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THE 1989 BERLIN COURT DECISION ON COPYRIGHT TO A SPACE REMOTE SENSING IMAGE

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Abstract In 1988 the European Space Agency (ESA) sued a private company at the State Court of Berlin. The company had used an image of the ESA's Meteosat satellite for a commercial advertisement in a local Berlin newspaper, without making reference to the copyright of ESA. The image showed the Earth together with the Moon. The court denied the copyright claim of the ESA.

This paper explains the relevant articles of the German Copyright Act together with the full text of this decision translated into English. Although this case does not create legal precedent, it constitutes important legal material for space law.

1. INTRODUCTION

In 1988 an advertising agency acquired a space remote sensing image from a Berlin distributor of the European Space Agency. The image, taken by the Meteosat satellite, was used in a commercial advertisement for a customer in a newspaper in Berlin, in March 1988. When the advertisement was made public, no copyright notice was included. ESA and its distributor sued the advertising agency at the State Court of Berlin (first instance).

The court based its decision on the German Copyright and Neighboring Rights Act[1], which grants copyright protection to photographs.

This case has not been published and remained unnoticed by the space law community. It took the author of this paper three years to find this court decision. ESA and Eumetsat personal maintained this case did not exist, others commented it "did not constitute legal precedent, thus being unimportant", others qualified it as "confidential information". Anyway, the translation of this case and the original version are annexed to this article.

2. ESA VERSUS ADVERTISEMENT AGENCY

In 1983 the European Space Agency started the operational use of the Meteosat satellite system[2]. This system is designed to provide meteorological information mainly of Europe. Although the national meteorological services of the Member States of ESA receive the satellite images free of charge, ESA offers Meteosat images to the general public on a commercial basis. In Germany in 1983, the private company CDZ Film in Berlin was the only distributor of ESA.

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I thank Stefan Kaiser for the revision of the text and the translation of the court decision.

Through a distribution contract between ESA and CDZ Film in 1984[3], the latter was appointed as the commercial agent of ESA in Germany. In Article 2 n° 1 of this contract, it is stipulated that ESA keeps the copyright of those images. In paragraph 2 of the same article, CDZ Film accepts the non-exclusive and non-transferable rights to sell and distribute the Meteosat images to commercial users in the Federal Republic of Germany, and also to authorize those commercial users to publish the Meteosat images in Germany, without previous consent of ESA. Some months later, this contract was complemented with two new agreements: ESA transferred some copyrights to CDZ Film "as far as legally permissible" and granted powers to CDZ Film to present claims before the German courts in case of violation of rights[4].

For the sales promotion of products and services, a private advertisement agency in Berlin requested and bought an image from the ESA distributor. The advertisement was placed in a local Berlin newspaper. The image, originally in a digital format, was automatically taken by the Meteosat satellite. The digital data were then transformed into a photograph in black and white, enlarged, colored and finally reduced in size. The end product was a photograph in color of the Earth and the Moon.

When the advertisement of a product using this photograph appeared in a Berlin newspaper in 1988, it did not contain the copyright notice of ESA. This motivated ESA and its distributor to present a legal claim in the State Court of Berlin.

ESA claimed that the disputed image was a "photograph" protected by the German Copyright and Neighboring Rights Act, that such photograph was a creative work recognized under the aforementioned act and that ESA was the "author" of such photograph.

Opposingly, the advertising agency requested the Court not to recognize the protection of the photograph under the German Copyright and Neighboring Rights Act, and claimed that the photograph was not taken by ESA.

3. RELEVANT ARTICLES OF THE GERMAN COPYRIGHT AND NEIGHBORING RIGHTS ACT

The German Copyright and Neighboring Rights Act was enacted in 1965 and has been revised several times. The version of 1985 was the legal basis for the State Court of Berlin decision in 1989[5].

The Court put its central attention on two questions:

a. Is the Meteosat image a protected work under the German Copyright and Neighboring Rights Act?

b. Does ESA qualifies as "author" of the work?

3.1. Could the Meteosat image be considered as an object protected by copyright? In the claim filed, ESA considered that the Meteosat image was a "photograph" under the terms of the German Act. In the German copyright legislation there are two types of photographs to be protected: photographic works and simple photographs.

ESA indicated that the photograph was a "...black and white image of the satellite that was enlarged, colored and then again reduced in size"[6]. It is necessary to

indicate that this photograph was actually produced with digital data generated automatically by a sensor placed in a satellite. Such a sensor measured radiation and expressed it in a matrix of numbers. This sequence of numbers was sent to Earth by an electromagnetic signal. After this set of numbers was transformed into a photographic format in the ground station, the resulting photograph showed the Earth together with the Moon.

ESA was of the opinion that such photograph deserved to be protected with copyright as a "simple photograph" under the terms of Art. 72 of the German Act. But ESA also claimed that this photo was an act of creation in the meaning of Art. 2 paragraph 1 no. 5 of the German Act. With these two statements ESA claimed that the object in dispute was a photographic work but also that it was a simple photograph. Why was ESA making these contradictory claims?

3.1.1. Photographic works and similar works. In the first part of the German Act, Article 2 paragraph n° 5. presents a list of the works protected by "copyright". Among them, there are the *"Lichtbilder"*[7]. This German word is usually translated into English as "photograph", but literally it means "picture of light" or "scene reproduced with light". The word *Lichtbild* denotes that light or radiation is being manipulated to generate an image.

This same paragraph of Article 2 also includes works that are produced similarly like photographs. Thus, besides the photographs, the concept *"Lichtbild"* in Article 2 may also apply to holograms, digital images, etc. This word is very descriptive and is open to encompass not only photographic works, but also similar products made with new techniques, possibly also space remote sensing images, based on digital data.

