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VIOLATION OF PERSONAL RIGHTS
ON THE BASIS OF COMPOSING A WORK OF ART

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ABBREVIATIONS

| | | |
|---------------|---|--------------------------------------|
| AUHFD | - | Ankara University Law School Journal |
| journ. | - | Journal |
| c. | - | Clause |
| FSEK | - | Law of Intellectual Property Rights |
| D. | - | Decision |
| a. | - | Article |
| MK | - | Civil Code |
| p. | - | Page |
| TBK | - | Turkish Code of Obligations |
| TCK | - | Turkish Criminal Law |
| Vol. | - | Volume |
| YUHFD | - | Yasar University Law School Journal |
| AUHFD | - | Ankara University Law School Journal |

INTRODUCTION

A work of art is an intellectual product of effort, as a basic concept in literary and artistic law, flourishing out of the author's own personality and creativity. The author can just as well make use of another person's understanding of the world or their experience in the process of creation. In this regard a conflict occurs between the third person's personality rights and the author's freedom of creativity.

Artistic freedom, as a constitutional right and a protected clause by several international covenants, is regarded a basic right for any artist who does engage or means to engage in artistic creation. On the other hand, personality rights is a constitutional right enabling to protect a person's free and independent integrity which can be claimed against anyone. These two concepts are likely to conflict and they do often conflict in the process of composing a work of art.

This work of art is composed of four chapters. In the first chapter the concept of "work of art" shall be dwelled upon: the definition, conditions and types of work of art. Also some other types of work of art, although they fail to be defined strictly as "work of art", shall be exemplified which can benefit from the protection offered by law. In the second chapter the concept of "personality rights" shall be examined in addition to determining the scope of it and touching upon compliance with law in case of violation. In the third chapter freedom to create art shall be emphasized, giving some concrete examples as to conflicts of interest. It shall be discussed whether a person's personality rights or an artist's creativity rights prevail in case there exists a personality rights violation as a result of which some criteria shall be determined so as to illuminate the subject.

CHAPTER ONE

I. The Concept of “Work of Art”

In our system of law the concept of work of art has been defined specifically in the scope of FSEK¹. Thus a work of art represents all intellectual and artistic products of knowledge, literature, music, fine arts and cinema bearing its author’s character². According to this definition a product needs to be within the fields specified in a limited scope and also needs to bear its author’s character so that it can qualify as a work of art and benefit from FSEK’s protection³.

There are two types of elements that a work of art is required to have for FSEK: objective and subjective elements. Supreme Court also stated that these two elements should exist together in a product for it to qualify as a work of art within the scope of FSEK⁴.

A. Objective Element

For a work of art to be protected the first element to look for is if the idea is curated⁵. In other words, FSEK does not protect ideas but their curated form⁶. This rule has been adopted by our law from foreign countries⁷. Supreme Court decisions also state clearly that an intellectual or an artistic product cannot qualify as a “work of art” so

¹ Law of Intellectual Property Rights, accepted on December 5, 1951, was published at the Official Gazette on December 31, 1951, numbered 7981.

² Specified at FSEK’s article 1/b

³ Sami **KARAHAN**/Cahit **SULUK**/Tahir **SARAC**/Temel **NAL**, *Fikri Mulkiyet Hukukunun Esaslari*, 4th edition, Ankara, 2015, p. 42; Yalcin **TOSUN**, *Sinema Eserleri ve Eser Sahibinin Haklari* (“**TOSUN**, Eser”), Istanbul, 2013, p. 26.

⁴ Supreme Court Assembly of Civil Chambers 2009/15-459 E., 2009/541 D. and 18.11.2009 dated decision, Supreme Court 11. Civil Chamber’s 2006/934 E., 2007/4555 D. and 13.03.2007 dated decision. (Kazanci, accessed on: 19.10.2017)

⁵ Paul **TORREMANS**, *Holyoak and Torremans Intellectual Property Law*, 6th Edition, New York, 2010, pp. 177, 178. ; David I. **BAINBRIDGE**, *Intellectual Property*, 8th edition, Harlow, 2010, p. 50.

⁶ Mustafa **ATES**, *Fikri Hukukta Eser*, Ankara, 2007, P. 32; Ernest Eduard **HIRSCH**, *Fikri ve Sinai Haklar*, Ankara, 1948, p. 134.

⁷ **TORREMANS**, p. 176.

long as it stays as an idea merely⁸. The rationale behind this is to prevent monopolization and to protect public interest⁹. For example, if the idea about drawing the friendship between a kid and a dog is protected as a work of art it might lead to the extinction of such drawings. However any artist can handle this subject in a different context and draw the picture. Continental Europe has adopted this opinion. In French doctrine there's a saying "ideas are free ways of expression"¹⁰. As a result, however original an idea is, FSEK does not offer protection unless it is curated. It's not obligatory for a work of art to be completed in full scale to qualify and be protected as a work of art. Curated and completed to some level suffice. Drafts, doodles, work sheets and melody testings all carry a curated characteristic, thus benefiting from FSEK's protection¹¹.

B. Subjective Element

Subjective element is about "character". Character in this regard is defined as "close intimacy" by Turkish Language Society¹². This concept has been reinterpreted within the scope of the doctrine, but today its boundaries have become more lucid. Several opinions about character within the doctrine shall be stated below.

For Hirsch, who had an important role in the composition of FSEK, character is explained as a situation which cannot be displayed by anyone and everyone¹³. Following Hirsch's interpretation of character, many works of art shall easily fall

⁸ Supreme Court 4. Civil Chamber's 1976/5913 E., 1977/7617 D. and 01.07.1977 dated decision "an intellectual and artistic work does not acquire the status of a work of art as long as it is only at the stage of being an idea and thus cannot benefit from the protection offered by FSEK" (Kazanci, accessed on 19.10.2017)

⁹ Ozan Ali **YILDIZ**, *Fikir ve Sanat Eserleri Kanunu Kapsamında Cizgi Roman*, Istanbul, 2017, p. 8.

¹⁰ **YILDIZ**, p. 8.

¹¹ Unal **TEKINALP**, *Fikri Mulkiyet Hukuku*, 5th edition, Istanbul, 2012, p. 108.

¹² http://www.tdk.gov.tr/index.php?option=com_gts&arama=gts&guid=TDK.GTS.5a1ff7ed0fe6b7.92055392 (accessed on: 14.11.2017)

¹³ **HIRSCH**, p. 131; Ramazan **USLU**, *Türk Fikir ve Sanat Hukukunda "Eser" Kavramı*, Ankara, 2003, p. 35.

under the category of “ordinary” in that they can be displayed and performed by anyone and everyone, thus depriving these works of art of any legal protection. This opinion, we believe, is quite a strict one.

To mention another opinion about the issue, Tekinalp believes style is what matters most in terms of character. Style reflects the author’s personality, thus is personal. He also looks for a condition of “non-ordinariness” for character to exist¹⁴.

On the other hand, Ayiter expresses that the extent to which this concept reaches matters. A work of art needs to have character to some extent and an author adds up to the character of the work of art to the extent that they contribute to it from their own personality¹⁵.

Tosun examines different concepts of character in various law systems and conclude that the reflection of author’s personality to the work of art is an important feature, however this feature should be sought only at a small extent and also different levels should apply to different types of work of art¹⁶.

Erel advocates that for a work of art to be marked with its author’s character it needs to be independent of other works of art and creative, although he also states this should not be perceived as an obligation for absolute originality¹⁷.

Sundara Rajan understands that the work of art needs to be original, to be displayed as a result of artist’s special gifts and reflect their character¹⁸.

¹⁴ **TEKINALP**, pp. 105-108.

¹⁵ Nusin **AYITER**, *Hukukta Fikir ve Sanat Urunleri*, 2. Edition, Ankara, 1981, p. 44.

¹⁶ **TOSUN**, Eser, pp. 41-42.

¹⁷ Safak N. **EREL**, *Turk Fikir ve Sanat Hukuku*, Ankara, 1998, p. 53. The concept of individuality is explained in various ways in the doctrine except for creativity, however this author puts forward that individuality is “the reflection of creativity”.

