

Photographs and Privacy in Germany

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Introduction

The German concept of the right of privacy is based on the protection of the general rights of personality which find their legal support in Articles 1 and 2 of the German Basic Law containing constitutional principles of the protection of human dignity and personal civil rights and liberties.¹ Protected spheres, recognised by jurisdiction, are the individual, the private and the intimate sphere. The scope of the protection is indicated by the law of tort. Its basic provision, § 823(1) of the German Civil Code, states that anyone who injures the rights of another person with intent or by negligence is liable for damages. § 1004 of the Code protects against disturbances of such rights. Thus the scope of the protection is twofold: it comprises the static point of view to be left alone and also the dynamic point of view concerning the possibilities of free development and freedom of action. The special legislation of the Artistic Authors' Rights Act which protects a person's right in his or her own portrait is conceived of as the statutory part of the general rights of personality.

The first German statutory provision concerning photographs and the right in the own portrait was contained in § 35 of the Bavarian Act for the Protection of Authors' Rights in Literary Works and in the Art of 1865 which transferred the right of the copying of a portrait to the commissioner of the photograph. In 1907 the Imperial Parliament adopted the German Artistic Authors' Rights Act ('the Act') which contained provisions relating to the right in the own portrait. These provisions were not repealed by the German Authors' Rights Act of 1965.²

Even though the statutory provisions concerning the protection of the right in the own portrait were contained in the Artistic Authors' Rights Act, the motives of the Bill for the Act³ state that the right in the own portrait belongs characteristically to the rights of personality. In principle, one could assume that this right should be contained in the Civil Code, as are the provisions on the

protection of a person's name. Accordingly, the provisions concerning the right in the own portrait were contained in the draft of the Act Concerning the Protection of the General Rights of the Personality of 1959⁴ which, however, was not adopted.

Since the figure of a person is the characteristic feature of the individual to represent himself in the social context, the law protects the right of a person to determine and control the manner in which his image is presented in public. Accordingly, the German jurisprudence⁵ understands the right in the own portrait as a special case of the general personality rights, which are based on Articles 1 and 2 of the Basic Law, constituting the right of self-determination which here means a person's freedom of disposition with regard to his portrait. In consequence, the unauthorised publication of a photograph violates the freedom of self-determination and the freedom of activity of the personality. In this sense the right in the own portrait is conceived of as an immaterial right which arises in the natural person and which, in the individual case, becomes effective with the making and distribution of a photograph. The conception of the right in the own portrait as a part of the personality right leads to the consequence that the statutory protection by § 22 of the Act is not exclusive but complemented by the general personality right which, preliminary to the unauthorised prohibited publication or exhibition of a portrait, prohibits its unauthorised making.⁶

Thus the German conception of the right in the own portrait as part of the general personality rights differs from the concept of the right of privacy as it is understood in English law. Section 85(1) of the Copyright Act 1988 does not create a right of the portrayed person—it is the person who commissions the photograph who has the right to prevent the distribution of copies to the public, the public exhibition and presentation and also the broadcasting or broadcasting by cable.⁷

1 Article 1 of the German Basic Law states, 'Protection of the human dignity. (1) The human dignity is inviolable. Any state authority is obliged to respect and to protect it' Article 2 of the German Basic Law states, 'Personal rights and liberties. (1) Any person has the right in the free development of his personality, insofar as he does neither impinge upon the rights of other persons nor violate the constitutional order and the moral laws'.

2 Federal Constitutional Court of 5 June 1983, BVerfGE 35/202 at 224, *Lebach*, expressly confirmed that the provisions of §§ 22 to 24 of the Act are effective.

3 Motives of the Bill for the Act, Imperial Parliament, document 30, 1905, GRUR 1906/15 at 25.

4 Federal Parliament, document 3/1237, 29 Ufita 1959/39 at 41.

5 See for example Federal Supreme Court of 14 February 1958, GRUR 1958/408, *Gentleman rider*; and 10 November 1961, GRUR 1962/211 at 213, *Wedding photograph*; and 14 October 1986, GRUR 1987/128, *Nena*: 'Only the portrayed person shall have the right to determine whether, when and how he will be represented with regard to third persons or the general public'.

6 Federal Supreme Court of 10 May 1957, GRUR 1957/494 at 497, *Late-returning prisoner of war*.

7 W.R. Cornish 'Der Schutz des Urheberpersönlichkeitsrechts nach dem neuen britischen Urheberrechtsgesetz von 1988', GRUR Int. 1990/500 at 504.

The systematic application of the Act suggests the examination of the facts in the following order: first, it has to be examined whether the distribution or public exhibiting of the photograph would violate the protected person's rights in the sense of § 22 of the Act. Second, it has to be verified whether the personality rights are limited, in particular in the public interest (clause 1 of § 23(1) of the Act), so that a publication or exhibition of the picture or portrait will be lawful in the sense of § 23(1) of the Act. Third, even if the public interest in information be given, it has to be contemplated whether there are justified interests of the person concerned which are opposed to a publication or exhibition of the picture or portrait (§ 23(2) of the Act). If the provisions of the Act are not affected, for example in the case of the making of a photograph, the general personality rights may be violated. Whether this is the case will be established on a weighing of the legally protected interests involved. In the case of the violation of the general personality rights the legal analysis will have to follow the principles of tort law. Accordingly, it has to be examined whether there are, first, a legally protected right, second, a violation of this right by another person, third, fault of the person who must have acted with intent or by negligence, fourth, a damage of the violated person.

The Protected Person

The protection of the right in the own portrait is understood as a part of the general personality rights. Persons protected by the Act may be natural persons, legal persons and the defunct.

The individual person

The subject-matter of protection of the Act is the right in the own portrait, a characteristic configuration of the right of self-determination of a person.⁸ The protection of a person according to the Act presupposes its identity or similarity with the portrait in which it is depicted. Fantasy figures are not protected.⁹ This means that photographs which show other subject-matter will, generally, not be protectable under the Act. However, such photographs may fall within the scope of protection of the general personality rights, § 823 of the German Civil Code. The Federal Supreme Court held in the case of *House on Teneriffa*¹⁰ that the use of a photograph which shows the property of a person violates that person's general personality rights, insofar as it violates that person's reputation and, at the same time, falsifies the image of his personality, thus constituting a violation of the rights protected by § 823(1) of the Civil Code. In the case of *Friesian house* the Court¹¹ observed that protection of the intimate sphere will be provided against photographs if a person, 'by reason of his position, would have the legal and factual power to prevent photographs from being made of his property'.

8 Federal Supreme Court of 26 June 1979, GRUR 1979/732, *Soccer goal*.

9 Federal Supreme Court of 26 March 1971, NJW 1971/2169 at 2172, *Disney parody*.

10 Federal Supreme Court of 27 April 1971, GRUR 1971/417, *House on Teneriffa*.

11 Federal Supreme Court of 9 March 1989, GRUR 1990/390, *Friesian house*.

Accordingly, two principles may be stated: first, photographs of a person's property may lawfully be made and used, if this property is generally accessible like a house seen from a street, whereas the owner's rights would be violated if he could exclude his property from being photographed, for example if photographs were made and sold of his bedroom. Second, the use of photographs of a person's property, for example for advertising, must not ridicule that person or establish a false image of his personality.

Minors

It could be asserted that the personality right of a child merits less protection, because its personality is not yet fully developed and it cannot take part in all aspects of social life. In the case *Seed of sin* the District Court of Berlin¹² rejected the argument that a small child would not avail of a protectable personality and that its honour could not be affected, since small children are also protected in their civil rights according to Article 2(1) of the Basic Law. However, the Court admitted that within the assessment of damages it has to be taken into account that the features of a small child will change so that the amount should be less than in the case of an adult. The Court held that the personality rights of a four-year-old black child were gravely violated by the use of a photograph on the cover of a novel *Seed of Sin*, because the image was susceptible to create the impression that the child was the 'seed of sin'. Accordingly, the use of the photograph gave the impression that the child was of inferior value and belonged to a sphere of immorality.

The rights of children may be particularly affected in the case of nudes. The Federal Supreme Court¹³ held in the case *Sweet 16* that the distribution of nudes affects the intimate sphere of a 16-year-old girl. The importance of a widespread distribution and commercial exploitation of the photographs demands, in consideration of the minor's general personality rights, that the legal representatives cannot effectively consent to it without the express approval by the 16-year-old child. Accordingly, the publication of pornographic photographs of children seems, in principle, admissible in German law.¹⁴

Legal persons

German jurisdiction attributes protection by personality rights also to legal persons. The Federal Supreme Court¹⁵ held:

stock or limited companies may only within certain limits take recourse to the protection of the general rights of the personality. An extension of the effects of the protection of these rights beyond natural persons to legal persons is justified only insofar as they need this legal protection by reason of their nature as meaningful creation of the law and their functions.

12 District Court of Berlin of 12 February 1973, GRUR 1974/415, *Seed of sin*.

13 Federal Supreme Court of 2 July 1974, NJW 1974/1947 at 1950, *Sweet 16*.

14 See Provincial Court of Stuttgart of 30 January 1987, NJW-RR 1987/1434, *Pornographs*.

15 Federal Supreme Court of 8 February 1994, ZIP 1994/648.

Thus, legal persons and political parties are also protected by the general personality rights, for example against the imputation of untrue facts.¹⁶

The deceased

According to § 22 sentences 3 and 4 of the Act the relatives of the deceased have to consent to the publishing or public exhibiting of his portrait. However, this provision does not permit the conclusion that portraits made after the death will also be protected. The motives of the Bill for the Act of 1905¹⁷ state that the drafting of a particular provision which would expressly cover this case was not considered necessary, because the term 'portrait' was thought also to comprise this case. Jurisprudence considers that the right in the own portrait extends beyond the death of a person. The Provincial Court of Hamburg¹⁸ held in the case *Munich Oktoberfest bombing* that, generally, the portrait of a deceased person belongs to his intimate sphere so that the relatives have to consent to the publication.

By reason of the nature of the right in the own portrait as a part of the general personality rights, it is generally inferred that the protected person cannot dispose of this right as with other property apart from authorising a third person to make or publish photographs (consent).¹⁹ From this nature of the right it is inferred that the right is not inheritable.²⁰ Nevertheless, § 22 sentence 3 of the Act determines that within a period of ten years after the death of the person the publication or public exhibition of the photograph requires the consent of the relatives. This regulation in § 22 sentence 3 of the Act was conceived as the statutory recognition of the *post mortem* extension of the general personality rights.²¹

The publication of the photograph presupposes the consent of all relatives mentioned in § 22 sentence 4 of the Act. The scope of the *post mortem* protection is limited: the relatives may only bring an action for an injunction to stop the distribution or public exhibition of the photograph. The relatives cannot claim compensation for pain and suffering in the case of the violation of the personality rights of the deceased.²² Damages will only be granted if the violation of the personality right concerns the relatives of the deceased themselves.²³

The Photograph

Within the context of this article the term photograph is understood in a broad sense, comprising reproductions on any material.

16 Provincial Court of Cologne of 17 December 1985, NJW 1987/1415, *Political party*.

17 Motives of the Bill for the Act, Imperial Parliament, document 30, 1950, GRUR 1905/15 at 25.

18 Provincial Court of Hamburg of 7 July 1983, AfP 1983/466 at 468, *Munich Oktoberfest bombing*.

19 Federal Supreme Court of 20 March 1968, NJW 1968/1773, *Mephisto*.

20 *Ibid.*

21 *Ibid.*, at 1774.

