

# German BGH: The destruction of the work does not infringe the moral rights of the author

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German Federal Supreme Court's decisions of 21 February 2019 (ref.: I ZR 98/17, I ZR 99/17 and I ZR 15/18)

## Protection of moral rights in Germany, in particular the right to prohibit distortion of the work



Moral rights derived from copyright are not harmonized within the European Union. Rather, every EU member state has developed its own moral right concept under copyright law. But most EU countries have fairly similar moral right systems. So it may be interesting to look at the most recent developments in Germany concerning moral rights.

The German Copyright Act ("GCA", please find an English translation [here](#)) provides for three different moral rights of authors:

- Right of publication in Sec. 12 GCA, in particular the right of the author to determine whether and how his work shall be published.
- Recognition of authorship (Sec. 13 GCA): This means the right to be identified as the author of the work (first sentence) and also the right to determine whether the work shall bear a designation of authorship and which designation should be used (second sentence).
- Distortion of the work (Sec. 14 GCA): The author has the right to integrity of his work. The wording reads as follows: The author has the right to prohibit the distortion or any other derogatory treatment of his work which is capable of prejudicing his legitimate intellectual or personal interests in the work.

### The three BGH decisions: Does destruction violate the right against distortion of the work?

Up until now, the German Federal Supreme Court has not clarified whether the destruction of a copyright work infringes the author's moral right against distortion of the work, i.e. his right to integrity.

- According to a view held e.g. by the lower courts, Sec. 14 GCA only protected the author's interest in the continued existence of the work, but not the interest in the existence of the work as such. Therefore, the author could not defend himself against the destruction of the work he had created by invoking Sec. 14 GCA.
- In another view, the destruction of an original work is to be regarded as the most severe form of impairment within the meaning of Sec. 14 GCA. It would impact the author's interest in influencing the cultural or social communication process through his work and to live on in his work.

Now the Federal Court of Justice has had to decide on this question in three cases at once. It agreed with the latter view, confirming that destruction of a work would come under the right against distortion. However, the necessary balancing of this right against the rights of the proprietor would usually lead to the result that the author's interests do not prevail.

### Facts of the cases

In two of the three cases (ref.: I ZR 98/17 and I ZR 99/17), the parties argued about the admissibility of the destruction of the multimedia and multidimensional room installation "HHole (for Mannheim) 2006" and the light installation "Pharadise", both created in 2006 for the Kunsthalle Mannheim, an art gallery in Mannheim (Germany) operated by a regional authority. As part of restructuring measures, the installations had been removed by the art gallery in 2010 and thereafter. In both cases the artist appealed against the destruction and the rejected reconstruction of the installation, arguing infringement of his author right.

In another case (ref.: I ZR 15/18) – the third case at hand – the parties argued about claims for (immaterial) damages arising from the removal of two art installations from a minigolf course. Just over a year after the opening of the course, the company decided on a redesign, in the course of which both installations were removed.

### Legal reasoning

In both cases concerning the Kunsthalle Mannheim, the Federal Supreme Court decided that the artist was not entitled to the asserted claim to cease and desist from the destruction or reconstruction. In the opinion of the Federal Supreme Court, the destruction of a copyright work constituted "other impairment" within the meaning of Sec. 14 GCA. The balancing of interests, however, led to an overriding interest of the public sector in the redesign of the museum rooms.

In the opinion of the Federal Supreme Court, the fact that Sec. 14 GCA in general provides protection against the destruction of a work is already apparent from the wording and the scheme of the provision. Although the distortion mentioned first requires the continuation of the work, this was only a special case of impairment. The general understanding of the language also allowed the destruction to be seen as a subset of the other impairments. The reason for the government draft (when Sec. 14 GCA was introduced in the 1960s) only indicated that a public interest in the preservation of works does not constitute a prohibition of destruction in the meaning of the provision. However, this did not exclude the justification of a prohibition of destruction on the basis of the author's interests. The purpose of Sec. 14 GCA – to protect the legitimate intellectual or personal interests of the author in his work – also argued in favor of including destruction. The destruction of the work cut through the intellectual bond between the author and his work. Furthermore, the destruction of a work must in principle be covered by Sec. 14 GCA in order to take into account the affected fundamental rights in the subsequent balancing of interests. As a result, the BGH confirmed that destruction of a work would come under the right against distortion.

But to find infringement of the right against distortion, a balancing of interests with the legitimate interests of the proprietor (and his right to freely use his property) has to be undertaken. According to the Federal Supreme Court, within the scope of this balancing of interests it is necessary to take into account whether the destroyed work is the only copy and the level of originality of the work. It may also be relevant whether the author has had the opportunity to take back the work or to make copies. As a rule, however, the author's interest in the continued existence of the work of art takes second place to the building owner's interest in the other use of the building and the associated destruction of the work. This is supported in particular by the public art museum's right to change the museum buildings and exhibition areas, a right which a private owner would have in redesigning a building as well. An obligation to preserve the work of art must therefore usually be contractually agreed.

In the Court's view, however, it is not necessary to examine whether alternative planning methods were available which would have led to less impairment of the author's interests. According to the case law of the Federal Supreme Court, this applies to distortion, but even more to destruction. Destruction does not distort the form of the work, but leads to the fact that the work is no longer perceptible at all.

In the case of the miniature golf course, the Federal Supreme Court referred the case back to the court of first instance for a new decision. However, it provided the court with the aforementioned principles.

### Comment and outlook

With the aforementioned decisions, the Federal Supreme Court has established important principles for the destruction of works protected by copyright under German Copyright Law. Although the classification of the destruction of a work as other impairment within the meaning of Sec. 14 GCA is initially author-friendly, the Federal Supreme Court has made it clear that the author will generally not be able to defend himself against destruction by an owner, as the latter's interest in the redesign of his property generally speaking prevails. Since the moral rights of authors are not harmonized in Europe, the Federal Supreme Court was able to decide the cases mentioned above without referring the question of whether the destruction of a work affects the author's rights to the European Court of Justice for a preliminary ruling.