Protecting Defamatory Fiction and Reader-Response Theory with Emphasis on the German Experience

Henry Ordower

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PROTECTING DEFAMATORY FICTION AND READER-RESPONSE THEORY WITH EMPHASIS ON THE GERMAN EXPERIENCE

Henry Ordower**

I. INTRODUCTION

A. The Hypothetical Stasi Novels

Imagine that in 1975 Erich Honecker¹ commissioned one of the best writers in the German Democratic Republic to prepare a biography of Rudolph Junkold, a fictional head of Stasi, the East German secret police. I will refer to this book as "Version A." The completed work emphasized Rudolph Junkold's background of heroic exploits as an underground operative against the Nazis, followed by years of devotion to duty in service of the Communist regime. While chief of Stasi, the fictional Rudolph Junkold was ruthless in pursuit of those who would undermine it. The biography was intended to serve as a paradigm against which all children in the country would aspire to conform their behavior. Bertram Potgeit, an actual Stasi head

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¹ Erich Honecker was the dictatorial leader of the German Democratic Republic from 1971 until 1989 when the peaceful revolution leading to East Germany's unification with West Germany began. The German Democratic Republic (Deutsche Demokratische Republik or DDR in German) generally has been referred to as East Germany while the Federal Republic of Germany (Die Bundesrepublik Deutschland or BRD), the surviving German state, generally has been referred to as West Germany.

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during Honecker's administration, knew of the biography, that he had served as a model for the fictional head of Stasi, and, of course, that the work by no means provided an accurate account of his life. Yet he did not object to its publication at the time and, under then current political circumstances, may well have felt that the idealized portrayal of him would only help to advance his career.

Time passes; values change. East Germany merges into West Germany. A major publishing house in the united Germany proposes to reissue the biography. In the meantime, Bertram Potgeit has arranged for the publication of a novel, call it "Version B," about a head of Stasi who sought to undermine the Honecker regime. The novel's hero helped many important, "subversive" individuals flee to the west and in numerous ways materially contributed to the demise of the Communist system in Germany.

Meanwhile, the writer who prepared Version A has a new book, referred to in this article as "Version C." It depicts a rather ruthless head of Stasi who learned many of his most effective techniques for squelching dissent and forcing confessions to treasonous crimes from the Nazis during his years in the Hitler youth and the SS. The novel describes his rise to power in East Germany at the expense of men of conscience, particularly members of certain minority groups within the population, and closes with a chapter about his leadership of a neo-Nazi party seeking a larger role in the politics of the newly reunited Germany.

None of the three books uses Bertram Potgeit's name, yet some readers are likely to associate the books' respective main characters with Bertram Potgeit. Although intended as fictional accounts having some basis in reality, for those readers who identify the main character with Bertram Potgeit and assume all statements concerning the main character to be applicable to and true of Bertram Potgeit, all the books portray him in a false light. Bertram Potgeit would like to suppress the publication of Versions A and C, while further disseminating Version B. In both Germany and the United States, Bertram Potgeit has a reasonable chance of success. In the German courts, he may be able to restrain publication, while in the United States, his potential damage award might deter prospective publishers from publishing Versions A and C. Yet, neither jurisdiction prevents the publication of the equally fictitious Version B which, under current

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2 SS stands for Schutzstaffel (protection column) which was Hitler's elite guard corps during his years in power.
political conditions, reveals Bertram Potgeit in a false, but favorable, light.

B. Comments about the United States Discussion

Over the twelve years since the decision in *Bindrim v. Mitchell*, legal publications have aired the issue of libel in fictional works extensively. Since the beginning of 1985, for example, legal commentary publications in the United States published at least thirteen articles concerning United States libel law as it applies to fictional works. No fewer than fifteen articles published during the period 1978-1985 also addressed the topic. In addition, there is one German piece commenting on the American experience with libel in fiction.

The bulk of the articles dealing with libel in fiction express concern about the standard which courts apply to impose liability on authors and publishers. Most of the articles suggest modifications of the burden of proof and limitations on the availability of damages in

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order to limit the remedy to the most worthy plaintiffs. A student comment recommends an absolute privilege for fictional works under the First Amendment, but another commentator opines that the American courts provided too much protection to the defendant in *Pring v. Penthouse International*. One other commentator suggests that it is necessary to depart from traditional tort-based standards and shift to a constitutional analysis-based "balancing of interests" test. The test would balance the individual's interest in reputation against freedom (presumably the author's) of speech so that only the most weighty interests might overcome freedom of speech.

United States courts have employed traditional tort analysis to cases of libel in fiction. Supreme Court pronouncements with respect to the First Amendment protection for speech and the tort of libel have little relevance to the libel in fiction issue. *New York Times Co. v. Sullivan* and its progeny limit tort remedies for public officials, public figures, and some newsworthy individuals to cases in which the false statement about the plaintiff is published with "actual malice." The actual malice standard requires a showing that the defendant published a false statement about the individual "with knowledge that it was false or with reckless disregard of whether it was false or not." Such a standard proves to be of little importance to libel in fiction cases.

Fiction, by definition, does not depict and is not intended to depict actual events in the real world. Rather the fictional work creates its own fictional reality which often, depending upon the author's writing style and the author's desire or ability to create an apparent reality, generates an illusion that the fictional events transpire in the objective

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11. *Id.* at 365-66.
16. *Id.*
world. If a plaintiff demonstrates that the work is about him or her, the fictional world becomes real, and some readers may view the fictional facts and events as assertions of fact concerning that plaintiff. The author and publisher know that the statements made about the fictional characters lack objective reality. Accordingly, if those statements are taken as assertions about a specific real individual, the author and publisher know them to be false. The actual malice standard has been met. The plaintiff need prove only that the work was "of and concerning" him or her and that the work injured him or her in order to recover damages.

Successful plaintiffs have met this burden on scant evidence. The plaintiff in *Bindrim v. Mitchell* bore little physical resemblance to the character described in the novel but established that at least one reader associated the "nude" therapy employed by the main character with the plaintiff and his therapeutic methods. The author of the defamatory novel attended one of the plaintiff's nude therapy sessions and thus was familiar with the plaintiff's methods.

Courts have been less generous in protecting plaintiffs where the fictional work attributes outrageous or impossible conduct to the character with whom the plaintiff identifies. In *Pring v. Penthouse International*, the fictional character engaged in physically impossible and outrageous sexual conduct leading the court to conclude that no reasonable reader would take the story's events to be assertions of fact about the plaintiff. Similarly, in a parody case where no issue of identification was present, *Hustler Magazine, Inc. v. Falwell*, a jury determined that no reader would take the parody Campari advertisement as assertion of fact about Jerry Falwell, so the parody advertisement did not libel him; the jury, however, awarded Falwell damages for intentional infliction of emotional distress. The Supreme Court did not address the libel issue, but reversed on the damages for intentional infliction of emotional distress and held unanimously

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17 See infra note 74 and accompanying text (discussing Justice Stein's dissenting opinion in the Mephisto case).
18 92 Cal. App. 3d at 72-73.
19 645 F.2d at 443. The Penthouse story has its main character with whom the plaintiff identifies, perform fellatio on her coach causing him to levitate. The events described in the story take place before a national television audience.
20 See Scott, supra note 4, at 143-25 (arguing that Pring was entitled to recover).
21 485 U.S. 46 (1988). The parody Campari advertisement has Falwell, a public figure as leader of the so-called "moral majority," discussing his first time in an outhouse with his mother. The double meaning clearly was intentional.
that parody was a protected form of speech about public figures. Falwell was a public figure as leader of the so-called "moral majority."

Concern about the limits of First Amendment protection for fiction persists. The United States Supreme Court has not dealt with the issue of libel in fiction directly. When it does, the Court may or may not fashion a rule that will provide fiction special protection under the First Amendment. Libel in fiction is not a uniquely American problem. The issue has confronted the German courts at the highest levels. If the German experience with the libel in fiction issue provides any indication of how the United States Supreme Court will handle it, the future is bleak for the proponents of special protection for fiction. The German high courts have delegated principal responsibility for balancing the interests involved to the trial courts, providing them only a very general, but constitutionally derived, standard of guidance.

