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When Art Meets Criminal Law – Examining the Evidence¹

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¹ The team of the Chair of Criminal Law, Law of Criminal Procedure and Criminology of the European University Viadrina in Frankfurt (Oder) organised an exhibition entitled “Art and Criminal Law” in the Main Building of the University in the 2013/2014 winter semester. The aim of the project was to identify how the two fields overlap by means of texts and images displayed on eleven panels. The topic was discussed using, inter alia, examples of relevant cases and decisions, some of which are also dealt with in this paper. The exhibition has since been shown at the Faculty of Law of the Paris-Lodron-University in Salzburg and (including panels in Polish) at the Collegium Polonicum in Słubice, the University of Arts in Poznań, the Faculty of Law of the Adam Mickiewicz University, the Kazimierz Wielki University in Bydgoszcz, the Faculty of Law and Administration of the Nicolaus Copernicus University in Toruń and the University Białystok. For further information on this exhibition see <http://www.kunstundstrafrecht.de>. A modified German version of this paper (*Wenn Kunst und Strafrecht einander begegnen – Auszug aus einer Spurensuche*) has been published in “Iurratio” 2014, No 5, pp. 137-140.

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Abstract: When art and criminal law cross paths life has some fascinating stories to tell which may well extend beyond national borders. Such stories are closely linked with a multitude of diverse legal issues which can frequently be reduced to two aspects, both of which require clarification: First, what is art? And, second, is everything permitted in art? This paper explores both questions by considering several case studies by way of illustration. Possible solutions are presented and carefully examined. The paper also provides an interesting glimpse of the “Art and Criminal Law” exhibition developed by the team of the Chair of Criminal Law, Law of Criminal Procedure and Criminology under Professor Uwe Scheffler at the European University Viadrina, Frankfurt (Oder). The exhibition is currently on tour in Germany and Poland where it is being shown at a number of universities.

Keywords: the concept of art, artistic freedom, art exhibition, criminal law, borders, balancing of interests

Introduction

When art and criminal law cross paths life has some fascinating and, in some cases, almost bizarre stories to tell which may well extend beyond national borders. Moreover, art may assume very different roles. For example, if someone sneaks into a museum at night to steal a valuable 16th century gold work of art,² art is the object of a criminal act as referred to in Sections 242(1) and 243(1) 2nd sentence No. 2, 3 and 5 of the German Criminal Code (StGB).³ If, on the other hand, a politician is painted wearing nothing but shocking pink suspenders and her chain of office,⁴ art becomes the party who has committed an insult (Section 185 of the StGB) if it is no longer covered by artistic freedom.

Yet sometimes circumstances require the artist to reveal that he has broken the law. Take the case of artist Han van Meegeren who was possibly the cleverest

² This is based on the “Saliera Case”, one of the most sensational art thefts of the post-war period which took place in 2003. For further details see U. Scheffler, materials on the panels for the “Art and Criminal Law” exhibition: Panel “Art and Theft” – “The Saliera Case”, p. 2 ff., <http://www.kunstundstrafrecht.de> [accessed: 15.11.2015].

³ German Criminal Code (Strafgesetzbuch, StGB), English translation available at http://www.gesetze-im-internet.de/englisch_stgb [accessed: 12.11.2015].

⁴ This is how artist Erika Lust portrayed Helma Orosz, Lord Mayoress of Dresden – with the Waldschlösschen Bridge in the background – in early 2009. For further details on this case see U. Scheffler, materials on the panels for the “Art and Criminal Law” exhibition: Panel “Art and Insult” – “The Mayoress of Dresden Case”, p. 2 ff., <http://www.kunstundstrafrecht.de> [accessed: 15.11.2015].

art forger of the 20th century.⁵ Following the Second World War, he was literally fighting for his life when he protested “I painted the picture!” during his trial at an Amsterdam Court. As a Dutch national, he faced the death penalty after having been accused of collaborating with the enemy by selling art belonging to the Dutch nation to an enemy State. In 1941, van Meegeren had sold German Reichsmarschall Hermann Göring a painting entitled *Christ with the Adulteress*, which he had painted himself but claimed was by the great Dutch baroque painter Jan Vermeer van Delft,⁶ for 1,650,000 Dutch guilders.⁷ However, the examining magistrate did not believe van Meegeren’s confession.⁸ The artist therefore requested a visit to his studio in Nice, stating that four other “trial forgeries” were kept there, two of which had been painted in the style of Vermeer. When these paintings were indeed discovered in the studio, the court accepted another proposal by van Meegeren – that he be allowed to paint a new “Vermeer”. He subsequently did so while in custody using only those materials that were absolutely necessary and under police supervision. The painting “Jesus among the Doctors”,⁹ which was completed in eight weeks, subsequently resulted in considerable doubts about the authenticity of the

