

Celebrity Rights to their Own Image – a Civil Law Perspective

February 26, 2013



Overview

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I. Introduction

- The right to one's own picture has become **more and more important**
 - **Conflicting public interest** to be informed about important incidents and persons
 - **Commercial interests** involved: pictorial reporting and competitive marketing by media / press
- **Problem:** Celebrities are widely regarded as "fair game"; are being chased at every step without moderation



- Aim of any legal rules (statutes and jurisdiction):
Achieving a **reasonable and just balance** between pictorial reporting and the protection of privacy.
- German jurisdiction is especially characterized in the further development of the protection of personality rights by the "***Caroline of Hanover***" (or: "*of Monaco*") **cases**.

II. The legal bases

1. General right of personality

Article 1 Basic Law for the Federal Republic of Germany (GG)

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

Article 2 GG

(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

Source: German Ministry of Justice (Bundesministerium für Justiz) www.gesetze-im-internet.de

Art. 2 (1) GG in connection with Art. 1 (1) GG contain the **constitutional basis** for the right to one's own picture.



2. Freedom of the press and of information

A counterpart of this are the freedom of the press and of information in Art. 5 (1) GG, which are constitutionally guaranteed as well:

Article 5 GG

(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.



3. Sect. 22, 23 German Law on the Protection of Copyright in Works of Art and Photographs (KUG)

Sect. 22, 23 KUG substantiate the right to one's own picture and aim at reconciling the oppositional rights.

a) Sect. 22 KUG

Sect. 22 KUG

A person's image may only be disseminated or displayed publicly with the consent of the person depicted [...].

Principle: → **consent** is needed for any dissemination or public display



b) Sect. 23 (1) KUG

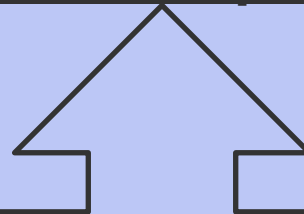
Sect. 23 KUG

(1) Images of the following may be disseminated or displayed publicly without the consent required under Sect. 22:

1. Images of the sphere of contemporary history

[...]

Exception to the principle → no consent is needed with regard to an **“image of the sphere of contemporary history”**



= All questions of general social interest, governed by the general public
→ **individual decision!**

Less important than the **context of the reporting** if dealing with a **person** of contemporary history (formerly: distinction between “absolute” and “relative” persons of contemporary history).



c) Sect. 23 (2) KUG

Sect. 23 KUG

(2) The authorisation does not extend to a dissemination or display that violates legitimate interests of the person depicted [...].

Counter-exception → no violation of **legitimate interests of the person depicted**

- **What** are "legitimate interests"? **How** may they be violated?

Typical categories:

- private and intimate sphere
- images with negative tendency
- creating dangers for the depicted person
- disposal for advertising purposes

**Assessment
necessary!**

4. Legal consequences in case of violations

a) Injunctive relief

The violated person may demand the omission of dissemination according to Sect. 22, 23 KUG in connection with Sect. 1004 BGB.

Sect. 1004 German Civil Code (BGB)

(1) If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.

b) Revocation

- The person who is depicted contrary to Sect. 22, 23 KUG may also have a claim to **revocation** based on Sect. 1004 BGB.
- = typical claim in cases of violations in written articles, but also relevant for pictorial reporting, e.g. in cases of a photomontage or where pictures get a negative tendency in connection with the written text.



c) Right of redemption or destruction

Sect. 37 KUG gives a claim to the **destruction** of pictures as well as the equipment for their reproduction. Alternatively the person depicted may demand their **delivery** in accordance with Sect. 38 KUG.

d) Indemnity

The victim has a claim to (financial) indemnity for the violation of the right to one's own picture even if there is only an immaterial damage, Sect. 22, 23 KUG in connection with Sect. 823 (1) BGB.

Sect. 823 BGB

(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.

It is the predominant view that the right to one's own picture is "another right" in the sense of this Section.



e) Penal law

- Sect. 33 KUG contains a rule of penal law, providing for fines or even imprisonment.
- According to Sect. 42, 43 KUG the rights of redemption or destruction may also be claimed in the course of a criminal procedure.

f) Problem: effectiveness of legal protection

Criticism in doctrine:

- Pictures are often **not noticed** until they are published
→ infringement has already happened, pictures are already in circulation and noticed by public, the results of which can **hardly be made undone!**
- **Financial sanctions are too small**, and financially strong publishing companies will consciously incur them.

