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The Worth of the Priceless, and the Price of the Worthless: Does the Modern Art Market Affect the Freedom of Artistic Creativity?

Keywords: freedom of artistic creativity, right to cultural life

Słowa kluczowe: wolność twórczości artystycznej, prawo dostępu do życia kulturalnego

Abstract

The text presents some features of the contemporary art market and a few specific issues related to the valuation and circulation of works of art. The specificity of the art market, the role of experts and intermediaries, difficulties in valuing works of modern art, have an impact on the scope and content of the protection of moral and material interests resulting from artistic production, the scope and content of freedom of artistic creativity. Processes of valuing artworks bring questions on the necessity of the introduction of regulatory mechanisms to increase the transparency of transactions, in order to protect the value of works of art and the freedom of artistic creativity.

Streszczenie

Wartość bezcennego i cena bezwartościowego. Czy rynek sztuki współczesnej wpływa na wolność twórczości artystycznej?

Artykuł prezentuje kilka cech współczesnego rynku sztuki związanych z ewaluacją i obrotem dziełami sztuk pięknych. Specyfika rynku sztuki, zwłaszcza rola ekspertów i pośredników w obrocie, w świetle trudności w miarodajnej ocenie wartości dzieł sztuki

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współczesnej mają wpływ na zakres i treść ochrony interesów osobistych i majątkowych twórców, a w konsekwencji – zakres i treść wolności twórczości artystycznej. Procesy wyceny dzieł sztuki uzasadniają tezę o konieczności wprowadzenia mechanizmów regulacyjnych w celu zwiększenia transparentności transakcji w celu ochrony wartości dzieł sztuki i wolności twórców, jak też zagwarantowania pozostałym uprawnionym dostępu do efektów pracy artystycznej.

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The art market is a natural and necessary environment for the free circulation of works of art. It is also one of the foundations of the freedom of artistic creation, since the taste and recognition of recipients is the most meaningful assessment of artworks. The free circulation of works of art creates conditions on which creators can count for reaping the fruits of their work. This idyllic image, however, should be subjected to a more thorough analysis, because the circulation of works of art exhibits several specific features, related both to the attributes of the artworks and to the terms of conducting the transaction. The contemporary art market is a world of huge money and stunning transactions; the prices of young and little-known artists are able to soar in a very short time, mainly due to buyers, who treat their work as an investment with a high rate of return². These prices often quickly record equally dramatic declines, sometimes even returning to the original values, which raises a lot of doubts about reliable valuations and the operation of market laws in this sector³.

It is a world of anonymous buyers, mystery owners, an arena of brokers, gallery owners, agents, experts and art critics. The mechanisms that this secret and hermetic world of art uses, and the roles of particular actors have

² <https://www.artsy.net/article/artsy-editorial-what-you-need-to-know-about-the-emerging-art-market-right-now> (17.05.2020). Among others: Y. Bouvier, the famous owner of the gallery, inflates the prices of works in an unauthorized way, see: K. Ackerman, *Appraisal, Art Market & Investing, Authentication, Forgery & More*, <http://ackermansfineart.com/art-market-regulation-badly-needed> (26.05.2020).

³ J. Marsh, *Jeff Koons, art dealer running Ponzi scheme: investor*, 19.04.2018, <https://nypost.com/2018/04/19/jeff-koons-art-dealer-running-ponzi-scheme-investor> (26.05.2020).

a decisive influence on the seemingly undistorted laws of market economy – the rules of supply and demand.

The article analyses specific features of the value of contemporary artworks and their designation in a market environment, in order to demonstrate their impact on the rights and freedoms of creators and art recipients. It presents the need to improve current regulations concerning the limitation of profiteering and the need to introduce additional regulatory mechanisms to increase the transparency of transactions carried out in the art market.

Aesthetics and history of art, as well as economics have long struggled with the question of valuing works of art. This is inherently subjectified and not very measurable, which means that it is, therefore, not well transferable to the language of economic value, although such attempts are still made⁴. Therefore, it is extremely difficult to build between them a scale for comparing their value – both aesthetic and economic⁵.