⁵ Han van Meegeren was a Dutch painter, restorer and art dealer. However, art critics were disparaging about his work owing to the close similarity of his style to that of the 17th century Old Masters. To quote H. Schulz, in: G.H. Mostar, R.A. Stemmler (eds.), *Der neue Pitaval*, Kurt Desch Verlag, Wien – Basel 1964, p. 22: “Van Meegeren and his kitschy symbolic pictures. Always imitating the Old Masters! It’s nothing but cheap sensationalism.” It was for this reason that, to quote idem, p. 34, “Van Meegeren swore revenge on his critics to ‘show that they’re the ones who are stupid and don’t know a thing about art’” (Schulz’s emphasis). Van Meegeren resolved to imitate the Old Masters so well that art critics would be unable to tell that his paintings were forgeries. He began studying the techniques of 17th century Dutch painters systematically, particularly the style employed by Jan Vermeer van Delft (as well as that of Frans Hals, Gerard ter Borch and Pieter de Hooch). Van Meegeren earned a total of around 7,300,000 Dutch guilders from selling eight forged paintings (two in the style of de Hooch and six in the style of Vermeer). See J. Kilbracken, *Fälscher oder Meister? Der Fall van Meegeren*, Paul Zsolnay Verlag, Wien – Hamburg 1968, p. 11 ff.

⁶ Vermeer’s oeuvre, of which the portrait *Girl with a Pearl Earring* is probably the most popular work, is generally considered to comprise fewer than 40 paintings. This is one of the reasons why the painting “Christ with the Adulteress” – initially thought to be a previously unknown work by Vermeer – caused such a sensation when it was discovered in a salt mine near Alt-Aussee in Austria in 1945 after the end of the Second World War. This was where Hermann Göring had had his works of art stored in 1944 to protect them against Allied bombardments. Thus it can be seen that “van Meegeren never just copied any of the lesser known paintings of the great Delft Master. He painted in Vermeer’s style but was always searching for new motifs and always based his work on his own ideas”, H. Schulz, op. cit., p. 21.

⁷ “Wie sich herausstellte, hatte Göring aber [...] im Tauschwege gezahlt; er übergab [...] mehr als zweihundert Gemälde, die von Nazi-Okkupatoren in Holland geraubt worden waren. Der Gesamtwert dieser Bilder dürfte indes den vereinbarten Kaufpreis eher noch überstiegen haben.” (It turned out that Göring had paid for the painting by exchanging over two hundred paintings stolen by the Nazi occupying force in Holland. The total value of those paintings probably exceeded the agreed sales price), J. Kilbracken, op. cit., p. 234.

⁸ “The situation is quite unusual. Generally, the judge accuses the defendant of an offence and the defendant does everything to prove his innocence. However, in this case, the defendant accuses himself and the judge tries his best to prove that he *did not* commit the offence concerned”, H. Schulz, op. cit., p. 20 (emphasis in original).

⁹ Van Meegeren had already taken an interest in the motif earlier on (in 1918) when he was personally going through a religious phase, see J. Kilbracken, op. cit., pp. 144 ff., 242.

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work of art that had been sold to Göring. In order to be absolutely certain, the court appointed an international investigative commission comprising seven experts and art historians from England, Belgium and the Netherlands and headed by Professor Dr. Paul Coremans, Director of the chemical laboratory of Belgian museums.¹⁰ The Commission was asked to subject all of those paintings which van Meegeren claimed to have forged¹¹ and which had been sold to a thorough scientific and artistic examination. It took the Commission more than two years to reach a unanimous decision which was submitted in October 1947. The Commission found that: "Our investigations have demonstrated without doubt that none of these paintings can date back to the 17th century. Without exception, they are all more recent – they are all fakes [...] and were probably painted by van Meegeren."¹² The accusation of collaboration with the enemy was therefore groundless.¹³ The charge was subsequently reduced to the accusation that van Meegeren had acted fraudulently for personal gain and that he had signed the paintings using a false name or signature

¹⁰ For more details see *ibidem*, p. 248 ff.

¹¹ Apart from the painting bought by Göring, the work *Supper at Emmaus* painted in the style of Vermeer in 1937, which was one of the eight, caused a sensation. When Van Meegeren had placed his forgery on the art market, he had claimed it originated from a private Italian collection and had been smuggled out of the country. The most prominent Dutch art historian of that time, Abraham Bredius, classified the painting as a genuine Vermeer and it also passed another five random tests, all of which seemed to confirm its origin. It was then purchased by the Rembrandt Society for 530,000 Dutch guilders for the Boymanns Museum in Rotterdam where it was displayed as one of 450 works by Dutch Masters at the celebrations for Queen Wilhelmina's jubilee in September 1938. See J. Kilbracken, *op. cit.*, pp. 11, 90 ff.; H. Schulz, *op. cit.*, p. 24 ff. Against this background, the case against van Meegeren was particularly controversial as the artist's confession, if proven to be true, would be devastating for the reputation of the expert who had claimed for years that the "rediscovered" Vermeer was genuine. The buyers of van Meegeren's pictures also stood to lose a great deal of money if the paintings in their possession turned out to be worthless forgeries, see J. Kilbracken, *op. cit.*, p. 242 f.