22 Federal Supreme Court of 4 June 1974, GRUR 1974/797 at 800, *Fiete Schulze*.

23 Federal Supreme Court of 5 March 1974, GRUR 1974/294 at 296, *Deadly poison*; and 4 June 1974, GRUR 1974/797 at 800, *Fiete Schulze*.

The portrait of a person ('Bildnis')

The term 'portrait' ('Bildnis') in the sense of the Act includes any representation of persons which depicts them in their exterior appearance in a manner recognisable to third persons.²⁴ The recognisability of a person is the essential feature of a portrait in the sense of the Act but it does not matter whether the publication intended to represent exactly the portrayed person.²⁵ What matters is the impression on the viewer of the photograph: it is essential that the viewer obtains the impression that he sees an authentic representation of the person concerned.²⁶ Thus § 22 of the Act is applicable if a person is portrayed by a double or an actor, since the viewer is made to believe that the photograph depicts authentically the person concerned.²⁷ There is a portrait of a person if the photograph was published with the portrayed person's name, even if the person could not have been recognised without the indication of his or her name²⁸ or where a small eye-patch is added to the portrait.²⁹ It is sufficient if friends of the portrayed person could recognise him.³⁰ It is not required that the portrayed person has actually been identified by third persons, the hypothetical possibility is sufficient.³¹ The recognisability of a person may be inferred from accidental circumstances, for example if his relatives are photographed. The Provincial Court of Frankfurt³² held in the case *Brother and sister*:

For the assumption of a violation of the rights of the personality through the publication of a picture it is sufficient, if the portrayed person has good reasons for the assumption that he could be recognised according to the kind of the representation . . . In this sense the first plaintiff is recognisable on the photograph in question, because he is portrayed with his sister, the second plaintiff, and for their friends it is obvious to recognise that also the brother is portrayed. On a closer view the brother is, positively, recognisable for his friends . . .

Photographs which do not show a person cannot be the subject-matter of protection of the Act. Protectability thus requires the subsistence of a portrait. However, a photograph which does not show a person may nevertheless affect the general personality rights, for example if its making or publication violates the private or intimate sphere of a person. The District Court of Düsseldorf³³ held that the general personality rights comprise the 'right

24 Federal Supreme Court of 14 February 1958, GRUR 1958/408, *Gentleman rider*; 10 November 1961, GRUR 1962/411, *Wedding photograph*; and 9 June 1965, GRUR 1966/102, *Playmate I*.

25 Federal Supreme Court of 26 June 1979, GRUR 1979/732 at 733, *Soccer goal*.

26 District Court of Stuttgart of 2 March 1982, AfP 1983/292, *Marriage impostor*.

27 *Ibid.*

28 Federal Supreme Court of 9 June 1965, GRUR 1966/102, *Playmate I*.

29 Provincial Court of Karlsruhe, order of 2 October 1979, NJW 1980/170, *Policeman*; Provincial Court of Munich 21 December 1981, AfP 1982/230, *American love schools*.

30 See Federal Supreme Court of 26 June 1979, GRUR 1979/732, *Soccer goal*.

31 Federal Supreme Court of 25 January 1971, NJW 1971/698 at 700, *Parisian love drops*.

32 Provincial Court of Frankfurt of 12 July 1991, NJW 1992/441, *Brother and sister*.

33 District Court of Düsseldorf, order of 31 October 1958, NJW 1959/629, *Apartment*.

to prevent seeing inside the apartment or house of a person'. The Court explained that:

on the one hand, to the protected own sphere of the personality belongs the private sphere which is, generally, accessible to everybody but which needs protection with regard to the general public, and, on the other hand, the secret sphere, that is to say the part of the personal life which is open for nobody or only a limited circle of friends and which has to be safeguarded against the unauthorised intrusion by other persons. The scope of these general rights of the personality thus may differ according to the individual case. The delimitation will be made with reference to the evaluation of any relevant circumstances according to the principles of the evaluation of property interests and obligations. On the basis of a weighing of interests it follows that one's own apartment and its appearance belong in principle to the protected secret sphere, because the owner has a justified interest in the maintenance of secrecy . . . This interest relates also to the image of the apartment as such.

The commercial utilisation of the property of a person, including the right to have photographs made and distributed of that property, appertains to the proprietor.³⁴

Caricatures and photograph retouches

A caricature may be defined as a distortion or estrangement with artistic means in order to make obvious a truth which is not evident in real life or in order to produce a mere humorous effect.³⁵ Since the caricature is an artistically estranged representation, it cannot be considered as a portrait in the sense of the Act. This will be true, even if the artist uses photographs in order to create a montage, provided that the result cannot be considered as the image of a person but as his caricature. But the right in the own portrait may be violated if montages, retouches or distorting photographs are published. The right in the own portrait in the sense of the Act will be violated if a certain person is represented by a mask, although in the case of a person in public life, such a representation may be lawful without consent, unless the justified interests of the portrayed person are affected which may be the case if the representation distorts the image of that person's life.³⁶ The Provincial Court of Hamburg³⁷ considered that alienated drawings of the portrait of a popular TV-moderator in an advertisement with 5,000 copies violated the right in his own portrait. Thus the means of painting, drawing and the making of a statue may be used for the creation of a portrait in the sense of the law.³⁸ On the other hand the imitation of a popular person for advertising

purposes does not violate the right in the own portrait, because here nobody will believe that the imitation is authentic.

Film and video

According to jurisprudence³⁹ the term 'portrait' has to be understood as the reproduction of the external appearance of a person by means of which it is recognisable. Thus the material of the reproduction does not matter: the principle is that the portrayed person must be recognisable. The Federal Supreme Court⁴⁰ held that the terms 'portrait' or 'picture' in the sense of the Act will also comprise the image on a TV-screen or sequences of images in a film. Accordingly, the provisions of the Act will be applicable to the portraits contained in a film or video.⁴¹

The District Court of Munich⁴² and the Federal Supreme Court⁴³ applied the Act to portraits made in films which represented 'portraits of the lives' of the General Field Marshal von Witzleben and of Mr Conan Doyle. The Provincial Court of Schleswig⁴⁴ applied the Act in the case of a video which was secretly made of an employee at his place of work. In the case *Biology textbook II* the Federal Supreme Court⁴⁵ held that a TV-broadcasting organisation which broadcast for two or four seconds the photograph of a naked man who had consented to its reproduction in a biology textbook, violated the right in the own portrait in the sense of the Act. The Court seems to have considered that the broadcasting constituted a 'distribution' of the photograph; however, it appears that such a use of a portrait would appropriately be classed as a 'public exhibiting', because the portrait is made accessible to a plurality of persons without a corporeal distribution. Generally, in the case of the broadcasting of portraits via television, one has to consider that the images are only shown for a few seconds and bearing in mind the aim of the broadcasting organisations to provide information. Concerning the conflict which may arise in the case of the application of §§ 22 and 23 of the Act to TV-broadcasts, the Federal Constitutional Court⁴⁶ held in the case *Lebach* that the principle has to be employed according to which the freedom of broadcasting organisations must not excessively be restrained. Although nowadays TV-broadcasts may be registered on video by many persons so that the public exhibiting of a photograph by a TV-channel does not necessarily have shortlived consequences, the judgment has not lost in actuality, in particular with regard to the increase in the number of TV-broadcasting

34 Federal Supreme Court of 27 April 1971, NJW 1971/1359, *House on Teneriffa*; Provincial Court of Munich of 4 December 1986, AfP 1988/45.

35 Court of Appeals of Berlin of 13 December 1988, NJW 1990/1996, *Caricature of a politician*.

36 §§ 22 first sentence, 23(1) clause 1 and (2) of the Act; see Court of Appeals of Berlin of 18 January 1928, GRUR 1928/227, *Piscator*; District Court of Munich of 27 June 1955, 20 Ufita 1955/230, *General Field Marshal von Witzleben*; Federal Supreme Court of 15 November 1957, BGHZ 26/52 at 67, *Sherlock Holmes*.

37 Provincial Court of Hamburg of 8 April 1982, AFP 1983/282 at 284, *TV-moderator*.

38 District Court of Stuttgart of 2 March 1982, AFP 1983/292, *Marriage impostor*.

39 District Court of Munich of 27 June 1955, 20 Ufita 1955/230, *General Field Marshal von Witzleben*.

40 Federal Supreme Court of 16 September 1966, NJW 1966/2353, *Close at hand*.

41 See, for example, Federal Constitutional Court, order of 11 November 1992, GRUR 1992/3288, *Honecker*.

42 District Court of Munich of 27 June 1955, 20 Ufita 1955/230, *General Field Marshal von Witzleben*.

43 Federal Supreme Court of 15 November 1957, BGHZ 26/67, *Sherlock Holmes*.

44 Provincial Court of Schleswig of 3 October 1979, NJW 1980/352, *Casino*.

45 Federal Supreme Court of 22 January 1985, MDR 1985/920, *Biology textbook II*.

46 Federal Constitutional Court of 5 June 1973, BVerfGE 35/202 at 225, *Lebach*.

organisations and the general orientation of TV-programmes towards events in the public interest.

The Unlawful Use of the Photograph

Since the right in the own portrait is conceived of as a special case of the general personality rights, a violation of the 'privacy' of a person may not only have to be considered with regard to the provisions under the Act but also with regard to the general personality rights which are protected by tort law.

§ 22 of the Act prohibits the unauthorised publication or public exhibition of photographs of a person. From this general prohibition exceptions are made with regard to the public interest in information (§ 23(1) of the Act), and for the purpose of the judicature and public security (§ 24 of the Act). However, the exception with regard to the public interest in information is limited if the publication violates a legitimate interest of the portrayed person (§ 23(2) of the Act). This means that, unless the publication of a photograph is justified on the grounds of the public interest in information or the judicature and the public security, its distribution or public exhibition requires the prior consent of the portrayed person. Other acts like the taking of the photograph are not dealt with by the Act. The question whether such acts violate a person's rights has to be answered by tort law.

The taking of the photograph

The conception of the right in the own portrait as a personality right leads to the consequence that the statutory protection by § 22 of the Act is not exclusive but complemented by the general personality right which, preliminary to the unauthorised prohibited distribution or public exhibition of a portrait, may enjoy its unauthorised taking.⁴⁷ The Federal Supreme Court⁴⁸ held in the case *Late-returning prisoner of war* that the unauthorised taking of a photograph violates the personality right if it is taken in the private personal sphere without the knowledge and against the will of the portrayed person, who in this case was a person in public life. The Court observed that only in exceptional cases may the obtaining of a photograph on false pretences be permissible for the reason of the prevailing interests of the general public or of an individual and held:

With regard to the fact that the progress of the technique facilitated the possibilities to take secret photographs, to copy them and to present them to the public, particular concern has arisen to safeguard the limits imposed by the law and to prevent an abuse of the general rights of the personality which have become more easily violable. The law may not, in this respect, yield to the technical development.

47 Federal Supreme Court of 10 May 1957, GRUR 1957/494 at 497, *Late-returning prisoner of war*, the Motives of the Bill for the Act, Imperial Parliament, document 30, 1905, GRUR 1906/15 at 25, state that the Act affects neither the making nor the reproduction of photographs.