¹⁸ Mira T. **SUNDARA RAJAN**, *Moral Rights, Principles, Practice and New Technology*, New York, 2011, p. 8.

Last of all, Rosenthal Kwall believes the protection of a work of art should not have anything to do with the high level of character or economical rewarding that it receives¹⁹.

As a result, it can be said that the most important element that distinguishes an intellectual product from others and covers it as a protectable work of art is its capacity to carry the author's character. Character does not entail high level of creativity and originality²⁰. Otherwise it shall be almost impossible to cover a product with work of art protection²¹. This opinion also reflects Supreme Court's judgments.

II. Types of Work of Art

Works of art are categorized into four groups within the scope of FSEK: scientific and literary works, musical works, works of fine art and cinematographic works. In line with the Numerus Clausus principle, other works that do not fall under these categories are not regarded as "work of art" within the scope of FSEK²². Types of work of art shall be touched upon briefly below.

A. Scientific and Literary Works of Art

Scientific and literary works of art have been protected since 1710²³. In Turkish law scientific and literary works of art are described under article 2 of FSEK specifying which works of art fall under this category. The significant element is the use of language as the means of communication²⁴. It does not matter which language it is or

¹⁹ Roberta **ROSENTHAL KWALL**, *The Soul of Creativity: Forging a Moral Rights Law for the United States*, Redwood City, 2009, p. xiv.

²⁰ **BAINBRIDGE**, p. 41.

²¹ Supreme Court 11. Civil Chamber's 2006/934 E., 2007/4555 K. and 13.03.2007 dated decision rules that individuality might be attributed to products that do not qualify as "work of art" in a loose definition of the term. (Kazanci, accessed on: 20.11.2017)

²² **KARAHAN/SULUK/SARAC /NAL**, p. 62.

²³ Lionel **BENTLEY**, Brad **SHERMAN**, *Intellectual Property Law*, 2. Edition, Oxford, 2004, p. 59.

²⁴ **KARAHAN/SULUK/SARAC /NAL**, p. 62.

if the language used is extinct or not²⁵. Novel, story, narration, letter, diary, travel writing, etc. are protected as part of this category as well as conference, oration, etc. which are expressed through language²⁶.

There has been a debate in the doctrine over whether cinematographic works fall under the category of scientific and literary works since scripts are written works expressed in a language. In case we protect the script as a scientific and literary work, the film that is shot based on the script shall be a processed work of art²⁷. Not every script bears character, thus it might not be possible for us to protect each and every script in line with the protection provided to scientific and literary works of art²⁸.

Since computer programs are composed of softwares these programs are also protected under this title²⁹. Computer programs are the communication of certain directives through writing, code, etc. Computer programs are protected under the category of scientific and literary works thus fulfilling the obligations stated in Bern Covenant³⁰.

Although they do not directly associate with the category of scientific and literary works, dances, written choreographic works, pantomimes, and similar stage works are protected under this category because there is no other category that covers them³¹, which Bozbel criticizes³².

²⁵ **TEKINALP**, p. 114.

²⁶ Letters, memoirs and diaries that are considered literary works are to be handled in the following sections under a separate heading since they are closely connected to the topic of this work.

²⁷ **TOSUN**, Eser, p. 57.

²⁸ **TOSUN**, Eser, p. 57.

²⁹ This part was added later in 1995 with an amendment.

³⁰ **TEKINALP**, pp. 117-119.

³¹ Bkz. FSEK article 2

³² Savas **BOZBEL**, *Fikir ve Sanat Eserleri Hukuku*, Istanbul, 2012, p. 40.

Bozbel states at a footnote in his book, page 40, that “This clause includes ‘all dancing’, ‘pantomime’ and ‘nonverbal stage works’ wrongfully, which, instead, should have been included under article 4 of fine arts.

Last, all technical and scientific photographic works that are devoid of any aesthetic qualification, all maps, plans, projects, sketches, pictures, geographical and topographical models, all architectural and urban designs and projects, architectural models, industrial, environmental and stage designs and projects are protected under the category of scientific and literary works of art as part of FSEK's article 2, clause 3.

B. Musical Works of Art

Musical works of art are protected under "1988 Act"³³. In Turkish Law it is regulated under FSEK article 3. Musical works of art are understood as compositions with or without lyrics. Music is a way to express an idea through sound³⁴. Thus works of art under this category are based on the protection of sound³⁵. Music genre does not have importance in terms of protection, every music genre is protected³⁶. On the occasion that a musical work of art has a different composer and a lyricist, they are both protected. The content should be protected in musical works, not the form³⁷. Musical works of art are likely to be protected also under the category of scientific and literary works³⁸.

³³ Lionel BENTLEY, Brad SHERMAN, p. 67.

³⁴ USLU, p. 125.

³⁵ USLU, p. 125.

³⁶ TEKINALP, p. 123.

³⁷ TEKINALP, pp. 123-124.

³⁸ "...Every verbal and nonverbal composition is a musical work of art and every writing expressed in language in any way is a literary work of art. Then the lyrics of the song "Saclarin Tarumar" is a work of art". Supreme Court 4. Civil Chamber 1987/9793 E., 1988/3227 D. numbered and 29.03.1988 dated decision. (Kazanci, accessed on 10.03.2018)

C. Works of Fine Art

Works of fine art are regulated under FSEK's article 4, which covers "oil paintings, watercolor paintings, pictures, sketches, patterns, engravings, calligraphy, ornamentations, works of art that are done through scraping, carving, nailing with metals, stones, woods or other stuff, silk screen painting, sculptures, reliefs, architectural works, handicrafts, small artworks, miniatures, decorative artworks, fashion designs, photographic works, slides, graphical works, cartoons, comics, caricatures, typecasting". According to the classification done by FSEK it is seen that the main communication means is shapes or colors. With reference to these criteria, works of fine art are defined as works of art in which an aesthetic content is reflected on a surface or on an object addressing the eyesight³⁹.

"Having an aesthetic content" is the condition that defines a work of art as a "work of fine art". In other words, aesthetic value is a common feature that is to be found in all works of fine art.

D. Cinematographic Works of Art

Cinematographic works are regulated under FSEK's article 5: "an interrelated series of moving pictures, carrying aesthetic, scientific, didactic, or technical value or reflecting daily events regardless of the material used, using electronic, mechanical or other tools, voiced or silent." For a work of art to be protected as a cinematographic work it needs to be composed of an interrelated series of moving pictures and also to be viewed⁴⁰.

Apart from these criteria, it is discussed within the doctrine whether a work of art is required to have a scriptwriter and a director so that it can be protected⁴¹.

³⁹ AYITER, p. 55; YILDIZ, p. 25.

⁴⁰ TOSUN, Eser, pp. 66-68; Engin ERDIL, *Fikir ve Sanat Eserleri Hukukunda Islenme Eserler*, Istanbul, 2003, p. 34.

⁴¹ YILDIZ, p. 32.

Another opinion states that there needs to be both a scriptwriter and a director so that it can be protected as a cinematographic work of art⁴². Still another opinion expresses that since FSEK's article 5 does not specify it openly there is no such obligation⁴³. In our opinion, considering that works of art such as improvization do not have any preconditioned script, not covering them in terms of protectional rights shall lead to understanding these works of art as not-cinema and deprive the author of the rights henceforth. Thus an obligation for the existence of a script shall not be just.

III. Non-Work of Art Subjects to be Protected

A. Letters and Diaries

FSEK's articles 85-87 state that although some writings do not bear qualifications for a "work of art", they are provided a protection regarding personality rights. Common features of these writings are that they provide protection in terms of personality rights. These writings are also protected under blanket clauses regarding personality rights⁴⁴. Since they are closely related with the scope of FSEK the legislative body has made a special regulation within FSEK.

Under FSEK's article 85 the title only remarks "Letters"; however, not only letters but also "diaries etc." have been included. This is why our work of art shall dwell upon letters and diaries together.

