

Chapter 4: Germany

Marc Mimler

I. Introduction – Graffiti and Street Art in Germany

Germany has a vivid and thriving street art and graffiti scene.¹ Its beginnings can be traced back to the late 1970ies, early 1980ies when hip hop culture became increasingly popular throughout Europe.² The Bavarian capital Munich can be seen as the cradle of graffiti and street art in Germany³ though all large cities, such as Frankfurt, Cologne Stuttgart and Leipzig, are all hubs for street art and host interesting art works and active crews. Berlin, of course, has to be mentioned in this context as Germany's prime location for street art and graffiti attracting many visitors from around the globe.⁴ But also, from a copyright perspective which of course is the focus of this chapter, Berlin's esteem is also unrivalled to other German cities. Many cases which discuss the copyright aspects of street art relate to the city's most famous canvas: The Berlin Wall.

Built in 1961 to stop East Germans from fleeing into the Western part of Berlin, it offered the nascent graffiti and street artist scene with an ideal canvas. More elaborate murals were applied in the course of time.⁵ One of the early artists painting on the Berlin wall was the French street artist Thierry Noir.⁶ The Berlin wall symbolises the recent history of Berlin in many ways - a history and present which influences and inspires artists and writers: From the division of the city, its unification, to Berlin's current status as a hub for the arts. After the German unification in 1990, Berlin saw an influx of international artists making Berlin a hub for art.⁷ This was largely due to comparatively low house and renting prizes which enabled the creation of Berlin's art scene. The famous words of Berlin's former mayor, Klaus Wowereit, that Berlin was "poor but sexy" highlight this Zeitgeist quiet well. But the growing gentrification,⁸ where property developments alter the very fabric that created Berlin's scene, is being resonated in the works of local artists and crews.

Berlin stages the whole spectrum of graffiti, street- and urban art in abundance. All of their various forms of expression can be seen here – stencilling, reverse graffiti, fire bucket things, paste ups,⁹ tags, pieces, murals, throw ups. Many famous pieces of street art can be found around the

¹ This introduction can hardly do justice to the great street art and graffiti scene in Germany. There are many interesting publications with regard to this which are cited in this chapter which can be consulted by the interested reader.

² Cedar Lewison, *Street Art: The Graffiti Revolution* (Tate Publishing 2009) 35.

³ "Die Wiege der deutschen Street-Art steht in München" (12 April 2017) Die Zeit <<https://www.zeit.de/news/2017-04/12/kunst-die-wiege-der-deutschen-street-art-steht-in-muenchen-12163403>>. The first window-down end to end whole train piece in Germany, the so called "Geltendorf train", was produced on the outskirts of Munich in 1985 with the current Munich based graffiti writer and street artist Loomit taking part - Sebastian Gabriel, "Von einem, der auszog, das Sprayen zu lernen" (2011) Süddeutsche Zeitung <<https://www.sueddeutsche.de/muenchen/landkreismuenchen/graffiti-kuenstler-loomit-von-einem-der-auszog-das-sprayen-zu-lernen-1.992964>>

⁴ Alison Young, *Street Art World* (Reaktion Books 2016) 112.

⁵ Rafael Schacter, *World Atlas of Street Art and Graffiti: The World Atlas of Street Art and Graffiti* (NewSouth 2013) 202.

⁶ Jonathan Jones, "Thierry Noir: the first graffiti artist fired up by the Berlin Wall" (03 April 2014) The Guardian <<https://www.theguardian.com/artanddesign/jonathanjonesblog/2014/apr/03/thierry-noir-graffiti-artist-berlin-wall>>

⁷ Ted Loos, "In Berlin, Artists Find a Home" (24 April 2018) The New York Times <<https://www.nytimes.com/2018/04/24/arts/berlin-living-artists.html>>

⁸ Alison Young, *Street Art World* (Reaktion Books 2016) 107 -114.

⁹ See, for instance, the paste-ups by El Bocho - <<http://www.elbocho.net/>>.

Oberbaumbrücke in the Berlin district of Kreuzberg.¹⁰ This multi-ethnic area of Berlin used to border the Berlin Wall and with it the former German Democratic Republic. After the fall of the wall, famous street artists, such as Blu, Roa, Victor Ash and Os Gêmeos have left their traces in Kreuzberg with large murals.¹¹ But other parts of Berlin showcase many pieces of street art. Street artists that have been active in Berlin are amongst many others, XOOOOX, Mein Lieber Prost and Alias.¹² Finally, Berlin has also a very active graffiti scene which has acquired world renown. Crews, such as 1UP and Berlin Kidz which use an array of techniques need to be mentioned among others. 1UP, for instance, a crew from Kreuzberg which has been active since 2003, has acquired some esteem for bombing S-Bahn cars.¹³ The crew Berlin Kidz makes its mark not only by graffiti in the “pichação” style but also through train riding, parkour, and city climbing.¹⁴

On a broader note, Berlin also showcases the effects of the increasing popularity of street art. While graffiti is still generally frowned upon (or not understood) by the general public, the perception is quite different with regards to street art. Berlin now hosts a street art museum, Urban Nation,¹⁵ which attracts many visitors. The East Side gallery, a protected listed monument, is on the agenda of many Berlin tourists. It contains a 1,3km of remaining Berlin wall between Oberbaumbrücke and Ostbahnhof where the government of Berlin commissioned famous murals, such as the “Fraternal Kiss” by Dmitri Vrubel. However, the increasing gentrification that has come over Berlin affects the scene. The cheap living space which provided shelter for many artists is decreasing since property developers are entering the empty spaces, often created by the bombs of World War 2.¹⁶ The white-or rather blackwashing of two famous murals by the Italian artists Blu located near the Oberbaumbrücke by authority of the artists can be seen as part of a protest against this development.¹⁷ They would rather commit auto-iconoclasm than providing property developers with the opportunity to advertise their middle to upper class living property with views on the murals. So things may be changing within Berlin’s scene or as a local graffiti writer has said: “One good thing about Berlin was that it was so poor and that the city was totally in debt and they didn’t even have the money to buff graffiti, for example. But it’s now hyped and a lot of tourists are coming and bringing money into the city.”¹⁸ Berlin’s success and appeal may trigger its own doom.

¹⁰ Bastian Heinsohn, “Critical Voices from the Underground: Street Art and Urban Transformation in Berlin”, in Jill E. Twark, Axel Hildebrandt (eds), *Envisioning Social Justice in Contemporary German Culture* (Camden House 2015) 119.

¹¹ Natalia Samutina and Oksana Zaporozhets, “Berlin, the City of Saturated Walls” (2015) *Laboratorium: Russian Review of Social Research* 36-61, 39.

¹² <<https://www.smashingmagazine.com/2011/07/the-heritage-of-berlin-street-art-and-graffiti-scene/>>

¹³ Norbert Koch-Klaucke, “Kreuzberger Sprayer-Gang „One United Power“ BVG, S-Bahn und Polizei sind machtlos” (25 August 2017) *Berliner Zeitung* <<https://www.berliner-zeitung.de/berlin/kreuzberger-sprayer-gang--one-united-power-bvg--s-bahn-und-polizei-sind-machtlos-28221532>>

¹⁴ Natalia Samutina, Oksana Zaporozhets, “Berlin, the City of Saturated Walls” (2015) *Laboratorium: Russian Review of Social Research* 36-61, 41.

¹⁵ <https://urban-nation.com/museum/>

¹⁶ Philip Oltermann, “Why the writing's on the wall for Berlin's murals” (02 April 2018) *The Guardian* <<https://www.theguardian.com/world/2018/apr/02/eduardo-paolozzi-mural-uncovered-berlin-not-long>>

¹⁷ Lutz Henke, “Why we painted over Berlin’s most famous graffiti” (19 December 2014) *The Guardian* <<https://www.theguardian.com/commentisfree/2014/dec/19/why-we-painted-over-berlin-graffiti-kreuzberg-murals>>

¹⁸ Ryan Balmer, “Just: A Berlin Graffiti Legend” (14 February 2013) <<http://issyvoo.de/just-a-berlin-graffiti-legend/>>

II. LEGAL ANALYSIS

This part of the chapter will analyse the copyright issues surrounding street art and graffiti. It will look at copyright subsistence of such works with a particular focus on tags. The chapter then discusses the question of authorship and ownership. Here, issues of works created by crews and the conflict with copyright and real property are discussed. It will then look at the economic- and moral rights that authors of works of graffiti and street art may have. These rights become particularly relevant where the walls holding such works are removed and sold along with the art work or displayed in galleries. Finally, the chapter looks on exceptions to copyright infringement, in particular the panorama freedom under German copyright law. Aspects of criminal law are relevant but are outside of the scope of this chapter.

1. Copyright subsistence of graffiti and street art in Germany

Any work within the literary, artistic, or scientific domain can qualify for copyright protection under German law.¹⁹ § 2(1) of the German Authors Rights Act (Urhebergesetz; abbreviation: UrhG) specifies the categories of works that may be protected by copyright law. These are, for instance, musical, artistic, and cinematographic works. In contrast to UK copyright law²⁰, this catalogue is non-exhaustive.²¹ German copyright law uses an open list system which means that copyright protection of a work is not dependent on it falling within one of the enumerated categories.²² A qualification of the work within a category of protected works, like in the United Kingdom²³, is therefore not necessary.

