KAMMERGERICHT

[Higher Regional Court, Berlin]

IN THE NAME OF THE PEOPLE

JUDGMENT

Case Number: Pronounced on: 1/28/2010

8 U 56/09 (Hubert)

19 O 116/08 Berlin Regional Court

Court Clerk

In the litigation

Peter Sachs,
4370 Hidden River Road,
Sarasota, FL 34240 USA

Plaintiff, Counterclaim Defendant,
Appellee and Appellant

Attorneys: FPS Fritze Wicke Seelig
Kurfürstendamm 220, 10719 Berlin

versus

Deutsches Historisches Museum,
Public Law Foundation,
Represented by its President, Prof. Dr. Hans Ottomeyer
who is represented by:
The Vice President Dr. Vorsteher
Unter den Linden 2, 10117 Berlin

Defendant, Counterclaimant,
Appellant and Appellee

Attorneys: Redeker Sellner Dahs & Widmaier
Leipziger Platz 3, 10117 Berlin

the 8th Civil Panel of the Kammergericht in Berlin-Schöneberg, Elßholzstr. 30-33, 10781 Berlin, upon the hearing of January 28, 2010, by the Kammergericht Presiding Judge Bulling, Kammergericht Judge Dr. Henkel, and Kammergericht Judge Spiegel held:

Upon appeal by Defendant, the Berlin Regional Court decision of Feb 10, 2009 — 19 O 116/08 — is partially amended and reformulated as follows:

> It is determined that Plaintiff is not entitled to demand the surrender of the posters in the possession of Defendant from the poster collection of the dentist Dr. Hans Sachs (period of collection from 1896 to 1938) which can be identified by a sticker or stamp marking as having been collected by Dr. Hans Sachs — currently identified: 4,259 posters.
>
> The complaint and the further counter-claim are herewith dismissed.

The further appeal by Defendant and the appeal by Plaintiff are dismissed.

The parties pay their own costs of the legal dispute.

This decision is provisionally enforceable. Defendant may avert the enforcement by making a security payment of the amount enforceable from the judgment plus 10 %, unless Plaintiff makes a security payment in the amount to be enforced plus 10 %.before the enforcement.

Revision [appeal] is not permitted.

Substantiation

I.

In his capacity as second heir in succession, Plaintiff demands the surrender of two posters from a collection which was taken away from his father, Dr. Hans Sachs, in 1938, as ordered by the Reich Propaganda Ministry, large parts of which came into the possession of the Museum of German History and then of Defendant. Defendant, in its counter-claim, demands the determination that Plaintiff is not the owner of the posters in its possession which are to be identified by sticker or stamp as having been collected by Dr. Hans Sachs, alternately it demands that it be determined that Plaintiff cannot demand the surrender of these posters. The Regional Court Berlin ruled that Defendant has to return the poster "Mastiff"; it dismissed the complaint with regard to the poster "The Blonde Venus" and the counter-claim. With regard to the details of the factual and legal status of the dispute in the first instance, the motions filed and the substantiation of the decision, reference is made to the appealed decision.

On March 12, 2009, both parties appealed this decision, which was sent to Defendant on Feb 12, 2009 and to Plaintiff on 2/13/2009. Defendant's brief on

appeal was received on 5/11/2009, after the deadline for submission had been extended to May 12, 2009, upon request dated March 25, 2009. The deadline for submission of Plaintiff's substantiation was extended to May 13, 2009, upon request, and was received on that day.

With this appeal, Plaintiff continues to pursue his claim for surrender of the poster "The Blonde Venus" and asserts the following:

Contrary to the opinion of the Regional Court, the evidence presented sufficiently proved that the poster belonged to his father's collection, particularly since it — indisputably — was found wrapped together with posters that were clearly marked by stickers and stamps to belong to the Sachs collection and when incorporated in the inventory of the Museum of German History or Defendant it was attributed to the Sachs collection. According to time of origin and artistic value of the design as well as according to the subject depicted, the poster belongs to the collecting focus of the Hans Sachs collection. With regard to artistically designed posters from the time period up to 1938, Defendant's poster collection consists practically exclusively of the Hans Sachs collection. Defendant did not submit that the poster was acquired any other way.