Turkish Language Society defines "letter" as "a written paper, document in an envelope, sent via mail to someone in order to inform them of something, ask or want something, or tell about emotions and feelings"⁴⁵. Diaries are defined as "not out of corresponding with someone else or informing them but writing for oneself telling

⁴² **TEKINALP**, p. 127; **TOSUN**, Eser, p. 86.

⁴³ **KARAHAN/SULUK/SARAC/NAL**, p. 73.

⁴⁴ **HIRSCH**, p. 25.; Levent **YAVUZ**/Turkay **ALICA**/Fethi **MERDIVAN**, *Fikir ve Sanat Eserleri Kanunu Yorumu*, 2. Edition, Ankara, 2014, p. 2950.

⁴⁵ http://www.tdk.gov.tr/index.php?option=com_gts&arama=gts&guid=TDK.GTS.5a85dd41822e33.82920133 (accessed on: 10.02.2017)

about memories and events that one lives”⁴⁶. There’s a special regulation for diaries in FSEK’s article 85. Letters and diaries are covered within FSEK’s article 85 because they contain details on private life which are part of a person’s character⁴⁷. FSEK’s article 85 states that “Even if the document does not qualify as “work of art”, letters and diaries, etc. cannot be published without the written permission of the author, and if the author is deceased, written permission of the persons stated under article 19 clause 1.”

It is accepted that there are four main points in consideration about the protection of letters and diaries, etc. These points shall be examined below under separate headings.

1. Seeking No Qualification for Work of Art

Letters and diaries can also qualify as work of art under FSEK, however this is not a must. If they qualify as work of art, special protection provided by FSEK shall be valid. And at this point the importance of FSEK’s article 85 becomes apparent, since the article states that FSEK’s article 85 shall provide legal protection even though they do not qualify as work of art⁴⁸.

In our opinion, the regulation that provides legal protection to writings that do not qualify as work of art is a positive arrangement, however, this regulation should not be part of FSEK, the aim of which is, as stated in article 1, the protection of a work of art and its author as a product of intellectual creativity. Protecting a letter or a memoir bearing no qualification for work of art within the scope of FSEK is not proper, we

⁴⁶ Ahmet M. **KILICOGLU**, “Eser Sayılmayan Fikri UrunlerandEserin AdiandAlametleri Uzerindeki Haklar”, YUHFD, Volume 8, Ozel Sayi, Yil: 2013, p. 1597. (Kilicoglu, Eser).

⁴⁷ **TEKINALP**, p. 289; R. Yilmaz **YAZICIOGLU**, *Fikri Mulkiyet Hukukundan Kaynaklanan Suclar*, Istanbul, 2009, p. 532; Huseyin Cem **COL**, “Fikir Sanat Eserleri Kanunu’na Göre Eser Disinda Koruma Yollari”, AuHFD, Cilt: 52, Sayi: 4, Yil: 2003, p. 375.; **YAVUZ/ALICA/MERDIVAN**, p. 2953.

⁴⁸ **YAVUZ/ALICA/MERDIVAN**, p. 2952.

believe. This regulation can be more properly included within Turkish Civil Code or at least Turkish Criminal Law.

In the doctrine, the existence of the expression “etc.” is interpreted more broadly and it is understood that several other writings such as notes and messages should also be included⁴⁹. Considering that the aim of the relevant article is to provide protection for interpersonal private correspondences and to prevent the sharing of such correspondences with third parties, e-mail correspondences, any private messaging on social media and on smart phone apps shall be covered under FSEK’s article 85⁵⁰. Indeed FSEK’s article 85 clause 1 openly states that the protection is not limited to letters and diaries but also covers “similar writings”.

2. Consent of the Author and the Addressee

For FSEK’s article 85 to be implemented it is required that no consent be given to the publishing of writings and the consent period not be expired. However, there is not any specific regulation regarding the consent to be given for the use of writings. In the doctrine, it is believed that the consent in question should be given as a written document⁵¹. If the person (the writer of the letter, memoirs, etc.) who is authorized to give consent is alive, they personally should give consent; if not, FSEK’s article 19 clause 1 states who are authorized to give consent: testamentary executor, if no testamentary executor is assigned, then the surviving spouse, children, appointed legatees, parents and siblings respectively.

The legislative body has laid down as a condition one more thing in addition to the conditions stated above in FSEK’s article 85 clause 2 about letters. Apart from taking the consent of the author in order to publish the letter, the addressee’s consent should

⁴⁹ YAZICIOGLU, p. 532; COL, p. 375; AYITER, pp. 87-88; EREL, p. 187; TEKINALP, p. 113.

⁵⁰ YAVUZ/ALICA/MERDIVAN, p. 2951.

⁵¹ COL, p. 37

also be sought⁵². In the doctrine it is argued that the additional consent that is sought in terms of letters should also be sought for other writings that have addressees⁵³. Since there is not an addressee in diaries, no additional consent needs to be taken. Although it is accepted that the publishing of letters, memoirs, etc. can be legal only with author's consent or after 10 years of author's death, if the publishing breaches personal rights of the authors or addressees, responsibility therewith may occur in accordance with TMK's articles 24 and 25. TMK's article 24 states that publishing of the letters, memoirs, etc. might be considered legal on condition that "a superior private or public good exists or authority stemming from law is used". This general rule is also applicable for FSEK's article 85 which qualifies as a special rule⁵⁴.

3. Time Limit of Protection

The protection offered by FSEK's article 85 is limited to a certain time⁵⁵. Letters, memoirs, etc. can be published upon the written consent of the author or ten years after the author's death without seeking anyone's consent. In other words, there is no time limit for giving consent if both the author and the addressee are alive. But if they both die a period of ten years after the second death starts to tick⁵⁶. FSEK's protection becomes valid ten years after the death of both the author and the addressee⁵⁷.

4. Preservation of Personality Rights Violation

FSEK's article 85 clause 3 states that the publishing of letters, memoirs, and similar writings without consent, no matter if the writing qualifies as a work of art or not,

⁵² YAVUZ/ALICA/MERDIVAN, p. 2953.

⁵³ KILICOGLU, Eser, p. 1598; COL, p. 377.

⁵⁴ YAVUZ/ALICA/MERDIVAN, p. 2954.

⁵⁵ YAVUZ/ALICA/MERDIVAN, p. 2955.

⁵⁶ KILICOGLU, Eser, p. 1600; COL, p. 377.

⁵⁷ YAVUZ/ALICA/MERDIVAN, p. 2955.

TBK's article 49 and TCK's articles 132, 134, 139 and 140 shall be eligible to be put into practice. Additionally, the person who suffers moral damage as a result of the publishing is entitled to filing a lawsuit for mental anguish in accordance with FSEK's article 70/1⁵⁸. This article does not specify any time limit⁵⁹. During the process of determining the amount of moral damage payment, the agony and sorrow that the person suffers needs to be paid close attention⁶⁰. The author or the addressee of the letter, memoir, etc. might have died and thus no violation of personality rights can be indicted for; however, close relatives of the related persons are entitled to taking legal action if they are affected from an aggression⁶¹.

B. Paintings and Portraits

FSEK's article 86 states under the heading "Paintings and Portraits", "Even if they are not qualified as works of art, paintings and portraits may not be offered to public without the consent of the depicted person, and if the depicted person has passed away the consent of the persons lined in the first clause of the 19th article upon 10 years of the death. "Paintings and portraits" are used in a broad sense to include images such as photography and comics⁶².

This regulation of FSEK's article 86 is also based on "protection of character". It's because the painting or portrait of a person is one of the most important means to

⁵⁸ FSEK's article 70/1: "The person whose moral rights have been defected may file a suit for spiritual damages. The court may rule this in money, or in another spiritual damage."

⁵⁹ Yalcin **TOSUN**, M. Murat **INCEOGLU**, "Fikir ve Sanat Eserleri Kanunu Uyarınca Manevi Tazminat Talepleri and Bunların Türk Borçlar Kanunu İle İlişkisi", *Banka and Ticaret Hukuku Dergisi*, C.XXVIII Volume 3, Ankara, 2012, p. 83.

⁶⁰ **TOSUN/INCEOGLU**, p. 91.

