

Imprint

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Introduction

The exhibition “Art and Criminal Law” was conceived in 2013 at the Europa Universität Viadrina Frankfurt (Oder). It is based on an initiative by Dr Dela-Madeleine Halecker and was created jointly by the entire team of the chair in both German and Polish. In the meantime, we have also produced the boards as roll-ups in English, which are easier to transport.

On each of the twelve boards, cases are depicted in words and pictures, illustrating in particular the points of contact between the freedom of art and legal interests protected by the criminal law. In particular, information is to be provided on the constitutional guarantee and the limits of artistic freedom as well as on the protection of the work of art by simple law (namely criminal law). As a basis for the discussion, examples from the relevant case law of various countries and also from past times were mostly used.

Art and criminal law have many interesting points of contact. One could say that art can be both a passive “victim” and an active “perpetrator” of crimes.

Victim, to be more precise: art is the sufferer if it is damaged, stolen, counterfeited or censored. Here, exciting problems arise that are far from being comprehensively scrutinized and that cannot be solved so easily from a legal point of view: For example, German criminal law does not know of any forgery of art; a sales market for often unsaleable works of art and thus an incentive to steal or rob art is only created by the expected secret (re)purchase efforts of the owners (and their insurances!) - abetting or receiving stolen goods? In addition, one also has to deal with the strangest perpetrators, i.e. not only with “ordinary” criminals: There are, for example, crazy “art murderers” who sneak through museums with hydrochloric acid (may one “lock them away forever”?), but also brilliant painters who “earn” a luxury life as counterfeiters of the Great Masters and, after their exposure, (almost) become “pop stars”.

On the other hand, art is a perpetrator (or rather a tool of crime in the hands of artists) above all when it shocks, offends, provokes or injures. There are numerous groups of cases: An artist can make fun of state or religious symbols, such as the national flag or the crucifix, in his pictorial works; he can also, for example, make a politician or other celebrity contemptible in a satire or depict him in a caricature due to physiognomic characteristics derogatory as an animal or fruit; he can also depict violence or pornography. An artist can further break taboos in photographs or films, such as extremely drastically depicting perversions, excrements, or corpses, as the American Andres Serrano does in his photo series. After all, an artist can also slaughter animals in the theatre or perform sexual acts on stage like the “Viennese Actionists” once did. Whoever does not reduce art to the “uninterested joy of beauty”, as the Supreme Court of the German Reich, the Reichsgericht (RGSt 24, 365 [367]) did, but creates “committed art”, is in constant danger of violating criminal law norms, namely, to realize one of the so-called “art-prone” facts (in particular insult, “blasphemy”, state denigration, use of marks of unconstitutional organizations, incitement of the people, glorification of violence, pornography, cruelty to animals, damage to property) with his art.

The question of artistic freedom precedes the question of “every art” whether it is

,visual' or ,performing' poetry or ,musical art'. "Art and science, research and teaching are free" states Art. 5 para. 3 sec. 1 of the German Basic Law (GG) – and does not mention any restriction for art. That this cannot be absolutely ,understood' is obvious. Because then not only a futuristic artist might ,demand' to be allowed to draw (professional) traffic ,sitting quietly' in the middle of the main street, but it would also be allowed, for example, for every painter to steal brushes and canvas, to force everyone to model for the (erotic) photographer, or the theatre director to stage a real murder on stage every evening. On the other hand, however, it would be a farce if today – as in 1930 the Reichsgericht (RGSt 64, 121 [128] – Christ with a Gas Mask) – despite the wording in Art. 142 of the Constitution of the Reich that is almost identical with Art. 5 para. 3 sec. 1 of the GG – one were still to judge "even an artist may not cross the barriers.", which the "other cultural activities legally guaranteed protective measures", i.e. the German Penal Code, have established. Then the postulate of artistic freedom would be a mere program sentence. – But where is the limit of artistic freedom? At what point must punishability not be assumed as insult, as cruelty to animals, as blasphemy, as pornography? Where is the boundary of what is still permitted, what is just yet to be accepted?

The boards of our exhibition "Art and Criminal Law" are dedicated to such themes. The exhibition attempts to approach answers to this question.

Stations of the Traveling Exhibition



German boards:

October 2013	European University Viadrina Frankfurt (Oder)
October 2014	Collegium Polonicum Slubice
December 2015	Paris Lodron University of Salzburg
February 2016	University of Münster
April 2016	University of Osnabrück
June 2016	Coblenz University of Applied Sciences
June 2016	University of Augsburg
July 2016	University of Bayreuth
October 2016	Julius Maximilians University of Würzburg
November 2016	Leibniz University Hanover
December 2016	Johannes Gutenberg University Mainz
January 2017	Ruhr-University of Bochum
December 2017	Rheinische Friedrich Wilhelms University of Bonn
April 2018	Istanbul Bar Association of Istanbul
April 2018	Özyeğin University Istanbul
April 2018	University of Cologne
July 2018	Bielefeld University

October 2018	Friedrich Alexander University Erlangen-Nürnberg
November 2018	University of Constance
April 2019	Brandenburg University of Technology Cottbus-Senftenberg
May 2019	Medieval Crime and Justice Museum Rothenburg ob der Tauber
June 2019	RheinMain University Wiesbaden
September 2019	Nordkolleg Rendsburg
December 2019	University of Leipzig
March 2020	Martin-Luther-University Halle-Wittenberg
November 2020	Education Forum Potsdam

Polish boards:

October 2014	Collegium Polonicum Słubice
February 2015	University of the Arts Poznań
March 2015	Adam Mickiewicz University Poznań
April 2015	Kazimierz Wielki University Bydgoszcz
May 2015	Nicolaus Copernicus University Toruń
September 2015	University of Białystok
January 2016	University of Warmia and Mazury in Olsztyn
May 2016	University of Gdańsk
May 2017	University of Zielona Góra
October 2018	University of Opole
November 2018	Scientific Information Centre and Academic Library, Katowice
March 2019	Pedagogical University of Kraków
October 2019	University of Silesia in Katowice
December 2019	Silesian Library in Katowice
January 2021	City library in Sosnowiec

English boards / roll-ups:

September 2017	Lubostron Palace
October 2017	European University Viadrina Frankfurt (Oder)
April 2019	European University Viadrina Frankfurt (Oder)

Information about the Exhibition Boards and Roll-Ups

Exhibition boards

- 12 exhibition boards in wooden transport box
- weight of the 12 boards in total (without transport box): approx. 55 kg
- size / board: 1.50 m x 0.90 m
- size / board: 1.50 m x 0.90 m
- material / board: Aluminum Dilite composite boards with aluminum coating
- 2 self-adhesive hooks on the left and right of the exhibition board
- font size: 16 pt.
- 4/0-colored euro scale
- about 1,150 words per exhibition board
- about 7,300 characters without spaces per exhibition board
- about 8,800 characters with spaces per exhibition board
- about 190 lines per exhibition board

Roll-ups

- 12 roll-ups in transport bags
- weight of the 12 roll-ups: about 42 kg
- size / Roll-Up: 2.20 m x 1.00 m
- digital printing 4c on PVC 230 gsm (opaque, backside white)
- print: 600 x 600 dpi
- UV stable coated with semi-matt protective laminate (scratch-resistant)
- fire protection class B1
- housing made of aluminum, with carrying bag
- font size: 16 pt.
- 4/0-colored euro scale
- about 1,150 words per roll-up
- about 7,300 characters without spaces per roll-up
- about 8,800 characters with spaces per roll-up
- about 190 lines per roll-up

Presentation Types of the Exhibition Boards

The presentation of the exhibition is left to the individual organizers. Therefore, we are always surprised in which variety you can present the exhibition boards. By way of example, only a few are to be depicted here.



On special scaffolding (Adam Mickiewicz University Poznań)



On partition walls (University of Augsburg)



Free-floating in the room (University of the Art Poznań)

There are no limits to creativity. Of course, the way of presentation always depends on the possibilities. In many cases we were very pleasantly surprised. As a result, the exhibition boards always look new to us.



Classically on the wall (Julius Maximilians University Würzburg)



On easels (University of Białystok)

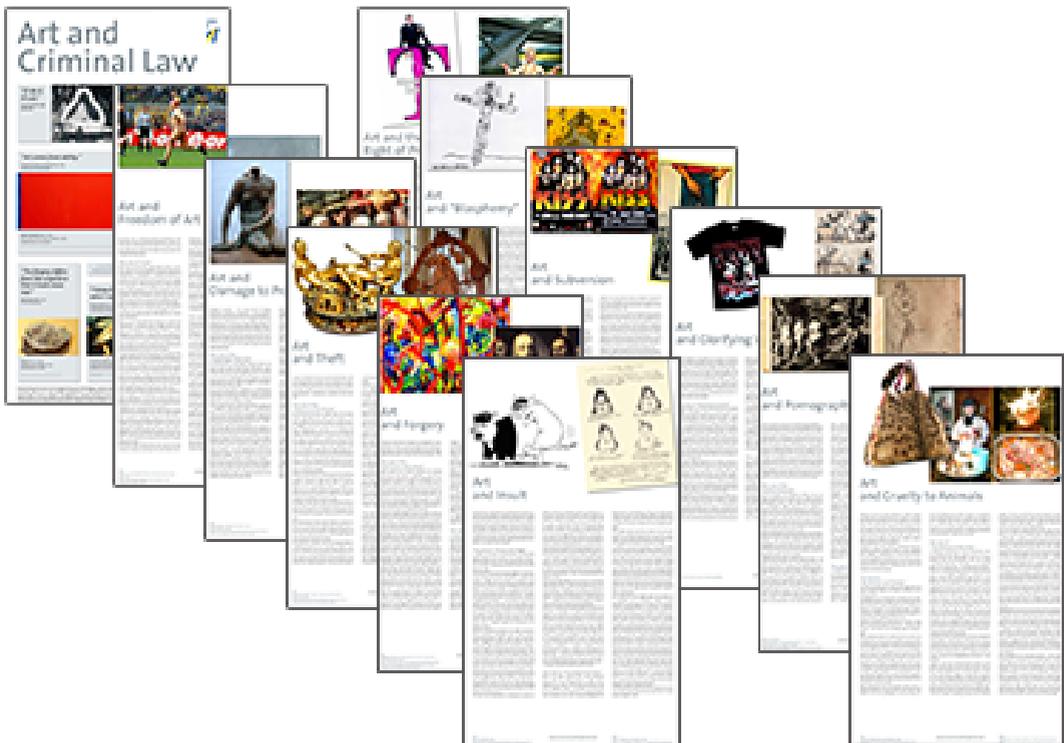


As roll-ups (European University Viadrina Frankfurt [Oder])

Systematics of the Exhibition Boards

The exhibition boards have a systematic order:

- Board 1: Art and Criminal Law (Introduction board)
- Board 2: Art and Freedom of Art
- Board 3: Art and Damage to Property
- Board 4: Art and Theft
- Board 5: Art and Forgery
- Board 6: Art and Insult
- Board 7: Art and the General Right of Privacy
- Board 8: Art and “Blasphemy”
- Board 9: Art and Subversion
- Board 10: Art and Glorifying Violence
- Board 11: Art and Pornography
- Board 12: Art and Cruelty to Animals



Art and Freedom of Art



"Ernie" in the Westfalenstadion, Dortmund, April 16, 2005

Art. 5 para. 3 sect. 1 of the German Basic Law (GG) states: "*Arts and sciences, research and teaching shall be free.*" A short, concise sentence. But the Basic Law is silent as to what art is, and says nothing about whether this freedom has any limits. This is made clear by two cases:



*Harald Naegeli: Undine (1978)
Deutsches Seminar, Schönberggasse 9, Zürich*

The case of “Ernie”

ERNST WILHELM WITTIG (born 1947), known as ERNIE, is a German streaker from East Westphalia. During his appearances a baseball cap – his trademark – is usually the only fabric on his body. He attracted attention from beyond his home region for the first time in 1997, when his pitch invasion resulted in an interruption of the Bundesliga soccer match between Borussia Mönchengladbach and Arminia Bielefeld. ERNIE had his largest number of spectators in April 2005, when he ran naked across the field in front of 76,500 people as Borussia Dortmund played Arminia Bielefeld at the Westfalenstadion.

ERNIE sees himself as an “interaction artist”. He has declared his body a work of art. In contrast, psychologists see him as a man with a personality disorder, while lawyers see a criminal and troublemaker.

