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Author-architect copyright interests in buildings: the view from Germany

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When plans for a building are being commissioned, a raft of contractual issues needs to be considered. Sometimes, these can relate to the respective interests in copyright between the parties. Admittedly, such disputes are less frequent in the United Kingdom than in civilian jurisdictions. Nevertheless, the often cross-border and cross-jurisdictional nature of construction projects may require serious engagement with applicable copyright law in order to avoid any headaches in the future, particularly when modifications to a building may be contemplated by the building's owner.

This article first sets out some fundamental principles of authorship and ownership of architectural output in copyright, before focusing on a recent decision by the Cologne District Court.¹ The case concerns a mosque, with the architect objecting to the local mosque association adding a glass roof/canopy to the building on the basis that this constituted an unlawful interference with his interests as the building's author.

Copyright: the distinction between authorship and ownership

Copyright law protects a raft of different types of output which UK law compartmentalises into different categories of "works".² On the one hand, there are literary, artistic, musical and dramatic works (also referred to as primary works). These enjoy protection if they are "original" in the sense that they represent the author's own intellectual creation, based on the author's free choices leading to their "personal stamp" on the work. Pre-Brexit, the law of the UK and fellow EU member states was shaped in this respect by jurisprudence of the Court of Justice of the European Union, particularly in its interpretation of the Copyright and related rights in the Information Society Directive 2001/29/EC.³ On the other hand, the law also protects secondary works which derive from the former, for example, films, sound recordings and broadcasts. In the context of our discussion architectural drawings and plans as well as buildings are protected by copyright if they cross the comparatively low hurdle of originality.

"Copyright" is often used as an umbrella term which somewhat hides its multi-faceted principles. The law distinguishes between authorship and ownership, and different rights and obligations are attached to each. While the author of a work might also be its owner, this is regularly not the case, for example when a work is commissioned by a client. The client becomes the work's owner, but its creator will still be regarded as its author. Different types of rights flow from these notions. Owners of copyright works control the commercial exploitation of the work and enjoy what the law terms "restricted acts", including the right to copy the work, adapting, renting, lending or performing it. Any of these acts require the permission of the owner who may seek legal action for copyright infringement if no permission was granted.

Authors retain what UK copyright law labels "moral rights." These only entered the fray in the UK in 1988, and are rarely contested before the courts. The key provisions are s. 77 which covers the right to be identified as the author of a work (the paternity right), and s. 80 allowing the author to object to derogatory treatment of the work (the right to integrity). Controversially, the right to be identified must be asserted by the author; moral rights can also be waived in certain circumstances and are subject to a raft of exceptions where they do not apply. In the context of architecture they seem to be rather limited. The right to be identified applies to works of "architecture in the form of a building

or a model for a building, [...] copies of a graphic work representing it, or of a photograph of it," if issued to the public.⁴ Authors of architectural works also have the right to be identified on "the building as constructed."⁵ The integrity right, however, applies to "a work of architecture in the form of a model for a building" only.⁶ It finds no application to the actual building itself, "but where the author of such a work is identified on the building and it is the subject of derogatory treatment he has the right to require the identification to be removed." It is, therefore, unsurprising that there has been next to no judicial activity in relation to architectural works and moral rights before UK courts.

This is different in civilian jurisdictions where moral – or authors' – rights enjoy a much higher status based on the underlying philosophy and policy: creation of copyright output starts with the author, an entity that therefore is deserving of having their rights protected in a meaningful manner. The German Copyright Act recognises the same authorial rights as UK law and are positioned right at the beginning of the statute, before "rights of exploitation". S. 13 covers the right to be identified, while s. 14 allows authors to object to the distortion or any other derogatory treatment of the work, where it prejudices the legitimate intellectual or personal interests of the author in the work. In contrast to the UK approach, this provision also applies to buildings. German copyright law also has something to say about owners in this context in s. 39(1), who are not permitted to modify the work, unless the parties agree to such, and unless the author cannot withhold their consent to the modifications in good faith.⁷

