information but would encompass the right of accessing information.¹¹⁰ While freedom of expression is a highly treasured right, it is not provided without limits. The right can be restricted by law and particularly where this conflict with constitutionally guaranteed interest of other parties. With this regard, the Higher District Court of Munich has held that the copyright act is such a piece of legislation.¹¹¹ Additionally, the exception provisions, in this particular case the quotation rule (see discussion above), would aim at balancing the interest of the right holders and those of third parties.¹¹²

It appears that copyright is not the best mechanism to regulate discriminatory speech.¹¹³ So should copyright law be content-neutral? In **chapter ...** Haber provides a good overview of the benefits of such approach.¹¹⁴ In any event, it is criminal law which can be applied with regards to such works and their dissemination which is the appropriate tool to tackle the task. An interesting approach that would infuse the copyright discussion with that of criminal law is provided by Reh binder. He argues for limiting the exercise of exclusive rights where the public performance and dissemination of works containing illegal contents would be considered as criminal activities.¹¹⁵ Only the negative rights targeting piracy should be provided, while the positive rights of exploitation and seeking revenues would not be available to the right holder.¹¹⁶

¹⁰⁷ Article 13 EU Charter on Fundamental Rights, Article 5 (3) German Basic Law.

¹⁰⁸ Article 10 ECHR; Article 11 EU Charter on Fundamental Rights.

¹⁰⁹ Article 5 (1) Basic Law. The German Federal Constitutional Court has held that the dissemination of national socialist ideology is not as such discarded from the scope of the fundamental right of freedom of expression but may be curtailed by law - BVerfG, NJW 2010, 47, 49.

¹¹⁰ With regard to the ECHR: ECtHR, Youth Initiative for Human Right v Serbia, no. 48135/06 25 June 2013, [20], [24].

¹¹¹ OLG München ZUM-RD 2012, 479, 484.

¹¹² OLG München ZUM-RD 2012, 479, 484.

¹¹³ European Copyright Society, Limitations and exceptions as key elements of the legal framework for copyright in the European Union - Opinion on The Judgment of the CJEU in Case C-201/13 Deckmyn, [33] (Nov. 1, 2014). <http://www.create.ac.uk/wp-content/uploads/2014/11/Limitations-and-Exceptions-as-Key-Elements-of-the-Legal-Framework-for-Copyright-in-the-EU-Opinion-of-the-European-Copyright-Society-on-Case-C-201-13-Deckmyn-final.pdf>.

¹¹⁴ See chapter ??

¹¹⁵ Manfred Reh binder & Alexander Peukert, Urheberrecht §10 [209] (17th ed. 2015).

¹¹⁶ id.

Rehbinder states that otherwise the legal order would be contradictory where criminal law would forbid an action on the one hand, which would be permissible by copyright law, on the other.¹¹⁷

An example to highlight such an approach is - to some extent - the case on Goebbels diaries which has attracted considerable news coverage.¹¹⁸ The defendant of the case brought forward that the claimant should not benefit from the royalties created by such a book. Alternatively, the claimed sum should at least go towards an association that alleviates the atrocities of the Nazi dictatorship.¹¹⁹ While no criminal action was argued on behalf of the defendant, it was argued that the exploitation of Goebbels's works would be immoral. A criminal action would also be difficult to argue with regards to the diaries as the discussion on the criminal law within this chapter has shown.¹²⁰ But perhaps, not strictly legal measures could have been applied in this scenario in form of "shaming".¹²¹ But this discussion is now moot due to the lapse of copyright. For contemporary works of hate speech whose dissemination would entail criminal sanctions, Rehbinder's approach could be a feasible way to counteract the enforcement of such works by their right holders, however bearing in mind the difficulties in its practical application.

xi. Conclusion

The treatment of works such as "Mein Kampf" is a timely discussion. Heldrich states that anyone that would have read the book and then have voted for Hitler in 1933 cannot totally claim to be innocent of the occurrences that led to the Holocaust.¹²² Alas, works containing hate speech are still being produced, concerts with Nazi rock music are still able to attract thousands of Neo-Nazi in 2017.¹²³ However, as this chapter has argued, copyright is not the ideal regulatory tool to tackle hate speech – in the past, in the present and in the future – simply, because it has not been designed to do so. In Germany and other jurisdictions, criminal law, will remain to be applicable to the extent discussed above. In these lines, the Bavarian Minister of Justice Bausback said that the "present tools of criminal law would be applied – we owe this to the victims of the Holocaust

¹¹⁷ *id.*

¹¹⁸ See for instance: Spiegel Online, Streit um 6507,87 für Goebbels-Zitate (Sept 9, 2014), <http://www.spiegel.de/kultur/gesellschaft/joseph-goebbels-random-house-muss-auskunft-ueber-gewinn-geben-a-992702.html>; Dayla Alberge, Joseph Goebbels' family win legal battle to be paid royalties for diary extracts, The Guardian (Jul 9, 2015) <https://www.theguardian.com/world/2015/jul/09/joseph-goebbels-family-royalties-diaries-nazi-propaganda-minister>; Ofer Aderet, Goebbels' Heiress Wins Legal Battle to Receive Royalties From Biography of Nazi Minister (Jul 11, 2015) <http://www.haaretz.com/israel-news/.premium-1.665364>.

¹¹⁹ Again, this may prove to be counterproductive as seen in the case relating to the royalties in the UK received by German Welfare Council from the publisher Random House. In 2001, the charity decided to return the royalties to the publisher after its source was disclosed. – Owen Bokott, Charity returns £250,000 royalties for Hitler's credo, The Guardian (Jun 18, 2001) <https://www.theguardian.com/uk/2001/jun/18/books.humanities>.

¹²⁰ *Supra.*

¹²¹ Elizabeth L. Rosenblatt, Fear and Loathing: Shame, Shaming, and Intellectual Property, 63 DePaul Law Review, 1, 4 (2013).

¹²² Heldrich, *supra* note 11, at 645, 645 (Andreas Heldrich ed., 2007).

¹²³ Deutsche Welle, Hundreds of neo-Nazis band together for concert in Germany (Jul. 30, 2017), <http://www.dw.com/en/hundreds-of-neo-nazis-band-together-for-concert-in-germany/a-39896740>.

and their relatives.”¹²⁴ Seul, on the other hand, welcomes the publication of the annotated version of “Mein Kampf.”¹²⁵ Not only could the annotated version provide a historically-critical alternative to all the already available version of the book but it would highlight its antihuman ideology and perverted rationality to the unknowing reader.¹²⁶ And hopefully to educate so that history will never repeat itself - Principiis obsta!

¹²⁴ Bayerisches Staatsministerium der Justiz, (Jun. 25, 2014), <https://www.justiz.bayern.de/presse-und-medien/pressemitteilungen/archiv/2014/91.php>.

¹²⁵ Supra note 10.

¹²⁶ id.