ERNIE has been fined more than 20 times as a result of his “interactions”. In February 2007, he began serving a five-month prison sentence for appearing unclothed at a school playground in Bielefeld. In 2009, ERNIE was sentenced to 11 months imprisonment on probation by the Duisburg Regional Court because at a previous trial (he had appeared naked on the sidelines of a women’s football match in Rheinhausen) he had pulled down his trousers in the courtroom.

The city of Herford had already issued an administrative order in 1995 forbidding him from displaying his naked body on all public roads as well as in all municipal facilities and buildings. ERNIE, however, had argued that his nude appearances were art. The consequence of this would have been that freedom of art would stand in the way of administrative order. ERNIE’S lawsuit was, however, rejected by the Minden Administrative Court and the Münster Higher Administrative Court. They ruled his nudism did not fall within the scope of the fundamental right of freedom of art (Art. 5 para. 3 sect. 1 GG).

In its reasoning, the Minden Administrative Court placed particular emphasis on two definitions for the concept of art, almost indescribable in all its forms, that the Federal Constitutional Court had developed in two landmark decisions (“Mephisto” and “The Anachronistic Procession”):

“Following the Constitutional Court’s broad ‘material’ concept of art, the essence of artistic activity is free creative design in which impressions, knowledge, experiences of the artist are brought to immediate perception through the medium of a specific formal language. Artistic creation, in which intuition, imagination, and artistic appreciation interact, is the ‘most im-mediate’ expression of the artist’s individual personality.” But ERNIE’S mere nudity, the court said, had no amount of creative charisma of its own.

The Münster Higher Administrative Court came to the same conclusion, basing its reasoning on the Constitutional Court’s antithetical “formal” definition of art, as described in the “Anachronistic Procession” case. According to this, the essence of a work of art is that it fulfills the requirements of a certain type of work (“e.g. *painting, sculpture, or poetry*”) from a formal, typological perspective. The Münster judges decided that *“the mere presentation of the naked body is neither a ‘classic’ form of street theater nor an avantgarde form of artistic installation or action”*.

But what art now is, remains nebulous. This term self-evidently does not lend itself to an unequivocal definition. But is a polemical poem about “*asylum cheats*” art, just because it rhymes passably at the ends of lines? (Yes, said the Bavarian Supreme Court in 1994). Can giving the Hitler salute be art while ranting about the “*dictatorship of art*”? (Yes, said the Kassel Local Court in 2013). Whether something can be considered art is itself important, because as “*a daughter of freedom*”, as Friedrich Schiller called it, art is allowed to do many things – although not, as Kurt Tucholsky said of satire, “*everything*”.

The case of the “Sprayer of Zurich”

HARALD OSKAR NAEGELI (born 1939) became known worldwide in the late 1970s as the “Sprayer of Zurich”.

Beginning in 1977, his wireframe figures suddenly appeared overnight on building façades and brick walls in the Zurich area. With an estimated 400 to 600 figures, each created in a few seconds, NAEGELI painted the walls, naturally with-out ever asking even a single owner of the affected surfaces for permission. For two years he was out at night, with the police on his trail, along with cleaning crews whose job it, was to remove the graffiti. NAEGELI’S identity remained undiscovered; the media hyped him as an enigmatic phantom. Citizens and the city government were indignant. NAEGELI was accused of “*vandalism*” and “*damage to property on a grand scale*”; hundreds of charges were filed against him. A “bounty” of 3,000 francs was offered. The police finally caught him in 1979. He had left his glasses at a crime scene and had gone back to look for them. NAEGELI was sentenced to six months conditional imprisonment (in other words, imprisonment on probation) for damage to property in almost 200 cases.

Overwhelmed with claims for compensation, he fled to Germany. Soon, hardly any more of his drawings could be seen in Zurich.

On appeal NAEGELI was sentenced in absentia by the Zurich Higher Cantonal Court in 1981 to an unconditional prison sentence of nine months and to pay more than 100,000 francs in compensation for damages. The severity of the punishment drew sharp criticism around the world. The Swiss Federal Court rejected NAEGELI’S plea of nullity.

NAEGELI defied the order to report to jail in February 1982 and remained in Germany. German Chancellor Willy Brandt later said he was reminded of the “*dark period in history ... when Germans instead sought refuge in Switzerland*”. An international warrant was issued for his arrest.

After a trip to his mother’s Norwegian homeland, NAEGELI was finally taken into custody on August 27, 1983 at the border with Denmark. The Schleswig Higher Regional Court declared the extradition of NAEGELI to Switzerland to serve his sentence to be legal.

The Federal Constitutional Court chose not to take up a constitutional complaint against the decision for lack of sufficient prospects of success. On the one hand, the court agreed with the Swiss legal authorities that NAEGELI’S graffiti constituted art. It said Art. 5 para. 3 sect. 1 GG recognized and guaranteed an individual right to freedom

to engage in artistic endeavors. This provision, the justices ruled, thus protects artistic activity against the influence of public power, especially in terms of content, methods and trends. But at the same time, the court reasoned, the guarantee of freedom of art does not allow the artist to simply disregard the property rights of others. This is because the fundamental right to property in Art. 14 GG itself contains a guarantee of freedom; and in terms of the assessment made in the Basic Law it does not, as a matter of principle, rank below the freedom of art.

This interpretation can be found in the Federal Constitutional Court's abovementioned Mephisto decision. This said that art, with its special nature and rules, had an absolute, but not limitless guarantee under Art. 5 para. 3 sect. 1 GG. This meant that the limits of this guarantee of freedom of art were not subject to ordinary law, for example the penal code, but were to be determined by the constitution itself. If the guarantee of freedom of art gives rise to any conflict with another fundamental right, such as with Art. 14 GG, it must, they reasoned, be resolved by an interpretation of the constitution in accordance with the values contained within it, and taking into consideration the unitary set of values underpinning it.

Despite extensive protests – Willy Brandt, Heinrich Böll, Joseph Beuys, Jean Tinguely, and Sarah Kirsch were among those standing up for him – NAEGELI had to report to prison. Accompanied by numerous artists he presented himself to the Swiss authorities at the Lörrach border crossing on April 24, 1984; but beforehand he quickly sprayed another graffito on the frontier hut in front of the cameras. NAEGELI served his sentence under harsh prison conditions. The official explanation was that there was no place available in the prison for first-time offenders; so NAEGELI initially had to spend four months in a maximum security prison in Winterthur, only after which was he transferred to an open prison in Lucerne. This elevated him to a kind of martyr and until today has been part of his claim to fame.

The rehabilitation of one of Switzerland's most famous contemporary artists came only in 2004, when the canton of Zurich spent 2,000 francs to restore and preserve one of the last remaining wireframe figures from NAEGELI'S Zurich period. He had sprayed the water spirit "Undine" illegally on a concrete wall in 1978. This bothered only the politicians of the rightwing nationalist Swiss People's Party (SVP). In a parliamentary party declaration they described NAEGELI'S works as "*infantile drawings of a multiply convicted vandal*".

Art and Damage to Property



*Edvard Eriksen: The Little Mermaid (1913)
Langelinie, Kopenhagen
here headless in 1998*

Damage to property – in its various facets of damage, destruction, or alteration of appearance – can be punished in accordance with § 303 of the German Penal Code (StGB) with up to two years' imprisonment or a fine. In addition, anyone who damages graves or monuments; publicly displayed objects of art; or items that serve to beautify public thoroughfares, places, or facilities faces an additional year in prison in accordance with § 304 StGB. Damage to public cultural goods often does not just spring from wanton destructiveness, because some see such an act as an opportunity to send a political signal by extremely questionable means.



*Albrecht Dürer:
The Lamentation of Christ (1500)
Alte Pinakothek, Munich*

The case of the “Copenhagen Mermaid”

The Little Mermaid is a Copenhagen landmark created in 1913 by the Danish sculptor Edvard Eriksen (1876-1959). A note-worthy detail is that the bronze figure’s head was modeled on that of the Danish prima ballerina Ellen Price. The sculpture can be seen in Copenhagen on the Langelinie waterfront promenade, but only as a copy. The original is in the possession of the Eriksen family estate.

This artwork’s long history of suffering is an especially good illustration that while the modalities of action in § 303 and § 304 StGB are formulated so simply, implementing them often proves much more difficult in practice.

Cases in which the arm or head of the artwork is broken off – as happened in 1964, 1984, and 1998 – are unproblematic when it comes to identifying them as damage to property. But is this true even in cases like the “decapitation” of 1964, when the performance artist Jørgen Nash said his act was a “happening” against the “Danish tourism industry”?

In the cases where the Little Mermaid was smeared or sprayed with red (1973 and 2007), white (1970 and 2008), green (2006), and pink paint (2007), it was more difficult to assume damage to property. If the paint cannot be removed without leaving residue, this can be described as “damage” in the true sense of the word. If it is determined that the appearance of the mermaid is “not only insignificantly and not only temporarily changed”, then the criteria are met for the punishable offense of damage to property. But “damage” in the true sense would also have to be affirmed if the aspect that an artistic sculpture has the function of being “beautiful” and of conveying artistic intent is taken into account. After it is smeared with paint, there can hardly be any talk of the sculpture conforming to the artist’s vision.

But how can it do this if the appearance of the Little Mermaid is changed not by paint, but by disguise? Often, after their soccer team wins, overenthusiastic away fans dress it in a club jersey or wrap a team scarf around its neck. Does it matter that disguises can also be political actions that comment on current political issues? Thus, in the context of the discussion of Turkey’s potential accession to the European Union at a summit in Brussels in December 2004, the Little Mermaid was veiled in a black burka, with a white band bearing the provocative inscription “*Tyrkiet i EU?*” (“*Turkey in the EU?*”). In 2007, the Little Mermaid wore the hooded robe of the Ku Klux Klan. And in 2009, environmental activists put a protective mask on her during the UN climate summit in Copenhagen to get their message across that nuclear power was obstructing the fight against global warming. Is damage to property to be assumed in all cases?

And what happens when, as in 2003, the entire statue is pushed from its pedestal into the sea? Can this action be punished at all if the statue remains undamaged?

The case of “Bohlmann”

The deeds of HANS-JOACHIM BOHLMANN (1937-2009) had a more dramatic impact on art history than the attacks on the Little Mermaid – which is, after all, only a copy of the precious original. From 1977 to 1988 he damaged 52 important works of art, including paintings by Dürer, Rembrandt, and Rubens. In total, he caused damage worth about 260 million German marks (€134 million).

BOHLMANN was psychologically disturbed. His anxiety and compulsion to control were attributed to his childhood, which was marked by a severe upbringing, being driven from his home in Silesia at the end of World War II, and an almost fatal fall into a septic tank while his mother looked on. At age 15, he entered psychiatric treatment. Electric shocks and insulin coma therapy did not help. A stereotactic brain operation in 1974 was supposed to cure him, but instead let loose his aggressions. BOHLMANN played with fire, desecrated graves, and killed swans. His symptoms worsened so much that he entered early retirement in 1975. Disappointed and full of hatred for society, BOHLMANN decided to avenge himself.

After he damaged Paul Klee’s “The Golden Fish” in Hamburg in March 1977, the resulting outrage in the news media gave BOHLMANN a sense of recognition. He traveled all over West Germany causing damage. His acts gave him satisfaction, to such an extent that he did not need medication anymore. This came to an end after he was arrested for damaging Rembrandt’s “Jacob Blessing the Sons of Joseph” in Kassel’s Schloss Wilhelmshöhe in autumn 1977. The Hamburg Regional Court found BOHLMANN to be criminally liable and sentenced him to a total of five years for damage to property and damage to objects of public interest. By 1982, he had served his sentence in full.

BOHLMANN had barely been freed before he began again, damaging construction machinery and site trailers and senselessly chopping down trees. In 1983, he was arrested and sentenced to a total of three years’ imprisonment. He was released in 1986.

Being confronted with claims for damages reawakened BOHLMANN’S old feelings of hatred, so he entered therapy in 1987. At the same time, though, he secretly bought and stockpiled sulfuric acid. The following year he took a leave of absence and went to the Alte Pinakothek in Munich, where he attacked three paintings by Dürer with the acid, causing damage estimated at 100 million German marks. One of the paintings was “The Lamentation of Christ”, 70 percent of which was destroyed. The full restoration took 21 years.

The Munich Regional Court sentenced BOHLMANN, who was now classified as suffering from diminished responsibility, to a term of imprisonment totaling two years, after which he was transferred to a psychiatric institution.

