



# **An EU and Civil Law Perspective on Merchandising – Celebrity and Image**

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# Overview

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**I. Introduction**

**II. Statutory law**

**III. Leading cases**

**IV. Summary**

**V. Annex: Protection of names**

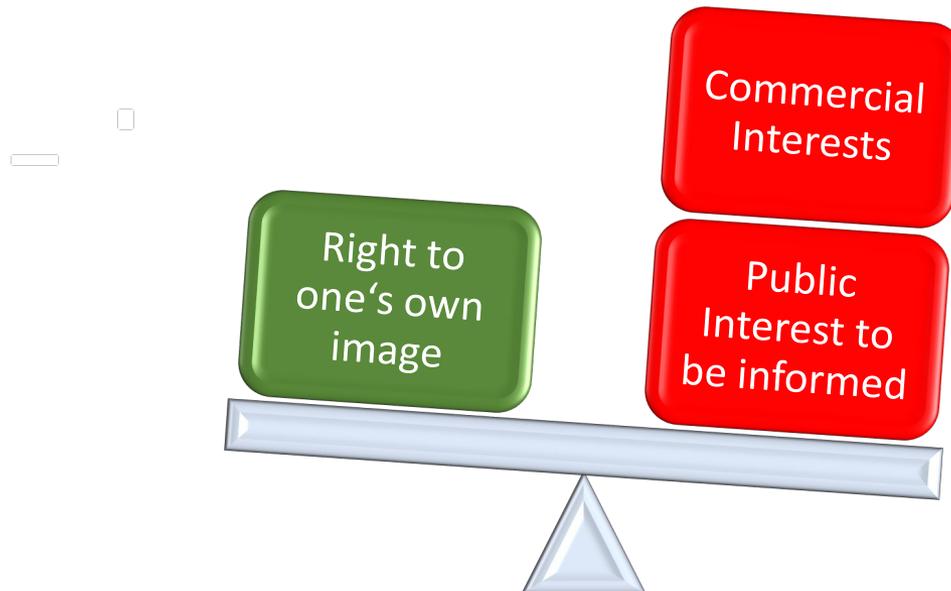
# I. Introduction

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- **Public figures** are an object of interest for photojournalists
- They are widely regarded as “**fair game**”; are being chased at every step without moderation
- Most public figures want to keep a **private sphere** for themselves; don't want to be photographed constantly
- **Inherent conflict** sometimes even leads to violence
- **Question:** when is it allowed for journalists to take and disseminate pictures of public figures?

# I. Introduction

- Every individual has **the right to one's own image**
- **Problem:** There can be **conflicting public or commercial interests**
- Aim of any set of legal rules (statute or case law):  
Achieving a **reasonable and just balance** between legitimate photojournalism and the protection of privacy



## II. The legal bases

### 1. Protection of the right to one's image

- The right to one's image is part of the **general right of personality**
- That right is protected by the **EU Charter of Fundamental Rights**, the **ECHR** and the **law of each country**

	<b>Law of the EU</b>	<b>ECHR</b>	<b>German law</b>
<i>General right of personality</i>	Articles 7, 8 EU-Charter	Article 8 ECHR	Articles 2(1), 1(1) GG
<i>Right to one's image</i>	Not explicitly granted	Not explicitly granted	Sections 22, 23 KUG

## II. The legal bases

**Short excursion:** What are the key **differences between** the protection of human rights under the **EU-Charter** and the **ECHR**?

### – **EU-Charter:**

- Only addresses Member States of the EU when they are implementing Union law (Article 51 EU-Charter) → the EU-Charter is not applicable in many cases
- Individuals are unable to sue Member States before the European Court of Justice; protection of the EU-Charter only via preliminary ruling (Article 267 TFEU)

### – **ECHR:**

- The ECtHR (Court) has jurisdiction over all infringements of the ECHR
- Individual application to the ECtHR is possible (Article 34 ECHR)
- The Court may afford just satisfaction to the injured party (Article 41 ECHR)

→ Protection under **ECHR is more effective** and thus of more relevance in practice

## II. The legal bases

### 2. Protection of conflicting interests

- Interests of photojournalists and the general public are also protected by the law:

	<b>Law of the EU</b>	<b>ECHR</b>	<b>German law</b>
<i>Freedom of press and information</i>	Article 11 EU-Charter	Article 10 ECHR	Article 5(1) GG
<i>Right to engage in work</i>	Article 15 EU-Charter	Not explicitly granted	Article 12 GG

- Those interests may outweigh the interests of the photographed person → would result in a limitation of the right to one's image

## II. The legal bases

### 3. Limitation of the right to one's image

- **Question:** How to determine in which situations the right to one's image needs limitation?
- EU-Charta and ECHR only grant the general right of personality → **no particular limits** to the right to one's image can be extracted
- German law limits the right to one's image in **Section 23 KUG:**

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

**1. Images of the sphere of contemporary history**

[...]

- **Problem:** that approach does not avert the need for a careful assessment in every case
- Criteria for assessment:
  - Importance of the content for the general public
  - Intensity of the intervention in privacy

## II. The legal bases

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### 4. Legal consequences in case of violations

#### a) Injunctive relief

#### b) Claim to Retraction

A typical claim in cases of violations in articles, which is also relevant for photojournalism, e.g. in cases of a photomontage or where images obtain a negative tendency in connection with the text.