¹² Quoted from H. Schulz, *op. cit.*, p. 30. In this context it should be noted that proving that the paintings were forgeries did not yet establish van Meegeren as their originator as these were two completely different issues in the investigations. The Commission based the verification of the paintings as forgeries on the following aspects in particular: 1. The presence of phenol and formaldehyde in the top layer of paint (unknown up to the 19th century); 2. Indian ink in the craquelure (cracks that occur when the paint and varnish "liquid preparation applied to protect paint" dry); 3. The hardness of the paint (which partly withstood solvents which would have completely destroyed genuine paintings) and 4. The structure of the craquelure which turned out to be artificial, cf. J. Kilbracken, *op. cit.*, p. 254. It was the "trial forgeries" in particular, along with the pigments, artificial resin mixes, oils, fragments of canvas and frames, discovered in van Meegeren's studio that indicated that the artist was the originator. Various objects dating from the 17th century and discovered in van Meegeren's possession, such as a wine jug that can be seen in five of the eight forgeries that were sold, were further evidence, cf. *ibidem*, p. 252 f. Legal proceedings against Coremans in 1955, instituted by art collector van Beuningen, who had bought the painting "The Last Supper", amongst others, from van Meegeren for 1,600,000 Dutch guilders and subsequently continued to insist that the painting was a genuine Vermeer, were unsuccessful, thus confirming the results of the Commission. For further details see J. Kilbracken, *op. cit.*, p. 255 f.; H. Schulz, *op. cit.*, p. 42 ff.

¹³ The public prosecutor is said to have given a cynical reply to the judge's question as to whether the charge of collaboration with the enemy should be maintained: "Anyone who sells paintings that belong on the flea market to the enemy at a high price cannot be convicted as a collaborator. He should be given a medal!", H. Schulz, *op. cit.*, p. 30.

in order to pass them off as works by someone else which constituted a violation of Article 326¹⁴ and 326a¹⁵ of the Dutch Criminal Code.¹⁶ The Amsterdam Regional Court finally found van Meegeren guilty of both charges and sentenced him to the minimum penalty of one year's imprisonment on 12th November 1947.¹⁷

Yet it is not only stories of this kind that make the subject of art and criminal law so interesting. In particular, it is the closely linked legal issues that lead lawyers to rediscover the law time and time again, while improving their general education in the field of art at the same time. Thus the question of whether draping a black

¹⁴ Article 326 of the Dutch Criminal Code: "Any person who, with the intention of benefitting himself or another person unlawfully, either by assuming a false name or a false capacity, or by cunning manoeuvres, or by a tissue of lies, induces a person to hand over any property, to render a service, to make available data, to incur a debt or relinquish a claim, shall be guilty of fraud [...]". Dutch Criminal Code (Wetboek van Strafrecht), http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf [unofficial translation; accessed: 15.11.2015]. See K. Toebelmann, *Das niederländische Strafgesetzbuch vom 3. März 1881*, W. de Gruyter, Berlin 1959, p. 68. It is noticeable that the most important difference between the cited article and Section 263 of the StGB is that "culpability is not based on simple deception but on fraudulent practices. As simple lies, even though they are or may be deceptive, are not covered by criminal law, the protection of assets against deception under criminal law in the Netherlands somewhat lags behind Section 263 of the StGB", see M.G. Faure, *The Protection of Property against Deception in Belgium, France and the Netherlands*, "Zeitschrift für die gesamte Strafrechtswissenschaft" 1996, Vol. 108, pp. 527, 544.

¹⁵ Article 326b of the Dutch Criminal Code states that "anyone who falsely places any name or any mark, or falsifies the authentic name or the authentic mark on or in a work of [...] art [...] with the intention of making it appear as if that work had been created by the person whose name or mark he has placed on or in it; 2° intentionally sells, [...] a work of [...] art [...], on which or in which any name or any mark has been falsely placed, or on or in which the authentic name or the authentic mark has been falsified, as if that work had been created by the person whose name or mark has been falsely placed on or in it [...]" will be punished. See K. Toebelmann, op. cit., p. 68 ff. Art forgeries are not dealt with in German criminal law. However, forging art may, under the conditions set out in Section 267 (1) of the StGB, be punishable as falsification of documents and selling a forged work of art may be regarded as fraud under the conditions set out in Section 263 (1) of the StGB.

