RESTRICTIONS ON FREEDOM OF EXPRESSION IN ART: GERMANY, THE US AND NORWAY

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AN INTRODUCTION

As globalization is setting tone in the development of the world and as states are becoming more interdependent and connected, also the social environment and cultures contained within it are changing, unless a deliberate choice of seclusion is at play, that is. The way individuals express themselves and react to their surroundings – just as the surroundings as such – is changing, but the need for the protection of personal liberties remains. There has been a lot of regard given to the issues of media freedom during the recent decades, especially since the uprising of human rights concepts and establishment of various instruments and principles which govern human rights on an international level. And that is understandable as media is the link and tool of communication between society, state and the international arena, which, to a various extent, applies to every individual of conscious age. Very little regard has been given to the more abstract, ambiguous and subjective type of expression – art. There are first steps that have been taken towards the exploration of the interdisciplinary field of art law, but certainly a lot more is still left up for debate.

This particular short research will examine this topic by comparing the different regulations, laws and cases in, first of all, the "pioneer" that is known for its renowned contribution regarding the concept of free speech and expression – the United States of America, where there is currently said to be a predominant amount of free speech cases in the courts[1]. Secondly, Norway as the first ranking state in the press freedom index of "Reporters without Borders"[2] and the seventh ranking country in the general "Human Freedom Index 2017 [3]" (in 2016, Norway was third), 16th strongest in the world in protecting civil liberties[4] and 18th strongest in protecting political rights[5], according to "Freedom House". And, as a last subject of analysis – Germany, as it is considered relatively free or free[6], and is governed by EU laws and national ones. Thus, these states are chosen, respectively, one for its significance in the development of the concept of free speech, the second for its supposed success in implementing

[1] Stohr, Greg. "Free Speech Is Starting to Dominate the U.S. Supreme Court's Agenda." Bloomberg.com. November 14, 2017. Accessed April 21, 2018. https://www.bloomberg.com/news/articles/2017-11-14/listen-to-this-free-speech-dominates-at-u-s-supreme-court
[2] "2018 World Press Freedom Index. Reporters Without Borders." RSF. Accessed April 21, 2018. https://rsf.org/en/ranking
[3] "Human Freedom Index." Cato Institute. Accessed April 21, 2018. https://www.cato.org/human-freedom-index
[4] "Civil Liberties by Country, around the World." TheGlobalEconomy.com. Accessed April 21, 2018. https://www.theglobaleconomy.com/rankings/civil_liberties/
[5] "Political Rights by Country, around the World." TheGlobalEconomy.com. Accessed April 21, 2018. https://www.theglobaleconomy.com/rankings/political_rights/
[6] "2018 World Press Freedom Index. Reporters Without Borders." RSF. Accessed April 21, 2018. https://rsf.org/en/ranking

and protecting it, and the third for coverage of a somewhat full picture of different systems and environments nurturing the rights examined in this research.

Different types of art are looked at (where possible) – literature, music, visual arts – as each type may have different legal issues tied to it and therefore each needs to be represented in order to provide a more precise view on the matter at hand.

The **hypothesis** applied to this paper: **There are restrictions on freedom of expression in art when weighed against the personal rights of another individual.**

The examination therefore would have two issues at its core – in which cases regarding artwork there actually are restrictions put on the right to freedom of expression; and whether there is a tendency to approach stricter those cases which concern alleged damage to the individual.

The methodology within this research is: **applied interdisciplinary methodology** (*law practice + the law itself = law in context*)[7] – the law will be examined within context of relevant cases, and a deeper analysis of these will be conducted to distinguish the reasoning, criteria for restriction of the right to free speech.

[7] Chynoweth, Paul. "Legal Research." Accessed April 21, 2018. http://www.bing.com/cr?IG=242726C04208499D87E9F6AF9380DC92&CID=209B8D876A9F6ECD302B81816B626F29&rd=1&h=LkDjrT5RHIt6ZTNbRiKoRR5nlNjoqNvr4zEcVHRNzZQ&v=1&r=http://www.csas.ed.ac.uk/__data/assets/pdf_file/0005/66542/Legal_Research_Chynoweth_-_Salford_Uni..pdf&p=DevEx.LB.1,5145.1.