#### c) Claim for damages

The victim has a claim for damages even if there is only an immaterial damage

## II. The legal bases

### d) Problem: Effectiveness of legal protection

Pictures are often **not noticed until** they are **published**.

→ The infringement has already happened, pictures are in circulation and noticed by the public, the results of which can **hardly be made undone!**

**Financial sanctions are (too) small**, and financially strong publishing companies will consciously incur them.

→ This problem is specific to jurisdictions which do not grant exemplary (or punitive) damages; for example Germany.

# III. Leading Cases

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## Overview

- 1. Caroline of Hanover**
- 2. Heide Simonis**
- 3. Sabine Christiansen**
- 4. Jörg Kachelmann**
- 5. Christian Wulff**
- 6. Gunter Sachs**
- 7. Kate Middleton's topless picture**
- 8. Lillo-Stenberg and Saether**
- 9. Albert II of Monaco**
- 10. Prince Harry**
- 11. Prince George**
- 12. Günther Jauch**
- 13. Special case (1): Minors**
- 14. Special case (2):  
Accompanying persons**
- 15. Special case (3): incidentally depicted persons**

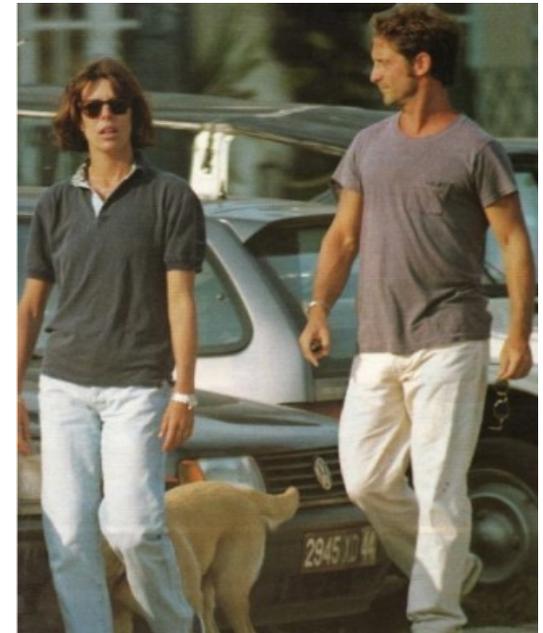
# III. Leading Cases

## 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*.

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

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



## III. Leading Cases

### 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 also **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.
  - The claim of *Caroline* was **partly successful**, namely for those pictures which were taken at an **isolated café** or with a **telephoto lens**. However, other pictures taken in public were permitted.



### III. Leading Cases

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

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



- **District courts** dismissed the claims of *Caroline*.
- No appeal granted by the BGH. The **German Federal Constitutional Court (BVerfG)** dismissed a **constitutional complaint**.

# III. Leading Cases

## c) Case of *Charlotte Casiraghi*:

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

The German Federal Court of Justice (BGH) held that *Charlotte Casiraghi* was not a person of **public interest** since she held no official position.



# III. Leading Cases

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## f) Summary

### Strengthening of the rights of celebrities:

- “**sphere of contemporary history**”
- Any reporting must have an **(actual!) information value, not just be aimed at satisfying public curiosity**
- Increased protection for celebrities who do not hold a political office

### Criticism by some:

- Still **no adequate protection** as the private sphere is not entirely excluded from reporting



# III. Leading Cases

## 2. Heide Simonis

- Former politician
- **Pictures:** Private shopping activities the day she lost her government position and the day after
- **Decision by the Federal Court of Justice (2008):** ◀



- 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 suffer a defeat.
- Pictures are in **close relation to her political position** because they show how she handles her political defeat.
- Pictures of the day after: **Different result**, lack of the **close** (temporal) relation to her political defeat.

# III. Leading Cases

## 3. Sabine Christiansen

- well-known TV journalist
- **Pictures:** private shopping activities and touching her new boyfriend
- **Decisions by the German Federal Court of Justice (2008/2009):**

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**

# III. Leading Cases

## 4. Jörg Kachelmann

- well-known TV weather presenter, was taken into custody on suspicion of rape (he was subsequently acquitted)  
**Pictures:** from the time of the remand, especially at yard exercises (taken from an adjoining building)
- **Decision by the regional court of Cologne (2010):**



### **Publication is unlawful:**

A 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 criminal proceedings were ongoing and that he was in remand (where freedom is limited anyway) **did not make a difference**

## Confirmation by the ECtHR:

- The judges of the ECtHR found that the German courts had rightly assumed that the image "**did not contribute any added value** to reporting".
- Accordingly, *Kachelmann's right to respect privacy* has priority over the **freedom of expression** of the publishing house.
- *Kachelmann* did not have to expect to be secretly photographed during his stay in prison.