To qualify for copyright protection, these photographic works and similar works need to be created by the direct intervention of human beings and need to show sufficient intellectuality from its author. In a legal dispute, the alleged authors must prove that sufficient intellectuality has been introduced in the photograph or similar work, such as the manipulation of the source of illumination, the inclination of such illumination, the selection of photographed objects and perspective, etc.

But there are other types of photographs which lack sufficient intellectuality in order to qualify as works: "simple photographs". The protection of simple photographs is governed by the second part of the German Act about neighboring rights. Most of the countries do not grant legal protection to simple photographs as Germany does.

3.1.2. Simple photographs and similar products. Simple photographs and similar products are addressed in Article 72 of the German Copyright and Neighboring Rights Act[8]:

Article 72 paragraph 1 states: "[simple] photographs and products, that are produced similarly like [simple] photographs, are protected by the provisions applicable to photographic works of the First Part" (under copyright)[9].

It seems contradictory that "simple photographs", which do not necessarily need to be the result of a qualified creative process, are protected by copyright. But the German legislator decided to protect all

sorts of photographs, however with different periods of protection. [10].

There is no specific legislation which differentiates photographic works and simple photographs. Thus, the German courts must decide on a case-by-case basis.

Both, the notion "similar" to photographic works and the notion of simple photographs are flexible and can cover images made by new techniques. The scope of legal protection of new technological products "similar" to photographs under this act is also decided on a case-by-case basis by German courts.

ESA stated that the image was a simple photograph under Art. 72 (neighboring rights), but failed to point out which type of simple photograph it was. Because it appeared in a newspaper, one may believe that it was a document of history with a copyright protection of 50 years. As this photograph was not documenting breaking news, but was part of a commercial advertisement, it could also be considered as "another" type of simple photograph with only 25 years of copyright protection. This decision was in the hands of the court.

When ESA insisted that this photo qualified to be treated as a simple photograph, at the same time it asserted that it was a creative work under the terms of art. 2 (paragraph 1, n° 5). Despite this contradiction, the court examined the disputed object in the light of art. 1 which addresses copyright protection of creative works.

3.2. Was the European Space Agency "author" of the Meteosat photograph? In order to qualify for copyright protection, two important elements must be fulfilled: the direct intervention of a human being and the introduction of its intellectual creativity into the work.

Article 7 of German Act on Copyright states that the word "author" *(Urheber)* is the "creator of the work"[11]. The term *Urheber* may be translated into English as "the first creator" or "the original creator". With Article 11, copyright protection is granted to an author for the "intellectual and personal relation to its work" and for "the use of such work"[12].

Article 2 paragraph 2, provides copyright protection only for "personal intellectual creations"[13]. This statement indicates that a person must be the source of the intellectuality. But what is the meaning of "person"? Does it cover only natural persons or also legal persons, such as private companies and international organizations as ESA?

Although the German Act does not require that the author is a natural person, the repetitive reference to "personal" and "intellectual" and Article 64, which specifies that the protection of works under copyright law lasts 70 years after the *death* of the author[14], indicates that the author must be a natural person.

Similarly, German specialists in copyright refer to "author" as "...the creative (human) individual who, as a natural person, has created the work; that is, not a robot, apparatus, machine, or even animal"[15]. This implies that private companies or international organizations are neither "first creators", nor "authors" of a work.

The court confirmed this view: "...Author in the meaning of art. 2 of the German Act, as well as creator of an image

in the meaning of art. 72 of the German Act, can be only a natural person, because only a natural person has the personal and intellectual capability for the creation of a work. As a legal person ESA can neither be author nor creator of an image"[16]. Thus, the German court dismissed ESA as an author or creator of the Meteosat image.

3.3. Had the European Space Agency exploitation rights of the Meteosat photograph? Although the Berlin court dismissed the claim of ESA, it requested ESA to present the natural person who made the photograph or to present the contract by which an employee, in accordance with art. 31 of the German Act, transferred its exploitation rights to ESA.

Article 31 indicates that a natural person may transfer the exploitation rights[17] *(Nutzungsrecht)* over its work to another person. In the framework of labor law, an employee may transfer its exploitation rights to its employer. In Germany the transfer of full or partial exploitation rights must be done by contract (Art. 34)[18].

However, ESA insisted to be itself the "author" of the photograph and denied to present a natural person. ESA maintained that it had ceded its copyright to its associate in Berlin (CDZ Film) through a contract. This contract contained the qualifier that the cession of rights was executed "as far as legally permissible"[19].

The court was of the opinion that the plaintiffs alleged cession of rights was not sufficient proof to be in possession of the rights under the Copyright Act[20].

The court argued that ESA failed to "...provide evidence, which natural person has taken the photos by technical aids and that this person has transferred its right to use to (ESA)[21]". Based on this the court found that "...it was therefore not relevant if the photos have a protection under Art. 2 paragraph 1 no. 5 of the Copyright Act as optical images or if they have protection under art. 72 paragraph 1 of the Copyright Act"[22].

The Court dismissed the claim of ESA who did not appeal this decision.

Five years after this court decision, Mr. Gervais, a WIPO specialist commented "...if they had been able to prove to the judge that the satellite is not taking dumb pictures, that someone has to tell it what to take the picture of, when to take the picture, that there was a human intervention, I think the Court would have concluded that the photos were protected"[23].