Defendant evidently changed the poster. When exhibited in 1992 it had still been mounted on grey linen which can be seen in Defendant's inventory listing and which was a specialty of Dr. Hans Sachs; in the hearing however, it was mounted on a different material. The original grey linen shirting had borne a stamp. The handwritten note "Kupfer-Sachs" on the poster was Dr. Hans Sachs'. Moreover, individual posters had not been labeled by Dr. Sachs since he had not yet gotten around to doing it and also since they were earmarked for exchange; also, his collection included folded posters.

[According to Plaintiff] the admissibility of the recourse to the courts is no longer to be examined according to § 17a Para. 5 GVG [Gerichtsverfassungsgesetz, the German Judicature Act]. At any rate, this case is characterized by the fact that there was no seizure of property but a theft perpetrated by government bodies within the area of application of the Federal Restitution Act [Bundesrückerstattungsgesetz - abbreviated BRüG]. Cases processed under this act are not subject to the Law on the Regulation of Unsolved Property Questions [Vermögensgesetz] (hereinafter: VermG). The past payment of compensation does not exclude the claim to restitution of the asset, but would only have to be paid back if the poster collection returns to Plaintiff's power of disposal. Regarding the plea of forfeiture, the element of protection of legitimate expectation requires more than the mere use of the posters.

Plaintiff moves:

> to amend the Berlin Regional Court decision of 2/10/2009 — 19 O 116/08 — and to sentence Defendant to return to Plaintiff the poster "The Blonde Venus" kept under inventory No. P62/599, created in 1932 by the company A. Scherl, Berlin, in color-offset procedure, having a size of 204 x 95.5 cm, and bearing the handwritten note: : "Kupfer-Sachs",
>
> and to dismiss Defendant's appeal.

Defendant moves:

> to revoke the Berlin Regional Court decision of 2/10/2009 — 19 O 116/08 and

to

1. dismiss the complaint to the extent it has not yet been dismissed.

2. concerning the counterclaim:

a) to determine that Plaintiff is not owner of the posters in the possession of Defendant belonging to the collection of the dentist Dr. Hans Sachs (collecting period 1896— 1938) which are identifiable by sticker or stamping as having been collected by Dr. Hans Sachs — presently there are 4,259 identified posters,

b) to determine in the alternative that Plaintiff is not entitled to demand surrender of the posters in the possession of Defendant from the poster collection of the dentist Dr. Hans Sachs (collecting period 1896¬1938) which are identifiable by sticker or stamping as having been collected by Dr. Hans Sachs - presently there are 4,259 identified posters,

and to dismiss Plaintiff's appeal.

Defendant's appeal opposes the ruling that it has to surrender the poster "Mastiff" and the dismissal of the counter-claim, and Defendant asserts:

The complaint is to be dismissed as being inadmissible, since the restitution fact of § 1 Para. 6 VermG has precedence; the case cannot be brought before the Administrative Court because the restitution claim was filed too late by Plaintiff, therefore § 17a Para. 5 GVG is not applicable. For the VermG to be applicable it does not depend, according to legal practice of the Federal Administrative Court and the Federal Court of Justice, on whether the unjust measure taken by the National Socialists led to a loss of ownership. At any rate, Plaintiff's claim for

surrender is barred since the compensation provisions of the Allied restitution law and the Federal Restitution Act [BRüG] have precedence.

Based on Dr. Hans Sachs' report from 1953 and Dr. Richard Lenz's statement of 11/28/1946, one would have to assume that ownership of the poster collection was transferred by means of an agreement on constructive possession [Besitzkonstitut] - and was not feigned. This confiscation in 1938, though unconstitutional, created ownership by the Reich. In the GDR, the posters became property of the people. Also Dr. Sachs' letter to Mr. Rademacher of 5/23/1966 demonstrates that he had given up ownership.