This potentially wide scope of protectable works under German copyright law would generally render street art in its various manifestations, as well as graffiti, as protectable works. The effort placed in creating the work,²⁴ as well as aesthetic considerations, are not relevant for its protectability. Neither is the material used to create the work considered relevant, nor does the work need to consist of permanent material but can also be made of ice or other perishable material.²⁵ Much street art, such as paste-ups and posters, is deliberately made of ephemeral ingredients left to the decay of weather²⁶ or from being removed. But this does not hinder their ability to be protected by copyright. Finally, German copyright law does not have a requirement of fixation whereby copyright only subsists when the work is fixed in tangible form. Under German law, copyright may subsist in a work that is simply performed without being recorded.²⁷

However, the criterion of originality might pose a considerable threshold in establishing copyright protection in some forms of street art, particularly graffiti. Copyright protection in a work only subsists where it constitutes the author's personal intellectual creation - "persönliche geistige Schöpfung"- pursuant to § 2 (2) UrhG. This means that the work must be the result of an individual

¹⁹ § 1 UrhG.

²⁰ Marta Iljadica, *Copyright Beyond Law – Regulating Creativity in the Graffiti Subculture* (Hart Publishing 2016) 89.

²¹ Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 2 [2].

²² Manfred Rehbinder, Alexander Peukert, *Urheberrecht* (17th edn, C.H. Beck 2015) [208].

²³ The qualification is relevant since different economic rights exist for artistic and literary works - Marta Iljadica, *Copyright Beyond Law – Regulating Creativity in the Graffiti Subculture* (Hart Publishing 2016) 87-98.

²⁴ Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 2 [26].

²⁵ Hartwig Ahlberg and Horst-Peter Götting (eds), *Beck'scher Online-Kommentar Urheberrecht* (21st edn, C.H. Beck 2018) § 2 [24].

²⁶ Anna Waclawek, *Graffiti and Street Art* (Thomas & Hudson 2011) 91.

²⁷ Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 2 [20].

process of creation by the author.²⁸ This criterion stipulates that a work must rise above mere craftsmanship and cannot be a copy of something else. It also implies a certain level of creativity – labelled in German as “Gestaltungshöhe” or “Schöpfungshöhe”²⁹ which discards trivial everyday creations from copyright protection.³⁰

The necessary level of creativity for copyright protection requires a distinct analysis of street art and graffiti. Street art in its various forms of imagery will generally be considered to surpass the threshold of originality. This has been confirmed by the German Federal High Court (Bundesgerichtshof, short: BGH) which has discussed the protectability of street art under German copyright law in its *Wall Pictures* decision.³¹ The case related to images of faces on the Berlin wall, as well as elements connecting these images. Based on these facts, the murals in question could clearly be considered as street art. The Court affirmed the finding of the appellate court that these murals would qualify as copyright protected works since they would constitute a “personal creation of individual expressiveness” - “persönliche Schöpfungen von individueller Ausdruckskraft.”³² Based on this, street art in its various displays will usually involve the necessary level of creativity and be susceptible for copyright protection under German law.³³ Similar considerations can be applied to stencilled artwork created by street artists.³⁴

In contrast, establishing copyright protection for graffiti, i.e. the technique of applying letters and names onto various surfaces, such as walls or trains, may be less straightforward. While more elaborate forms of graffiti, such as throw-ups and pieces, which can incorporate figurative elements,³⁵ may easily qualify for copyright protection, this might not be so straightforward with regard to tags.³⁶ Tagging refers to the writing of letters, generally the writer’s chosen name or that of a crew of writers and is often executed in a calligraphic way.³⁷ They are usually written within a few seconds.³⁸ Since the lines between street art and graffiti lettering are porous,³⁹ the question whether

²⁸ Alexander R. Klett, Matthias Sonntag and Stephan Wilske, *Intellectual Property Law in Germany* (C.H. Beck Lexis Nexis 2008) 60.

²⁹ Both terms mean the same though the latter would be preferable due to its resemblance with the wording of § 2(2) UrhG – Lukas Mezger, *Die Schutzwelle für Werke der angewandten Kunst nach Deutschem und europäischem Recht* (V&R unipress 2017) 21.

³⁰ Bom³⁰ Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 2 [23].

³¹ *Mauer-Bilder* (1995) GRUR 673 (BGH) - *Wall Pictures* (1997) IIC 282 (BGH).

³² The Court, however, uses the unfortunate expression that the images in question would belong to the artistic style of “Graffiti Art” which amalgamates both the two styles of street art and Graffiti- *Mauer-Bilder* (1995) GRUR 673, 675 (BGH) - *Wall Pictures* (1997) IIC 282, 284 (BGH). On the inaccuracy of the term “graffiti art” and distinction between street art and graffiti, see: Cedar Lewison, *Street Art: The Graffiti Revolution* (Tate Publishing 2009) 18 - 19.

³³ With regards to UK law - Enrico Bonadio, “Copyright protection of street art and graffiti under UK law” (2017) I.P.Q. 187, 192; Marta Iljadica, *Copyright Beyond Law – Regulating Creativity in the Graffiti Subculture* (Hart Publishing 2016) 147.

³⁴ Daniel Rassouli, “Banksy und sein Urheberrecht - Eine Bestandsaufnahme des Schutzes der Kunstform Street Art durch das Urheberrecht am Beispiel von Banksy“ (2013) KUR 97, 97.

³⁵ Marta Iljadica, “Graffiti and the Moral Right of Integrity” [2015] I.P.Q. 266, 267.

³⁶ With respect to the difficulties in assessing whether a single word may qualify as a copyright protected literary work in the United Kingdom – Marta Iljadica, *Copyright Beyond Law – Regulating Creativity in the Graffiti Subculture* (Hart Publishing 2016) 95-97.

³⁷ Enrico Bonadio, “Copyright protection of street art and graffiti under UK law” (2017) I.P.Q. 187, 193.

³⁸ Anna Waclawek, *Graffiti and Street Art* (Thomas & Hudson 2011) 14.

³⁹ Marta Iljadica, “Graffiti and the Moral Right of Integrity” [2015] I.P.Q. 266, 268.

copyright protection can be granted for this form of graffiti will largely be based on the facts of each case.

The District Court of Munich had to discuss the question whether a tag could be considered as a copyright protected work within two decisions.⁴⁰ The factual scenario, which is identical in both decisions, does not involve graffiti or street art in its ordinary application since it related to a work for hire.⁴¹ The claimant in the first decision was a graphic designer and worked at a sprayer shop. The defendants instructed him to design the combination of letters and a number “K1X” in a graffiti tagging style (Illustration 1, below). This logo was created with a felt pen and was subsequently applied to apparel, such as basketball caps and shoes. The artist initially received DM 10 and a pair of shoes as payment but subsequently received € 2000, - for permitting further uses of the logo by the defendant. The CEO of the defendant’s company gave concrete specifications - the logo should be designed as a graffiti tag, should entail the company’s letters, the number 1 should be clearly readable and he suggested the logo to have an underline.⁴² The artist then prepared 50 drafts of the logo for the CEO to choose from.⁴³



(Photo #1)

The first decision by the District Court of Munich held that the logo was the author’s own intellectual creation, hence a work susceptible to copyright protection.⁴⁴ It elaborated that the concrete design of letters and the number – the curvy x, the elongation of the left line of the k and

⁴⁰ *Urheberrechtsschutz für ein Logo in Form eines Graffiti* (2015) ZUM-RD 204 (LG München); *Urheberrechtsschutz für die grafische Gestaltung eines Schriftzuges* (2015) ZUM-RD 423 (LG München).

⁴¹ In the first decision (*Urheberrechtsschutz für ein Logo in Form eines Graffiti* (2015) ZUM-RD 204 (LG München)), the graffiti writer was the claimant and asked for disclosure of income generated by the defendant for use of the logo. In the second decision (*Urheberrechtsschutz für die grafische Gestaltung eines Schriftzuges* (2015) ZUM-RD 423, 424 (LG München)), the roles of claimant and defendant were reversed since the company sought the court to declare, *inter alia*, that the logo was not a copyright protected work.

⁴² *Urheberrechtsschutz für die grafische Gestaltung eines Schriftzuges* (2015) ZUM-RD 423, 423 (LG München).

⁴³ *Urheberrechtsschutz für die grafische Gestaltung eines Schriftzuges* (2015) ZUM-RD 423, 423 (LG München).

⁴⁴ *Urheberrechtsschutz für ein Logo in Form eines Graffiti* (2015) ZUM-RD 204, 205 (LG München).

the underline which would cross with the letter k – are without doubt the claimant’s creation.⁴⁵ The Court found that the fact that the logo was created with a felt pen rather than a spray did not alter this finding.⁴⁶ The other decision by the District Court elaborated on this analysis. In particular, it held that the necessary level of creativity is given since creative and aesthetic elements would be important for graffiti tags in contrast to ordinary fonts.⁴⁷ In addition, the fact that the artist devised 50 drafts of the logo would stipulate an array of design options making the logo in question likely to be a copyright protectable work. The District Court added that the BGH would nowadays only require a relatively low level of creativity for works of applied art as stipulated within the *Birthday Train* decision.⁴⁸ The fact and the way in which the Munich court mentioned the impact of this decision by the BGH which decreases the level of creativity required for works of applied art⁴⁹ could be an *argumentum a fortiori* for the positive finding that the tag was original. It probably had concluded that the graffiti tag would have surmounted the necessary level of creativity anyway even without the decreased level mooted by the *Birthday Train* decision.⁵⁰

The Higher District Court of Munich which had to decide on the admissibility of the appeal against the second decision agreed with the District Court that the logo would be protected by copyright law.⁵¹ The Court seconded the lines of argumentation of the District Court by again referring to the *Birthday Train* decision by the BGH. The Court held that the predetermined letters and number were only the basis of the creation. Relevant in this context would be the unique, innovative and above all aesthetic design of the sequence of letters and numbers in graffiti style.⁵² The necessary level of creativity could not be denied for such playful- dynamic aesthetics. This finding very much reflects the fact that writers generally aim to create a skilful, personalised style in their tags in order to enhance their status within the graffiti scene.⁵³

Importantly, these decisions by the Munich courts relate to work for hire where the work was created as a logo for a company. As such, it could be considered as a work of applied art, i.e. works which are created for a particular purpose, such as furniture, toys or jewellery.⁵⁴ Such works are distinguished from so-called pure or purposeless art.⁵⁵ Since the tag in the Munich decisions was devised as a logo for the purpose of affixing it to apparel, it might be considered as a work of applied art which just happened to be created in a “graffiti style”. The District Court of Hamburg has held that the purpose of a logo is to represent a company which would make it a work of applied art.⁵⁶

⁴⁵ *Urheberrechtsschutz für ein Logo in Form eines Graffitis* (2015) ZUM-RD 204, 205 - 206 (LG München).