Since owners of buildings sometimes want to make alternations to them, perhaps based on changes to the building's use or for public policy reasons, the scene is set for clashes with the building's author which regularly play out before the courts on the back of the right to integrity. This requires judges to embark on a delicate balancing act, taking into account the parties' differing rights, interests and motivations. The *Lehrter Bahnhof* decision,⁸ which centred around the then new Berlin railway station, serves as a good illustration of this point. Its architect had been tasked to base the project on the concept of "cathedral of mobility" which meant that the exterior and interior of the building resembled a dome. This included a spectacular – but expensive – glass ceiling of the main subterranean hall. However, in order to save costs the employer had made changes to the effect of replacing that ceiling with a cheaper, but mundane concrete alternative. The architect sought the installation of the ceiling as originally planned which would amount to extra cost of some 45 million Deutschmark at the time. Holding that the building in general and the underground arrival and departure hall with its ceiling in particular constituted works of authorship protected by copyright, the Berlin court held that since the project had been subject to a lengthy planning and negotiation process, once the final blueprint had been agreed, significant changes were no longer permissible.⁹

It is an extraordinary outcome for the architect and a signal that author's rights can impact on construction projects under German copyright law. This leads neatly to a recent, perhaps much less dramatic, case heard before the Cologne District Court.

The mosque and the distorting glass canopy

An architect had been commissioned to plan the design of a new mosque for a mosque association ("the employer") in a city in North Rhine Westphalia. While the design was initially approved by the employer and the local authority, the former sought changes to the original plans, for example to widen the windows. The architect, however, insisted on implementing the design as originally planned, and after protracted negotiations the mosque was completed in 2018. The parties had set out the project in a contract which contained a clause about copyright:

"Clause 4: Protection of the architect's work and the author

[...] (3) The statutory copyright protection remains unaffected [...]

Clause 13: Copyright Law

[...] (2) The client has the right to use the planning for the construction project described in Clause 1. He is entitled to use the services of the architects for the agreed purposes and to make changes and additions to the structural and other facilities created, while preserving the intellectual character that the client considers appropriate with regard to their use. In this case, no special remuneration is owed.

(3) Alterations to parts of the building that affect the architect's copyright are inadmissible without cooperation."

The owners of the mosque proceeded to install a metal and glass roof construction next to the main entrance to provide shelter from the elements for the patrons of its club house, as well as preventing ingress of rainwater at its entrance. The architect had not agreed to the installation of the roof, and he had not responded to an earlier query on the matter. As his requests to remove the canopy were ignored, he pursued a remedy to achieve this before the district court by relying on the author's rights provisions in the German Copyright Act which seek to protect a work's integrity. Essentially, he argued that the canopy constituted an unlawful distortion of his work. The mosque association argued that the building was not protected as a copyright work in the first place, and even if it was, the adding of the roof did not constitute a distortion.¹⁰

The court commenced by considering whether the mosque building was protected by copyright law, reiterating that any buildings may be protected, irrespective of purpose or function, as long as they represent a personal intellectual creation of its author. In order to reach the required individuality, the building needed to stand out from the crowd rather than be the result of routine craft. The objective test person is "receptive to art and reasonably familiar with art."¹¹ Aspects that come into the equation are the building's size, its proportions, integration into its surroundings, a specific design or motif, amongst other considerations, but it is necessary that the composition goes beyond the mere solution of a technical problem. While a building's design does not need to be outstanding compared to other buildings in an architectural category, the court opined that the mosque at issue was "distinctly above average from an architectural viewpoint."¹²

Having established that the mosque enjoys copyright protection as a work of architecture, the court moved on to consider the effect of the glass canopy, finding that it constitutes "an encroachment on the overall intellectual and aesthetic impression of the work."¹³ The court emphasised that the claimant's creativity is characterised by the specific use of form, like the high and narrow windows and the protruding, roofed entrance. The latter, in particular, is impacted by the newly installed canopy which extends the entrance on one side only, creating an imbalance. It gives this part of the building a different impression, directly interfering with the design.

While the addition to the building seems minor, the court was of the view that it was sufficiently serious to activate the architect's right to integrity. In addition to thwarting the architect's design of the entrance, extending to that entire side of the mosque, the canopy's inclination created an unsightly contrast to the rectangular roof of the protruding entrance. Viewed from the side, the "canopy clearly was an alien element due to its inclination and its lower height compared to the entrance at the end of the roof at its pillars."¹⁴

The respondents' view on the necessity and the purpose of the canopy as protecting the clubhouse's visitors and entrance from poor weather did little to impress the court. While the court understood the motivation for installing the canopy, it nevertheless constituted an unlawful interference with the architect as the mosque's author. Reiterating the special position authors of copyright works enjoy under German copyright law, it became clear that arguments based on members of the association to consume drinks or otherwise spend time just outside the clubhouse were too weak to trump the architect's authorial interests in this scenario. The newly installed canopy gave the - incorrect - impression that it was part of the architect's work. Since it interfered with the building's aesthetics, it had the potential to put off new clients based on this erroneous association. In the same way, the court gave short shrift to the view that the canopy prevented moisture from penetrating the building. If that was indeed an issue based on a defect in the building's design or construction work, the remedy would surely lie in breach of contract rather than seeking to utilise copyright law in such a way to change the intellectual-aesthetic impression of the mosque without consent of its author – pointing to the contractual clauses on copyright highlighted earlier.

