

[DE] Judgment of the Federal Court of 23 February 1995 on the Sale of Painted Sections of the Berlin Wall

IRIS 1995-6:1/18

Marcel Schulze
Internationale Gesellschaft für Urheberrecht e.V., INTERGU

In a judgment given on 23 February 1995, the First Chamber of the Federal Court ruled that artists were entitled to receive a fair share of the proceeds from the sale of sections of the Berlin Wall which they had painted.

The case was brought by artists who had painted extensive sections of the Berlin Wall between 1985 and 1988. At the end of 1989, when the internal border in Berlin was abolished, these painted concrete sections were cut up and later offered for sale at an auction organised by the defendants, among others, in Monte Carlo in June 1990. Among other things, the Court ruled that: The right to disseminate (Section 15, Sub-section 1 (2), Section 17, Sub-section 1 of the Copyright Act) the murals, which were art works subject to copyright (Section 2, Sub-section 1 (4) of the Copyright Act) lay with the plaintiffs, and had not been exhausted under Section 17, Sub-section 2 of the Copyright Act. Since there had also been unlawful interference with their right to disseminate their copyright works, they were entitled to claim on grounds of unjust enrichment (Article 812, para. 1 (1), second alternative, of the Civil Code, Section 97, Sub-section 3 of the Copyright Act).

Concerning the right of dissemination, the Federal Court specifically found that: The plaintiffs had painted their works on another party's property, i.e. the Berlin Wall, which belonged at that time to the former German Democratic Republic, and property rights applying to objects which incorporated copyright works might be exercised only insofar as copyright was respected (Article 903 of the Civil Code). Property owners were admittedly entitled to destroy (copyright) art works unlawfully imposed on them against their will, but this right did not include the general right to exploit such art works for commercial purposes. The situation was different when an art work was "imposed" on an object which had an independent commercial value (e.g. movable or immovable property, such as houses or cars, which had been sprayed with graffiti): this derived from the individual's constitutional right (Article 1, 2 of the Basic Law) to dispose freely of his property.

The distinctive feature of this case was the fact that the Berlin Wall, because of its intended purpose, had never had any commercial value, but had acquired commercial value on the art market only when it was divided into separate sections.

Finally, the painted sections of the Wall had also been brought into circulation by being sold without the plaintiffs' consent (Section 17, Sub-section 2 of the Copyright Act). It was true that "disposal" within the meaning of Section 17, Sub-section 2 of the Copyright Act generally covered any transfer or alienation of property and was not therefore limited to sale in the narrow sense, within the meaning of Article 433 ff. of the Civil Code: to place an art work on part of another person's premises was not, however, to dispose of it within the meaning of Section 17, Sub-section 2 of the Copyright Act - an interpretation which would be compatible neither with the wording nor the meaning and purpose of that provision.