⁴⁶ *Urheberrechtsschutz für ein Logo in Form eines Graffitis* (2015) ZUM-RD 204, 206 (LG München).

⁴⁷ *Urheberrechtsschutz für die grafische Gestaltung eines Schriftzuges* (2015) ZUM-RD 423, 428 (LG München).

⁴⁸ *Geburtstagszug* (2014) GRUR 175 (BGH) – *Birthday Train* (2014) IIC 831 (BGH). This decision changed the BGH’s jurisprudence where stricter rules were applied to works of applied art due to the availability of alternative protection by, for instance, design rights – *Silberdistel* (1995) GRUR 581, 582 (BGH).

⁴⁹ J.A.L. Sterling (ed), *Sterling on World Copyright Law* (4th edn, Sweet & Maxwell 2015) [7.33].

⁵⁰ Silvia Hartmann, “Geburtstagszug in voller Fahrt? – Bisherige Auswirkungen der Entscheidung in der Praxis” (2016) WRP 1327, 1333.

⁵¹ *Urheberrechtsschutz für ein Logo in Form eines Graffitis* (2015) ZUM-RD 190, 190 (OLG München).

⁵² *Urheberrechtsschutz für ein Logo in Form eines Graffitis* (2015) ZUM-RD 190, 190 (OLG München).

⁵³ Anna Waclawek, *Graffiti and Street Art* (Thomas & Hudson 2011) 44.

⁵⁴ Eva Inés Obergfell, “Abschied von der „Silberdistel“: Zum urheberrechtlichen Schutz von Werken der angewandten Kunst“ (2014) GRUR 621, 621.

⁵⁵ Eva Inés Obergfell, “Abschied von der „Silberdistel“: Zum urheberrechtlichen Schutz von Werken der angewandten Kunst“ (2014) GRUR 621, 621.

⁵⁶ LG Hamburg, Urt. v. 24. 4. 2012 – 310 O 100/11, [41] – *Ponto-Auge*.

This situation needs to be contrasted where tags are devised and applied in its usual way onto surfaces in the urban world. Here, one cannot necessarily regard these as works of applied art, so the rules of works of pure art might apply. Along these lines, it has been said that graffiti would fall within the category of works of pure art by referring to the *Mauerbilder*⁵⁷ and *Bemalung von Teilen der Berliner Mauer*⁵⁸ decisions of the BGH,⁵⁹ though these decisions relate to works of street art and not tags.⁶⁰ On the other hand, it could be argued that tags fulfil a purpose, i.e. to identify and represent its writer and to increase his or her fame, and apply the logic from the Hamburg court which found a logo to serve to identify the company behind it.⁶¹ So, how can tags be qualified, as works of applied art, of pure art or are they rather literary works?⁶²

This distinction between works of pure and applied art used to be important. Case law prescribed that even such works of pure art only containing a low level of creativity, often labelled as “kleine Münze” or “small change”, could be protected under copyright law.⁶³ Works of applied art, however, had to demonstrate a higher level of creativity. The *Birthday Train* decision, however, now makes the need to qualify a work as a piece of applied art or pure art moot.⁶⁴ Now, some level of creativity must be present for tags to be considered a work protected under German copyright law which then depends on the facts of the each case. Some tags require a considerable amount of aesthetic and individuality which would involve the necessary level of creativity like seen within the Munich decisions, while very simple tags may not qualify for copyright protection. Whether they are considered as pure or applied art is not of relevance anymore.

Another point that needs to be considered relates to the legality of street art and graffiti and whether this impacts on copyright subsistence. The creation of works of street art and graffiti often involves the application of paint on surfaces, usually walls or train cars.⁶⁵ The artists do generally not own these surfaces and in many occasions, the owner of the surfaces would oppose to the application of paint or of other materials to their property. The lack of consent would render the application of paint as a violation of property which could be sanctioned by civil and criminal law measures. This, however, does not hinder the subsistence of copyright in such works. The BGH has held that the fact that violation of civil and criminal law provisions in the creation of the work would

⁵⁷ *Mauer-Bilder* (1995) GRUR 673 (BGH) - *Wall Pictures* (1997) IIC 282 (BGH).

⁵⁸ *Bemalung von Teilen der Berliner Mauer* (2007) GRUR 691 [25] (BGH).

⁵⁹ Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly (eds), *Schricker/Loewenheim, Urheberrecht* (5th edn, C.H. Beck 2017) § 2 [169].

⁶⁰ See discussion in footnote 32. **Note to Enrico: Probably good to cross-reference with another chapter. Does anyone talk about this?**

⁶¹ Along these lines, the District Court of Potsdam has held that a tag could be considered as a pseudonym for a signature of the writer in a criminal case. The court demonstrated knowledge of the practices of writers as it argued that tags would be used to identify the writer and that this could be regarded as more than an indication of complicity in applying graffiti to commuter trains. The court added that the copying of a tag would be frowned upon within the writer scene – LG Potsdam, FD-StrafR 2015, 372010.

⁶² A literary work must convey information which could arguably be the case with tags as they identify the writer and are used to receive recognition within the scene – Mark Halsey and Alison Young, "Our desires are ungovernable: Writing graffiti in urban space" (2006) *Theoretical Criminology* 275, 280. The fact that most people will not understand the tags' message is irrelevant for it being a literary work - Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 2 [4].

⁶³ *Silberdistel* (1995) GRUR 581, 582 (BGH).

⁶⁴ Eva Inés Obergefell, "Abschied von der „Silberdistel“: Zum urheberrechtlichen Schutz von Werken der angewandten Kunst" (2014) GRUR 621, 624.

⁶⁵ Enrico Bonadio, "Copyright protection of street art and graffiti under UK law" (2017) *I.P.Q.* 187, 187.

generally be irrelevant for copyright subsistence. But it may affect the exercise of copyright which is discussed below.⁶⁶

2. Authorship and Ownership:

Copyright in the work is originally vested with its creator pursuant to § 7 UrhG. The author of a copyright protected work is also the owner of the copyright work, i.e. of the intangible work. Copyright ownership is generally not transferable.⁶⁷ This is also the case where the work has been commissioned by a third party or was executed in the course of employment. Street artists are frequently commissioned to produce a work for payment.⁶⁸ Such works can often be seen in restaurants, bars and shops. In such cases, authorship and ownership of the copyright will still remain with the artist. The exclusive use of copyright is contractually arranged through licencing which authorises the commissioning party or the employer to use the work.

Where a work is created by several authors together, such as in the case of crews, they all may be considered joined authors pursuant to § 8 UrhG. The Copyright Act defines co-authorship in a work where the contributors could not “separately exploit their individual shares in the work.” The individual contributions of authors rather merge to a unitary work. This, however, does not necessarily mean that the individual parts would need to be physically inseparable. They would rather constitute incomplete parts of the unitary work.⁶⁹ Co-authorship of a work entails that certain exclusive rights can only be exercised together with the joint authors. The Copyright Act, for instance, states that “alterations to the work are only permissible with the consent of the joint authors”. The refusal of a joint author regarding the publication, exploitation or alteration of the work must not, however, be “contrary to the principles of good faith.”⁷⁰

The collaboration of crews in the creation of a work of street art would, depending on the particular facts, render them as co-authors. Some creative input and collaboration on the creation of the work would be necessary to render an individual a joint author.⁷¹ This means that simply commissioning a work would usually not amount to a sufficient creative input⁷². In these lines, the Higher District Court of Munich has held that commissioning and financing the creation of a company logo in graffiti style by using certain particular letters and numbers does not suffice for establishing joint authorship with the graphic designers producing the logo.⁷³ In another decision (but in relation to the same factual scenario; see footnote 41), the same court compared this to the situation where the person commissioning a portrait would not be considered as a joint-author of the work.⁷⁴

⁶⁶ *Mauer-Bilder* (1995) GRUR 673, 675 (BGH) - *Wall Pictures* (1997) IIC 282, 284 (BGH); Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 2 [31][32].

⁶⁷ § 29 (1) UrhG.

⁶⁸ Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 7 [9].

⁶⁹ Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 8 [7].

⁷⁰ § 8 (2) UrhG.

⁷¹ Manfred Reh binder, Alexander Peukert, *Urheberrecht* (17th edn, C.H. Beck 2015) [358].

⁷² Manfred Reh binder, Alexander Peukert, *Urheberrecht* (17th edn, C.H. Beck 2015) [360] – [361].

⁷³ *Bedeutung eines Unternehmenslogos für den Erfolg des Unternehmens* (2015) ZUM-RD 188, 189 (OLG München).

⁷⁴ *Urheberrechtsschutz für ein Logo in Form eines Graffitis* (2015) ZUM-RD 190, 190 (OLG München).

