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Germany's approach to publicity and image rights

The Federal Court of Justice has recently introduced a new graduated concept of protection under which the greater the informative value of the image or the social relevance of the incident reported, the more the protection of the personal rights must take second place

The protection of image and publicity rights has a long tradition in Germany. Its legislative origin stems from the *Bismarck Case*. When Chancellor Otto von Bismarck died on July 30 1898, two photographers entered his bedroom through the window and took pictures of the body. The pictures were sold in Berlin to the highest bidding publishing company. The public outrage gave rise to new legislative considerations to the protection of personality and image rights. Finally, on July 1 1907 the Copyright in Works of Art and Photography Act (*Kunsturhebergesetz*, hereinafter CWAPA), which contained express provisions as to the protection of an individual's image, entered into force.

The right of an individual to the protection of his or her own image is regulated in Sections 22 and 23 of the act. 'Image right' is conceived as the product of the general rights of a personality (see the judgment of the Federal Court of Justice of December 1 1999 – *Marlene Dietrich*). Protected images are not merely photographs or film shots, but any conceivable presentation of a person that reproduces that person's appearance so as to be recognizable to third parties. Protected images can hence also be paintings, drawings, cartoons or dolls, among other things. The use of a lookalike of a famous person in advertising may also constitute a violation of the right to protection of that person's image. German football legend Franz Beckenbauer, for example, won a case against a mobile telephone network company that had used his *doppelganger* in a television advertising spot (Regional Court of Düsseldorf, AfP 2002, 64).

In principle, an 'image' – as defined in Section 22 of the CWAPA – may be circulated or displayed in public only with the consent of the person it depicts. The most significant exception to this principle, in accordance with Section 23 of the act, relates to images of people who are continuously or temporarily in the public eye, so that their images may be published without their consent when the interest of the general public in information outweighs the rights of the person depicted.

The practice of the German courts has long been to differentiate between 'absolute persons of contemporary history' and 'relative persons of contemporary history'. 'Absolute persons of contemporary history' are those people who stand out from others by reason of their position, function, achievements or acts and are for this reason in the public eye, so that the general public is particularly interested in information concerning them. They include outstanding politicians and significant sportsmen and women.

With these people, German courts have tended until now to assume that the general interest of the public has, as a rule, priority over an individual's image rights.

By contrast, 'relative persons of contemporary history' are those who are not well-known personalities in public life, but who have become the focus of public interest because of a specific current incident. They include victims of accidents or natural catastrophes and people involved in a scandal.

The courts have held that relative persons of contemporary history can be depicted without their consent if the image relates objectively to the contemporary incident. In addition, the illustrated report must answer an objective interest of the public and not merely satisfy the public's curiosity or lust for sensation.

This press-friendly court practice was shaken by a decision of the European Court of Human Rights (ECHR) in 2004 (Application 59320/00). In this case, the complainant, Princess Caroline of Monaco, had failed before German courts in her attempt to prohibit the publication of photographs from her private life in the tabloid press. The ECHR saw the princess's petition as justified and found that the German courts had failed to weigh up the conflicting interests fairly when assessing the case.

Consequently, the German Federal Court of Justice departed from precedent and established a graduated concept of protection in place of the rigid differentiation between absolute and relative persons. Accordingly, each individual case now calls for a decision as to whether an image is really to be considered as relevant to contemporary history and hence priority conceded to the interest of the public in information as against the personal interests of the depicted party. The greater the informative value of the image or the social relevance of the incident, the more the protection of the personal rights must take second place – and vice versa. Along these lines, the Federal Court of Justice issued a decision on July 1 2008 (VI ZR 243/06) concerning a photograph published in a magazine showing a well-known German television journalist shopping in Majorca in the company of her household help. The court found that the photograph showed the plaintiff in a totally insignificant situation, so that the informative value of the report was of no significance or interest to the general public and thus could not justify an intervention against image rights.