Only after BOHLMANN had been held for 16 years did the Hamburg Regional Court order him to be released. It ruled he still posed a threat and took it as a given that there was a risk of further similar acts; in addition, no positive prognosis could be made. Nonetheless, it found lifelong confinement to a psychiatric institution for the protection of invaluable cultural assets in the public interest to be disproportionate. It

decided other offenses, in particular acts of violence against persons, were not to be expected of BOHLMANN. His right to liberty, it said, therefore outweighed the general interest in the protection of cultural assets.

BOHLMANN was released in January 2005 on condition he reports to the police and was banned from museums. After 18 months of quiet BOHLMANN traveled to Amsterdam, where he poured lighter fluid over Bartholomäus van der Helst's "Banquet at the Crossbowmen's Guild in Celebration of the Treaty of Münster" in the Rijksmuseum, setting it alight. The Court of Justice (Gerechtshof) in Amsterdam sentenced him to three years' imprisonment and ordered him to pay damages of €17,772 to the Rijksmuseum. In June 2008 he was able to return to Hamburg, where he succumbed to cancer on January 19, 2009.

Art and Theft



*Tilman Riemenschneider:
Madonna of the Rosary (about 1521/24)
Pilgrimage church „Maria im Weingarten“, Volkach*

41 years lie between the two events described below, which are among postwar Germany's most sensational art thefts. But one thread connects them, if only tenuously: The thieves were able to obtain the works of art because they were virtually unprotected – scandalously so, especially in view of their value.



*Benvenuto Cellini: Saliera (1543)
Kunsthistorisches Museum, Vienna*

The case of the “Madonna of the Rosary”

The first theft took place in August 1962 in the Roman Catholic pilgrimage church “Mary in the Vineyard” in the town of Volkach in the Franconia region of northern Bavaria. The highlight of the church’s interior is the “Madonna of the Rosary” hanging above a side altar. It is an imposing relief sculpture made of lime wood, 2.8 m tall and 1.9 m wide. The outer frame of the artwork is a garland of roses that binds five medallions depicting scenes from the life of Mary. In the center, Mary stands on a crescent moon cradling the baby Jesus, surrounded by radiant light and angels playing music. The relief sculpture is one of the last and most fully developed works of Tilman Riemenschneider (1460-1531), who was, alongside Veit Stoss, probably the most important late-Gothic carver. He created it in 1521-1524 for the newly built pilgrimage church. The artwork is priceless.

Despite its considerable size, three young men from Bamberg – LOTHAR GEHEB, ALFRED VOGLER, AND FRANZ XAVER BAUER – decided it would be worth their while to steal the Madonna. The trio had already carried out a number of art thefts and now wanted to pull off a big heist. Their friend MANFRED RÖSCHLAUB provided the flatbed truck needed to transport it and offered his services as a driver.

On August 6, 1962, GEHEB, VOGLER, and RÖSCHLAUB drove to Volkach. BAUER remained in Bamberg to spread the risk. While RÖSCHLAUB waited for the artwork in the getaway truck, GEHEB and VOGLER were able to enter the church at around 22:00.

But unmounting the bulky wooden Madonna proved to be both time-consuming and strength-sapping. When after several hours they at last succeeded in prying the Madonna out of her frame, she fell to the floor. As a result, angel wings and other small parts broke off the artwork.

The perpetrators ultimately moved the damaged Madonna to Bamberg aboard the truck. There BAUER, himself a sculptor, put a damper on their excitement, telling them the wellknown work of art had probably become unsellable due to news reports of the theft. He then covered the Madonna with red floor wax. Halfway protected in this way, they buried her a short time later in a plot belonging to VOGLER in nearby Hollfeld.

It was then that Henri Nannen, the former editor-in-chief of the magazine “Stern”, made an unexpected appeal for the return of the Madonna, surprising both the inhabitants of Volkach and the thieves. As an art lover, Nannen was moved to act because he knew just how unique and irreplaceable the carving was. He placed an advertisement in around 100 newspapers in Franconia with a call to “*Give back the Madonna of Volkach!*” Nannen assured the perpetrators of secrecy and the payment of a ransom of 100,000 German marks (about €51,000).

After two more appeals by Nannen in “Stern”, the thieves contacted him in October 1962. In return for payment of the ransom in two installments, Nannen made sure that the Madonna found her way back to the pilgrimage church. An alarm system was finally installed to protect her against further larceny.

Although the investigation continued, the perpetrators remained undetected until 1967. Ultimately, they betrayed themselves, when a drunken RÖSCHLAUB boasted about the act. GEHEB and BAUER were apprehended, while RÖSCHLAUB was already behind bars

for other crimes. VOGLER, who had in the meantime settled in Istanbul, was extradited in October 1969. All were sentenced to several years in prison.

Preliminary proceedings by the public prosecutor's office against Nannen for aiding and abetting (§ 257 German Penal Code, StGB) were discontinued. It was concluded that Nannen's primary aim was to see the work of art returned. In his case, they decided, there was no intent to help the thieves profit from their crime, as a prosecution would require. But critical voices refused to be silenced, saying that offering such "rewards" could encourage potential copycats...

The case of the "Saliera"

In May 2003, the most valuable possession of the Kunsthistorisches Museum in Vienna was the Cellini Salt Cellar, or Saliera. It was originally intended as a functional receptacle for the table and is the only surviving work of the Florentine goldsmith Benvenuto Cellini (1500-1571). He made the Saliera out of rolled gold for King Francis I of France during his stay in Paris between 1540 and 1543. This work, too, is of immeasurable value.

Cellini created two figures sitting opposite each other, their legs intertwined, joining land and sea, as he put it, "*suggesting those lengthier branches of the sea which run up into the continents*". Alongside Neptune, symbolizing the sea, Cellini placed a richly decorated boat containing the salt. Next to Tellus, the Roman goddess of the earth, he set a finely detailed temple for the peppercorns produced by the earth.

The Saliera came into the possession of the Austrian archdukes in 1570 when it was handed over to them by King Charles IX as a Wedding present. It has been displayed at the Kunsthistorisches Museum in Vienna since the end of the 19th century.

The museum's art chamber closed in 2002 amid plans for an extensive redesign and extension of the building, and the Saliera was temporarily relocated to its Raphael Room. However, this lacked the modern alarm systems found elsewhere in the museum. For reasons of cost, it was decided not to install them during the renovation work. As a result, the Saliera was displayed only under a glass cover, its only protection provided by an ultrasonic motion detector connected to an acoustic signal generator.

During a visit to the museum, the alarm technician ROBERT MANG (born 1956) immediately noticed the inadequate security for the Saliera. MANG absconded with it almost effortlessly in the night of May 10-11, 2003. He climbed the scaffolding that had been erected for the renovation of the external façade, entered one of the unsecured windows of the Raphael Room, smashed the glass cabinet, took the Saliera, and fled. The security staff did not respond to the motion detector's signal because they assumed it was a false alarm, which happened frequently.

Within a day, an international search was initiated. The reward was set at €70,000.

In 2003 and 2005, MANG demanded insurer Uniqo pay a ransom, which he first set at five, then 10 million euros. To show he was serious, in October 2005 he removed Neptune's original trident and sent it to the investigating authority.

In November 2005 he led the police on a wild goose chase by text message all over

Vienna, without delivering the loot. But this game proved to be MANG's downfall: By identifying where one of the prepaid phones MANG used had been purchased, and examining recordings from a surveillance camera installed there, they were able to produce an image of their suspect. MANG initially called the police, complaining about the apparently "wrong" picture. But before long he confessed to the theft and led the police to the location of the Saliera, which he had buried in a wooded area. In January 2006, it returned to the Kunsthistorisches Museum.

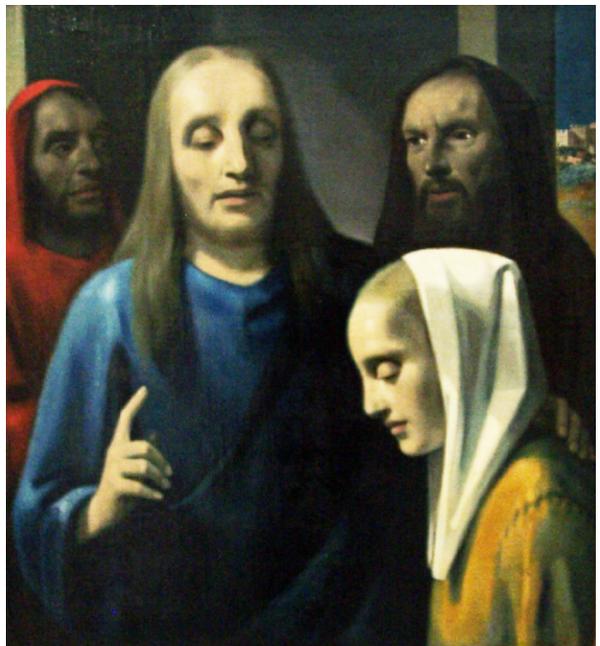
MANG was sentenced to five years' imprisonment in 2007 for felony burglary and attempted extortion. At the end of October 2008, he was granted early release from prison. In March 2009, the "Kronen Zeitung" newspaper reported that MANG was trying to regain his footing in his old business, alarm systems engineering.

Art and Forgery



*Wolfgang Beltracchi,
purportedly Heinrich Campendonk:
Red Picture with Horses*

In German criminal law, art forgery is not regulated as a separate offense. However, it can be punishable under the provisions of § 267 para. 1 German Penal Code (StGB) as document forgery. Selling a fake artwork is usually a fraud under § 263 para. 1 StGB.



*Han van Meegeren,
purportedly Jan Vermeer van Delft:
Christ and the Adulteress (1942)
Instituut Colectie Nederland, Amsterdam*

The case of the “Red Picture with Horses”

2006 Trasteco Ltd. of Malta auctioned the painting “Red Picture with Horses”, purportedly a 1914 work by the Rhenish expressionist Heinrich Campendonk, at the Kunsthaus Lempertz in Cologne. The purchase price of almost €2.9 million was the highest amount achieved to date for a work by the artist on the German auction market. The painting was believed lost for more than eight decades – the last time it had been documented was in 1920 in a catalog from the renowned gallery of Alfred Flechtheim, but providing no illustration, dimensions, signature, or whereabouts. So no one knew what the painting really looked like.

The buyer evidently began to have his doubts about the painting’s authenticity shortly after he acquired it, so he called in the experts. In 2008 it was discovered that the painting was a fake: Assessors in Munich and Oxford independently came to the conclusion that titanium white had been applied to the painting in some areas, a color pigment not in use at the time the original was created. Subsequently the three labels attached to the back as a guarantee of origin – including that of the famous Flechtheim Collection – proved to be counterfeit.

Kunsthaus Lempertz had acquired the painting from Helene Beltracchi and her sister. They claimed the work had come from the unknown collection of paintings belonging to their grandfather, Cologne businessman Werner Jägers, who had supposedly acquired it from art dealer Alfred Flechtheim. In reality, however, the painting had been painted by WOLFGANG BELTRACCHI (born 1951), Helene’s husband; a “Jägers Collection” never existed. Over the course of 35 years, the talented painter BELTRACCHI had created numerous “replicas” of other paintings from the first half of the 20th century, including those by Max Pechstein, Fernand Léger, André Derain, and Max Ernst – in each case, works known to the art world by name, but depicted nowhere. In addition, he also painted motifs he invented himself that fit the artists’ oeuvre so well that even experts thought they were authentic. For a long time no one caught on to BELTRACCHI; he later spoke about his unmasking in an interview with the news magazine “Spiegel”: *“I had always used a zinc white, very common in Campendonk’s time. I usually mixed my own, but I lacked pigments. That’s why I took a zinc white from a tube, a product of Holland, on which it unfortunately didn’t mention that it also contained a small amount of titanium white. So the thing was blown open just because of a mislabeled tube.”*

In 2011 the BELTRACCHIS’ trial took place before the Cologne Regional Court. However, the subject of the trial was only 14 paintings, with which they were believed to have earned a total of almost €16 million. Both gave full confessions.

Wolfgang BELTRACCHI was sentenced to six years imprisonment for fraud and document forgery, and his wife Helene to four years.

The couple is now free and enjoys life in the spotlight. BELTRACCHI is painting again, selling and exhibiting his works, now under his own name, in well-known galleries.

