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^{éditorial} *Nouvelles de la fondation*

Chères et chers Membres,

Après ces derniers mois qui ont bouleversé notre quotidien et nos activités, nous sommes heureux de pouvoir maintenir notre habituelle édition du *Art Law Magazine* avant les vacances estivales.

Ce numéro revient notamment sur l'affaire du collectionneur zurichois qui a donné lieu à plusieurs décisions cruciales du Tribunal fédéral et du Tribunal administratif fédéral. Il apparaît que le collectionneur a importé 86 œuvres d'art en Suisse par l'intermédiaire d'une galerie d'art, selon une procédure de report, lui permettant d'éviter le paiement de la TVA à l'importation. En réalité, la galerie d'art n'a jamais été en possession des dites œuvres, qui ont été exposées dans les propriétés du collectionneur. Dès lors, le Tribunal fédéral a considéré que ces œuvres avaient été importées en Suisse par le collectionneur, et l'a condamné au paiement des arriérés de TVA et

The Foundation's News

Dear Members,

After the last few months that have shaken our daily life and our activities, we are happy to be able to maintain our usual edition of *Art Law Magazine* before the summer holidays.

In this issue, we go back to the Zurich collector case, which has given rise to several interesting decisions by the Federal Supreme Court and the Federal Administrative Court. It appears that the collector imported 86 works of art into Switzerland through an art gallery, following a deferral procedure, allowing him to avoid paying import VAT. In reality, the art gallery was never in possession of the works, which were exhibited in the collector's properties. Consequently, the Federal Court considered that these works had been imported into

d'une amende de plusieurs millions de francs suisses. Cette affaire démontre que les conditions en droit suisse pour importer des œuvres d'art franc d'impôt sont très restrictives, et que les tribunaux ne se limiteront pas à analyser les contrats signés entre les parties pour déterminer si les exigences sont satisfaites, mais se baseront plutôt sur les circonstances concrètes et factuelles du cas d'espèce.

Vous trouverez notamment dans nos pages un exposé sur les droits d'auteur en Turquie en cas de modification d'une œuvre architecturale sans l'aval de son créateur, ainsi qu'un article sur les points à observer lors de l'acquisition d'objets d'art en ligne. Cette édition présente en outre l'analyse de nouvelles lois russes sur la protection du *street art*, une approche pionnière puisque ces lois visent à légaliser la création de graffitis pour une durée limitée dans le temps et selon des conditions bien délimitées.

Le colloque annuel de la FDA organisé conjointement avec le Centre du droit de l'art portera sur les nouvelles dispositions du droit d'auteur suisse, entrées en vigueur le 1^{er} avril dernier. Il s'agira d'exposer leur impact pour les acteurs du monde de l'art. Celles-ci concernent les utilisateurs, les archives, les musées, les bibliothèques et la société civile dans son ensemble. Le droit

Switzerland by the collector and ordered him to pay arrears of VAT and a fine of several million Swiss francs. This case demonstrates that the conditions under Swiss law for importing works of art free of tax are very restrictive, and that the courts will not limit themselves to analysing the contracts signed between the parties to determine whether the requirements are met, but will rather base their assessment on the concrete and factual circumstances of the case.

Furthermore, you will find in this edition a presentation on the architect's copyright under Turkish law in the event of modifications without his approval of a building he has created, as well as a reminder of the points to be observed when acquiring a work of art (online). This edition also presents the analysis of new Russian laws on the protection of street art, a pioneering approach since these laws aim to legalize the creation of graffiti works for a limited period of time and under well-defined conditions.

The FDA's annual conference, organized jointly with the Art Law Center, will focus on the new provisions of Swiss copyright law, which came into force on 1st of April. The aim will be to explain their impact for the players in the art world, since they concern users, archives, museums, libraries and civil

d'auteur protège les artistes et leur confère le droit de décider si, quand et comment leurs œuvres peuvent être utilisées. D'éminents spécialistes exposeront ces nouvelles règles et leur application en pratique. Nous vous invitons à retenir la date du 5 novembre 2020 dans vos agendas.

Nous nous réjouissons de pouvoir reprendre nos événements et de vous revoir après l'été.

Pour la FDA :
Anne Laure Bandle, directrice

society as a whole. Copyright protects artists and gives them the right to decide whether, when and how their works can be used. Leading experts will explain these new rules and their application in practice. We invite you to mark 5 November 2020 in your diaries.

We look forward to our events and to seeing you again after the summer.

On behalf of the ALF:
Anne Laure Bandle, director

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Competing Interests of the Architect and the Property Owner under Turkish Law

*By Faruk Çikin Ömer**



The competing rights of the architect and the property owner over an architectural work have long been debated among practitioners and scholars in many jurisdictions including Turkey. In line with the Berne Convention for the Protection of Literary and Artistic Works, the Turkish Intellectual and Artistic Works Law No. 5846 (the “Law”) grants authors an exclusive right of authorizing adaptations, arrangements, and other alterations of their works. An architect’s copyright protection over the architectural work, however, often clashes with the interests of the

property owner. Striking a balance between these two competing interests has set a challenge for Turkish courts in the past years and may still be open for further discussion to provide foreseeability for the concerned parties and encourage architectural creativity.