Defendant, which expressly does not raise objections because of the statute of limitations, invokes forfeiture, for the reason that even though Dr. Sachs had known since 1966 of the whereabouts of the parts of the poster collection that are the subject of this dispute, that neither he nor his widow – despite the deadline under the VermG of June 30, 1993 - nor Plaintiff himself, demanded its surrender until 2006, and since the Museum of German History and its successor, the Defendant, had relied upon the statement made by Dr. Sachs that he had no intention to claim his former property because of the compensation he received, and had therefore made arrangements to integrate the posters into its own much more comprehensive poster collection, and making them accessible, particularly within the framework of the exhibition in the summer of 1992.

Defendant criticizes Plaintiff's submission regarding the poster 'The Blonde Venus" in the second instance as being too late. Apart from that, it claims that Dr. Sachs' collection did not contain significant numbers of film posters. The fact that it was published in 1932 is no indication for its belonging to his collection, to which only few additions were made after 1922. The approximately 6000 posters which were found in 1953 constituted a remaining stock from the "larger body" of advertising posters of the Advertising Standards Authority of the German Economy in preparation for the institution of an advertising archive, which, among others, also contained Dr. Sachs' collection; it claims that in 1962 the poster "The Blonde Venus' was erroneously attributed to this collection. Defendant's entire poster collection contained approximately 10,000 posters from the inventory of the Museum of German History from the period 1888 — 1938. The notation "Kupfer-Sachs" in the 1992 exhibition catalog regarding the poster "The Blonde Venus" did not refer to the Sachs collection but to the artist who designed and signed this poster. According to the restoration report, the poster had been "laminated on new white linen" before 1992 and was restored by mounting it on Japanese paper, and even at that time there was no stamp or sticker that would have shown that it belonged to the Sachs collection.

With regard to further details of the factual and disputed status of the matter reference is made to the briefs and exhibits exchanged.

II.

The admissible appeal of the Defendant is partially successful, while Plaintiffs admissible appeal has no merit. The complaint is admissible but without merit. The admissible counter-claim is only successful because of its alternative motion.

1.

The complaint is admissible. Whether the litigious procedures are subject to § 1 VermG which would exclude the recourse to civil law (BGHZ 118, 34; BGH ZOV 2005, 2210) may therefore remain open, since the appellate court does not have to review the legal process, § 17a Para. 5 GVG. There is no violation of § 17 a Para. 3 clause 2 GVG, in which case the legal process in the second instance would have to be reviewed (BGHZ 121, 367; BGH NJW 2008, 3572); there was no need to render an advance decision on the admissibility of legal recourse since none of the parties before the Regional Court made a relevant complaint. Also, § 17a Para. 5 GVG is not inadmissible — in Defendant's opinion — since in restitution matters any reference by ordinary courts to the Administrative Court (BGH NJW 1993, 332, 333) does not come into question and since therefore there is no threat of continuation of the legal process in (possibly several instances) of other courts. Such a limited interpretation finds no basis in § 17a GVG and is also not warranted according to the meaning and purpose of the provision, i.e. to promote an expeditious decision on the facts.

2.

However, the complaint is without merit.

a.

There is no claim for surrender in light of the precedence of Allied restitution law and the compensation provisions of BRüG.

Plaintiff's father's claims to the return of the poster collection – also vis-à-vis third party buyers and owners – would be subject to Art. 1 of the Ordinance BK/O (49) 180 of the Allied Command Berlin on Restitution of Identifiable Assets to Victims of National Socialist Oppressive Measures of 7/26/1949 (Ordinance Gazette for Greater Berlin, Part I, page 221), since the collection had been unjustly seized from him for reasons of race — because of Jewish descent. Claims that were subject to this ordinance could only be asserted in proceedings according to this ordinance, according to Art 51 clause 1. Furthermore, it is codified in § 7 BRüG that restitution claims can only be asserted according to the requirements of this statute, i.e. in BRüG proceedings.