According to these new court rulings, prominent people in particular need no longer put up with practically unrestricted photography of their persons outside the bounds of their private territory. The publication must contribute to a topic of public interest. Bearing in mind the freedom of the press guaranteed under German

constitutional law, the standards for this are not set very high. In a decision of February 2008 (NJW 2008, 1793) the Federal Constitutional Court ruled that "mere entertainment" can serve to shape public opinion as well. The protection of freedom of the press can hence justify articles regarding the private or everyday life of prominent people and their social surroundings. Accordingly, the Federal Court of Justice dismissed on July 1 2008 (VI ZR 67/08) the action of Caroline of Monaco in which she sought to prevent the publication of a photo in a magazine, thus emphasizing the freedom of the press. The publishers had featured an article about the leasing of a holiday villa belonging to Caroline's husband that was illustrated by a picture of the couple on a road near the villa. The article was thus highlighting the change in consumer behaviour of the 'rich and beautiful' in letting unused real estate. This could be of interest to the public, the court ruled, and thus the inclusion of the photo was considered admissible. The decision shows that the admissibility of the publication of photos depicting prominent people in public significantly depends on the content of the report that the photos illustrate.

Besides its character as a privacy right, a major component of the general right of personality concerns the freedom to decide whether and how an individual's image is to be provided commercially for advertising purposes. German courts, as a rule, work on the assumption that the unauthorized use of an image in an advertisement is unacceptable and that the personality rights of the person depicted without his or her consent have priority over the (financial) interest in publication of the party placing the advert. In 2004 the Higher Regional Court of Hamburg issued a decision regarding an action filed by former German national football goalkeeper Oliver Kahn against a game manufacturer that had used a cartoon depiction of Kahn as goalkeeper in its game. The court held that Kahn was justified in his interest in not being used for commercial purposes in the computer game without his consent. This was a violation of the individual's right to self-determination.

These principles have been toned down somewhat by more recent decisions issued by the Federal Court of Justice on the satirical use of the images and names of various prominent persons in advertisements (judgment of October 26 2006, BGHZ 169, 340 – *Oskar Lafontaine* and judgments of July 5 2008 – *Dieter Bohlen/Ernst August of Hanover*). The court considered the unauthorized publications to be lawful, holding that business entities may also rely on the constitutional freedom of opinion when creating an advertisement that is to be intentionally satirical.

Should the publication infringe an individual's image right, the violated party is fundamentally entitled to claim injunctive relief. He or she is also often entitled to call for the destruction of the image and any reproductions. In addition, the depicted person may also be entitled to claim compensation for damages. Hence, in general the unauthorized commercial use of an image gives grounds for claiming compensation in the form of an appropriate licence fee. The amount of the licence fee depends on what the violating party would, within reason, have had to pay for the publication in question. A guideline can be given by former advertising contracts and the extent of the circulation and spread of the advertisement, among other things.

Moreover, the unjustly depicted party may also possibly claim indemnification for non-pecuniary damages suffered from the violation of personal rights. In 1958 the Federal Court of Justice held in its *Herrenreiter* decision (BGHZ 26, 349) that "now that Article 1, 2 [of the Constitutional Law] has basically recognized the right to self-determination of the individual as a basic value of the legal system, it is justified to grant just indemnification in money to the injured party in compensation for the non-pecuniary damages derived from the unauthorized publication of his [or her] image".

Such indemnification, however, is awarded only if personal rights have been seriously violated (eg, by the unauthorized use of nude images). Moreover, the amounts granted are considerably less than those granted, for example, in the United States and usually do not exceed €10,000. Only in exceptional cases has compensation for immaterial damages of €50,000 or higher been awarded.

In summary, the protection of an individual's image rights has a long tradition in German legislation and case law. The most recent development has further reinforced the protection of personal rights. By contrast, in the 1899 *Bismarck Case*, the Supreme Court of the German Reich was unable to refer to any rights of personality whatsoever, nor to any statutory image rights – in those days neither were known. Given the lack of any pertinent legal provisions, the two photographers could be charged only with unlawful entry. WTR

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