ANALYSIS OF LEGISLATION AND THEORY

Defining Art

Although it is clear that art cannot have a unified, permanent definition in the legal context, as it is subject to the influence of time, technological development, culture and ultimately – in the context of this paper – different professional fields, players and legal areas, there is still a necessity to attempt definitions. The reason for that – the legal issues of the art industry are broad and part of larger law areas, such as constitutional law, contracts, copyright, etc., which have been developed, without special notice to the specifics and requirements of art, as it is just one of many industries. And where there have been developed special rules for art over time, there a need for definition arises to determine whether a given subject falls under the scope of said rule.[8] And that needs to be done in accordance with the intent and goal of the rule.

Thus, there is no common definition for art, only the notion that it has to involve the element of creativity, although, that element solely is not enough. What is sure, that "art is defined differently depending on the purpose for which it is being defined".[9] Deriving from that – there is commonality in how certain groups define art, which can be classified.

Direct industry participants or artists and art critics have expressed countless pictorial views on what art is, but what all of these have in common is – that "art is whatever the art world accept as art". From this more philosophical point of view, two takeaways should be noted regarding art – (1) that it is man-made, creative and fixed in tangible form, and (2) that there are different levels of art, such as fine arts, crafts and industrial design/manufactured items.[10]

Other than that, there is also the option for art being defined by tariff laws, e.g., in the US tariff schedule, section 97 is concerned with defining what should *not* be considered art. Altogether this section excludes the third level of art – industrial design – by essentially only allowing hand-made productions to fall under the art tariff. Although design products can then fall under other categories, e.g., sportswear or metal, these cannot, under the given provisions,

[8] Lazerow, Herbert I. *Mastering Art Law*. Durham, NC: Carolina Academic Press, 2015, pages 3-4.
[9] Ibid., page 4.
[10] Ibid., pages 5-6.

fall under any part of the art section.[11] In these cases the main concern is the valuation – a work has almost always a higher value, if it is recognized as art, than if it is not; and there is the factor of non-functionality.[12]

The definition of art under copyright law demands mainly the element of originality as the main purpose of copyright is to support the creation of new designs by protecting those designs that are sufficiently original from copying.[13] Also, within housing laws (e.g., regarding specific artist's residency rules or exceptions) and income tax laws there is concern with definitions of art or – who is considered an artist.[14]

Finally, the human rights aspect of the right to freedom of expression and freedom of speech comes in play. Here, for something to qualify as art it needs to be sufficiently expressive. Although it seems natural to assume that all artworks carry a message, it may be asked to prove that the right to free speech is applicable from the meaning that the main goal of the work is the expression through it, not making profit.[15] In cases like *Mazer v Stein* characteristics debated by the famous art historian H. W. Janson bring out significant points, as the court did not accept a work as art on the grounds that it was also useful, not just aesthetic. Janson puts emphasis on the distinction between an artistic idea and the actual tangible expression of that and he distinguishes between the previously mentioned levels of art, putting these in a hierarchy, where fine art is supreme, nonetheless not the only level which qualifies as art, and also stating that what was considered to be plainly utilitarian might be considered art today.[16] Again, the definition is pointed towards the criteria of art being "what the art world accepts", or the world in general. It can also be concluded that art is not static at all; it changes over time and so does the perception and subsequently the definitions of it. In Norway, there are no clear definitions of the term, and there are seemingly no restrictions on freedom of speech, unless it comes to protection of children or young people.[17] In the German constitution art is especially protected, when it comes to freedom of expression, but *what* art is considered to be – is not clearly defined. In the case *2 A 10264/07.OVG in Rheinland-Pfalz* from 2007 an entertainer was trying to argue that his performances, although, not original creations entirely, should be considered artistic

[11] "Norway." The Heritage Foundation. Accessed May 17, 2018. https://www.heritage.org/index/country/norway
[12] Lazerow, Herbert I. *Mastering Art Law*. Durham, NC: Carolina Academic Press, 2015, pages 8-10.
[13] Ibid., page 10.
[14] Ibid., page 12.
[15] Ibid., page 11.
[16] Gerstenblith, Patty. „Art, Cultural Heritage, and the Law: Cases and Materials" 3rd ed. Durham, NC: Carolina Academic Press, 2012, pages 4-14.
[17] United Nations Human Rights "Norway.doc." OHCHR | Convention on the Rights of the Child. Accessed May 17, 2018.
http://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/CulturalRights/ConsultationArtistic/Norway.doc&action=default&DefaultItemOpen=1.

expression, but the court disagreed and came to a significant conclusion that art is not primarily about conveying a message, but about expressing oneself, meaning – it is primarily about the *personality of the individual being directed to the outside*, not a communication goal set towards the recipient (to reach the recipient).[18]