III. Leading Cases

1. Caroline of Hanover

Princess of Hanover, Duchess of Brunswick and Luneburg, eldest daughter of Prince *Rainier III of Monaco* and Princess *Gracia Patricia* (aka *Grace Kelly*). Married to Prince *Ernst August of Hanover*.

→ No one else has influenced German jurisdiction on the matter in a similar way; most important cases for the right to one's own picture!

a) **First series of lawsuits (1993-1995):**

Pictures depicting Caroline in France: leisure activities, partly with kids or accompanied by her former boyfriend *Vincent Lindon*.





Federal Court of Justice (BGH):

- Even absolute persons of contemporary history must get some protection of their privacy.
- This protection is not limited to private premises but may **extend to public places.**
- This is the case when it can **objectively be determined that a person wants to be in private.**
 - Infringement if pictures are taken in abuse of the fact that the depicted person feels unwatched, or if the depicted person is taken by surprise.
 - Therefore the claim of *Caroline* was **partly successful**, namely for those pictures which were taken at an isolated garden café or with a telephoto lens. However other pictures taken in public are permitted.

b) Second and third series of lawsuits (1997-1998):

Pictures on holiday activities, partly with her later husband Prince Ernst August of Hanover



- **District courts** (LG/OLG Hamburg) dismissed the claims of *Caroline* with regard to the standards laid down by the Federal Court in the first series.
- No appeal granted by the BGH. The **Federal Constitutional Court (BVerfG)** did not accept a **constitutional complaint**.



c) Fourth lawsuit (2000):

- **Individual application** (Art. 34 ECHR) to the **European Court of Human Rights (ECHR)** against the decisions of the German courts in all three lawsuits
- **Grounds: protection** under German law is **insufficient**; violation of the right under **Art. 8 (1) ECHR**

Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

- **Decision of the ECHR:** German courts **did not reach a fair balance** between the different fundamental rights; **no adequate protection** for the persons depicted
 - **Referral back** to the German Federal Court for a new assessment; damages granted to *Caroline*



d) Fifth lawsuit (2008-2012)

Decision of the ECHR no. 40660/08 and 60641/08 of February 7, 2012

- **Facts:** *Caroline* and *Prince Ernst August of Hanover* complained, under **Art. 8 ECHR**, of the **German courts`** refusal to prohibit any further publication of a photo which had appeared in February 2002 in a German magazine. It showed the couple on a relaxed walk in **St. Moritz** and was accompanied by an article on the **poor health** of *Prince Rainier of Monaco*.
- The **Federal Court** found that the reigning **prince's poor health** was a subject **of general interest** and the press had been entitled to report on the matter.
- In a judgment of 2008, the Federal Constitutional Court had dismissed *Caroline's constitutional complaint*.



Grounds of the ECHR:

- The ECHR held, unanimously, that there had been **no violation** of **Art. 8 ECHR**.
- The Court comments on the changes regarding the evaluation of the information value of photos for the public by stating that the photo did at least to some degree contribute to a **debate** of **general interest**.
- Accordingly the Court confirms that the applicants had to be regarded as **public figures**.
- In conclusion, the Court holds that the German courts had correctly balanced the **freedom of the press** with the respect of **privacy**.

e) Case of *Charlotte Casiraghi*:

- In April 2008 a German magazine published pictures depicting *Caroline's* daughter ***Charlotte Casiraghi*** on an opening of art by *Warhol* student *René Ricard* in the Scream Gallery in London.
- ***Charlotte Casiraghi*** filed for injunctive relief regarding the publication of these pictures.

The Court held that *Charlotte Casiraghi* is not a person of **public interest** since she holds no official position.

In addition, the Court refused to consider the report about the opening in the gallery of any public interest. Therefore the pictures were not considered as images of **the sphere of contemporary history**.





Federal Court of Justice (BGH):

- The **Federal Court of Justice** overruled this judgement, stating that the publication of the pictures was legitimate.
- The Court interprets the term “**sphere of contemporary history**” in **Sect. 23 KUG** with regard to the **freedom of the press** in a broader sense by declaring that not only events of political or historical importance are addressed but also questions of **general social interest**.