It seems a matter of policy, that ESA did not want to acknowledge the existence of a human being behind the photograph in dispute. Likely ESA suspected that such claims have no legal support and tried to avoid publicity of this case in order to continue to use the invalid contract clause.

Since the beginning of the commercialization of satellite remote sensing images to the present, governmental institutions, international organizations, private companies and individuals, are signing contracts about the purchasing or licensing of satellite images. But the copyright clause, must be watched through a magnifying glass. It may happen that the product in question has not been produced directly by a human being and it does not deserve copyright protection.

4. CONCLUSIONS

It is not up to the decision of an individual to define the terms and conditions of copyright protection. The State of which he is national or which grants national protection, is the only one who decides if a given work qualifies for protection. Only legislators determine the terms of copyright protection and when an author may be the beneficiary of the protection.

Unilateral or multilateral copyright claims are not valid if they do not fulfill the requirements of applicable copyright legislation. In practice, there may be thousands of contracts already signed on the purchasing or licensing of satellite images which invalidly attempt to benefit from copyright protection. No matter if the parties know that the copyright clauses are not enforceable, in any case such clauses do not create legal precedent[24]. Clauses attempting to establish copyright protection can never substitute the applicable legislation which requiers direct human intervention and human creativity.

Although this court decision does not create legal precedent in the German legal system, it is an example how a national court decides[25], if legal persons as ESA, Eumetsat, Spot Image S.A, Co., Space Imaging Co., etc. insist to have authorship without a natural creator of satellite remote sensing products.

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1 German Copyright and Neighboring Rights Act (*Gesetz über Urheberrecht und verwandte Schutzrechte)* of 9th of September, 1965, as amended with status 24th. of June, 1985.

2 The Meteosat system was later transferred to the European Organization for the Exploitation of Meteorological Satellites (Eumetsat).

3 The contract was signed on the 26-28 of March, 1984.

4 These agreements were made on the 19th of December, 1984 and 31st of January, 1985.

5 Court Decision: State Court of Berlin, 16th civil chamber, file number 16.O.33.89, announced on the 30th. of May, 1989. *(Landgericht Berlin, 16. Zivilkammer, Urteil Geschäftsnummer 16.0.33.89, verkündet am 30 Mai 1989).*

6 Court Decision: State Court of Berlin State Court of Berlin: Facts: supra end note 1.

7 Art. 2. Protected works: (1) Protected works in literacy, science and art, are...5. photographic works, including the works produced in a similar manner as the photographic works *(§2 „Geschützte Werke (1) Zu den geschützten Werken der Literatur, Wissenschaft und Kunst gehören insbesondere:...5. Lichtbildwerke einschließlich der Werke, die ähnlich wie Lichtbildwerke geschaffen werden).* German Copyright and Neighboring Rights Act: supra note 1.

8 The German Act on Copyright and Neighboring Rights at the time of the Meteosat dispute was in force in the version of 24th of June, 1985.

9 Second Part: Neighboring rights, second section: Protection of photographs (simple photographs) German Copyright and Neighboring Rights Act: supra note 1.
(*Zweiter Teil: Verwandte Schutzrechte, Zweiter Abschnitt: Schutz der Lichtbilder:*
§ 72 (1) „Lichtbilder und Erzeugnisse, die ähnlich wie Lichtbilder hergestellt werden, werden in entsprechender Anwendung der für Lichtbildwerke geltenden Vorschriften des Ersten Teil (Erster Teil: Urheberrecht) geschützt).

10 Before 1995 the periods of protection were different: Art. 72 paragraph 3: The protection granted in paragraph 1 to [simple] photographs which are documents of history, expires 50 years after their publication, but in any case 50 years after their production if the [simple] photograph was not published in this period. For all other [simple] photographs, the protection expires after 25 years, instead of 50 years...*(§ 72 (3) Das Recht nach Absatz 1 erlischt für Lichtbilder, die Dokumente der Zeitgeschichte sind, fünfzig Jahre nach dem Erscheinen des Lichtbildes, jedoch bereits fünfzig Jahre nach der Herstellung, wenn das Lichtbild innerhalb dieser Frist nicht erschienen ist; für alle anderen Lichtbilder tritt an die Stelle der Frist von fünfzig Jahren eine Frist von fünfundzwanzig Jahren...”*
Since the amendments of 1995, all simple photographs and similar products have the same 50 year period of protection. The current text (with all amendments until the 8th of May, 1998) reads as follows:

Art. 72 paragraph 3: The protection granted in paragraph 1 expires 50 years after the publication of the [simple] photograph or after the [simple] photograph was authorizedly disclosed for the first time; but after 50 years after its production, if the [simple] photograph was not published or disclosed. *(§ 72 (3) Das Recht nach Absatz 1 erlischt fünfzig Jahre nach dem Erscheinen des Lichtbildes oder, wenn seine erste erlaubte öffentliche Wiedergabe früher erfolgt ist, nach dieser, jedoch bereits fünfzig Jahre nach der Herstellung, wenn das Lichtbild innerhalb dieser Frist nicht erschienen oder erlaubterweise öffentlich wiedergeben worden ist...").* German Act on Copyright and Neighboring Rights: supra note 1.

11 Art. 7. Author. Author is the creator of the work *(§ 7. Urheber. Urheber ist der Schöpfer des Werkes).* German Act on Copyright and Neighboring Rights: supra note 1.
See also Nordemann, Vinck, Hertin, Meyer: International Copyright (Commentary), VCH Publishers, New York, 1990, p. 220.

12 Art. 11. The copyright protects the author's intellectual and personal relation to his work and his use of such work. *(§ 11. Das Urheberrecht schützt den Urheber in seinen geistigen und persönlichen Beziehungen zum Werk und in der Nutzung des Werkes).* German Act on Copyright and Neighboring Rights: supra note 1.