¹⁶ Cf. J. Kilbracken, op. cit., p. 269. Regarding the charge under Article 326 of the Dutch Criminal Code, van Meegeren's defence counsel, E. Heldring, requested a verdict of not guilty as his client had not acted for motives of pecuniary gain but had only wished to defend himself against the critics who had relentlessly rejected or ignored him; money had never been important. "Beim Malen seien zwar gewisse 'raffinierte Kunstkniffe' angewendet worden, beim Verkauf habe es jedoch 'keinerlei Tricks' gegeben. Niemals sei behauptet worden, das betreffende Bild sei ein Vermeer oder ein de Hooch, ja nicht einmal, es könnte einer sein – diese Entscheidung sei in jedem Falle dem Sachverständigen, dem Händler oder dem Käufer anheimgestellt geblieben." (He argued that, although certain artful tricks had been employed during painting, no tricks of any kind had been employed when selling the work; it had never been claimed that the painting concerned was by Vermeer or de Hooch, nor even that it could be the work of one of those artists – this decision had been left entirely up to the expert, the dealer or the buyer at all times.), *ibidem*, p. 281.

¹⁷ Van Meegeren did not appeal against the judgment. On 26th November 1947 he suffered a heart attack from which he recovered slightly in hospital. However, he suffered another heart attack on 29th December 1947 which led to his death the following day. In August 1958, two German newspapers ("Welt" and "Rheinischer Merkur") both reported that "an exhibition of van Meegeren's work [was] being held at de Boer's art shop in Haarlem" and "that a number of 'genuine' paintings by van Meegeren [were] currently being sold for several thousand guilders each [...] Forgers [were] now attempting to imitate van Meegeren's paintings and sell them for a good price", cited from H. Schulz, op. cit., p. 45. The forger's popularity as expressed by such fakes still persists to this day – in 2010, the Boijmans Van Beunigen Museum in Rotterdam held an exhibition entitled "Van Meegeren's fake Vermeers".

burqa over the Little Mermaid statue in Copenhagen can be regarded as damage to property shifts the focus of attention to Section 304 of the Criminal Code (StGB), which is frequently neglected even in criminal cases, in addition to Section 303 of the Code.¹⁸ And if one considers the stick figures sprayed on façades and walls by Harlad Naegeli, also known as the “Zürich sprayer”, from the same legal point of view, it is possible to understand the terms commonly used in the graffiti scene such as “pieces” and “tags” which are either “bombed” or “pimped”.¹⁹

The abundance and diversity of possible legal issues lead us to two aspects, both of which require fundamental clarification: First, what is art? And, second, what is permitted in art? Is it “everything” as Tucholsky once claimed for satire? Even though lawyers otherwise often find answers to other questions in the law, little is found in this case. Indeed, Article 5(3) 1st sentence of the German Basic Law consists of the following short and concise statement only: “Arts and sciences, research, and teaching shall be free.” The Law does not even mention how art is to be defined or whether there are any limits to its freedom. Consequently, it is left up to the courts to develop guidelines for this field. These will be illustrated below in a discussion of several model cases.

The Concept of Art

Ernst Wilhelm Wittig (born in 1947), also known as Ernie, is a German streaker from Bielefeld who is usually “active” in the Ostwestfalen region. Apart from shoes and socks, the only item of clothing he wears during his appearances is a baseball cap which is his hallmark.²⁰

Ernie first attracted attention outside his home region when he ran naked across the pitch during the second half of the Bundesliga football match between Arminia Bielefeld and Borussia Mönchengladbach at the Alm Stadium in Bielefeld on 16th February 1997 before a crowd of 22,000 fans, causing the match to be interrupted.²¹ His largest audience was at the Bundesliga football match between

¹⁸ For a more detailed account see, U. Scheffler, materials on the panels for the “Art and Criminal Law” exhibition: Panel “Art and damage to property” – “The Case of the Little Mermaid in Copenhagen”, p. 2 ff., <http://www.kunstundstrafrecht.de> [accessed: 15.11.2015].

¹⁹ For a more detailed account see U. Scheffler, materials on the panels for the “Art and Criminal Law” exhibition: Panel “Art and artistic freedom” – “The Zürich Sprayer Case”, p. 2 ff., <http://www.kunstundstrafrecht.de> [accessed: 15.11.2015].

²⁰ For a detailed account of the case see U. Scheffler, materials on the panels for the “Art and Criminal Law” exhibition: Panel “Art and artistic freedom” – “The Ernie Case”, p. 2 ff., <http://www.kunstundstrafrecht.de>, [accessed: 15.11.2015].

²¹ Streaking at sporting events was supposedly “invented” by Michael O’Brian. The 25-year-old Australian ran naked across the pitch in front of 48,000 fans at the rugby international match between England and France at Twickenham Stadium in London on 20th April 1974 to win a bet. For more details see U. Scheffler, materials on the panels for the “Art and Criminal Law” exhibition: Panel “Art and artistic freedom” – “The Ernie Case”, p. 2 ff.

Borussia Dortmund and Arminia Bielefeld at the Westfalen Stadium in Dortmund on 16th April 2005 when he ran naked across the pitch in front of 76,500 fans in the 78th minute of the match.²²

Ernie sees himself as an “interaction artist”. He calls himself “Germany’s most handsome streaker” and has declared his body a work of art. Psychologists regard him as a man with a personality disorder, lawyers as someone who has broken the law and caused a disturbance.