According to established case law of the highest courts, claims by victims of National Socialist acts of injustice can only be asserted according to the

requirements of the restitution and compensation laws (BGHZ 9, 34, cited to Juris, subsection 16; BGH RzW 1956, 237), and that the regulation adopted in the compensation statutes of the individual occupation zones excludes claims for return under general civil law because of seizures that were within the limits of general persecutory measures (BGHZ 10, 340). The Allied restitution laws claimed exclusive applicability for all restitution cases, independent of a possible nullity of the expropriation measure; ordinary courts were only allowed to adjudge claims for return of assets if they were not based on persecutory reasons (BVerwGE 98, 261). Accordingly, restitution facts under the Law on the Regulation of Unsolved Property Questions have been accorded precedence over claims under civil law (BVerwG l.c.; BGHZ 130, 231, cited to Juris, subsection 15 with further evidence).

The adjudicating panel is in agreement with these views. The precedence accorded the Federal Restitution Law — for good reason, i.e. for the disentanglement of facts created by National Socialist acts of injustice — has to be adhered to, even if, as in the present case, a formal expropriation has not occurred. Thus, a claim for surrender cannot be made to Defendant, since Plaintiff does not assert a legal cause which would have nothing to do with National Socialist persecution — and thus with restitution and compensation law. The fact that a beneficiary under the VermG does not have to make do with compensation payments made at an earlier date (cf. BVerwG ZIP 1997, 1392 and § 7a Para. 2 VermG) only concerns the relationship of restitution norms among themselves and does not revive a claim under civil law to restitution in kind.

The "Principles of the Washington Conference With Regard to Works of Art Confiscated by the National Socialists" of 12/3/1998 and the "Declaration by the Federal Republic, the Federal States and the Local Government Central Associations regarding locating and returning cultural assets seized on the basis of National Socialist persecution, particularly from Jewish ownership" of December 1999 do not change this. Also, Plaintiff does not assert that these would involve norms from which a legal claim could be derived.

b.

The question whether a claim for surrender by Plaintiff is also excluded in light of the mentioned precedence of the VermG can therefore remain unanswered and should only be touched on here.

The requirements, according to the wording of § 1 Para. 6 VermG are met, since this is a restitution claim by a citizen of Jewish descent (and his legal successor), who was persecuted during the time period of 1/30/1933 to 5/8/1945 for reasons of race and who consequently lost his assets as a result of expropriation or otherwise. It is not important that Plaintiff's father was not formally expropriated, since § 1 Para. 6 VermG according to its wording and settled case law by the highest courts also includes factual seizures of assets (BVerwGE 98, 261, cited to Juris, sub-section. 10;

BVerwG Buchholz 428 § 1 VermG Nr. 100 cited to Juris, sub-section 2; BVerwG VIZ 2000, 284, cited to Juris, sub-section. 11; BGHZ 153, 258 = VIZ 2003, 179, cited to Juris, sub-section 9). No dissent can be found in the decisions BGH VIZ 1996, 87, BGH ZOV 2003, 322 and KG ZOV 2003, 104 — contrary to the appealed decision — since they do not concern § 1 Para. 6 VermG but rather the question whether assets within the scope of § 1 Para. 3 VermG had been "acquired" on the basis of dishonest machinations.