⁶¹ **YAVUZ/ALICA/MERDIVAN**, p. 2956.

⁶² **TEKINALP**, p. 289; Yalcin **TOSUN**, *Medeni Hukuk, Sözleşme Hukuku ve Fikir ve Sanat Eserleri Hukuku Açısından Manevi Haklar*, İstanbul, 2016, p. 317; **COL**, p. 379.

make them known to others, reflecting their personality to the outside world. Thus FSEK's article 86 protects personality rights⁶³.

FSEK's article 86 specifies four elements to be taken into consideration:

- 1) It need not qualify as work of art
- 2) The consent of the depicted person need not give consent
- 3) The protection is limited to a time period
- 4) No exceptions where permission is not sought

FSEK's article 86 does not require the painting and portrait to qualify as work of art⁶⁴. If the painting or portrait qualifies as a work of art, no doubt it will be covered as part of FSEK's protection for works of art. When they do not qualify as works of art, paintings and portraits cannot be offered to public or cannot be displayed without the consent of the persons listed under FSEK's article 19. This prohibition is limited to a period of ten years following the death of the depicted person⁶⁵. Consent seeking and a period of ten years are not valid for paintings and portraits. FSEK's article 86 clause 2 states that no consent needs to be sought for "paintings or pictures of figures consisting the nation's political and social life showing up at parades, official ceremonies or general meetings, and daily events can be used on radio and TV without a need for consent".

It is a violation of personal right to release to the public or reproduce a picture or a photograph of a person without permission⁶⁶. The photograph shall be protected under FSEK's article 86 even though it is not considered a work of art⁶⁷. In the doctrine, it is

⁶³ COL, p. 379; **KILICOGLU**, *Eser*, p. 1601; Durgun **YARSUVAT**, *Turk Hukukunda Eser Sahibi ve Haklari*, Istanbul, 1984., p. 72; **AYITER**, p. 82. "The person has personality rights over means that allow for the reflection and recurrence of their appearance. In respect to this, FSEK's article 86 specifies that pictures and portraits are included within a person's personality rights." (**EREL**, p. 190)

⁶⁴ **YAVUZ/ALICA/MERDIVAN**, p. 2960.

⁶⁵ **TOSUN**, *Manevi Haklar*, p. 316; **COL**, p. 382 et al.; **KILICOGLU**, *Eser*, p. 1602.

⁶⁶ Safak **PARLAK BORU**, *Fotograf Uzerindeki Haklar*, Ankara, 2013, p. 61.

⁶⁷ **PARLAK BORU**, *Photograph*, p. 399.

understood that if, just coincidentally, some person has been included within the photograph, which means that the main subject of the photograph is not the person himself/herself but they look only as a detail, there is no need to take the related permission under FSEK's article 86⁶⁸. Parlak BORU adds that this condition needs to be technically compulsory, too⁶⁹. For photographs with commercial interests, the Supreme Court has passed judgment to the contrary⁷⁰. Failure to comply with the conditions specified under FSEK's article 86 clause 1, which means absence of consent or less time than ten years spent after the death, TBK's article 49 and if other conditions apply, TCK articles 134, 139, and 14 shall be applicable, which is stated in FSEK's article 86 clause 3. In all circumstances, even though the release is in accordance with FSEK's article 86 clauses 1 and 2, it is specified under FSEK's article 86 clause 4 that the release shall not be conflicting with TMK's article 24.

IV. The Concept of Personality Rights

It is first necessary to define what a person is in order to define the concept of personality rights. In Latin languages, the word "persona" was used to describe the mask actors and actresses used to wear in old times⁷¹. Today the same work has been used to describe the concept of an individual so that the role individuals play in terms of legal theatre stand out⁷².

Personality rights have been protected by the Constitution, chapter 2 entitled "Fundamental Rights and Duties". Similarly, articles of 23, 24 and 25 of Turkish Code of Obligations also apply. In addition to these articles, special provisions are

⁶⁸ PARLAK BORU, *Photograph*, p. 401.

⁶⁹ PARLAK BORU, *Photograph*, p. 401.

⁷⁰ See HGK, 3.10.1990, E.1990/4-275, K.1990/459 (YKD, April 1991, C.17, Issue 4, p. 522).

⁷¹ Zahit IMRE, *Medeni Hukuka Giris (Temel Kavramlar Medeni Kanununun Baslangic Hukumleri ve Hakiki Sahislar Hukuku)*, 3. Edition, Istanbul, 1976, p. 347.

⁷² Serap HELVACI, *Gercek Kisiler*, Istanbul, 2012, p.19.

also applicable as to the protection of individual values regarding personality rights⁷³. As can be seen, there is not a description of personality rights in our legal system, which paves the way for the occurrence of several definitions within the doctrine. For example, Dural and Oguz define it as *a set of values protected for creating respect and improving an individual's status within the society*⁷⁴. Supreme Court decisions show that personality rights “is an absolute right that protects the free and independent integrity of one’s self and can be claimed against anybody”⁷⁵. There is also a Supreme Court decision in which the court defines personality rights as “rights that protect one’s life, health, physical and spiritual integrity, intellectual efforts, pride and prestige, respectability”⁷⁶.

Another point to dwell upon is the relation between the concept of personality rights and moral rights. These two rights are closely intertwined and most of the time they intersect. In the doctrine it is discussed that these rights are interrelated or extension of one another. Tosun and Inceoglu put forward that there is not an absolute answer that delivers a solution to the problem in terms of interrelatedness, thus one should examine the current issue at hand to understand it⁷⁷. Distinguishing between the two interconnected rights is significant in order to prevent recurrent proceedings. In some instances these two rights might be understood as inseparable and proceeding should follow both of them. In such a case it is attention worthy whether there is related as in special or general provision⁷⁸. The existence of special provision shall make the appliance of general provision inessential⁷⁹.

⁷³ For example MK article 26 - The person whose name is used contentiously may file a suit for the assessment of their name. This person whose name has been used contentiously may ask for the other party to stop using their name, to dissipate the material damage, and, if the qualification of the harm allows, to pay for spiritual damages.

⁷⁴ Mustafa **DURAL**, Tufan **OGUZ**, *Turk Ozel Hukuk Cilt 2 – Kisiler Hukuku*, Istanbul, 2017, p. 8.

⁷⁵ Supreme Court Assembly of Civil Chambers 2012/4-179 E., 2012/512 D. and 27.06.2012 numbered decision (Kazanci, accessed on: 21.10.2017)

⁷⁶ Supreme Court 4. Civil Chamber’s 2002/13785 E., 2003/7489 K. and 10.06.2003 dated decision (Kazanci, accessed on: 21.10.2017)

⁷⁷ **TOSUN/INCEOGLU**, p. 81.

⁷⁸ **TOSUN/INCEOGLU**, p. 96.

⁷⁹ **TOSUN/INCEOGLU**, p. 97.

V. Characteristics and Scope of Personality Rights

Personality rights is one of immaterial rights and it is invaluable, which should not be understood that violation of personality rights does not result in pecuniary punishment⁸⁰. For example, there is a certain treatment expense to be made to the hospital as a result of getting injured because of tortious act. Similarly if someone gets injured because of tortious act and cannot work for a period of time that loss of pay is also calculable⁸¹. Then it is valid to say that although personality rights are invaluable, violation of them has pecuniary results, which means that personality rights can very well consist the subject of a legal contract like other rights do. An individual can consent to someone else's using of a personality rights value for a fee. Then in terms of using someone else's personality rights value for a fee at a certain ratio can be possible as we will handle further in this study.

Personality rights is an absolute right and can be claimed against anybody. Thus everybody apart from the right-holder is entitled to showing respect to this right and obliged not to violate it⁸². But when it is considered that fundamental rights and freedoms can be limited under some circumstances, it might not be always possible to use an absolute right such as personality rights.

Personality rights are unduly attached to the individual, thus ends by death and cannot be transferred to legal heirs⁸³.