Ernie has already been fined more than 20 times following his “interactions”. As early as 1995, the authorities in Herford had banned him from displaying his naked body on all public roads and paths as well as in all public facilities and buildings. The ban was based on the general authority of the police to prevent a threat to public order.²³

Ernie protested that his nude appearances were art – which is an aspect of fundamental legal relevance as the Federal Constitutional Court had previously explicitly stressed²⁴ “that the freedom of art as set out in Article 5(3) 1st sentence of the Basic Law is not subject to the restrictions arising from the general authority of the police to intervene in order to prevent a threat to public order”.

The issue therefore shifted from whether Ernie was a work of art to whether his nude appearances were performing art, comparable, say, with a performance by a nude opera singer on stage.²⁵

However, Ernie’s complaint against the ban was dismissed in the last instance by the Higher Administrative Court in Münster.²⁶ His performances were not deemed to be covered by the protection conferred by the fundamental right to artistic freedom enshrined in Article 5(3) 1st sentence of the Basic Law.

The Court based its decision on three different concepts of art formulated by the Federal Constitutional Court: on the one hand, the Higher Administrative Court considered what is known as the formal concept of art cited by the Federal

²² Borussia Dortmund was fined 3,000 € by the Sports Tribunal of the German Football League (DFB) in a simplified procedure after charges were brought against the club by the DFB’s Supervisory Committee for failing to provide adequate security services.

²³ Section 14 (1). Police Authorities Act of North Rhine Westphalia (Gesetz über die Organisation und die Zuständigkeit der Polizei im Lande Nordrhein-Westfalen, 5 July 2002, GV.NRW 2002, p. 308, as amended): “The police authorities may take any steps required to avert a danger to public safety or order in individual cases.”

²⁴ Judgments of the Federal Constitutional Court of Germany (Entscheidungen des Bundesverfassungsgerichts), BVerfGE 1, pp. 303 (305).

²⁵ For example, Jens Larsen’s performance as a nude Seneca in Barrie Kosky’s production of “Poppea” by Claudio Monteverdi at the Comic Opera in Berlin in 2013, see U. Scheffler, materials on the panels for the “Art and Criminal Law” exhibition: Panel “Art and artistic freedom” – “The Ernie Case”, p. 12 ff.

²⁶ Münster Higher Administrative Court, “Neue Juristische Wochenschrift” 1997, p. 1180 with discussion by F. Hufen, “Juristische Schulung” 1997, p. 1129.

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Constitutional Court in 1984 in its decision²⁷ on “The Anachronistic Procession”²⁸ according to which the essence of a work of art could be considered to be that, “from a formal, typological perspective, requirements of a certain type of work are fulfilled” – a concept of art “which relates only to the activities and results of painting, sculpture or poetry, for example [...]”.

Based on this definition, the Higher Administration Court did not consider Ernie’s appearances as the realisation of any form of art: “The mere presentation of the naked body is neither a ‘classic’ form of street theatre nor an avant-garde form of artistic installation or performance.”²⁹

In addition, the Higher Administrative Court in Münster referred to what is known as the material concept of art developed by the Federal Constitutional Court in 1971 in its decision³⁰ on the “Mephisto Case”.³¹

The essence of artistic endeavour lies in the free creative process whereby the artist, in his chosen communicative medium, gives immediate perceptible form to what he has felt, learnt, or experienced. Artistic activity involves both the conscious and the unconscious, in a manner not rationally separable. Intuition, imagination, and knowledge of the art all play a part in artistic creation; it is not so much communication as expression, indeed the most immediate expression of the artist’s individuality.

Even when seen in this light, the court refused to classify Ernie’s nude appearances as art, giving only a brief statement of its reasons for doing so.³²

The complainant’s conduct does not satisfy this description of the requirements for what is to be considered as art. Even given a generous interpretation of the conceptual requirements there is nothing to suggest that the complainant’s behaviour could be classified as artistic. There is nothing creative about the complainant merely being nude.

In its ruling on “The Anachronistic Procession”, the Federal Constitutional Court had also drawn on a third concept of art³³ which is closer to the material con-

²⁷ BVerfGE 67, pp. 213 (226 f.).

²⁸ The “Anachronistic Procession” was a political street theatre event performed in Munich in 1980 and based on the poem of the same name written by Bertolt Brecht in 1947. The then Bavarian Premier Franz Josef Strauß was allegedly insulted during the performance.

²⁹ Münster Higher Administrative Court, *op. cit.*, pp. 1180 (1181). However, the Higher Administrative Court did not mention the aspect of entertainment, for further details see U. Scheffler, materials on the panels for the “Art and Criminal Law” exhibition: Panel “Art and artistic freedom” – “The Ernie Case”, p. 13 ff.

³⁰ BVerfGE 30, pp. 173 (188 f.).

³¹ The decision concerned the novel “Mephisto” by the writer Klaus Mann in which the deceased actor Gustav Gründgens had allegedly been disparaged.

