Developments

Headwind from Europe: The New Position of the German Courts on Personality Rights after the Judgment of the European Court of Human Rights

By Corinna Coors [*]

A. Introduction

In Germany, as in the U.S., the relationship between protection of privacy and freedom of expression has been subject of many decisions.[1] In the U.S. a right of privacy was famously conjured out of common law precedents by Warren and Brandeis.[2] Over the course of a century, it developed into a right of publicity, which gave celebrities the power to prevent the commercial use of their names, endorsements, images, voices, and other attributes of personality by unauthorized third parties.[3] In defining such a right, much attention has been focused on separating what is commercially unacceptable from what is desirable free speech under the First Amendment of the U.S. Constitution.[4] It has also been important to settle the duration of such rights.[5] Publicity rights as a commercial value of a person's identity are therefore well established in the U.S., although state laws vary widely as to the

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[1] In the US the right of publicity gained actual significance in the increasing commercial use of baseball statistics. *See* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007).

[2] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 *et. seq.* (1890); Pavesich v. New England Life Ins. Co., 122 Ga. 190 (1905).

[3] *See* Haelan Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (1953); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 564 (1977).

[4] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 849 *et. seq.* (5th ed. 1984); J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:10 (2008).

[5] *See* Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., 568 F. Supp. 2d 1152 (C.D. Cal. 2008); Shaw Family Archives Ltd. V. CMG Worldwide, Inc., 486 F. Supp. 2d 309 (S.D. N.Y. 2007).

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extent of protection.[6] In Germany, due to the constitutional background of the personality right, the balance between public and private interests still operates differently. After the European Court of Human Rights (ECHR) in 2004 convicted the German Federal Republic of violating the Convention for the Protection of Human Rights Fundamental Freedoms, the German Federal Court (*Bundesgerichtshof—BGH*) took the opportunity to think over its previous position about image rights. Three judgments were examined by the German Constitutional Court (*Bundesverfassungsgericht—BVerfG*) and one of them was reversed.[7]

After giving a short description of the legal basis for personality rights in Germany, the article illustrates the old and introduces the new German jurisprudence in relation to personality rights. It further examines how the *BGH* and the *BVerfG* have reacted to the critics of the ECHR by developing and defining the limits of the graded protected concept (*abgestuftes Schutzkonzept*) and giving up the absolute figure of contemporary history (*absolute Person der Zeitgeschichte*). Where necessary for the purpose of a better understanding of German law, a comparative approach to United States law will be provided.

Since the debate about the adoption of a federal right of publicity is continuing in the United States, the recent developments in Germany and Europe might be of particular interest to the American jurist.[8]

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[6] Both the American Bar Association and the International Trademark Association have formulated a model statute, that, if enacted, would create a Federal Right of Publicity. A Federal Right could address some of the problems inherent in a Right of Publicity derived from State Law. Such problems include law uncertainty, instability and the possibility for plaintiffs to engage in forum shopping to maximize their rights. See the draft of the International Trademark Association, *available at* http://www.inta.org/index.php?option=com_content&task=view&id=285&Itemid=153&getcontent=5.

[7] The *BVerfG* must prevent or correct a violation of international law by national courts, such as the incorrect application and the non-compliance with international law. As the Convention contributes to an enhancement of a joint European development of fundamental rights, the Federal Constitutional Court observes the compliance with rights of the Convention in particular, see Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 1481/01, Oct. 14, 2004, 111 BVerfGE 307 [hereinafter *Görgülü*], a decision in which the Constitutional Court made very fundamental remarks on the relationship between international law, especially laid down by the *ECHR*, and national law, especially with respect to the sovereignty of the Federal Republic of Germany. For further analysis, see Matthias Hartwig, *Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights,* 6 GERM. L.J. 869, 869–94 (2005).

[8] *See* Richard S. Robinson, *Preemption, the Right of Publicity and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183, 201–02 (1998); Eugene Salomon, Note, *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179, 1186 (1987); Eric J. Goodman, *A National Identity Crisis: The Need For a Federal Right of Publicity Statute*, 9 J. ART & ENT. L. 227 (1999).