13 Art. 2, paragraph 2. Work in the meaning of this Act are only the personal intellectual creations *(§ 2 (2) Werke im Sinne dieses Gesetzes sind nur persönliche geistige Schöpfungen).* German Act on Copyright and Neighboring Rights: supra note 1.

14 Art. 64. General. Paragraph 1. Copyright expires seventy years after the death of the author *(§ 64. Allgemeines. (1) Das Urheberrecht erlischt siebzig Jahre nach dem Tode des Urhebers).*
In case of collective works, the protection lasts 70 years after the death of the last co-author of the work (§ 65). German Act on Copyright and Neighboring Rights: supra note 1.

15 Nordemann, Vinck, Hertin, Meyer: supra note 11.

16 Court Decision: State Court of Berlin: Reasons for the decision: supra note 5.

17 Art. 31. Transfer of rights of use. Paragraph 1. The author may grant another person the right to exploit the work in a certain or all ways of exploitation *(§ 31. Einräumung von Nutzungsrechten. (1) Der Urheber kann einem anderen das Recht einräumen, das Werk auf einzelne oder alle Nutzungsarten zu nutzen (Nutzungsrecht).* German Act on Copyright and Neighboring Rights: supra note 1.
As in other legislations, copyright and neighboring rights are a bundle of rights that are traditionally separated into two groups: The moral rights and the exploitation rights. The moral rights, as rights of paternity over a work, are not transferable. On the other hand, exploitation rights, as rights to exploit the work, to copy and to publish it, are transferable.

18 Art. 34. Transfer of exploitation rights. Paragraph 1: Exploitation rights may only be transferred with the consent of the author *(§ 34. Übertragung von Nutzungsrechten. (1) Ein Nutzungsrecht kann nur mit Zustimmung des Urhebers übertragen werden).* German Act on Copyright and Neighboring Rights: supra note 1.
Art. 39 Changes on the work. Paragraph 1: The possessor of an exploitation right is not allowed to change the author designation, unless agreed otherwise *(§ 39. Änderung des Werkes. (1) Der Inhaber eines Nutzungsrechts darf ...[die] Urheberbezeichnung nicht ändern, wenn nichts anders vereinbart ist).* German Act on Copyright and Neighboring Rights: supra note 1.
In the case of collective works, all the participants are considered as co-authors whose joint consent is required for the publication, use or modification of the work. Art. 8 Co-author. Paragraph 2: The right to publish and use of the work is exercised jointly by all the co-authors; Modifications in a work are only allowed with the consent of all the co-authors *(§ 8. Miturheber. (2) Das Recht zur Veröffentlichung und zur Verwertung des Werkes steht den Miturhebern zur gesamten Hand zu; Änderungen des Werkes sind nur mit Einwilligung der Miturheber zulässig).*

19 This was done through an additional agreement of 19.12.1984/31.1.1985. Court Decision: State Court of Berlin: Facts: supra note 5.

20 Court Decision: State Court of Berlin: Reasons for the decision: supra note 5.

21 Court Decision: State Court of Berlin: Reasons for the decision,: supra note 5. The judges also reasoned "As the defendant had disputed that the images were taken by (ESA), such proof was necessary. The plaintiffs were unable to provide such proof in court, even when requested by the court in the hearing".

22 Court Decision: State Court of Berlin: Reasons for the decision: supra note 5.

23 Gervais D., (WIPO official): Workshop *Proceedings Intellectual Property Rights and Space Activities, ESA,* Paris, Dic. 1994, p. 106.

24 Even though a representative of ESA commented "All [contracts] include clauses that

bind the user to recognize ESA's full title over ERS-1 data as owner of the satellite. This right is reinforced by separate recognition of ESA's copyright in the data. Through this consistent practice, ESA has established a precedent for general application in the field of Earth Observation data generally". Ferrazzani, M.: ESA Data Policy, European Centre on Space Law. ECSL News, N° 9, June, 1992.

25 Although the German Copyright Act has been amended since 1985, the state of the law to protect photographic works and simple photographs did not change substantially. Thus the result of the analysis under the current German legislation remains the same.

Annex 1

STATE COURT OF BERLIN
In the Name of the People

File Number: 16.0.33/89
announced: 30 May 1989

Schreurs [title]

In the legal dispute
[plaintiffs][1]
against
[defendant]

the 16th civil chamber of the State Court of Berlin, in Berlin 10 (Charlottenburg), Tegeler Weg 17-21, based on the hearing of 30 Mai 1989, with the judge chairman at the State Court Horn, judge at the State Court Prietzel-Funk and judge Hennicke
has held:

1. The suit is dismissed.
2. The plaintiffs bear the costs of the legal dispute.
3. The judgment is preliminarily enforceable upon security payment of 2,800.00 DM.

FACTS

The defendant - an advertising agency - used for an advertisement of a customer in [newspaper] of [date] a photo which was taken by the [Meteosat] satellite. The plaintiffs operate under the name [CDZ Film] an association under civil law. In the name of this association the plaintiffs concluded with date of 26./28. March 1984 a contract with [ESA], by which [ESA] grants to the association of the plaintiffs, as their agency, the right to permit commercial users the use of the [Meteosat]-images. Art. 2 no. 1 stipulates that the copyright to the images remains with [ESA]. No. 2 of the same article states that [ESA] transfers to the association of the plaintiffs the non-exclusive and non-transferable right to sell and distribute the images in the Federal Republic of Germany to commercial users and the non-transferable right for authorization of commercial users to publish the images in the Federal Republic of Germany without prior permission. No.3 of the same article provides that [ESA] does transfer requests of commercial users to the association of plaintiffs, to the extend that the association is in a position to fulfill the agreement. For additional details reference is made to the copy of the contract contained in the files.