(ECtHR 4.12.2018 – 62721/13, 62741/13 (Bild GmbH & Co KG/Deutschland; Axel Springer AG/Deutschland))

# III. Leading Cases

## 5. Christian Wulff

- **Former Federal President** of Germany, who resigned in 2012 after accusations of corruption
- **Picture** of him with his ex-wife during a **shopping trip** was published shortly after they reunited in 2015
- Decision by the **German Federal Court of Justice (2018)**:



### **Publication is lawful:**

→ former Presidents remain of political importance even after their resignation (still represent the country; get salary)

→ *Wulff* has made details of his divorce public himself

→ the picture does not put him into a bad light

→ the intrusion into the private sphere is of little intensity since the picture was taken in a public area

# III. Leading Cases

## 6. Gunter Sachs

- Famous photographer and author
- **Pictures:** reading a tabloid on his yacht, published by the same tabloid

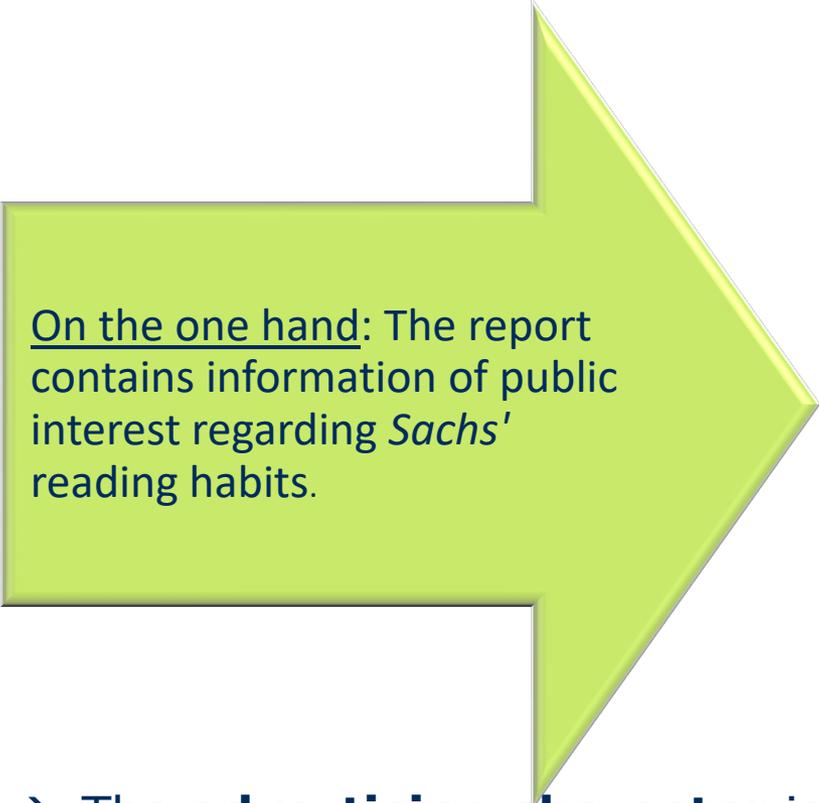
**Picture description:** "Gunter Sachs reads *Bild am Sonntag* – so do more than eleven million Germans."

- **Decision by Federal Court of Justice** (2012): The **Publication is unlawful**

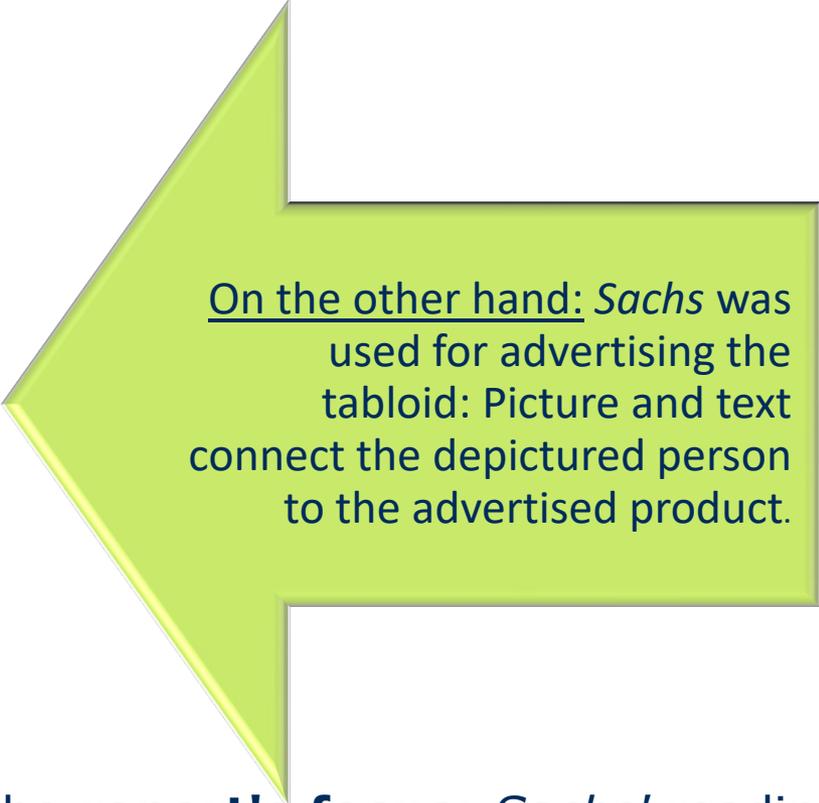
- Violation of *Sachs'* right to his own picture and his privacy
- *Sachs* is a person of public interest, therefore an assessment is required



### III. Leading Cases



On the one hand: The report contains information of public interest regarding *Sachs'* reading habits.



On the other hand: *Sachs* was used for advertising the tabloid: Picture and text 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 the freedom of the press is subordinate.
- Violation of right to one's own picture, as *Sachs* is shown in a **private situation**.