The illegality of some forms of street art and graffiti means that intellectual property may collide with real property. The immaterial work protected by copyright which is materialised in a tangible form must be differentiated from that real property in the material carrier of the work. In this situation, there is a collision between the property rules and that of copyright. We have already said that this collision does not hinder the subsistence of copyright in the work. The artist, however, does not necessarily become the owner of the physical embodiment of the work. In the situation where paint is attached to a wall for a work of street art or graffiti, the property rules of § 946 of the German Civil Code (Bürgerliches Gesetzbuch, abbreviation: BGB) apply. When a movable good (e.g. the paint) is combined with a plot of land (to which the wall belongs to)⁷⁵ in such a way that it becomes an essential part of this plot of land (i.e. it is attached to it in a way that it would be destroyed if removed)⁷⁶ then the ownership of the plot of land extends to the movable good (i.e. the paint).

These abstract words of German property law mean that the owner of the building (the plot of land) to which the wall belongs to becomes the owner of the movable thing (i.e. the painting) where it becomes an essential part of it. This is the case where the movable good is attached in such a way where its removal is difficult.⁷⁷ In practice, this means that the owner of the building to which the work of street art is attached to becomes the owner of the paint which physically manifests the work.⁷⁸ On the other hand, ownership of the immaterial copyright protected work, by means of the representative signs,⁷⁹ belongs to the creator of the work. This overlap of real with intellectual property⁸⁰ can lead to various problems as will be discussed in this chapter.

3. Economic rights

German copyright law provides authors with, *inter alia*, the exclusive rights of reproduction (§ 16 UrHG) and distribution (§ 17 UrHG) of the protected work. The exclusive rights enable authors to commercialise and exploit their works but they may also choose not to do so.⁸¹ In addition, authors may restrict these uses by third parties unless they authorise them to do so unless an exception or limitation provision applies. Any unauthorised use not covered by an exception/limitation may constitute copyright infringement and can entail claims for injunctive relief (§ 97 (1) UrHG) and damages (§ 97(2) UrHG).

⁷⁵ Pursuant to § 94 (1) BGB a building (along with its walls) are an essential part of the plot of land where it is connected to the land.

⁷⁶ § 93 BGB.

⁷⁷ This would generally refer to paint being applied to the walls in form of tags and throw ups which need to be removed by using chemicals but possible not to paste ups.

⁷⁸ A different situation occurs where the artwork is applied to a movable good. § 950 (1) BGB prescribes that the person who creates a new movable things by transforming or processing one or more substances, would acquire the ownership of the new article. The provision states that processing would include “writing, drawing, painting, printing, engraving or a similar processing of the surface.” However, this rule would not apply “where the value of the processing or the transformation is substantially less than the value of the substance.” This means, that a vehicle to which paint is applied to would not become the property of the painter, but where a table cloth has been used a canvas - Haimo Schack, “Geistiges Eigentum contra Sacheigentum“ (1983) GRUR 56, 60.

⁷⁹ J.A.L. Sterling (ed), *Sterling on World Copyright Law* (4th edn, Sweet & Maxwell 2015) [6.18].

⁸⁰ Daniel Rassouli, “Banksy und sein Urheberrecht - Eine Bestandsaufnahme des Schutzes der Kunstform Street Art durch das Urheberrecht am Beispiel von Banksy“ (2013) KUR 97, 97-98.

⁸¹ »Mein Kampf« – Grenzen des urheberrechtlichen Zitatrechts (2012) ZUM-RD 479, 484 (OLG München).

The right of reproduction could be used against other artists or writers copying the work though this “biting” is generally frowned upon within the graffiti scene and regarded as a form of forgery.⁸² The right of distribution can become an increasingly relevant feature for street artists since this form of art is becoming increasingly popular and can achieve high price tags on the art market.⁸³ The increasing esteem of street art is demonstrated by an example from Berlin. In 2008, a part of a wall belonging to a military cemetery which displayed the stencilled artwork “Anarchy Rats” by the famous British Street artist Banksy (see below) was removed with permission of the responsible authority and was sold for allegedly € 20.000,-.⁸⁴ This raises the question whether an economic right of the author is infringed where the material support, e.g. the wall, which carries the work of street art, is removed and sold. The BGH has held that street artists could rely on the economic right of distribution in such a situation. This right even extends to the owner of the material support (i.e. the wall) to which the work is applied to.⁸⁵



(Photo #2)⁸⁶

⁸² Anna Waclawek, *Graffiti and Street Art* (Thomas & Hudson 2011) 28.

⁸³ Ilja Czernik, “Stealing Banksy – Immobilienrechtliche Herausforderungen durch Street Art“ (2014) ZfIR 551, 554.

⁸⁴ “Graffiti an der Friedhofsmauer für 20 000 Euro verkauft“ (25 February 2008) BZ
<<https://www.bz-berlin.de/artikel-archiv/graffiti-an-der-friedhofsmauer-fuer-20-000-euro-verkauft>>

⁸⁵ *Mauerbilder* (1995) GRUR 673, 675 (BGH) – *Wall Pictures* (1997) IIC 282, 284 (BGH).

⁸⁶ <http://animalnewyork.com/2009/banksys-berlin-wall-painting-up-for-auction/>

In the *Mauerbilder* decision from 1995, the BGH elaborated its approach to unravelling this conflict between real and intellectual property. The case involved the sale of parts of the Berlin wall which contained murals. The artists perceived this as a violation of their copyright and sued for copyright infringement. The BGH applied a fundamental rights analysis to untangle the positions of the artists and the owner of the wall. It held that while intellectual and real property rights would exist separately from one another, the owner of the material support cannot exercise his right at will where this would impair the copyright of the artists. However, in the present case where the work has been created illegally, i.e. in violation of civil and criminal law norms, the constitutionally guaranteed artistic freedom pursuant to Article 5 (3) of the German Basic Law of the artist is limited by the fundamental right of property enshrined within Article 14 German Basic Law. This means that the owner may exercise his property rights which entitles him to destroy a work of street art. There is, however, a caveat: He does not have the right to commercially exploit the work in question. The Court explained that even the owner of a work of art who has purchased the piece from the artist would not acquire any economic rights deriving from the copyright.

The BGH, however, held that this consideration would not apply where the material carrier to which the piece of street art is applied would constitute an independent economic asset, such as a house or a car. In that case, the owner could commercialise the object as otherwise this would unduly impair the constitutionally guaranteed private sphere of autonomy⁸⁷ permitting the owner to use the object as he or she thinks fit (§ 903 BGB). In such circumstances, the court held, copyright would need to give way to the exercise of real property. Applying these considerations to the factual scenario, the Court held that the Berlin Wall in its original state could not be considered to be such an independent economic asset. It only became a tradable asset when it was divided into different segments. In such case, the exercise of copyright could not be denied since the author should participate appropriately in the economic exploitation of his work. Applying these considerations to the “Anarchy Rats” stencil scenario mentioned above, it can be said that the piece of wall in question only became a tradable asset through the application of the stencil and the removal of the wall it was applied to.⁸⁸ In this case, Banksy would retain his economic rights but could not use his exclusive rights where the whole building is being sold.⁸⁹

In *Mauerbilder*, the BGH also dismissed the argument that the authors could have waived their economic rights: First, the authors originally did not expect a commercial exploitation of their work when they produced it, which means that they could not implicitly waive such right. Second, the authors have not remained anonymous, as is often the case with regards to graffiti and street art. Rather, they have acknowledged their copyright and have been named as authors within publications covering the murals. Finally, German copyright law does not see the possibility of an abandonment of property rights like in form of dereliction in real property. The court astutely notes that “(t)here is no “ownerless” copyright.”⁹⁰

⁸⁷ Article 2(1) of the German Basic Law.

⁸⁸ Daniel Rassouli, “Banksy und sein Urheberrecht - Eine Bestandsaufnahme des Schutzes der Kunstform Street Art durch das Urheberrecht am Beispiel von Banksy“ (2013) KUR 97, 101.

⁸⁹ Daniel Rassouli, “Banksy und sein Urheberrecht - Eine Bestandsaufnahme des Schutzes der Kunstform Street Art durch das Urheberrecht am Beispiel von Banksy“ (2013) KUR 97, 101.

⁹⁰ *Mauerbilder* (1995) GRUR 673, 675 (BGH) – *Wall Pictures* (1997) IIC 282, 285 (BGH).

The BGH also held that the right of distribution of the authors “to offer the original or copies of the work to the public or to bring it to the market” was not exhausted pursuant to § 17 (2) UrhG. The appealed decision by the Higher District Court of Berlin, the Kammergericht, initially held that the right of distribution would have been exhausted.⁹¹ It came to this conclusion since it considered the application of the paintings to a wall belonging to someone else as a disposal. Furthermore, this would constitute a conscious act of publication by the author.⁹² This decision has been criticised⁹³ and this interpretation was later discarded by the BGH in its decision. The highest civil court in Germany agreed with the Kammergericht’s wide interpretation of the term “Veräußerung” (engl.: disposal) which would encompass any form of transfer, whether by selling, swapping or providing it as a gift.⁹⁴ The BGH, however, held that disposal could not be a mere display of a work. It argued that the rationale of the doctrine of exhaustion revolves around the notion that the work should be freely tradeable once the author has disposed of the work and his exploitation interests have been satisfied, usually by payment of a charge. This was not given in the present case since the display of the work would not amount to “a release of a marketable copy of the work as an economic asset.”⁹⁵ Coming back to the “Anarchy Rats” example, it must be held that Banksy then did not exhaust his right of distribution according to the BGH’s logic since the display of the work cannot be considered as a disposal.⁹⁶

The right of distribution was also discussed within another decision of the BGH. The case involved a gift by the German Parliament, the Bundestag, to the United Nations Organisation (UNO) in form of segments of the Berlin wall.⁹⁷ These segments contained the mural “Ost-West Dialog” by the artist Kani Alavi.⁹⁸ The mural did not contain Alavi’s signature. The pieces of the wall were the property of the City of Berlin which gifted them to the Bundestag in an official act of state on the 12th July 2001. The president of the Bundestag then endowed the segments during this act of state to the United Nations in Berlin with the former UN General Secretary Kofi Annan present. The murals were then placed near the UN headquarters in New York City (see below). The artist, claimed, *inter alia*, that his right of distribution had been violated. However, the BGH held that the right of distribution was not violated since the work had not been distributed by the endowments. The endowment by the City of Berlin in favour of the Bundestag and then to the UN could not be regarded as disposing or offering to dispose of the work to the public since the painting would remain under public ownership.⁹⁹ The endowment of the segments during the act of

⁹¹ *Mauerbilder* (1994) GRUR 212 (KG).