C. The Purpose of this Article

Although the law upon which the German decisions is based differs from United States law, the interests and protections involved are not dissimilar and the German decisions accordingly instructive. In both countries, a protected interest—free speech in the United States, freedom of art in Germany—comes into conflict with the individual’s right to protection from the harm false statements about him or her might do. The German constitution provides explicit protection for the individual’s sphere of personality, but the United States Constitution does not. Yet such protection must be implicit in the United States or else the protected free speech interest would always prevail and parties injured by speech be left wholly without recourse.

The first part of the article summarizes and analyzes the principal German case relating to the issue of libel and fiction. It highlights the differences and similarities between United States and German law. In its second part, the article turns to certain current trends in literary theory, reader-response theory, in order to reveal a fundamental flaw in the German courts’ analysis of the issue and to suggest that absolute protection of fictional works from libel liability exposure is warranted.

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22 See infra note 37 (discussion of Articles 1 and 2 of the German Basic Law).
II. THE GERMAN EXPERIENCE

A. Introduction

In 1963 Nymphenburger Verlagshandlung, a West German publishing house, announced the pending publication of an edition of Klaus Mann’s works including his 1936 novel *Mephisto—Roman einer Karriere*. While the novel had been published in Amsterdam and in Paris during the Nazi period in Germany and again in East Germany in 1956, it never had appeared in West Germany. Peter Gorski, Gustaf Gründgens’ adoptive son, sued to enjoin the novel’s publication as defamatory of his adoptive father who served as a model for the novel’s main character. Since Gründgens was dead, the trial court denied the injunction on the grounds, *inter alia*, that the rights involved in protection of the individual’s reputation die with the individual, and the novel as a work of art enjoyed special protection under the Basic Law. Pending appeal, the appellate court permitted the publication by Nymphenburger of an edition of 10,000 copies conditioned upon the insertion in the edition of an explanatory foreword intended to limit the impact on Gründgens’ personality sphere. Later the appellate court issued the injunction. The pub-

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23 Querido Verlag published German exile literature until the German occupation of the Netherlands in 1942.


26 The publisher never disputed that Gustaf Gründgens was the model for the main character of the novel, Hendrik Höfgen.


28 The Basic Law of the Federal Republic of Germany (Das Grundgesetz für die Bundesrepublik Deutschland) became effective May 23, 1949 upon the favorable votes of the legislatures (Landtage) of all the German states (Länder), except Bavaria, occupied by the Allied Powers following the war.

29 The foreword read:

‘An den Leser

Der Verfasser Klaus Mann ist 1933 freiwillig aus Gesinnung emigriert und hat 1936 diesen Roman in Amsterdam geschrieben. Aus seiner damaligen Sicht und seinem Ha. gegen die Hitlerdiktatur hat er ein zeitkritisches Bild der Theatergeschichte in Romanform geschaffen. Wenn auch Anleihungen an Personen der damaligen Zeit nicht zu verkennen sind, so hat er den Romanfiguren doch erst durch seine dichterische Phantasie Gestalt gegeben.’
lisher’s appeals to the Federal Court of Justice\textsuperscript{31} and the Federal Constitutional Court\textsuperscript{32} were of no avail. The injunction stood.\textsuperscript{33}

\textit{Mephisto} tells the story of the world of the theater during the early years of the Nazi regime in Germany. It centers around the actor, Hendrik Höfgen, who collaborates with the Nazis in order to

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\textit{Der Verleger}’

[To the reader]
The writer, Klaus Mann, out of conscience emigrated voluntarily in 1933 and wrote this novel in Amsterdam in 1936. Because of his view at that time and his hatred for Hitler’s dictatorship, he created an image of theater history in the form of a novel which was critical of the period. Although borrowings from individuals of that period are unmistakable, he first processed their form through his poetic imagination. This is especially true of the main character. Actions and tendencies which are attributed to these individuals correspond in large part to the writer’s imagination. For that reason he added the explanation to his work: ‘All characters in this book represent types, not portraits.’

The Publisher

(author’s translation)


\textsuperscript{31} Judgment of March 20, 1968, BGH Gr. Sen. Z., 50 Entscheidungen des Bundesgerichtshof in Zivilsachen [BGHZ] 133 (F.R.G.). The Federal Court of Justice is established by Art. 95 (1) of the German Basic Law and is the higher court in most civil and criminal matters. Its jurisdiction is primarily appellate.

\textsuperscript{32} Judgment of February 24, 1971, BVerfG, 30 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 173 (F.R.G.); 51 UFITA 337. The Federal Constitutional Court is established pursuant to Art. 92 of the German Basic Law. Its jurisdiction is described in Art. 93 and generally involves issues of application or interpretation of the Basic Law. However, it also is competent to resolve disputes between or among states (Länder) of the federal republic, and parliament legislatively may assign other cases to it. In the \textit{Mephisto} case, the court was exercising its jurisdiction to determine whether other courts correctly interpreted the Basic Law. The panel split 3-3 thereby affirming the decision of the Federal Court of Justice, a majority being required to overturn another court’s decision.

\textsuperscript{33} According to Berthold Spangenberg’s introduction to the 1980 West German edition of the novel published by Rowohlt Taschenbuch Verlag, by 1980 the novel also had been translated into and published in eleven other languages. Klaus Mann, \textit{Mephisto—Roman einer Karriere} (Reinbek bei Hamburg, 1980), p. III. Since the courts determined that Gründgens’ rights would diminish as memory of him faded in Germany, Rowohlt elected to risk publishing the novel in 1980. The publisher added an extensive introduction summarizing the legal history and attempting to present additional evidence of Mann’s lack of animosity toward Gründgens, as well as evidence that the public’s memory of Gründgens had faded considerably so that the time for publication was ripe.
advance his career. The actor cultivates a friendship with Hitler’s right hand man, Hermann Göring, who helps him to become the director of the state theater in Berlin and later a state councillor. Höfgen generally basks in the glow of the Nazi hierarchy while enjoying a masochistic sexual relationship with a black, female dancer whom he eventually betrays to the Gestapo.\footnote{Gestapo is an acronym for Geheime Stattpolizei (Secret State Police). The Nazi racial laws applied to Jews, not blacks. Sections 1 and 2 of the Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre vom 15. September 1935 (Law of September 15, 1935 for Protection of German Blood and German Honor), Strafgesetzbuch mit den wichtigsten Nebengesetzen (Penal Law Book with the most important Incidental Laws), C. H. Beck’sche Verlagshandlung (München and Berlin 1944) 217, respectively prohibited marriage and extra-marital sexual relations between members of the Aryan race and Jews. Nevertheless, the Nazis were no more fond of blacks than they were of Jews. According to Robert Proctor, “[a]pplicants for membership in the Nazi party were asked to certify that they had neither Jewish nor ‘colored blood’ . . . in their ancestry,” ROBERT PROCTOR, RACIAL HYGIENE, MEDICINE UNDER THE NAZIS AT 114 (1988). Disclosure of Höfgen’s relationship with a black could have resulted in grave consequences to him. It is interesting to note that SS officers in the camps protected a number of Jewish women who serviced the officers sexually in exchange for the protection. Thus, even within the elite group, the racial purity laws were not respected. Moreover, Gründgens was reputed to be gay so the black, female lover does not fit. Male homosexual activities were also illegal. Sections 175 and 175a of Strafgesetzbuch, etc., supra this note, at 59-60.} In order to hedge his bets, Höfgen also helps a Jewish actor escape the Nazis.

Höfgen bears considerable resemblance to the historical Gustaf Gründgens. Their careers are parallel, Gründgens being especially closely associated with the role of Mephisto in Goethe’s Faust. There are significant dissimilarities as well. Following the war, it was learned that Gründgens did not collaborate with the Nazis, but used his position to save the lives of Jewish actors—much to his own personal risk. Neither was Gründgens a regular guest in Göring’s house, nor did he deliver a speech at a party celebrating Göring’s forty-third birthday.