48 Federal Supreme Court of 10 May 1957, GRUR 1957/494 at 497, *Late-returning prisoner of war*.

The prevailing German jurisprudence⁴⁹ seems to accept a general protection against the taking of photographs if the violation of the general rights of the personality results from a weighing of the values and interests involved in the individual case. Even those persons who are in public life do not have to accept that photographs are taken of them in their private sphere without their knowledge and consent. This follows from the general right of personality which protects against any isolation of private rights unless they are covered by higher ranking interests.⁵⁰ In the case *Late-returning prisoner of war* in which photographs were taken without authorisation in the offices of the plaintiff, the Federal Supreme Court⁵¹ held:

In principle, also persons of contemporary history do not have to accept that photographs are made of them for the purpose of publishing within their private sphere . . . without their knowledge and against their intention. This does not follow from the protection of portraits (§§ 22 and onwards of the Act) which does not relate to the making but only the publication of a portrait, but rather as a corollary from the general rights of the personality as a unitary and original privilege which is founded on the personality as such and which safeguards against any violations of the sphere of the personality which are not protected by higher ranking interests . . . The interest of the general public in the pictorial information does not suffice to justify the secret making of photographs destined for publication within the private sphere of the portrayed person.

The Federal Supreme Court⁵² held in the case *Close at hand*:

Concerning the unauthorised making of photographs the Artistic Author's Rights Act does not contain provisions. But this has, in principle, to be considered as a violation of the general rights of the personality. Only in exceptional cases the obtaining of the possibility to make a photograph by false pretences may be permissible, namely in the case of prevailing interests of the general public of another person.⁵³

In the case *Neighbours* the Provincial Court of Hamm⁵⁴ held that not only the making of a portrait for the purpose of distribution may violate the right in the own portrait but, in principle, any photographing. However, apart from the factual requirements imposed by the Act, the unlawfulness of the violation of the general personality rights has to be positively established on an evaluation of the interests involved. Here the Court seems to have based the unlawfulness on the differentiation made in the Act according to which photographs of the property of a person may generally be distributed or publicly exhibited whereas, in principle, only the individual person merits protection under

49 See, for example, Federal Supreme Court of 10 May 1957, GRUR 1957/494, *Late-returning prisoner of war*; Provincial Court of Hamm of 24 April 1987, JZ 1988/308, *Neighbours*; District Court of Oldenburg, order of 21 April 1988, GRUR 1988/694, *Grill party*.

50 Federal Supreme Court of 10 May 1957, NJW 1957/1315, *Late-returning prisoner of war*.

51 *Ibid.*

52 Federal Supreme Court of 16 September 1966, NJW 1966/2353, *Close at hand*.

53 See Federal Supreme Court of 10 May 1957, NJW 1957/1315, *Late-returning prisoner of war*.

54 Provincial Court of Hamm of 24 April 1987, JZ 1988/308, *Neighbours*.

the Act except in cases of self defence or for the purpose of the identification of a criminal. A less rigid view was held by the Provincial Court of Schleswig⁵⁵ in the case *Casino*. The Court stated that it is very difficult to delimit in a general abstract manner the 'intimate' sphere which is protected against the taking of photographs by third persons as opposed to the unprotected non-private sphere. If a person is photographed on a videotape in his private rooms the question of the protection of the private sphere has to be decided with due regard to the circumstances of the individual case. The Court considered that the place of work does not belong as such to the sphere of the private life protected by the Basic Law or the general personality rights. However, a mediating view seems to be appropriate. Since it results from the motives of the Act that the taking of photographs should, in principle, be free, reference to the provisions of the Act for the purpose of weighing the interests of the persons involved for the establishment of the violation of the general personality rights should only be made with care. On the other hand, the legislator of 1907 could not have predicted the technical advances which facilitated the secret taking of photographs. Thus a line may be drawn by applying a standard according to which the taking of photographs will be admissible, if the portrayed person would reasonably have had to consider the possibility that photographs would be taken of him and could fairly have been expected to consent to it. This would cover those cases in which a person appears in public places, such as streets and theatres, but it would exclude the taking of photographs in private clubs or at the place of work, in shops and banks, unless consent to being photographed could be implied if the person tolerates that photographs are taken by another person or if this could be justified by a prevailing interest of the employer, shopkeeper or bank in monitoring customers.⁵⁶ This standard would appropriately take into account the constitutional rights concerning the protection of human dignity, Article 1(1), and of personal civil rights and liberties, Article 2(1) of the German Basic Law. It can further be assumed that the taking of a photograph will not violate the general personality rights of a person if its distribution or public exhibiting would be admissible according to § 23 of the Act.

It should be mentioned here that there are some legal provisions which prohibit the taking of photographs, for example photographs of military installations.⁵⁷ Also during court trials the taking of photographs is not permitted⁵⁸ although before or afterwards it is, as

illustrated by the *Honecker* case,⁵⁹ subject to the regulating power of the presiding judge. However, the unauthorised taking of a photograph, even against the express will of the portrayed person, does not constitute a criminal offence in the sense of § 33 of the Act.⁶⁰

The distribution or public exhibition

The term 'distribution' of a photograph as used in the Artistic Authors' Rights Act of 1907 has a different meaning from that which it assumes in the German Authors' Rights Act of 1965. Here 'distribution' is used in a broad sense, meaning any kind of distribution, thus also in small and smallest private circle, such as the showing of the photograph to relatives and friends. The motives of the Bill⁶¹ indicate, 'A distribution falls within the prohibition even if it is not addressed to the public . . . On the other hand an exhibition shall remain free insofar as it is limited to a small circle.'

The distribution of a portrait presupposes the subsistence of a corporeal support and its dispersion. Thus the broadcasting of a photograph via television cannot constitute the distribution of a portrait but only its public exhibiting. If one assumes that the term 'public exhibiting' will be defined in accordance with § 15(3) of the German Authors' Rights Act of 1965, a photograph will be publicly exhibited if it is made perceptible to a plurality of persons unless the circle of persons is definitely limited or characterised by personal relations either among the persons themselves or between the persons and the organiser.⁶² Accordingly, the showing of the photograph among staff members of a journal or of an agency or the passing on of the photographs or negatives for archiving is not a 'distribution' or 'public exhibiting' in the sense of the Act, because it does not make the photograph accessible to a larger circle of persons with the consequence that it would reach the public. The purpose of the provisions of the Act is to prevent portraits of an individual being made accessible to the public without his control.

The consent of the protected person

The consent of the portrayed person is required for the distribution or public exhibiting but not for the copying of the portrait. The term 'consent' which did not receive a statutory definition and which authorises the otherwise unlawful distribution or public exhibiting of a photograph consists in the waiver to avail of the rights in the own portrait for the benefit of another person. The beneficiary thus obtains a mere obligatory right. The consent may be given as a unilateral act. It may also be declared within a more complex contractual arrangement. Such a contractual arrangement was the subject-matter of the Federal

55 Provincial Court of Schleswig of 3 October 1979, NJW 1980/352, *Casino*.

56 A person's consent to the taking of photographs may be implied if he accepts that photographs are taken for example in the case of participation in a grill party, District Court of Oldenburg, order of 21 April 1988, GRUR 1988/694, *Grill party*; the Provincial Court of Hamburg of 13 July 1989, NJW-RR 1990/1000, held that an employer could lawfully take a photograph of an employee who had reported sick and went on a stroll with a popular singer in order to obtain evidence in support of a summary dismissal—however, the reasoning of the Court seems to have focused on the status of the employee as a 'relative' person of the public life which, in fact, she was not, because the photograph of her and her popular companion was not taken in order to serve the public interest in the supply of information as required by § 23(1) clause 1 of the Act.

57 See, for example, § 109(g) of the German Criminal Code.

58 See § 169 of the German Constitution of Courts Act.

59 Federal Constitutional Court, order of 11 November 1992, NJW 1992/3288, *Honecker*.

60 Administration Court of Cologne of 15 May 1987, NJW 1988/367, *Purposefully photographed*.

61 Motives of the Bill for the Act, Imperial Parliament, document 30, 1905, GRUR 1906/15 at 25.

62 See District Court of Oldenburg of 22 March 1990, AfP 1991/652, *Eviction proceedings*; Administration Court of Cologne of 15 May 1987, NJW 1988/367, *Purposefully photographed*.

Supreme Court's judgment in the *Nena* case.⁶³ This case concerned the popular singer's merchandising – sponsor – promotion contract in which Nena assigned commercial rights such as the right in the own portrait to an agent. Whereas the nature of the right in the own portrait as part of the general personality rights would support the argument of the non-assignability of the right, the German Federal Supreme Court considered this problem in its *Nena* judgment⁶⁴ as controversial. The Court did not submit an analysis of this question; however, in practice the recognition of the commercial value of the right in the own portrait will often suffice to grant relief by means of the principle of unjust enrichment. In practice, the agent might attempt to bring a suit for unjust enrichment in the case of an unauthorised use of the photograph by third persons.⁶⁵ However, with regard to the increasing commercialisation of the right in the own portrait it would be helpful if German legal doctrine would positively accept that the right in the own portrait could be contractually transferred.

The Provincial Court of Munich⁶⁶ held that consent to the publication of photographs is a declaratory act in the sense of the law with the consequence that the rules of the German Civil Code concerning legal acts would be applicable. The consent of the portrayed person may be limited, for example for the use of the photograph for a certain purpose such as advertising, for a certain duration, such as six months, or for a certain territory only.

The declaration of consent is open to interpretation. The Federal Supreme Court⁶⁷ held in the case *Paul Dahlke* that it cannot be inferred from the consent of a film or theatre actor to the publication of a photograph made by a press photographer that the photograph could be used for advertising purposes. The Court stated that in the case in which the consent is not expressly limited, an interpretation of the authorisation, taking into consideration the different circumstances of the individual case, will reveal which kinds of distribution are permissible. In the *Talkmaster* case,⁶⁸ which was decided by the Federal Supreme Court, a popular talkmaster agreed to be photographed wearing spectacles of a particular fashion house during that house's opening fête. Subsequently, a guest of this fête, an optician, used this photograph for an advertising campaign of his own business. The Court held that the acceptance by the talkmaster to be photographed may mean that he was prepared for his photograph to be used to advertise the fashion house and its products, but his conduct did not express the consent that free advertising could also be made with his photograph for the commercial interests of the customers of the fashion house.

The consent may be implied as held by the Provincial Court of Frankfurt⁶⁹ in the *Accountant* case:

63 Federal Supreme Court of 14 October 1986, GRUR 1987/128, *Nena*.

64 *Ibid.*

65 This was the remedy available to the agent in the *Nena* case.
66 Provincial Court of Munich of 17 March 1989, NJW-RR 1990/999, *Nudes*.

67 Federal Supreme Court of 8 May 1956, GRUR 1956/427, *Paul Dahlke*.

68 Federal Supreme Court of 14 April 1992, GRUR 1992/557, *Talkmaster*.

69 Provincial Court of Frankfurt, order of 8 May 1990, GRUR 1991/49, *Accountant*.

A consent may also be implied, and the implied consent will generally be assumed if the making of the portrait occurs under circumstances which suggest the subsequent publication. But even an implied consent presupposes that the purpose and the scope of the subsequent publication are recognisable to the portrayed person . . . If the portrayed person shall be . . . presented in a manner which is seriously detrimental to his prestige or professional career, the purpose and scope of the intended publication will either have to be expressly determined or, according to the circumstances, be so evident that there are no uncertainties on the part of the portrayed person concerning his consent. In the case in which the portrayed person is intentionally not informed on the aim and purpose of the portraying, and, taken by surprise, accepts the making of the shooting by a journalist, without knowledge how and where it shall be published, the accepting of the making of the shooting may not lead to the assumption of a consent.