Freedom of expression

Purposes

As the US is a pioneer in the field of freedom of expression with its First Amendment, naturally there is significant theory on the main purposes and functions as well as restrictions on it, the latter being the focus of this paper. This right is not only protected because of its value to the individual, it has deep-rooted purposes within society as a whole. Thomas Emerson describes the foundations and theory of this right in his work "The System of Freedom of Expression", which – according to him – are applicable in any democratic society. Four postulates are argued to be the main functions and values of freedom of expression which are each derived from the previous. The first of these is "**assuring individual self-fulfillment**" as realization of ones' potential comes when the mind is free to seek out the subjective truth. As a consequential pillar the "**advancement of knowledge and discovery of truth**" is given. In order to arrive to an opinion or discover the core and some sort of truth in an issue, and individual has to perceive all sides of this issue, also the ones he or she does not agree with. Thirdly, there is necessity to "**provide for participation in decision-making by all member of society**", especially when debating political decisions, but also other spheres. People need to be able to shape the environment, realm they live in, regardless of whether through a political opinion, a sub-culture or way of life. Lastly, Emerson argues that free expression ensures a "**balance between healthy cleavage and necessary consensus**", meaning – if society is integrated in the decision-making process, which affects them, by allowing them to express themselves, an outcome which is not their first choice or is even disadvantageous, will be accepted with less resistance. That way the government can monitor and avert possible violent

[18] Case 1 BvR 2000/96 (Constitutional Court, Order of the First Senate, August 16, 1996). http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1997/11/rk19971112_1bvr200096.html

outcomes, ensuring a balance vital for progress and development. It provides possibility for engagement of different opinions while not allowing those to annihilate that society.[19]

Emerson also points out that freedom of expression is not the only need of a society, and it often clashes with other needs and rights to achieve other goals as well, while still attempting to keep a healthy proportionality between self-expression and free progression. At this point the first hints towards the legal basis come into play – he argues that to ensure this balance and proper proportion a tool is necessary, which could control what expression is and where the boundaries of it are. It is proposed that a distinction be made between expression and other types of conduct, referred to as "action".[20] The main emphasis – no opposition towards a specific subject as that would contaminate the reasoning and make it illogical. **Focus must stay on the individual right to exercise his or her freedom and the effect of that on society and the rights of others, but not on the content of what is expressed**.[21] This idea still does not contradict the current issues that occur in regards to hate speech – the reasoning, according to Emerson, should be to determine to what extent it affects another individuals' rights, not how "bad" the content of such speech is. That would taint all objectivity and create a normative reasoning.

Article 19 of the Universal Declaration of Human Rights set out the right to freedom of expression in a broad manner, no hints towards any kind of restriction, but the historical context – the drafting of it – provides the same principle mentioned above. During the time when the document was still voted for and amended, the Soviets suggested the article included the term "fascism" which would not be clearly defined and made it so ambiguous that it deformed the essence of article 19 so that ultimately it could be applied to anyone whose expressions went against communist ideas.[22] It is a clear example why Emerson's argument stands – control over content is unacceptable and constitutes censorship.

Constitutional provisions

The chosen subjects in this analysis also have different provisions in their constitutional laws, where in Norway it is article 100 of the *Lovdata*. This article is very

[19] Emerson, Thomas I. *The system of freedom of expression*. New York: Vintage Books, 1971, pages 6-7
[20] Ibid., page 8
[21] Sadurski, Wojciech. *Freedom of speech and its limits*. Dordrecht: Kluwer, 2002, page 158
[22] Morsink, Johannes. "The Universal Declaration of Human Rights." 1999, pages 68- 69

elaborate, detailed and provides not just the norm on what the rights of an individual are, but also in which few cases it would be allowed to hold someone liable for imparting or receiving information, ideas or messages. Liability is possible only, if "justifiable in relation to the grounds of freedom of expression", which are "the seeking of truth, the promotion of democracy and the individual's freedom to form opinions", meaning – if any of these grounds is present in the expression of an individual and outweighs the issue being considered, this individual should not be held liable for it. Even more, in the last sentence it puts an obligation on the state to "create conditions" that encourage public discussion, exchange of expression. The only preventive measures of restriction allowed are **when necessary to protect children and young people** in the context of exposure to "moving pictures" (usually, films).[23]

Also the German *Grundgesetz* contains a detailed provision in article 5, where it is even specified that expression can be formed not only in speech, but imagery and writing as well, and should be protected the same way. What more, there is a specific article set out for ensuring that "art, science, research and teaching are free", this puts an emphasis on the special protection of these areas in addition to the already existing shield in form of article 5. Here, the only acceptable restrictions in law that can be put on the right to freedom of expression are **"for protection of the youth and in the right of personal honor"** [24]**,** meaning that under the German constitution, in addition to the scope of the protection of a special group (the young), also the personal scope of one's right to dignity and honor can be weighed against the right to freedom of expression.