While Klaus Mann generally is not regarded as fine an author as his father,\footnote{Thomas Mann is probably the most respected German language author of the twentieth century. His other son, Golo, became a comparatively well-known historian, and his daughter, Erika, was an actress who at one time was married to Gustaf Gründgens. It is likely that Höfgen’s poor marital relationship with Barbara Bruckner is modelled after Gründgens’ marriage to Erika Mann.} some critics view him as having made an important contribution to German literature, particularly the German exile literature of the 1930s and 40s. Such critics contended during the litigation surrounding Mephisto that the availability of Mephisto was
essential for the public to have a complete picture of Mann's literary production and the literature of the World War II German ex-patriot community.\textsuperscript{36}

\textbf{B. The German Decisions}

In the view of the trial court, the general right of personality\textsuperscript{37} does not survive the individual. While other laws protect the survivors' interests in preserving the memory and reputation of a decedent, in the \textit{Mephisto} case, such laws come into conflict with an express constitutional protection of art and the right to disseminate it.\textsuperscript{38} But the trial court does not stop with finding the protection of art to be superior to the other laws which protect the survivors' interests in a decedent. It takes the position that readers readily recognize the "free,

\begin{itemize}
\item \textsuperscript{36} See, e.g., Judgment of August 27, 1965, Landesgericht Hamburg [Hamburg State Court], 51 UFITA 352, 359-60 (1969).
\item \textsuperscript{37} The right of personality (das Persönlichkeitsrecht) encompasses both protection against libel and protection of the intimate sphere. It derives from Articles 1 and 2 of the Basic Law.
\item Art. 1 (1) reads:
\begin{quote}
"The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority."
\end{quote}
\item Art. 2 (1) reads:
\begin{quote}
"Everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code."
\end{quote}
\item The original follows. Grundgesetz Art. 1, Abs. 1: "Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt."
\item Art. 2, Abs. 1: "Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäße Ordnung oder das Sittengesetz verstoßt."
\item Grundgesetz [Constitution] [GG] art. 1(1)-2(1) (F.R.G.) [hereinafter Constitution].
\item \textsuperscript{38} Basic Law Art. 5 (3) reads:
\begin{quote}
"Art and science, research and teaching, shall be free . . . ."
\end{quote}
\item Grundgesetz Art. 5, Abs. 3:
\begin{quote}
"Kunst und Wissenschaft, Forschung und Lehre sind frei . . . ." Constitution, supra note 37, art. 5(3).
\item Art. 5 (1) guaranties freedom of the speech and the press and outlaws censorship; but Art. 5 (2) limits those protections by provisions of the general laws, \textit{inter alia}. The Federal Court of Justice and the Federal Constitutional Court view paragraph (2) as placing a limitation on paragraph (1) but not paragraph (3).
\item See supra text accompanying note 58.
\end{itemize}
poetic formulation” given the characters and events for which Gründgens and others serve as models.\(^{39}\) Despite the apparent superiority of the right of art, the court nevertheless balances the right of personality against art in concluding that *Mephisto* wins. It regards the danger to Gründgens’ good name to be insubstantial in view of other information about him which is available to the public. Moreover, the novel, whether or not a “keyhole” novel,\(^ {40}\) deserves all the protections of art. A novel is the expression of its author’s opinion, and in this case that opinion of the Nazis is provided with “masterful sarcasm.”\(^ {41}\) Since the novel is known throughout the world and forms part of the material about that period in German history, it should not be outlawed in Germany.\(^ {42}\)

The Hamburg Court of Appeals finds that the basic right of personality survives and is enforceable by the decedent’s heirs. Critical acclaim notwithstanding, the court takes a far less generous approach to the novel and the reading public. It has its own opinion and accordingly labels the novel as undeserving of protection as a work of art. Rather it is simply “libel in the form of a novel.”\(^ {43}\) It sees the public as having such strong desire for sensation that it readily transfers whatever Mann wrote of Höfgen to Gründgens. The alienation which would enable Mann’s readers to separate Höfgen from Gründgens is absent. The court is particularly outraged by Höfgen’s masochistic, sexual relationship with the black woman, but apparently did not think the attribution of that relationship to Gründgens to be so outrageous that the reader would be able to reject it as false.\(^ {44}\)

\(^{39}\) Judgment of August 25, 1965, Landesgericht Hamburg [Hamburg State Court], 51 UFITA at 357: “Im vorliegenden Fall hat die Schilderung der Personen und des Handlungsablaufs, für jeden Leser ersichtlich, eine freie dichterische Gestaltung erfahren.” [In the instant case, *obvious to every reader*, the description of characters and plot has experienced a free, poetic formulation.] (emphasis added) (author’s translation).

\(^{40}\) *Roman à clef* (Schlüsselroman in German) is the customary literary term referring to a novel which intentionally depicts and frequently defames individuals only thinly disguising them so as to leave them easily recognizable by the general reader.


\(^{42}\) *Id.* at 361.

\(^{43}\) Judgment of March 10, 1966, Hanseatisches Oberlandesgericht Hamburg [Hamburg Court of Appeals], 51 UFITA at 369. Translation of the German “eine Schmähchrift in Romanform” is mine.

\(^{44}\) *Compare* Pring v. Penthouse International, 695 F.2d 438 (10th Cir. 1982), *cert.*
Once having determined that the novel was about Gründgens and that readers would be unable to separate fact from fiction, prohibiting publication of the novel was a short step. Since Gründgens provided no occasion for the novel's criticism of him, there can be no justification for the novel.\textsuperscript{45} The appellate court does not even consider the novel to be worthy of a position as a document of the emigration period. Rather it relegates \textit{Mephisto} to the position of one man's opinion of the theater world in Germany during that era.\textsuperscript{46}

The appellate court concludes, however, that the injunction need not be unlimited in duration. Publication will be permissible when memory of the actor Gründgens fades and an extensive introduction providing an accurate picture of him and his activities during the period accompanies the publication.\textsuperscript{47} The limitation on the duration of the injunction raises rather serious issues. Unlike pornography, for example, which the court might view as utterly lacking in value and, therefore, subject to permanent injunction, this book is worthy of publication in the future. Presumably it has merit. In the case of pornography one might argue that the chilling effect on the author is of no importance, as the product is devoid of value.\textsuperscript{48} But what of this novel which the court acknowledges as having at least some value and being entitled to protection as art?

Before proceeding to decisions of the Federal Court of Appeals and the Federal Constitutional Court, some observations about the decisions of the trial court and initial appellate court seem appropriate. Both courts review the quality and literary significance of \textit{Mephisto}, and both make observations concerning the act of reading. The trial court identifies and emphasizes the novel's literary merit and its importance to German exile literature.\textsuperscript{49} The appellate court denigrates it, relegating it to a rather minor position within the world of German literature.\textsuperscript{50} Similarly, the trial court ascribes to the reader the ability

\textit{denied} 462 U.S. 1132 (1983) \textit{with} Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (the offensive publication was so outrageous that no reader would believe it to be true of the individual so that there was no libel).

\textsuperscript{45} Judgment of March 10, 1966, Hanseatisches Oberlandesgericht Hamburg [Hamburg Court of Appeals], 51 UFITA at 370.

\textsuperscript{46} \textit{Id.} at 374.

\textsuperscript{47} \textit{Id.} at 374-75. Rowohlt Taschenbuch Verlag relied upon this limitation on the injunction when in 1980 it published the novel with an extensive introduction. \textit{See supra} note 33.

\textsuperscript{48} Such a conclusion concerning pornography probably is also unwarranted. \textit{See infra} discussion text accompanying note 112 (discussion of pulp fiction).

\textsuperscript{49} \textit{See supra} text accompanying note 41.