⁹² *Mauerbilder* (1994) GRUR 212, 213 - 214 (KG).

⁹³ Axel Beater, “Verbreitungsrecht des Urhebers und aufgedrängte Kunst - Der Streit über Graffiti-Bemalungen der Berliner Mauer, (1995) UFITA 61, 73..

⁹⁴ *Mauerbilder* (1995) GRUR 673, 675 - 676 (BGH) - *Wall Pictures* (1997) IIC 282, 286 (BGH).

⁹⁵ *Mauerbilder* (1995) GRUR 673, 676 (BGH) - *Wall Pictures* (1997) IIC 282, 286 (BGH). It can be, however, argued that any form of transferring property would exhaust the right. Article 4 (2) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (InfoSoc Directive) provides a wider wording than the German norm (i.e. (which could encompass the transfer of property by application of street art to a wall (see 946 BGB). While the right of distribution would be exhausted in such reading, the artist could still rely on the resale right pursuant to § 26 UrhG - Ilja Czernik, “Stealing Banksy – Immobilienrechtliche Herausforderungen durch Street Art“ (2014) ZfIR 551, 554 -555.

⁹⁶ Daniel Rassouli, “Banksy und sein Urheberrecht - Eine Bestandsaufnahme des Schutzes der Kunstform Street Art durch das Urheberrecht am Beispiel von Banksy“ (2013) KUR 97, 101.

⁹⁷ *Bemalung von Teilen der Berliner Mauer* (2007) GRUR 691 (BGH).

⁹⁸ “Alavi verliert Rechtsstreit um sein Mauerbild“ (24 May 2007) Die Welt <<https://www.welt.de/regionales/berlin/article893514/Alavi-verliert-Rechtsstreit-um-sein-Mauerbild.html>>

⁹⁹ The same would apply to the transport of the segments abroad -*Bemalung von Teilen der Berliner Mauer* (2007) GRUR 691 [30] (BGH).

state in July 2001 was only symbolic and could not amount to a disposal of the work.¹⁰⁰ The same applies to the display of the work during the act of state on that day.¹⁰¹ German copyright law was deemed not applicable with regard to the final endowment which took place in New York on the 04th April 2002 and was held to be outside of the court's jurisdiction.



(Photo #3)

4. Moral Rights

Aside the economic rights, authors can resort to moral rights. In contrast to common law countries, Germany has a high standard of moral right protection¹⁰² which exceeds that mandated by Article 6bis of the Berne Convention.¹⁰³ Their importance is highlighted by their positioning before the economic rights of the author within the German Author's Rights Act. They are also not alienable, nor waivable.¹⁰⁴ The violation of moral rights can lead to damages or injunctive relief against the infringer pursuant to § 97 UrhG.¹⁰⁵ German copyright law, for instance, protects the rights of the author to decide if and to what extent the work is made available to the public pursuant to § 12 UrhG. However, the right of publication is usually not touched upon in the street art or graffiti context discussed in this chapter since the writers or street artists have usually “published” the work already by applying it to a wall.¹⁰⁶

¹⁰⁰ *Bemalung von Teilen der Berliner Mauer* (2007) GRUR 691 [28] (BGH).

¹⁰¹ *Bemalung von Teilen der Berliner Mauer* (2007) GRUR 691 [29] (BGH).

¹⁰² Marta Iljadica, *Copyright Beyond Law – Regulating Creativity in the Graffiti Subculture* (Hart Publishing 2016) 216.

¹⁰³ Manfred Rehbinder, Alexander Peukert, *Urheberrecht* (17th edn, C.H. Beck 2015) [535].

¹⁰⁴ Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly (eds), *Schricker/Loewenheim, Urheberrecht* (5th edn, C.H. Beck 2017) Vor 12ff [11].

¹⁰⁵ Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly (eds), *Schricker/Loewenheim, Urheberrecht* (5th edn, C.H. Beck 2017) Vor 12ff. [28].

¹⁰⁶ Daniel Rassouli, “Banksy und sein Urheberrecht - Eine Bestandsaufnahme des Schutzes der Kunstform Street Art durch das Urheberrecht am Beispiel von Banksy“ (2013) KUR 97, 98; Ilja Czernik, “Stealing Banksy – Immobilienrechtliche Herausforderungen durch Street Art“ (2014) ZfIR 551, 553.

4.1 Right of attribution - § 13 UrhG

The right of attribution gives the author the right to be named as the author of the work in relation to every use and reproduction of the work. This would include photographic books of street art and graffiti but also the publication of the works over the internet in a blog post. The author needs to be identifiable in a clear and unequivocal way.¹⁰⁷ Authors may also exercise the right of attribution by using pseudonyms¹⁰⁸ which is, of course, frequently used in the context of graffiti and street art. Graffiti writers, in particular, tend to use pseudonyms which are often written in a specific style.¹⁰⁹ With this regard, the District Court of Potsdam has held in a criminal decision that tags used by graffiti writers could be regarded as pseudonym of a signature attributable to a particular person.¹¹⁰ Where an author determines a pseudonym to designate authorship then this form would need to be applied to any use of the work.¹¹¹

German law also permits the author to stay anonymous while still enjoying the full scope of rights.¹¹² Authors can determine that the work is only referred to without naming them.¹¹³ This anonymity does not place the work in the public domain.¹¹⁴ In the *Bemalung von Teilen der Berliner Mauer*, the BGH has held that the artist of the mural which was subsequently placed at the premises of the UN in New York City could still rely on his right of integrity even though he has not signed the work “according to the usual habits in relation to graffiti.”¹¹⁵ However, in this case, the German Federal High Court held that the author could not rely on a violation of his right to be identified. The Court found that all alleged infringing actions which took place in Germany did not violate §13 UrhG since the author was not inhibited from asserting his right of integrity.¹¹⁶

4.2 Right of integrity - § 14 UrhG

Another important moral right, or rather the “king of the moral rights” as Raue states¹¹⁷, is the right of integrity. It aims at protecting the reputation of the author and acts against the distortion or any other form of impairment of the work. The object of protection is the embodiment and form of the work in its concrete, individual creative overall expression as devised by the author.¹¹⁸ By this, it reinforces the general prohibition to alter the work.¹¹⁹ Importantly, the

¹⁰⁷ Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly (eds), *Schricker/Loewenheim, Urheberrecht* (5th edn, C.H. Beck 2017) § 13 [15].

¹⁰⁸ Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 13 [13].

¹⁰⁹ Enrico Bonadio, “Copyright protection of street art and graffiti under UK law” (2017) I.P.Q. 187, 193.

¹¹⁰ See again the discussion in a criminal case by the District Court of Potsdam (supra fn 61).

¹¹¹ Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly (eds), *Schricker/Loewenheim, Urheberrecht* (5th edn, C.H. Beck 2017) § 13 [22],[25].

¹¹² Hartwig Ahlberg and Horst-Peter Götting (eds), *Beck'scher Online-Kommentar Urheberrecht* (21st edn, C.H. Beck 2018) § 13 [10]; Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 13 [10].

¹¹³ However, this does not cover situations where the author's real name is exposed - Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly (eds), *Schricker/Loewenheim, Urheberrecht* (5th edn, C.H. Beck 2017) § 14 [23].

¹¹⁴ *marions-kochbuch.de* (2010) GRUR 616 [43] (BGH).

¹¹⁵ *Bemalung von Teilen der Berliner Mauer* (2007) GRUR 691 [34] (BGH).

¹¹⁶ *Bemalung von Teilen der Berliner Mauer* (2007) GRUR 691 [34] (BGH).

¹¹⁷ Peter Raue, “§ 1 Grundlagen des Urheberrechts” in Peter Raue, Jan Hegemann, *Münchener Anwaltshandbuch Urheber- und Medienrecht* (2^{dn} edn, C.H. Beck 2017) [66].

¹¹⁸ Peter Raue, “§ 1 Grundlagen des Urheberrechts” in Peter Raue, Jan Hegemann, *Münchener Anwaltshandbuch Urheber- und Medienrecht* (2^{dn} edn, C.H. Beck 2017) [66].

integrity right extends to those parties which have a contractual right to use the work pursuant to § 39 UrhG – they may not alter the work unless this was agreed upon.¹²⁰ The right is also available for works created in violation of the property rights of the owner of the object to which the work is applied to.¹²¹ However, in reality this right may not often be enforced since it would require artists to come out, confirm authorship of the unauthorised piece and thus risk serious legal consequences.