What stands out in the First Amendment of the US Bill of Rights is that it is very short, there are no limits set out, and the wording used to set out freedom of speech (among other rights to expression, e.g., freedom of religion) is that there can be **no** laws that lessen the right to free speech, or to be exact "**Congress shall make no law abridging the freedom of speech, or of the press;"[25].** Compared to the constitutional provisions in both Norway and Germany, the First Amendment is very strict and broad, which is in accordance with the legal system of the US, but leaves a lot of space for interpretation and questions in regard of the scope and proper use of this right, which are therefore debated within court proceedings. Historically the legislative activity in regards to the meaning of the First Amendment mostly comes from the

[23] The Constitution of the Kingdom of Norway, Article 100. Ministry of Justice and Public Security. Accessed May 23, 2018. https://lovdata.no/dokument/NLE/lov/1814-05-17

[24] Bildung, Bundeszentrale Für politische. "Das Grundgesetz für die Bundesrepublik Deutschland." I. Die Grundrechte (Art. 1-19). Accessed November 29, 2017. http://www.bpb.de/nachschlagen/gesetze/grundgesetz/44187/i-die-grundrechte-art-1-19

[25] The Bill of Rights, First Amendment. Accessed May 23, 2018. https://www.archives.gov/founding-docs/bill-of-rights-transcript

twentieth century, where it is interpreted through the purposes given to it. These purposes include, first of all, "**enhanced self-governance"** through the means of communication between private individuals, representatives of individuals and representatives of the government and institutions. Secondly, free speech encourages "**truth-seeking**", which in turn **allows "the marketplace of ideas to function"** – this means that in order to reach the truth we need different ideas that are in competition with each other, similarly as products in a marketplace. Thirdly, free speech is a matter of "**personal autonomy**". Also, it is considered as a tool for "**balancing stability and change**" by not suppressing open and honest discourse, which can often result in violence. And lastly, the purpose of the First Amendment is also the "**promotion of tolerance**", which speaks to the individual level of protection.[26] These purposes partly overlap with the previously explained postulates as those are applicable to the purposes of free expression in any democratic society, and the main idea to take from that is – the value of freedom of expression is more or less the same in any democratic society, therefore the reasons for it protection and promotion are also more or less the same.

The tests

To further distinguish, how art is protected by the right to freedom of expression, it is necessary to understand what is considered expression or speech in art under the First Amendment with the help of positive and negative tests. Positive tests, which include two qualifications – conduct and art –, determine whether the given communication of ideas, information or emotions is considered expression, falls within both qualifications and is thus protected by law. Conduct is considered expression, if it has the nature of communication. Art is communicative in all cases; therefore this scope is too broad. As it is rarely an easy task to differentiate communicative conduct from non-communicative conduct in art, it goes that two elements are recognized for this distinction. For art to fall under protected expression, it has to contain, first of all, (1) **the intent to communicate a specific message** and (2) **the likelihood that the message will be received and understood** by the audience it is directed at. Thus, the artists who are trying to express a message which is more personal to him/her (narrowing the audience who might possibly receive the message), would have to make stronger arguments for why the message is likely to be understood if it comes to proving his/her rights in court. [27]

[26] Lazerow, Herbert I. *Mastering Art Law*. Durham, NC: Carolina Academic Press, 2015, pages 16-18.
[27] Lazerow, Herbert I. *Mastering Art Law*. Durham, NC: Carolina Academic Press, 2015, pages 19-21.

Negative tests provide exclusions for what is not protected under the First Amendment, which are – obscenity (in accordance with the protection of youth), child pornography (part of the former) and national security. Art is mostly concerned with the first restriction. Although sexual content in art is still protected, there are elements whose presence takes away the protection of the First Amendment, as set out in *Miller v. California* and *Roth v. United States*. Thus, if (1) the work as whole is considered libidinous by the understanding of an average person, (2) the work contains depiction or description of sexual conduct in a clearly offensive way and (3) the work as such is lacking significant artistic, political, literary or scientific value.[28] What can be taken from this – the values within the First Amendment and the scope seem to remain relatively similar to what the law-makers in Germany and Norway tried to define. The purposes and values of free expression are fundamental and the exceptions to this freedom are justifiable when it comes to protection of the morality and psychological development of youth.