It was held⁷⁰ that a model who takes part in a fashion show impliedly consents that photographs may be made during the show and published in fashion journals. The Provincial Court of Frankfurt⁷¹ held that a person's consent to being photographed during a mountain tour does not imply the consent to the use of the photograph for advertising purposes.

The consent, once given, remains effective, but it may be avoided according to the rules contained in the Civil Code⁷² or cancelled in analogous application of § 42 of the Authors' Rights Act of 1965 and § 35 of the Publishing Law of 1901 in the case of a change in the conviction or circumstances for reasonable cause.⁷³ In this respect it does not matter whether the consent has been given by a unitary act or in a contract.⁷⁴ The portrayed person will be entitled to cancel the consent with effect for the future, if the continuation of the use of the photograph would, due to a change of the personality, violate the personality rights.⁷⁵

An illustration of this principle is the judgment of the Provincial Court of Frankfurt,⁷⁶ *Photograph of the girlfriend*. The Court held that in the case in which the friend of a popular singer in the year 1979 consents to the distribution of a portrait in which she is depicted bare breasted, lying on a bed, this consent does not extend to the distribution in the year 1984 with the headline: 'On the Greek island H. he relaxes with changing girlfriends', if the portrayed person at that time no longer entertained a relation with the singer. The portrait and the headline are a serious disparaging of the honour and prestige of the portrayed

70 District Court of Aachen of 14 February 1958, 30 Ufita 1960/113 at 117, *Fashion show*.

71 Provincial Court of Frankfurt of 28 February 1986, GRUR 1986/614, *Holiday brochure*.

72 §§ 119 and onwards of the German Civil Code, see District Court of Cologne of 29 March 1989, AfP 1989/766, *TV-interview*.

73 Provincial Court of Munich of 17 March 1989, NJW-RR 1990/999, *Nudes*; District Court of Oldenburg, order of 21 April 1988, GRUR 1988/694, *Grill party*; District Court of Cologne of 29 March 1989, AfP 1989/766, *TV-interview*.

74 Provincial Court of Munich of 17 March 1989, NJW-RR 1990/999, *Nudes*.

75 District Court of Cologne of 29 March 1989, AfP 1989/766, *TV-interview*.

76 Provincial Court of Frankfurt of 11 September 1986, GRUR 1987/195, *Photograph of the girlfriend*.

woman through which the protected right of self-determination is seriously violated. Not least with regard to the circulation of the journal with millions of copies and the corresponding distribution and in order to achieve an effective preventive protection of the rights, the payment of damages of DM10,000 will be appropriate.

In the case in which the photograph shows several persons or if the deceased portrayed person has several relatives, the consent of all persons concerned is required.

An examination of the scope of the consent will particularly be relevant for those who purchase photographs from agents. A publisher who has purchased a photograph showing a naked person has to examine whether the photograph may be published and he may not rely on the presumption of his right. The publication of a photograph without consent may at the same time constitute a violation of the contractual obligations and of the right in the own portrait.⁷⁷ In the case of pornographic photographs it is doubtful whether contracts for their making are void; anyway, the Provincial Court of Stuttgart⁷⁸ held that the making of pornographic photographs does not imply the consent of the photographed person to their distribution.

The unauthorised use of photographs for advertising

Because of the direct effects which photographs have on the viewer, their power of suggestion, they are particularly useful to exploit the popularity of prominent persons. Thus the right in the own portrait is often the subject of contracts in which well-known persons 'transfer' commercially exploitable rights to agents.⁷⁹ Such photographs of prominent persons, models or actresses may not be used against their will for advertising purposes.⁸⁰

The concept of the right in the own portrait has been influenced by the economic, technological and social changes of society. This change in legal conceptions was particularly evident in the case of the unauthorised use of a portrait for advertising purposes. Whereas the Imperial Court⁸¹ in its judgment *Count Zeppelin* of 1910 placed importance on the 'moral' damage which occurred to the Count through the unauthorised use of his portrait (and name) for the trade mark of a tobacco manufacturer, the Court⁸² held in the judgment *Tull Harder* of 1929 that the use of the portrait of a popular soccer player for advertising did not in itself violate a justified interest of a person since this would not constitute the degradation of the portrait

for a vulgar or immoral purpose. Subsequently, when concerned with the unauthorised exploitation of portraits for commercial purposes, the jurisdiction of the Federal Supreme Court⁸³ no longer focused on the question whether the publication causes a moral damage. It is essentially the criterion of the violation of the economic interests of the person concerned which is taken into consideration by jurisprudence in the assessment of a violation of the rights in the own portrait.

In an order of 8 May 1989 the Provincial Court of Hamburg⁸⁴ held: 'The Federal Supreme Court protects the personality as a whole in particular in those cases in which it had to be safeguarded against being exploited for the benefit of material interests in advertising . . . This is applicable independent of the fact whether the commercial use, additionally causes a prejudice to the honour'.⁸⁵ The Court, sustaining the prior jurisdiction, indicated that the protected legal right is the free determination of the portrayed person of which he avails as a corollary of the general rights of the personality, so that it is up to him to decide whether and how he will make available his portrait for the commercial interests of third persons.

Archiving and storing

Since the unauthorised archiving and storing of photographs do not fall within the classes of behaviours prohibited by the Act, they will only entitle the portrayed person to a remedy if such acts violate the general personality rights. Generally, the archiving of photographs will be admissible, because already at the stage of the taking of the photograph it has to be examined whether it is lawful with regard to the general personality rights of the portrayed person. If the taking of the photograph was covered by the consent of the photographed person the consent may, impliedly, relate to the archiving. This will, in principle, be the case if models are photographed. But in such a case it has additionally to be verified with the necessary care whether the exploitation of the photograph is covered by the consent. For example, if by reason of a mistake of the archivist advertising photographs showing the portrayed persons in bath tubs are used for the illustration of a report on 'American love schools', the publisher may be liable for damages for the violation of the general personality rights as held by the Provincial Court of Munich⁸⁶, and the photograph agency may be liable for breach of the contract concerning the supply of photographs in which the agency assured that the photographs were free of rights of third persons.

77 Provincial Court of Munich of 21 December 1981, AfP 1983/276, *American love schools*.

78 Provincial Court of Stuttgart of 30 January 1987, NJW-RR 1987/1434, *Pornographs*.

79 Federal Supreme Court of 14 October 1986, GRUR 1987/128, *Nena*.

80 Federal Supreme Court of 26 January 1971, NJW 1971/698, *Parisian love drops*.

81 Imperial Court of 28 October 1910, RGZ 74/308 at 313, *Count Zeppelin*: 'It will certainly not appeal to everybody's taste to see his portrait on the goods of any merchant whatever'.

82 Imperial Court of 26 June 1929, RGZ 125/80 at 84, *Tull Harder*, 'Commercial advertising may be made in so many different kinds that it may not altogether be classed as an activity of low rank, in particular since the craft, technique, science and art are now connected with it'.

83 For example, see Federal Supreme Court of 20 February 1968, GRUR 1968/652, *Soccer league player*, according to which it 'corresponds with the general conception that those persons who want to purchase single portraits of a sportsman or artist will have to address those persons who have been granted the permission by the sportsman or artist to distribute the portraits of the sportsman or artist themselves'.

84 Provincial Court of Hamburg, order of 8 May 1989, NJW 1990/1995.

85 See Federal Supreme Court of 8 May 1956, GRUR 1956/427, *Paul Dahlke*; and 6 February 1979, GRUR 1979/425 at 427 *Soccer player*.

86 Provincial Court of Munich of 21 December 1981, AfP 1983/276, *American love schools*.

Exemptions to Protection

The limitations of the right in the own portrait reflect in particular the regard of the personal sphere of other persons and the interests of the general public.

Portraits in the field of contemporary history, § 23(1) clause 1 of the Act

The term 'contemporary history' is broadly defined. It comprises any events which, for whatever reason, attain the public interest. The application of the statutory exemption of § 23(1) clause 1 of the Act presupposes that there exists an interest of the general public in the pictorial representation of the person concerned, determined by a real need for information.⁸⁷

Thus the exception clause covers only those uses of photographs taken for the satisfaction of the need for information of the general public, worthy of protection, but not for the satisfaction of business or commercial interests.⁸⁸ In the case in which the photograph serves both the public interest in information and also commercial purposes, a clear differentiation has to be made. This may be illustrated by the judgment in the *Boris Becker* case which was delivered by the Provincial Court of Frankfurt.⁸⁹ A publisher used a photograph of the popular sportsman for the cover of a textbook for learning tennis. The Court indicated that the new-style textbook intended to provide a documentation of the different styles of playing tennis as employed by the different top tennis players in order to present the advantages of individual training in comparison to standardised training. The Court said: 'The individual different illustrations in the textbook on tennis are the indispensable "quotations" in order to render possible and comprehensible the overall information provided by the work'. The Court pointed out that it corresponded with the public interest in information that the defendant, the publisher, featured on the cover of the book, Boris Becker, whose sports career was at the centre of the attention of the general public. The Court, which referred to prior jurisprudence⁹⁰ observed: 'The giving prominence to the person of the plaintiff (as a "draught-horse" with advertising appeal) which also relates to the economic interests of the publisher does not compel to deny the pictorial information the benefit of § 23(1) clause 1 of the Act'. Thus, the publication of a portrait of a person in the public life which does not exclusively serve the public interest in the supply of information and which also serves the financial interests of the publisher will also qualify for the exemption.

According to jurisprudence⁹¹ the decisive criterion should be the test whether the publication contributes, independently from any commercial or business purposes, to the legitimate public interest in information. In the case *Udo Lindenberg* the pop singer's portrait was without his authorisation used for the cover of his biography; the Court of Appeals of Berlin⁹² held that the portrait supplied instantly the information on the subject-matter of the biography so that the publication of the photograph did not require the pop star's consent. Thus the use of a portrait which does not relate to the purpose of information is not covered by the exemption and requires the consent of the portrayed person. German jurisprudence⁹³ considers that the use of a photograph for advertising purposes does not serve the protectable interest of the general public in information, because here the commercial interests of the canvasser to boost the sale of his goods prevails. The delimitation whether the publication of the photograph is made for advertising or for information purposes is, admittedly, not easy in practice. It was held that a shot from a popular TV-series may not be used for the advertising of TV-sets.⁹⁴ However the District Court of Stuttgart⁹⁵ held in the case *Ex-empress S* that the sequences of images copied from a newsreel and used for the advertising campaign for electric blankets did not violate the rights of the ex-empress and the princess even though they were shown with the announcement, 'Finally in Germany! Warmth against cold feet . . . You shall see a film, on current affairs, unparalleled, stirring up your heart! Free entrance! With Ex-empress S and Princess GP von Monaco.' The Court held: 'There is no possibility to connect the persons shown in the film with the subject-matter of the canvassing in the sense that the persons would have authorised the use of the sequences for advertising purposes', and stated that there would be no violation of justified interests of the ex-empress and the princess for another reason. Since neither the film nor the accompanying text, shown during the advertising action but separately from it, mentioned the canvassing action, the Court considered the representation covered by the exemption, since it was exclusively presented in the public interest in information.