Although TMK states some general provisions regarding the protection of personality, there is not a one-by-one listing of elements that are considered personality rights. This is because elements within the scope of personality rights differ in time and new

⁸⁰ DURAL, OGUZ, p. 6.; Mehmet AYAN/Nursen AYAN, *Kisiler Hukuku*, 8. Edition, Ankara, 2016, p. 88

⁸¹ DURAL/OGUZ, p. 103.

⁸² AYAN/AYAN, p. 87.

⁸³ DURAL/OGUZ p. 104; AYAN/AYAN, p. 88.

values emerge. Therefore TMK only refers to framework provisions⁸⁴. In the doctrine elements that are accepted as part of personality rights are as follows.

One of the most fundamental personality rights is “the integrity of life, health and body”. The article 17th of Constitution states clearly that everybody has a right to life as a fundamental right, to live, to protect and improve their physical and moral existence. The individual’s life, health and body integrity are understood as part of their personality⁸⁵. Everybody needs to show respect to other people’s lives and body integrity, as well as being obliged to respect and protect their own life and body integrity. There are numerous regulations regarding the protection offered against an aggression to an individual’s life, health and body integrity. TMK’s articles 23⁸⁶ and 24⁸⁷, as well as TBK’s article 49⁸⁸ offer regulations in order to protect life, health and body integrity. Similarly, TCK’s heading “Crimes against Life” states that killing, wounding, experimenting on human beings are subject to certain punishments.

Another element within the scope of personality rights is “reputation”. Reputation is described as the totality of moral values attributed to an individual by society⁸⁹. Whatever the position of an individual within the society, they are entitled to asking for protection in the event of violation of their reputation. TMK’s article 24 entitled “Protection of Personality” includes reputation as part of the protection to be offered.

⁸⁴ M. Kemal **OGUZMAN**/Özer **SELICI**/Saibe **OKTAY – OZDEMIR**, *Kisiler Hukuku (Gerçek ve Tuzel Kisiler)*, 16. Edition, Istanbul, 2016, p. 42; **DURAL/OGUZ**, p. 92.

⁸⁵ **HELVACI**, p. 50; **OGUZMAN/SELICI/OKTAY OZDEMIR**, p. 166; **DURAL/OGUZ**, p. 100.

⁸⁶ TMK article 23: “Nobody may retract from their rights and obligations, not even partially. Nobody may retract from their freedoms or limit them as opposed to the law or morality. It is possible to receive, inoculate, and transfer biological substances of human origin upon written consent. However, the person who has given consent may not be obliged to fulfill their deed and may not be asked to pay material or spiritual damages thereof.”

⁸⁷ TMK article 24: “The person whose personality rights have been violated against the law, may ask for protection from the judge against those who attack them. Unless justified as having superior public or private interest, any attack on personality rights is illegal.”

⁸⁸ TBK article 49: “Committing an action which is defected and unlawful requires compensation. Even though there exists no law prohibiting harming action, the person who harms another person by an immoral action is obliged to undo the harm.”

⁸⁹ Ahmet M. **KILICOGLU**, *Seref, Haysiyet ve Özel Yasama Basin Yoluyla Saldirilarda Hukuksal Sorumluluk*, Ankara, 2008, p. 87; Safak **PARLAK BORU**, “*Esra Karari Isiginda Bir Hassas Denge Degerlendirmesi: Kisilik Haklarinin Korunmasi vs. Sanat Ozgurlugu*“, Inonu University Law School Journal, Volume 8, Issue 2, Year: 2017, p. 251. (BORU, *Esra Karari*)

Violations of reputation have become more important as a result of the higher technology and proliferation of communicative tools.

Like reputation, secrets and private life of an individual is also an element that consist personality rights. An individual's secrets and private life which they prefer not to be discovered by other people are among interests worthy of protection⁹⁰. Any illegal violation of these two shall count as a violation of personality rights. The 20th article of the Constitution states that "Everybody has a right to expect respect for their private life and family life. Confidentiality of the private life and family life cannot be breached". Similarly, acts like spying on somebody, recording private conversations, breaching the privacy of life, and saving somebody's personal data are described as felonies under the heading "Crimes against Private Life and Private Aspects of Life" of TCK.

VI. Compliance with Laws in Violation of Personality Rights

Personality rights do not stem from an absolute and limitless legal protection, which means that not every act that harms someone else's personality rights can be legally punished⁹¹. TMK's article 24 states that "Any violation of personality rights is against the law unless the person whose personality rights have been breached show consent or a higher private or public interest exists". Similarly, TBK's article 63 clause 2 states that "The consent of the disadvantaged person, a higher private or public benefit, justified defense, self defense of the disadvantaged person when the institution in charge shall intervene only untimely shall make the act not illegal".

Since the subjects of consent and higher public benefit are important, they are handled under separate headings.

⁹⁰ HELVACI, pp. 59, 62; OGUZMAN/SELICI/OKTAY OZDEMIR, p. 136.

⁹¹ Sevil AYDIN, *Radyo ve Televizyon Yoluyla Kisilik Haklarinin Ihlali ve Hukuksal Korunma*, Ankara, 1999, p. 125.

A. Higher Public Benefit

The 13th article of the Constitution states that fundamental rights and freedoms can be limited due to “public interest”, which means that personality rights can also be limited based on the existence of higher public interest constitutionally. Although it is claimed that rather than the individual’s interests, higher public interests are cared for⁹², the demarcation is not definite, thus the concrete case determines it.

For example intervening private lives of public servants and public figures is obligatory at some point because the role of the press is to inform the public. Article 28 of the Constitution states that “The press is free and cannot be censored”.

Therefore, broadcasts to be made within the framework of freedom of press can hurt personality rights a bit. In such a situation, the rule is that no liability occurs thereof⁹³. However this does not entail any and every intervention in private life or safe area. For the intervention not to be illegal there should be public interest and the news piece to be published should be regarding the position the persons are occupying or regarding the subject they are known to the public. Without public interest disclosing of these persons’ private life shall be deemed illegal⁹⁴.

In sum, if a person’s right to privacy conflicts with public interest, best interest steps in and privacy shall remain in the background. It is not only regarding the press and news pieces, also within the context of artistic creation privacy of persons can be intervened in or their dignity can be incidentally harmed. In such a situation,

⁹² **OGUZMAN/SELICI/OKTAY OZDEMIR**, p. 222.

⁹³ **AYAN/AYAN**, p. 121; **DURAL/OGUZ**, p. 139; **OGUZMAN/SELICI/OKTAY OZDEMIR**, p. 217.

⁹⁴ **OGUZMAN/SELICI/OKTAY OZDEMIR**, pp. 227-228; **DURAL/OGUZ**, p. 139; **OGUZMAN/SELICI/OKTAY OZDEMIR**, p. 223.

determining which freedom or right to protect shall require the weighing of the benefits⁹⁵.

B. Consent of the Harmed

The law maker agrees that contracts that do not completely abolish a person's personality rights and do not restrain these rights to a great extent may be made. This is accepted as a natural result of the freedom of contract⁹⁶. The person's consent may legalize interventions in their privacy. For example, a person may give consent to the publishing of their memoirs including many secrets about their private life⁹⁷. In this case, when the person gives consent to the disclosing of private dimensions of their life, no illegal action occurs thereof.

If the person conditions that the content to be disclosed needs to be true and fair this line should not be overstepped⁹⁸. For example if the person has allowed the releasing of only two out of three photos it is deemed illegal to publish all three of them.

Consent of the person prevents the illegality of the publishing of pictures, novels and such. Thus the doctrine dictates that the person, upon giving consent, may ask for no further compensation as a result of the publishing⁹⁹. We believe that giving consent first and asking for compensation later is to be regarded as misuse of the right.

The law maker makes no restraint as to the requirement as to form of the consent. Consent can be given in the form of explicit declaration of intent as well as covertly¹⁰⁰. In the event of covert consent, every case is required to be handled in itself. Consent can be about direct action as well as undertaking of a risk. For

⁹⁵ AYDIN, p. 129.

⁹⁶ AYDIN, p. 151.

⁹⁷ AYAN/AYAN, p. 118; PARLAK BORU, *Esra Karari*, p. 261.

⁹⁸ DURAL/OGUZ, p. 139.