The report has an **entertaining content** about the everyday life of celebrities, which could be a reason for **socio-critical considerations**.

Therefore the Court considers the information as relevant for the **public** although the corresponding persons do not hold official positions.



Federal Court of Justice (BGH):

- In addition, that the publication of the pictures did not interfere with the **private sphere** of *Charlotte Casiraghi* since the opening was a public event and she attended it as a journalist for "*AnOther Magazine*".
- Thus, the Federal Court extends public interest in the sense of Sect. 23 KUG to **common celebrities** who appear in public.

d) Summary: What is new?

- Strengthening of the **rights of celebrities**
- Derogation from the terms “relative” and “absolute persons of contemporary history”, approximation to the legal wording “**sphere of contemporary history**” (Sect. 23 (I) no. 1 KUG)
 - Result: All reporting must have an **(actual!) information value, not just be aimed at satisfying public curiosity**
- Partially increased protection for celebrities who do not hold a political office

Criticism in doctrine:

- Only a **partial harmonisation** with the jurisdiction of the ECHR
- Still **no adequate protection** as the private sphere is not entirely excluded from reporting

Confirmation of this new jurisdiction by the Federal Constitutional Court

2. Heide Simonis

- Politician, former minister-president of the land of Schleswig-Holstein for a long period
- **Pictures:** Private shopping activities on the day she lost her official position and the day after
- **Decision by the Federal Court** (2008, pursuant to the **new jurisdiction**):
 - On the day she lost her official position: **No injunctive relief.**
Politically active persons have to take into account that they will be in the focus of public attention even if they have a failure.
Pictures are in a **close relation to her political position** because they show how she handles her failure.
 - Pictures of the day after: **Different result**, lack of the **close** (temporal) relation to the failure



3. Sabine Christiansen

- Famous TV journalist
- **Pictures:** Private shopping activities and touching her new boyfriend



- **Decisions by the Federal Court (2008/2009, new jurisdiction):**
No reporting from the sphere of contemporary history as there is **no news value** that can be a contribution to the formation of a public opinion
 - merely a matter of **satisfying public curiosity,**
 - so the publication is **unlawful**



4. Jörg Kachelmann

- Famous TV weather presenter, was temporarily taken into custody because of the suspicion of rape,

Pictures: from the time of the remand, especially at yard exercises (taken from an adjoining building into the yard)



- **Decision by LG Köln** (2010, following the **new jurisdiction**):

Publication is unlawful

- Prison is **not open to the public**; inside, a person does not have to think about being depicted; also **no other possibility of getting insularity**
- The fact that there is a criminal procedure going on and that he is in remand (where freedom is limited anyway) **does not change anything**

5. Gunter Sachs

- Famous photographer and author



- **Pictures:** reading the weekly tabloid “Bild am Sonntag” on his yacht, published in “Bild am Sonntag”

Heading of the picture: “*Gunter Sachs* reads Bild am Sonntag – so do more than eleven million Germans.”

- **Decision by Federal Court** (May 31, 2012):
Publication is unlawful
 - Violation of *Sachs*` right to his own picture and his privacy
 - *Sachs* is a person of public interest, Sect. 23 (I) no. 1 KUG, therefore assessment is required



- On the one hand: The report contains **information of public interest** regarding *Sachs`* reading habits.
- On the other hand: *Sachs* has been used by the publisher for **advertising** his newspaper although *Sachs* has not recommended "Bild am Sonntag" explicitly: The pictures combined with the report and the heading connect the depicted person to the advertised product.
- The **advertising character** is the **report`s focus**: *Sachs`* reading habits can hardly be described as news; therefore Art. 5 (1) GG is subordinate.
- Violation of Art. 2 (1) GG in connection with Art. 1 (1) GG because *Sachs* is shown in a **private situation**

6. Martin Kaymer

- Famous professional golfer
 - An artist sells a portrait that depicts *Kaymer* and is called "Golfing Superstar *Martin Kaymer*" via the internet.
- **Decision by LG Düsseldorf** (November 28, 2012):
Sale is unlawful
 - Violation of Sect. 22 (I) KUG
 - **Sect. 23 (I) no. 4 KUG** ("no consent needed, if the dissemination is based on overriding artistic issues") does not apply.
 - The artist pursues commercial interests and therefore cannot refer to overriding artistic issues.
 - *Kaymer* is a person of public interest in the sense of **Sect. 23 (I) no. 1 KUG**, but there is only a subject of general interest if the depicted person can obviously be connected to the performances he or she is famous for.



