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ART AND ARCHITECTURE – AND VARIOUS COPYRIGHT DILEMMAS

Werner Stauffacher, LL.D.

Very few articles of the Swiss Copyright Act (hereinafter SCA) deal explicitly with the art-and-architecture realm: Art. 2 lists examples of copyright protected works, Art. 12 gives the legal provisions governing architectural works, Art. 15 concerns protection against the destruction of copyrighted works, and Art. 27 specifies copyright applicability for works at publicly accessible locations. The legal questions upon which *Kunst am Bau* touches are as varied as the uses of the concept are numerous.

The first distinction to be made is between „*Kunst am Bau*“ [trans. note: a consecrated term referring to art in and/or on the construction/building] and „architectural works.“ The latter commonly include buildings, garden and park layouts, underground constructions and the interior design of buildings – always on condition that their „individual character“ (Art.2, §1 together with §2 lit. e SCA) can be ascertained. Already here, the first difficulties arise in setting boundaries: When in fact can an architectural work be said to embody „individuality“?

Certainly, the „Villa Turque“ in La Chaux-de-Fonds, designed by Le Corbusier, is a copyrighted work. However, the level of individuality required of a building for it to qualify for a copyright is very high. Because of the utilitarian purpose and engineering needs underlying a building's design, architects must take into consideration a great number of technical requisites, leaving but little leeway for individualist architectural design. Indeed, only a markedly independent, or even unique architectural work can qualify for copyright protection. Nonetheless, works in or on a publicly accessible location for a permanently lasting period of time may be illustrated, and the illustrations may be sold, circulated or otherwise distributed (Art.27, §1 SCA). This holds true also for

the „Villa Turque,“ for instance: It can be reproduced on art cards or posters and these, in turn, can also be sold. Only 3-dimensional copies are forbidden – that is to say, no contractor is allowed to make a reproduction of such a building and build the same house.

MULTIFACETED PROTECTION OF KUNST AM BAU

By contrast, *Kunst am Bau* designates art (or, more exactly, copyrighted art works) in the sense of works provided for, or integrated into, an existing building. Numerous examples exist, be it a wall painting or fresco, a sculpture in the courtyard or entrance area, a color/light installation against a building wall – or even an artist's separately designed color scheme for a building, together with the design for its interior fittings. All of which gives rise to the question of what qualifies such works for copyright protection.

Copyrights cover more than just what pleases the eye or is widely agreed to be fitting; they cover whatever meets the requirements stipulated by the copyright law – namely, „intellectual art creations which have an individual character irrespective of their purpose or value“ (Art.2, §1 SCA). Clearly, then, the decisive factor in connection with *Kunst am Bau* is a work's individual character. This means that not every color scheme based on a given color pattern

for the interior design of a building will enjoy copyright protection. Rather, it must be representative of the author's style. Thus the buildings by the Mexican architect Luis Barragán are copyrighted as both architectural works and interior design works because the color scheme is of the architect's own design. By the same token, the exterior design of buildings by the Swiss artist Remi Zaugg or Jean Pfaff's trademark color schemes for buildings are entitled to copyright protection.

Interestingly, it is irrelevant whether such works are set up as temporary or permanent. This is for instance attested by the project James Turrell and Magdalena Jetelová submitted to this year's Frankfurt Luminal. Although lasting a mere six weeks, their entry – a light installation in continuously rotating colors, projected on the inside and outside walls of a bank building – nevertheless received a copyright.

Decisions to grant a copyright depend on the extent to which a Kunst-am-Bau work can exist independently of the building to which it is linked. The painting of the building walls – contrary to the wall paintings or sculptures in or on the buildings – could hardly be conceived as an independent work. When a building and its Kunst am Bau are not by the same person, a case of co-authorship arises because several people collaborated in achieving the joint whole. This does not keep each co-author from exploiting and commercializing his or her own contributions to the whole independently, always on the condition that they are willing to abandon any claims to the rest of the works and that their use does not prejudice the exploitation of the joint work (Art. 7 SCA). Of course, in this connection there also exist countless cases where the building itself is not under copyright, while a wall painting, sculpture or interior design contributed to it is. In such cases, the author of a work of art in or on the building benefits from an exclusive and independent copyright guarantee.

Generally speaking, however, Kunst-am-Bau works fall under the scope of the architectural work's copyright. As such, they too – granted they are to be found in or on a publicly accessible location – may

be illustrated and, according to the law, such illustrations may be publicly distributed. This does not apply to works to be found inside a part of a building not open to the public, in which case the relevant author's rights must be readjusted.