In addition to these two independent values of the artwork, it should be remembered that pieces of art also express cultural value, distinguished from aesthetic value⁶, meant as the ability to transfer patterns, beliefs and customs, as well as knowledge and art among each member of the community⁷. This role of art does affect the valuation and circulation of works of art with national and international regulations, such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970⁸, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995⁹ and the Convention

⁴ D. Throsby, *Economics and culture*, Cambridge 2001, pp. 31–33, 83–87, R. Hewison, *Commentary 1: Looking in the wrong place*, “Cultural Trends” 2002, No. 12, p. 85, D. O’Brien, *Report: Measuring the value of culture: a report to the Department for Culture Media and Sport AHRC/ESRC Placement Fellow 2010*, No 12, S. Selwood, *Making a difference: The cultural impact of museums* London 2010, p. 5; C.A. Scott, *Exploring the evidence base for museum value*, “Museum Management and Curatorship” 2009, No. 24(3), p. 195–196, B. Ivey, *Art. Inc.: How Greed and Neglect Have Destroyed Our Cultural Rights*, Berkeley 2008, p. 16, R. Florida, *The Rise of the Creative Class*, New York 2002.

⁵ D. Throsby, *Economics...*, p. 83–87, 113.

⁶ *Ibidem*, p. 91.

⁷ A..L. Kroeber, C. Klukhohn, *Culture. A Critical Review of Concepts and Definitions*, Cambridge Mass 1952, p. 181.

⁸ Signed on 14 November 1970, No. 11806.

⁹ Adopted: Rome on 24 June 1995.

on Offences relating to Cultural Property 2017¹⁰, prohibiting the export and import of works of art that constitute objects of national heritage.

There is also another kind of value of art works – the value of prestige, intrinsically linked with the work of art. According to J.F. English, avant-garde artists produce art in their closed circles; this field is its own market and is related to the educational system that legitimises it¹¹. This circle has a similar scope as the so-called Art World, the environment of people involved in artistic creation, cooperating with each other thanks to an agreement on the meaning and content that art brings. Prestige is granted within this group; its primary function is to serve as a facilitator and indicator of cultural “market transactions,” enabling the various individual and institutional agents of culture, with their different assets, interests and dispositions¹².

The four types of values indicated, market, aesthetic, cultural and prestige, are related, although they all come from and belong to different evaluation systems. The immanent problem is to determine the measures and criteria of beauty and meaning, in the absence of comparability of fine art objects, which is due to the lack of unique standards, reference points and objective measures for valuing artworks¹³. It points to the crucial role of market value and art value; works of art have been considered as not only prestigious but also luxurious goods, they have the value of financial assets and can be used as a deposit or to make a speculative profit. Thus, the art market is, in a sense, a market in which economic laws apply; however the law of demand and its price-creating role cannot be applied in the art environment directly; not only is the number of goods that can be considered a commodity in the art market limited, but also the number of cus-

¹⁰ The Council of Europe Convention on Offences relating to Cultural Property adopted on 3 May 2017 (Council of Europe Treaty Series No. 221), open for signature by the member States and no member States since 19 May 2017.

¹¹ J.F. English, *The Economy of Prestige. Prizes, Awards and the Circulation of Cultural Value*, Harvard University Press 2005, p. 234. See also: P. Czaplinski, *Preface* [in:] J.F. English, *Ekonomia prestiżu*, Warsaw 2013, p. 11.

¹² *Ibidem*, p. 243.

¹³ J. Bialynicka-Birula, *Cultural Policy on the Art Market in Poland*, 2009 EAEPE Annual Conference (European Association for Evolutionary Political Economics), 6–8 November 2009, University of Amsterdam, Amsterdam, p. 282–283; <http://eaepe.org/eaepe-conference-2009>, <http://eaepe.org/node/5059> (26.05.2020).

tomers able to make a reliable assessment and valuation of a work of art is definitely quite narrow.

The art market is also an intermediate sphere, where not only artists and consumers exist, but also bureaucrats, officials, patrons and cultural organisers who vigorously produce and implement measures of influence and value¹⁴. The verdicts of individuals belonging to the Art World assigns value to an object that it did not have before, and does not find value in the work in which it was already embodied. What is more, it happens under conditions of monopoly, because their verdict is irrefutable and irrevocable. This phenomenon applies to all verdicts and assessments of works of art on the market.