Freedom of Expression v. Other rights

When it comes to defamation, the US jurisprudence covers the protection of an artist from defamation more extensively than the possibilities of an artist to commit defamation with his/her work as art is a highly subjective expression of one's opinion, thoughts and point of view, and does not often assume to fulfill the function of an information source.[29]

The right to privacy has different sections – there are offensive intrusions on seclusion, false light and unreasonable publicity given to private life. The first has essentially no coverage in the context of art, merely media and reporting. There are no false light cases, besides a few where there also has been defamation present (by the artist). Finally, the third section has different provisions in the US than it does in Europe. The US prohibits harassment, but allows publishing a picture of a public person in a public place, while the European Convention of Human Rights protects one's private and family life as well as one's home and correspondence, and the courts have drawn a line in the case of von Hannover v. Germany where the pictures of the Princess Caroline of Monaco had been published in German tabloids and contained visual material of her private life activities, such as sports. These were considered an unnecessary

[28] Ibid., pages 21-29.
[29] Lazerow, Herbert I. *Mastering Art Law*. Durham, NC: Carolina Academic Press, 2015, pages 45-50.

intrusion of her private life and therefore the ECHR ruled in her favor.[30] This case provides an example for the reasoning in regards to media, though, but no clarity in regards to how art fits in this picture. Nevertheless, it is clear that the privacy of public figures is especially protectable as they live in a constant environment of being recognized, thus – constant lack of the security of their privacy.

Self-regulation and self-censorship

A condensed and precise definition for the mechanism of self-regulation would be that "self-regulation can be seen as the delegation of public policy tasks to private actors in an institutional form with one of the main objectives being the regulation of markets (industry) by the participants (players) within"[31]. This can be attributed to different types of regulation, but for the interest of this paper the concept is viewed from a legal perspective, thus meaning – *it is the ability for a specific field or industry and its participants to more or less govern itself, to provide lawfulness and ethics that are upheld voluntarily and evaluated independently, without unnecessary state interference.* Most well-known is media self-regulation, which manifests itself in the form of media councils or complaint committees that act similarly as courts.[32] In order for self-regulation to be effective consensus and agreement is vital as one cannot regulate oneself, if there is no desire or assent to do so. And within this context "self" is attributed to a common group rather than an individual – the participants of the industry form a group, which is "one" or "self", thus the importance of voluntary agreement is so much emphasized.[33]

Self-censorship, however, is a decision of the individual. It is not a mechanism or tool implemented by an industry, but a psychological phenomenon. It is in essence "intentionally and voluntarily withholding information from others despite the absence of formal obstructions". This type of action – or inaction – may be necessary at times, but more often it lessens the quality of democracy and hinders the accessibility to new and diverse information on issues in a society.[34] A democratic society does not only provide freedom of expression and

[30] „The Right to the Protection of One's Image" Factsheet, The European Court of Human Rights. 2017. Accessed May 30, https://www.echr.coe.int/Documents/FS_Own_image_ENG.pdf
[31] Richardson, Genevra, and Hazel Genn. Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review. Oxford: Clarendon, 1994.
[32] OSCE. "The Media Freedom Internet Cookbook - Chapter: Self-regulation, Co-regulation, State-regulation." December 16, 2004, page 63-65. Accessed June 1, 2018. https://www.osce.org/fom/13844
[33] Black, Julia. "Constitutionalising Self-Regulation." The Modern Law Review 59, no. 1 (1996), page 26
[34] Bar-Tal, Daniel. "Self-Censorship as a Socio-Political-Psychological Phenomenon: Conception and Research." Political Psychology, page 13 and 23

freedom of access to information, but goes further – provides an environment where there is also free flow of information. The motivations for such behavior can differ depending on the situation – it may be the protection of a third party as well as protection of a belief or avoidance of sanctions. But at the core all these are the same and the main motivation is *protection from the perceived harm the given information might do* to one's self view, another person or the image of an institution or belief.[35]

The commonalities of both concepts are clearly visible as the action or inaction comes from within and may manifest its symptoms (such as – lack of initiation of court proceedings regarding certain issues) externally in seemingly similar ways, but the difference is that one is usually institutional, meant to provide a sort of "self-checking", but the other is fear-based and diminishes the promises of democracy.