The forgeries by WOLFGANG BELTRACCHI investigated until now represent only the “tip of the iceberg”. The forger admitted to being the creator of about 300 fakes that had been sold. In the “Spiegel” interview, the couple spoke cryptically: *“If anyone suspects hat a Beltracchi is hanging in his home, he should contact us. And he’ll get an honest answer.”*

The case of “Christ and the Adulteress”

The Dutch painter, restorer, and art dealer HAN VAN MEEGEREN (1889-1947) is regarded as perhaps the most ingenious art forger of the 20th century. Because of the close similarity of his painting style to that of the “old masters” he was faced with critics’ accusations that his pictures were mere imitations and that he lacked the talent for his own creative work. VAN MEEGEREN thus felt unrecognized as an artist. To get his revenge, he decided to imitate the “old masters” so well that art critics would be fooled into thinking his paintings were genuine. To do this, he especially studied the painting of Jan Vermeer van Delft, one of the most famous Dutch painters of the Baroque era, of whose works fewer than 40 survive. Between 1936 and 1937 VAN MEEGEREN painted the forgery “Jesus and the Disciples at Emmaus”. The painting was submitted to the most important art historian of the Netherlands at the time, the “Pope of Vermeer”, Abraham Bredius, who was told it had been smuggled from a private Italian collection. Bredius was convinced it was genuine. The painting also passed five different tests that confirmed its supposed authenticity. In 1938, it was admired at an exhibition of Dutch masterpieces in Rotterdam to celebrate the 40th anniversary of Queen Wilhelmina’s coronation. No one seemed to notice the similarity of a woman standing beside Jesus to a then current photo of actress Greta Garbo.

For the paints used in his works, VAN MEEGEREN acquired old substances, including the semi-precious stone lapis lazuli, used by Vermeer. He bought old paintings from the 17th century and scraped off the images to be able to paint on their canvas. In addition, instead of oil he used instant curing resin and heated the final images in an oven to obtain a hard surface with fine hairline cracks.

Through the sale of six “rediscovered” Vermeers, VAN MEEGEREN became a millionaire. Between 1941 and 1942 he painted “Christ and the Adulteress” and sold the picture to the Bavarian banker Alois Miedl, art consultant and buyer for Hermann Göring. The Nazi Reichsmarschall, who had a magnificent art collection in his Carinhall hunting lodge north of Berlin, exchanged more than 200 paintings from his collection worth a total of about 1.65 million guilders for the “Adulteress” and, full of pride, put the work on display there. Göring later brought the image to safety from the Allied bombing raids in the Altaussee salt mine in Austria; where it was discovered by the Americans in 1945.

The spectacular transaction came to light after the war. VAN MEEGEREN was arrested on charges of collaboration – the sale of national art treasures to a hostile power. He faced the death penalty. So on July 12, 1945, he confessed: “*That painting that ended up in Göring’s hands is not, as you suppose, a Vermeer, but a VAN MEEGEREN! I myself painted that picture!*”

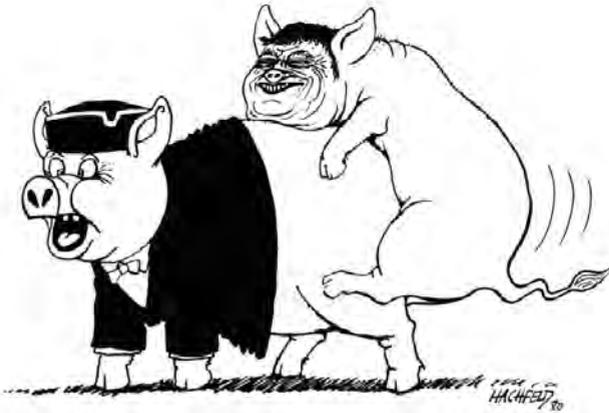
Because the investigating authorities did not believe him, VAN MEEGEREN was provided with the necessary materials in pretrial detention, where over the course of a few weeks he painted “Jesus Among the Scribes” in the style of Vermeer. An international expert commission then examined several “rediscovered” Vermeers and found they were all fakes.

On November 12, 1947, the Amsterdam Regional Court gave van Meegeren the most lenient possible sentence of one year imprisonment on charges of “name forgery” and

fraud. He died of a heart attack before entering prison.

The forger who managed to fool the art experts of the Netherlands as well as Hermann Göring remains popular to this day. In 2010, Museum Boijmans van Beuningen in Rotterdam hosted the exhibition “Van Meegeren’s Fake Vermeers”.

Art and Insult



Rainer Hachfeld:
 Satire darf alles.
 Rainer Hachfeld auch?
 (Satire can do anything.
 Can Rainer Hachfeld too?)
 Konkret 7/1980

Personal honor, understood as an entitlement to respect as required by human dignity, is protected under German criminal law by § 185 of the German Penal Code (StGB). This standard penalizes insult to another person in the form of proclamation of disrespect, contempt, or disdain in the form of words, images, gestures, symbolic acts, or by means of an assault. But it is especially in the field of satire that it proves extremely hard to draw the line between what is legally permissible and forbidden in accordance with § 185 StGB...



Charles Philipe:
 Louis-Philippe transformed into pear (1831)
 La Caricature 56/1831 and 65/1832

The case of “Strauss the Piggy”

In 1980-81, the German cartoonist RAINER HACHFELD (born 1939) published several cartoons in the monthly “Konkret”, which describes itself as the “only popular left-wing magazine in Germany”, depicting then-Bavarian Premier Franz Josef Strauss as a pig.

In the first, HACHFELD drew two pigs engaged in sexual intercourse. One pig, with Strauss’ facial features, copulates with another, in judge’s robes, from behind. An expression of joy can be seen on the face of the mounting pig, while the other appears surprised but compliant. The image was captioned, “*Satire can do anything. Can Rainer Hachfeld too?*” The reason was an interview with Strauss in the same issue, in which he straightforwardly declared, “... *I do not believe in any lawsuits against cartoonists. They need to have more freedom to do they please.*” HACHFELD’S provocative drawings themselves were aimed at the ongoing accusations of corruption against the politician, which, however, did no harm to his political career, since Strauss always had the judiciary on his side. Strauss filed a complaint against the cartoonist for the offense of insult.

HACHFELD responded promptly to the public prosecutor’s office’s preliminary investigation with a second caricature showing both figures of pigs – partly in pairs, partly separately – engaged in a variety of sexual activities. These caricatures were again provided with a provocative accompanying text: “*Which is the right drawing, Mr. Prosecutor?*” A later issue contained the sequel to the original drawing. This time four pigs were shown, three of them mounting the pig in front. Here, too, two of the pig figures are adorned with Strauss’ facial features, while the other two are dressed in judicial robes and caps. The cartoon was preceded by a statement by HACHFELD in which he complained that he was forced to draw “*piggy pictures*” again and again, as Strauss was always keeping the justice system busy. Strauss again filed a complaint of an offense for insult. The criminal proceedings lasted seven years and went through all instances up to the Federal Constitutional Court.

The courts were responsible for clarifying the question of whether HACHFELD’S drawings should be considered an insult under § 185 StGB. This required a balance between the protected interests of freedom of art in accordance with Art. 5 para. 3 of the German Basic Law (GG) and the general right of privacy of Art. 2 para. 1 in combination with Art. 1 para. 1 GG. Here, it is characteristic of satire and caricature to work with exaggerations, distortions, and alienation. The Supreme Court of the German Reich, the Reichsgericht, had once made the following statement: “*A satirical representation [must] first be stripped of the satirical garments chosen in words and pictures before it can be judged whether what is expressed and represented in this form contains the offense of an ... insult.*” However, a grave impairment of the general right of privacy is to be assumed – on the one hand, if there is an infringement of the fundamental personal honor protected by Art. 1 para. 1 GG, and on the other hand, if the core message is one of so-called vilification – that is, it inherently defames and degrades a person.

The Hanseatic Higher Regional Court found that “the drawings violate [Strauss’] honor ... because they portray him as a sexually active pig”. The drawing, it said,

should be understood to mean that Strauss “*obnoxiously uses the legal system for his purposes*” and “*feels an animal pleasure in a pliant system of justice*”. In addition, the court found the depiction of devious sexual behavior went “*beyond any satirical freedom*”.

HACHFELDS constitutional complaint against the decision was dismissed as unfounded. The Federal Constitutional Court argued it was evident the cartoonist had intended his work to be attack on Strauss’ personal dignity: “*It is not his human features, his personal peculiarities, that are to be brought home to the observer through the alienation chosen. Instead, the intention is to show that he has marked ‘bestial’ characteristics and behaves accordingly.*” The court further stated: “*Particularly the portrayal of sexual conduct, which in man still today forms part of the core of intimate life deserving of protection, is intended to devalue the person concerned as a person, to deprive him of his dignity as a human being. ... In the case of interference with this core of human dignity protected by Art. 1 para. 1 GG, a severe restriction on the general right of privacy is always present, which ... is no longer covered by the freedom of artistic activity.*”

The case of “The King of the Pears”

When in the 1980s, cartoonist Hans Traxler lampooned Helmut Kohl, then seeking election as West German chancellor, as a “pear” in both words and pictures in the satirical magazine “Titanic”, not everyone was aware that there was more to this mockery than his supposed physiognomic similarities, but it had a historical background. Following France’s July Revolution of 1830, the newly elected “King of the French” Louis-Philippe proffered a guarantee of complete freedom of the press and the renunciation of all censorship in the form of Article VII of the amended constitution.

From October 1830 to April 1831, however, five laws were enacted that enabled the government to set limits on press freedom. They included punishments for attacks by the press on the dignity of the king (law of November 29, 1830).

In reaction to the new circumstances, the so-called Petite Presse was formed whose pages followed political events in the form of satirical contributions of a literary and figurative nature. Within just three years, the most important satirical journals of the 19th century had been founded, including “La Caricature” (1830) and “Le Charivari” (1832). But beginning in mid-1831, their criticism became increasingly directed against the person of the king. While at first he had enjoyed a reputation of espousing liberal and democratic views, his style of government soon turned out to be conservative and authoritarian. Thus, in 1831-2 alone, there were 411 legal proceedings against various press organs with 143 convictions leading to fines or imprisonment.

One of these trials was brought against the publisher of “La Caricature” and “Le Charivari”, CHARLES PHILIPON (1800-1861), for lèse-majesty. The subject of the indictment included a drawing published in “La Caricature”, depicting a mason with the features of Louis-Philippe, who plasters over the ideals of the July Revolution written on a wall. PHILIPON’S defense against the accusation his depiction resembled the king was a *reductio ad absurdum*. He thus sketched the royal likeness metamorphosing into

a pear in four phases. By so doing, he attempted to make it clear to the judges that drawing a pear, a pear head, or indeed any grotesque heads that coincidentally bore a resemblance to Louis-Philippe, would have to be punished. To no avail – PHILIPON was sentenced on November 14, 1831 to six months' imprisonment and a fine of 2,000 francs. Only ten days later PHILIPON's pear sketches appeared in "La Caricature". Since at least some of the copies were confiscated, they were reprinted again in the January 26, 1832 issue. Their instant publication along with reports from various newspapers about the trial made the pear motif very popular. In the satirical pages, the pear motif was exploited massively by various caricaturists – in particular Honoré Daumier. As a result, it became a familiar derisive symbol of the July monarchy and led to the popular name for Louis Philippe as "roi poire" ("King of the Pears").

It is believed that the frequent use of the comparison to a pear in the satirical sheets caused the French word "poire" to come to mean "stupid" or "fool".

Art and the General Right of Privacy



*Allmächtiger Sommer (Sommer Almighty)
WirtschaftsWoche September 14, 2000*

In practice, attacks on personal honor in Germany are generally treated only as civil matters. Under civil law, the general right to privacy, as developed through the judicial interpretation of Art. 1 and 2, para. 1 of the German Basic Law (GG), protects the individual above all from the disparagement and misrepresentation of his or her biography and character image. In the event of infringement, civil law allows claims for damages and compensation for pain and suffering, or injunctive relief. Nevertheless, those affected must tolerate encroachment on their general right of privacy, if, in the context of balancing conflicting interests, this is outweighed by freedom of art guaranteed to artists in Art. 5 para. 3 GG and other fundamental rights.