\textsuperscript{50} \textit{See supra} text accompanying note 43.
to recognize and evaluate the effect of the artistic imagination upon the raw material of the novel, so that the reader does not accept the events and characterizations as factual.\textsuperscript{51} The appellate court takes a far less generous approach to the reader and views the average reader as someone who is eager to believe whatever the author writes without attempting to discriminate between truth and fiction or to discount the credibility of a fictional or fictionalized account.\textsuperscript{52}

It is difficult to say whether or not these literary judgments were determinative to the outcome of the litigation. Perhaps each court decided the case first and then offered arguments to support its decision. But whether or not determinative, it seems significant that the courts perceive it to be necessary to evaluate both the literary merit and the general impact of the novel upon its reader. Somehow those evaluations are material to the resolution of the issue. Disregarding technical legal issues, the courts have fundamental, literary disagreements. While the trial court may imply that the quality of the art is irrelevant to consideration of its protectability,\textsuperscript{53} the appellate court does not wish to protect unworthy art.\textsuperscript{54} In addition to these literary considerations of quality and reader impact, the appellate court also examines the motivations of the author and finds them to be evil. Evil motives enhance the arguments that the novel is unworthy of protection.\textsuperscript{55}

The Federal Court of Justice\textsuperscript{56} and the Federal Constitutional Court\textsuperscript{57} focus their attention primarily on the legal standards and the identification of the appropriate constitutional provisions and their limitations. The Federal Court of Justice definitively characterizes protection of art\textsuperscript{58} as a special law not subject to the general limitations on freedom of speech and the press. The Constitutional Court con-

\begin{itemize}
\item \textsuperscript{51} See supra text accompanying note 39.
\item \textsuperscript{52} See supra text accompanying note 43.
\item \textsuperscript{53} Judgment of Aug. 25, 1965, Landesgericht Hamburg [Hamburg State Court], 57 UFITA at 360 (asserting that whether or not the novel is a roman à clef is irrelevant to its right to protection as a work of art).
\item \textsuperscript{54} Id. at 372 (granting that even "libel in the form of a novel" may be art but asserts that it is not entitled to protection).
\item \textsuperscript{55} Rosen & Babcock, supra note 4 (suggesting enhancing protection for fiction by creating a malice standard which must be satisfied before imposing liability on the author). In the view of the appellate court in Mephisto, Klaus Mann apparently would meet such a standard and be subject to liability.
\item \textsuperscript{56} See supra note 31.
\item \textsuperscript{57} See supra note 32.
\item \textsuperscript{58} Constitution, supra note 37, art. 5(3). See supra note 38.
\end{itemize}
firms this characterization of the protection of art provision as *lex specialis* but rejects the "free development of personality" provision\(^59\) as a source of the rights which protect Gründgens from defamation after his death. The "human dignity" provision\(^60\) is the only source of *post mortum* protection for Gründgens, but it is the guiding principle of the entire Basic Law and consequently of primary importance.

Since the general laws cannot place limitations on the freedom of art, only when art comes into conflict with other protections found in the Basic Law is it subject to restriction. Where it does conflict with other Basic Law rights or protections, a balancing of interests is required to ascertain which right or protection prevails.\(^61\) Both federal courts consider whether the court of appeals adequately balanced protection of art with *post mortum* protection of Gründgens' right of personality under Article 2 in the case of the Court of Justice and Article 1 in the case of the Constitutional Court.

Despite a finding that the court of appeals erroneously failed to limit its consideration of applicable law to the constitutional provisions, the Federal Court of Justice holds that the appellate court's factual conclusions are without legal error.\(^62\) The court approves the appellate court's characterization of the novel as "libel in the form of a novel."\(^63\) Approval of the appellate court's characterization of the novel determines the outcome of the appeal. The Federal Court of Justice emphasizes that art is entitled to its creative space and that an artwork may fictionalize events and speech, but only so long as the overall image the work projects concerning a real individual is correct.\(^64\)

Similarly, the prevailing opinion\(^65\) in the Federal Constitutional Court takes a narrow view of its scope of review. Reliance by the

\(^{59}\) Id. art. 2(1). See supra note 37.

\(^{60}\) Id. art. 1(1). See supra note 37.

\(^{61}\) Phillip Möhring, Verfassungsgerichtliche Wertentscheidungen: Anmerkungen zur "Mephisto"-Entscheidung des Bundesverfassungsgerichts in Dimensionen des Rechts: Gedächtnisschrift für René Marcic 575, 578 (Duncker u. Humboldt, Berlin 1974) (suggests that the freedom of art is one of numerous specific, clarifying extensions of the human dignity provision of the Basic Law rather than a conflicting provision).

\(^{62}\) Supra note 31, 51 UFITA at 344.

\(^{63}\) The finding is mentioned supra at note 43.

\(^{64}\) Supra note 31, 51 UFITA at 348. The United States Supreme Court recently took a similar approach to fictionalized quotations in news reporting. So long as the alleged quote conveys accurately the sense of what the public figure speaker said, failure to reproduce the speaker's words faithfully is not actionable. Masson v. New Yorker Magazine, Inc., 111 S.Ct. 2419 (1991).

\(^{65}\) The Federal Constitutional Court affirmed in a split decision. Judgment of
lower courts on Art. 2 of the Basic Law as well as Art. 1 is not reversible error as the other courts indeed balanced the pertinent interests. The Constitutional Court does not review de novo. In large part, discussion of art theory makes up the body of the prevailing opinion and the vigorous dissent by Justice Stein. The opinion recites the views of the Minister of Justice who points out that art must be judged as art. Not every reader need be able to recognize the artistic sublimation of the material from the real world. According to the court, the guaranty of freedom of art includes both the freedom to create and the freedom to disseminate the creation so that it can have its impact in the world. Although the prevailing justices recognize that the novel transforms reality, the transformation in this case is insufficient to persuade them to reverse.

Justice Stein in his dissent, in addition to asserting that the court should review constitutional issues without deferring to the findings of the other courts, takes a more generous view of the artistic process. He contends that the prevailing justices as well as the lower courts simply compare events depicted in the book with reality, thereby failing to give adequate recognition to the artistic world of the book. An artist selects material of importance from the real world and reforms it to comply with his or her artistic reality. Interestingly, however, in support of his argument that literary characters take on their own realities, Justice Stein levels a rather serious criticism at Mann’s artistry and thereby undercuts his later argument concerning the quality and importance of the novelist. Justice Stein points out that Höfgen lacks nuance in characterization in the novel.
To Justice Stein, lack of nuance signals that the character is not intended to be real and identification with the real individual unthinkable. But one generally classifies lack of nuance in characterization as aesthetically displeasing and associates it with second rate novelists who are unable to give their characters more than a wooden existence.  

A second dissenting opinion criticizes the lower courts for examining details but missing the overall picture of the novel. Höfgens' sexual perversion and betrayal of his mistress, for example, symbolizes his political weakness. Justice Rupp von Brünneck admits she does not think much of the novel but considers artistic quality to be irrelevant to the scope of its protection. And she cites New York Times Co. v. Sullivan for the position that in the absence of "actual malice" there is the need for vigorous, unencumbered political debate concerning public figures such as Gründgens. Of course, under the New York Times's standard, in a damage action, the publisher may well have lost in the United States.

C. The Stasi Novels Under German Law

I have assumed that none of the three versions of the novel accurately depicts the life and career of Bertram Potgeit, but readers
of all three would identify Bertram Potgeit as the model for the main character. Version A portrays him as an avid and ruthless Communist, version C as an ex-Nazi and current neo-Nazi supporter and version B as a democrat helping to bring about changes from the repressive Communist regime in East Germany. Unless version B offends the personality rights of other individuals, Bertram Potgeit alone would have a cause of action to prevent the book’s publication. Absent a complainant, Bertram Potgeit is free to disseminate version B without limitation.

Even if version B provided accurate information concerning Bertram Potgeit and his career, under the Mephisto cases, its publication would be immaterial to the decisions with respect to the other novels. By 1965 Gründgens already had been exonerated with respect to his activities during the Third Reich.81 Nevertheless the courts must not have viewed the availability to the public of accurate information about Gründgens as ameliorating the adverse impact upon his sphere of personality from the libellous content of the novel.82 In outlining the contents of the introduction to the novel which should accompany its publication at some unspecified future date, availability of accurate data, except as part of the novel itself, does not prevent the injury to the individual’s personality.

That version B provides a distorted, but favorable, image of Bertram Potgeit raises questions about its impact upon the publication of versions A and C. Perhaps Potgeit, by involving himself in the publication of version B, has opened a debate permitting versions A and C additional leeway in their depictions of him. Two cases involving Franz Josef Strauss, the Christian Democrat Union’s candidate for chancellor in 1980, shed some light on this topic. Strauss certainly had placed himself in the public eye voluntarily. One also may assume that in the course of a political campaign not all statements made about Strauss by him and his supporters were completely accurate. At the very least there must have been exaggeration of his good qualities.