[35] Ibid., page 32-34

CASE LAW AND DISCOURSE

When it comes to the case law regarding free speech issues in art, the picture is very speckled. In Norway, there are no cases during the past 20 years that are concerned with these issues, nevertheless the data shows that it is the most free country in regards to free expression, which suggests that there truly is a high level of freedom and little issue with breaches of the rights protecting art and artists, and that is for both sides – the state and other individuals as well as the artists themselves seem to grasp the rights and limitations assigned to them.[36] This would suggest that the phenomenon of self-regulation in combination with according instruments may be present in other areas besides just media.[37,38] This may be what is lacking in the states that have reached a certain level of development and are trying to attain the next level bringing them closer to the stage of overall freedom, stability in the rule of law characteristic for Nordic states, or it may as well be that self-regulation is a byproduct of a certain level of development.

One of the most relevant cases in Germany (that has been cited also in the Latvian case *Draguna v. Bargais)* was *Esra und Adam v Beschwerdefuhrerin*, where the issue at hand was a literary work named "Esra". The book contains a portrayal of the intimate relationship between the author of the book and a German actress, who is also the plaintiff in the case. The relationship had been described in broad and personal detail, as well as other relationships of the author, which the defendant (author) claimed to be fictional. The fact of the case was that the author did in reality have a relationship with said actress in the past.

During first instance – temporary injunction proceedings – the court asked the defendant to revise parts of the book in order to protect the plaintiff's privacy, which he did and then republished the book.

In the main proceeding the plaintiff argued that the work was essentially an autobiography even with the alterations. The defendant refused, but the plaintiff further claimed

[36] United Nations Human Rights "Norway.doc." OHCHR | Convention on the Rights of the Child. Accessed May 17, 2018. http://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/CulturalRights/ConsultationArtistic/Norway.doc&action=default&DefaultItemOpen=1.

[37] Greenslade, Roy. "Media Lessons from Scandinavia - Where Press Self-regulation Works." The Guardian. July 04, 2012. Accessed June 1, 2018. https://www.theguardian.com/media/greenslade/2012/jul/04/us-press-publishing-sweden

[38] Law, Tom. "Norway: Transparently Ethical and Setting Standards That Win Media Respect." Ethical Journalism Network. November 07, 2017. Accessed June 01, 2018. https://ethicaljournalismnetwork.org/resources/publications/trust-factor/norway

that within the writing she was indisputably identifiable, not only – the personal details of her intimate life, including the sexual relationship with the defendant, was depicted with insult and offence harming the plaintiff's private life in areas where it should be completely protected. The court agreed with the arguments stating that "the challenged novel violated the plaintiffs' general right of personality in a way which meant that artistic freedom in Article 5.3 sentence 1 of the Basic Law had to take second place to it", further the court elaborated that the issue was whether the protagonist, who could be recognized as the actress (plaintiff), had in fact such a relationship with the defendant. The connection of recognition and factual truth would provide linkage necessary for intrusion of privacy.

The dissenting opinions were that, firstly, one cannot "dissect a novel by passages" - a literary work has to be reviewed as a whole. And lack of details of legal reasoning was pointed out. The majority held that the injured party has to be recognizable in the literary work in order to claim privacy. The dissenting opinion specified that the plaintiff should be recognizable as a specific person, not just a model, which may be applied to others as well. Also, where the majority held that the facts have to be true in order to claim affect, the dissenting opinion specified that affect to the personality is not enough; a certain level of affect has to be met.

The dissenting judge pointed out that a literary work of art "must in principle be regarded initially as a work of fiction that does not purport to be factual". Thus, in the special circumstances of art – if the court has categorized the work as art and applies reasoning according to that, as in this case – the plaintiff should be proving that the depiction is true in the first place. It should not be the defendant to prove that the facts in his story are in reality not facts, but fiction. The same applies to the affect to the personality of the plaintiff – the extent of it has to be proven by the plaintiff, not disproved by the defendant.[39]

In the case *BVerfGE 75, 369* or *Beschwerdeführer v. Strauß* the facts of the case stated that a caricature artist published a depiction of the Bavarian Prime Minister as a swine engaging in different sexual acts. The Prime Minister's facial features were recognizable in the picture of the swine. What more, the caricature was republished several times with amendments, and the third time it had the caption: "Which then is the final and correct drawing, Mr. Prosecutor?" On the lower levels courts ruled all three times in favor of the first plaintiff, the Prime Minister, Mr. Strauß, and when the case was brought before the constitutional court, the outcome was no different. The reasoning issues they brought forth were, first of all, whether the core message