7. Special case (1): Children under age

Principles for the publication of pictures of minor children were already **developped by the Federal Constitutional Court (BVerfG)** in the context of the first series of lawsuits of the **Caroline cases**:

- Appreciation of **interests**
- In favour of the children's rights their protection granted by the **Constitution** (Art. 6 GG) has to be taken into account, as children **still have to grow up to become independent persons**
- A continuous portraiture by media would cause special dangers for the children's development of personality, so they **need a special, enhanced protection**
- **Exceptions** only if the prominent parents are consciously taking part in **public events** with their children or if the **consent** of the children or their parents is **unquestionable**



Federal Court: These principles still apply. There is **no general prohibition**, but **an individual assessment in each case is necessary**

8. Special case (2): Accompanying persons (example: „Herbert Grönemeyer“)

- Partner of the musician *Herbert Grönemeyer*
- **Pictures:** at a café and private shopping at a holiday trip in Rome; in connection with a text about *Grönemeyer's* sorrow about the cancer-related death of his wife, which he used in his songs as a central theme
- **Decision of the Federal Court (2007, new jurisdiction):**



The interest that founds the sphere of contemporary history must be **attributable to the accompanying person him- or herself.**

The fact that *Grönemeyer* himself used his feelings about his wife's death in his songs does not have the result that his new partner has to accept limitations of her private sphere.

An attribution of *Grönemeyer's* artistic work to his new partner is not admissible

IV. Summary

- **Enhanced protection** of the right to one's own picture by Federal Courts
- Always necessary is a **contribution to a public debate** – reaching beyond the satisfaction of mere curiosity and sensationalism
- The **written context** may play a role as well
- **Special protection for children under age** of famous parents
- Particular impact of the European Union Law because of the **European Convention for the Protection of Human Rights and Fundamental Freedoms**
- It remains to be seen how the German development with regard to the level of protection will continue – also with regard to the jurisdiction of the European Court of Human Rights



V. Annexe: Protection of Names

1. Case *Marlene Dietrich* no. 1:

(BGH, Judgment of December 1, 1999 - 1 ZR 49/97)

- In 1993, **Lighthouse GmbH** used the name and life story of German actress **Marlene Dietrich** for the production of a musical. Ms Dietrich had died one year earlier. They registered the trade mark "**Marlene**". The musical was a flop but Lighthouse had profited from selling the right to other companies such as **FIAT** and **Ellen Betrix** to advertise using the mark and the picture of Marlene Dietrich. Furthermore, Lighthouse sold merchandise bearing the sign "**Marlene**" and pictures of the late actress.



The only child and heir to Marlene Dietrich alleged a breach of her **mother's personality rights**.

In a claim against the former CEO of Lighthouse, she sought **financial compensation** for this use and an **injunction** against further use.

The court of first instance rejected the claim for deletion of the registered trademark and compensation, since posthumous personality rights had been considered only to protect non-material, i.e. non-commercial interests until then.

The **Federal Court of Justice** decided differently:



- **The Court** found that Lighthouse and defendant had both used the name "*Marlene*" and a picture of *Marlene Dietrich* to market products of *Ellen Betrix* and *FIAT*.
- Even if the mere use of a first name in general were no sufficient link to an individual, the **popularity** of *Marlene Dietrich* and the context of the use implied an **infringement** of the **right** to determine whether one's **own name** may be used for advertising purposes.
- The use of the **portrait** of *Marlene Dietrich* was considered an infringement of Sect. 22 of the German Law on the Protection of Copyright in Works of Art and Photographs (KUG).
- Therefore the Court granted a **limited injunction** against the defendant and ordered him to disclose his earnings on merchandising and licensing. The claimant was entitled to **compensation** for **purely commercial uses** because the of violation of the right of personality.