The first case, known as the street theater case,83 involves a street theater performance based on Bertold Brecht’s poem “Der Anachronistische Zug oder Freiheit und Democracy.”84 A person resembling

81 Hamburg Court of Appeals decision, supra note 30, at 371.
84 The title translates as “The Anachronistic Procession or Freedom and De-
Franz Josef Strauss is depicted seated in a vehicle beside the driver. Puppets masked as well-known Nazi leaders are in the back seat. The Nazi leaders represent repression, leprosy, fraud, stupidity, murder and robbery. The trial court fined the person portraying Strauss and the organizer of the procession for defaming Strauss. The Constitutional Court remanded the case for further consideration of the balancing of constitutional interests. It held that the lower courts did not consider the importance of the constitutional protection of art adequately. Since the street theater was art, it was not subject to the limitations of the ordinary laws under which the individuals involved were fined. Accordingly, they could be punished only if, in balancing Strauss's constitutional right of personality against artistic freedom under the specific facts of the case, Strauss would prevail. The lower courts based their judgment on a single scene out of context of the performance as a whole. The Federal Constitutional Court emphasizes the need to consider the multiple possible interpretations of the scene in the performance.

This first Strauss case implies that the court will allow considerable latitude in the use of art insofar as it holds that involvement of the artist or use of the artistic product in the political process does not lessen the scope of its protection under the Basic Law. Moreover, the decision supports a broad definition of art to include the avant garde, although some people might not view it as art at all. It is entitled to the same constitutional protection as more traditional manifestations of art.

The second Strauss decision, usually referred to as the political satire case, undercuts the force of the first. As in the Mephisto case, the court limits its review function to a determination of whether the lower courts adequately balanced the interests of the parties. In this political satire case, the magazine konkret (concrete) published several caricatures of Strauss as a pig. In one caricature he is copulating with another pig in judicial robes. In other caricatures he is engaged in various sexual activities alone or with other pigs. The

mocracy" and is based on Percy Bysshe Shelley's poem "The Masque of Anarchy: Written on the Occasion of the Massacre in Manchester." Id. at 214. Brecht is the celebrated German poet and playwright known for his socialistic themes emphasizing the plight of the working class and other downtrodden groups in the society. See MARTIN ESSLIN, BRECHT: THE MAN AND HIS WORK 227 (1961). There is a theater in the formerly eastern sector of Berlin dedicated to performance of his works.

court acknowledges that the caricatures are entitled to protection as art but finds no reversible error. In the court’s view, the lower courts properly balanced the magazine’s rights of protection as art against Strauss’s personality rights before penalizing the magazine. Presumably, the Constitutional Court would affirm in the street theater case as well if the lower courts conclude on remand, after balancing the rights of art against Strauss’s personality rights, that Strauss was excessively defamed.

That Potgeit placed himself in the public eye with version B would not seem to lessen his protection where the publication severely and unfavorably distorts his image. In the political satire case, the court recognizes that politicians—and probably other public figures as well—are subject to criticism, the protection of that criticism stops where it clashes with protection of the politicians’ rights of human dignity protected by the Basic Law. If characterizing Potgeit as a Nazi-type as in version C or a staunch and relentless Communist as in version A offends Bertram Potgeit’s human dignity, the special protection of the novels as works of art will not prevail over Potgeit’s rights of personality.

Counterintuitively perhaps Potgeit’s failure to object to publication of version A when it first appeared in East Germany may be immaterial to the balancing of interests. Since Bertram Potgeit was in fact the chief of Stasi, he hardly could object to an inaccurate publication which showed him, from the perspective of the regime then in power, in a favorable light. Objection to the book would have rendered him suspect in that he would have had to admit he was not so ruthless, an admission which might have cost him his job and more. Similarly, had Gründgens objected to the first exile publication, his objections may have compromised his ability to function and help others during the Third Reich, and even may have endangered him. In addition, the courts in the Mephisto cases did not consider it to be significant that some copies of the earlier editions of the book already were available in West Germany, because in their view additional harm would be done to Gründgens by further publication.

D. Reader-Response Theory and Libellous Fiction

One of the finest East German writers prepared versions A and C of the Stasi novels. If the courts enjoin publication of Version C

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86 The courts do consider it significant that after the war Gründgens continually sought to suppress the novel.
and re-publication of Version A, a portion of that author's work becomes unavailable to the reading public. Removal of the novels from the body of accessible literature makes a value judgment on a broad scale. The legal dispute implicates not just the rights of the author to disseminate his or her work versus the rights of the defamed individual, but the rights of the public to receive and have access to the literary product. The overall public value of the product is not easy to evaluate.

Courts and legal commentators appear to comprehend the general nature of the creative process. Both discuss how writers transform the raw material of their experiences into the literary product. Their characters rarely are wholly fictional. Usually, people the author knows provide the raw material for the characters, and those characters frequently are amalgamations of more than one person. Commentators offer lists of critically well-regarded novels which might have been considered libellous when first published. But while courts and commentators understand how the writer works and that libel laws might jeopardize the creative process, in my view they do not appreciate the full breadth of the danger presented by the libel claim.

The Hamburg State Court and the Hamburg Court of Appeals reach diametrically opposed conclusions concerning the constituency of the reading public and the manner in which it receives a work of fiction. The Hamburg State Court determined that readers would recognize the fictionalized nature of the narrative and understand that actual events had been filtered through the author's imagination and modified and distorted to suit the needs of the artistic product. The appellate court considered the reading public ready to believe whatever publishers might offer it to satisfy its thirst for scandal.

87 See supra text accompanying note 74 (discussing Justice Stein's dissenting opinion in the Mephisto case). See also Comment, "Clear and Convincing" Libel: Fiction and the Law of Defamation, 92 Yale L.J. 520, 535-37 (1983) (identifying fiction as synecdoche; characters and events are representative of a greater whole).

88 See Writers at Work: The Paris Review Interviews (M. Crowley ed. 1958). Rosen & Babcock, supra note 4, at 225-33 (discussing this issue in some detail); Libel in Fiction, supra note 4, at 484 (Judith Rossner comments on the selection and development of characters).

89 Klaus Kastner, Freiheit der Literatur und Persönlichkeitsrecht, 35 NJW (Neue Juristische Wochenschrift) 601, 602 (1982) (offering examples from German literature); Schauer, supra note 4, at 261 (offering examples from American literature in which characters may have been identified with real individuals). Rosen & Babcock, supra note 4, 221-22 (discussing how residents of Asheville, North Carolina saw themselves and their town in Thomas Wolfe's Look Homeward Angel).
Both courts probably are equally correct in their identification of types of readers but neither correctly identifies all readers.

E. The Rights and Interests of the Reader

Literary theory\textsuperscript{90} teaches us that literature and the reading of it is an interactive process. While the author contributes the text to the interpretive process, his or her control over the work ends once it is committed to paper. The reader brings along to the reading a network of interpretive norms which enable him or her to understand and utilize the literary product. The norms differ from reader to reader, rendering interpretation of a literary work multi-dimensional. Since the work is subject to many interpretations by the reader, the author's purpose in writing, if even identifiable, leads to one of the interpretations but by no means the only valid one. Each network of norms may generate a discrete, but equally valid, understanding of the literary product, while the product changes its significance with each of the interpretations. The quality, or at least the durability, of a literary work may depend upon its flexibility, its accessibility to a multiplicity of readers applying differing interpretive norms finding the work useful in satisfying some reading related need of the reader. "The devil can cite Scripture for his purpose."	extsuperscript{91}

\textit{Mephisto} can be read on many levels as readers approach it with differing interpretive norms. Certainly one group of readers fits the

\textsuperscript{90} WOLFGANG ISER, \textsc{The Act of Reading, A Theory of Aesthetic Response} (Johns Hopkins University Press 1978), and STANLEY FISH, \textsc{Is There a Text in This Class? The Authority of Interpretive Communities} (Harvard University Press 1980), are probably the best known of the works on reader-response theory in the United States. RANAN SELDEN, \textsc{A Reader's Guide to Contemporary Literary Theory} (The University of Kentucky Press 1989), ELIZABETH FREUND, \textsc{The Return of the Reader: Reader-Response Criticism} (Methuen 1987) and \textsc{Reader-Response Criticism: From Formalism to Post-Structuralism} (Jane P. Tompkins ed., The Johns Hopkins University Press 1980), provide excellent overviews of the topic, although, the last named has become slightly out of date. Many other primary texts are significant to the development of the theory and its permutations; see ARIEL DORFMAN, \textsc{Hacia la Liberacion del Lector Latinoamericano} (Ediciones del Norte 1984); HANS ROBERT JAUS, \textsc{Toward an Aesthetic of Reception} (Timothy Bahti trans.), \textsc{2 Theory and History of Literature} (1982), and STEVEN MAILLOUX, \textsc{Interpretive Conventions, The Reader in the Study of American Fiction} (Cornell University Press 1982) to name just a few. MAJORIE L. DEVault, \textsc{Novel Readings: The Social Organization of Interpretation}, \textsc{95 Am. J. of Sociology} 887-921 (1990) (providing a sociologically-oriented case study of differing interpretations on a single novel which are dependent upon interpretive communities and social perspectives which change over time).