B. The Development of the Right of Personality in Germany

I. The German Right of Personality—A Short Overview

In Germany, as in the United States, personality rights were largely born out of the need for protection of privacy.[9] Article 1 of the German Constitution (*Grundgesetz)* imposes a duty on all state authorities to respect and protect "human dignity." In Article 2 everyone is said to have the right to the free development of his personality in so far as it does not infringe upon the rights of others or offend against the constitutional order or the moral code.

Based on these Articles and sections 823 and 826 of the Civil Code (*Bürgerliches Gesetzbuch—BGB)* the German Federal Court, has developed a "general right of personality" known as *Allgemeines Persönlichkeitsrecht*. Under the general right of personality one can find a number of different rights such as the right to one's image, the right to one's name, and the right to oppose publication of private facts. As opposed to the U.S. law there is no specific right of privacy recognized in German law but privacy rights are covered by this general right of personality.[10] Some of the rights protected under this principle are also protected by specific provisions in the law such as section 22 of the Art Copyright Act (*Kunsturhebergesetz—KUG*), granting a right to one's image.[11]

II. The Opinion of the German Courts

The protection of personality rights was first recognized in the Schacht decision.[12] However, it was not until 1958 in the Gentleman Rider case that the German Federal Court for the first time acknowledged a pecuniary value in personality rights.[13] Despite this general recognition, in its early stage the era of general damages for reputational harm was characterized by caution. Legal literature raised doubts as to the legislature's explicit

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[9] HORST-PETER GÖTTING ET AL, HANDBUCH DES PERSÖNLICHKEITSRECHTS, § 1, n.4 (2008).

[10] Michael Gerlinger, *Sports Image Rights in Germany, in* SPORTS IMAGE RIGHTS IN EUROPE § 119 *et. seq.* (Ian S. Blackshaw & Robert C.R. Siekmann eds., 2005); for an overview of the American right of privacy, see Warren, *supra* note 2, at 193 *et. seq.*; KEETON, *supra* note 4, at 849 *et. seq.*; MCCARTHY, *supra* note 4, at § 1:10 *et. seq.*.

[11] *See* Kunsturhebergesetz [KUG-German Copyright Act] Jan. 9, 1907, § 22 ("Bildnisse dürfen nur mit Einwilligung des Abgebildeten verbreitet oder öffentlich zur Schau gestellt werden.") (Portraits must only be offered to the public or placed in circulation with the consent of the portrayed individual).

[12] Bundesgerichtshof [BGH-Federal Court of Justice], Case No. 1 ZR 211/53, May 25, 1954, 13 BGHZ 334 [hereinafter *Schacht-Briefe*].

[13] Bundesgerichtshof [BGH-Federal Court of Justice], Case No. 1 ZR 151/56, Feb. 14, 1958, 26 BGHZ 349 [hereinafter *Herrenreiter*].

intention to exempt defamation cases from damage awards for pain and suffering.[14] Over the decades the courts gradually started to recognize that commercial interest in a person may have its own value and therefore granted a stronger protection. In 1999, for example, the daughter of Marlene Dietrich sued for damages because of the unauthorized use of her mother's image in the advertisement for a musical about her life.[15] The lower courts had rejected the protection of a simply commercial interest but the *BGH* overturned these rulings and held that patrimonial interests were also protectable, especially for famous individuals. Still, the courts remained reluctant to award large sums of damages as they are known in the United States. The reason for this lies in the difference between the defamation laws of the respective countries. The American concept relies far more on damage awards to protect the personality of the defamed person.[16] By contrast, the German system favors a variety of different remedies that place less emphasis upon money awards; for example, the publication of a counterstatement (*Gegendarstellungsanspruch)* or a claim for retraction (*Widerruf)*.[17]

However, in one of the earlier Caroline of Hanover cases, the *BGH* was disposed to award higher damages. In that case, Princess Caroline of Hanover (earlier: Monaco), a well-known media-celebrity in Germany, had tried to stop German media from publishing a purely invented interview with her. The lower courts had awarded a modest sum for violation of the princess' right of privacy. The Federal Court of Justice reversed the Court of Appeal's decision and advised the lower court expressly to take into account the gains

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[14] *See* JOHANNES KOENDGEN, HAFTPFLICHTFUNKTIONEN UND IMMATERIALSCHADEN AM BEISPIEL VON SCHMERZENSGELD UND GEFAEHRDUNGSHAFTUNG (SCHRIFTEN ZUM BUERGERLICHEN RECHT) 30, 55 (1976); KOMMENTAR ZUM BUERGERLICHEN GESETZBUCH, §§ 241–432, 249 (Theodor Soergel ed., 1999).