The Art World is not a homogeneous group; it includes art critics, academics, the artists themselves, gallery owners, experts, collectors, and also museum directors, representing the public sector, and employees of various state agencies involved in the promotion of contemporary art. It is not difficult to notice that their roles are often interconnected, and that overlap is very strong¹⁵. Actors who are constantly and professionally associated with the art market, are strongly identified, joined by a strong sense of belonging, as well as long-term relationships and cooperation, which promotes the formation of loyalty. Studies carried out in the Scandinavian countries, as well as in Great Britain and France, reveal an extremely strong correlation of many roles and their interconnection: art critics are also members of commissions that decide on the purchase of works of art for the public sector, publish their opinions in the media and are usually art collectors – it can be compared to a net, woven by internal rules, and the attitudes and practices of its actors¹⁶.

These remarks allow to look at the contemporary art market as not only the world of big money and stunning transactions, but also as a world of unclear connections, dependencies and influences, unquestionable authorities and unarguable judgments, with the silent participation of the vast majority of creators, and to a large extent the confused buyers. In consequence the art market has been becoming an increasingly unreliable and

¹⁴ J.F. English, *The Economy...*, p. 35.

¹⁵ A.I. Jyrämä, A.M. Äyväri, *Shaping the practices – role of different actors within the context of contemporary art market*, 2006, <https://www.impgroup.org/uploads/papers/5617.pdf> (20.05.2020).

¹⁶ *Ibidem*.

unpredictable mechanism of resource allocation and valuation of pieces of art. Since, these are some economically justified reasons for state interference and the introduction of regulatory instruments. The art market, however, is almost completely devoid of regulatory instruments; despite the commonly used bans on the import of illegally acquired artworks and the export of works of art important for preserving the cultural identity of a nation¹⁷, it is not regulated by the state or its agencies. The lack of regulation of the art market, however, is starting to test its users. According to a Deloitte report¹⁸, 65 per cent of managers of funds investing in works of art, 63 per cent of collectors and 69 per cent of art professionals have noted problems related to the functioning of the art market, and in particular the lack of due diligence standards in transactions. Among the biggest threats, the authors of the report indicated the risk of price manipulation, insider trading and other activities, which may cause market distortion. As estimated by the authors of the report, as many as 79 per cent of investment managers and 62 per cent of collectors see a lack of transparency as a key problem of the art market¹⁹. The lack of transparency and clear criteria for the valuation of works of art also make this market an ideal environment for money laundering. This phenomenon has already been noticed, and actions to limit such practices have resulted in the Directive (EU) 2018/843 of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU²⁰. Pursuant to the Directive, the obligations related to the reporting and recording of transactions above EUR 10,000 are charged to persons engaged in the trade of works of art or act-

¹⁷ A. Jakubowski, *State Succession in Cultural Property*, Oxford University Press 2015, see also: *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law, Studies in Intercultural Human Rights*, vol. 4, eds. S. Borelli, F. Lenzerini, Brill 2012. It is also worth adding that new regulations are planned in this area - in July 2017 the European Commission proposed a new regulation: *Proposal for a Regulation of the European Parliament on the Import of Cultural Goods*, Brussels 2017, p. 263.

¹⁸ Report Deloitte Art & Finance 2017, <https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/artandfinance/lu-art-finance-report.pdf>, 237 (25.06.2020).

¹⁹ *Ibidem*, p. 242.

²⁰ PE / 72/2017 / REV / 1.

ing as intermediaries in the trade of works of art. Similar regulations are to be designed in the US²¹.

Theregulations adopted so far aim to protect heritage or reduce illegal transactions for fear of terrorism and the marketing of illicit sources, but ignore the rights of creators and trade in modern art as goods worthy of protection in themselves. Meanwhile, the unpredictability and unreadability of the criteria setting the price of works of art evoke the distrust and confusion amid customers²². The world of art is increasingly shaken up by news about lawsuits and charges against traders in the circulation of works of art, including against some of the most influential ones²³, as well as against some of the most famous artists²⁴.