³² Münster Higher Administrative Court, *op. cit.*, p. 1180 f.

³³ BVerfGE 67, pp. 213 (227).

cept than the formal one: the “open” concept of art. While the material concept tends to centre on the artist’s creative act, the open concept focuses to a greater extent on the interpretative aspect.

Even when seen from this point of view, the Higher Administrative Court in Münster failed to arrive at a different result:³⁴

If the distinguishing feature of an artistic statement is regarded solely as the ability constantly to permit new and broader interpretations owing to the diversity of its message [...] then this feature is also lacking. The complainant’s nude appearance does not extend beyond its ordinary function as a statement, nor does it lead to an inexhaustible and multi-faceted communication of information.

Yet, even after considering the above discussion, art remains a nebulous concept. It is evidently impossible to define the term with any clarity. Is an inflammatory poem about fraudulent asylum seekers art because it rhymes, even if only passably so? The Bavarian Supreme Regional Court found in 1994 that it was.³⁵ Can showing the Nazi salute be art if, when doing so, one is ranting on about the “dictatorship of art”? The Kassel Local Court ruled in 2013 that it was.³⁶ The significance of the question as to whether something counts as art can be illustrated well by a quote from Schiller – the writer once described art as “freedom’s daughter”. However, it would be wrong to assume that art therefore enjoys a sacrosanct primacy over other protected interests. This is demonstrated by the following case:

³⁴ Münster Higher Administrative Court, *op. cit.*, pp. 1180 (1181). The performance “Imponderabilia” by the Serbian artist Marina Abramovic in collaboration with the German Frank Uwe Laysiepen, alias Ulay, would be open to such an interpretation, for further details see U. Scheffler, materials on the panels for the “Art and Criminal Law” exhibition: Panel “Art and artistic freedom” – “The Ernie Case”, p. 15.

³⁵ Judgments of the Bavarian Supreme Regional Court in criminal matters, Bayerisches Oberstes Landesgericht (BayObLGSt) 1994, pp. 20 (25); according to the court, the poem came under “the formal concept of art due to the mere fact that it rhymed”; the Regional Court in Hanover was of a different opinion, “Niedersächsische Rechtspflege” 1995, p. 110.

³⁶ Kassel Local Court, “Neue Juristische Wochenschrift” 2014, p. 801: “It was an art performance. This is demonstrated by the fact that, at the start, the defendant read out a manifesto on the ‘dictatorship of art’ lasting several minutes which he had written himself. He used the stylistic device of exaggeration – in the content by the constant use of superlatives and formally by the loudness of his voice and by his gestures – and by the absurdity of it all. [...] As far as the content was concerned, the defendant was expressing his view of contemporary art and his fellow artists. Furthermore, the event was held only a few days before the opening of the ‘documenta 13’ art exhibition. At that time, the air was ‘supercharged with art’. [...] The fact that the defendant had had his photograph taken standing with a unicorn in front of swastikas and had uploaded this picture to his website together with the Nazi salute also indicates that he did not identify with the symbols but was ridiculing them instead. The artistic device of satire was being employed; this is characterised by certain persons, views, events or circumstances being mocked using ridicule, irony or exaggeration; it conveys a distorted image of reality [...]”. By classifying the defendant’s action as an art performance, the court ruled that he had not committed a punishable offence as defined in Sections 86a (1) no. 1 and 86 (1) no. 4 of the StGB, with reference to Sections 86a (3) and 86 (3) of the Criminal Code, and acquitted him.

Artistic Freedom

A performance³⁷ by the 46-year-old German performance artist Falk Richwien in February 2006 caused a furore. Entitled *Death of a rabbit*, it took place in a backyard gallery known as the “Monster Basement” in the Berlin district of Mitte.

At about 10 o'clock in the evening, around twenty to thirty people who had read about the performance in a city magazine met in a back room of the gallery where two white rabbits had been placed in a cardboard box. The performance, which was conducted in silence, began by the artist handing the first animal to an organic butcher who was present and who proceeded to give it a well-aimed blow to the back of the neck with a club. The butcher then held the rabbit by its feet while the artist's black leather-clad assistant wrung the rabbit's neck. She then cut off the rabbit's head on a wooden block and hung it by a nylon string in a glass jar filled with formaldehyde. The second rabbit was killed in the same manner. The work of art created in this way was called *Rabbit in formol* and was offered for sale for 9,800 € before vanishing without trace after the gallery had been put under pressure. As originally planned, the remaining parts of the rabbit were eaten at a dinner for twelve people held several days later.³⁸

Richwien's intention was for art experienced in this way to be educational. The artist considered such art to be focused on spirituality and as working with emotions, to quote:

I attempted to raise awareness of a particular issue and therefore tormented the awareness of consumers who gorge themselves without thinking. It is naive to call this action cruel as it happens every day in our abattoirs – we only try to push it to the back of our minds.³⁹

Around a year after the performance Tiergarten Local Court fined all three participants,⁴⁰ Richwien and the butcher for infringing Section 17 no. 1 of the Ani-

³⁷ A performance is an event in which an artist or group of artists presents a work of art, for further information see <http://de.wikipedia.org/wiki/Performance> [accessed: 15.11.2015].