⁹⁹ PARLAK BORU, *Esra Karari*, p. 261.

¹⁰⁰ PARLAK BORU, *Esra Karari*, p. 262.

example, it is accepted that the risk is undertaken and the probable result is consented beforehand at a sports competition.

VII. Freedom of Artistic Creation

In the 20th century the definition of art was heavily argued¹⁰¹. Philosophers and artists have put forward various (and mostly contradicting) definitions and they failed to agree upon a specific one¹⁰². We need to explain what art is a bit first because the concept fails to have a universally agreed-upon definition before dwelling upon the freedom of artistic creation.

Art is the almost same age as humanity¹⁰³. In other words, it is an old and rooted concept that has existed since the dawn of humanity. Discussing what art is, people often apply to the concepts of aesthetics and rationality. At earlier times works of art with high aesthetic quality were accepted as true works of art, but later works of art with a rational concept behind were also considered so. In the doctrine various understandings of art have come forward, but in general art is accepted to have a power of understanding and changing the world, putting oneself in someone else's shoes, illuminating social relations and bringing light to reality¹⁰⁴.

No doubt that freedom of artistic creation has been regarded as a need that advances societies and has been put under protection by law. Whether a state is repressive or

¹⁰¹ Nigel **WARBURTON**, *The Art Question*, London, 2003, p. 1.

¹⁰² Bilge **BINGOL**, "Sanat Ozgurlugu", *Hacettepe Law School Journal*, Bingol, 2011, p. 95.

¹⁰³ Ernst **FISCHER**, *Sanatin Gerekliligi*, 6. Edition, Istanbul, 2018, pp. 27-30.

¹⁰⁴ **FISCHER**, p. 27.

libertarian can be judged from such laws protecting art¹⁰⁵. Societies with free art have always been more prone to criticism and development¹⁰⁶.

In Turkey freedom of artistic creation appears in the 27th and 64th articles of our Constitution. These two articles together assure that the freedom of artistic creation is protected against state intervention in the individual and enjoins the state not to interfere.

As to the 27th article of the Constitution¹⁰⁷, the right of artistic creation is a subjective right and as to the 64th article it is secured institutionally¹⁰⁸. In other words, the state protects and supports the artist's effort to produce works of art. For the state to protect and support the artistic production and the artist themselves, the person is not required to be a professional artist. The state does offer protection for non-professional artistic production, as well¹⁰⁹. The person's method for artistic production may be in various different forms. Mostly, people set off from their own lives and produce artistic works but this is not a must. People can also set off from other people's lives or base their works solely on fiction. If there exists an artistic work the state is obliged to protect it.

There exists a delicate balance between the protection of personality rights and freedom of art. There is disagreement as to the extent to which the law should protect this balance. Freedom of artistic creation requires the state to protect the work of art regardless of the method of production. However, in certain cases, personality rights might conflict with this. It is possible for a work of art to violate personality rights. In

¹⁰⁵ Bingol, p. 101.

¹⁰⁶ When we examine the top ten countries where artistic censorship is widespread we can form this opinion easily. See: <https://cpj.org/reports/2006/05/10-most-censored-countries.php> (accessed on: 30.04.2018), For graphs which illustrate that countries where freedom of expression overweighs are generally more developed ones see: <https://www.weforum.org/agenda/2016/11/freedom-of-speech-country-comparison/> (accessed on: 30.04.2018)

¹⁰⁷ Constitution article 27: This article assures freedom of art and science. Everybody is entitled to learn and teach, explain, spread and do research freely on art and science. As this article requires, the person who uses freedom of art and science is obliged to be objective which is an attribution to art and science.

¹⁰⁸ Christian RUMPF, *Türk Anayasa Hukukuna Giriş*, Ankara, 1955, p. 160.

¹⁰⁹ PARLAK BORU, Esra Karari, p. 264.

such a case, should the state protect the work of art and the artist or the person whose personality rights have been violated? It is required to examine certain real life cases which have become sensational throughout the society in the past.

CHAPTER TWO

I. Cases from the Real Life

A. Book of *Esra*

In Germany, a writer called Maxim Biller wrote a novel entitled *Esra* about his former lover in real life. In the novel he included details and personal information about Esra and her mother. Although the book does not solely depend on real events, the author's writing style and real life details that he gives creates the impression that the totality is real and based on real life events. Upon the publishing of the book the writer's former girlfriend and her mother sued the writer and the publisher with a *bill quia timet* arguing that their personality rights have been violated. The writer and the publisher argued that the case should be dismissed on the basis of German Constitution that secures artistic production within the framework of artistic freedom. The local court ordered the book to be suspended from selling as a preventative action and ruled that it can be sold only if the parts that violate the related persons' personality rights are omitted. When the case was brought to federal court, it ruled that in this case personality rights were heavily violated and right of artistic creation should remain in the background. Even though the changes that the local court ordered to be made were already made, the book was prevented from publishing¹¹⁰. In this case, Federal Court of Germany ruled that the "core of the private life" of the writer's girlfriend was intervened in which required the court to place personality rights before the right of artistic creation¹¹¹.

In our opinion, the court's rule in *Esra* case is sound. Private details that the writer gives about his former girlfriend and her mother are significant ones. The writer does not conceal the real life situation and persons at most times; to the contrary, he creates

¹¹⁰ PARLAK BORU, *Esra Karari*, pp. 272-274

¹¹¹ Paul M. SCHWARTZ/Karl-Nikolaus PEIFER "Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?" *California Law Review*, Vol.: 98, Issue: 6, p. 1932.

a work of art disclosing information about the persons who would prefer it to remain unknown. Although it is no doubt that the novel itself is a work of art, the quality of the novel remains in the background because there exists a heavy violation of personality rights throughout the book. In other words, the book *Esra* is based on the violation of someone's personality rights and when this basis disappears the book itself is left with no considerable content worthy of artistic value.

We believe that legalizing the book *Esra* is to change the persons and plot of the book. If the writer had shown a bit of an effort to protect the personality rights of his former girlfriend and her mother and if he had changed the flow of events and the time of events, the intensity of the violation of personality rights would have been less and the book could have been understood to carry artistic value apart from the violation. However in this case the writer is known to have taken no precaution not to hurt personality rights, but he deliberately violated heavily the personality rights of his former girlfriend and her mother.

B. The Book and Documentary of *Voyeur's Motel*

The Netflix documentary *Voyeur* is an interesting documentary that tells the story of a work of art created by violating someone's private life. Famous journalist Gay Talese receives a call. Gerald Foss, who spied on people staying in his hotel from the ventilating opening, tells what he has seen so far and make the journalist write a book and later this process becomes a documentary.

People staying at the hotel room have no idea that they were being spied on and a book and a documentary were produced out of this, which, no doubt, breaches the secrecy of private life as well as personality rights. The question is, shall the documentary be evaluated as a work of art or a breach of personality rights?

We understand that the stories that Gerald Foss means to tell are collected by breaching personality rights, but the breach remains in the background when

compared to the value of the product because information about the specific persons have not been mentioned in the book, neither in the documentary. Therefore, we believe that right of artistic creation overweighs the breach of personality rights in this case.

C. The Book and Film of *Ucurtmayi Vurmasinlar*

Feride Cicekoglu's *Ucurtmayi Vurmasinlar* was made into a film, script by the same author. Cicekoglu tells the story of Baris ("peace") whom she met at the prison serving her time because of her political ideas. She changed her name but not Baris's. We understand that this preference is because of the ironic contrast this name holds with the prison.

After the publishing of the book and screening of the film, Baris Gokce filed a suit claiming that his personality rights were breached since no payment was done to him from the high revenues collected from the book and the film which told his real life story without any permission of his.