The required connection to the acceding territory (BVerwG VIZ 2000, 719, cited to Juris, sub-section 3 with further evidence) in the application of the VermG (enacted by the Volkskammer of the GDR) might however be absent, since the posters were seized in Berlin-Schöneberg — later part of West Berlin. The fact that later they ended up in Berlin-Mitte — later the acceding territory — where a compensation for National Socialist injustice also did not occur and whereby a restitution (in kind) according to Allied and West German restitution law was factually impossible, would not be able to justify the application of the VermG according to the decision of the Federal Administrative Court –BverwG - of 11/25/2009 — 8 C 12/08 - since the VermG aims at damage/loss in the acceding territory and not at rectification of decisions under the Allied restitution law or the compensation law of the Federal Republic of Germany. This perception seems to also be in accord with the decision of the Federal Constitutional Court of 2/6/2004 (VIZ 2004, 220, cited to Juris, sub-section 16-19).

c.

Furthermore, with regard to good faith (§ 242 BGB [Bürgerliches Gesetzbuch, the Civil Code]) this complaint has to be dismissed since Plaintiff's claims for surrender are forfeited.

A right is forfeited if the beneficiary has not asserted it for any length of time and the obligated party has adapted to this and was permitted to do so according to the entire conduct of beneficiary that beneficiary would no longer assert this right (BGH NJW 2006, 219, cited to Juris, sub-section 22 with further evidence). The passage of time alone is not sufficient to assume forfeiture. In the present case, however, what carries considerable weight is that the surrender of the posters was only demanded in 2006 even though Plaintiff's father already knew 40 years prior to this of the whereabouts of large parts of his poster collection in the Museum of German History. Since claims for surrender during GDR times were unenforceable it would not be possible to solely take into account this passage of time until 1990; however, according to the legal principle in § 206 BGB (and § 203 Para. 2 BGB old version) this time period also has to be considered. Additionally, there is the contents of Dr. Sachs' letter dated 5-23-1966 to Mr. Rademacher, an employee of the Museum of German History, according to which he was interested only in an intellectual, and not material, cooperation with the Museum and had already received payment of a considerable sum of money in compensation on the basis of a

court decision, which compensation covered all his claims. Dr. Sachs' article concerning the reappearance of his poster collection (and another collection in Cologne) which appeared in winter of 1970/71 goes in the same direction, and it reads therein: "A collecting activity of 40 years' duration (...) has been proven justified. I am sure that West and East Germany will know how to protect their treasures." The "Advisory Commission for the Return of Cultural Assets Seized on the Basis of NS Persecution" based its recommendation of 1/25/2007 to leave the collection in the Museum of German History on the collector's will expressed in this article. Even considering that such statements by Dr. Sachs were made at a time when claims for surrender would have had no chance of success (see also. OLG Brandenburg OLG-NL 1995, 135), Defendant could have been confident that it would be able to permanently keep the posters from the Sachs collection, since long after reunification a restitution claim had not been made. Such an element of trust had already been created, in the view of the Panel, with the expiration of the deadline under § 30a Para. 1 Satz 1 VermG on June 30, 1993, since it would have stood to reason to file restitution claims; after all an applicability of § 1 Para. 6 VermG to assets which arrived in the acceding territory only after damage/loss, could have been seriously considered (in the affirmative: VG Berlin ZOV 2008, 115, cited to Juris sub-section 38; Neuhaus in: Fieberg/ Reichenbach/ Messerschmidt/Neuhaus, VermG, § 1 margin no. 134), even though it has now been denied in the decision of the Federal Administrative Court of 11-25- 2009. Defendant, after the lapse of another 12 years, could rely even more on not being called on to return [the posters]. Particularly in light of the above-mentioned statements made by Dr. Sachs, Defendant scarcely needed to reckon with the circumstance that his closest relatives and heirs might possibly be inactive only because they did not know the whereabouts of the posters. Defendant had indeed been prepared to no longer be exposed to a demand for surrender. It incorporated the posters in its own collection, preserved them and made them accessible and made them, among other things, the focus of an exhibition in the summer of 1992 — when it especially paid tribute to Dr. Sachs. It has to be assumed that the Museum in its efforts to preserve more than 4,000 posters in an orderly fashion incurred considerable expenditures, which at least in individual cases ("The Blonde Venus"), included restoration work. This does not present itself, as Plaintiff thinks, as mere use, but as confirmation of Defendant's confidence that it could keep the posters in its own inventory. The belated assertion of the claim for surrender thus violates the principle of utmost good faith (see also. BGH NJW 2003, 824 with further evidence). This is not changed by the fact that Defendant — apparently in light of the principles of the Washington Conference — does not invoke the statute of limitations, i.e. a mere lapse of time, since within the framework of forfeiture what is important is whether there are other circumstances that oppose the enforcement of a claim.

d.