\textsuperscript{91} WILLIAM SHAKESPEARE, \textsc{The Merchant of Venice}, \textit{Act I}, \textit{Scene iii}.
description of the appellate court as ready to accept as true the
scandalous "allegations" of the novel. Yet even within that group,
interpretive frameworks may differ, as will the reasons for believing
and the use to which the reader will put the false information. For
example, some readers may use the book to satisfy their voyeuristic
taste for "dirt" about specific individuals in public life. Others may
know or care nothing about Gründgens but may be far more interested
in the perversions of actors, or the absence of moral standards among
public figures who emerged unscathed from their lives in Nazi Ger-
man. Arguably the satisfaction of such base desires hardly recom-
mands the book for protection.

Yet, at the same time and with equal interpretive validity are other
possible norms which various readers might apply to the work. Ob-
viously those closest to Gründgens and whose opinion probably would
be most important to Gründgens would know that the actions at-
tributed to him do not comport with reality. They might be likely
to interpret the novel as reflecting Klaus Mann's bitterness and venge-
fulness. Moreover, a sociologically or psychologically oriented reader
might extract from Mephisto insights into the functioning and views
of the German exile community of World War II. A biographical
critic might contend that the novel is significant for what it contribu-
tes to the understanding of its author, and perhaps his family as well.
A Marxist reader may approach the work as exemplifying the cap-
italistic decadence which paved the way for Hitler. A religiously-
based observer may read the book as the Faust legend, a parable of
selling one's soul to the devil. Others may aver that the novel has
no extrinsic meaning and seek to deconstruct it to ferret out its
intrinsic significance. And some readers simply may be interested in
the story as an aesthetic experience.

Moreover, even in the view of the courts which enjoin publication
of Mephisto, interpretation and importance of the work is rarely
static; it varies with time and changing interpretive norms.92 The
courts identify two discrete periods which are significant to the in-
terpretive history of the novel and during which the outcome of the
litigation would differ. Those two are the period following Gründgens'
exoneration and the period commencing when familiarity with
Gründgens has faded from the public memory. During the first,

92 Cf. Stanley Fish, Change, in Doing What Comes Naturally: Change, Rheto-
ric, and the Practice of Theory in Literary and Legal Studies, ch. 7 (Duke
Univ. 1989).
publication is impermissible because of the intrusion on Gründgens' rights of personality, protection of his dignity. During the second, the book may be published, but only if the publication includes a preface explaining the author's relationship to Gründgens and the truth about Gründgens' activities during the years of the Nazi regime.

These two periods imply the existence of a third more remote period when protection of Gründgens' rights of personality becomes unnecessary because readers are unfamiliar with or have lost all interest in Gustaf Gründgens. At that time, presumably, the explanatory preface may be excluded from the publication.

A fourth period, that of creation, also would appear to be of interest. During that period, the falsity of the activities attributed to Höfgen/Gründgens would have been unavailable to a court located outside Germany, and Gründgens in Germany scarcely would have been in a position to seek suppression of the publication outside Germany. Being labelled a collaborator might not adversely affect Gründgens' status in Germany. The opinion of him by those with whom he dealt in his daily life could remain unsullied by Mann's book, which in any event probably was unavailable to them. While within Germany, Gründgens was immune to criticism from without. To the ex-patriot German community, the novel was more than a mere exposé of Gustaf Gründgens. It unmasks the collaborator, the opportunist as much as a type as a specific individual. Outside Germany, Gründgens as an individual was unimportant. As a symbol, however, he became an object of derision.²³

Even if one assumes that Mann's motives were evil, factors other than ill will are material to the determination of the appropriate remedy if a remedy is appropriate at all.²⁴ That Mann wished to defile his former brother-in-law is almost utterly without importance to the finished product. Once a work of literature has left the author's hands, the author no longer controls its use or interpretation. Unless the author chooses to alter the text itself, he or she is virtually powerless to impose a specific interpretation on the text. The work

²³ This article will not address the very interesting issue of territoriality. The issue is really a matter of determining how far to extend the remedy. Does the injunction include publication outside West Germany so that the United States publisher becomes subject to sanctions in Germany for publication in the United States? Under rules of comity, would the German injunction be enforceable in the United States? Similarly, does Bindrim of Bindrim v. Mitchell, 155 Cal. Rptr. 29, get damages for injury to his reputation in Germany?

belongs to the readers and its interpretation depends upon their various interactions with the text. Each reader interprets and utilizes the product according to the reader's own set of norms. The text is stabile; its interpretation is not.

_Mephisto_ is a case in point. As early as 1936 Mann asserted that his _Mephisto_ was not a _roman à clef_. Yet despite his protestations, the German courts read it in the late 1960s and early 70s as precisely that, a _roman à clef_, a thinly veiled attack on Gustaf Gründgens' honor.

The balancing of interests by the German courts appears to disregard the interests of the readers. When their interests are taken into account, the balancing test becomes far more complex. While the Federal Constitutional Court correctly identifies the dual nature of freedom of art, that it includes both the realm of creation and the realm of effect or reception, the court does not appreciate fully the reach of the latter concept. The realm of effect includes not only the creator's right to disseminate his or her work but also, and probably more importantly, the right of the audience to receive the work and interpret it. The interests at stake are not only the artist's (or publisher's) opposing the injured individual's right to protection of personality but equally each potential reader's right of access to the literary work in order to interpret and exploit it. The realm of effect is not merely a private interest in the dissemination of the publication, but a public right of access.

To deny the public its right of access is censorship. While the Basic Law specifically outlaws censorship, characterizing the prohibition

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95 When the Pariser Tageblatt published the novel in serialized form, _supra_ note 24, Mann objected to the editor's characterization of the novel as a Schlüsselroman (_roman à clef_). Mephisto, _supra_ note 33, p. VIII-IX of Spangenberg's introduction.

96 Fish, _supra_ note 92, at 90 (relating the incident involving the popular song _Short People_. Groups of short people objected to its bias against them. The singer asserted that he chose that group to demonstrate by use of irony how absurd prejudice against any group is. The protesters did not accept his explanation but continued to accuse him of bias).

97 _See supra_ discussion at note 69.

98 This is not to suggest that the public has a right of access even when the creator chooses not to release the product into the public's hands, although in some instances the public's right of access even may outweigh a private individual's right to withhold the output of his or her creative processes. It suggests only that once the creator chooses to release his or her literary work to the public, the public has an interest in receiving it.

99 Art. 5 (1), 3d sentence of the Basic Law. In its decision of April 4, 1972, 33
as censorship adds little to the analysis. Following the appropriate balancing of interests, censorship may be permissible if the publication impinges upon other basic rights, for example, where the publication endangers the constitutional democracy of Germany or the rights of personality of individuals. 100 If the court determines that the product is harmful to the public, or a specific segment of the public, a court may outlaw it or require that access by the endangered segment of the public be limited. 101 In Germany the general laws for protection of children take precedence over freedom of speech and permit restrictions on minors' access to pornography. 102

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100 Compare the decision of the Federal Constitutional Court of June 5, 1973, 35 BVerfGE 202 (1973), involving the television documentary about the murder of soldiers in Lebach matter with its decision of November 3, 1987, 77 BVerfGE 240 (1987), concerning the use of the Free German Youth symbol. In the former case, the court prohibited German television from showing a documentary drama based on the murder of several soldiers in Lebach. One of the convicted criminals objected to use of his name and likeness because the television drama attributed involvement and motives to him which were inaccurate and showed him in a false and unfavorable light. The events were no longer newsworthy so the individual's right of personality outweighed the television network's right to use his name and likeness. The balance of freedom of art against public protection from subversive organizations came out in favor of art in the latter case. There use of the symbol of a group outlawed under Art. 9 (2) of the Basic Law (freedom of association except when group advocates violating criminal laws or is directed against the constitutional order), while prohibited generally, could be used in advertising for performance of a literary work—in this case a play by Brecht.