2. Case *Marlene Dietrich* no. 2:

(BGH, Judgment of December 1, 1999 - 1 ZR 226/97)

- A company advertises the eco-friendliness of its products using a reconstructed picture from *Marlene Dietrich's* film "***The Blue Angel***" rather than the usual environment emblem of a blue angel. *Marlene Dietrich's* daughter again applied for an injunction and compensation.
- The **Federal Court of Justice** granted compensation because of the violation of the right of personality.



The **Federal Constitutional Court (BVerfG)** confirmed this judgement.

3. Case of Zappanale

- The dispute between the **Zappa Family Trust** and fans of the cult musician **Frank Zappa** over the use of the **word mark Zappa**, registered as a **Community trade mark** is still going on.
- The **OLG Düsseldorf** in 2010 revoked the **Zappa word mark** registered as Community mark on the basis of a lack of genuine use under **Art. 50(1)(a)** of the **Community Trade Mark Regulation** (CTMR), according to which a registered mark may be revoked unless there had been **genuine use** made during a period of **five years** from the date of registration.
- It further allowed the defense for lack of genuine use under **Art. 26** of the **German Trade Marks Act** in relation to a national **graphic mark**.



Gail Zappa – Frank Zappa’s widow - claimed that the festival and merchandise breached the **EU trademark rights** held by her.

The Court held that the **word mark Zappa** had not been genuinely used, as required under **Art. 50 (1)(a) CTMR**:

- The **name** had only been used as part of a **domain name** of a **website** based in the **US** but accessible from the **EU**. That website had not used the trademark to sell or advertise products for the **EU market**, though, and so was not used in trade, although it had been live for years.

That finding was based on **two fundamental concepts**:

- The need to show actual use that exceeds a mere passive operation of a **website** without certain evidence of **relevant consumer recognition**.
- And the more general assertion that **registration** alone is **insufficient**, given that the relevant consumer would not make **a mental link** with the **owner trade mark**.



Federal Court of Justice

- In its decision of **May 31, 2012**, the Federal Court of Justice confirmed the judgement:
- A community trade mark consisting of a celebrity's name is not used genuinely by a domain name if the relevant consumer only expects **information about the celebrity's life** but not about any goods.
- A genuine use under **Art. 15 (2) (a) CTMR** has to be negated if a community trade mark is used in a form that differs from the originally registered one (ZAPPA Records) in such a way that the relevant consumer only regards the differing form as a reference to production of goods.

4. Case of Dieter Bohlen

- Famous songwriter, producer and entertainer
- An advertising campaign by the cigarette company behind "Lucky Strike" refers to Bohlen`s autobiography that needed a number of changes.

- Decision by OLG Hamburg (2005):

-Violation of the general right of **personality** as the company only intends to merchandise the product by using *Bohlen`*s first name

- Art. 5 (1) GG (freedom of the press) is subordinate since the advertisement does not refer to a socio-critical event

- Decision by Federal Court of Justice (2008):

-**no violation** of the general right of personality

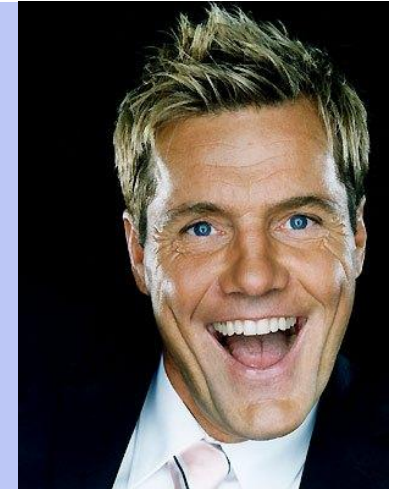
Look, Dieter, this is how you write books.





Grounds of the Federal Court of Justice:

- In this case freedom of the press takes precedence over the proprietary, non-constitutionally guaranteed component of the right of personality.
- An advertisement is lawful if
 - it refers to an event of **public interest**, and
 - it does not give the impression that the person concerned **identifies with the advertised product**
- The advertisement has to be seen as a part of the discussion concerning *Bohlen*'s book release as a topic of public interest. Furthermore it does not give the impression that *Bohlen* identifies with the cigarettes. Due to the fact that his book release has called public attention his right of personality is subordinate to freedom of the press.



Bohlen now sues Germany at ECHR (2009 – no decision rendered yet)



Thank you for your attention!