## Contents

Ack	knowledgements	page xi
Tal	ble of Cases	xiii
Int	troduction	1
1	Defining Art	10
	1.1 Defining Art in Theory of Art	11
	1.1.1 Classical Approaches to Art	12
	1.1.1.1 Does Art Mean Making Beautiful Things?	12
	1.1.1.2 Does Art Mean Imitating Reality?	13
	1.1.2 Modern Theories of Art	14
	1.1.2.1 Modern Artistic Practice and Its Influence	
	on Modern Artistic Theories	15
	1.1.2.2 Art as an Open Concept	17
	1.1.2.3 Danto and the Institutional Theory of the Arts	18
	1.1.3 Contemporary Art Theories	20
	1.2 Defining Art in Law	22
	1.2.1 Why the Law Should Not Provide a Definition of	
	the Arts	22
	1.2.2 The Law Does Not Offer a Definition of the Arts	24
	1.2.2.1 Non-definition of the Arts under Cultural	
	Heritage Law	24
	1.2.2.2 Non-definition of the Arts under Intellectual	
	Property Law	26
	1.2.3 Challenges Arising from the Problem of Non-definition	1
	of the Concept of 'Art'	27
	1.2.3.1 Exceptions to Rules of General Application	28
	1.2.3.2 Classification of Artists and Artworks	29

vi

	1.2.3.3 Legitimate Limitations or Negation of the	
	Qualification of Art?	33
	Concluding Remarks	36
2	The Nature, Scope and Protection of Artistic Freedom	38
	2.1 The Emergence of a Distinct Right to Artistic Freedom	40
	2.1.1 Issues of Terminology: Creation, Expression or	
	Entertainment?	40
	2.1.2 The Input of Constitutional Traditions	42
	2.1.2.1 The Legacy of the Weimar Constitution	42
	2.1.2.2 The Legacy of the French Genre of Caricature	4
	2.2 The Nature of Artistic Freedom	47
	2.2.1 The Free Enjoyment of the Arts in Light of Article 27 of	
	the UDHR	48
	2.2.2 The Free Speech Approach to Artistic Freedom	49
	2.2.3 Cultural and Collective Aspects of Artistic Freedom	5
	2.3 The Scope and Institutional Protection of Artistic Freedom	53
	2.3.1 The Protection of Artistic Freedom by UNESCO	53
	2.3.2 The Practice of International Human Rights Bodies	56
	2.3.2.1 The Practice of the UN Human	
	Rights Committee	56
	2.3.2.2 The Practice of the Committee on	
	Economic, Social and Cultural Rights	57
	2.3.3 The Practice of Regional Human Rights Bodies	59
	2.3.3.1 Artistic Freedom in the Context of the	
	European System	59
	2.3.3.2 Artistic Freedom in the Context of the Inter-	_
	American System	62
	2.3.3.3 Artistic Freedom in the Context of the	_
	African System	64
	Concluding Remarks	66
3	Censorship and Restrictions	68
	3.1 Arts Should Be Free: Abstaining from Censorship in the Arts	70
	3.1.1 Legitimate or Illegitimate Censorship?	70
	3.1.1.1 Lack of Clarity in International Standards	7
	3.1.1.2 The Hate Speech Exception	76
	3.1.1.3 Negationism, Revisionism and	
	Holocaust Denial	80