101 Compare the requirement that the Consumer Product Safety Commission determine that an item is hazardous before it may demand the product's withdrawal from the market, and consider the function of the Food and Drug Administration which must approve a drug for distribution in the United States so long as its manufacturer demonstrates that it is "safe and effective." While literature has no implications for physical health, its suppression may have an adverse impact on the mental health of the general public. Arguably, some types of literature may affect adversely specific segments of the general public such as children. Presumably, pornography may be outlawed precisely because it is deemed harmful to its consumers and the community at large.

102 The Heinrich case, 11 BVerfGE 234 (1960), confirms the permissibility of these
Generalized denial to the public of its right of access to a literary work because of the harm it may do to a specific individual, however, has potentially grave repercussions. Given the broad range of prospective readers/interpreters of the literary work, it seems unlikely that reception by all possible readers would be harmful to the libelled individual. Ideally, access by only that limited group of readers who will interpret the work as applicable to and truthful in its depiction of the libelled individual should be restricted. All other interpretations and uses of the work do not conflict with the rights of the individual and, therefore, deserve full protection.

In many cases a properly tailored limitation on access will prove elusive. The courts in the *Mephisto* litigation were spared consideration of the greater problem of generalized restriction on access. The book had been published at one time. Copies of it were available to those who made a significant effort to seek them out. The text would be preserved despite the injunction on publication, and the decisions contemplated re-publication in the future. The restriction on access which the courts selected was temporary and limited in scope. It did not require all owners of early editions of the work to turn them in to the state for destruction. Thus, the text was fully durable.\(^{103}\) It would survive the injunction. Only some readers during the period of publication prohibition were deprived of access to the text. Most often litigation and, more importantly, the threat of litigation, will have a far more extensive long term impact. Although it is extremely difficult to draw general conclusions where a creative process is involved, one suspects that restricting access frequently will be tantamount to complete and permanent denial of access.

\(^{103}\) Justice Brennan utilized the concept of durability of speech in justifying the permissibility of greater regulation of commercial than non-commercial speech. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 n. 24 (1976). My colleague, Professor Alan Howard, builds the concept of durability into his relational framework for analyzing schemes regulating or limiting commercial speech in his recent article. Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. REV. 1093 (1992). The concept would seem to work equally well for analyzing speech in a less commercial context as an alternative to the more traditional concerns about chilling effects. Hardy or durable speech is speech which is unlikely to be chilled by regulation or tort remedies. 
Intuitively, one may feel it preferable to provide increasing protection as perception of artistry increases. An artist may be unconcerned with his or her impact upon the society or even whether or not there are buyers for the work. That type of artist might continue outpourings of genius even if a court enjoined publication of the product or publishers shunned it. The artistic production in such a case would be fully durable and in need of little protection. Of course such artistry assumes an artist of independent means or a benefactor who protects the artist from the need to become concerned with the world and its demands. At best that image, which is reminiscent of the late nineteenth century French and German movement of “art for art’s sake,” describes only a fragment of the artistic world.

Writers rarely are wholly independent of their readers—or at least of having readers at all. It is more realistic to identify a continuum of audience dependence which determines the durability of the literary production with the least hardy work arguably requiring the greatest art or speech protection. Perhaps counterintuitively, it may be the least artistic individual within the artistic spectrum who is in the greatest need of speech or art protection. The financially independent poet lies at one end of a continuum of reader dependence being the least dependent and the author of pulp fiction, westerns, romances, thrillers, and pornography, lies at the other being the most dependent.

Of the literary genres, poetry, as the least accessible to general readers, also must be least reader dependent. Books of poetry tend to appear in quite small editions, generate little profit and are rarely the topic of widespread public discussion. Typically critics view poetry as personal to the author expressing the innermost thoughts and feelings. Because poetry often is personal reflection, it is quite hardy and requires little protection to survive. Absence of readers may have little impact upon that poet’s need for poetic expression.

104 L’art pour l’art became the rallying cry of such poets as Charles Baudelaire and Stefan Mallarme in France and Stefan George in Germany. In the English speaking world, Oscar Wilde is most closely associated with the concept, which frequently is referred to as aestheticism. For English speakers, Gertrude Stein also comes to mind. Such writers reject interpretation as unimportant to the work. Art need have no meaning. Its very existence justifies it. Many readers find the works of those poets impenetrable. The phrase is from Victor Cousin, Cours de Philosophie (1918), and the full quotation reads: “[W]e need religion for religion’s sake, morality for morality’s sake, art for art’s sake.”

Alternatively, one might address the issue by attempting to quantify and balance relative harms. Since poetry lacks the mass audience, few people would suffer injury to their right to access from suppression of the poetic product. By the same token, however, the risk of injury to the individual whom the poem portrays adversely is minimal owing both to the small audience and the difficulties encountered in the interpretive process. Interpretive difficulty diminishes the likelihood that the "libellous" statements concerning the individual will be attributed to that individual or understood as reflecting adversely on him or her. Indeed the effort required by the reader to interpret the poem signals and emphasizes to the reader that any events or individuals the poem depicts have been filtered through the poet's imagination rendering them unreliable with respect to factual content. The form warns the reader to question thoroughly before accepting the accuracy of the poem's reportage.

The pulp fiction business tends to be quite profitable, and most authors of such literature are in the business for the money perhaps more so than from the need to express themselves artistically.\textsuperscript{106} If the market for the product is restricted or there is a risk that it will be restricted—if the publishers will not publish or the courts directly or indirectly prevent publication—the author will modify the product or not write at all. Thus, pulp is the least durable literary product and accordingly most in need of protection. Depriving the author of a market, deprives her or him of a livelihood. The artistic product becomes susceptible to influences extraneous to the creative process, such as the threat of litigation, which might alter the final form and cause it to differ from the product the author would have produced free from such influences. Law inhibits the creative process.\textsuperscript{107} In view of the size of the market for the pulp fiction, the legal impediments to publication and dissemination may deprive a significant number of readers of access to the "genuine" literary work, that is, the work the author would have produced free from the threat of legal action, and, sometimes the work in any form, as the author seeks another livelihood.\textsuperscript{108}

\textsuperscript{106} It is interesting to note that several twentieth century American authors of serious literature, including William Faulkner, have written other types of literature for a mass audience in order to support themselves.

\textsuperscript{107} Charles Rembar in the roundtable discussion, \textit{Libel in Fiction} supra note 4, at 485, would disagree with this conclusion. He expressed the opinion that concern about potential libel suits may improve the quality of manuscripts. He relates an incident in which, in his opinion, it did because it forced the writer to reconsider the work and exercise greater imagination.

\textsuperscript{108} Spangenberg, in his introduction to \textit{Mephisto}, supra note 33, suggests that
Unlike poetry, pulp fiction often lacks the stylistic indicia of unreliability. The narration generally is straightforward making it easy to read. It is the most accessible literary genre at certain interpretive levels. Readers may respond to it viscerally, if not intellectually. Some, but not all, readers and potential readers of the product use it for its libellous content. Others derive from it opportunities to escape reality, voyeuristic pleasure and even pure aesthetic enjoyment in no way associated with the injured individual. Although it may be fair to deprive the former group of readers of their opportunity to exploit the work unadulterated by the effect of litigation or its threat, so depriving the latter group of readers lacks such justification. Certainly the size of the market subjects an individual whom the work libels to a greater volume of injury than a poem. The number of people receiving the libellous message is greater and, therefore, it is reasonable to assume that the number of people using the message for its libellous content also is greater. Directly or indirectly preventing publication, however, simultaneously harms a larger segment of the reading public whose use of the work would have been without evil purpose.  

Balancing the interests of the author and reading public on the one hand and the interests of the libelled individual on the other threatens to become a formidable task, especially where permanent rather than temporary loss of access to the literary work is at stake. While the court denies it, the decision of the appellate court in *Mephisto* displays signs that the court based its ultimate decision in part upon its judgment about the quality and importance of the novel. That basis for decision seems quite sensible in fact. It resembles typical, economic cost-benefit analysis. The issue is whether greater harm is done to the reading public and the author by prohibition or to the libelled individual by publication. If the novel is without literary or historical value and the publication will do some injury to the individual, prohibition seems appropriate. If the novel has great literary value, the injury to the individual may well prove

109 Moreover, the larger the audience, the more likely that the fictional work will generate commentary in the media and a concomitant likelihood that the false light in which the fiction displays the injured individual will be debated, the truth known, and the adverse impact of the fictional account ameliorated or neutralized.