Three criteria need to be fulfilled for the integrity right to be violated¹²²: there must be a distortion or any other form of impairment of the work, this distortion or impairment is capable of prejudicing the author’s legitimate intellectual or personal interests in the work and that a balancing of involved interests is applied. Each of these criteria are discussed below.

4.2.1. Distortion or impairment of the work

First, there must be a distortion or impairment of the work. This is an objective assessment. The particular wording of § 14 UrhG suggest that distortions are a sub-category of impairments, albeit particularly severe cases thereof.¹²³ Such distortions are given, where the physical integrity of the work is affected¹²⁴ by, for instance, overpainting a work.¹²⁵ Impairments of the work are also actionable and may relate to rearrangements of the work. Since the right of integrity protects the author’s interest to present the work as envisaged and devised by him or her, such impairments may not only occur where the treatment negatively affects the work, but also where they objectively have positive effects.¹²⁶

The overpainting of a piece of street art or graffiti writing can be regarded as a distortion pursuant to § 14 UrhG. Also, “tagging”, going over a piece, crossing it out or destroying it¹²⁷ (“buff”) could be regarded as distortions.¹²⁸ But even where the physical integrity of the work as such is not affected, like in cases where a work is removed from its original location to which it

¹¹⁹ *Schülerweiterung* (1974) GRUR 675, 676 (BGH).

¹²⁰ Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly (eds), *Schricker/Loewenheim, Urheberrecht* (5th edn, C.H. Beck 2017) § 14 [7].

¹²¹ Axel Beater, “Verbreitungsrecht des Urhebers und aufgedrangte Kunst - Der Streit über Graffiti-Bemalungen der Berliner Mauer“ (1995) UfITA 61, 72-73; Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) §14 [47]; Haimo Schack, “Geistiges Eigentum contra Sacheigentum“ (1983) GRUR 56, 60.

¹²² Thomas Dreier and Gernot Schulze, *Urhebergesetz* (6th edn., C. H. Beck 2018) § 14 [9]; Haimo Schack, *Urheber- und Urhebervertragsrecht* (7th edn, Mohr Siebeck 2015) [380].

¹²³ Hartwig Ahlberg and Horst-Peter Götting (eds), *Beck’scher Online-Kommentar Urheberrecht* (21st edn, C.H. Beck 2018) § 14 [3]; Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 14 [3]; Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly (eds), *Schricker/Loewenheim, Urheberrecht* (5th edn, C.H. Beck 2017) § 14 [18]; Thomas Dreier and Gernot Schulze, *Urhebergesetz* (6th edn., C. H. Beck 2018) § 14 [5].

¹²⁴ *Kirchen-Innenraumgestaltung* (1982) GRUR 107, 109 (BGH).

¹²⁵ *Felseiland mit Sirenen* RGZ 79, 397.

¹²⁶ Manfred Rehbinder, Alexander Peukert, *Urheberrecht* (17th edn, C.H. Beck 2015) [561].

¹²⁷ Note that it is disputed whether the total destruction of the art work could be considered actionable pursuant to § 14 UrhG. While some voices in the literature regard the destruction of the piece as the ultimate case of impairment, other voices and the courts take a more restrictive approach – see discussion in Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly (eds), *Schricker/Loewenheim, Urheberrecht* (5th edn, C.H. Beck 2017) § 14 [21]; Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 14 [22] – [25].

¹²⁸ In the UK these instances could be considered a “derogatory treatment” pursuant to Section 80 CDPA 1988 - Marta Ijadica, *Copyright Beyond Law – Regulating Creativity in the Graffiti Subculture* (Hart Publishing 2016) 228-229.

has a specific spatial reference to, the integrity right may be violated.¹²⁹ The above mentioned “Anarchy Rat” stencil serves as a good example here for this form of possible de-contextualisation by removing the work from its original site. The severance of the particular spatial context of the work could be seen as a violation of the right of integrity. With regard to street art, urban surroundings provides context to the art work,¹³⁰ in particular for street installations. Often, the artwork is reflective of its particular location.¹³¹ Then, the piece will maintain its artistic meaning only as long as it is kept in its original surrounding which can represent its dominant element.¹³² For graffiti writers the location aspect is also relevant.¹³³ The writers’ fame and reputation within the writer scene is partially based on producing works in highly visible locations.¹³⁴ Furthermore, the display in a gallery could be seen as violating the integrity right. The BGH has held that the interests of the author may be impaired by the form and type of display and use of the work.¹³⁵ They do not change the work as such but rather the environment in which it is placed.¹³⁶ This would mean that removing them from their original environment and possibly placing them into galleries would be like “locking wild animals in zoos”¹³⁷ or clipping their wings.¹³⁸ Graffiti writers, for instance, oppose the formal exhibition of their work as graffiti would its sense of dynamism.¹³⁹

The case law in Germany on de-contextualisation generally relates to pieces of public art. For instance, the Higher District Court of Hamm has held that the relocation of the sculpture “Keilstück” by the sculptor Wilfried Hagebölling from a church square in the town centre of Minden in North-Rhine Westphalia to a building yard which was not accessible to a public would violate the author’s integrity right. The Court held that the work’s spatial relation to its environment would also be protected by the integrity right.¹⁴⁰ It stated that the work in question would not be self-contained but would receive its particular artistic expressiveness in context with its surroundings.¹⁴¹ The Higher District Court of Cologne provided a more differentiated approach in its assessment of a relocation of a work of public art in a more recent decision.¹⁴² It confirmed the finding that the right of integrity might also be affected where exterior factors of work influencing its reception are affected and by this changing its overall impression. The Court outlined two scenarios: In the absolute site-specific scenario, the work would be specifically construed and conceptualised in relation to its particular surrounding. It then can only achieve its expressiveness in this particular surrounding and positioning it in a different location would change the aesthetic

¹²⁹ Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 14 [1].

¹³⁰ Anna Waclawek, *Graffiti and Street Art* (Thomas & Hudson 2011) 84.

¹³¹ Cedar Lewison, *Street Art: The Graffiti Revolution* (Tate Publishing 2009) 63.

¹³² Enrico Bonadio, “Copyright protection of street art and graffiti under UK law” (2017) I.P.Q. 187, 201.

¹³³ Marta Iljadica, *Copyright Beyond Law – Regulating Creativity in the Graffiti Subculture* (Hart Publishing 2016) 228.

¹³⁴ Marta Iljadica, “Graffiti and the Moral Right of Integrity” [2015] I.P.Q. 266, 267.

¹³⁵ *Kirchen-Innenraumgestaltung* (1982) GRUR 107, 109 (BGH).

¹³⁶ Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 14 [3].

¹³⁷ Enrico Bonadio, “Copyright protection of street art and graffiti under UK law” (2017) I.P.Q. 187, 201-202.

¹³⁸ Cedar Lewison, *Street Art: The Graffiti Revolution* (Tate Publishing 2009) 127.

¹³⁹ Anna Waclawek, *Graffiti and Street Art* (Thomas & Hudson 2011) 174.

¹⁴⁰ *Entstellung einer Plastik durch Entfernung von einem öffentlichen Platz und Verbringung auf einen Bauhof* (2001) ZUM-RD 443, 444 (OLG Hamm).

¹⁴¹ *Entstellung einer Plastik durch Entfernung von einem öffentlichen Platz und Verbringung auf einen Bauhof* (2001) ZUM-RD 443, 444 (OLG Hamm).

¹⁴² *Urheberrechtsschutz gegen Standortverlegung eines Kunstwerks* (2010) ZUM 180 (OLG Köln).

impression of the creation¹⁴³ and be considered a distortion of the work.¹⁴⁴ The second, relative scenario would relate to situations where the work is linked to a certain kind of location but not a particular one. In this scenario, an alteration would occur where the work is placed in an unsuitable place.

Transposing these considerations to the street art scenario, then a removal of a piece of street art could amount to an impairment of the work. Works of street art could qualify as site-specific works since they tend to be created at their exhibition location¹⁴⁵ or where it was created with special reference and consideration of the surroundings. The assessment whether a removal would constitute a distortion or impairment is neither based on the author's subjective view nor that of an adept but that of an unbiased average observer.¹⁴⁶ This then very much depends on the given circumstances. A distortion could be found in cases where street installations are removed from their original locations where the nexus between location and work is very close but could also apply to other pieces of street art.

4.2.2 Distortions or impairment capable of prejudicing his legitimate intellectual or personal interests in the work

Secondly, it has to be established whether the above treatments of an artwork would be “capable of prejudicing his legitimate intellectual or personal interests in the work.” This criterion is assessed through objective criteria, not the artist's sentiment,¹⁴⁷ and has a filter function. It renders § 14 UrhG not applicable where a distortion or impairment would not give prejudice to the author's interest.¹⁴⁸ Such prejudice is generally indicated by a distortion or impairment¹⁴⁹ but is not given where the author has allowed such alteration or where the impairment takes place in the private sphere of the owner of the work.¹⁵⁰

4.2.3 Balance of interest

Finally, the interest of the author must be legitimate in order to outweigh any countervailing interests. This involves a balance of interests-analysis.¹⁵¹ Possible countervailing interests to those of the author are, for instance, those of the owner of the artwork whose interest to exercise his property right is taken into the equation. The latter becomes more prevalent, the more the particular work does not just serve artistic pleasure but has also practical use.¹⁵² Dietz also mentions “the

¹⁴³ Here, the Court specifically referred to the above-mentioned decision of the Higher District Court of Hamm - *Entstellung einer Plastik durch Entfernung von einem öffentlichen Platz und Verbringung auf einen Bauhof* (2001) ZUM-RD 443, (OLG Hamm).