PROTECTION AGAINST DESTRUCTION

The copyright law explicitly affords the author of a copyrighted original work of art in or on a building protection against that work's destruction. Thereby, the building owner is not allowed to destroy such a work without first offering to sell it back to its author. Moreover, should the author be kept from buying it back for technical or financial reasons, he or she must be allowed to make a copy of the original work (Art. 15, §1 and 2 SCA). Hence, the ever-repeated cases of wall paintings on or in a building being simply painted over, without the author's prior consent, are illegal.

This proviso's range of application is exemplified by the following concrete case: Many years ago, the artist Willy Müller-Brittnau was commissioned to decorate – in a Concrete Art paint style – the entire stairwell and ground-floor restaurant of an administration building. Much later, and by coincidence, the artist found out that his decoration for both the stairwell and the restaurant had been painted over in uniform white. The artist was floored to learn that the new tenants of the restaurant, finding his color scheme too dark for their business, had simply gone on to lighten not only the restaurant but also the stairwell. At no point did the consequences of infringing upon the existing copyright for the painted walls even cross their minds. Luckily, in this case there were photographs and sketches of the original wall paintings, so it would have been easy to recreate their original state. However, after prolonged negotiations, the parties concerned reached a different solution: The artist relinquished his claim for the restoration of his walls, preferring instead to sell several of his works to the Gemeinde (commune) – obtaining an excellent price at that!

Another frequently asked question linked to Kunst am Bau is whether the owner of such a work can readily change its location. Here the „written pic-

tures" created in 1987 by the artist Rudolf Mumprecht for the entrance to the BEDAG computer center in Bern represents a case in point. While working on this project, the artist visited the designated entrance hall several times, in order to determine – together with the contracting authorities – the work's exact positioning. Some time after the finalization of the project, Mumprecht realized that, without his prior consent, his work had been switched from one wall of the entrance hall to another, putting it into an entirely different context. He could not agree to the move, especially since the exact location had been mutually agreed upon during the work's preparation. Legal intervention in this connection, including an appeal based on the author's moral rights under copyright law, led to the transfer of the work in question back to its original location in the entrance hall.¹

These cases demonstrate that the questions concerning Kunst am Bau are highly diversified and not always easily resolved. If two or more authors contribute to the creation of a work, they would do well to draw up in writing the clearest possible agreement with respect to the individual works and how they are to be used. It is certainly not in any party's interest for a building's architect to hold the rights to all the Kunst-am-Bau works or, the other way round, for the artist to have a decisive say with respect to the building as a whole.

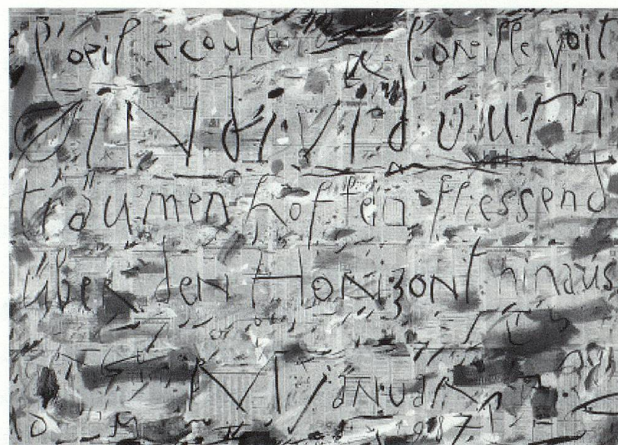
In conclusion, a few words on the duration of the copyright term: Basically, works remain protected for 70 years after the author's death. This applies as well to the buildings as to the Kunst-am-Bau works. In cases of co-authorship, the copyright term runs as of the death of the last of the copyright owners. If, on the other hand, the individual works contributed are made separable and open to be autonomously exploited, the copyright expires upon the death of the respectively authorized copyright owner (Art. 29 and 30 SCA).

Werner Stauffacher, LLD, Vice-director and Head of the Legal Department of ProLitteris

¹ Today, after much toing and froing, the painting hangs at the Staatskanzlei.

Rudolf Mumprecht, Köniz-Bern

Individuum 1987 Kat. Nr. 550
Acryl Collage auf Leinwand, 200x280 cm
Staatskanzlei Kanton Bern
© ProLitteris



Villa Turque

© Jean-Claude Voumard