110 See supra text accompanying note 43. On a more elementary level, it is possible that willingness to enjoin publication of the novel reflects a particular sensitivity in Germany to allegations that one was a Nazi or Nazi collaborator.
less weighty than the value of the survival of the literary product.\textsuperscript{111}

Employing such an analysis, at first glance, pulp fiction which may be libellous has little chance of surviving the balancing test. The critical standards of educated and cultured readers—judges generally being educated or cultured or both—assign little literary value to pulp fiction. Pulp is found wanting. It tends to be formulaic, its characters one dimensional, lacking nuance.\textsuperscript{112} Its themes are common throughout the genre; the contemporary critical eye discerns little variation from one story to the next. Yet despite the certainty that a novel of that type has no significant worth, it nevertheless sells. Many readers deem it worth its cover price. If the novel were indistinguishable from others of the genre, why does not the reader of such fiction simply read the same novel over and over again? Perhaps the critic's eye is undiscerning while the reader perceives the nuances, to which the critic is blind, but which make each new novel appealing. Popular culture frequently differs from culture which catches the critics' eyes, but that hardly justifies treating it less favorably under the legal system. Couched slightly differently, is it reasonable to render a judgment or perpetuate a system which might condemn a product of that genre to oblivion and permanently deprive the public of its use?

If this question is troublesome when one deals with what critics might classify as a "low" art form, it must become even more difficult as the artistic product moves closer to the recognized higher art forms of the day. Even if it were reasonable to assign lower value to lower art forms thereby acknowledging that the legal values are those of the dominant forces within the society, position along the cultural continuum from lower to higher art is by no means static. Cultural positioning and perceptions of value constantly change. Examples of such change are ubiquitous.

Contemporaneous critics of Shakespeare's plays would not have viewed them as high art. The plays were designed for accessibility by a mass audience. They are bawdy, replete with puns and sexual allusions. Yet today and for the past several hundred years, even the

\textsuperscript{111} The American approach appears to bring the issue close to pure economic analysis. Since damages are the only remedy available, the work survives but possibly loses its profit potential to the injured party. Unfortunately, the more likely result is that the author will not write the novel or the publisher not publish the manuscript in order to avoid the damage exposure. Permanent removal of the work or potential work from the literary world ensues nevertheless.

\textsuperscript{112} According to Justice Stein of the Federal Constitutional Court, lack of nuance signals to the reader that the character is unreal, fictional, and not to be associated with real individuals. See supra note 74 and accompanying text.
most educated and cultured readers have regarded those plays as a highpoint of western culture. Imagine the loss if a court of the day enjoined a play before the scribe who would have transcribed it at the performance had an opportunity to view the play, or the Globe Theatre refused to produce one of Shakespeare's plays for fear of having to respond in damages for the libel contained in it. Shakespeare may even have censored himself in order to have his plays produced. Perhaps all these events occurred, and we are ignorant of it—a loss nevertheless.

The perceived value of a literary work may even oscillate. Such may well be the case with *Mephisto* itself. When first published, the book may have had considerable cultural value to the German exile community, while in the late 1960s, the courts may correctly have characterized it as having severely limited cultural value, "libel in the form of a novel." And it may take on additional or different cultural value as the society and its interests change, just as fairy tales took on new cultural importance and validity during the early nineteenth century as natural, immediate cultural forms, untainted by modern society, only to be relegated to the status of children's stories during most of the twentieth century. Recently they have come to be viewed as parables for adult audiences, rather terrifying to children.

Not only may position on the cultural continuum change over time and with different societal structures, but use by readers of the written work also may change and with that change the value of the work. Jonathan Swift's "A Modest Proposal" in its day was a political essay. Today it is frequently part of the repertoire of English literature courses or courses in irony and satire, chosen for its enduring literary rather than political value. At the same time it might be part of a history curriculum for its contribution to an understanding of the conditions of the time.

Similarly, Icelandic family sagas have been used for different purposes at different times. In the thirteenth century when they were composed, or if not composed, committed to parchment from their oral form, their use probably was for entertainment and perhaps also for the Christian ethics many of them taught. Later they lost much value, and, but for Arne Magnusson's collecting of manuscripts in the 16th century, may have disappeared. Arne Magnusson wished

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113 See Judgment of March 10, 1966, 51 UFITA 362.
114 Except for some manuscripts found in old monasteries, Icelanders who were
to preserve the sagas as part of the rich Icelandic cultural heritage. Gradually and through the nineteenth century, readers looked to them for their historical content in order to learn about 9th and 10th century Iceland. Later scholars determined that they lack historicity and began to view them as a developed literary form worthy of attention for their aesthetic qualities. Recently, scholars have begun again to exploit them for their historical content but in a manner different from their use in the 19th century and earlier. Such scholars do not look to the stories themselves for the historical validity of the events they depict, but seek to generate an image of the culture and society during the period of composition. Their method assumes that writers or transcribers describe conditions as they experience them even in fictional accounts. Thus, social history can be extracted even from otherwise fictional works.¹¹⁵

Against the backdrop of cultural values shifting over time, present conviction that a literary product has little or no immediate value to readers offers little certainty as to the long term value of the product. The stakes seem reasonably straightforward. Threat of legal action may, and is likely to, chill the creative process in some instances. Balancing the interests of the willing and unwilling participants to the literary creation becomes considerably more complex than the German decisions disclose, as the reader's and potential reader's interests enter the field of discussion. Addition of a third element into the analysis in and of itself increases the sheer number of possible permutations. Even evil motives of the author set opposite an innocent defamed individual can no longer determine the outcome.¹¹⁶ Like the defamed individual, readers and potential readers are also innocent parties to the conflict. Their interests are not extraneous to the analysis since they are an integral part of the literary process as receivers (users) and interpreters of the product. In fact the rights of readers

primarily poor farmers did not collect and preserve the manuscripts during the 14th and 15th centuries. Arne Magnusson, who was a man of vision, wished to save the manuscripts and preserve his nation’s cultural heritage. Surely much to his dismay, he found that the farmers frequently abused the parchment manuscripts employing part of them for many undesirable purposes including the patching of holes in the shoes.


¹¹⁶ Cf. Rosen & Babcock, supra note 44.
arguably are superior to those of both the author and the injured individual insofar as readers are the only participants having a long term interest in the literary process. Long after both the author and the injured party have been forgotten, there are likely to be readers whom the legal system today may deprive of the opportunity to use and interpret products on account of the short term interests of a single individual.

III. Conclusion

Under German law, outcome of the legal issue depends upon a balancing of the conflicting interests guaranteed by the Basic Law. While Germany’s courts have had an opportunity to give the issue an airing at all judicial levels, in this writer’s view, their decisions fail to give ample consideration to the rights of the recipients of art. Uncertainty as to the long term value of literary products to readers, accompanied by the risk that availability of legal remedies to injured individuals chills the creative process, leads to the conclusion that potential long term harm to the creative process and its reader participants outweighs the short term harm to individuals labelled by fictional works. The courts in Mephisto themselves emphasize the short term nature of the harm by limiting the remedy to a temporary injunction, albeit of unspecified duration. Leaving injured individuals without a remedy seems justified where the creative process is jeopardized.

This is not to suggest that everything anyone writes should be published. Publishers make aesthetic and economic judgments which similarly chill the creative process. Some items which in the future, and even in the present, have great value are not published. Perhaps publishers are not the best candidates for making publication decisions, but at least they are immediately linked to the literary, creative process. Their judgment is unavoidable. Judges are not part of that process and should not inject themselves into it.117

No doubt cases will arise which make us uneasy leaving an injured individual without legal recourse. This article does not deny that fictional works may damage reputation. Unfortunately, to carve out exceptions to the strict rule of protection for fiction returns the issue to a state of uncertainty which may affect behavior, chill artistic

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117 Möhring, supra note 61, at 579-80, (expressing similar discomfort at judicial involvement in judgment of the quality or characterization of an item as art).
production and deprive the present and future consumer of literature of a valuable literary work. As the reading public grows accustomed to fiction's absolute privilege, its skepticism concerning the content of what it reads labelled as fiction hopefully will increase, and the damage to the defamed individual decrease commensurately.