³⁸ Cf. Tiergarten Local Court, “Kunst und Recht” 2007, p. 116; Berlin Higher Regional Court, “Neue Zeitschrift für Strafrecht” 2010, p. 175; see also the press release entitled *Animal Welfare versus artistic freedom: rabbits slaughtered in Monster Basement*, “Spiegel Online”, 4 June 2007, http://www.spiegel.de/panorama/justiz/tierschutz-vs-kunst-kaninchenmeucheln-im-monsterkeller-a_486660.html [accessed: 15.11.2015] and the press release *Death of a rabbit*, “Stern”, 3 March 2009, <http://www.stern.de/panorama/icke-muss-vor-gericht-das-ableben-des-hasen-656490.html> [accessed: 15.11.2015]. In the first press release it was also reported that the Berlin tabloids had gone to town on the “Rabbit scandal” and that Richwien's file was overflowing with complaints. Yet why do artists often come in for so much criticism from the public when they use animals in their art or as part of a work of art or art performance? Although Richwien subjected his audience to shocking scenes, innumerable animals are treated just as appallingly in factory farms every day. Furthermore, the consumerism of the majority of people who are indignant about “animal art” probably contributes towards such treatment.

³⁹ *Death of a rabbit*, op. cit.

⁴⁰ Tiergarten Local Court, “Kunst und Recht” 2007, p. 116.

mal Welfare Act,⁴¹ the assistant for infringing Sections 17 no. 1 and no. 2a of the Animal Welfare Act⁴² – in each case as joint principals (Section 25(2) of the StGB⁴³). While the assistant accepted the ruling, the artist and butcher appealed against it.

However, their appeals at the Berlin Regional Court and the appeals on points of law at the Higher Regional Court in Berlin were unsuccessful. The Higher Regional Court was satisfied that “the defendants had acted jointly to kill the two rabbits ‘without reasonable cause’ within the meaning of Section 17 1 of the Animal Welfare Act”.⁴⁴

The Court stated that, although killing animals for meat could be regarded as “reasonable cause”,⁴⁵ the rabbits had in this case primarily been killed for a different purpose. When staging their artistic project, the defendants had intended to kill the two animals in a way that would capture the audience’s attention as effectively as possible. This was not altered by the fact that the animals were eaten a week later.

The Higher Regional Court in Berlin recognised that artistic freedom as a fundamental right also had to be considered when interpreting the phrase “reasonable cause”.⁴⁶ However, the court also took the view that artistic freedom did not

⁴¹ According to Section 17 no. 1 of the German Animal Welfare Act (Tierschutzgesetz, 18 May 2002, Federal Law Gazette I, pp. 1206 and 1313, as amended), anyone who kills a vertebrate without reasonable grounds for doing so is committing an offence.

⁴² According to Section 17 no. 2a of the German Animal Welfare Act, anyone who brutally subjects a vertebrate to considerable pain or suffering is committing an offence. The assistant’s sentence (as a joint principal) under Section 17 no. 1 and no. 2a of the German Animal Welfare Act can be explained by the fact that she had limited her objection to the penal order to the legal consequences so that the verdict of guilt became effective (cf. Section 410 of the Code of Criminal Procedure). By contrast, the criminal prosecution of the other two defendants was limited to an infringement of Section 17 no. 2a of the Animal Welfare Act with the consent of the Public Prosecutor’s Office in accordance with Section 154a (2) of the Code of Criminal Procedure, cf. Tiergarten Local Court, “Kunst und Recht” 2007, p. 116 ff. See M. Pfohl, in: W. Joecks, K. Miebach (eds.), *Munich Commentary on the Criminal Code*, 2nd edn., Vol. 6, C.H. Beck, München 2013, Section 17 of the Animal Welfare Act Note 138 ff. for the relationship between Section 17 no. 1 and no. 2 of the Animal Welfare Act.

⁴³ Section 25 (2) of the StGB: “If more than one person commit the offence jointly, each shall be liable as a principal (joint principals).”

⁴⁴ Berlin Higher Regional Court, op. cit., p. 175.

⁴⁵ “A cause is deemed reasonable when it is recognised as being cogent, comprehensible and based on a legitimate interest and if, under the specific circumstances, it outweighs the animal’s interest in its physical integrity and wellbeing.” E. Metzger, in: G. Erbs, M. Kohlhaas (eds.), *Strafrechtliche Nebengesetze*, Loseblattsammlung, 204. Ergänzungslieferung September 2015, C.H. Beck, München 2015, on Section 1 of the Animal Welfare Act, Note 24. For further details see A. Lorz, E. Metzger, *Animal Welfare Act*, 6th edn., C.H. Beck, München 2008, Section 17 Note 19; J.-D. Ort, K. Reckewell, in: H.-G. Kluge (ed.), *Animal Welfare Act*, Kohlhammer, Stuttgart 2002, Section 17 Note 165 ff.