*Erika Lust:
Ms. Orosz Campaigns for World Heritage (2009)
Private Collection*

The case of “Sommer Almighty”

In 2000, German business magazine “WirtschaftsWoche”, owned by the HANDELSBLATT publishing group, published an article titled “Sommer Almighty” about the economic and financial situation of Deutsche Telekom, the former telephone monopoly that had been privatized four years earlier. The tenor of the multi-page article was that Chief Executive Officer Ron Sommer had led the company into a serious crisis with his “autocratic” style, likening his rule to that of the French “Sun King”, Louis XIV. This came against the backdrop of billions in losses and the crash of Telekom shares on the stock market, which later caused the supervisory board to bring a premature end to the “Sommer era”. The article was illustrated with a photograph of a man in business suit, sitting on top of a crumbling magenta “T”, from the Telekom logo, blithely gazing upwards. The image had been created by taking a photo of Sommer’s head, stretching it by five percent, and then placing it on a different body. Sommer refused to accept that his face appeared longer, his cheeks fleshier and broader, his chin area fuller, his neck shorter and thicker, and his skin color paler – and filed for injunctive relief to enjoin publication.

After both the Hamburg Regional Court and the Hanseatic Higher Regional Court had decided in favor of Sommer, HANDELSBLATT appealed to the Federal Court of Justice, which overturned the decisions of the lower courts and dismissed the suit in its entirety. The mere fact that a satirical illustration had been published did not in itself open up the scope of protection of freedom of art under Art. 5 para. 3 GG, the court ruled, because while satire could indeed be art, not every satire is necessarily art. The photomontage, it said, “*clothed*” a statement of opinion, protected by Art. 5 para. 1 sect. 1 GG, in which a nonchalant Sommer is “*enthroned*” atop Telekom’s problems. As such, it ruled, the montage fell under the protection of free speech. The plaintiff would therefore have to expect a restriction of his general right of privacy in order to protect this freedom of expression.

Sommer lodged a constitutional complaint against the judgment of the Federal Court of Justice before the Federal Constitutional Court, which upheld his complaint in 2005: To the extent that Sommer’s face had been altered by technical manipulation, it said, this part of the graphical implementation of the message had a separate relevance to privacy: “*Photos suggest authenticity, and the viewer will assume that the depicted person looks like this in reality.*” This assumption would prove false with image manipulation that changes appearance: “*The picture’s message*”, the constitutional judges continued, “*becomes inaccurate if the picture is altered in ways that go beyond those needed solely for technical reproduction or that are insignificant to its content*”. uch manipulations affected the right of privacy. The court ruled that the allegation of fact about the depicted person was inaccurate information that could not serve the constitutionally provided ability to form a truthful opinion, and thus, from the perspective of this same freedom of expression, not subject to protection.

The Federal Constitutional Court set aside the judgment, and the case ultimately returned to the Hanseatic Higher Regional Court, which came to the conclusion that Sommer’s facial features had actually been manipulated in a manner that went beyond technically unavoidable changes. It also decided this manipulation had not

been so trivial that the privacy rights of the plaintiff would not be harmed significantly. The outcome thus remained: The defendant, the HANDELSBLATT publishing group, was prohibited from distributing the published photomontage.

An action filed by HANDELSBLATT before the European Court of Human Rights against the injunction was finally dismissed on March 16, 2016. This ended a legal dispute that had lasted 16 years.

The case of the “Dresden Mayor”

The painting “Ms. Orosz Campaigns for World Heritage” by ERIKA LUST (born 1961) was created in early 2009 as the artist’s response to the pending loss of UNESCO World Heritage Site status for the Elbe Valley in the German city of Dresden, which it had only been awarded in 2004. The reason for this was the controversial construction of the Dresden Waldschlösschen Bridge, which connects both banks of the Elbe river in a picturesque area. In the face of a binding 2005 referendum in which voters approved the bridge’s construction, opponents of the project turned to the UNESCO World Heritage Committee for help. The cultural landscape of the Elbe Valley was added to the list of Endangered World Heritage Sites in July 2006. Despite this, construction began in 2007. The World Heritage Committee made clear: *“If the construction of the bridge is not stopped and the damage is not repaired, the Dresden Elbe Valley will be removed from the World Heritage List in 2009.”* The World Heritage Committee again convened to discuss the Dresden Elbe Valley on June 25, 2009. Dresden was represented by Mayor Helma Orosz, a strong supporter of the construction project. The result of the six-hour discussion was that the valley was finally removed from the World Heritage List. The Waldschlösschen Bridge opened on August 24, 2013.

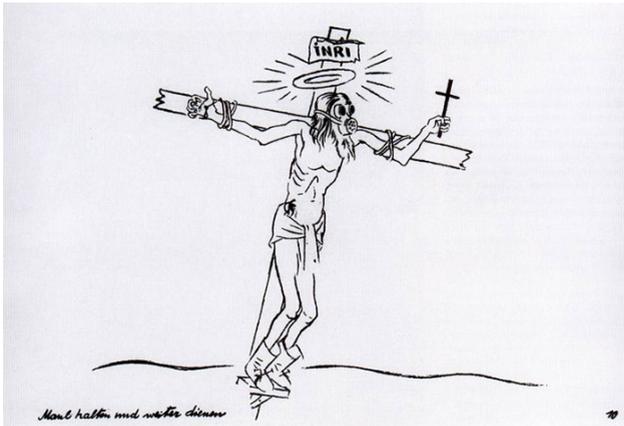
LUST’s painting, which depicts Orosz almost naked, wearing suspenders and her chain of office in front of the bridge, made its public debut on the internet in an announcement of an exhibition held by the Dresden Artists’ Union. The mayor found out about it from the mass-circulation tabloid “Bild”. She felt humiliated by the image and filed for injunctive relief against the artist. The Dresden Regional Court decided that Orosz’s right to her own image and her general right of privacy had been violated. The painting was not satire, the court ruled, because it did not show it had been *“produced with characteristics common to satire, with distortion, alienation, and exaggeration, but instead the observer is more likely to make the association with a real person.”* LUST was forbidden from making the image public in the original or as a reproduction, under penalty of a €250,000 fine.

In 2010 the Dresden Higher Regional Court overturned the judgment of the Regional Court. It ruled that freedom of art and expression had priority over the general right of privacy. The painting was *“a satirical representation of a current political event, which falls under the protection of the general freedom of expression”*. Orosz’s “campaigning” for the bridge was *“depicted with recognizable satirical intent, through the stance with open arms and the pose pointing to the bridge, and at the same time subjected to ridicule”*. The nudity could thereby *“be seen as an allegorical representation of the impossibility or [Orosz’s] inability ... to further influence the proceedings before*

UNESCO". It was, the court said, intended to present Orosz, in the manner of Hans Christian Andersen's "The Emperor's New Clothes", no longer as a figure of authority, but of ridicule, with only the mayor's chain of office remaining of her official dignity. The core of this statement, the judges ruled, kept within the limits of what Orosz had to accept as a politician and public figure. The court went further: "*For a satirical representation in the form of a painting to be acceptable, it cannot depend on whether the person shown is distorted to the maximum possible extent and thus no longer recognizable to the observer ... Nor must the addition of a different body necessarily lead to the prohibition of the publication of the image ... However, a female nude in a painting differs from a photomontage in that its creation always represents only the artist's interpretation of the depicted person, even in naturalistic representation. This also characterizes the expectations of the viewer.*"

ERIKA LUST had sold the picture to an innkeeper for €1,500 before the first trial.

Art and “Blasphemy”



George Grosz:
Maul halten und weiter dienen
(Shut up and keep serving)
„Hintergrund“ – 17 drawings
for the performance of „Schweik“
in the Piscator stage (1928)

Insulting religious confessions, faith communities, and ideological associations can be punished with up to three years' imprisonment or a fine under § 166 of the German Penal Code (StGB), Germany's "blasphemy law". This provision has immense significance for the criminal liability of artistic activities – in particular, those involving caricature and satire, which have always taken aim at religion and clergy.



Chris Ofili:
The Holy Virgin Mary (1996)
Museum of Modern Art, New York

The case of “Christ with a Gas Mask”

One of the most sensational trials involving an alleged violation of § 166 StGB saw the German painter, graphic artist and caricaturist GEORGE GROSZ (1893-1950) and his publisher WIELAND HERZFELDE (1896-1988) before the dock.

The indictment for insulting the institutions of the church was filed in May 1928. In contention were three of 17 drawings that GROSZ had originally made for the set design of Erwin Piscator’s stage production of Jaroslav Hašek’s “The Adventures of the Good Soldier Švejk” in Berlin in January 1928. These were also published as a portfolio entitled “Hintergrund” (“Background”).

Sheet 2 of the portfolio, captioned “Seid untertan der Obrigkeit” (“Bow to the authorities”), shows a member of the clergy balancing a cross on his nose in front of an open Bible while a Prussian and an Austrian officer stand alongside; in the background, a judge wields a whip with tails shaped like legal section marks. Sheet 9 shows a clergyman clenching his fists during a sermon at the pulpit; all sorts of munitions escape from his mouth. It is subtitled “Die Ausschüttung des heiligen Geistes” (“The Outpouring of the Holy Spirit”).

The initial sentence by the Berlin-Charlottenburg Court of Lay Assessors on December 10, 1928 was based solely on sheet 10 of the portfolio: It found the drawing, showing Christ hanging on the cross wearing a gas mask and soldier’s boots, with the caption “*Maul halten und weiter dienen*” (“*Shut up and keep serving*”) – which from the point of view of the court was placed in Christ’s mouth – to be a crude and disparaging manifestation of contempt for the crucifix, venerated by so many.

GROSZ and HERZFELDE were acquitted on appeal by the Second Grand Criminal Division of Berlin Regional Court III on April 10, 1929. The drawings, the court argued, needed to be seen in context to reveal their full meaning. The image of Christ with the gas mask had to be understood in terms of the core statement: “*A gas mask and soldier’s boots have as little to do with Christ as the warmongering teachings of the church’s representatives have to do with the actual message of Christianity.*”

The court found GROSZ had intended to illustrate the degradation of Christian doctrine by a bellicose church but had not declared that he himself thought that way.

The Second Criminal Division of the Supreme Court of the German Reich, the Reichsgericht, which reviewed the case on appeal on points of law, did not agree with this interpretation. In its decision of February 27, 1930, the Second Criminal Division stated that it could only be a matter of the artist’s intentions “*if the artistic means employed were capable of evoking solely the intended impressions and not others*”. It said it was therefore necessary to examine whether the representation of Christ “*in a disgraceful situation*” would be seen by believers as a particularly crude form of contempt, regardless of the intentions of the artist. It did not discuss the matter of to whom the words “*shut up and keep serving*” in the caption were to be assigned.

It was considerations like these that occupied Berlin Regional Court III after the Reichsgericht referred the matter back for another hearing. In its judgment of December 4, 1930, the Regional Court upheld the findings of its initial decision, that the phrase could not meaningfully be attributed to the depicted Christ. Based on this

it once again ruled to acquit, and this in turn was upheld by the Reichsgericht after a second appeal on points of law on November 5, 1931.

Just over a year after the trial ended – in January 1933 – GROSZ left Germany. He was only to return to West Berlin more than 25 years later, where he died on July 6, 1959. In 1937 several of his works, including “Christ with a Gas Mask” were shown in the Nazis’ “Degenerate Art” exhibition in Munich.

The case of “The Holy Virgin Mary”

From October 2, 1999 to January 9, 2000, the Brooklyn Museum of Art in New York hosted the eagerly anticipated exhibition “Sensation”. The art show, which featured works from the collection of art dealer and gallery owner Charles Saatchi, had previously visited the Royal Academy of British Arts in London and the Hamburger Bahnhof in Berlin.

The Nigerian-British painter and sculptor CHRIS OFILI (born 1968), a member of the Young British Artists group, contributed his painting “The Holy Virgin Mary” to the exhibition. It depicts a black Madonna surrounded by numerous figures made of cutouts of female genitalia from pornographic magazines. These allude ironically to the figures of little naked boys (putti) who often adorn traditional religious paintings. One of the Madonna’s exposed breasts is made of a clump of elephant dung.

The artwork had been displayed without incident in London and Berlin but led to a heated debate even before the exhibition opened at the Brooklyn Museum of Art in New York: Rudolph Giuliani, then mayor, called it “*sick*”. Giuliani took OFILI’s use of elephant dung, among other materials, as an attack on religion. The mayor demanded the artwork be removed and withheld \$7.2 million in funds already appropriated for the museum when it refused.