Furthermore, Plaintiffs appeal is without merit since he cannot prove his ownership of the poster "The Blonde Venus".

Admittedly, no excessive requirements of burden of demonstration and proof should be made to the injured party who was affected by a National Socialist persecutory measure without a confiscation record or similar document. However, in his complaint, Plaintiff himself submitted that his father's posters were marked by stamp or sticker, which, according to the decision of the Regional Court is not the case with the poster "The Blonde Venus". Accordingly, it was right in not considering the appealed decision as sufficient evidence of ownership, that this poster was inventoried in the Museum of German History and by Defendant as part of the Sachs collection, after Defendant submitted comprehensibly that this attribution was only made since other posters that were found at the same time were marked in such a way. Apart from that, Plaintiff did not substantiate in the first instance his claim that the poster "The Blonde Venus" belonged to his father's collection.

As far as Plaintiff now offers in his brief on appeal the evidence that this poster, before its restoration in 1992, was marked with a stamp as being part of the Sachs collection, and bore his father's signature, he is excluded by this submission (disputed by Defendant) according to § 531 Para. 2 ZPO [Zivilprozeßordnung, the Civil Procedure Code]. It was negligent for Plaintiff not to have presented this already in the first instance after Defendant in its statement of defense of 5/28/2008 had invoked the missing marking on the poster; there would have been sufficient opportunity before the hearing before the Regional Court on 1/20/2009 to examine this — if necessary by visual inspection at Defendant — and to make inquiries regarding this. When this was pointed out to him by the Panel in the hearing, Plaintiff was not able to exculpate himself from this omission.

Also, one cannot determine that this poster's provenance very likely was the Sachs poster collection. Plaintiff's submission that Defendant's collection of artistically designed posters up to 1938 almost exclusively consisted of his father's collection is without substance in light of the submission made by opposing party and could also not be admitted according to § 531 Para. 2 ZPO. Furthermore, the stamp of the Film Auditing Office on the front of the poster indeed shows an alternative to where it might have originated. Finally, the Regional Court was right in considering that the fact that the poster was folded was atypical for the Plaintiff's father's collection.

3.

According to § 33 ZPO the counter-claim is admissible, however its main motion of determining the lack of ownership by the Plaintiff, was without merit.

a.

It cannot be determined that Plaintiff's father had lost ownership in the poster collection before it was seized. According to the essentially accurate reasons of the appealed decision one cannot assume that the collection was sold to Dr. Richard Lenz. Even though a transfer of property based on the accounts of Dr. Sachs ("formally assigned) and of Dr. Lenz ("assigned .....in pledge") appears possible - according to §930 BGB - and since it cannot be excluded that an apparently agreed upon inspection was made by an expert, a concrete property sharing agreement is not sufficiently explained. The Regional Court was right in pointing out that for an assignment agreement by way of security there was already no demand to be secured. Within the framework of a fiduciary relationship it might have stood to reason to transfer the posters to Dr. Lenz in his capacity as trustee. For the rest, with regard to the appealed decision one has to assume an invalid fictitious transaction took place (according to § 117 BGB), since the participants obviously were only interested in avoiding the confiscation of the collection. This result was not dependent upon a valid assignment — which would exclude a fictitious transaction — (cf. Ellenberger in: Palandt, BGB, 68th edition, § 117 margin no. 4 with further evidence) - but on the way it outwardly appeared to the authorities. There is nothing proving that Dr. Lenz was to be granted the right to dispose of the posters as he wished, as per § 903 BGB.

b.