[15] Bundesgerichtshof [BGH-Federal Court of Justice], Case No. 1 ZR 49/97, Dec. 1, 1999, 143 BGHZ 214 [hereinafter *Marlene Dietrich*].

[16] Alexander Bruns, *Access to Media Sources in Defamation Litigation in the United States and Germany*, 10 DUKE J. COMP. & INT'L. L. 283 *et. seq.* (2000); Gary M. Ropski & Marc S. Cooperman, *Schadensersatz in Rechtsstreitigkeiten über geistiges Eigentum in den Vereinigten Staaten*, GRUR INT. 411 (1990).

[17] The counter-statement is an explanation by the person affected by the publication which contradicts the published article. The availability of counter-statements, based on the states' (*Bundesländer*) press and media codes, disclaimers, and corrections have proven effective for most cases and the issue of a counter-statement can be disposed of without necessarily going to full trial. The courts can grant an injunction against further publication. If, however, publication only of a counter-statement from the plaintiff is insufficient to remove the intrusion, the infringed person may cumulatively claim for a full retraction of an untrue statement. For a comparative study on defamation remedies in Germany and the U.S., see Bruns, *supra* note 16, at 283 *et. seq.*; for a general comparative analysis, see Basil S. Markesinis & Nico Nolte, *Some Comparative Reflections on the Right of Privacy of Public Figures in Public Places*, *in* PRIVACY AND LOYALTY 113, 127 *et. seq.* (Peter Birks ed., 1997); for more on the German claim for a counterstatement or retraction, see Bundesverfassungsgericht [BVerfG-Federal Constitutional Court], Case No. 1 BvL 20/81, Feb. 8, 1983, 63 BVerfGE 131, 142; Bundesverfassungsgericht [BVerfG-Federal Constitutional Court], Case No. 1 BvR 1/84, Nov. 4, 1986, 73 BVerfGE 118, 201; WALTER SEITZ ET AL., DER GEGENDARSTELLUNGSANSPRUCH: PRESSE, FILM, FUNK UND FERNSEHEN (3d ed., 1998).

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made by the publisher when measuring the damages for non-economic loss.[18] The court awarded the sum, not least to prevent this kind of interference with people's private lives and explicitly stated that monetary compensation must act as a real deterrent. Since then courts have been more frequently disposed to award higher amounts.[19] Nevertheless, German courts normally do not render judgments comparable in size to those in American practice, presumably as a consequence of the above mentioned variety of remedies available.

C. Recent Developments in Germany After the Judgment of the European Court of Human Rights in 2004

I. The Underlying Caroline-Judgments of the BGH and the BVerfG

1. The Decision of the BGH

Further changes followed in 2004 on the back of a much-noticed ruling by the European Court of Human Rights in Strasbourg. Again, Princess Caroline of Hanover complained about several earlier decisions of the *BGH* regarding the admissibility of photojournalistic articles.[20] The *BGH* had rejected her claim on the grounds that as an absolute figure in contemporary history, Princess Caroline had to tolerate the publication of photographs of herself in public places, even if they showed her in scenes of daily life rather than in official duties.[21] This reasoning illustrates that German courts in the past distinguished between absolute and relative figures of contemporary history.[22] Courts defined absolute figures of contemporary history as people who because of their status or relevance or public function are famous outside a certain context or irrespective of a certain contemporary historical

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[18] Bundesgerichtshof [BGH-Federal Court of Justice], Case No. 6 ZR 56/94, Nov. 15, 1994, 128 BGHZ 1 [hereinafter *Caroline I*]; Bundesgerichtshof [BGH-Federal Court of Justice], Case No. 6 ZR 332/94, Dec. 5, 1995, 131 BGHZ 334 [hereinafter *Caroline II*].

[19] *See*, *e.g.*,Oberlandesgericht Hamburg [OLG-Higher Regional Court], Case No. 3 U. 60/93, Jul. 7, 1996, NEUE JURISTISCHE WOCHENSCHRIFT 2870, 2873 (1993); Oberlandesgericht Hamm [OLG-Higher Regional Court], Case No. 3 U 168/03, Apr. 2, 2004, GRUR-RR 970, 974 (2004) (TV Total); Oberlandesgericht Ansbach [OLG-Higher Regional Court], Case No. 3 O 380/96, Aug. 30, 1996, NEUE JURISTISCHE WOCHENSCHRIFT 978 (1997).