⁴⁶ The Senate did not rule on whether artistic freedom as guaranteed by the constitution is affected by the illegality of the deed in this case, cf. Berlin Higher Regional Court, “Neue Zeitschrift für Strafrecht” 2010, p. 176. See the overviews on the controversial meaning of the term “without reasonable cause” within the meaning of Section 17 no. 1 of the Animal Welfare Act by J.-D. Ort, K. Reckewell, op. cit., Note 29 with citations; M. Pfohl, op. cit., Note 32 ff.

automatically take precedence over animal welfare in spite of being guaranteed without any limitations⁴⁷ as it was also subject to limitations intrinsic to the Basic Law. Moreover, animal welfare interests had to be taken into account when considering artistic freedom ever since animal welfare had been incorporated into Article 20a of the Basic Law as a national objective in 2002 (“the State shall protect the natural foundations of life and animals [...] within the framework of the constitutional order”).⁴⁸

This interpretation was based the Federal Constitutional Court’s decision in the “Mephisto Case” which was mentioned earlier on:⁴⁹ The independence and autonomy of art is guaranteed by Article 5(3) 1st sentence of the Basic Law without reservation, but not without limitations. Thus the limits of the guarantee of artistic freedom are not to be defined by a simple law such as the Animal Welfare Act (or the Criminal Code), but by the constitution itself. Therefore “any conflict to be considered within the framework of the guarantee of artistic freedom shall be resolved by interpreting the constitution in accordance with the system of values enshrined in the Basic Law and by taking account of the unity of that fundamental system of values”.⁵⁰

The Higher Regional Court took the view that the chosen form of artistic expression – performance art which aimed to shock in a dramatic way by an explicit presentation, by “celebrating” the [rabbits’] deaths – had been particularly likely to conflict with Article 20a of the Basic Law. It had been demonstrated to the audience just how little effort was required to consciously kill animals of this particular kind.

According to the Higher Regional Court, this interpretation did not diminish the essence of artistic freedom as the defendants had been free to express their intentions in a different way. Moreover, the artist’s intention did not require two animals to be killed. Thus animal welfare took precedence and justified limiting artistic freedom.

To sum up, Art is not permitted to do “everything”, as could be postulated on the basis of Tucholsky’s words. Instead, “the appropriate and best possible balance”⁵¹ has to be found between art and other values that are enshrined in the constitution, such as animal welfare. Thus a great deal is permitted in art. However

⁴⁷ As a result of its incorporation in Article 20a of the Basic Law, animal welfare as a national objective is regarded as equal to other constitutional norms, including fundamental rights, cf. Tiergarten Local Court, “Kunst und Recht” 2007, p. 116; A. Epiney, in: H. v. Mangoldt, F. Klein, C. Starck (eds.), *Basic Law*, 6th edn., Franz Vahlen Verlag, München 2010, Section 20a Note 47 with citations.

⁴⁸ By the Act to Amend the Basic Law of 26th July 2002, Federal Law Gazette I, p. 2863.

⁴⁹ BVerfGE 30, p. 173.

⁵⁰ BVerfGE 30, pp. 173 (193).

⁵¹ BVerfGE 83, pp. 130 (143).

– and this is where we disagree with the Higher Regional Court – art need not allow anyone to dictate that it should be exercised in a different manner, one that gives greater consideration to other constitutional values. This is because:

One cannot without inhibiting the free development of the creative artistic endeavour, prescribe how the artist should react to reality or reproduce his reactions to it. The artist is the sole judge of the “rightness” of his response. To this extent the guarantee of artistic freedom means that one must not seek to affect the manner in which the artist goes about his business, the material he selects, or the way in which he treats it, and certainly not seek to narrow the area in which he may operate or lay down general rules for the creative process.⁵²

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⁵² BVerfGE 30, pp. 173 (190).

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- The English translations of extracts from the StGB (Strafgesetzbuch StGB), German Code of Criminal Procedure (Strafprozessordnung StPO) and Basic Law for the Federal Republic of Germany (Grundgesetz GG) were taken from: www.gesetze-im-internet.de/englisch [accessed: 15.11.2015] (English translations provided by the German Ministry of Justice).
- The English translations of extracts from Dutch Criminal Code (Wetboek van Strafrecht, Van Meegeren Case) were taken from: http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf (unofficial translation) [accessed: 15.11.2015].
- The English translation of extracts from the decision in the Mephisto Case was taken from: Case reference BVerfGE 30, p. 173 1BVR 435/68 Mephisto Decision (English translation) in the website of The University of Texas School of Law, http://www.utexas.edu/law/academics/centers/transnational/work_new/ [accessed: 15.11.2015], Copyright: Professor Basil Markesinis.

COMMENTARIES

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