Although there might exist a breach of personality rights in *Ucurtmayi Vurmasinlar*, the high quality of the work makes it a matter of public record. It received best screenplay award at 26th Antalya Altin Portakal Film Festival and has been considered as one of the best examples of Turkish cinema¹¹². No doubt that the film has been a cult¹¹³, which was examined by academic authors¹¹⁴. Then it can be concluded that the public loss as a result of pulling the book off the shelf and

¹¹² <http://www.hurriyet.com.tr/kelebek/keyif/iste-100-kisilik-buyuk-jurinin-en-iyi-10-film-tercihleri-40406840> (accessed on: 22.03.2018)

¹¹³ <http://t24.com.tr/yazarlar/yilmaz-murat-bilican/tyatrocu-kadinlar-tyatroya-gelemeyen-kadinlar-icin-oyyadi,19519> (accessed on: 22.04.2018) The newspiece mentions that "a generation has watched *Ucurtmayi Vurmasinlar*"; <http://yenilerkendinihayat.blogspot.com/2014/06/ucurtmay-vurmasnlar.html> (online: 22.04.2018) In the blog the film is characterized as "an unforgettable film".

¹¹⁴ An article on perspectives of a child gives examples from *Ucurtmayi Vurmasinlar*. https://s3.amazonaws.com/academia.edu.documents/47528649/Cocuk_Bakis_Acisi.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1524395723&Signature=7Yf4pTm74eylyqL9MfcFx64b3ag%3D&response-content-disposition=inline%3B%20filename%3DCHILD_S_POINT_OF_VIEW_AS_A_NARRATIVE_TEC.pdf (accessed on: 22.04.2018)

preventing the screening of the film shall be much greater than the good the person is going to have because of breach of personality rights.

Besides, the suit was filed far later than the book and the film was made public, which brings to mind that Baris, whose personality rights were violated, might not be well intended and might be pursuing his economic interests per se. In this case, in our opinion, the balance of interests reveals that the right of artistic creation outweighs the breach of personality rights.

D. The Song of “Chelsea Hotel No: 2”

Leonard Cohen’s song “*Chelsea Hotel No:2*” is about Janis Joplin whom he met at Chelsea hotel in 1968. The lyrics reveal private moments they had together¹¹⁵. Lines such as “(You were) giving me head on the unmade bed”, “You told me again you preferred handsome men, but for me you would make an exception”¹¹⁶ clearly breach the secrecy of private life. The song was released in 1974 four years after Janis Joplin’s death. It was impossible for Janis Joplin to be aware of the song. Although her name was not mentioned in the song even for once, Cohen does not bother himself to keep it a secret that he wrote it for Janis. However, Janis Joplin’s heirs did not take any legal action as to this, which means that there is consent in this case. Consent does not come from the person whose personality rights were violated directly, but from her heirs in the form of covert consent by not taking a legal action.

E. The Film of *40*

Emre Sahin wrote and directed the film of *40* in 2009. It is an action film in which three people look for a bag running around in the back streets of Istanbul. The interesting thing is one of the characters is too similar to G.O.’s life who converted to Christianity and became a deputy priest. G.O. takes legal action against the writer¹¹⁷

¹¹⁵ <https://www.rollingstone.com/music/features/how-leonard-cohen-met-janis-joplin-at-the-chelsea-hotel-w450211> (accessed on: 22.04.2018)

¹¹⁶ <https://lyricstranslate.com/tr/chelsea-hotel-no-2-chelsea-oteli-no-2.html> (accessed on: 22.04.2018)

¹¹⁷ Supreme Court 11. Civil Chamber., 10.6.2014, E. 2013/17824, D. 2014/11064, www.kazanci.com.tr

and the court rules that the claimant is to receive spiritual damages as a result of the breach of his personality rights since his life story is copied in the film and even his last name was kept the same¹¹⁸.

F. Files Against Comedians

Louise Reay, a comedian living in England, was talking about their private life with her ex husband in her show as a result of which the court sentenced her to 30.000 pounds of spiritual damages as well as attorneyship fee. In 2017 at a show themed censor and parrhesia, Louise Reay said that “This file is not only about my freedom but about the freedom of all comedians because it is our job to talk about ourselves and social issues”¹¹⁹. Upon failing to cover the court expenses, she started out a fund on crowdfunding website. Louise Reay explains that she only talked for two minutes about her ex husband at a fifty minute show and the content was how miserable she became after the divorce. She pursues her career as a comedian in Australia these days.

This is not the first case dealing with the content of a comedian’s show. Sue Croonquist, an American comedian, was formerly sued by her stepmother¹²⁰. She was adversely affected by the file and she said that her marriage was almost ending as a result. The file was dismissed by the court eventually¹²¹.

¹¹⁸ TOSUN, *Manevi Haklar*, p. 308.

¹¹⁹ http://www.chortle.co.uk/news/2018/02/17/39167/comic_sued_by_ex-husband_for_talking_about_him_on_stage (accessed on: 22.04.2018)

¹²⁰ <https://www.telegraph.co.uk/news/picturegalleries/howaboutthat/6090333/Comedian-Sunda-Croonquist-sued-by-mother-in-law-over-racist-jokes.html> (accessed on: 22.04.2018)

¹²¹ http://www.chortle.co.uk/news/2018/02/17/39167/comic_sued_by_ex-husband_for_talking_about_him_on_stage (accessed on: 22.04.2018)

G. The Novel of *Imkansiz Ask*

Hasan Oztoprak revealed that his book *Imkansiz Ask* was actually autobiographical, which resulted in the exposure of Asli Erdogan's private life, one of the main characters in the book. Asli Erdogan explains that she is not willing to share with everyone the information that she does not wear a bra as is told in the book, which, she claims, caused her father to have a heart attack and almost die. Erdogan tells that she could not read even a newspaper for a full year after the trauma that she had and people nicknamed her as "braless woman". Asli Erdogan expresses that she is afraid of being even more exposed and believes the subject shall be forgotten if she keeps silent, and thus prefers not to file a suit¹²².

H. The Character of Can Manay

It was claimed that Can Manay, protagonist of Fi series, is actually Cem Mumcu in real life. Upon this claim the journalist Ayse Arman interviewed Cem Mumcu¹²³. He told Arman that people tell him they resemble Can Manay's character to him quite often, however Can Manay does not have the same character as he does, besides he does not know the author in person, and if he claimed the author was inspired from him it would be quite a speculative claim. The author has not talked whether she was influenced or inspired from Cem Mumcu's character. Cem Mumcu specified that he did not particularly like this situation but took no legal action.

I. Photography Case

Arne Svenson, a photographer based in New York, took photos of the large windows in Tribeca neighborhood in 2012. Martha and Matthew Foster filed a suit upon

¹²² <http://www.milliyet.com.tr/-bastan-beri-kadin-olmayi-reddettim-/pazar/haberdetayarsiv/02.02.2005/103610/default.htm> (accessed on: 22.04.2018)

¹²³ <http://www.hurriyet.com.tr/yazarlar/ayse-arman/yazar-ressam-psikoterapist-can-manay-sanilan-cem-mumcu-gerceklik-kadar-seksi-hicbir-sey-yoktur-40521362> (accessed on: 22.04.2018)

discovering that familial life of their neighbors are shown in the photography. Upon their request the photograph that reveals their four year old daughter in a swimming suit and two year old son in diapers was omitted from the exhibition. Foster couple did not find this satisfying enough and wanted to appropriate film negatives. Svenson defended himself at this point. The large windows had no curtains which made their house life observable from outside, he claimed. In the court it was discussed that the private life that a person has in their house *vis-a-vis* at a park, for instance, is not the same. As a result the court examined the content of the photograph and could not find anything more private than kids playing at a park, thus ruled in favor of Svenson¹²⁴.

J. Artworks Produced out of Body Parts

The world famous BODY WORLD exhibition aims to teach how our bodies look inside and how our system works by creating plastic sculpture out of human cadaver and body parts¹²⁵. There has been a claim that these body parts belong to arrested men in China¹²⁶. People in charge denied this and announced that body parts belong to desolates or unidentified persons. The company responsible of BODY WORLD in the USA was asked to show documentation for the owners of cadavers and body parts. Also refund of money to those who visited the exhibition came up. Eventually it remained unproved where the bodies were taken from and a campaign was started to prevent the importing of plasticized human parts from the USA.