The limitation of the personality right is justified on the reasoning that a person merits less protection if he or she appears in the general public. However, this thought is sound only insofar as persons who voluntarily entered the public life are concerned and also insofar as the representation is covered by a legitimate interest of the general public in information. Thus, different standards are applied for the determination of the scope of the exemption: jurisdiction differs between 'absolute' and 'relative' persons in the public life.

⁸⁷ Imperial Court of 26 June 1929, RGZ 125/80, *Tull Harder*; Federal Supreme Court of 9 June 1965, GRUR 1966/102, *Playmate I*.

⁸⁸ Federal Supreme Court, 14 April 1992, GRUR 1992/557, *Talkmaster*; and 8 May 1956, GRUR 1956/427 at 428, *Paul Dahlke*; and 6 February 1979, GRUR 1979/425, *Soccer player*.

⁸⁹ Provincial Court of Frankfurt of 21 January 1988, VersR 1989/258, *Boris Becker*.

⁹⁰ Federal Supreme Court of 6 February 1979, GRUR 1979/425, *Soccer player*.

⁹¹ Federal Supreme Court of 6 February 1979, GRUR 1979/425, *Soccer player*; Court of Appeals of Berlin of 30 September 1980,

90 UFITA 1981/163 at 165, *Udo Lindenberg*; Provincial Court of Frankfurt of 21 January 1988, VersR 1989/258, *Boris Becker*.

⁹² Court of Appeals of Berlin of 30 September 1980, 90 Ufita 1981/163 at 165, *Udo Lindenberg*.

⁹³ Federal Supreme Court of 8 May 1956, GRUR 1956/427, *Paul Dahlke*; and 17 November 1960, GRUR 1961/138, *Familie Schölermann*; 26 June 1979, GRUR 1979/732, *Soccer goal*.

⁹⁴ Federal Supreme Court of 17 November 1960, NJW 1961/558, *Familie Schölermann*.

⁹⁵ District Court of Stuttgart, 40 Ufita 1963/226, *Ex-empress S*.

'Absolute' persons in the public life

Absolute persons in the public life are those persons who by reason of their social position or their actions stand out against their fellow-beings and thus are in the limelight of the general public. To the circle of 'absolute' persons in the public life generally belong politicians, statesmen, presidents of political parties or unions, members of parliament, researchers, discoverers, scientists, sportsmen (for example boxers in the European championship⁹⁶), but also former politicians who ended their career as (suspected) criminals, like Mr Honecker.⁹⁷ Generally, 'absolute' persons in the public life will be protected against unauthorised photographing of their private and family life and in those spheres which otherwise are not related to the public interest in the supply of information, in particular in the case of distorting portraits or portraits which may otherwise cause a risk for the person's reputation or standing.

'Relative' persons in the public life

'Relative' persons in the public life are those persons who voluntarily or against their will, by reason of their relation with a certain event will be only temporarily in the centre of the public interest.

The Provincial Court of Frankfurt⁹⁸ gave the following definition of the term:

By means of a single shooting and the broadcasting of this shooting the portrayed person does not become a 'relative' person of the public life. The limitation of the right in the own portrait presupposes that there is a representation of a person which belongs to the contemporary history and which is, according to its content and style susceptible and destined to serve the addressed public as a documentation of the contemporary history. Also the purpose of the documentation must provide the factual connection between the portrayed person and the contemporary history, made evident and illustrated for the viewer by the representation in question. Thus it is required a real need to inform the general public with regard to the pictorial representation of the person concerned . . .

Generally, 'relative' persons in the public life have to accept that photographs are published which relate to the event which made them a 'relative' person in the public life. The limited scope of the exemption of § 23(1) clause 1 in the case of 'relative' persons in the public life may be illustrated by the judgment *Companion* rendered by the Provincial Court of Hamburg.⁹⁹ The Court held:

A popular singer like Roy Black has to be considered as an 'absolute' person in the public life. If Roy Black is photographed with a companion during a walk, this person

has become, in this respect, a 'relative' person of the public life . . . But the making of photographs showing this companion of Roy Black together with a third person which is not a person of the public life does not show the companion as a 'relative' person of the public life. The making and publication of such a photograph thus requires her consent . . .

The mere event in relation to which a person is photographed may cause him or her to become a 'relative' person in the public life. In the case *Munich Oktoberfest bombing* the Provincial Court of Hamburg,¹⁰⁰ concerned with a bomb attack killing 13 persons and the assailant at the Munich Oktoberfest, held that in principle a photograph which shows a deceased person belongs to his intimate sphere so that its publication presupposes the consent of his relatives. However, this protection has to recede if the content of the photograph is not limited to the representation of the deceased, but if his death and accompanying circumstances are part of an event giving rise to justified interest of the general public insofar as the interest concerns the death itself. On the other hand, the participation of an event which belongs to contemporary history does not necessarily make a participant a 'relative' person in the public life. The Provincial Court of Karlsruhe¹⁰¹ held that the delimitation should focus on the objective susceptibility and the determination of the photograph as a documentation of contemporary history. The Provincial Court of Celle¹⁰² held that any person in connection with an event which affects the interest of the general public may belong to the field of contemporary history; however, a policeman taking part in a demonstration as part of his functions does not become a 'relative' person of the public life. Thus it seems that something more than the mere participation in an event of contemporary history is required to make a person a 'relative' person in the public life. This may be a particular function in that event or special circumstances which particularly attract the public interest. This view is in line with the judgment of the Administration Court of Karlsruhe¹⁰³ which held: 'The fact that a photograph of a policeman during his service on the occasion of a demonstration was unlawfully published does not make him a "relative" person of the public life.'

The Provincial Court of Hamburg¹⁰⁴ held that a criminal accused in a show trial may become a 'relative' person of the public life so that the photographs depicting him during the period of the trial are portraits in the field of the public life. However, the exemption does not relate to the publishing of photographs made after the judgment entered into legal force, because the personal conditions of the criminal which concern his social adjustment, his re-integration into life, the safeguarding of his private existence and freedom are not part of the event which made the criminal a 'relative' person in the public life.

⁹⁶ Court of Appeals of Berlin of 19 February 1952, GRUR 1952/533, *Boxing champion*.

⁹⁷ Federal Constitutional Court, order of 11 November 1992, NJW 1992/3288, *Honecker*.

⁹⁸ Provincial Court of Frankfurt, order of 8 May 1990, GRUR 1991/49, *Accountant*.

⁹⁹ Provincial Court of Hamburg of 13 July 1989, GRUR 1990/35, *Companion*.

¹⁰⁰ Provincial Court of Hamburg of 7 July 1983, AfP 1983/466, *Munich Oktoberfest bombing*.

¹⁰¹ Provincial Court of Karlsruhe, order of 2 October 1979, NJW 1980/1701, *Policeman*.

¹⁰² Provincial Court of Celle of 25 September 1978, NJW 1978/57, *Communist demonstration*.

¹⁰³ Administration Court of Karlsruhe of 11 January 1980, NJW 1980/1708.

¹⁰⁴ Provincial Court of Hamburg of 6 March 1986, AfP 1987/518.

Pictures in which persons appear as accessories in addition to a landscape or other place, § 23(1) clause 2 of the Act

The District Court of Oldenburg¹⁰⁵ established the borderline between the portrait of a person the distribution or public exhibiting of which requires his consent and the authorised representation of a person as accessory according to § 23(1) clause 2 of the Act. The Court held:

Concerning the delimitation between the unlawful publication of a portrait and the lawful representation of a person as accessory in addition to a landscape or other place it is essential whether, according to the impression of the publication as a whole, the landscape or the other places are the subject-matter of the picture and the different portrayed persons appear 'by chance', or whether the one or the other is removed from the anonymity. This was the case according to jurisdiction in which a woman was depicted in a service hall since she was instantly caught by the eye¹⁰⁶ or in which persons were depicted which went on a hunting ride and the ride was the subject-matter of the picture.¹⁰⁷ According to these principles the advertising poster complained of constitutes an unlawful publication of a portrait of the plaintiffs. The eye of the spectator is instantly caught by the plaintiffs who are depicted in large in the foreground. They are visibly nearly in the centre of the picture and so to speak 'driving' towards the spectator. This representation makes them stand out from the level of mere accessories of the depicted street scenery.

The composition in the photograph has to be weighed and also the role which the persons assume in the photograph. It is understood that a person may be portrayed in the photograph and nevertheless be an accessory to the picture. The montage of a portrait with a landscape would require the consent of the portrayed person and also the cutting out and copying of a portrait from such a photograph.

Pictures of assemblies, processions and similar events, § 23(1) clause 3 of the Act

The exemption according to this provision concerns the photograph taken at a real event and not, for example, a shot with crowds in a film. Within this exemption fall photographs of public pools, the zoo, theatre, fun fairs, markets, the Oktoberfest and the carnival. But a photograph taken on the occasion of such an event will not benefit from the exemption if only a few persons are depicted, for example a model on a footbridge in the case of a fashion show.¹⁰⁸

Proceeding on a broad definition of the term 'assemblies', photographs of school classes, larger wedding parties or meetings of clubs will be exempted so that their publication does not presuppose the consent of the portrayed persons.

The photograph, in order to benefit from the exemption, has to create the impression that the photograph does not represent the portraits of several persons but a plurality of persons. The photograph of a struggle between demonstrators and the police at the front of a demonstration does not benefit from the exemption, because it is not the photograph of an assembly; the exemption will only be available if the photograph relates to the event, photographs of details are not exempted.¹⁰⁹ In the case in which a portrait is cut out and enlarged, the consent of the portrayed person will be necessary, because this kind of use of the photograph is not within the exception.

Portraits which are not commissioned and the distributing or exhibiting of which serves a higher interest of the Art, § 23(1) clause 4 of the Act

The purpose of this exemption is to give the artist the possibility to work freely. According to the prevailing view the exemption is applicable in the case of artistic photographs. The 'commissioner' in the sense of the Act may only be the portrayed person. Only after his death, for example in case of a death mask, his relatives may be commissioners.

Photographs serving the judicature or public security, § 24 of the Act

The consent of the portrayed person is not required for the publication of photographs for purposes of the judicature or public security, and it corresponds with the legislator's intention also to consider the taking of photographs as lawful, if their publication would fall under the exemption; similarly, the storing and archiving of photographs by the police is lawful.¹¹⁰ The first part of the constituent facts of the exemption necessitates the pending of a prosecution, or at least preventive measures, subject, however, to the purpose of the identification of a criminal.¹¹¹ § 24 of the Act requests the evaluation of the interests involved, characterised by the prevalence of the public interest in the prevention of criminal offences and crimes. According to the Provincial Court of Hamm¹¹² the suspicion of a serious crime justifies the distribution or public presentation of a photograph. Under such circumstances the presentation of a video secretly made at the place of work of an employee during the trial cannot be avoided by an accused or witness.¹¹³ However, the photograph of a victim of a rape or of a sex crime may not be published, because the general personality rights constitute a barrier to the freedom of the press.

