

I. Schluss IV – English Summary

This thesis deals with the legal implications of the practice of producing limited editions in the field of contemporary photography under German law. A “limited edition” in the field of the fine arts is the practice of producing a work of art – where possible due to the medium used (as especially in most photographic techniques) – in a limited quantity of identical copies and communicating this quantity to the public via a fraction or similar designation affixed to the individual copy.

In the first section of the thesis, the mechanisms and actual practices of artists and dealers in the art market with regards to the production and dissemination of limited editions in photography are reviewed. The second part deals with the legal conclusions drawn from the factual review.

The main conclusions of the thesis are as follows:

- 1) The contemporary photography market can be roughly divided into photography that was created before around 1970 and photography that was created after 1970. The first era generally being called “historic photography” and the latter being called “contemporary photography”. The significantly different prevailing industry practices in those two periods have to be taken into account when discussing the legal implications of limited editions.
- 2) The economic value of a photographic print, which could theoretically be printed in infinite quantities, derives – among other factors such as the popularity of the artist, etc. – largely from the number of prints available for purchase.
- 3) In the area of “historic photography” limited editions were extremely rare. Instead so-called “vintage prints” today fetch the highest prices. Generally prints created by the artist or under the artist’s supervision within a maximum of 10 years from the creation of the negative are considered vintage prints. Prints produced after this period are considered “later prints”. In the area of “contemporary photography” the term “vintage print” has no valuable meaning. Instead almost all artistic photographic prints are produced in limited editions. Most well-established

artists nowadays limit the number of prints in their editions to the single digits or low double-digits. Derived from a practice already used in earlier fine art printing, the edition is communicated via a fraction (the “limitation declaration”) with the nominator counting the individual prints and the denominator stating the overall amount of prints produced. For example “2/6” stands for “This is print No. 2 from an edition of 6 prints”. The limitation declaration can usually either be found on the print itself or on a “certificate of authenticity” which comes along with the print.

- 4) A practice also adopted from fine art printing is that of producing so-called “Artist’s Prints“. Artist’s Prints are generally not numbered, but marked “A. P.“. Usually they are not part of the limited edition’s count and thus have to be taken into consideration as additional prints beyond the communicated edition. The argument supporting this practice is that those prints are supposed to remain with the artist or the artist’s close friends and shall not be sold. However a fair practice towards the purchaser already adopted by some market participants is to also denominate the Artist’s Prints (for example in a fashion like “2/6+1 A.P.“).
- 5) Photography – especially color photography – is prone to damage due to exposure to the usual exhibition environment (e. g. light, warmth, humidity). Especially color photography may develop color aberrations or altogether fade. To circumvent this problem today’s artists usually produce so-called “exhibition prints” which are usually neither signed nor sold. Ideally the artists themselves retain ownership of the prints. The artists provide such exhibition copies for exhibitions, where they can be displayed under ideal display circumstances with little or no regard to the damage that may occur to them. They will be scrapped once no longer deemed fit for exhibitions. Furthermore the host of the exhibition (e.g. a museum) saves on insurance and transportation expenses for the exhibition prints’ value insured is usually restricted to the value of the materials.
- 6) The definition of a “limited edition” in contemporary photography may vary. Generally “motif-centered”, “format-centered” and “material-centered” definitions can be distinguished. A limited edition for the purpose of this thesis will be considered “motif-centered” if the limited edition is meant in a way that no prints of the particular motif or compo-

sition (i.e. the particular scene, its framing by the artist, etc.) will be made once the limit of the edition has been reached. In the case of a “format-centered” edition the artist will have retained the right to print the same motif in different formats and consider every format a “limited edition” by itself. In the same way an artist may have retained the right to produce prints in different materials or techniques (material-centered editions) – however this is a relatively rare case and usually not prone to causing problems for using a substantially different technique generally requires solid altering of the original work and thus creating a new work of art in most cases.

- 7) Functionally vintage prints in historic photography can be compared to limited editions in contemporary photography. In both cases a numerally limited body of works is defined, which makes those pieces more exclusive and hence more desirable in the view of the art market.
- 8) The German Act on Copyright and Related Rights (UrhG) uses the term “original” in relation to works of art without providing an exact definition of this term. In connection with the artist’s resale right (sec. 26 UrhG) the term has to be defined in accordance with the EU directive EG/593/2008 which harmonized the artist’s resale right within the European Union. This thesis comes to the conclusion that three cumulative criteria define an “original” of contemporary photography in terms of the UrhG: firstly the print has to be one of a limited edition. Secondly such prints have to be the first consumable materialization of the artist’s work (meaning that for example a negative will not be considered an “original” as defined by the UrhG). Thirdly the print has to be made by the artist himself or otherwise authorized by him. Therefore posthumously produced prints can never be “originals” within the scope of the UrhG even if printed from a negative originally produced by the artist. Also prints produced in excess of the communicated limit of the edition will not be considered “originals” in terms of the UrhG. Artist’s Prints (A. P.s) can be considered “originals” in this way as long as they are produced in a reasonably small amount according to the custom governing their production and are not sold to the general public. This definition of “original” can and should also be used apart from sec. 26 UrhG whenever the term “original” is used within the UrhG.
- 9) Under German civil law the act of communicating a limited edition on a work of art (by means of a fraction like “2/6”) can be considered a de-

claration of intent (“Willenserklärung”) and thereby potentially legally binding. This declaration of intent can be interpreted according to sec. 133, 157 German Civil Code (BGB) as an offer of the artist to enter into a contract about the limitation of the edition with the buyer of the print according to sec. 145 BGB. Upon purchase of the print the buyer will enter into the “limitation contract” (“Limitierungsvertrag”) whereby the effectiveness of the contract is subject to the condition precedent that the transfer of ownership of the print is concluded.