# III. Leading Cases

## 7. Case of *Kate Middleton's* topless picture

- The French magazine “Closer” published pictures of *Kate Middleton* sunbathing with her husband *William* in France during their private holidays in a secluded place. The pictures were taken with a telephoto lens.
- In 2012, a French civil court, based on an “**invasion of privacy**”, ordered the

- handing over of the original photos to the couple within 24h;
- payment of a fine of 1,000 EUR;
- payment of an additional 10,000 EUR per day in case of delay with handing over the photos;
- removal the pictures from the internet.



# III. Leading Cases

- **Reasons of the French civil court:**
  - Referring to the **case law of the ECtHR** and Articles 8, 10 ECHR as well as to Article 9 of the French *Code Civil* the French court **limited the public's right to be informed** to information about persons of public life in their public life, voluntary disclosed information and pictures, and to information with some significance/actuality for a general discussion.
  - Sunbathing is **an intimate private moment** and of no general interest.
- The photographer and the head of publisher of “Closer” were confronted with **criminal charges** in France.

# III. Leading Cases

## 8. Case of Lillo-Stenberg and Saether

- *Lillo-Stenberg* is a well-known musician, and *Saether* is an actress in Norway.
- A magazine in Norway published pictures of their **wedding**, which was a private ceremony on an island near Oslo, accompanied by a description of the ceremony. The magazine was **not invited** to the wedding and the photographs were taken **without the knowledge** of the couple from **afar**.



The **Oslo District Court** granted the couple compensation from the magazine, the responsible editor and the photographer. In a subsequent appeal the **High Court** upheld the judgment. However the **Supreme Court** found against the couple.

# III. Leading Cases

## Reasons of the Norwegian Supreme Court:

- There needs to be a **violation of privacy** under section 390 of the Norwegian Penal Code, which means that the publication has to be **assessed as a whole**, in the actual context and situation, where the protection of privacy must be weighted against the freedom of expression interpreted in the light **of Articles 8, 10 ECHR**
- Both persons are **well-known**, but without a prominent role in **any public body**; therefore the article is of **pure entertainment value**
- A wedding ceremony is **part of private and family life**, but it has a **public side** as a public affirmation of the intention to live together
- The wedding was organized in a very unusual way (bride on an open rowing boat) and took place **in an area accessible to the public and easily visible**;
- Moreover, the photos do **not show the most personal part** – the marriage ceremony itself.

### III. Leading Cases

## Decision of the ECtHR (2014):

Both persons are **public figures**;

the interests of both sides were **carefully balanced out** by the Norwegian Supreme Court;

although the pictures were taken **without the consent** of the couple and **from afar**, the article did not contain **anything unfavorable** and there were **no photographs of the actual marriage ceremony**;

the wedding was exercised in an **unusual way**, the area was **accessible to the public**, **easily visible** and a **popular holiday location** and thus likely to attract attention;

thus **no violation** of article 8 ECHR.

## III. Leading Cases

### 9. Case of *Albert II of Monaco*

**Facts:** The magazine Paris Match published an article under the headline “Albert of Monaco: Alexandre, the secret child” illustrated by a photo of the Prince and the child (later named **Alexandre Grimaldi-Coste**). The article contained an interview with the child’s mother *Nicole Coste*, she had provided the photo.

*Ms Coste’s* aim was to bring Albert II of Monaco to legally **acknowledge** the child, which he subsequently did.

**Albert II of Monaco sued** Paris Match **successfully** in France on the basis of Art. 8 and 9 ECHR.

- The **French *Cour de Cassation*** held that the publication of the photograph amounted to an **invasion of privacy** because the child’s existence was unknown to the public and the constitution of Monaco **barred** Alexandre from **ascending to the throne** (*born out of wedlock*), which **would** have been of **legitimate public interest**.

## III. Leading Cases

### Decision by the ECtHR (2015)

On **application by *Paris Match*** and its publication director the ECtHR found the decisions of the French courts **in violation of Article 10 ECHR:**

- The ECtHR held that in a hereditary monarchy a Prince embodies the nation. **Events affecting the ruling family** are therefore part of **contemporary history**.
- In this context the **birth of a child**, even if born out of wedlock, would be of importance for the **continuity of the monarchy**, especially if the child appeared to be the prince's **only descendant** at the time and thus **contributed to a debate on a matter of public interest**.
- Consequently the ECtHR found the French decisions **in violation** of Article 10 ECHR: A **reversal of fortune** for the *Grimaldis*.

(ECtHR, *Couderc and Hachette Filipacchi Associés v. France*, Application no 40454/07)