105 District Court of Oldenburg, order of 23 January 1986, GRUR 1986/464, *German Communist Party poster*.

106 District Court of Cologne of 27 April 1965, MDR 1965/658, *Theft of the air-travel ticket*.

107 Provincial Court of Düsseldorf of 30 September 1969, GRUR 1970/618, *Drag-hunt*.

108 District Court of Aachen of 14 February 1958, 30 Ufita 1960/113, *Fashion show*.

109 Provincial Court of Celle of 25 September 1978, NJW 1979/57, *Communist demonstration*.

110 Federal Supreme Court of 12 August 1975, NJW 1975/2075, *Photographing policemen*.

111 Federal Administration Court of 9 February 1967, NJW 1967/1192, *Police archives*.

112 Provincial Court of Hamm, order of 12 August 1981, NJW 1982/458, *Exploration*.

113 Provincial Court of Schleswig of 3 July 1979, NJW 1980/352, *Casino*.

The Limitation of the Exemption in the Justified Interest of the Photographed Person, § 23(2) of the Act

The legitimate interests of a person in the sense of § 23(2) of the Act will only have to be examined if the unauthorised distribution or public exhibiting of the photograph would otherwise benefit from the exemption contained in § 23(1) of the Act. The motives of the Bill¹¹⁴ mention that this provision shall in particular serve to prevent events of personal, domestic or family life being rendered public and the portrait being used for purposes which, without being a defamation in the sense of criminal law, nevertheless constitute a violation of the respect which the portrayed person is due, or an insult, or the risk of another injury. It may be argued that the photograph of a person who belongs to the public life, showing a family or an intimate situation, is not a portrait of contemporary history so that it cannot qualify for the exemption provided by § 23(1) of the Act and that, accordingly, the scope of application of § 23(2) of the Act would be limited. Yet it results from the motives of the Bill that the legislator intended particularly the inclusion of aspects of the general personality rights. § 23(1) clause 1 of the Act exempts only portraits which relate to contemporary history but not portraits of persons who belong to contemporary history.¹¹⁵ It appears that to the legislator the test whether the portrait relates to contemporary history would have included primarily objective elements. § 23(2) of the Act permits, beyond this differentiation, the inclusion of aspects which concern the individual circumstances of the publication and the general personality rights of the portrayed person. The justified interests of the portrayed person may be classed in the different categories in facts relating to the general personality rights. These are in particular cases of the commercial use of the portrait for advertising purposes, the publication of photographs constituting a distorting representation of the personality or untrue facts in relation to this person, of photographs of private life, in particular if the publication would affect the honour of the portrayed person, the family life and of photographs the publication of which would create a danger or risk for the health or life of the portrayed person. The subsequent discussion will take into consideration these categories.

Concerned with the examination of the justified interests of soccer players of the federal league the Federal Supreme Court,¹¹⁶ which considered that the sportsmen were persons of the public life, held that the players have to accept that their portrait is presented to the general public even without their consent. But this duty of tolerance is limited. Justified interests of the players (§ 23(2) of the Act) may be violated if the portraits are distorting or if they concern the private sphere of the portrayed person. Further the players do not have to accept that their portraits are

used without their consent for the advertising of goods or commercial services. The interests of a person may in particular conflict with the right of the general public in free and unfettered information. However, this latter right prevails over the interest of the portrayed person to participate in the economic result of the distribution of his portraits.¹¹⁷ This means that in the case in which a person belongs to the public life, under § 23(1) clause 1 of the Act, he or she has to accept the publication of his or her photograph without availing of a higher ranking right which, in the application of § 23(2) of the Act, could be opposed to the freedom of the publication. To decide otherwise would mean accepting a situation which would not be compatible with the constitutional principle of the freedom of opinion, speech and press, which is guaranteed by Article 5(1) of the Basic Law. In this respect it may be taken into consideration that the media often play an essential role in the creation of the popularity of a person so that it would be fair enough that the media may publish its portrait without having to pay a remuneration.

It is in particular the function of § 23(2) of the Act to avoid an unacceptable impairment of the prestige and honour of the photographed person¹¹⁸ and thus to provide a barrier against an excessive exercise of the freedom of the press, especially with regard to persons in the public life. The scope of a right against the distribution of untrue facts is not yet clear. The publication of a photograph of the place of an accident which reproduces the image of a person who incidentally stopped in this place affects the personality right insofar as it imputes that the person caused that accident. The untrue facts may also derive from the text accompanying the published photograph. The Federal Supreme Court¹¹⁹ held that the rights of the portrayed person were violated in the case *Double murderer* by a text which imputed his participation in such a crime; in the case *Deadly poison*¹²⁰ where the text imputed that the parents of the dead drug addict had failed; or in the case *Playmate II*¹²¹ where the text stated: 'The playmate denied . . . she did not save the friend'. However, if it is essentially the text which meets with critique, it has to be examined whether the publication of the image is inadmissible without the text.

The Provincial Court of Frankfurt¹²² held in the case *Manager magazine*:

The protection of the interest in the publication through the publishing of portraits, not needing a consent in the field of the contemporary history, is not applicable if a person is incorrectly depicted together with the eye-catching stressing of the word 'mismanagement' and if the portrait is lined with a graphic representation of the decrease of the turnover of an undertaking, even if the depicted manager was active only after the serious decrease of the turnover. Admittedly, the content of the

114 Motives of the Bill for the Act, Imperial Parliament, document 30, 1905, GRUR 1906/15 at 25.

115 Provincial Court of Munich of 6 February 1962, 41 UFITA 1964/322, *Top candidate*; the case concerned the unlawful publication of two photographs in a journal, showing a politician who ran an election campaign for the position of the Federal Chancellor and a lady with whom he had entertained an extramarital relationship.

116 Federal Supreme Court of 6 February 1979, GRUR 1979/425, *Soccer player*.

117 *Ibid.*

118 Provincial Court of Karlsruhe of 18 August 1989, GRUR 1989/823, *Photograph of the accident*.

119 Federal Supreme Court of 5 January 1962, NJW 1962/1004, *Double murderer*.

120 Federal Supreme Court of 5 March 1974, GRUR 1974/794, *Deadly poison*.

121 Federal Supreme Court of 7 January 1969, GRUR 1969/301, *Playmate II*.

122 Provincial Court of Frankfurt of 18 September 1986, GRUR 1987/62, *Manager magazine*.

value of the constitutional principle of the freedom of the press has to be taken into consideration when assessing the right of the press to conduct its own publicity, but this finds its limits in the right of the personality not to be discriminated publicly in a general manner and through the assertion of untrue facts.

In the case *Freon* the Federal Supreme Court¹²³ was concerned with posters of the Greenpeace organisation which reproduced a photograph of the chairman of the board of executive directors of the Hoechst company, a leading manufacturer of the product freon in the world. In 1989 Hoechst announced the abandonment of production until 1995. The defendant, the German representative of the Greenpeace organisation, said in a press release that this was falsehood and deceit and announced a poster action directed against the plaintiff and the chairman of the board of executive directors of the Kali-Chemie-AG company showing his portrait and the headline: 'Everybody talks about the weather. We destroy it', indicating his name and address as the person responsible for the destruction of ozone and for the greenhouse effect. The plaintiff asked for an injunction to stop the defendant's action. The Court held:

According to § 22 of the Artistic Authors' Rights Act the right in the own portrait is protected as part of the general rights of the personality practically since the foundation of the German Empire. Largely exempted from this protection are persons of the public life (§ 23(1) clause 1 of the Act) insofar as the distribution of their portrait does not impeach upon a legitimate interest of the portrayed person (§ 23(2) of the Act). Whether this is the case has to be determined by weighing of the interests of the portrayed person and the person who published the picture. As a matter of fact, the right in the own portrait has to be examined just like any other subject-matter of the rights of the personality which have not been particularly regulated by the legislator and the scope of which can only be determined in the individual case upon a comprehensive weighing of the interests involved.

The Court accepted that in the interest of the freedom of speech and writing which is guaranteed in Article 5(1) of the German Basic Law the chairman's general personality rights, which were severely violated, were subordinate, because the posters constituted a satirical and sarcastic critique which had to be tolerated, since it ensued from a public discussion of the related problems so that only a malignant and disparaging critique would be unlawful and since the challenge was not directed against a private person but against the chairman of the company which was an important manufacturer of freon.

Generally, the reproduction of family photographs is not admissible, even if it is the family of an 'absolute' person in the public life.¹²⁴ The Federal Supreme Court,¹²⁵ concerned with the use of a wedding photograph, held: 'Even if the photograph concerns a person in the public life, its portrait may not be used without its consent for business purposes. In the case in which the photograph

was purchased by a press agency a particularly careful examination is required by the publisher'.

According to German jurisprudence¹²⁶ the publication of photographs showing a policeman in action against terrorists or demonstrators may violate the personality rights if the publication causes a risk of acts of revenge. The Provincial Court of Karlsruhe¹²⁷ held that a journalist who photographed a secret agent on the occasion of a demonstration did not act with the intent of informing the general public concerning a certain event, taking into account that the photograph neither showed a view of the event nor a person who assumed a prominent role in the event. The Court found that the intent was rather to depict the secret agent and to render his portrait accessible to interested circles, to compromise him and thus to obstruct the effective fulfilment of his tasks.

In the case *Mortal danger* the Provincial Court of Munich¹²⁸ held:

An agent, whose professional activity concerning the fight against terrorism and grave criminality has been reported in books, papers and journals is an 'absolute' person of the public life. A portrayal of his person requires consent, if this is necessary for health and life. In such a case the interest of the person to be portrayed prevails over the interest of the press in a free reporting and expression of opinion and the interest in information of the general public.

The breach of contractual rights does not necessarily constitute the violation of a legitimate interest of the portrayed person. The District Court of Hamburg¹²⁹ held that the broadcasting of a film on television which violated the contractual rights of an actress did not violate her legitimate interests according to § 23(2) of the Act. The acknowledgement of the existence of legitimate interests which render the exception from the requirement of the prior consent in the publication of the portrayed person inapplicable thus presupposes in principle a violation of the general personality rights and the non-existence of higher ranking rights of other persons.

The Remedies of the Protected Person

In the case of the violation of the general personality rights the remedies provided by the Civil Code and by the Code of Civil Procedure are available, and, in the special case of a violation of the right in the own portrait, additionally those provided for by the Authors' Rights Act of 1907.

Injunctions

In application of §§ 823 and 1004 of the German Civil Code the injured person may obtain a restrictive injunction against the distribution or public exhibition of the

123 Federal Supreme Court of 12 October 1993, NJW 1994/124, *Freon*.

124 Federal Supreme Court of 5 March 1974, GRUR 1974/794, *Deadly poison*.

125 Federal Supreme Court of 10 November 1961, GRUR 1962/211, *Wedding photograph*.

126 See, for example, Provincial Court of Hamburg of 14 April 1992, JR 1973/69; Provincial Court of Bremen of 14 September 1976, NJW 1977/158.

127 Provincial Court of Karlsruhe, order of 2 October 1979, NJW 1980/1701.

128 Provincial Court of Munich of 13 July 1989, ZUM 1990/145, *Mortal danger*.

129 District Court of Hamburg of 21 December 1960, 34 Ufita 1961/363 at 368.

photograph. It is required that a violation of the personality right has taken place and may be repeated or that the violation is seriously imminent. However, the Provincial Court of Oldenburg¹³⁰ observed that in the case of a violation of the right in the own portrait, generally, an action for recantation or an injunction are not available since the journal containing the picture has already been distributed and a subsequent violation is not imminent.

An injunction may also be obtained against the unauthorised making of photographs. The Provincial Court of Hamm¹³¹ held in the case *Neighbours* that the unsolicited taking of photographs of another person constitutes a violation of the general personality rights. Accordingly, anyone who has to count with being photographed may ask for an injunction to prevent it.