1. Brief background information on copyright protection over architectural projects and works

Under article 2 of the Law, architectural plans, drawings, and designs are regarded and categorized as “works of science and literature” along with other scientific maps, technical and scientific photography, geographical and topographical models, and similar works. The author of these literary works can benefit from moral and economic rights even if such works do not possess an aesthetic value, as long as they bear the character and originality of the author. On the other hand, architectural works, as the outcome based on an architectural project, are categorized and regarded as “works of fine art” which must possess aesthetic value to benefit from the copyright protection under the Law. Accordingly, and although the architectural plan is protected as a scientific work, this protection

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will extend to the architectural work itself only if it possesses artistic value. This will also entitle the author to a protection tool foreseen particularly for copyright infringement relating to works of fine art, that is the possibility to request restoration in addition to monetary damages.

In fact, the author of an architectural work has the exclusive economic right to adapt or modify their work. Therefore, in principle, if the architectural work bears the character and originality of its author and carries aesthetic value, it cannot be altered or modified without the consent of the author. However, the architect of a regular building without aesthetic value will not be able to prevent any alterations to the building since copyright protection is limited to the architectural project and does not extend to the building.

2. Progress of the Turkish Supreme Court's decisions

Prior to 2005, the Turkish Supreme Court had embraced a highly conservative approach, by requiring the architect's consent for any alterations on an architectural work without discussing whether it can be deemed as "a work of fine art", i.e. whether it has an aesthetic value¹.

In a decision from 1998, the property owners of a building in a mass-housing settlement that was based on an awarded architectural project were sued by the architect when the outer walls were painted in a color other than the one the architect had originally planned. The Supreme Court found that such deviation from the architectural project violated the architect's copyright. This ruling did not make any distinction between the copyright protection over the architectural project/drawing and the architectural work/building itself and therefore the Court considered the deviation from the architect's plans as a violation of the Law².

Ever since a decision of 2005³, the Turkish Supreme Court significantly shifted its approach by clearly distinguishing the authors' copyright protection over the architectural project and the architectural work. Under this decision, the architect claimed moral compensation from the property owner for the alterations carried out without his/her consent, however, the lower court rejected the claim considering that such alterations did not infringe the architect's copyright since; i) the building, which was based on the architect's project, did not possess aesthetic value, ii) copyright applied therefore merely to the architectural

1 The following are to fill as examples; 11th Circuit of Turkish Supreme Court, E. 1998/3202, K. 1998/5147, 06.07.1998; E. 2002/6101, K. 2002/6394, 21.06.2002; E. 2001/10702, K. 2002/2515, 19.03.2002.

2 11th Circuit of Turkish Supreme Court, E. 1998/3246, K. 1998/4717, 22.6.1998.

3 11th Circuit of Turkish Supreme Court, E. 2004/6421, K. 2005/3433, 04.04.2005.

project as a “work of science and literature” under article 2 of the Law and iii) the defendant did not carry out any alterations of the architectural project⁴. The Supreme Court approved this decision, setting a precedent that is still in effect today. Accordingly, the architect’s copyright protection can extend to the architectural work itself provided that it possesses aesthetic value, otherwise it is limited to the architectural project.

3. Required alterations based on functionality

Adapting a more flexible approach after 2005, the Turkish Supreme Court also established that even an architectural work that is categorized as work of fine art can be altered by the property owner without its author’s consent if such alteration is required to maintain the work’s functionality.

The Turkish Supreme Court held another significant decision in this regard which has set precedent for copyright claims of architects against alterations of functional buildings. In this decision, the heirs of an architect claimed moral and material compensation because the hotel chain owner had not obtained their consent for the prospected alterations. The hotel was built in 1970 and was transferred to a new owner after approximately

thirty years (judging by the date of the decision) in worn-out condition. The new owner of the hotel had planned certain renovations some of which were required by reformed construction laws and included changing the doors and other maintenance, repair and paint work. The lower court rejected their claim and found that although the hotel was evidently an architectural work as a work of fine art, it could still be renovated under certain conditions without requiring the author’s consent, since these alterations were inevitable to fulfill its function as a hotel. The lower court rejected the plaintiff’s claim and the decision was approved by the Supreme Court. Pursuant to this decision, works of fine art with artistic value may be altered without the consent of the author if such alterations i) are required to maintain the safety of the building and to expand the used areas, ii) are carried out in view of changing comfort and service expectations, iii) do not endanger the integrity of the project and building and iv) do not damage the honor and reputation of the author⁵.

In brief, case law referred to above has shown that the owner of a functional building categorized as a work of fine art with aesthetic value, can be altered based on changing needs provided that such alteration is actually required to meet those needs and does not

⁴ Under this decision, the lower court also stated that copyrights of the architect cannot be infringed solely based on the fact that these alterations were in violation with the construction laws.

⁵ 11th Circuit of Turkish Supreme Court, 2005/3748 E., 2005/107277 K., 25.10.2005.

endanger the integrity of the building and the honour and reputation of the architect.

4. Conclusion

The Supreme Court decisions have shown a significant shift over the years. In an effort to strike a balance, also lower courts have abandoned the conservative approach requiring the consent of the architect for every modification. However, some scholars and practitioners criticize that the recent court precedents are now too favorable for property owners enabling them to make modifications simply by relying on the reasoning of maintaining the building's function.

It is also surprising that courts often rely on expert opinions for the assessment of whether an architectural work possesses artistic value and do not provide an objective test that would surely offer more foreseeability for concerned parties.

Architecture is a form of art that people are regularly exposed to during their lives, unbeknownst to them most of the time. Therefore, other than the architect and property owner, architecture should concern a larger circle, whom we can refer to as stakeholders. Intellectual property laws and their interpretation play a vital role in incentivizing the artist and other sector components which then would lead to welfare of all stakeholders.



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