The respondent's attempt to rely on these clauses was also unsuccessful. They argued that Clause 13(2) permits changes to the building; however, in the view of the court that clause only referred to changes that did not thwart the individual character of the mosque – and the canopy had that effect. Clause 4(3) laid the supportive foundation for this view, stating that the architect's statutory copyright (which includes authors' rights) remain untouched. Accordingly, the court ordered the removal of the canopy.¹⁵

Conclusion

Authorial interests enjoy different levels of status and legal protection in different jurisdictions despite international attempts to create a level playing field and a common standard amongst signatories of copyright treaties and conventions. While works of architecture are protected by copyright law in the UK, their author's moral rights are considerably weaker, particularly compared to civilian jurisdictions. Even in the latter the position of the owners of commissioned buildings usually stand on reasonably firm ground when it comes to making modifications to buildings, it is by no means the case that it is possible to ride roughshod over the interests of their authors. The German Glass Canopy decision is almost a textbook example of the careful, balanced and objective approach courts apply to such disputes. Construction projects regularly involve cross-jurisdictional teams, and it will be prudent to keep an eye which copyright law may find application as well as maintain an open channel of communication with the building's architects when modifications to buildings are contemplated. In respect of the present case, one cannot help to think that the mosque association could have achieved the desired protection of its community by investing in two or three outdoor parasols, items regularly seen in outdoor entertainment. This may have been a less permanent but a more pragmatic solution, avoiding direct interference with a building and its author's right to integrity.

¹ *Glass Canopy*, LG Köln, Az. 14 O 12/22 (20th October 2022). Judgment full-text (in German): https://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2022/14_O_12_22_Urteil_20221020.html

² Copyright Designs and Patents Act 1988 (as amended), s.1(1)

³ See, for example, Case C-5/08 *Infopaq* [2009] ECDR 16; Case C-145/10 *Painer* [2012] ECDR 6; Case C-683/17 *Cofemel* [2020] ECDR 9.

⁴ CDPA 1988 s.77(4)(c).

⁵ *Ibid.*, s.77(5).

⁶ *Ibid.*, s.80(4).

⁷ German Copyright Act, s.39(2).

⁸ Reginal Higher Court Berlin, GRUR 2007, 964 – *Lehrter Bahnhof*.

⁹ For a more general analysis of copyright law and architecture, see Thorsten Lauterbach, ‘Author-architects and the moral right of integrity in copyright law’ (2011) South African Journal of Art History vol. 26, issue 1, 57-66, available at <https://journals.co.za/doi/10.10520/EJC94116>.

¹⁰ Images of the mosque were redacted in the final judgment. However, it may be useful for readers to view the following images which are publicly accessible on the internet: Annika Kasties, ‘Jetzt wird auch in der Moschee geimpft’, Aachener Zeitung, 13. December 2021 https://www.aachener-zeitung.de/lokales/aachen/jetzt-wird-auch-in-der-moschee-geimpft_aid-64608501 (mosque without canopy); DITIB Aachen Yunus Emre Camii https://www.facebook.com/photo.php?fbid=638264348346855&set=pb.100064898852045.-2207520000.&type=3&locale=de_DE (mosque with canopy).

¹¹ *Glass Canopy*, para 34 (writer’s translation). German courts have applied this “informed observer test” in copyright law since 1911. For an extensive analysis, see Ohly, Ansgar, ‘The Copyright – Design Interface in German Law: History, Doctrine, Policy’ (September 17, 2017). E. Derclaye (ed.), *The Copyright/Design Interface*, Cambridge University Press, 2018; ISBN: 9781108182676, Available at SSRN: <https://ssrn.com/abstract=3223327>.

¹² *Ibid.*, para 37 (writer’s translation).

¹³ *Ibid.*, para 43 (writer’s translation).

¹⁴ *Ibid.*, para 44 (writer’s translation).

¹⁵ The Cologne Higher Regional Court confirmed the decision of the lower court: OLG Köln, judgment of 2 June 2023, case no. 6 U 162/22.