# III. Leading Cases

## 10. Case of Prince Harry

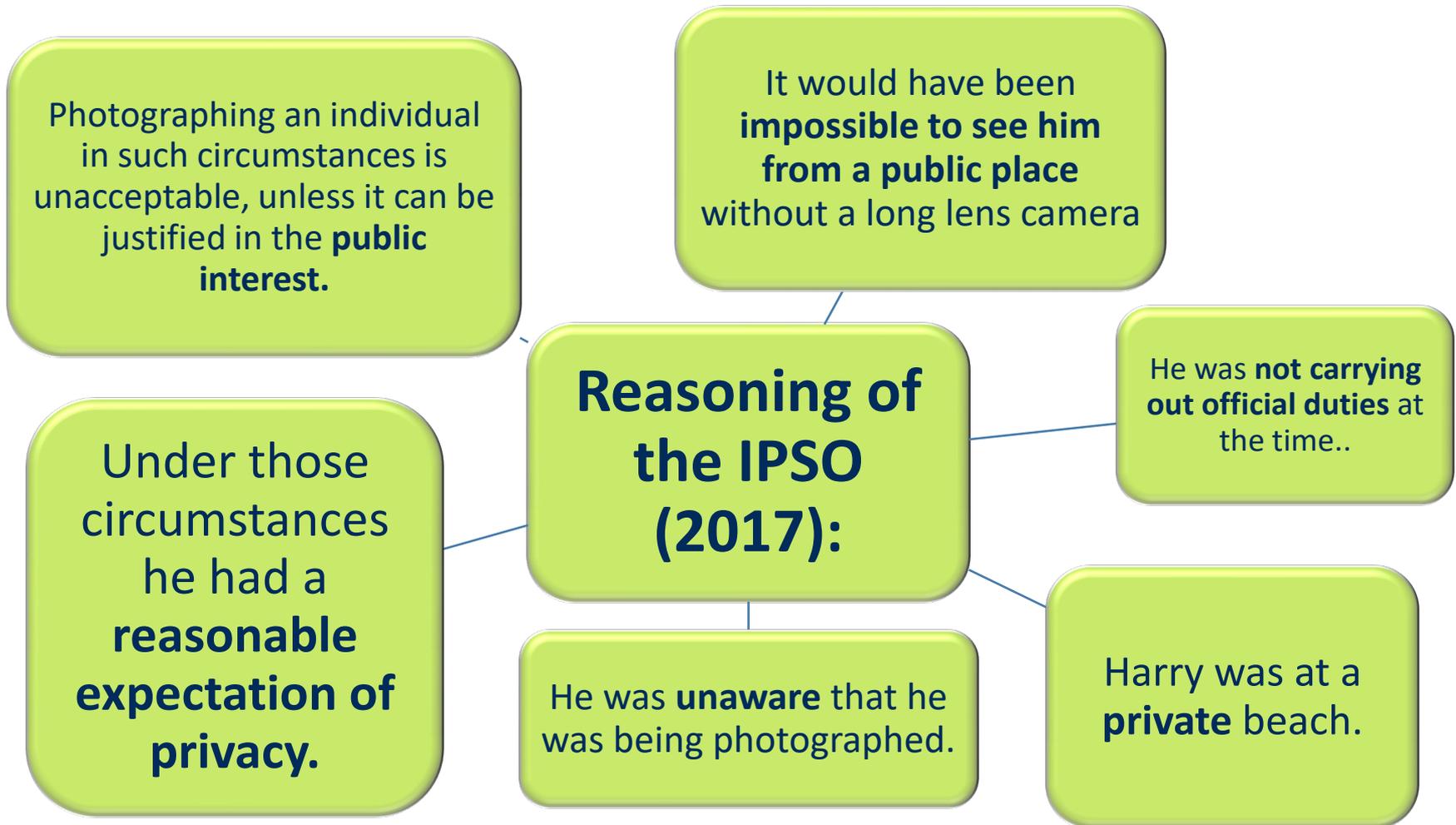
- “**MailOnline**” published a picture of Prince Harry at a **private beach** in Jamaica; picture was taken with a long lens camera; photographer had been 700 to 800 yards away from the beach
- Harry complained to the **Independent Press Standards Organisation:**
- **Ruling:** the **adjudication had to be published** on the website for 24 hours with a link to it; it had to be published within the top fifth of the homepage



### **Section 2 Editors` Code of Practice:**

(iii) It is unacceptable to photograph individuals, without their consent, in public or private places where there is a reasonable expectation of privacy.

### III. Leading Cases



However, there are no grounds for a justification.