Contents

	3.1.2	Challenging Prior Restraints before Human	
	F	Rights Bodies	82
	3	.1.2.1 An Obligation of Most Careful Scrutiny	83
		.1.2.2 Challenging Classification for Theatre,	
		Video Art and Cinematography	85
	3	.1.2.3 Challenging Censorship in Painting and the	
		Visual Arts	87
	3.2 Minim	nal Restrictions in the Exercise of Artistic Freedom	89
	3.2.1 S	Subsequent Imposition of Liability	89
	3.2.2 E	Balancing Conflicting Interests at the ECtHR	90
	3	.2.2.1 Effectively Protecting the Arts	90
	3	.2.2.2 Restrictions or Duties and Responsibilities?	92
	3.2.3 I	Preventing Private Actors from Interfering?	93
	3	.2.3.1 Private Exhibitions and Events	93
	3	.2.3.2 Digital Art and Social Media	96
	Concludir	ng Remarks	97
4	Positive O	bligations in Relation to Artistic Freedom	99
		ing Effective Judicial Remedies	101
	4.1.1 E	Effective Remedies against Censorship in Performance,	
	A	art and Music	101
	4.1.2 F	Reparations for Demolition of Art Installations	103
	4.2 Positiv	e Obligations under the ICESCR	103
	4.2.1	Obligations Relevant to Participation in Cultural Life	103
	4	.2.1.1 Artistic Freedom and Participation in	
		Cultural Life	104
	4	.2.1.2 Shaping Collective Cultural Representations	106
	4.2.2 F	Positive Obligations Relevant to Artistic Freedom	
	a	and Practice	107
	4		107
	4	2.2.2 To the Maximum of Its Available Resources	108
		2.2.3 Achieving Progressively	111
		The Application of the 4-A Scheme in	
		Artistic Freedom	111
		iscrimination and Equality Obligations in the	
	Art W		115
		Towards the Elimination of Discriminatory Practices	
		gainst Artists and Creatives	115
	4	3.1.1 Towards Elimination of Direct Discrimination	115

viii Contents

	4.3.1.2 Towards Elimination of	
	Indirect Discrimination	118
	4.3.1.3 Eliminating Discrimination in the Digital	
	Art World	119
	4.3.2 Real Equality in the Art World	121
	4.3.2.1 Is Real Equality Ever Possible?	121
	4.3.2.2 Affirmative Action and Artistic Freedom	122
	Concluding Remarks	126
5	Street Art, Graffiti and Art in Public Space	128
	5.1 The Human Rights Law Perspective on Graffiti and	
	Street Art	130
	5.1.1 Definitions of Graffiti and Street Art	130
	5.1.1.1 Terminology Issues	130
	5.1.1.2 Transgressive or Mainstream?	131
	5.1.2 Graffiti as a Grey Area in Law	135
	5.1.2.1 Legal Treatment in Domestic Laws	135
	5.1.2.2 State Obligations under Human Rights Law	136
	5.1.2.3 Arguments against Removal from the	
	Public Space	138
	5.1.3 Street Art for Future Generations?	141
	5.1.3.1 Murals and the Preservation of	
	Cultural Identities	141
	5.1.3.2 Murals as Urban Cultural Heritage	144
	5.2 Artistic Freedom, Cultural Heritage and Urban Planning	146
	5.2.1 Is Contemporary Street Art Cultural Heritage?	146
	5.2.1.1 La Demeure du Chaos (Abode of Chaos)	146
	5.2.1.2 The Legacy of 5Pointz	149
	5.2.2 Unpopular Art and the Urban Space	152
	5.2.2.1 A Human Rights Law Perspective to	
	Richard Serra's Tilted Arc	152
	5.2.2.2 Debates on Racist and Sexist Art in the	
	Public Space	155
	Concluding Remarks	157
6	Public Morality, Obscenity and the Arts	159
	6.1 Evil, Worthless and Immoral Arts	161
	6.1.1 The Contextuality of Morality Considerations	161
	6.1.1.1 Is There a Universal Standard of Morality?	161
	6.1.1.2 Obscenity Treaties and Lack of Agreement	163

Contents

165
Law 165
166
169
on
169
172
dy 174
174
Genre
175
176
178
welte) 178
n to Cadaver
180
lard Case 182
in Fine Arts
182
185
nography 187
188
iously
190
190 193
193
193 ates? 193
ates? 193 193 193 194 ipreme
193 ates? 193 s 194
193 rates? 193 s 194 ipreme 198 200
193 rates? 193 s 194 ipreme 198
193 rates? 193 194 1preme 198 200
193 rates? 193 194 1preme 198 200 0ss
193 ates? 193 194 1preme 198 200 204 208
193 rates? 193 194 1preme 198 200 0ss 204 208 Arts 208
193 ates? 193 194 1preme 198 200 204 208

X

7.2.2 Where Would UN Human Rights Bodies Draw	
the Line?	211
7.2.3 Where Would the European Court Draw the Line?	213
Concluding Remarks	217
Index	221