William Donahue, president of the Catholic League for Religious and Civil Rights, was also enraged by the picture. Speaking of OFILI’s work, he said it was no wonder that even Adolf Hitler had been acknowledged as an artist, because all he had needed to do to be welcomed into artistic circles was to call himself one. The controversy notwithstanding, the exhibition attracted many visitors.

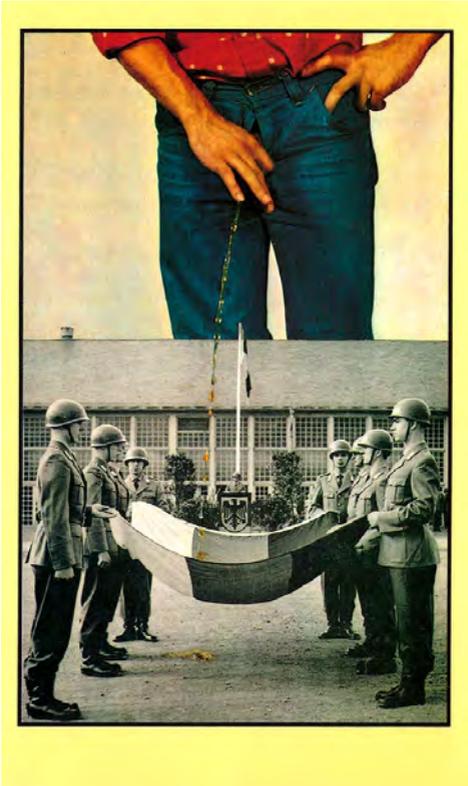
Later, the US District Court for the Eastern District of New York ruled that Giuliani’s withholding of funds violated the freedom of expression guaranteed in the First Amendment to the United States Constitution: “*There is no federal constitutional issue more grave than the effort by government officials to censor works of expression and to threaten the vitality of a major cultural institution, as punishment for failing to abide by governmental demands for orthodoxy.*” As justification, Judge Nina Gershon added, “Sensation”, despite its controversial nature, had been judged by other prominent museums to be worthy of public display. During the legal proceedings, the Brooklyn Museum pointed out that OFILI often used dried elephant dung as a cultural reference to his African homeland; the pornographic clippings were meant to signify the decadence of the west. Giuliani retorted, “*There is nothing in the First Amendment that supports horrible and disgusting projects.*”

In mid-December 1999, 72-year-old Dennis Heiner succeeded in smearing paint on

the face and upper body of OFILI's Madonna before he was apprehended by security guards at the Brooklyn Museum. Heiner's wife later stated that her husband, a devout Catholic, had wanted to protest "blasphemy". Charged with second-degree criminal mischief, Heiner was given a conditional discharge and a fine of \$250.

After the controversy in New York, an already planned exhibition of the picture at the National Gallery of Australia in Canberra was canceled. In 2007, Australian art collector David Walsh acquired OFILI's Madonna. It was shown at the Tate Britain in London in 2010 as part of a retrospective on OFILI's artistic work. Since 2011, "The Holy Virgin Mary" has been exhibited in Walsh's private Museum of Old and New Art (MONA) in Hobart, Tasmania. *(Since 2018 the painting has been in the (Museum of Modern Art [MoMA]) in New York.)*

Art and Subversion



Jürgen Holtfreter:
Rear cover of book
„Laßt mich bloß in Frieden – Ein Lesebuch“
(Just Leave Me Alone – A Reader)
by H. Venske u.a. (1981)

The first two sections of the Special Part of the German Criminal Code bring together important criminal provisions for the protection of the state.
At the core are offenses endangering the democratic constitutional state, intended to protect the Federal Republic of Germany from vilification (§ 90 et seq. German Penal Code, StGB) and prevent propaganda that endangers the state (§ 86 et seq. StGB).



Kiss: Tournee Alive (2008)
Event poster Paris-Bercy
Event poster Mannheim



The case of “Urination on the Flag”

§ 90a para. 1 No. 2 StGB protects the flag of the Federal Republic of Germany as a state symbol. Desecration of the flag is punishable by imprisonment of up to three years or a fine.

This protection of the national flag against defilement, however, can collide with the constitutional guarantee of freedom of art. One such collision passed through several levels of the judicial system and found resonance in legal scholarship. It was based on the following: A book distribution company sold numerous copies of the paperback “Laßt mich bloß in Frieden“ (“Just Leave Me Alone”) in 1981 and 1982, described as a “reader” that compiled antimilitarist prose and poetry, loosened up with caricatures and collages. The back cover was a collage of two images. Above the collage, a color photograph showed a male torso directing a stream of urine downwards. Below, an image of Bundeswehr soldiers holding the flag outstretched during an oath-taking ceremony – as the target of the urine. On the ground below the flag is a yellow puddle. This juxtaposition led to prosecution.

The Giessen Local Court fined the managing director of the book distribution company 90 daily rates of 50 German marks (€26) each. In the judges’ opinion, there was no question of freedom of art, since they could not detect any indication that the paired images were, in fact, a work of art. The court stated: *“It may be that some professor may, from his subjective evaluation, discover some so-called art in this picture, but the court is not bound by such an evaluation.”* The Frankfurt Higher Regional Court dismissed the appeal on points of law as groundless. The defendant then lodged a constitutional complaint with the Federal Constitutional Court, reprimanding his guarantee of freedom of art had been violated. On March 7, 1990, the court reversed the conviction:

Taking its aspects of form and content into account, the court began by affirming that the collage was indeed a work of art. This characteristic, the judges ruled, could not be negated by the offensiveness of what it depicted. Art, they said, was not subject to an assessment of style or standard on the part of the state. Accordingly, the fact that the artist wanted to convey a certain opinion with his work did not deprive it of the protection of freedom of art.

At the same time, the court said, this would not have ruled out punishment under § 90a para. 2 No. 2 StGB. The guarantee of freedom of art could, it said, clash with constitutional provisions of all kinds. The purpose of state symbols is to appeal to citizens’ national pride, it said, and as a free state, the Federal Republic of Germany relies on the identification of its citizens with the fundamental values the flag symbolizes. It is this significance of the German flag, the court said, that makes it the object of protection of this provision under criminal law – which in turn comes into conflict with the freedom of art.

However, in light of freedom of art, the court said the protection of symbols should not lead to the state becoming immune to criticism or even outright rejection. It said it was therefore necessary to weigh up the conflicting constitutional rights on a case-by-case basis.

The court found the conviction did not meet these constitutional requirements: The caricature, it said, primarily had an anti-militarist tendency. It was directed against the state swearing-in ceremony or the soldiers' oath. While the court found the picture showed a state symbol being treated in an unworthy manner, it decided this attack was aimed at the state only to the extent that the state lent military service a special legitimacy through the use of its symbols in the soldiers' commencement of their duty. The expressed criticism thus applied not to the flag itself, but to its abuse – a fundamental statement embodied and alienated by the man urinating on the state symbol. The means of satirical alienation, the court ruled, are afforded greater freedom than their actual contents.

The case of “Kl↯”

Alongside the swastika, the runic „↯“ insignia is the symbol that awakens the most obvious associations with the Nazi regime. This sign, known in the National Socialist era as the “Sieg rune” or “victory rune”, was the emblem of various youth and junior organizations of the Nazi party. The double “Sieg rune” also served as an identifying mark of the paramilitary Schutzstaffel (SS). More than any other, it is a symbol that stands for despotism and tyranny. The democratic constitutional state may have an interest in banishing such symbols from everyday political life.

§ 86a para. 1 No. 1 StGB therefore criminalizes the use of symbols of anti-constitutional organizations. Infringements are punishable by imprisonment of up to three years or a fine. However, in view of the recognition that any penal law restricting freedom of art must be viewed in light of the value-imparting significance of the guarantee of freedom of art, a consideration of the specific conflicting constitutional values that takes into account the circumstances of the individual case is also necessary under the application of § 86a StGB.

Consequently, the question arises as to whether and to what extent art using such a symbol can be open to criminal charges. The issue was raised in the following case:

Founded in 1973 in New York, the US hard rock band Kiss is one of the world's most successful rock groups, with more than 100 million albums sold. In their logo, the “S” of the band name appears as „↯“. Asked why, bass player Gene Simmons said it had nothing to do with the SS – and that he was Jewish. After investigations by the German public prosecutor's office against Kiss's German distributor and a warning to record stores that all Kiss albums could be confiscated, the Hamburg record company Phonogram announced in 1980 it would change the logo.

Beginning with the release of the compilation album “Killers” in 1982, new Kiss records (including reissues) have been distributed in Germany with two more conventional S's in the band name on the cover. Old pressings and imports are still sometimes available, with the result that the problem with § 86a StGB has not been eliminated completely: In July 2008 Baden-Württemberg Justice Minister Ulrich Goll (FDP) replied to a query by two Green Party members, informing the state parliament that three preliminary investigations had been initiated at the Mannheim public prosecutor's office in 2001 and 2002 in connection with the use of runes in the lettering of the music group Kiss.

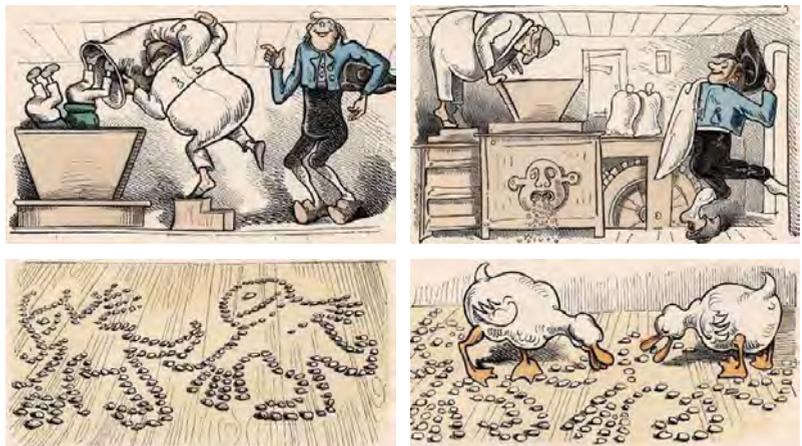
However, none of these proceedings had resulted in a conviction. In the summer of 2008, Kiss performed in eight German cities on their “Alive 35” tour. Unlike in other European countries, the band name was written on posters with the two conventional S’s. The Kiss logo with the runes, however, adorned the stage without complaint. And in 2011, then- Bavarian Environment Minister Markus Söder (CSU) appeared on Bavarian television’s top-rated “Fastnacht in Franken” variety show dressed as Kiss singer Paul “Starchild” Stanley wearing the old rune logo on his shirt, without any legal consequences.

Art and Glorifying Violence



*Cannibal Corpse:
T-Shirt with the Cover of „Butchered at Birth“
by Vincent Locke (1991)*

German legislators criminalized the circulation of excessive forms of images that glorify violence through the 4th Penal Law Reform Act (Strafrechtsreformgesetz [StrRG]) of November 23, 1973 (§ 131 of the German Penal Code, StGB). Other countries do not have any similar criminal legislation. The current law means that spreading these images can invite a prison sentence of up to one year or a fine if “they depict brutal or other inhumane forms of violence against people or humanlike creatures in a way that glorifies or trivializes these acts of violence or shows the brutality or inhumanity of the action in a way that violates human dignity”.



*Wilhelm Busch: Drawings from „Letzter Streich“ (“Last Trick”) (1865)
Max und Moritz. Eine Bubengeschichte in sieben Streichen
(Max and Moritz. A Rascals History in Seven Tricks)*

The case of “Butchered at Birth”

CANNIBAL CORPSE is a US death metal band that was founded in 1988. It immediately caused a stir with the cover of its second studio album entitled “Butchered at Birth” in 1991; this was designed by the American cartoonist, VINCENT LOCKE. He has gained fame by creating extremely violent horror drawings and still illustrates nearly all of CANNIBAL CORPSE’S albums. The cover of “Butchered at Birth” shows two zombies with bloodstained aprons, skeletonizing a woman who is giving birth on a table. One of them seizes the child and its umbilical cord from the woman’s womb, while the other stabs the woman’s heart through the skeletonized ribs with a butcher’s knife. Baby corpses, hung up by their intestines and umbilical cords and some of them without arms and legs, are visible in the background.

The German Federal Department for Media Harmful to Young Persons outlawed the cover just a few weeks after its appearance because of its ability “to disorient children and young people in social ethical terms” and “threaten morals”. This meant that children and young people were unable to gain access to the cover in any form. However, the Federal Department did not cover the song texts on the “Butchered at Birth” album, which are virtually incomprehensible because of the typical growling noise, but not any less violent.