# III. Leading Cases

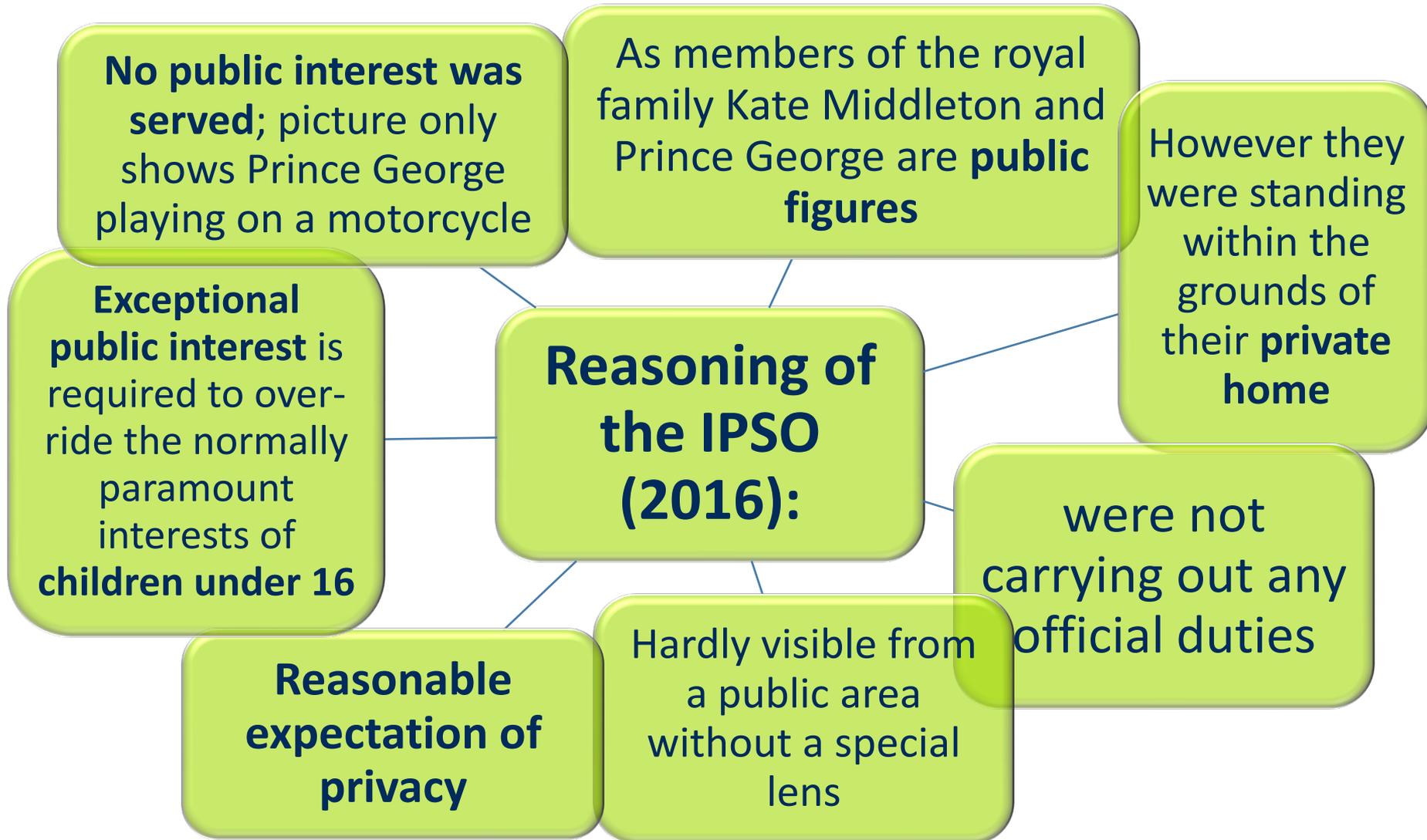
## 11. Case of Prince George

- “**Express.co.uk**” published a picture of *Prince George* sitting on a police motorcycle while his mother was watching him;
- they were on private ground;
- the picture was taken with a long lens camera from a distance of 200 yards



- Arguments of Express.co.uk:
  - Not a private interaction (officers were on duty)
  - It is important for the public to see how young members of the royal family interact with public servants
  - As an heir to the throne *Prince George* is a subject of great public interest
- However the **complaint** of *Kate Middleton* and *Prince George* **was upheld** by the **IPSO**

### III. Leading Cases



### III. Leading Cases

#### 12. Case of *Günther Jauch* (Clickbaiting)

A picture of *Günther Jauch*, a well known TV quiz show host, was shown online with two colleagues and a headline stating: "One of these TV moderators has to withdraw because of cancer." Only when one clicked on the link it became obvious that *Jauch* was not meant.

#### **Ruling of the Higher Regional Court Cologne (2018):**

- A TV magazine is not allowed to link the image of a celebrity with the question of cancer without good reason.
- Use of a captivating headline in conjunction with pictures of celebrities that opens a curiosity gap for the readers („clickbaiting“).
- **Unlawful commercial use** of the image
- Appeal allowed

# III. Leading Cases

## 13. Special case (1): Minors

**Principles** for the publication of pictures of minors were already developed by the German Federal Constitutional Court in the **Caroline cases**:

- balancing **of interests**;
- the **protection of children** by the Constitution has to be taken into account, as children still have to grow up to become self-responsible persons;



### III. Leading Cases

- a continuous portraiture by the media would cause special dangers for the **children's development**, so they **need special, enhanced protection**;
- **exceptions** if the 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 of Justice: **No general prohibition**, but **an individual assessment in each case must be made.**



# III. Leading Cases

## 14. Special case (2): Accompanying persons

- **Partner** of the musician *Grönemeyer*
- **Pictures:** At a café, in connection with a text about *Grönemeyer's* grief about the cancer-related death of his late wife, which he used in his songs as a central topic.

## Decision of the Federal Court of Justice (2007):

The interest of contemporary history must be **attributable to the accompanying person.**



# III. Leading Cases

## 15. Special case (3): incidentally depicted persons

- **Picture:** A German football player was photographed at the beach, accompanied by an article about him and his pickpocketed wallet and watch.
- In the background: **an identifiable woman** in a bikini sitting on a chair.



### Section 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;
  2. **Images of landscapes or other locality with persons incidentally depicted**
- [...]

## III. Leading Cases

### **Decision of the Federal Court of Justice (2015):**

**An image** of a contemporary historically significant person for illustrative reasons **with an identifiable incidentally depicted person** next to the main focus or in the background of the image **is unlawful**, provided that the event of contemporary history is **not attributable** to the incidentally depicted person.

In accordance with the intent and purpose of section 23(1) no 2 KUG, the exception **cannot be applied** in cases in which the landscape or other locality is just incidental work instead of being the image's main object.

### **On the other hand: Decision of the same Court (2014):**

If the identifiable incidentally depicted person **was informed of photographers at the event** (in this case a hostess promoting tobacco products at a dinner party with celebrities), images are permitted due to person's implied consent.

## IV. Summary

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- **Enhanced protection** of the right to one's own image
- Always required 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 underage children**
- Particular impact of the **European Convention for the Protection of Human Rights and Fundamental Freedoms**
- In **the UK** the **IPSO** plays an important role in protecting the right to one's image

# V. Annex

## Protection of Names

### 1. Case *Marlene Dietrich* no 1:

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.