- 10) The limitation contract is a contract which obliges the artist to not produce prints in excess of the amount stated in the artist’s limitation declaration. Under German civil law the artist’s obligation to do so can be demanded in the way of specific performance.

Of great importance is the limitation definition as communicated by the artist via the limitation declaration. Depending on whether it is “motif centered” or “format centered” additional prints may or may not be legally produced. If necessary, the question whether a print has been produced in excess of the stated amount or not, will be answered via interpretation (sec. 133, 157 BGB – “Auslegung”) of the limitation declaration. It is a conclusion of this thesis that in cases where the artist has only used a fraction (e.g. “2/6”) to denominate the edition, an impartial or “objective” recipient (“objektiver Empfänger”) of this message will and may interpret this limitation definition as being “motif-centered”. Generally additional prints of the same motif in different formats will violate the stipulated limited edition if they have not been set out within the original limitation declaration. However an objective recipient will also take into consideration the common practice of the production of Artist’s Prints as well as exhibition prints as these print’s – if handled correctly – will not “compete” with the prints from the limited edition on the art market.

At all times the artist can create a new work of art based on a work used in a former edition (e.g. by using a radically different technique like turning a photography into a wood block print; see also above) and then print a “new” (actually being a first) edition of this work. However in order to not interfere with the former edition the new work must contain sufficient “originality” to make it differ from the already existing work. In this context the criteria used within the field of copyright law are a good means to establish whether a work of art is merely a copy of a former work of art or rather “more”. As a general rule simply changing the format does not create a new work of art here as well.

- 11) The artist's obligation is exclusively personal and does not bind the artist's heirs after his death. The heirs of the artist are thus able to produce new prints disregarding all former limitations as long as the full copyright is inherited by them and they have not been bound in other ways by the artist. However such prints must not be sold labelled "originals" but should carry a clear remark that they have been produced posthumously. Such prints shall also not be considered "originals" in terms of sec. 26 UrhG (see above).
- 12) It is the artist's primary duty to refrain ("Unterlassungspflicht") from the production of prints in violation of the stipulated limited edition. However if he does not comply with this duty and instead produces such prints his duty to refrain will be replaced by a duty to undo ("Beseitigungspflicht") under German Civil Law. This would be the case where the artist has produced new prints in violation of the limitation and still has the power to destroy these works (for example because they still remain unsold in his possession). Both the duty to refrain as well as the duty to undo can be enforced by the obligee (i.e. the person to whom the obligation from the limitation contract is owed) by means of an injunction.
- In the case where the duty to undo has become impossible to fulfill ("Unmöglichkeit") according to sec. 275 BGB, the obligee will be able to claim damages (sec. 280 (1), 280 (3), 283 BGB and sec 280 (1) BGB). This is generally the case when the artist has sold the additional prints and transferred ownership to a third party and thus has no more actual power over the prints.
- This thesis also points out that it is possible for the obligee to claim the profits the artist obtained by producing and selling the additional prints according to sec. 285 (1) BGB. In this case the obligee will only be able to claim further damages if the total amount of damages suffered is greater than the profits claimed under sec. 285 (1) BGB.
- To obtain the information necessary in order to pursue his claims the obligee also may demand disclosure of the relevant facts from the artist according to sec. 242 BGB if he is unable to access this information in reasonable ways otherwise.
- 13) Apart from claims arising from the limitation contract the law on the purchase of goods (sec. 433 et seqq. BGB) may also provide relief for the buyer in some cases. Because of the general importance of limited editions when buying contemporary photography, information given

about such a limitation by the seller will in most cases be considered part of the agreed quality of the good (“Beschaffensvereinbarung”) as defined by sec. 434 (1) BGB. However the purchased good only has to adhere to the agreed quality upon the moment of the passing of the risk (sec. 434 (1) BGB). In the case of the sale of photographic prints this will usually be the moment when the print is handed over to the buyer. If the limited edition has not been violated at this point of time the print will be deemed of the agreed quality. Later violations of the edition will not be able to constitute a “material defect” necessary for buyer’s remedies according to sec. 434 (1) BGB. In such a case claims will only be possible if the seller explicitly or implicitly agreed to warranty the reliability of the limitation declaration. This will usually be the case when the print has been bought directly from the artist. However such an implicit warranty cannot be assumed when buying from a third party (like an auction house) which has no legal or practical means of ensuring that the limitation will not be violated in the future.

In cases where the violation of the limitation constitutes a material defect, the artist is obliged to undo the violation of the limitation if it is still possible according to sec. 437 No. 1, 439 (1) BGB (see also above for examples). If the violation of the limitation cannot be undone, the buyers claim arising from sec. 437 No. 1, 439 (1) BGB is impossible as defined by sec. 275 BGB and therefore no longer available. The buyer may then revoke the agreement or reduce the purchase price and/or demand damages (sec. 437 No. 2 and 3 BGB).