The explanation for outlawing the cover also added that it was obvious “*that the cover could be classified as a work of art, even using a broad concept of art*”. The ruling continued, “*the guarantee of freedom of art, however, is not infinite, but is restricted by the German Basic Law itself. Consideration must therefore be given to the opposing constitutional values of freedom of art, protecting young people and protecting human dignity, as guaranteed in Art. 1 para. 1 of the German Basic Law. The purpose of the cover is solely to represent the most violent brutality. It is designed in such a way that observers’ regard for the physical integrity of human beings and their ideas of humaneness are deeply violated.*”

CANNIBAL CORPSE record label then sold “Butchered at Birth” with a “neutral” cover. “Butchered at Birth” was then banned throughout Germany through a ruling by Stuttgart Local Court for glorifying violence (an infringement of § 131 para. 1 and § 184 para. 3 StGB [old version]) on March 3, 1994. The album could then no longer be sold to adults either and the music could not be played in public.

The ruling by Stuttgart Local Court fell under the statute of limitations in 1997, so that “Butchered at Birth” was still banned, but adults could purchase it again. A new version of the “Butchered at Birth” album appeared in Germany at the end of 2002 and the Federal Department banned both the cover and song texts in 2003 – and this is still the case today.

The strategy of forbidding the spread of these kinds of albums through the retail trade, particularly to protect young people, fails because people can order the banned CD with the original cover from abroad via the Internet without any great effort. In addition, only the cover itself is banned, but not the motif, so that fan items like t-shirts or stickers can be legally purchased with the motif.

The case of “Max and Moritz”

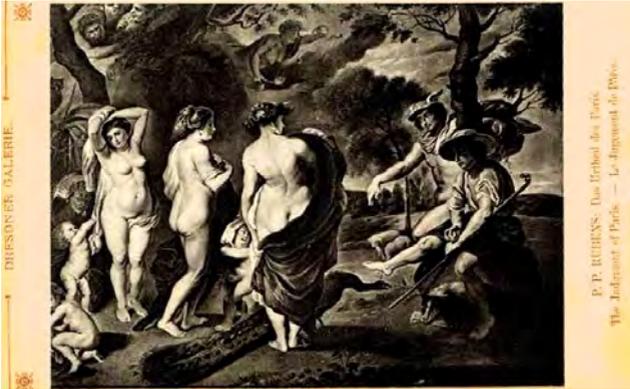
Even CANNIBAL CORPSE has not yet written a text where children are cast into the chute at a grain mill alive and then thrown to animals as crushed feed. Their cartoonist, Vincent Locke, has not yet designed this kind of cover either. Both would certainly be banned quickly and the album would be attacked at once for depicting violence, in accordance with § 131 StGB. However, a book successfully started making its way into many German children’s rooms almost 150 years ago, where this kind of brutal killing scenario is depicted in images and words: WILHELM BUSCH (1832-1908) sent what is easily his most famous work “Max and Moritz” to his discoverer and first publisher, Kaspar Braun, in Munich in February 1865.

“*Woe to you!*” Who still hasn’t heard about them? The story of the scoundrels and their seven pranks, which has amused children, young people and even adults all over the world since it was first published, turned BUSCH into one of the most famous Germans of his day. BUSCH created a new genre with his pictorial stories and is therefore called the “father of modern comics.” His unmistakable style involves a mixture of humorous images in the style of wood engravings and words written in couplets and bristling with mischievousness.

What is the moral of the story? Max and Moritz have their childlike fun in a village in the then-Kingdom of Hanover in the mid-19th century. “*Teasing creatures – climbing fences / Stealing apples, pears, and quinces / Is, of course, a deal more pleasant / And far easier for the present / Than to sit in schools or churches / Fixed like roosters on their perches.*” Their first and second tricks are directed against Widow Bolte. Her precious poultry first swallow pieces of bread that Max and Moritz have tied to threads connected to each other in the form of a cross. When trying to disentangle themselves, the poultry hang themselves on a branch of a tree and later end up in Widow Bolte’s frying pan. The rogues then haul the freshly fried chickens up the chimney and eat them. Bock, the master tailor, who falls into the water head over heels when a wooden bridge, which Max and Moritz had sawn, splits in two, is the victim of the third trick. In the fourth, Max and Moritz stuff gunpowder into the meerschaum pipe of teacher Lampel; it explodes when lit. “*Nose, hands, eyes and ears / Are quite black now, it appears / Burned the last thin spear of hair / And his pate is wholly bare.*” Uncle Fritz is the victim of trick five; Max and Moritz give him an uneasy night by hiding May beetles under his blanket. The scoundrels themselves fall into the cake dough in the sixth trick when attempting to steal delicacies from the master baker. They survive the baking process and are able to escape. But the seventh and final trick proves their downfall: Farmer Mecke catches the rascals as they cut holes in full grain sacks, seizes them and takes them to the mill. The miller throws the rogues head over heels down the mill’s chute to punish them until it crushes them alive – “*Rumble, grumble, batter, chatter / Grinds the mill with crackling clatter*” – and then feeds them in coarsely ground form to the geese. And as if the brutal execution were not an excessive punishment, the village community is not at all deterred by the death of Max and Moritz, but rejoices at the end of the “*great rascality*”.

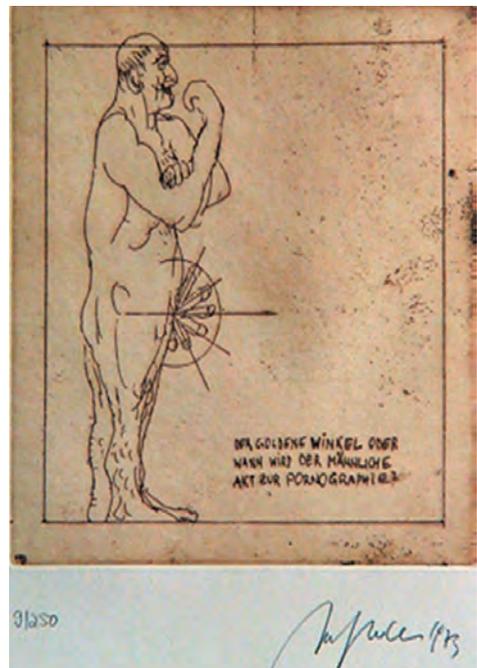
The work is still read today as a harmless rebellion or protest story against adult authority; it provides amusement, and nobody would think of banning it for glorifying violence.

Art and Pornography



(Studio of) Peter Paul Rubens:
The Judgment of Paris (around 1636)
Gemäldegalerie Alte Meister, Dresden

“Art can be obscene, but never simultaneously pornographic.” – This conceptual exclusivity of art and pornography was meant to end the conflict, once perceived as bothersome and embarrassing, between freedom of art and the punitive ban on the dissemination of pornographic publications (§ 184 German Penal Code, StGB). But the development of a broad concept of art increasingly weakened the foundation underlying this exclusive relationship between the two categories. It led instead to the recognition of an intermeshing of both fields, in which representations dealing exclusively with sexuality could also have an artistic character. It should be apparent that the further the concept of art is taken, the less manifestations of pornography can be excluded from the arts. But how must “indecent” acts of artistic creation be constituted to survive as “decent” art? Here is an extract of our search for evidence:



Alfred Hrdlicka:
Goldener (Penis-)Winkel
(Golden [Penis-]Angle) (1973)
Portfolio „Wiener Blut“

The case of the “Artistic Postcards”

In the mid-1830s, the Englishman William Henry Fox Talbot developed the principle of the negative-positive photographic process, which allowed the reproduction of a photographic image using prints from a negative. It became the basis of all major photographic processes from about 1860 onwards and also made possible the ubiquitous picture postcard, which often showed works of painting and sculpture. Resourceful book and art dealers soon discovered they could draw a lot of attention by putting out artistic postcards depicting naked women.

But by displaying these postcards publicly in shop windows, they soon faced the charge of disseminating “indecent publications”, which had been prohibited under criminal law throughout the German Reich since its foundation in 1871 (§ 184 Penal Code of the German Reich, RStGB). This defined as “indecent” any publication that was likely to undermine the general public’s sense of morality.

In May 1907, the Breslau stationer EMMO DELAHON – like other merchants before him – faced charges because he had sold postcards, including some depicting the painting assigned to the School of Rubens “The Judgment of Paris”, to a police commissioner posing as a customer. In the painting, the Greek goddesses Aphrodite, Athena and Hera are depicted naked, each trying to win the favor of the mortal youth Paris in the hope he would award her the golden apple inscribed “The Fairest of All”. On June 18, 1907, the Breslau Regional Court sentenced DELAHON to six weeks in prison for distributing indecent publications. But shortly before, the Dresden public prosecutor’s office, referring to the jurisprudence of the Supreme Court of the German Reich, the Reichsgericht, had decided not to press charges in another case involving the alleged indecency of exactly the same postcard: “*The originals of these replicas are well-known works of art ... They have the recognized purpose of emphasizing the beauty of the bare male and female human body. Such a representation is not indecent per se*”, the court reasoned. “*Therefore, the reproduction of such a work of art is in itself also not indecent*” and also does not become so through “*the subjective intent of the disseminator*”.

The Reichsgericht nevertheless rejected DELAHON’S appeal on points of law against the Breslau judgment on September 27, 1907. By displaying the postcards in his showcase, it ruled DELAHON “*had exhibited them to every passer-by for the purpose of sale without distinction of sex or education.*” The court accepted that the postcards showed pictures of paintings by famous masters. These had, however, “*been intended ... to arouse sexual lust*” and were therefore capable of “*injuring the feeling of shame and morality with respect to sexuality, under which ... only the overall violation of the normal average sense of discipline and morality can be understood*”.

The Reichsgericht’s jurisprudence was therefore not consistent in this regard. That probably explains why in another trial the following year the Breslau Regional Court, despite misgivings, found a reproduction of “The Judgment of Paris”, along with two other artistic postcards, not to be indecent. The matter thereafter went quiet in Breslau. After the Berlin public prosecutor’s office founded the “Central Office to Combat Filth in Word and Image” in 1910, the artistic postcard trials shifted to the capital. The outbreak of World War I soon focused attention on more important matters. After the

war, there was little more in the way of artistic postcard trials. The zeitgeist of the Weimar Republic was – at least in the early years – very different...

The case of the “Golden Penis Angle”

The understanding of “indecent publication” in the sense of a representation injuring general feelings of shame and morality remained in place for many more years. Only in 1973 was the term “indecent” replaced in § 184 StGB by “pornographic”. Protection of minors was intended to take the place of the protection of public morality, allowing the publication, within limits, of softcore pornography for adults. What remained unsettled, however, was what was meant by pornography. Change of scene: In the summer of the same year the Vienna bookseller Wilhelm Herzog was charged with distributing pornographic magazines and books in Austria and sentenced to three months imprisonment on probation. He had published a private collection of lyrics and drawings, more than a century old, under the title “Wiener Blut” (“Viennese Blood”). It contained, among other things, erotic images from a time when love and eroticism were viewed as a means to the end of procreation within wedlock, while everything that went beyond this was frowned upon and branded as sin. A review of the book, also referred to as the “Biedermeier Erotikon”, said: *“Here, what an anonymous Viennese painted in water-colors before the turn of the century, could roughly be summed up by a much earlier dialect rhyme, ‘Oh you, my dear boy / I beg you, thrust away / And it’s just so good right now / Cause it’s making me come – and how!’* In Germany, in contrast, Herzog’s book was published without objection.

When the Austrian sculptor and painter ALFRED HRDLICKA (1928-2009) learned of Herzog’s conviction, he took it upon himself to protest what he saw as the hypocrisy, smugness and bigotry of the prevailing legal situation by creating a cynical cycle of 16 color etchings, which he also called “Viennese Blood”, as a commentary on the pornography law. Austrian journalist GÜNTHER NENNING (1921-2006) undertook a further provocative act by publishing parts of this cycle in his magazines “Forum” and “Neue Freie Presse”. They then reported themselves to the Vienna public prosecutor’s office, saying: *“We are not in a position to determine, before bringing our act to fruition, whether we have committed a crime or not. That is why we are filing charges against ourselves.”* They included the etchings with the report as evidence.