Abatement

In the case of a violation of the general personality rights the injured person may claim the abatement of the unlawful situation in application of §§ 823 and 1004 of the German Civil Code. Thus he may claim the handing over of copies and negatives of the photograph.¹³² However, in the case of commissioned photographs the photographer is, in principle, not obliged to render the commissioner the negatives.¹³³

In the case of the violation of the right in the own portrait § 37 of the Act entitles the injured person to claim the destruction of the photographs, the original, copies and negatives. The claim for the handing over of photographs may conflict with the constitutional guarantee of the freedom of the press (Article 5(1) of the Basic Law) if the photographs are kept in an archive and the violation of the personality right of the portrayed person could only result from the combination of the photograph with a certain text and if the publication with another text would be lawful. However, the District Court of Oldenburg¹³⁴ considered whether photographs made in violation of the general personality rights may be destroyed on the demand of the portrayed person in application by way of analogy of § 37(1) of the Act or § 1004 of the Civil Code.

The Provincial Court of Oldenburg¹³⁵ observed that in the case of a violation of the right in the own portrait, generally, an action for a revocation or an injunction will not be available. If the publication of a photograph in a journal has taken place, the written declaration by the publisher that the portrayed person was photographed accidentally and without his consent and that he did not receive a remuneration is not appropriate, because the number of persons who recognised the plaintiff in the photograph is unknown so that a 'rectification' would, generally, not be possible.

130 Provincial Court of Oldenburg of 14 November 1988, NJW 1989/400, *Bare breasted*.

131 Provincial Court of Hamm of 24 April 1987, JZ 1988/308, *Neighbours*.

132 Provincial Court of Stuttgart of 30 January 1987, NJW-RR 1987/1434, *Pornographs*.

133 District Court of Wuppertal of 5 October 1988, GRUR 1989/54, *Negatives*.

134 District Court of Oldenburg of 22 March 1990. AfP 1991/652, *Eviction proceedings*.

135 Provincial Court of Oldenburg of 14 November 1988, NJW 1989/400, *Bare breasted*.

Damages

Damages may be granted for the violation of the general personality rights but also for the violation of the right in the own portrait, since the right in the own portrait is but a special case of the general personality rights.¹³⁶ The calculation of the damages is made according to the following principles. German legal doctrine differs between damages for material and immaterial injuries.

Material damages

The claim for compensation of material damage is not dependent on the subsistence of a violation of the general personality right, it is sufficient if the photograph has been used without authorisation so that there is a case of the violation of the right in the own portrait.

The grant of material damages presupposes the possibility of the economic exploitation of the photograph. A photograph showing a normal citizen putting on his coat in a theatre dressing-room is not susceptible of commercialisation. Thus the publication of the photograph, not for advertising purposes but in a theatre brochure, without the consent of the portrayed person did not engender liability for damages.¹³⁷ This means that, generally, the publication must have been such that the portrayed person could have authorised the use of the photograph only against a remuneration. On the other hand the commercial appreciability of a damage was considered in the frustration of a promotion caused by the publication of a photograph which showed the candidate undressed sunbathing in the English Garden of Munich.¹³⁸

The damage is calculated on the basis of a 'reasonable royalty' which the parties would have stipulated had they concluded a licence agreement.¹³⁹ This means that, in the case in which the portrayed person would not have had the fictive possibility to consent to the publication against a remuneration, he may if at all only claim compensation for pain and suffering.¹⁴⁰ Thus the 'reasonable royalty' method is used for the calculation of material damages, and the employment of this method is independent of the question whether the portrayed person would, in the individual case, have been prepared to consent to the use of the photograph at all. The amount of damages will generally depend on the fee which reasonable contractual partners would have negotiated, taking into account the circumstances of the individual case.¹⁴¹

136 Provincial Court of Frankfurt, order of 8 May 1990, GRUR 1991/49, *Accountant*.

137 Magistrates' Court of Hamburg of 4 September 1990, GRUR 1991/910, *Normal citizen*.

138 Provincial Court of Munich of 13 November 1987, NJW 1988/915, *Sunbathing in the English garden*.

139 Federal Supreme Court of 8 May 1956, GRUR 1956/427, *Paul Dahlke*; 14 February 1958, GRUR 1958/408, *Gentleman rider*; 26 June 1979, GRUR 1979/732, *Soccer goal*; 14 April 1992, NJW 1992/2084, *Talkmaster*; however, it seems to be controversial whether the 'reasonable royalty' approach is applicable in the case of non-popular persons, see, for example, Magistrates' Court of Hamburg of 4 September 1990, GRUR 1991/910, *Normal citizen*; Provincial Court of Karlsruhe of 18 November 1988, GRUR 1989/73, *Body painting*.

140 Federal Supreme Court of 14 February 1958, GRUR 1958/408, *Gentleman rider*.

141 Federal Supreme Court of 14 April 1992, NJW 1992/2084, *Talkmaster*.

The Federal Supreme Court¹⁴² held that since a court is free to fix the amount of damages according to § 287 of the German Code of Civil Procedure the assessment will depend on an unfettered evaluation of all circumstances, assisted, if necessary, by expert evidence. If the photograph is published in a journal the number of copies of the circulation will be relevant, the nature of the journal or publication and the publicity value or whether the portrayed person consented to the free use of the photograph for similar advertising purposes.¹⁴³

The immaterial injury

The principles applicable in the case of immaterial injury were stated by the Provincial Court of Karlsruhe¹⁴⁴ in the judgment *Body painting*:

Even in the case of a violation of the right in the own portrait (according to § 22 of the Act), the grant of damages according to § 847 of the Civil Code (this provision concerns the compensation for pain and suffering) presupposes that the violation of the right in the own portrait constitutes a serious violation of the right of the personality . . . Whether a case of a serious violation can be assumed, depends upon the actual circumstances of the individual case, hereby one has to consider the nature and seriousness of the prejudice, its cause and reasons, and the degree of fault.

Here the Court did not consider the prejudice as serious, taking into account that the aesthetic image was used for advertising purposes whereas the advertising related to products which were neither ill-reputed nor could they affect the social standing of the plaintiff who agreed to the publication of the photograph in journals; that the advertising leaflet was published only in 500 copies, roughly half of which were distributed at a cosmetics fair at a place some distance from the domicile of the plaintiff; that the plaintiff did not claim to have been subjected to remarks and allusions by friends or neighbours; that the fault of the defendant was not serious taking into account that he relied on the statements of two witnesses and refrained from making inquiries with the owner of the rights in the image; and that the photograph did not have a disreputable nature and could not make the plaintiff ridiculous.

When fixing the amount of damages, a court has to take into account that the particular interest of protection of the injured person can only be safeguarded if the injuring person will have to be aware that his unlawful intrusion into the personality right will engender his liability to pay a perceptible compensation. On the other hand the concept of satisfaction which lies at the basis of the compensation for pain and suffering may not serve as the basis for excessive claims of money which are not within the scope of the function of compensation.¹⁴⁵

Generally, photographs which concern the intimate sphere such as nudes will cause serious violations.¹⁴⁶ The unauthorised use of a photograph for purposes of advertising is not necessarily but only on certain facts a serious violation of the personality.¹⁴⁷ According to the Provincial Court of Frankfurt¹⁴⁸ the risk of damage to the reputation caused by the impression that photographs for advertising purposes were taken of the portrayed person during his holidays for the payment of a remuneration will suffice for the assumption of a serious violation. The general personality rights are in particular prejudiced by the publication of images concerning intimacy. In the case *Bare breasted* the Provincial Court of Oldenburg¹⁴⁹ considered that the reproduction of a photograph of a bare-breasted woman in a slip taken on a beach, in a journal which covers essentially sexual subject-matter, presenting the breast frontal to a community of millions of readers of the journal who generally, will think that the plaintiff received a remuneration for the publication has to be differed from a case in which a woman voluntarily goes bare-breasted on the beach and thus can be seen by other bathers. Whereas in the first case the reputation of the woman will seriously be damaged, she does not encounter this risk according to the common understanding in the second case.

The Magistrates' Court of Hamburg¹⁵⁰ held that the publication of a photograph of naked tourists showing an attractive blonde female and several men, violated the intimacy of one of the portrayed men of whom the blonde female commented: 'Mostly, Hanno joins us, he is a crazy rider'. The Provincial Court of Hamburg,¹⁵¹ concerned with the publication of a detail of a photograph showing a soccer goal scene and in particular the penis of a soccer player, partially stripped of the left leg of his trousers, complemented by the text: 'He convinced 30,000 spectators not only by his sportive but also his male qualities', held that the photograph compromised the sportsman in public and violated his general personality rights. The Provincial Court of Frankfurt¹⁵² held in the case *Photograph of the girlfriend* that the publication in the journal *Stern* of a photograph showing a bare-breasted woman lying on a bed, who was at the time she consented to the publication in 1979 the friend of a popular singer, violated the right in the own portrait and the general personality rights and awarded compensation for pain and suffering of DM10,000. The publisher and the journalist were jointly liable, because the photograph could not be published in 1984 without the renewal of the consent.

The grant of compensation was rejected in the following cases. A serious violation of the general personality rights

142 Federal Supreme Court of 26 June 1979, NJW 1979/2205, *Soccer goal*.

143 Federal Supreme Court of 14 April 1992, NJW 1992/2084, *Talkmaster*.

144 Provincial Court of Karlsruhe of 18 November 1988, NJW 1989/401, *Body painting*; see also the judgment *Wedding photograph* of the Federal Supreme Court of 10 November 1961, GRUR 1962/211.

145 Federal Supreme Court of 15 January 1965, NJW 1965/1374, *As the others see us*.

146 Provincial Court of Stuttgart of 16 December 1981, NJW 1982/652, *Biology textbook I*.

147 Provincial Court of Karlsruhe of 18 November 1988, NJW 1989/401, *Body painting*.

148 Provincial Court of Frankfurt of 28 February 1986, GRUR 1986/614, *Holiday brochure*.

149 Provincial Court of Oldenburg of 14 November 1988, NJW 1989/400, *Bare breasted*.

150 Magistrates' Court of Hamburg of 24 January 1989, GRUR 1990/149, *Gay cyclists*.

151 Provincial Court of Hamburg, quoted by Karl Wenzel, *Das Recht der Wort- und Bildberichterstattung*, Otto Schmidt, 1994 (4th edn), at 366, *Qualities*.