Furthermore, the Regional Court correctly explained that Dr. Sachs did not lose ownership of his posters through the seizure in 1938, since there was no act of expropriation according to the legal situation of the time. The argumentation contained in Defendant's brief of 1/28/2010, that the Reich became owner is not supported by the cited decisions. Rather, the decision BVerwGE 98, 261 assumes that the loss of assets ordered by the 11th Ordinance with regard to the Reich Citizen Law of 11/25/1941 was invalid and did not lead to the loss of ownership under civil law *l.c.*., sub-section 10), and bases its argument concerning the exclusion of claims under civil law by the restitution laws on the argument "that the expropriation measures provided the Reich at least the appearances of ownership and had concretely seized the asset from the persecuted person" (*l.c.*.sub-section 22). Insofar as in the decision BGHZ 153, 258 the ordinance of the provisional administration according to the Decree on the Treatment of Assets of Members of the Former Polish State of 9/17/1940 has been assessed as being a seizure of property, this cannot be applied to the present case, in which the assets were only factually seized without any legal act.

c.

It is not evident that the posters that are the subject of this dispute had passed into the ownership of the people during GDR times. Defendant did not demonstrate a

relevant legal act. It is not sufficient to argue that the posters, after they had been located in 1953, were incorporated in the inventory of the Museum for German History. Inasmuch as Defendant invokes that the assets of the former German Reich were assigned to the government bodies and authorities by the Decree No. 54 of the Ministries of the Interior and Finances of 10/1/1950, this has no relevance to the present case since the collection — as already explained — did not constitute Reich assets.

d.

Dr. Sachs did also not lose his ownership by the settlement of 3/7/1961 reached in the compensation proceedings. With regard to this reference can be made to the remarks in the appealed decision. Inasmuch as Defendant voiced the opinion during the hearing before the Panel that by means of this settlement, or the payment of the agreed-upon compensation of DM 225,000.00, ownership of the collection devolved upon the Federal Republic of Germany, no basis for this argument can be found either in the Ordinance of the Allied Command BK/O (49) 180, nor in the Federal Restitution Act (BRüG), and no case law supporting this view is evident. Rather, what speaks against such a transfer of ownership is § 7 a Para. 2 VermG, according to which compensation payments do not oppose a restitution claim by the party affected by the loss of ownership but simply have to be paid back in case of a restitution (see also BVerwG ZIP 1997, 1392, cited to Juris., sub-section 14).

C.

Also, the Landgericht [Regional Court] correctly substantiated why neither an abandonment of ownership within the scope of § 959 BGB nor an assignment may be deduced from the letter of Plaintiff's father of 5/23/1996 to Mr. Rademacher; Defendant does not provide concrete arguments against this in the brief on appeal. Defendant correctly no longer questions in the second instance that Plaintiff's and his mother's long standing inactivity does not allow the conclusion that a loss of ownership has occurred.

4.

With regard to the alternative motion to determine that Plaintiff cannot demand the return of the posters, the counter-claim is substantiated according to the statements regarding II.2.a and II.2 c.

5.

The present decision is not based on the submissions in Defendant's brief of 1/28/2010, so that Plaintiff was not to be accorded a deadline for explanation.

The decision on costs is in accordance with § 92 Para. 1 ZPO and the decision on enforceability is in accordance with § 709 No. 10, § 709 clause 2, § 711 ZPO.

The requirements of § 543 Para. 2 ZPO for allowing appeal [Revision] do not exist. In particular, the Panel considers itself in accord with the cited case-law of the highest courts with regard to the precedence of the restitution laws, and besides, with regard to forfeiture the decision was reached by weighing the circumstances of the individual case.

Spiegel Dr. Henkel Bulling

Executed:

Hubert

Seal of the Higher Regional Court Berlin