[39] Esra und Adam v Beschwerdefuhrerin (Consitutional Court, Order of The First Senate June 13, 2007), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2007/06/rs20070613_1bvr178305en.html

of the caricature was intended to be insulting, therefore – defamatory. The court held that the message conveyed the supposed attitude of the Bavarian Prime Minister towards the legal and court system, that he finds animalistic pleasure in abusing the justice system. And with combination of the repeated publishing of said caricature the court determined it as conduct with the goal to insult, not merely express oneself. Thus, according to the reasoning in this case, artistic expression is not protected anymore, when it is used as a vehicle or "suit" for intentional defamation, but only when the main goal is the expression itself. Finally, remarks were made that the general right of personality does not weigh heavily enough against *Kunstfreiheit* (freedom of art), but that in relation to the fundamental right to dignity, freedom of art does not prevail anymore; and that the person being a politician and consequentially being part of political discussion, does not make said person into a mere political topic and does not strip him from his individual right to dignity as a person.[40] Also, the case Herr K. v. von Sachsen was cited, where regarding satire in art an argument was made that it has to be determined, whether the given satiric message is contained in artistic expression or merely expression of opinion as "satire can be art, however not all satire is art".[41]

The case law in the US, naturally, is very broad because of its legal system and somewhat varying from state to state in its details. In *Bery v. New York* individual artists were selling their works of art on sidewalks, which was not allowed because of the "General Vendors Law", unless they obtained a general vendor's license. The district courts held that "political or religious views are much closer to the heartland of First Amendment protection of "speech" than the apolitical paintings in this case". The court of appeals disagreed stating that it "shields more than political speech and verbal expression" and counted numerous cases, where different types of entertainment or gestures/conduct were also protected by the First Amendment; it goes even further by quoting *Spence v. Washington* "if the First Amendment reached only expressions conveying 'a particularized message', its protection would never reach the unquestionably shielded paintings of Jackson Pollock, music of Arnold Schonberg, or Jabberwocky verse of Lewis Carroll". It argues that the main purpose of the First Amendment truly has been the discourse of political matters, but that the case law has never suggested expressions of philosophical, artistic, social, economic, literary or ethical subject matter would

[40] Strauß-Karikatur (Constitutional Court, Order of the First Senate, June 3, 1987). http://www.servat.unibe.ch/dfr/bv075369.html
[41] Case 1 BvR 2000/96 (Constitutional Court, Order of the First Senate, August 16, 1996). http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1997/11/rk19971112_1bvr200096.html

not be covered by the same right. It reasons that images broaden the medium for communication involving also those, who are limited by language or illiteracy. Finally, the court held that the selling of protected items should be protected as well, because it does not take away from the value of expression itself.[42]

Joseph Burstyn, Inc. v. Wilson was a landmark case which promoted the liberty of the movie industry from censorship as the court reasoned that motion pictures are also an important medium for the expression and exchange of ideas, setting out the idea that a movie does not lose its artistic value and thus protection by the Frist Amendment merely because it also has a commercial nature.[43]

Lahme v. University of Southwestern Louisiana[44] and *Piarowski v. Illinois Community College*[45] are both concerned with visual art exhibits and are an example of the rare limits of free expression in accordance with the concept of obscenity. Also, what sets these cases particularly apart from others is the reasoning that "relocation is not suppression" and that school grounds or university campuses were found not to be appropriate for exhibiting borderline obscene artistic content as such approach complies with the purpose of the obscenity provisions – to protect youth. Somewhat similarly, in *Close v. Lederle*[46] also removal from school corridors was demanded, but what stood out in this case was the court's reasoning that the artist's constitutional interests were minimal as they found the work did not intend to convey any political or social opinions. Thus, if a work is not found to be expressive enough – containing a message the artist is trying to communicate to the public – the work may be removed from school grounds or asked to be relocated, and such outcome is not seen as suppression of expression as it does not limit the extent or possibility of expression, merely excludes one exhibition location out of numerous.