152 Provincial Court of Frankfurt of 11 September 1986, GRUR 1987/195, *Photograph of the girlfriend*.

and accordingly the claim for compensation for pain and suffering was denied by the Provincial Court of Hamburg¹⁵³ in the case *Sex in the job*. In this case the plaintiff, a Hamburg doctor, saw his surgery in that town reproduced in a journal together with the profiles of an assistant and that of a male model, referring to an alleged story in the town Osnabrück, and a text which asserted, *inter alia*, 'Suddenly the consulting room assistant Sybille thought her boss to be wilder than her husband: then we made love in the surgery'. The Court rejected the doctor's assertion that anyone who knew his practice could have been induced to think that he was having a love affair with his consulting room assistant in Osnabrück. The Provincial Court of Stuttgart¹⁵⁴ held in the case *Sauna* that the owner of a sauna club was not entitled to compensation for pain and suffering for the publication of a photograph showing him with two undressed women in a bubble bath used as an illustration of an article in a daily newspaper which related to the public prosecution of a case which concerned encouraging prostitution. The Court considered that within the context of the article the reader of the newspaper would not assume that the portrayed person was involved in encouraging prostitution but would infer that he was a mere visitor of a sauna. The District Court of Stuttgart¹⁵⁵ held in the case *Just married* that the plaintiffs who consented to the archiving of the wedding photograph made in 1984 by the photographer acted with contributory negligence when they did not inform the photographer of their divorce; three years later the photographer had passed on the photograph to a journal which published it within the context of a competition for newly married couples. No case of serious violation of personality rights was given for the publication of a photograph showing the members of a family wearing eye patches, mourning the death of a son which was caused by an abuse of drugs. The article contained an accompanying text according to which the parents did not succeed, in spite of all their love, in preventing their son from being killed.¹⁵⁶ The Provincial Court of Munich¹⁵⁷ held in the case *Sex characteristics* that the publication of a photograph showing police action against prohibited naked sunbathing which depicted the plaintiff within a group of six naked persons did not seriously violate his rights, because his primary sex characteristics remained invisible. The Federal Supreme Court¹⁵⁸ in *Playmate II* held that the publication of a photograph with the text: 'Playmate E.B. denied—she did not save the friend' did not cause a serious violation of personality rights because the reputation of the portrayed person was already impaired by reason of the publicly discussed affair.

153 Provincial Court of Hamburg of 14 December 1972, 70 Ufita 1974/313, *Sex in the job*.

154 Provincial Court of Stuttgart of 20 October 1982, NJW 1983/1204, *Sauna*.

155 District Court of Stuttgart of 24 January 1989, *Just married*, quoted by Lothar J. Mielke, *Fragen zum Fotorecht*, Presse Informations Agentur, 1990 (3rd edn), at 92 (only DM1,500 damages were granted).

156 Federal Supreme Court of 5 March 1974, GRUR 1974/794, *Deadly poison*.

157 Provincial Court of Munich of 8 November 1985, AfP 1986/69, *Sex characteristics*.

158 Federal Supreme Court of 7 January 1969, GRUR 1969/301, *Playmate II*.

The liable person

The liability of a person has to be examined according to the general principles applicable in the law of tort.¹⁵⁹ Accordingly, a journalist may be liable even if he did not know of the content of the article but if the publisher had charged him with the responsibility. Also the publisher and journalist may jointly be liable.¹⁶⁰ The Court of Appeals of Berlin¹⁶¹ held in *Taxi Driver* that the liability of a person depends on the general principles applicable in the law of tort and does not derive from the fact that a person is indicated in a journal as the responsible person in the sense of the press law. The liability of a journalist for a publication in criminal law which focuses on this indication does not establish the journalist's liability for damages caused by a violation of the personality rights of a portrayed person. Thus the liability of a journalist who has not written the article accompanying the photographs and did not know about it before publication presupposes that he is charged with the task to decide on the content and form of the journal in which the photograph complained of has been published and to take care that inadmissible impingements of the protected scope of the personality of a third person through the publication are avoided.¹⁶² The Federal Supreme Court¹⁶³ has held that a publisher who intended to publish a photograph which he purchased from a third person is, in principle, obliged to examine whether consent for the publication was given and what scope this consent has; otherwise he will be liable for, *inter alia*, faulty organisation. The extent of the care to be employed by the user of the photograph depends on the circumstances of the individual case. The Federal Supreme Court¹⁶⁴ assumes fault in those cases in which a person refrains from a careful examination of his right of publication if he intends to use the photograph for advertising purposes. Thus the purchase of the photograph from an agency will not free the publisher from his obligation of examination.¹⁶⁵ Also a political party will not be freed of its liability if it transfers the manufacture of an election campaign journal to a hitherto reliable agency, if the journal contains an unauthorised portrait.¹⁶⁶ In a general manner the Federal Supreme Court¹⁶⁷ held that only in exceptional cases may the absence of fault be presumed if the photograph is published without the consent of the portrayed person. In the case *Photograph of the girlfriend* the Provincial Court of Frankfurt¹⁶⁸ held that the publisher and the journalist

159 Federal Supreme Court of 7 December 1976, NJW 1977/626.

160 Provincial Court of Frankfurt of 11 September 1986, GRUR 1987/195, *Photograph of the girlfriend*.

161 Court of Appeals of Berlin of 23 November 1990, NJW 1991/1490, *Taxi Driver*.

162 Federal Supreme Court of 7 December 1976, NJW 1977/626, *Liability of a journalist*.

163 Federal Supreme Court of 15 January 1965, GRUR 1965/495, *As the others see us*.

164 Federal Supreme Court of 26 January 1971, NJW 1971/698 at 700; 22 January 1985, MDR 1985/920, *Biology textbook III*.

165 Federal Supreme Court of 27 November 1979, NJW 1980/994 at 995, *Political Party*; Provincial Court of Frankfurt of 12 July 1991, NJW 1992/441, *Brother and sister*.

166 Federal Supreme Court of 27 November 1979, GRUR 1980/295, *Election campaign journal*.

167 Federal Supreme Court of 14 April 1992, NJW 1992/2084, *Talkmaster*.

168 Provincial Court of Frankfurt of 11 September 1986, GRUR 1987/195, *Photograph of the girlfriend*.

were jointly liable in the case of an unauthorised publication of a photograph, because the journalist was charged with the responsibility for the article.

Unjust enrichment

According to the concept of unjust enrichment (§§ 812 and onward of the German Civil Code) the user of the photograph has to return what he obtained at the expense of the portrayed person. This is, generally,¹⁶⁹ the remuneration which the user of the photograph would have had to pay the portrayed person in return for the consent to the publication. In this regard it does not seem to matter whether the portrayed person would not have agreed to the publication at any price.¹⁷⁰ The amount of the payment will, in principle, be calculated on an analogy to a reasonable royalty which the parties would have agreed on in a licence contract.¹⁷¹ Since it is not the purpose of the concept of unjust enrichment to recompense a diminution of the property of the impoverished person but to skim off the increase in the wealth of the enriched, the advertising appeal of the portrayed person will have to be taken into account for the assessment of the payment.¹⁷²

The concept of unjust enrichment does not presuppose the fault of the enriched person.¹⁷³ Thus the user of the photograph will have to pay the portrayed person if he received the photograph from a third person who wrongly asserted that the photograph could be used for advertising purposes.¹⁷⁴

Criminal law

§ 33(1) of the Act threatens with imprisonment of up to one year or pecuniary fine anyone who distributes or publicly exhibits pictures in violation of § 22 of the Act. Intent is an element of the statutory definition of the offence. The Administration Court of Cologne,¹⁷⁵ held in *Purposefully photographed* that a violation of §§ 33, 22 and 23 of the Act does not lie in the photographing of persons, even if this is done against their will, because § 33, which refers to §§ 22 and 23 of the Act, may not be extended to the taking of photographs by reason of the prohibition

of analogies in criminal law.¹⁷⁶ According to § 374(1) clause 8 of the Code for Criminal Procedure the punishment of the offence presupposes a private prosecution. § 33(2) of the Act presumes the express demand for a penalty by the injured person.

176 Provincial Court of Hamburg, order of 14 April 1972, NJW 1972/1290, *Angry policemen*; Provincial Court of Celle, 25 September 1979, NJW 1979/57, *Communist demonstration*.

Appendix

Legal Statutes

Civil Code

(Basic Provisions of Tort Law)

§ 823. Liability for damages:

(1) Who violates unlawfully the life, body, health, freedom, property or any other right of another person with intent or negligence is liable to pay damages to the other person . . .

§ 847. Compensation for pain and suffering:

(1) In the case of a violation of the body or health . . . the injured person may demand a fair compensation for pain and suffering for this damage which is not a damage to his wealth.

Artistic Authors' Rights Act of 1907

§ 22. Right in the own portrait:

Portraits may only be distributed or publicly exhibited with the consent of the portrayed person. In case of doubt the consent is deemed to be given, if the portrayed person received a remuneration for being portrayed. After the death of the portrayed person the consent of the relatives of the portrayed person is required until the expiry of 10 years. Relatives in the sense of this Act are the surviving partner of a marriage or the children of the portrayed person, and, if there are neither a surviving partner nor children, the parents of the portrayed person.

§ 23. Exceptions to § 22:

(1) Without the consent required by § 22 portraits may be distributed or exhibited:

1. portraits in the field of the contemporary history;
2. pictures in which the persons appear as accessories in addition to a landscape or other place;
3. pictures of assemblies, processions and similar events, in which the portrayed persons participated;
4. pictures which are not commissioned insofar as the distributing or exhibiting serves a higher interest of the art.

(2) The authority does not relate to a distributing or exhibiting through which is violated a legitimate interest of the portrayed person or, in the case in which the person has deceased, his relatives.

169 Federal Supreme Court of 8 May 1956, GRUR 1956/427, *Paul Dahlke*; Provincial Court of Hamburg of 8 April 1982, AfP 1983/282, *TV-moderator*.

170 Federal Supreme Court of 26 June 1979, GRUR 1979/732, *Soccer goal*, but see Provincial Court of Stuttgart of 3 November 1992, NJW 1983/1203, *Biology textbook II*, which held that in the case in which the portrayed person would not have taken a remuneration, his proprietary interests are not affected—a principle which is, according to the Court, also applicable to the concept of unjust enrichment.

171 Federal Supreme Court of 8 May 1956, GRUR 1956/427 at 429, *Paul Dahlke*; 14 February 1958, GRUR 1958/408 at 409, *Gentleman rider*.

172 Provincial Court of Hamburg of 8 April 1982, AfP 1983/282, *TV-moderator*.

173 Federal Supreme Court of 26 June 1981, NJW 1981/2402, *Racing sport association*; 14 April 1992, NJW 1992/2084, *Talkmaster*.

174 Federal Supreme Court of 14 April 1992, NJW 1992/2084, *Talkmaster*.

175 Administration Court of Cologne of 15 May 1987, NJW 1988/367, *Purposefully photographed*.

§ 24. Exceptions in the public interest:

For the purpose of the administration of justice and the public security the public administration may copy, distribute and exhibit in public portraits without the consent of the person entitled, or of the portrayed person or of his relatives.

§ 33. Penal provision:

- (1) Who distributes or publicly exhibits pictures in contravention to §§ 22 and 23 will be punished with imprisonment for up to one year or pecuniary fine.
- (2) The offence will only be prosecuted upon demand.

§ 37. Destruction:

(1) Unlawfully made, distributed or publicly exhibited copies and devices exclusively destined for the unlawful copying or exhibiting, like forms, records, stones, are subject to destruction. The same is applicable to the unlawfully

distributed or publicly exhibited portraits and the devices which are exclusively destined for copying them . . .

(3) The destruction has to be ordered even if the making, distribution, displaying or exhibiting was made without intent or negligence.

§ 38. Right of acquisition:

The injured person may demand, instead of a destruction, that he is granted the right to acquire the copies and devices in whole or partially against a reasonable remuneration up to the sum corresponding to the cost of the manufacture.

§ 48. Statutory limitation:

- (1) The right to demand damages and the criminal prosecution in the case of the unlawful distribution into circulation or public exhibition of portraits is statute-barred after three years.
- (2) The statutory limitation begins on that day on which the unlawful act has been committed for the last time.