[20] Von Hannover v. Germany, 2004-VI Eur. Ct. H.R. 294.

[21] *See* Bundesgerichtshof [BGH-Federal Court of Justice], Case No. 6 ZR 15/95, Dec. 19, 1995, 131 BGHZ 332 [hereinafter *Caroline III*].

[22] Bundesgerichtshof [BGH-Federal Court of Justice], Case No. VI ZR 410/94, Nov. 14, 1995 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 593 (1996); [hereinafter *Abschiedsmedaille]*; Oberlandesgericht Frankfurt [OLG-Higher Regional Court], NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 402 (1989) [hereinafter *Boris Becker*].

event.[23] Clear examples include the Queen or the President of the United States. But movie stars, actors and other celebrities also may gain this status of fame due to their extraordinary achievements.[24] Contrary to absolute public figures, a justifying need for general public access to their information was not assumed for so-called relative public figures who enjoy a less prominent status and therefore more protection against intrusions into the private sphere.[25] In both cases the courts balanced the celebrity's interest in protection from dissemination of his portrait against the general public's interests in information. A prevailing interest in information made the celebrity's portrait independent from the content. The celebrity, under these circumstances, had to tolerate the dissemination without any compensation.[26]

2. The Decision of the BVerfG

The *BVerfG* generally confirmed this position in 1999, but found the complainant's basic right was infringed by the refusal of her claim regarding three pictures published in the journal which showed her with her children.[27] The court emphasized the protective content of the general right of personality of parents being strengthened by Article 6 Sections 1 and 2 of the Basic Law in so far as it concerns publication of pictures which have as their object specific parental attention to children.[28] In this respect the judgment of the *BGH* was quashed and the case referred back to it. In other respects the constitutional complaint of Princess Caroline was rejected.

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[23] *See* Horst Neumann-Duesberg, *Bildberichterstattung über absolute und relative Personen der Zeitgeschichte*, JuristenZeitung (JZ) 114 (1960); GERHARD SCHRICKER, URHEBERRECHT (3d ed., 2006); KUG §§ 23 & 60; *Caroline III*.

[24] *See, e.g.*, Oberlandesgericht Hamburg [OLG-Higher Regional Court], Case No. 3 U 284/97, June 11, 1998, ZUM-RR 122, 125 (1999) [hereinafter *Backstreet Boys*]; *Boris Becker*.

[25] *See, e.g.*, Bundesgerichtshof [BGH-Federal Court of Justice], Case No. VI ZR 303/03 (Sept. 28, 2004), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2004-9-28&nr=30659&pos=14&anz=19. BGH Urt. v. 28.09.2004, VI ZR 302/03, VI ZR 303/03 and VI ZR 305/03 (Caroline's daughter); Oberlandesgericht Frankfurt [OLG-Higher Regional Court], Case No. 11 U 6/03, (Sept. 2, 2003), http://www.aufrecht.de/index.php?id=3043.

[26] *See*: BGH AfP 1996, 138 (Caroline's son); *Caroline III.*

[27] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 653/96, Dec.15, 1999, 101 BVerfGE 361.

[28] *Id.*

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II. The Opinion of the European Court of Human Rights

The European Court of Human Rights in 2004 criticized this view and held that the publications of photographs of Princess Caroline had been a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[29] The Court argued that the photos of the princess were illegal because she had not been photographed in any official capacity and there was no proof that the photos documented issues of general public concern. The Court went on to say that in certain situations a person has a legitimate expectation of protection for his or her life. That is, there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life. The judgment has come as a surprise to many as it was thought that, compared to most other jurisdictions, Germany's privacy laws were quite progressive and struck a fair balance between a right to privacy and freedom of expression.[30]

III. The Reaction of the German National Courts

The opinion of the ECHR gave rise to further national claims by Princess Caroline in Germany. The claims dealt with a publisher who had reported in its magazine about an illness suffered by the late Prince Rainier of Monaco and the Princess's possible attendance at a ball in the principality, as well as her stay at a well-known ski resort. Each article had been accompanied by photographs showing the Princess on holiday with her husband. A second publisher had reported on the letting of a holiday villa owned by the couple, also illustrating the story with a photograph of the Princess on holiday with her husband.