With the “Viennese Blood” cycle, HRDLICKA denounced the *“sexual intercourse without reproductive organs”* that lawmakers had demanded for the public sphere, and thus leading, in HRDLICKA’S view, to a condemnation of all sexual activity. With the etching *“The Golden Angle, or When Does the Male Nude Become Pornography?”* he thus sarcastically posed the question of how erect a penis must be before it becomes pornographic. In doing so, he attempted to illustrate the consequences that can result from an all-too-literal interpretation of legal clauses.

HRDLICKA and NENNING ultimately did not face legal action in Austria. In contrast, a folder containing the etchings, which HRDLICKA had sent to the Propyläen publishing house in West Berlin, was seized by customs at Tempelhof Airport as a “pornographic publication” in accordance with § 184 StGB.

Art and Cruelty to Animals



*Tinkebell:
My dearest cat Pinkeltje (2004)*

Whenever artists use living creatures for artistic purposes and allow them to become part of an artwork or art event, fierce criticism often breaks out in the public arena. But why? Artists may confront their audiences with shocking scenes, but countless animals face no less abhorrent treatment at factory farming companies every day. Most members of the public, who are enraged by “animal art”, support cruelty to them through their consumer behavior.

Despite this, artists may be liable to prosecution if they kill a vertebrate “*without a sensible reason*” or cause “*significant pain or suffering*”. According to § 17 of the Animal Protection Act (Tierschutzgesetz [TierSchG]), any such action can lead to a prison sentence of up to three years or a fine. The penal law assessment can be difficult in individual cases. Here are two examples to illustrate the point.



*Falk Richwien:
Das Ableben des Hasen
(The Demise of the Hare) (2006)
Theater der Rituale, Berlin*

The case of “My-dearest-cat-Pinkeltje”

The Dutch conceptual artist TINKEBELL (* 1979), whose real name is KATINKA SIMONSE, has caused an enormous stir on several occasions.

The graduate of an art university in Amsterdam has repeatedly sparked debates by staging scenes involving pets. The police intervened in 2008, for example, when she showed 100 hamsters in treadmills at an Amsterdam gallery. TINKEBELL commented, *“Nobody says anything about one hamster in a treadmill, but they suddenly do if there are 100.”*

TINKEBELL launched her controversial art career in 2004 when she personally broke her pet’s neck – a tomcat named Pinkeltje – and turned it into a handbag using her sewing machine.

When questioned about her motives for this art event, she admitted that her tomcat was terminally ill and she wanted to shield him from a poisonous injection; she believed her cat was very frightened of the vet. As she was not planning to turn her tomcat into a handbag from the outset, she initially kept the animal in a freezer for a few months. Then she hit on the idea of making something “artistic” out of her cat. Killing the animal therefore only became part of the artwork in retrospect. The artist only wanted to use this artistic event to expose “double standards”, as she emphasized in countless interviews: people’s love of their own pet compared to their ignorance about the torture faced by animals that are processed for industrial purposes.

When assessing this case in the light of German law, it is probably necessary to assume that the artist cannot invoke freedom of art as her justification, since her primary motive for the killing was not artistic. However, it is possible to view the killing of the tomcat in isolation from freedom of art. A “sensible reason” that excludes criminal liability in the sense of § 17 TierSchG could be assumed, if the animal’s sickness was associated with pain or suffering and treatment was impracticable or unlikely to be successful.

The case of “The-Demise-of-the-Hare”

A happening involving the German performance artist, FALK RICHWIEN (born 1963), caused no less of a stir in February 2006. The presentation, which was entitled “The-Demise-of-the-Hare”, took place in a rear courtyard gallery – the “monster cellar” – in the Mitte district of Berlin.

Some 20-30 interested people, who had learned about the event in a city magazine, gathered in a backroom at the gallery at about 22:00; two white rabbits were in a cardboard box. The performance started when RICHWIEN handed the first animal to a butcher who was present and he deliberately struck the animal on its neck with a club. The butcher held the animal by its paws while the artist’s assistant dressed in black leather broke the rabbit’s neck. She then cut off the animal’s head on a wooden block and hung it in a glass filled with formaldehyde, tied to a nylon thread. The second rabbit was killed in the same way during the silent performance. The artwork created

by this was called “Hare in Formaldehyde” and could be purchased for € 9,800, until it disappeared without a trace, after pressure was exerted on the gallery. The remaining parts of the rabbits were eaten by a group of twelve people a few days later – as had been planned from the outset.

In RICHWIEN’S view, art experienced in this way is designed to educate people. He says its goal is spirituality and it works at an emotional level. The artist said, *“I’ve tried to do something consciously and have therefore troubled people’s consciences – the consciences of devouring consumers. Calling this event cruel is naive – it occurs at our slaughterhouses every day – it’s just repressed.”*

Tiergarten Local Court sentenced both RICHWIEN and the butcher to fines about one year after the event. Their appeal to Berlin Regional Court and their appeal on points of law to the Court of Appeal in Berlin were unsuccessful. The Court of Appeal based its review of the appeal on § 17 No. 1 TierSchG and endorsed the view of the Regional Court that the artist killed the animals without any sensible reason.

Meat production may be a sensible reason for killing animals. In this case, however, the killings primarily served a different purpose. The court said that the accused wanted to arouse the greatest possible public interest when killing the two animals for their artistic project. It added that eating the animals a week later did not change anything.

The Court of Appeal recognized that the basic right of freedom of art had to be respected when interpreting the “sensible reason”. However, it insisted that unrestricted freedom of art did not take fundamental precedence over animal protection. It added that this basic right was rather subject to restrictions inherent in the Basic Law. Ever since animal protection had been included in Art. 20a of the German Basic Law (GG) as a state objective (*“The state protects ... animals as part of its constitutional order”*) in 2002, the interests of animal protection needed to be considered as part of freedom of art. This form of artistic expression – event art that was designed to startle people in a drastic manner through a clear presentation and by celebrating the killings, as it were – was particularly fitting to counter the goal of Art. 20a GG. The court said that the ease of consciously killing this kind of animal had been clearly shown to the public. This interpretation, the Court of Appeal continued, did not rob freedom of art of its essential content. After all, the accused were free to express their concern in a different way – and their artistic concern did not require two animals to be killed at the same time.

Putting aside the issue of love for animals, the final sentences of the Berlin Court of Appeal deserve further consideration. Transferred to other cases, they would mean this: ERIKA LUST could have made her protest against the Waldschlösschen Bridge far more discrete than painting the mayor of Dresden in suspenders. CANNIBAL CORPSE could have selected a simple cover for their album, like the Beatles’ “White Album”; their music would have remained the same. RUBENS could have painted his “Judgment of Paris” with fully clothed goddesses – as Sandro Botticelli once did in the Renaissance – but would it still be possible to talk about freedom of art if these demands were followed?

Art is not allowed to do “absolutely anything” – which could be postulated in connection with Tucholsky’s words. It should rather merge with other constitutional values like animal protection “*with the goal of optimization to achieve an appropriate balance*”. So, *art can do “a great deal”*. However, there is no need for pronouncements that it could be performed differently and more considerately to satisfy other constitutional values. Otherwise, art can only do “little”: anything that might avoidably affect other constitutional values would be forbidden – with the consequence that freedom of art would only be a second-class fundamental right.

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Exhibition Board Art and Cruelty to Animals

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The Team

**Team of the Department of Criminal Law, Law of Criminal Procedure and
Criminology of the European University Viadrina Frankfurt (Oder)**

**Prof. Dr. Dr. Uwe Scheffler,
Dr. Dela-Madeleine Halecker, Dr. Joanna Melz,
Claudia Zielińska, Lisa Weyrich, Paul Hoffmann
and Peggy Zimmer (design of the brochure)**

Former employee involved in the exhibition
Alice Anna Bielecki, Yvonne Biesenthal, Robert Franke,
Christian Lüdorf, Christin Toepler
and Max Ullrich (technical support)



Photo: Benk)

Prof. Scheffler at the first exhibition on October 21, 2013 at the Viadrina
with the founding team

Left: Y. Biesenthal, C. Lüdorf

Right: Dr. D.-M. Halecker, M. Ullrich, Dr. J. Melz, R. Franke, L. Weyrich,
C. Toepler, A. A. Bielecki, C. Zielińska



Photo: K. Scheffler

Prof. Scheffler with the later added team members
P. Zimmer und P. Hoffmann

Further Publications from the Chair Team on “Art and Criminal Law”

Independent Publications

Halecker, D.-M. / Hoffmann, P. / Melz, J. / Scheffler, U. / Zielińska, C.: Musik und Strafrecht, Ein Streifzug durch eine tönende Welt, Walter de Gruyter, Berlin (forthcoming).

Halecker, D.-M. / Melz, J. / Scheffler, U. / Zielińska, C.: Kunst und Strafrecht, Eine Reise durch eine schillernde Welt, Walter de Gruyter, Berlin (will be published soon).

Scheffler, U.: Materialien zu den Ausstellungstafeln „Kunst und Strafrecht“, <http://www.kunstundstrafrecht.de>, seit 2013, continuously expanded and supplemented.

Scheffler, U.: Sanat ve Ceza Hukuku, ed. from Y. Ünver, 2nd edition, Seçkin, Ankara 2020.

Essays/Publications in English, Polish and Turkish

In English

Melz, J.: “Art and Criminal Law” – a Few Words about the Exhibition “Kunst und Strafrecht”, *Santander Art and Culture Law Review* 2/2015 (1), 320–322.

Scheffler, U. / Halecker, D.-M. / Franke, R. / Weyhrich, L.: When Art Meets Criminal Law – Examining the Evidence, *Santander Art and Culture Law Review* 2/2015 (1), 245–258.

In Polish

Melz, J.: Zniwazenie religii przez sztukę w świetle niemieckiego prawa karnego, *Zeszyty Artystyczne* 26 (2015), 81–93.

Scheffler, U.: Uroczysty odczyt z okazji przekazania portretu olejnego Johanna Samuela Friedricha von Böhmera we Frankfurcie nad Odrą 28 listopada 2013, *Rocznik frankfurcki* 2013/14, 51–59.

Scheffler, U.: Sztuka a prawo karne, *Temida – Kwartalnik Wydziału Prawa i Administracji Uniwersytetu Mikołaja Kopernika w Toruniu* 1/2015 (1), 31–32.

(The following articles are printed in Różański, M. / Banakh, S. / Koval, O. [Hrsg.], Guarantees and Protection of Fundamental Human Rights as the Integral Element of Integration of Ukraine on the EU, Olsztyn 2019, each with abstracts in English and Ukrainian)

Bielecki, A. A. / Zielińska, C.: Sztuka a uszkodzenie mienia, *op.cit.*, 23–38.

Halecker, D.-M.: Sztuka a prawo karne – gdy fałszerz ujawnia się jako przestępca, *op.cit.*, 95–104.

Melz, J.: Fałszerstwo dzieł sztuki z perspektywy prawa niemieckiego. Jak pewien fałszerz i jego żona wadzili za nos rynek sztuki, *op.cit.*, 211–224.

Melz, J.: Kradzież rzeźb z metali kolorowych w miejskiej przestrzeni publicznej, *op.cit.*, 225–236.

Scheffler, U.: Sztuka i wolność sztuki – gdy dwa pojęcia nieokreślone mają decydować o karalności, *op.cit.*, 329–342.

In Turkish

(The following contributions are printed in the 2nd edition of Scheffler, U.: Sanat ve Ceza Hukuku.)

Scheffler, U.: Sanat ve Sanat Özgürlüğü – Cezalandırılabilirlik Hakkında Belirsiz İki Kavramının Hüküm Vermesi Gerekli İse, *op.cit.*, 15–25.

Scheffler, U.: “#MeToo” ve Sanat Sansürü, *op.cit.*, 93–128.

Scheffler, U.: Georg Grosz Mahkeme Önünde, *op.cit.*, 129–162.

Scheffler, U.: “Horst-Wessel-Şarkısı” Mahkeme Önünde – Adliyenin Zafer Belgesi Yok, *op.cit.*, 485–500.

Scheffler, U.: “Rus Blatnyak’ı” – Gangsta-Rep Yerine Gulag-Şansonları, *op.cit.*, 501–510.

Scheffler, U.: Antonio Correggios “Leda ile Kuğu”, *op.cit.*, 569–590.

Ὁ μὲν βίος βραχύς, ἡ δὲ τέχνη μακρά

Vita brevis, ars longa

Hippokrates



Ralph Hedley (1848; † 1913):
Ars longa, vita brevis (1900)
South Shields Museum and Art Gallery*

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