(German Federal Court of Justice, 01 December 1999 – I ZR 49/97)



## V. Annex

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- 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.

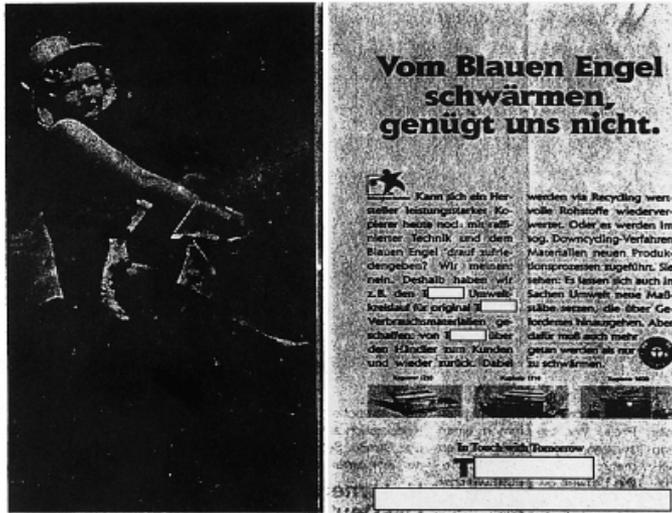
## V. Annex

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

- The court found that *Lighthouse* and the 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 is 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.
- 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 of the violation of the right of personality.

# V. Annex

## 2. Case *Marlene Dietrich* no 2:



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.

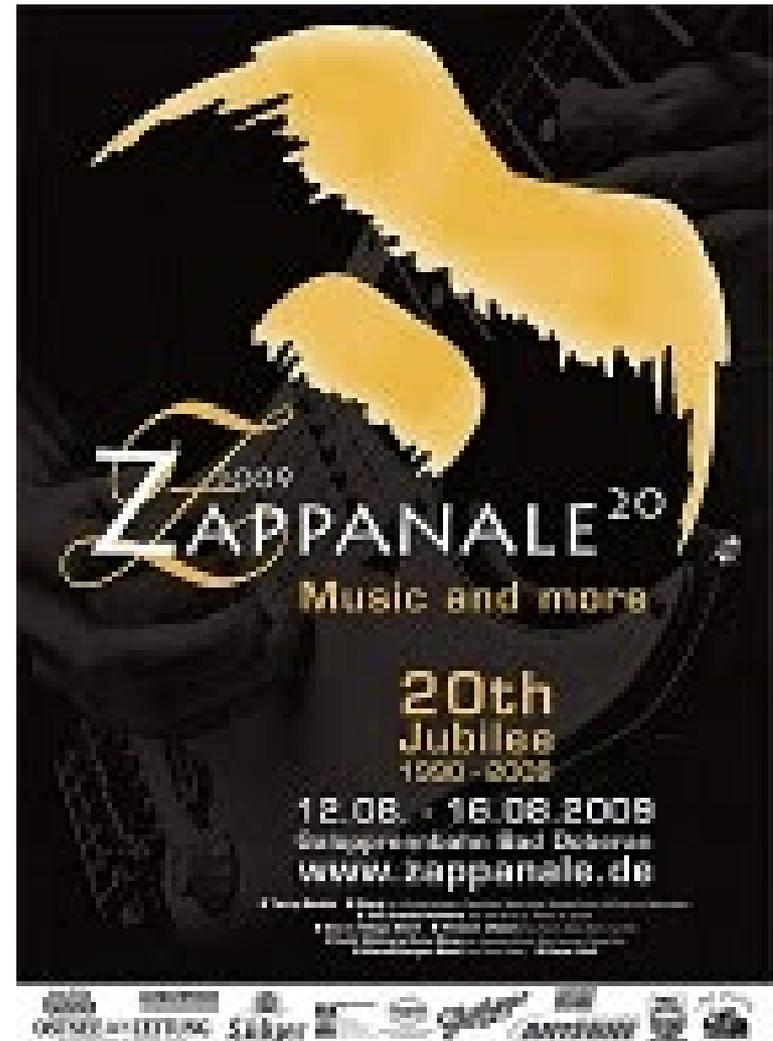
The **Federal Court of Justice** granted compensation because of a violation of the right of personality. The Federal Constitutional Court confirmed this judgement.

(German Federal Court of Justice, 01 December 1999 – I ZR 226/97)