In an additional agreement of 19.12.1984/ 31.1.1985 [ESA] has ceded the copyrights to the association of plaintiffs, as far as legally permissible. By this agreement [ESA] also empowers the association of plaintiffs to claim such rights, which cannot be ceded, by way of standing in for them in court[2].

The defendant used in 1985 the image in question which he had acquired from [ESA]. When the defendant made a request in 1988 at [ESA], he was referred to [CDZ Film], who in turn referred the defendant to the plaintiff (listed under 1. above). On 17 March 1988, in a telephone conversation between plaintiff (1). and an employee of the defendant, a price of 2500.-- DM was mentioned for the planned publication. Other details of this conversation are disputed.

After the advertisement was published, the association of the plaintiffs send the defendant an invoice amounting to 7,296.-- DM. It included a 100 percent surcharge to the usual fee plus VAT, because there was no notice indicating [ESA] as author. The defendant effected payment for this invoice at an amount of 3,648.-- DM.

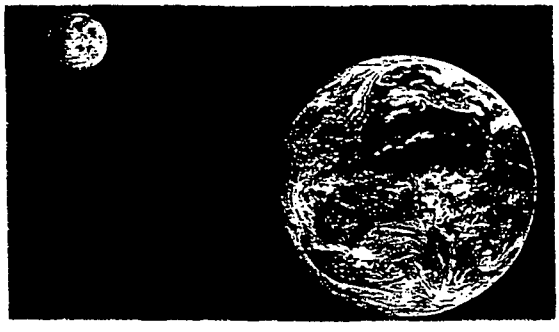
By attorney letter dated 24. May 1988 the defendant was requested to sign an undertaking in order to refrain from using the photo in the future or to pay a penalty. Further the defendant was demanded to pay 3, 648.-- DM. A deadline was set for 30 May 1988.

The plaintiffs allege that their association acquired from [ESA] the right to the [Meteosat]-images for the commercial distribution, especially their sale, the distribution and the granting of the right of their use. They are of the opinion that the photo constitutes a work under § 72 UrhG (German Copyright Act) and an act of creation in the meaning of § 2 para 1 no. 5 UrhG, because the black and white image of the satellite was enlarged, colored and then again reduced in size. The plaintiffs consider the publication of the advertisement to be a violation of their rights under the contract with [ESA]. By the telephone conversation of 17 March 1988 no contract would have been concluded. As a custom, the association of plaintiffs would conclude contracts only in writing. The plaintiffs reserve the right to claim the profit of the violator, instead of damages. They base their claims not only on their own rights, but also on the rights of the creator of the images in the meaning of § 72 UrhG, which they can claim by standing in court for him. The plaintiffs calculate the damage for the violation of the personal rights of [ESA] at a rate of 100 percent of the fee for publication. Their calculation of interest would be based on their status as commercial traders.

The plaintiffs seek:

I. to sentence the defendant

1. to refrain, upon avoidance of the legal means of order, the reproducing and distributing of the following satellite image no.8 (a):



2. to disclose their accounts to the plaintiffs relating to the acts specified under no. 1, especially indicating the volume of the edition of the reproduced matter, the receiver and the time of the reproduction.

II. to establish that the defendant is under the obligation to compensate the plaintiffs as joint debtors[3] for all damages which resulted, and will result in the future,

from the acts specified in I.1. above.

III. to sentence the defendant, to pay to [ESA], represented by Director General Prof. ...., to the hands of the plaintiffs 3,648.-- DM plus 5 percent interest since 25.5.1988.

The defendant seeks

to dismiss the suit.

The defendant alleges that a contract was concluded by the telephone conversation of 17 March 1988, whereby a fee of 2,500.-- DM was agreed for the said volume of the edition and the period of two years. The amount of 3,648.-- DM would not have been paid for the recognition of the claims, but only to avoid a legal dispute. The defendant is of the opinion that no copyright protection[4] or other right of protection[5] exists for the [Meteosat]-images. Further the defendant disputes that the images were taken by [ESA]. The defendant is of the opinion that in the contract only a simple right of use was granted to the association of plaintiffs. The defendant considers claims under § 1 UWG [German Unfair Competition Act] as time bared. The defendant also alleges that during the conclusion of contract by telephone there was no 100 percent surcharge agreed in case of a missing copyright notice.

REASONS FOR THE DECISION

The suit is dismissed.

The plaintiffs are not entiteled to have the defendant refrain from the acts as stated under no. I.1. above. The plaintiffs were neither violated in their own rights, nor were the rights of [ESA] violated, who the plaintiffs represent in court by their right to stand in for them.

The plaintiffs cannot base their claim on §§ 97 para. 1 no. 1 in connection with § 2 para. 1 no. 5 or 72 para. 1 UrhG, because they have not stated and have not provided evidence, which natural person has taken the photos by technical aids and that this person has transferred its right to use to [ESA]. Author[6], in the meaning of § 2 UrhG, as well as creator of an image[7], in the meaning of § 72 UrhG, can be only a natural person, because only a natural person has the personal and intellectual capability for the creation of a work. As a legal person [ESA] can neither be author nor creator of an image. The statement of the plaintiffs, that [ESA] had ceded their rights under the Copyright Act to the plaintiffs, is not sufficient for the plaintiffs to prove to be in possession of the rights under the Copyright Act. As the defendant had disputed that the images were taken by [ESA], such proof was necessary. The plaintiffs were unable to provide such proof in court, even when requested by the court in the hearing.