The previously mentioned case Miller v. California, which set out the obscenity test, did not only set out limitations, but the court also made an important note that they "acknowledge, however, the inherent dangers of undertaking to regulate any form of expression

[42] Gerstenblith, Patty. „Art, Cultural Heritage, and the Law: Cases and Materials" 3rd ed. Durham, NC: Carolina Academic Press, 2012, pages 26-33.
[43] Joseph Burstyn, Inc. v. Wilson (United States Court of Appeals, May 26, 1952), https://supreme.justia.com/cases/federal/us/343/495/case.html
[44] Lahme V. University Of Southwestern Louisiana (Court of Appeal of Louisiana, Third Circuit. March 5, 1997), https://www.leagle.com/decision/19971233692so2d5411862
[45] Piarowski v. Illinois Community College (United States Court of Appeals, Seventh Circuit. April 12, 1985), http://ncac.org/resource/piarowski-v-illinois-community-college
[46] Close v. Lederle (United States Court of Appeals, First Circuit, Decided April 28, 1970), http://ncac.org/resource/close-v-lederle

[..] State statutes designed to regulate obscene materials must be carefully limited"[47], thus emphasizing that obscenity laws may not be tool for suppression, but that it has to, most importantly, serve to "prevent extreme social offensiveness and to suppress corrupt and morally subversive ideas and behaviors"[48].

[47] Miller v. California (United States Supreme Court, decided June 21, 1973) https://caselaw.findlaw.com/us-supreme-court/413/15.html
[48] Lankford, E. Louis. "Artistic Freedom: An Art World Paradox." Journal of Aesthetic Education, vol. 24, no. 3, 1990, pp. 15–28.

CONCLUSIONS

This short research in the interdisciplinary field of art law has, without doubt, lead to numerous conclusions and even more questions to inspect further. First of all, the overtaking conclusion is that there is no common definition of art – art is defined depending on the purpose it is being defined for. Meaning, in each area of law the term will have its own specifics and criteria depending on the function it has to carry out. Within the subject examined in this paper, the main takeaways are that for the right to freedom of expression art most importantly means the personal message of the individual being expressed, directed to the outside. Of course, all art is expressive, but to be considered under free speech rights it has to have *intent* to express a message.

After examination of different constitutional provisions and case law, the situation in the three subjects of analysis turned out to be rather contrasting. While Norway did not provide any accessible data on actual cases regarding freedom of speech while still being the first ranking country in the world concerning the level of freedom, Germany's legal system showed more protection towards separate individuals, especially when it comes to publically known persons or celebrities as in accordance with the decisions of the European Court of Human Rights and altogether – the provisions of the EU that bind Germany.
In the US the case content within the context of the First Amendment is mostly concerned with the issue of obscenity, and as in all the cases and provisions overall – when it comes to freedom of expression in art the only limitation clearly identifiable in the law and agreed upon is for the purpose of protecting young people and children in order not to impact their moral and psychological development in a negative and damaging way. This indicates that the primary concern is the protection of personal rights, but in the form of a specific group. Thus, individual freedom of expression is not unnecessarily limited because of political reasons, but weighed against the benefit or detriment of society. As the German case *Beschwerdeführer v. Strauß* showed – when the work of art was inseparably connected with media, the reasoning applied was stricter in order to appropriately assess the extent of affect ensured by publicity.

The hypothesis is only partly confirmed as in the German cases truly the issues debated rarely went further than the individual impact and interests, when the case law of the US conversely debated the interests and rights of the individual in the frame of societal impact and value. Thus, it can be concluded that **there are restrictions on freedom of speech when weighed against the rights of an individual and the influence on society**.

The research raises further questions in regards to the phenomenon of self-censorship and self-regulation, and the situation in less developed states. It may be valuable to look at the workings of self-regulation in order to provide guidance to states that have reached a developmental level, where they may be able to implement this mechanism successfully and lessen the necessity for court proceedings and even somewhat lessen the clashing of rights as such. The British scholar Franceska Klug gave way to noteworthy arguments while looking at the two contrasting extremes – restricting free speech based on "hurt feelings" and giving expression an absolute freedom. Klug argues "freedom of expression must exclude unwarranted censorship and bans, and therefore can include the license to offend" and asks – but must it? She mentions the "spirit of brotherhood" therein, which calls for our own evaluation of the situation and sometimes – decision to stay mute when the receiver of our expression may be obviously more vulnerable than the expresser and when the expression itself is in all honesty attacking the core of a personality or person itself rather than a point of view, opinion or idea.[49] And does this amount to self-censorship or self-regulation?

Also, the subsections of this topic could be researched much further, especially the definitions of art, as these seem to be more structured in the US – paradoxically so, as the definitions of their courts can vary from state to state. The further examination of more similar countries may be valuable as well – by either choosing only EU countries for the comparative analysis, different states in the US or examining all Nordic states.

[49] Klug, Francesca. "A Magna Carta for All Humanity: Homing in on Human Rights." Soundings 60, no. 60 (2015), chapter 6

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