¹⁴⁴ Ilja Czernik, “Standortspezifische Kunst als besondere Herausforderung im Immobilienrecht” (2013) ZfIR 459, 462.

¹⁴⁵ Ilja Czernik, “Standortspezifische Kunst als besondere Herausforderung im Immobilienrecht” (2013) ZfIR 459, 460.

¹⁴⁶ *Urheberrechtsschutz gegen Standortverlegung eines Kunstwerks* (2010) ZUM 180, 182 (OLG Köln).

¹⁴⁷ Haimo Schack, *Urheber- und Urhebervertragsrecht* (7th edn, Mohr Siebeck 2015) [387].

¹⁴⁸ Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 14 [8].

¹⁴⁹ Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 14 [9]; Thomas Dreier and Gernot Schulze, *Urhebergesetz* (6th edn., C. H. Beck 2018) § 14 [15].

¹⁵⁰ Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly (eds), *Schricker/Loewenheim, Urheberrecht* (5th edn, C.H. Beck 2017) § 14 [24]-[25].

¹⁵¹ Adolf Dietz, “The Artist's Right of Integrity Under Copyright Law - A Comparative Approach” (1994) ICC 177, 192.

¹⁵² Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly (eds), *Schricker/Loewenheim, Urheberrecht* (5th edn, C.H. Beck 2017) § 14 [26].

counter-interests of the public in general” as well as of those of “official authorities responsible for the design of public places”¹⁵³ in the context of works of public art. Other considerations that are taken into account in this balance of interests are, *inter alia*, the kind and level of impairment or distortion, the level of creativity of the work and the intended use of the work.¹⁵⁴ A particularly important question in relation to graffiti and street art is whether aesthetic esteem has a role in the overall assessment. This is disputed: While the jurisprudence appears to assess esteem,¹⁵⁵ this is seen critically by voices in the literature. There it is argued that copyright should not take artistic esteem into consideration since taste is always subject to change and that it would prejudice against works of lesser known artists.¹⁵⁶

The final step in the analysis of § 14 UrhG, the balancing exercise, is of particular relevance for works of street artists and graffiti writers, especially, in situations where the owner of the material carrier overpaints the respective piece. Often, the owner of the material surface on which the graffiti or work of street art has been applied will want to delete them, showcasing again the conflict between real and intellectual property. In its *Mauer Bilder* decision, the BGH held that owner of the material support has the right to destroy the work as discussed above.¹⁵⁷ In such a situation, it can be argued that the author does not have a legitimate intellectual or personal interest where the work was inflicted onto the owner of the material support.¹⁵⁸

The District Court of Berlin had to decide a not yet legally binding case long these lines with regard to a mural at the East Side Gallery.¹⁵⁹ The mural required to be renewed due to adverse effects of the weather, graffiti and people breaking out pieces of the wall as a souvenir. The artist of the original mural was offered to repaint the mural after it had been whitewashed. Alternatively, the artist was urged to permit third parties to repaint the mural but neither option was acceptable. The artist claimed violation of the right to integrity after the mural had been whitewashed and sought damages. The District Court, however, held that the interests of the artist would not prevail in this case, *inter alia*, because he must have been aware of the potentially countervailing interests of the owner of the wall when creating the mural.¹⁶⁰ However, in exceptional circumstances the balancing of the interest may lead to another result. Schack mentions that this might be the case where the author had reason to rely on the acquiescence of the property owner.¹⁶¹ This could be seen as an acceptance of the painting by the property owner which would require him to abide to the rules of §

¹⁵³ Adolf Dietz, “The Artist’s Right of Integrity Under Copyright Law - A Comparative Approach” (1994) ICC 177, 192.

¹⁵⁴ Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 14 [15]-[21]; Ilja Czernik, “Standortspezifische Kunst als besondere Herausforderung im Immobilienrecht” (2013) ZfIR 459, 463.

¹⁵⁵ *Oberammergauer Passionspiele II* (1989) GRUR 1989, 106, 107 (BGH); *Kirchenraumgestaltung* (1982) GRUR, 107, 110 (BGH).

¹⁵⁶ Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 14 [17]; Ilja Czernik, “Standortspezifische Kunst als besondere Herausforderung im Immobilienrecht” (2013) ZfIR 459, 463.

¹⁵⁷ *Mauerbilder* (1995) GRUR 1995, 673, 675 (BGH) - *Wall Pictures* (1997) IIC 282, 284 (BGH); Thomas Dreier and Gernot Schulze, *Urhebergesetz* (6th edn., C. H. Beck 2018) § 14 [30].

¹⁵⁸ Axel Beater, “Verbreitungsrecht des Urhebers und aufgedrängte Kunst - Der Streit über Graffiti-Bemalungen der Berliner Mauer, (1995) UFITA 61, 72.

¹⁵⁹ LG Berlin (2012) ZUM 507.

¹⁶⁰ LG Berlin (2012) ZUM 507, 509.

¹⁶¹ Haimo Schack, “Geistiges Eigentum contra Sacheigentum“ (1983) GRUR 56, 60.

14 UrhG.¹⁶² However, while the owner of the material support may destroy the work, he is generally not permitted to use the work in other ways, like exploiting it commercially.¹⁶³

Something else applies where the work was distorted by someone else than the owner of the material support. Then, the balance of the involved interests is conducted with the general assumption that the interest of the author takes preference, unless the assessment establishes that other interests prevail.¹⁶⁴ According to the Higher District Court of Hamm, the assessment must be based on the concrete circumstances of the impairment to adequately assess the involved interests.¹⁶⁵ Based on the assessment of the decided case law, these following may apply to the application of the right of integrity to works of graffiti and street art:

- Third parties, i.e. neither the property owner nor the author, may not remove the work without authorisation of the property owner or that those of author as this may be considered as a violation of the integrity right. This means that whitewashing can only be done by the owners of the material carrier or based on their authorisation,¹⁶⁶ but not by third party “vigilantes.”¹⁶⁷ The BGH has held that copyright and the right of integrity would be available even for “illegal” works and that the privilege of destroying a piece of art is provided only to the owner of the material carrier.
- Where a piece of street art is removed from its original location, a violation of the right of integrity depends on whether this amounts to a distortion or impairment of the work. Where the work is absolute site-specific then this would amount to a distortion already by the act of removing it which the author may oppose to since its overall expressiveness has changed.¹⁶⁸
- Where the work is not site-specific in an absolute sense, it depends on where the piece is subsequently placed and much depends on the particular circumstances. It could be argued that placing a piece of street art in a gallery could generally be considered as an impairment since it places the work into a different context. But this depends on the assessment of the unbiased average observer and not of the street artists who may heavily oppose to their work being placed in galleries. Where a piece is placed in a gallery for sale without the authorisation of the author, i.e. infringing the right of distribution¹⁶⁹ as established by the BGH¹⁷⁰, it could be argued that the exhibitor does not have any legitimate interest which

¹⁶² Axel Beater, “Verbreitungsrecht des Urhebers und aufgedrangte Kunst - Der Streit über Graffiti-Bemalungen der Berliner Mauer“ (1995) UFITA 61, 73.

¹⁶³ *Mauerbilder* (1995) GRUR 1995, 673, 675 (BGH) - *Wall Pictures* (1997) IIC 282, 284-285 (BGH).

¹⁶⁴ Peter Raue, “§ 1 Grundlagen des Urheberrechts” in Peter Raue, Jan Hegemann, *Münchener Anwaltshandbuch Urheber- und Medienrecht* (2nd edn, C.H. Beck 2017) [74].

¹⁶⁵ *Entstellung einer Plastik durch Entfernung von einem öffentlichen Platz und Verbringung auf einen Bauhof* (2001) ZUM-RD 443, 445 (OLG Hamm).

¹⁶⁶ This has happened to two murals in Berlin made by the street artist “Blu” in Berlin Kreuzberg - Lutz Henke, “Why we painted over Berlin’s most famous graffiti” (19 December 2014) The Guardian <<https://www.theguardian.com/commentisfree/2014/dec/19/why-we-painted-over-berlin-graffiti-kreuzberg-murals>>

¹⁶⁷ This also applies to tenants of the building where the piece of street art or graffiti is applied to. They may, however, have a claim against the property owner to remove the piece in exceptional cases based on their contractual relationship - Ilja Czernik, “Stealing Banksy – Immobilienrechtliche Herausforderungen durch Street Art“ (2014) ZfIR 551, 553.

¹⁶⁸ Ilja Czernik, “Stealing Banksy – Immobilienrechtliche Herausforderungen durch Street Art“ (2014) ZfIR 551, 555.

¹⁶⁹ Peter Raue, “§ 1 Grundlagen des Urheberrechts” in Peter Raue, Jan Hegemann, *Münchener Anwaltshandbuch Urheber- und Medienrecht* (2nd edn, C.H. Beck 2017) [98].

¹⁷⁰ See, however, the countervailing points with regard to the exhaustion of the distribution right made by Czernik within footnote 94 supra.

outweigh the author's interest. Based on this logic, it then could be argued that the integrity right is violated.