It was therefore not relevant if the photos have a protection under § 2 para. 1 no. 5 Copyright Act as optical images[8] or if they have protection[9] under § 72 para. 1 Copyright Act.

A claim for refraining from the acts can also not be derived from § 1 UWG [Unfair Competition Act]. The plaintiffs were aware of the advertisement of 31 March 1988, no later than 22 March 1988, the date of the invoice. Until the date of submission of the suit in January 1989, more than six months had passed. The time bar, as invoked by the defendant, therefore applies, § 21 UWG.

Furthermore, a claim rooted in an illicit act, § 823 para. 1 BGB (German Civil Code), because of interference with an established and exercised business, is not justified either. There is no business related interference.

Also the claims for providing information on the income and establishing the obligation to compensate for damages[10] have no grounds. Firstly, there is no violation of the statutory rights cited above.

Secondly, concerning the claim for payment and the preparatory claims for information and establishment of the payment obligation, the defendant has received the right of exploitation without legal reason, leading - in theory - to a claim under § 812 BGB[11]. However, the defendant has effected payment upon invoice of 22 March 1988 at an amount that the association of the plaintiffs normally had requested for the right of a first time publication. Therefore the defendant has returned the savings by which he would have been enriched.

Also the claim for a 100 percent surcharge on that same amount, for the reason of having omitted a copyright notice, which the plaintiffs consider to be a copyright violation, is not justified. The plaintiffs have not proven - as explained above - their possession of the right to use under copyright. Thus they do not have a claim under § 97 para. 2 UrhG. It is also not correct to address [ESA] as author[12], for the reasons given above. This right for indicating the authorship is only vested in authors[13] in accordance with § 13 UrhG, but not those who possess the right to use. An obligation for posting the copyright notice could only be derived from a contract, but the plaintiffs deny that such contract has been concluded.

The decision of the legal costs is based on § 91 ZPO [Code of Civil Procedure].
The statement about the preliminary enforcement follows § 709 ZPO.

Horn Prietzel-Funk Hennicke

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1 The names of the parties have been omitted by the court. The presumed plaintiffs are here included in brackets by the author of the article: CDZ Film-gesellschaft (Film Society) and the European Space Agency (ESA).
2 German original *"Prozeßstandschaft"*.
3 Remark of translator: should read "joint creditor".
4 German original *"Urheberrechtsschutz"*.
5 German original *"Leistungsschutzrecht"*.
6 German original *"Urheber"*.
7 German original *"Lichtbildner"*.
8 German original *"Lichtbildwerke"*.
9 German original *"Leistungsschutzrecht"*.
10 Plaintiffs motions I.2. and II.
11 Unjustified enrichment.
12 German original *"Urheber"*.
13 German original *"Urhebern"*.

Annex 2

LANDGERICHT BERLIN
Im Namen des Volkes

Geschäftsnummer: 16.0.33/89
Verkündet am: 30. Mai 1989

Schreurs Justizhauptsekretärin

In dem Rechtsstreit (...)

hat die Zivilkammer 16 des Landesgerichts Berlin in Berlin 10 (Charlottenburg), Tegeler Weg 17-21, auf die mündliche Verhandlung von 30. Mai 1989 unter Mitwirkung des Vorsitzenden Richters am Landgericht Horn, der Richterin am Landgericht Prietzel-Funk und der Richterin Hennicke

für Recht erkannt:

1. Die Klage wird abgewiesen.
2. Die Kläger haben die Kosten des Rechtsstreits zu tragen.
3. Das Urteil ist gegen Sicherheitsleistung in Höhe von 2.800,00 DM vorläufig vollstreckbar.

TATBESTAND

Die Beklagte -sie ist eine Werbeagentur- verwendete für eine Anzeige in der (...) vom (...), in der sie eine Anzeige für einen Kunden schaltete, ein Foto, das von dem (...) Satelliten aufgenommen worden ist. Die Kläger betreiben unter der Bezeichnung (...) eine BGB-Gesellschaft. Im Namen dieser Gesellschaft schlossen die Kläger unter dem Datum des 26./28. März 1984 eine Vertrag mit der (...). in dem die (...) der Gesellschaft der Kläger das Recht einräumt, als ihre Agentur kommerziellen Benutzern die Einwilligung zur Benutzung der (...)-Bilder zu erteilen.

In Artikel 2 Nr. 1 ist dabei geregelt, daß das Copyright an der Bildern bei der (...) verbleibe. In Nr. 2 dieses Artikels heißt es weiter, daß die (...) an die Gesellschaft der Kläger das nicht exklusive und nicht übertragbare Recht überträgt, die Bilder in der Bundesrepublik Deutschland an kommerzielle Benutzer zu verkaufen und zu vertreiben sowie das nicht übertragbare Recht, kommerzielle Benutzer zu autorisieren, dieser Bilder in der Bundesrepublik Deutschland zu publizieren, ohne daß dafür die vorherige Einwilligung (...) erforderlich sei. In Nr. 3 dieses Artikels wird geregelt, daß die (...) Anfragen kommerzieller Benutzer an die Gesellschaft der Kläger weiterleitet, soweit diese Gesellschaft in der Lage sei, die Vereinbarung zu erfüllen. Bezüglich der weiteren Einzelheiten dieses Vertrages wird auf die zu den Akten gereichte Kopie Bezug genommen.