The regulation and protection of the art market also has a different justification, related to the protection of artistic creation itself and the right to participate in cultural life. The art market is the first and most important environment in which contemporary art is presented, where it begins to influence recipients²⁵. The implementation of freedom of artistic life needs verifying the quality of art in its reception by the public. It resembles in some parts the deliberations on the freedom of expression and the concept of “free marketplace of ideas”²⁶ formulated by John Milton in his *Aeropagitica* and reflected in many judgments on free press issues²⁷. It should be noted that the

²¹ E. Kinsella, *US Art Dealers May Soon Be Subject to Government Financial Regulation. The art world has been put on high alert with news of new government oversight*, 02.05.2018, <https://news.artnet.com/art-world/us-art-dealers-financial-regulation-1277351> (25.06.2020). See also: Tim Schneider, *The Gray Market: Why Congressional Regulation Would Be a Gut Punch to Most American Art Dealers (and Other Insights)*, 07.05.2018 (25.06.2020).

²² M. Khaire, *Culture and Commerce: The Value of Entrepreneurship in Creative Industries*, Stanford 2017, p. 15.

²³ E. Konigsberg, *The Trials of Art Superdealer Larry Gagosian, Profile*, 20.01.2013, <https://www.vulture.com/2013/01/art-superdealer-larry-gagosian.html> (25.06.2020).

²⁴ E. Kinsella, ‘*Something Is Rotten in the State of Denmark*’: 19/04/2018 (25.06.2020).

²⁵ M Khaire, op.cit., p. 11.

²⁶ A. Biłgorajski, *Doktryna „wolnego rynku idei”: geneza, ewolucja oraz praktyczne zastosowanie*, “Z Dziejów Prawa” 2011, No. 4, p. 114.

²⁷ E.g. in the opinion of the judge O.W. Holmes on *Abrams v United States*, 250 U.S. 616 (1919) A. The concept of the free market of ideas as an environment for freedom of speech was also mentioned in the decision on the *New York Times Co. v Sullivan* 376 U.S. 254 (1964). The need to guarantee pluralism of views and statements also appears in ECtHR jurisprudence:

freedom of artistic creation, guaranteed by the Convention is treated as a derivative of the freedom of expression. This was expressed explicitly in the first European Court of Human Rights (ECtHR) decision regarding the freedom of artistic creation, in the report *Müller and others v Switzerland* 10737/84 (1988); the Commission declared “is in no doubt that in painting and exhibiting the three works the applicants exercised their right to freedom of expression, a right which the Convention recognises whatever the form of expression used”²⁸. In terms of the freedom of artistic creativity, the schema of the free market is even more adequate, and has less metaphorical character. The creators should have an adequate environment to create verifiable conditions for acquiring their work, defining what value their work has for recipients, thus setting a standard for satisfying the need for beauty and the reception of a piece of art.

This feedback from the public regarding aesthetic value and the quality of artworks, however, requires the conditions of a free market, understood here completely literally, that is, the market of recipients and creators, operating according to clear and readable criteria. In circumstances where the art market becomes an arena for speculative games, the conditions for the functioning of such a mechanism are seriously disturbed. The freedom of artistic expression as a “free market of ideas” cannot exist in this regard.

The art market also has fundamental influence on the protection of moral and material interests resulting from artistic creation; since the benefits of creators works are guaranteed as a important part of freedom of artistic creation, declared in art. 27 para 2 of the UDHR²⁹, and in art 15 para. 1c of the ICESCR³⁰. It means the rights of the creator to present their works, having them received by the audience, based on reliable and legitimate evaluation

Handyside v UK 5493/72 (1976), *Castells v Spain* 11798/85 (1992), *Lingens v Austria* 9815/82 (1986), although without reference to the metaphor of the free market of ideas, or rather as a condition for the existence of free public debate.

²⁸ Para 33 of the Commission report *Müller and others v Switzerland*, note 6.

²⁹ Art. 27 (2) of the UDHR: Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

³⁰ Art. 15 para. 1c of the ICESCR: The States Parties to the present Covenant recognise the right of everyone: (...) c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

criteria. In the conditions described earlier, the interests of creators may be subordinated to a speculative game, with quality assessments made on criteria other than aesthetic and cultural.