¹²⁴ <https://itsartlaw.com/2013/07/21/right-to-privacy-v-freedom-of-expression-in-case-of-peeping-tom-photographer/> (accessed on: 22.04.2018)

¹²⁵ <https://bodyworlds.com/about/philosophy/> (accessed on: 22.04.2018)

¹²⁶ <https://cityroom.blogs.nytimes.com/2008/05/29/bodies-exhibit-must-put-up-warnings/> (accessed on: 22.04.2018)

K. Private Lives of Amish People

We touched upon private rights of individuals beforehand, but this time we shall touch upon the secrecy of private life of a community. During the shooting of *Witness*¹²⁷ in the USA there came up some ethical questions. The entertainment sector in the USA was aiming for displaying Amish people's lives¹²⁸, whereas they wanted to keep it private. Amish people try to untie their bonds with this world but Hollywood intends to make them a focal community. Amish people cannot afford lawyers and make use of the police force whereas Hollywood has all the facilities. Hollywood believes the messages that it gives about Amish people in the films, they believe these messages are truly controversial and distorted. Amish people looked for a solution in holy connection and Hollywood went to law¹²⁹. Should we protect Amish people who want their private life to remain secret and private or Hollywood that used the right of artistic creation and shot films?

II. Comparative Study of Breach of Personality Rights and Artistic Freedom

An artist's right of artistic creation and a third person's personality rights may conflict and when they do there are some elements to be looked at in order to determine which right overweighs:

- Which element has been breached as part of personality rights?
- Is the person whose personality rights have been breached famous?
- What is the type of the work?

¹²⁷ <https://www.imdb.com/title/tt0090329/> (accessed on: 24.04.2018)

¹²⁸ On Wikipedia Amish people are characterized as follows: "The Amish are a group of traditionalist Christian church fellowships with Swiss German Anabaptist origins. The Amish are known for simple living, plain dress, and reluctance to adopt many conveniences of modern technology." (accessed on: 24.04.2018, <https://en.wikipedia.org/wiki/Amish>)

¹²⁹ Larry GROSS/John Stuart KATZ/Jay RUBY//*Image Ethics, The Moral Rights of Subjects in Photographs, Film, and Television*, New York, 1988, p. 234.

- Is it possible to recreate the work in a different way?
- Is there public interest in the publishing of the work?
- What is the opinion of an average person?

A. Elements Breached in the Framework of Personality Rights

In our opinion, first of all it should be determined which personality right of the third person is breached. If a person's life, health or body integrity, then that person's personality right should unequivocally outweigh and right of artistic creation should remain in the background. This is protected by conventions such as International Bill of Human Rights and Universal Declaration of Human Rights. For example if a person's arm is chopped and a sculpture is made out of it, their personality right outweighs since their body integrity has been breached. Another example is that if a person is tortured for some time and this footage is used in a film —no matter how artistic the film is— personality rights outweigh. Besides intervention in a person's life, health or body integrity is considered criminal activity and requires criminal liability. Such intervention is called "black area" and on the occasion that a work is created by intervening in the black area, personality rights should directly outweigh, in our opinion¹³⁰.

If the breach is not against a person's life, health or body integrity but against another personal right, the work of art that has been created should be examined together with the personal characteristics of the individual whose personality rights have been breached. For example creating a work of art from a person's photograph or voice without consent or from their private life requires the examination of both the work of art and the person.

¹³⁰ Upon the death of a person, with their permission to be issued before death, excluding exhibitions such as BODY WORLD etc. created out of people's body parts or cadavers.

B. Whether the Person is Famous

Whether the person whose personality rights have been breached is famous is important¹³¹, because the extent to which the person is known by public may lead to a different rationalization process. For example it is more common to publish photographs and intervene in private lives of politicians, actors and actresses, and football players *vis-a-vis* ordinary people¹³². The Supreme Court rules that if the criticism is directed at an important statesman it is inevitable that the criticism is harsh¹³³.

That's why there is a distinction between publishing some ordinary person's photograph without their consent or creating a work of art from their memoirs and a famous person. An ordinary person's privacy is valued more in terms of personality rights.

C. Type of Work of Art

The type of the work of art shall be instructive in terms of determining whether the breach or right of artistic creation should outweigh. For example, autobiographical works, in respect of their qualification, are about the author's character as well as other things. Similarly, personality rights in cartoons or caricatures where humor outweighs shall remain in the background mostly. No doubt a distinction needs to be made between a documentary and an action film both of which breach personality rights of an individual, say, trying to illuminate a situation.

¹³¹ **PARLAK BORU**, Esra *Karari*, p. 265.

¹³² **OGUZMAN/SELICI/OKTAY OZDEMIR**, p. 228.

¹³³ Supreme Court Assembly of Civil Chambers 2006/4-550 E., 2006/570 D. numbered and 08.12.2010 dated verdict. (Kazanci)

D. Whether the Work of Art can be Created in another way

In a work of art which was created by breaking an individual's personality rights, it is of utmost importance whether the real identity of the person was used and whether flow of events, whereabouts, time, etc. was changed or not.

In the case of Gay Talese's book and documentary *The Voyeur's Motel* that we have dwelled upon earlier, real identities of the persons whose personality rights were breached were not disclosed, which lead to the strengthening of the right of artistic creation *vis-a-vis* the breach of personality rights. On the other hand, Maxim Biller's book *Esra* and Emre Sahin's film *40* breach personality rights by directly mentioning these people's names and disclosing their true identities. Authors should respect the value of other people's personality rights and refrain from disclosing heavy personal information about people's private lives, also from distorting the reality when writing about real persons¹³⁴. Changing the characters' names, hiding some aspects and telling it the other way if possible should be prioritized by authors instead of giving away the exact names and memoirs, which leads to the breach of personality rights. This is against the right of artistic creation, we believe. In other words, a reasonable average person should not be able to identify the person in the work of art, in which case the breach of personality rights is considered to be stronger.

E. Whether There Exists Public Good in the Publishing of the Work of Art

For the breach of personality rights to be slim against the right of artistic creation, the work of art should contain considerable amount of public interest and public good. The judge is to decide in a case whether public good exists and if it does, whether it is

¹³⁴ PARLAK BORU, *Esra Karari*, p. 276.

superior¹³⁵. In practice, courts apply to experts in such cases¹³⁶. The judge compares and contrasts interests of the breacher and the breached and tries to arrive at a balance between them¹³⁷. At this point it is important that the judge examines whether there is considerable public interest¹³⁸.

¹³⁵ **OGUZMAN/SELICI/OKTAY OZDEMIR**, p. 222.

¹³⁶ Supreme Court's decision which specifies that it is illegal to apply to a consultant about whether there is a breach of personality rights or not in a publishing with the knowledge required by a judge to have. Supreme Court 4. Civil Chamber 2002/12747 E., 2003/3019 D. numbered and 17.03.2003 numbered decision (Kazanci)

¹³⁷ **AYDIN**, p. 128.

¹³⁸ **AYDIN**, p. 128.

CONCLUSION

Artists produce works of art using their right of artistic creation and freedom to create. However, artistic freedom is not unlimited just as no other freedom is. Artists need to pay attention to other people's rights and freedoms when they use their own rights, otherwise the right of artistic creation and personality rights, both of which are under the protection of the Constitution, shall conflict. On one hand, there is the work of art with which the artist contributes to cultural legacy and development and on the other hand there are people's private lives and personality rights.

To arrive at a conclusion considering general knowledge on the issue and the cases which have been exemplified here in this work, when personality rights and artistic freedom conflict it is not always possible and feasible to prioritize one to the other automatically and the case should be examined in itself. Black area is intervened in only when a person's life, health and body integrity are intervened in by creating a work of art out of these, so personality rights should directly overrule and apart from this, we believe, the concrete case should be evaluated in itself.

Some criteria should be sought in determining whether the artist's right of creation or the person's personality rights should overweigh in a particular case. In order to compare and contrast conflicting interests, it is important to look at which element of personality rights is violated, whether the person whose personality rights are violated is famous or not, type of the work, if it is possible to recreate the work of art in any other way, if there is public interest in releasing the work of art, and the opinion of an average person.

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