In einer weiteren Erklärung vom 19.12.1984/31.1.1985 hat die (...) an die Gesellschaft der Kläger die urheberrechtlichen Ansprüche abgetreten, soweit dies rechtlich zulässig sei. Im übrigen ermächtigt die (...) in dieser Erklärung die Gesellschaft der Kläger, ihre Rechte, soweit eine Abtretung nicht möglich sei, im Wege der Prozeßstandschaft gelten zu machen.

Die Beklagte hatte im Jahre 1985 das betreffende Bild bereits einmal verwendet, das sie seinerzeit von der (...) erworben hatte. Als die Beklagte im März 1988 bei der (...) anfragte, wurde sie an die (...) verwiesen, die ihrerseits die Veklagte an die Klägerin zu 1. weiterverwies. Am 17. März 1988 kam es zu einem Telefonat zwischen der Klägerin zu 1. und einer Mitarbeitern der Beklagten, in dem als Preis für die geplante Veröffentlichung eine Summe von 2,500,--DM genannt wurde. Die weiteren Einzelheiten dieses Gesprächs sind zwischen den Parteien streitig.

Nach Erscheinen der Anzeige übersandte die Gesellschaft der Kläger der Beklagten eine Rechnung über 7.296,--DM, wobei sie einen Aufschlag von 100% zu dem üblichen Honorar von 3.200,--DM zuzüglich Mehrwertsteuer berechnet hatte, da in der Anzeige kein Vermerk gesetzt worden war, der auf die (...) als Urheber verwiesen habe. Auf diese Rechnung hat die Beklagte eine Summe von 3.648,--DM bezahlt.

Mit anwaltlichem Schreiben von 24. Mai 1988 ist die Beklagte abgemahnt worden, unter Strafbewehrung zu versprechen, künftig das betreffende Foto nicht mehr zu verwenden. In diesem Schreiben wurde die Beklagte ebenfalls aufgefordert, weitere 3.648,--DM zu zahlen. In diesem Schreiben wurde eine Frist bis zum 30. Mai 1988 gesetzt.

Die Kläger behaupten, daß ihre Gesellschaft von der (...) die Rechte an der (...)-Bildern zur kommerziellen Verbreitung, insbesondere zum Verkauf, zur Verbreitung und zur Vergabe von Nutzungsrechten erworben habe. Sie sind der Auffassung, daß das Foto ein nach § 72 UrhG geschütztes Werk und zudem eine im Sinne des § 2 Abs. 1 Nr. 5 UrhG schöpferiche Leistung sei, da die von den Satelliten in schwarz-weiß gelieferten Fotos vergrößert, koloriert und wieder verkleinert worden seien. Die Kläger sehen durch die Schaltung der Anzeige durch die Beklagte ihre Rechte aus dem Vertrag mit der (...) verletzt. Bei dem Telefonat am 17. März 1988 sei noch kein Vertrag geschlossen worden. Es sei bei der Gesellschaft der Kläger üblich, Verträge schriftlich zu schließen. Die Kläger behalten sich vor, ob sie anstelle des Schadensersatzes Herausgabe des Verletzergewinns verlangen wollen. Neben ihren eigenen Rechten stützen sie sich auf die Ansprüche, die der (...) als Lichtbildner im Sinne des § 72 UrhG zustehen könnten und die sie im Rahmen der gewillkürten Prozeßstandschaft wahrnehmen. Den Schadenersatz wegen einer Verletzung des Urheberpersönlichkeitsrechts der (...) beziffern die Kläger in Höhe von 100% des Entgelte für die Veröffentlichung. Bezüglich der Zinsen berufen sich die Kläger darauf, daß die Parteien Kaufleute seien.

Die Kläger beantragen,

I. Die Beklagte zu verurteilen,

1. es bei Meidung der gesetzlichen Ordungsmittel zu unterlassen, nachstehend abgebildetes Satellitenbild Nr. 8 a zu vervielfältigen oder zu verbreiten: (Foto).
2. den Klägern über den Umfang der vorstehend unter Ziffer 1. bezeichneten Handlungen Rechnung zu legen, und zwar insbesondere unter Angabe der Gesamtauflage der Vervielfältigungsstücke sowie deren Empfänger und des Zeitpunktes der Verbreitung von Vervielfältigungsstücken.

II. festzustellen, daß die Beklagte verpflichtet ist, den Klägern als Gesamtschuldnern allen Schaden zu ersetzen, der ihnen aus den vorstehend unter Ziffer I.1. bezeichneten Handlungen der Beklagten enstanden ist und künftig noch entstehen wird.

III. Die Beklagte zu verurteilen, an die (...) vertreten durch Generaldirektor Prof. (...), zu Händen der Kläger 3.648,-- DM nebst 5% Zinsen seit 25.5.1988 zu zahlen.

Die Beklagte beantragt,

die Klage abzuweisen.

Die Beklagte behauptet, daß bei dem Telefonat am 17. März 1988 ein Vertrag geschlossen worden sei, wobei für die genannte Auflagenhöhe und die Zeit von zwei Jahren eine Gebühr in Höhe von 2.500,--DM vereinbart worden sei. Die Zahlung der 3.648,--DM sei nicht zur Anerkennung der Ansprüche, sondern lediglich zur Vermeidung von Rechts-

streitigkeiten gezahlt worden. Die Beklagte ist der Meinung, daß für die (...)-Bilder kein Urheberrechtsschutz und kein Leistungsschutzrecht bestehe. Desweiteren bestreitet sie, daß die Bilder von der (...) aufgenommen worden sind. Sie ist weiter der Meinung, daß in dem Vertrag nur ein einfaches Nutzungsrecht an die Gesellschaft der Kläger übertragen worden ist. Etwaig bestehende Ansprüche nach dem § 1 UWG hält die Beklagte für verjährt. Die Beklagte behauptet weiter, daß bei dem telefonischen Vertragsabschluß kein Aufschlag in Höhe von 100% für einen etwaig unterlassenen Urhebervermerk vereinbart worden sei.