1. The Reaction of the German Federal Court

In its judgment, the German Federal Court took the opportunity to change its practice relating to image rights to come into line with that in the ECHR. The basic new approach is that the *BGH* gave up the distinction between an absolute and relative person of contemporary history. The court rather applied a graded protective concept (*abgestuftes Schutzkonzept*), examining each single case and picture as to their contemporary historical relevance.[31] Based on this case-by-case approach, the *BGH* also gave up its traditional

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[29] *See* European Convention on Human Rights art. 8 § 1, Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone has the right to respect for his private and family life, his home and his correspondence."). One countervailing right is the freedom of expression, which in turn is guaranteed by art. 10 of the Convention.

[30] *See, e.g.,* Andreas Heldrich, *Zur Rechtsprechung–Persönlichkeitsschutz und Pressefreihiet nach der Europäischen Menschenrechtskonvention,* NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2634 (2004); Roger Mann, *Auswirkungen der Caroline- Entscheidung des EGMR auf die forensische Praxis*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3220 *et. seq*. (2004)

[31] Bundesgerichtshof [BGH-Federal Court of Justice], Case No. VI ZR 13/06, 14/06, 50/06, 51/06, 52/06, 53/06, (Mar. 6, 2007) http://juris.bundesgerichtshof.de/cgi-

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view, according to which a person of absolute contemporary history could only complain about pictures taken in situations of elemental privacy. Still, the case law as to the relative person of contemporary history will remain relevant as a rule of interpretation.[32] In the future, Courts will therefore focus less on the prominent person as a contemporary event and more on the contemporary historical significance and the context in which the published information about the person appears.[33] Publishing a picture to illustrate a report may thus be justified only if the Courts acknowledge an objective public interest in information (*öffentliches Informationsinteresse*). The *BGH*, however, missed the opportunity to provide a clear definition or valuable criteria for what may be seen as public interest in information. Without such clear guidance, the *BGH* simply affirmed the public interest in information as to the publication of a picture of Rainier III, whereas the publication of the other pictures was held to be unjustified.[34]

2. The Answer of the German Constitutional Court in 2008

However, both the Princess and the two publishing companies lodged complaints about the constitutionality of the decision of the *BGH*. The *BVerfG* only upheld part of the *BGH's* decision and rejected the complaints of the first publisher and the Princess as unfounded.[35] In the opinion of the Constitutional Court judges, the *BGH's* legal consideration that the only admissible publications were those connected with the report on the illness of the ruling Prince of Monaco was not incompatible with the Constitution. Rather, they thought that the *BGH* had appropriately balanced the relevant interests of both parties, taking into account the main provisions of European Court of Human Rights' case law. In particular, the *BGH* was entitled to view the illness of the ruling Prince of Monaco as an event of general interest which had a sufficient connection with the published photograph.

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bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=39434&pos=0&anz=1; Bundesgerichtshof [BGH-Federal Court of Justice], Case No. VI ZR 243/06, Jul. 1, 2008, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3138 (2008) (Abgestuftes Schutzkonzept II); Bundesgerichtshof [BGH-Federal Court of Justice], Case No. VI ZR 164/06 (Jul. 3, 2007), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2007-7-3&nr=40906&pos=11&anz=13; *see also* Christian Teichmann, *Abgestuftes Schutzkonzept – Abschied von der absoluten Person der Zeitgeschichte,* NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1917 (2007); Sebastian Seelmann-Eggebert, *Die Entwicklung des Presse- und Äußerungsrechts in den Jahren 2005-2007,* NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2551–58 (2008).

[32] *See* Oberlandesgericht Karlsruhe [OLG-Higher Regional Court], Case No. 6 U 209/07, Apr. 8, 2009, 12 GRUR-RR 415 (2009); Oberlandesgericht Karlsruhe [OLG-Higher Regional Court], Case No 2-03 O 179/09, Jun. 25, 2009, *available at* http://openjur.de/u/31347-2-03_o_179-09.html; Goetting, *supra* note 9, at § 12.

