

Materialien
zu den Ausstellungstafeln

Kunst und Strafrecht

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Annex: Kunst und Verletzung des Allgemeinen Persönlichkeitsrechts

Art. 1 Abs. 1 GG

Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.

Art. 2 Abs. 1 GG

Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.



Art and the general right of personality

Today, the general right of personality, developed by judicial decisions based on Art. 1 and 2, para. 2 of the German Basic Law (GG), enjoys paramount importance in German Law. Its scope of protection has been expanded continuously over time. It is recognized that the general right of personality protects individuals against vilification and misrepresentation of biography and character. 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 personality, if, in the context of balancing conflicting interests, this is outweighed by the freedom of art guaranteed to artists in Art. 5 para. 3 GG and other fundamental rights.

The case of "Sommer Almighty"

In 2000, German business magazine *WirtschaftsWoche*, owned by the *HANDELSBLATT* publishing group, published an article titled "Allmächtiger Sommer" ("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 Rolf Sommer had led the company into a serious crisis with his "autocratic" style, blurring his role 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 Hanzsatic 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 and 2, GG, in which a nonchalant Sommer is "ordained" stop 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 personality 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." Such manipulations affected the right of personality. 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 Hanzsatic 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 appeal filed by *HANDELSBLATT* before the European Court of Human Rights against the injunction was finally dismissed on April 3, 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 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 personality 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, disassociation, 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 €350,000 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 personality. 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.

Picture on the left: *WirtschaftsWoche* 38/2000, p. 33 (picture detail)

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Picture on the right: Erika Lust, "Frau Orosz wirbt für das Welterbe", 2009, private collection. Photo: <http://www.erika-lust.com/malerei.htm>

Abb.: <http://www.erika-lust.de/malerei.htm> / Abb.: *WirtschaftsWoche* 38/2000, S. 83 (Ausschnitt)

Illustration zu Jürgen Berke / Thomas: Allmächtiger Sommer, *WirtschaftsWoche* 38/2000, S. 83 ff.

Erika Lust: Frau Orosz wirbt für das Welterbe (2009). Privatbesitz

„Allmächtiger-Sommer“-Fall*

<Wird in Kürze eingestellt>

* Für eine internationale Ausstellung unter der Federführung der Kazimierz-Wielki-Universität in Bydgoszcz wurden einige unserer Ausstellungstafeln ins Englische übersetzt; die Tafel „Kunst und Beleidigung“ wurde durch den Austausch des „König-Birne“-Falles gegen den (eher zivilrechtlichen) „Allmächtiger-Sommer“-Fall in eine Tafel „Kunst und Allgemeines Persönlichkeitsrecht“ überführt.