## V. Annex

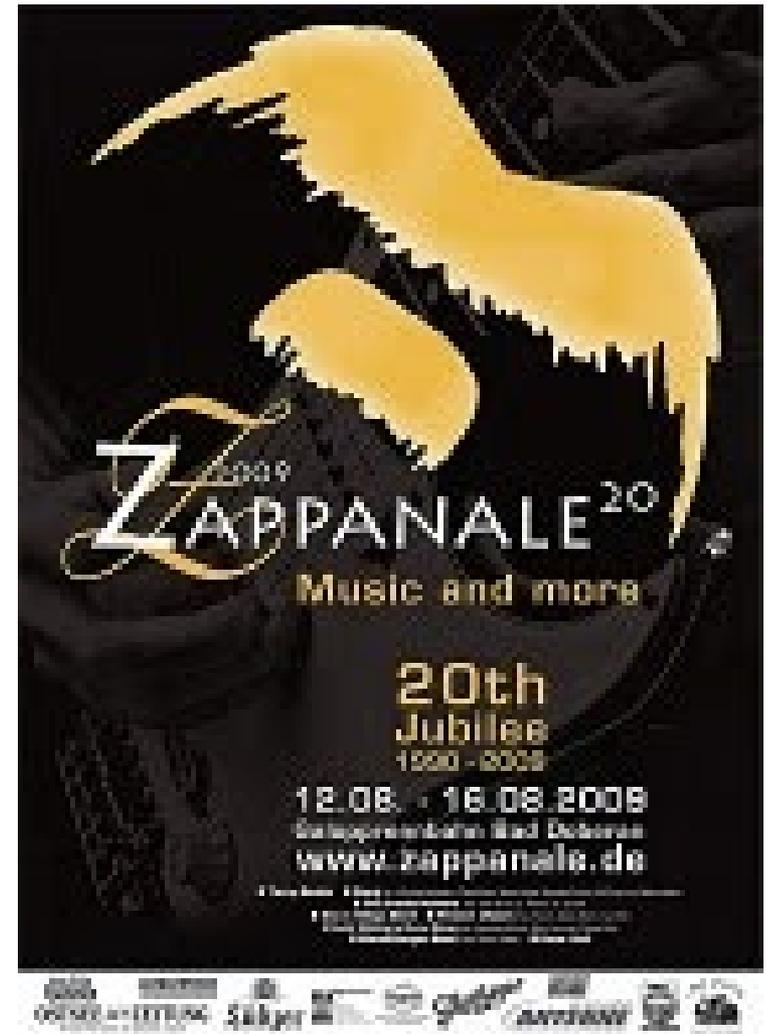
### 3. Case of Zappanale

A 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 (now: EU trade mark).



## V. Annex

A higher regional court (OLG Düsseldorf) in 2010 **revoked** the *ZAPPA* word mark registered as a Community trade mark on the **basis of a lack of genuine** use under the Community Trade Mark Regulation (CTMR; now: **EU trade mark regulation**), 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.



## V. Annex

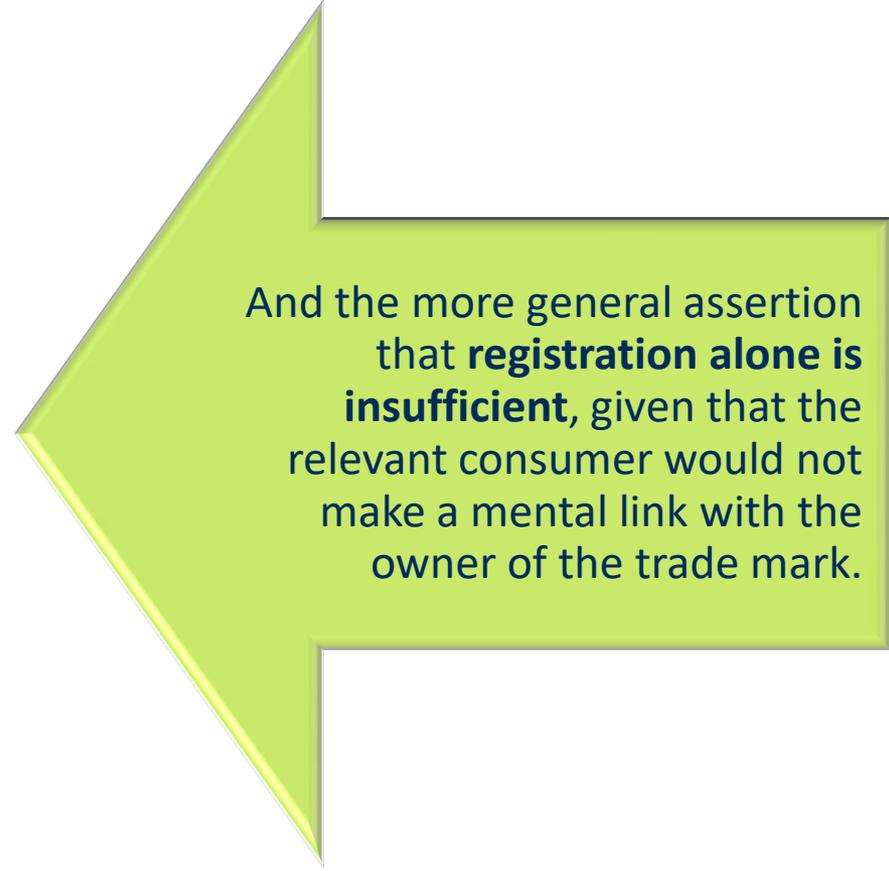
- *Gail Zappa* – Frank Zappa's widow – claimed that the festival and merchandise breached the EU trademark rights held by her. The name had only been used as **part of a domain name of a website** based in the US but accessible from the EU.
- The website had **not used the trademark to sell or advertise products** for the EU market, and thus was not used in trade, although it had been live for years.
- The Higher Regional Court **revoked** the *ZAPPA* word mark because of a **lack of genuine** use under the Community Trade Mark Regulation (CTMR; now: **EU trade mark regulation**), 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.

## V. Annex

The 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 of the trade mark.

## V. Annex

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In **2012**, the Federal Court of Justice **confirmed** this 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.
- There is **no genuine use** if a trade mark is used in a way 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 the production of goods.

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Thank you for your attention!