[33] HORST-PETER GÖTTING ET AL, HANDBUCH DES PERSÖNLICHKEITSRECHTS, § 12 (2008); THOMAS DREIER & GERNOT SCHULZE, URHEBERRECHTSGESETZ: URHG § 23 (2008).

[34] *See Caroline's Son*, *supra* note 26, at n.1.

[35] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 1602/07, Feb. 26, 2008, 120 BVerfGE 180.

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However, the complaint lodged by the second publisher against the ban on the photograph published alongside the report on the letting of the holiday villa in Kenya was upheld. In this case, the judges ruled that it could not be concluded from the courts' considerations that the subject of the report on the holiday villa letting did not justify the publication of a photograph of the complainant. According to the judges, insufficient account had been taken of the information content of the report, which could, in connection with the commentary it contained, give cause for criticism from its readers. There was no indication from the situation depicted in the image used that Princess Caroline of Hanover had been photographed while engaged in an activity which was typically associated with a need to relax and was therefore worthy of a higher level of protection from media attention and portrayal. The ban upheld by the *BGH* therefore infringed the right of freedom of the press to which the publishing company concerned was entitled.

IV. The Reception of the Judgment in German Scholarship

Generally, the decision of the *BVerfG* was positively received by German scholars as a convergence between two seemingly different approaches to the protection of celebrity rights.[36] Following the principles stated in the famous *Maastricht* decision, the *BVerfG* executed its jurisdiction in a relationship of cooperation (*Kooperationsverhältins)*.[37] This path is characterized by embracing cooperation instead of collision and by elements of a constitutional conversation between the courts. The artful and carefully-crafted compromise of the *BVerfG* was consciously designed to bridge the probable incompatible differences which still exist between the ECHR and the *BVerfG* regarding their current and future competencies.[38] Consequently, the judgment was seen a technical achievement in bringing together such disparate approaches.[39] Finally, journalists applauded the ruling of the *BVerfG* as a step toward widening press liberty, given that reports about the normality

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[36] *See* Wolfgang Hoffmann-Riehm, *Die Caroline II—Entscheidung des BVerfG—ein Zwischenschritt bei der Konkretisierung des Kooperationsverhältnisses zwischen den verschiedenen Gerichten*, JURISTISCHE WOCHENSCHRIFT (NJW) 20–26 (2009); Walter Frenz, *Recht am eigenen Bild für Prinzessin Caroline,* 2008 NJW 3102; Stefan Muckel, *Allgemeines Persönlichkeitsrecht Prominenter und Pressefreiheit*, 2009 JURISTISCHE ARBEITSBLATTER (JA) 156 *(Anm. zum Caroline-Urteil des BVerfG)*; Nadine Klass, *Die Bildberichterstattung über das Privat- und Alltagsleben Prominenter, Anmerkung zum BVerfG, Beschluss v. 26. Februar 2008, 1 BvR 1602/07, 1BvR 1606/07, 1BvR 1626/07,* 5 ZUM 432–35 (2008).

[37] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR L 134/92 & l 2159/92, Oct. 12, 1993, NEUE JURISTISCHE WOCHENSCHRIFT 3047 (1993).

[38] For an examination of the increasing power and significance of the ECHR, see Matthias Knauff, *Das Verhältnis zwischen Bundesverfassungsgericht, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte,* 9 DEUTSCHES VERWALTUNGSBLATT (DVBL) 533–42 (2010). For an analysis of the relationship between the BVerfG and the ECJ, see Ulrich Preis & Felipe Temming, *Der EuGH, das BVerfG und der Gesetzgeber—Lehren aus Mangold II,* 4 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT (NZA) 185–98 (2010).

[39] *See* Hoffmann-Riehm, *supra* note 36, at 26; Klass, *supra* note 36, at 432.

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of everyday life, provided they are useful to forming an opinion about matters of general interest, are now explicitly protected.[40] It is worth mentioning that the *BVerfG* did not expressively apply the graded protective concept of the *BGH*, rather, the *BVerfG* referred clearly to the objective interest in information as the main criteria for balancing the conflicting interests of the persons concerned.

D. Recent German Jurisprudence on the Protection of the Right of Personality

In the meantime, the *BGH* has issued two further verdicts on the legality of the publication of photographs. The first case concerned the daughter of Princess Caroline of Hanover, Charlotte Casiraghi, who argued against the publication of photographs in a German journal showing her at public events, such as a charity ball in France.[41] The lower court had prohibited the publication of these pictures; the *BGH*, however, ruled in favor of press freedom. Once again, the court acknowledged an objective public interest in information in context with the published report.