Finally, works of contemporary art are not bought in order to be seen only by the eyes of an individual buyer but also according to state policy in order to fulfil the public duty of providing access to cultural life. Each state pursues a cultural policy; the size and type of interference in artistic culture may take different forms, but most strategies for supporting cultural life assume that the state and its agencies will improve the organisation of artistic creation and all its corollaries³¹. Public entities participate in the purchase of works of art, both in order to provide access to the public and to support creators. Museums and contemporary art galleries are, therefore, an extremely important player in the art market. These entities make purchases – usually with public funds – on the same market, using the same mechanisms that operate on private purchasers. Transactions are usually accompanied by various instruments ensuring the quality of the acquired works, like advisory bodies at museums, which provide expert and objective valuations of the purchased works. However, usually the members of these bodies are the same people who appear in the Art World also in other roles, as art critics, gallery owners, academics, as well as collectors and artists themselves, which inevitably creates a risk of conflict of interest³². Even if the regulations of advisory bodies, such as purchasing commissions, contain clauses disqualifying members suspected of bias, it is almost impossible to separate their role as judges of aesthetic value. This problem concerns also the decisions to include works of art in exhibitions or the organisation of exhibitions of specific artists. Such choices result in the ennoblement of the artist and their work, sometimes causing rapid increase in its value, confirming the high cultural value of their work³³. In this respect, the lack of clear standards and criteria followed by the art market decision-makers is even more visible.

When the criteria are unclear, the valuations and transactions lack transparency, and there are no regulations facilitating the separation of roles of

³¹ J. Białynicka-Birula, op.cit., A. Młynarska-Sobaczewska, *Right to culture*, Warsaw 2018, p. 125–131.

³² Report Deloitte Art & Finance ... p. 267.

³³ T. Schneider, *3 Ways...*

various agents, art purchasing and exhibition decisions made by institutions with public funds are burdened with a systemic failure, regarding both the rules of the market, as well as guarantees of freedom of artistic creation and access to cultural life.

The picture of the contemporary art market shows the significant dominance of intermediaries over buyers (both public entities and private individuals) and creators – the authors of works that become objects of trade. Intermediaries, namely critics, gallery owners and appraisers act as a medium between art and market value, a territory difficult to navigate and verify its boundaries. Defining the limits of liability of intermediaries is also very difficult, as is the limits of competences of critics, experts, appraisers, galleries or auction houses.

There are very few mechanisms of intermediaries' liability for damages, caused in turn by overstating the value of the work or price fixing. A noteworthy example is the high-profile collusion which took place in 2002, when former Sotheby's president, Alfred Taubman, was convicted of setting up prices with Christie's. Both auction houses were forced to pay damages of USD 500 million³⁴. Even in counterfeits occurring in the sale of works, the limits of civil liability are not clear; thus, according to the decision of the Australian court *McBride v Christie's Australia Pty Limited* NSWSC 1729³⁵. Regulations at the national and international level should set more explicit rules of liability for damage caused by intermediaries, including the limits of their professional liability for the valuation and authentication of works of art. They also should determine the status of market agents, who determine the value of contemporary art, and in particular demarcate their independence from sellers, e.g., by prohibiting the reward of a commission and from auction houses. For a long time, changes have also been postulated to introduce the obligation to associate them with appropriate professional organisations, enforcing diligence and compliance with professional standards³⁶. The third necessary regulatory objective should be the introduction of the principle of transpar-

³⁴ <https://www.artquest.org.uk/artlaw-article/sellers-buyers-and-auctioneers-beware-4> (25.06.2020).

³⁵ C. Watson, *Buying a fake at auction, who is responsible?*, 2015, <https://www.avlawyers.com.au/blog/buying-a-fake-at-auction> (25.06.2020).

³⁶ Deloitte Report..., p. 265.

ency and accountability for transactions, full disclosure to the transaction chain, including the seller and all intermediaries in the sale, which will allow tracing the origin of the work and significantly reduce the risk of falsification, theft and illegal imports, the risk of speculation, money laundering and price fixing³⁷.

Such legal solutions have been postulated in the literature and practice for some time; it has not also appeared as a result of self-regulation of the art market. It would be a basic factor allowing the development of artistic creativity and connecting creators with the reception of their work. Where the art market is exposed to speculative games shaped by partial assessments and valuations, the artist themselves can be deprived of the most important moment of their creation, the unrestrained and spontaneous sensation of the recipient, their intellectual and aesthetic reaction to the work, which is the end point of the artist's creative process. Without this, the art market can function very well indeed, fulfilling the interests of its agents, but art itself is deprived of the basic environment and necessary conditions for its existence.

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