ENTSCHEIDUNGSGRÜNDE

Die Klage ist unbegründet.

Ein Unterlassungsanspruch, wie unter Ziffer I.1. geltend gemacht, steht den Klägern nicht zu, da die Kläger nicht geltend machen können, in ihren eigenen Rechten verletzt zu seien bzw. daß die (...), deren Rechte sie im Wege der Prozeßstandschaft wahrnimmt, in ihren Rechten verletzt ist.

Die Kläger können den geltend gemachten Anspruch nicht auf §§ 97 Abs. 1 Nr. 1 i.V.m. § 2 Abs. 1 Nr. 5 bzw. 72 Abs. I UrhG stützen, da sie nicht vorgetragen und unter Beweis gestellt haben, welche natürliche Person die Fotos mittels der technischen Hilfsmittel aufgenommen hat und daß diese das Nutzungsrecht an die (...) übertragen hat. Urheber im Sinne des § 2 wie auch Lichtbildner im Sinne des § 72 UrhG kann stets nur eine natürliche Person sei, da nur sie die persönlichen und geistigen Fähigkeiten zur Schöpfung eines Werkes besitzt. Da die (...) als juristische Person folglich weder Urheber noch Lichtbildner sein kann, reicht der Vortrag der Kläger, die (...) habe ihnen die Ansprüche nach dem Urhebergesetz übertragen, nicht zum Nachweis des Innehabens der Ansprüche nach dem Urhebergesetz aus. Da die Beklagte bestritten hat, daß die Bilder von der (...) aufgenommen worden sind, war ein solcher Nachweis der Ableitung der Rechte nach dem Urhebergesetz jedoch erforderlich. Die Kläger haben diese Angaben auch nicht auf entsprechende Nachfrage des Gerichts in der mündlichen Verhandlung geben können.

Es kam daher nicht darauf an, ob die Fotos als Lichtbildwerke einen Schutz aus Urheberrecht nach § 2 Abs. 1 Nr. 5 oder ob ihnen als Lichtbilder ein Schutz als Leistungsschutzrecht nach § 72 Abs. 1 UrhG zukommt.

Eine Begründung des Unterlassungsanspruchs ergibt sich auch nicht aus § 1 UWG, da die Kläger von dem Erscheinen der Anzeige am 31. März 1988 spätestens am 22. März 1988 Kenntnis hatten, da von diesem Tag die übersandte Kostenrechnung datiert. Bis zur Klageerhebung im Januar 1989 waren damit mehr als sechs Monate vergangen und somit die Einrede der Verjährung, die die Beklagte erhoben hat, begründet, § 21 UWG.

Der daneben noch im Betracht kommende Unterlassungsanspruch im Wege eines Schadenersatzanspruches aus § 823 Abs. 1 BGB wegen des Eingriffs in den eingerichteten und ausgeübten Gewerbebetriebs ist nicht gegeben, da ein betriebsbezogener Eingriff nicht gegeben wäre.

Auch der weiter geltend gemachte Auskunfts-und Feststellungsantrag ist nicht begründet. Diese Ansprüche ergeben sich zum einen nicht aus der Rechtsverletzung nach den bereits zuvor erörteten Anspruchsgrundlagen.

Soweit für den Anspruch auf Zahlung, und damit für den ihn vorbereitenden Anspruch auf Auskunft und Feststellung, noch Ansprüche nach § 812 BGB in Betracht kommen, ist zum anderen zwar festzustellen, daß die Beklagte etwas, nämlich das Verwertungsrecht- ohne rechtlichen Grund erlangt hat. Sie hat jedoch auf entsprechende Rechnung von 22. März 1988 die Summe gezahlt, die die Gesellschaft der Kläger üblicherweise für einen Vertrag über die Berechtigung zum erstmaligen Abdruck verlangt. Damit hat die Beklagte bereits dasjenige herausgegeben, was sie unter dem Gesichts-punkt der ersparten Aufwendung erlangt haben könnte.

Auch der Anspruch auf einen 100%igen Aufschlag auf diese Summe wegen des unterlassenen Urhebervermerks, in dem die Kläger eine Verletzung des Urheberpersönlichkeitsrechts der (...) sehen, steht ihnen nicht zu. Die Kläger haben zum einen nicht -wie bereits ausgeführt- die Innenhabung der Nutzungsrechte nach dem Urheberrecht nachgewiesen, so daß sie schon aus diesem Grunde einen solchen Anspruch nach § 97 Abs. 2 Urhebergesetz nicht geltend machen können. Zum anderen ist eine Nennung der (...) als Urheber des Bildes aus dem oben ebenfalls genannten Gründen unzutreffend, da dieser Anspruch auf Nennung gemäß § 13 UrhG nur den Urhebern, nicht jedoch dem Inhaber der Nutzungsrechte zusteht. Ein Anspruch auf die Verwendung des verlangten Urhebervermerks könte sich allenfalls aus Vertrag ergeben, dessen Zustandegekommen die Kläger jedoch verneinen.

Die Kostenentscheidung beruht auf § 91 ZPO.

Der Ausspruch über die vorläufige Vollstreckbarkeit folgt § 709 ZPO.

Horn Prietzel-Funk Hennicke