In the second case, the *BGH* had to decide about the publication of pictures of a well known German Talk-show presenter, Sabine Christiansen, showing her and her new friend during a shopping tour in Paris.[42] The *BGH* affirmed the judgment of the lower court in Berlin and confirmed an invasion of the claimant's private sphere with regard to the graded protected concept.

Looking ahead, this tendency among the German national courts to interpret the term of public interest in favour of press freedom is likely to continue. Without clear guidance for what may be seen as public information, the *BGH* has a wide sphere of influence.[43] However, by expressly referring to Articles 8 and 10 ECHR judgments, the national courts make sure that they strike a fair balance between the right of the celebrities to have their privacy safeguarded and the right of freedom of expression. This can be seen as sufficient and in line with European standards.[44]

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[40] *Karlsruhe stärkt Presserecht*, SPEIGEL ONLINE, 13 Mar. 2008, http://www.spiegel.de/kultur/gesellschaft/0,1518,542118,00.html.

[41] See the report in SÜDDEUTSCHE ZEITUNG, 14 Apr. 2010*, available at* http://archiv.sueddeutsche.apa.at/sueddz/index.php?id=A47082843_OGTPOGWPOPPRORGSHRPAGOHWOHTGRCPHECRE.

[42] Bundesgerichtshof [BGH-Federal Court of Justice], Case No. 6 ZR 75/08, Feb. 2, 2009.

[43] For an analysis of the graded protected concept, see Teichmann, *supra* note 31; Seelmann-Eggebert, *supra* note 31, at 2551, 2556.

[44] For a general examination of the relationship of cooperation between the courts, see Hoffmann-Riehm, *supra* note 36, at 20–26.

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E. Conclusion

Since the assimilation of human rights law into national law there have been important developments in the courts, building on and supplemented by decisions of the European Court of Human Rights. It is now clear that the Convention for the Protection of Human Rights not only applies to protect individuals against arbitrary interference with rights by public authorities but also in relation to the right of respect for private and family life.

After facing criticism by the ECHR, the *BGH* recently gave up its earlier concept of an absolute figure of contemporary history. Still, the case law as to the relative person of contemporary history remains relevant as a rule of interpretation. Thus, the courts will in the future focus less on the person as a contemporary event and more on the contemporary historical significance and the context in which the published information appears. The *BVerfG* acknowledged that this approach properly assesses the relevant concerns of both parties in a constitutionally unobjectionable manner, taking into account the relevant standards laid down by the case law of the ECHR.

After the involvement of regional courts in the Human Rights era, however, new questions arise, e.g., whether personality rights are human rights themselves and how the principles concerning public interest, privacy, and freedom of the press are to be applied in relation to personality rights.

It may be anticipated that these issues will become of increasing importance as the debate on legislation and cases concerning use of protected material on the internet and in the information society generally continues. Thus, the ambitious aim of achieving complete law certainty in this area, in Germany as well as in the United States, still may take a long time. It remains to be seen whether the existing uncertainties in both countries will lead to further guidelines, criteria for protection, or even new statutes, such as a Federal Statute of Publicity in the United States. In the meantime, the press may support this process of change by observing its own ethical standards. Section 8 of the German Press Code of 1973, for example, provides explicitly that the press shall respect the private life and intimate sphere of persons.[45] Though this rule seems like common sense, the principle has far too often been ignored in the past for the purpose of greed and sensationalism. Fair and clean journalism is and will be, however, the best way to prevent unnecessary court proceedings in future.

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[45] *See* German Press Code, drawn up by the German Press Council in collaboration with the Press association and presented to Federal President Gustav W. Heinemann on Dec. 12, 1973 in Bonn (2006), *available at* http://ethicnet.uta.fi/germany/german_press_code; see also http://www.aipce.net for information on "The Alliance of Independent Press Councils of Europe – AIPCE" which was founded on June, 10, 1999 in London. The AIPCE is an alliance of the German Press Council and other voluntary media self regulation organizations in Europe with the aim to uphold the freedom of the press. The press councils in the different countries in Europe work together to observe the basic rules of fair and clean journalism and their own professional principles.