5. Exceptions

Exceptions or limitations to the exclusive rights of authors can become relevant in context of street art and graffiti¹⁷¹ since they permit certain uses which would otherwise require authorisation of the author. § 59 (1) 1 UrhG, for instance, prescribes the panorama freedom under German copyright law. The provision mandates that the reproduction, distribution and making available to the public of works which are permanently located in public roads and ways or public open spaces is permissible.¹⁷² It, however, does not limit the moral rights of the author¹⁷³ and § 62 UrhG, which prohibits an alteration of the work and therefore substantiates the rule of § 14 UrhG, needs to be adhered to.¹⁷⁴ The scope of §59 UrhG potentially encompasses many pieces of graffiti and street art.¹⁷⁵ Importantly, the exception does not cover the distribution of the original work itself.¹⁷⁶ The legislative rationale of the provision is based on the idea that the public display of a work would stipulate that the work has been dedicated to the public.¹⁷⁷ This would justify a limitation of copyright law by allowing anyone to reproduce the work and use such reproductions.¹⁷⁸ The exception applies to such works which can be accessed publicly. This covers not only roads and areas which are owned by the public bodies but also such private roads which are accessible to the public.¹⁷⁹ This would exclude such works which are behind walls or placed within backyards from the scope of the exception.¹⁸⁰

The exception does not apply where the work is not intended to be located permanently in the public. Such permanence can generally be assumed with regards to many works of graffiti and street art, such as stencils,¹⁸¹ murals and throw-ups. Something else may arise where the work is only meant to be displayed for a certain period which was illustrated in “*Verhüllter Reichstag*” decision by the BGH in relation to the wrapped Reichstag building in Berlin by the artists Christo and Jeanne-Claude (see below) which attracted many visitors in the year 1995. The court held that the exception was not applicable here since the art work was intended only to be displayed for two weeks.¹⁸² In

¹⁷¹ Hartwig Ahlberg and Horst-Peter Götting (eds), *Beck'scher Online-Kommentar Urheberrecht* (21st edn, C.H. Beck 2018) § 59 [5].

¹⁷² Note that the provision only limits the extend of copyright protection of the author of the work which is located permanently on public paths, streets or squares and not the copyright of the photographer in the photograph - *East Side Gallery* (2017) GRUR 390 [21] (BGH) - *East Side Gallery* (2017) IIC 879 [21] (BGH).

¹⁷³ Daniel Rassouli, “Banksy und sein Urheberrecht - Eine Bestandsaufnahme des Schutzes der Kunstform Street Art durch das Urheberrecht am Beispiel von Banksy“ (2013) KUR 97, 99.

¹⁷⁴ Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly (eds), *Schricker/Loewenheim, Urheberrecht* (5th edn, C.H. Beck 2017) § 62 [1].

¹⁷⁵ Daniel Rassouli, “Banksy und sein Urheberrecht - Eine Bestandsaufnahme des Schutzes der Kunstform Street Art durch das Urheberrecht am Beispiel von Banksy“ (2013) KUR 97, 98.

¹⁷⁶ Daniel Rassouli, “Banksy und sein Urheberrecht - Eine Bestandsaufnahme des Schutzes der Kunstform Street Art durch das Urheberrecht am Beispiel von Banksy“ (2013) KUR 97, 100.

¹⁷⁷ Agnès Lucas-Schloetter, “Fotografieren von Kulturgütern und Street-Art: Die Panoramafreiheit in Deutschland, Frankreich und der EU“ (2018) ZUM 494, 495.

¹⁷⁸ *East Side Gallery* (2017) GRUR 390 [20] (BGH) -*East Side Gallery* (2017) IIC 879 [20] (BGH).

¹⁷⁹ Thomas Dreier and Gernot Schulze, *Urhebergesetz* (6th edn., C. H. Beck 2018) § 59 [3].

¹⁸⁰ Thomas Dreier and Gernot Schulze, *Urhebergesetz* (6th edn., C. H. Beck 2018) § 59 [4].

¹⁸¹ Daniel Rassouli, “Banksy und sein Urheberrecht - Eine Bestandsaufnahme des Schutzes der Kunstform Street Art durch das Urheberrecht am Beispiel von Banksy“ (2013) KUR 97, 99.

¹⁸² *Verhüllter Reichstag* (2002) GRUR 605 (BGH).

contrast, it can be said that the exception would apply to most works of graffiti and street art. There is a debate whether this would be applicable to such street art and graffiti which is applied to vehicles of public transport, such as trains and busses.¹⁸³ Two other relevant points with regards to street art need to be mentioned. First, the exception only applies where the reproduction is made from the façade of buildings. This then means that a reproduction of a piece of street art is placed on stair cases, the ceiling or other interior parts of buildings would fall outside the scope of the exception.¹⁸⁴ In addition, subsection 2 of § 59 UrhG mandates that “the reproductions may not be carried out on a building”.¹⁸⁵ This effectively means that a mural cannot be reproduced onto another building.¹⁸⁵



(Photo #4)¹⁸⁶

The scope of the exception is not limited to actions like reproductions made by photographing for private uses. More importantly, the provision also covers commercial uses of the work. In a very recent decision the German Federal High Court discussed the scope of the exception provision in the context of street art.¹⁸⁷ The case related to the use of a mural entitled “Homage to the young generations” by Thierry Noir¹⁸⁸ (see below: Photo #5) which is part of Berlin’s famous East Side Gallery. The defendant was a property developer who was marketing a residential property which was to be erected on the land behind the East Side Gallery. The defendant used an architectural model of the development for advertising purposes. The model which was placed on the internet incorporated a scaled down photo of parts of the East Side gallery along with the mural in question (see below: Photo#6). The Court held that the panorama exception would not only apply to photographs taken of a work which is located permanently in public but

¹⁸³ Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar zum Urheberrecht* (4th edn, C.H. Beck 2014) § 59 [5]; Agnès Lucas-Schloetter, “Fotografieren von Kulturgütern und Street-Art: Die Panoramafreiheit in Deutschland, Frankreich und der EU“ (2018) ZUM 494, 496. It could be argued that the exception should apply to vehicles, such as busses and trains, since they would remain in the public sphere even if they change their physical locations - Hartwig Ahlberg and Horst-Peter Götting (eds), *Beck’scher Online-Kommentar Urheberrecht* (21st edn, C.H. Beck 2018) § 59 [5].

¹⁸⁴ Manfred Rehbinder, Alexander Peukert, *Urheberrecht* (17th edn, C.H. Beck 2015) [640].

¹⁸⁵ Manfred Rehbinder, Alexander Peukert, *Urheberrecht* (17th edn, C.H. Beck 2015) [640]; Thomas Dreier and Gernot Schulze, *Urhebergesetz* (6th edn., C. H. Beck 2018) § 59 [9].

¹⁸⁶ <http://christojeanneclaude.net/projects/wrapped-reichstag>

¹⁸⁷ *East Side Gallery* (2017) GRUR 390 (BGH) -*East Side Gallery* (2017) IIC 879 (BGH).

¹⁸⁸ <http://www.galerie-noir.de/index.html>

also with regard to the further reproduction, distribution and communication to the public of such photographs. Importantly, the Court held that such further use could be for commercial purposes.¹⁸⁹ This means that the photos or films of works of graffiti and street art can be used for commercial publications, such as books, advertisement, post cards, apparel and souvenirs as long as the reproductions does not alter the work in question pursuant to § 62(1) UrhG.¹⁹⁰ Here, German law provides a wide scope for the panorama exception¹⁹¹ in comparison to the situation in other jurisdictions, such as the United Kingdom.¹⁹² This has been criticised and there might be a conflict with the 3 Step Test under the Berne Convention.¹⁹³ But the provision remains unchanged even though a committee of enquiry has suggested legislative change for commercially used reproductions of works in public spaces.¹⁹⁴



Photo #5¹⁹⁵



Photo #6¹⁹⁶

III. Conclusion

This chapter has discussed how street art and graffiti are covered by German copyright law. As elaborated, the law does not discriminate against these forms of artistic expressions. The originality criterion may provide a certain threshold for some form of tags but normally the vast array of street art and graffiti will be susceptible to copyright protection. Furthermore, the fact that the works are often produced without the authorisation of the owner of the material carrier does not hinder the existence of copyright protection. This, then can lead to interesting constellations and conflicts between the real and intellectual property. These conflicts arise with regards to the exercise of economic and moral rights of the artists. The elaborations in this chapter are purely aimed at

¹⁸⁹ *East Side Gallery* (2017) GRUR 390 [21](BGH) - *East Side Gallery* (2017)IIC 879 [21] (BGH).

¹⁹⁰ Daniel Rassouli, “Banksy und sein Urheberrecht - Eine Bestandsaufnahme des Schutzes der Kunstform Street Art durch das Urheberrecht am Beispiel von Banksy“ (2013) KUR 97, 99.

¹⁹¹ Winfried Bullinger, “Weite Auslegung der Panoramafreiheit” (2017) GRUR-Prax, 151, 151.

¹⁹² Enrico Bonadio, “Copyright protection of street art and graffiti under UK law” (2017) I.P.Q. 187, 201 - 211.

¹⁹³ Agnès Lucas-Schloetter, “Fotografieren von Kulturgütern und Street-Art: Die Panoramafreiheit in Deutschland, Frankreich und der EU“ (2018) ZUM 494, 496.

¹⁹⁴ The Committee argued that this would erase the unequal treatment of works in public spaces in comparison to other works. The Committee gave the example that while the photographer could exploit the photograph of a work in the public space, the artist of the work in the public space could not - Schlussbericht der Enquete-Kommission, “Kultur in Deutschland“ (Drucksache 16/7000, 16. Wahlperiode 11. 12. 2007) 265 – 267.

¹⁹⁵ <http://www.eastsidegallery-berlin.de/data/kuenstler/noir.htm>

¹⁹⁶ *East Side Gallery* (2017) GRUR 390 (BGH).

providing an overview of copyright protection of street art and graffiti. They do not seek to answer the question whether there is a normative need to change the law and how this should be done. Many times, graffiti writers may not be interested in exercising their copyright. A different situation does arise, however, with regard to street art which is becoming increasingly more popular and the mechanisms of copyright law, in particular the integrity rights, may be of use for the author.