THE MEDIA AND ENTERTAINMENT LAW REVIEW

SECOND EDITION

Editor
Benjamin E Marks

THE LAWREVIEWS

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PREFACE

I am pleased to serve as editor and US chapter author of this important survey work on the evolving state of the law around the world as affects the day-to-day operations of the media and entertainment industries.

By any measure, 2020 has been a highly unusual and especially challenging year, particularly for the media and entertainment industries, with large sectors devastated by the effects of the covid-19 pandemic. In many countries, live music, festivals, theatrical performances and sporting events were shut down entirely for much of the year (and, in many cases, remain so), ravaging the businesses that depend on in-person events for their success and the individuals that depend on them for their livelihoods. For other parts of the media and entertainment industries, the results have been uneven. The largest online distributors of books, for example, have generally fared quite well, while many independent bookstores that depend on foot traffic are in dire straits. In the music industry, touring artists, concert promoters, and theatre and venue operators have been particularly hard hit, but most streaming services, music publishers and record companies are continuing to flourish. It remains to be seen which changes to the media and entertainment industries are temporary and which will be permanent.

The pandemic is hardly the only global phenomenon accelerating changes to media and entertainment. We continue to see a rise in challenges to press freedom by repressive government regimes – a phenomenon, it should be noted, that has been testing the strength of free speech traditions in the world's most protective speech regime, the United States. The manifestations include increased censorship, reduced transparency, and more appalling acts of violence against journalists and editors. Around the world, businesses, governments and legal regimes continue to adapt to technological change, with the increased use of artificial intelligence and 'deep fakes' just a few of the examples at the forefront.

This timely survey work provides important insights into the ongoing effects of the digital revolution and evolving (and sometime contrasting) responses to challenges both in applying existing intellectual property laws to digital distribution and in developing appropriate legislative and regulatory responses that meet current e-commerce and consumer protection needs. It should be understood to serve, not as an encyclopedic resource covering the broad and often complex legal landscape affecting the media and entertainment industries but, rather, as a current snapshot of developments and country trends likely to be of greatest interest to the practitioner. Each of the contributors is a subject field expert, and their efforts here are gratefully acknowledged. Each has used his or her best judgment as to the topics to highlight, recognising that space constraints require some selectivity. As will be plain to the reader, aspects of this legal terrain, particularly as relating to the legal and regulatory

treatment of digital commerce, remain in flux, with many open issues that call for future clarification.

This work is designed to serve as a brief topical overview, not as the definitive or last word on the subject. You or your legal counsel properly should continue to serve that function.

Benjamin E Marks
Weil, Gotshal & Manges LLP
New York
November 2020

Chapter 5

GERMANY

Mark Peters[1]

I OVERVIEW

These are indeed interesting times. While covid-19 has certainly affected all sectors of life, the entertainment industry in Germany was among the most severely hit by the pandemic, given that public life came to a standstill for several months and only permitted a gradual restart. Despite unprecedented rescue packages, artists and companies are financially struggling. Early estimates of the federal government have valued potential losses as up to €28 billion in the worst-case scenario, compared to a total turnover of €168 billion seen in 2018.[2] According to a March 2020 survey, more than 80 per cent of Berlin artists were concerned that they could no longer pay their bills.[3] On the other hand, online services, and in particular streaming services, are booming, so that even temporarily, bandwith limitations have been applied to video streaming services to ensure the stability of the internet.[4] It can be expected covid-19 will further accelerate the shift towards digital media and entertainment.

Courts have adapted: non-urgent hearings were initially postponed, but were soon continued under strict health measures. The German legislator is working, in addition to the rescue packages on offer, on the implementation of various EU directives, and also on further measures against hate speech. In addition, platform regulation, in particular addressing network aspects from the perspective of competition law, is on the agenda.

II LEGAL AND REGULATORY FRAMEWORK

Individual German states, rather than the federal state, are competent for regulating the media. This distribution of power guarantees an independent media, allowing citizens to form their own opinions and safeguarding the control function of the media. For print media, the states have enacted press regulations addressing relevant topics from claims for counterstatements to information rights against public authorities. Correspondingly, TV and

1 Mark Peters is counsel at Grünecker Patent und Rechtsanwälte PartG mbB.

2 Study by the German federal government, Betroffenheit der Kultur und Kreativwirtschaft von der Corona Pandemie, https://tinyurl.com/y58rjuvg.

3 https://de.statista.com/statistik/daten/studie/1108035/umfrage/existenzaengste-durch-covid-19-bei-kuenstlerinnen-und-kuenstlern-aus-berlin/.

4 https://ec.europa.eu/germany/news/20200320-stabiles-internet-corona_de.

radio broadcast media are also regulated by the states based on the Interstate Broadcasting Treaty,[5] which shall eventually be repealed at the end of 2020 by the Interstate Media Treaty (MStV)[6] and state-specific broadcasting or media acts.

Public broadcasting services are supervised by the broadcasting councils. Private broadcasters are regulated by 14 different state regulatory authorities,[7] which grant the required licences, allocate frequencies or cable capacity and supervise compliance with the applicable legislation. Their focus is on safeguarding diversity of opinion, but also on compliance with advertising[8] and regulations for the protection of minors.[9] The regulatory authorities have wide regulatory powers at their disposal, ranging from complaints or fines to the revocation of licences. Core regulation for online media is provided by the Telemedia Act (TMG),[10] which applies to telemedia services.[11] The TMG includes provisions on applicable law, information obligations, restriction of liabilities and data protection.[12] The Interstate Broadcasting Treaty (which shall be repealed in 2020 by the MStV),[13] regulating journalistic aspects, and the State Treaty on the Protection of Minors, also apply. The MStV introduces a new category of telemedia services similar to broadcasting (i.e., on-demand services), where, for example, advertising regulations also apply (Section 74 MStV). The regulatory authorities supervise telemedia services for which, in general, no licence is required, with the exception of regular live journalistic video streams.[14]

Freedom of expression and freedom of information are comprehensively protected by the German Constitution (GG), the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights (ECHR).[15] Private parties (e.g., social networks) also need to consider their users' right to freedom of expression when acting in respect of content on their platform. Intellectual property rights are protected by the Copyright Act (UrhG)[16] and the Trademark Act (MarkenG),[17] which also protect titles of publications, cinematic or other comparable works. The Publishing Act regulates the relationship between the publisher and the author.

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5 https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/RStV_22_english_version_clean.pdf.

6 https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/Medienstaatsvertrag.pdf.

7 Joint website available at www.die-medienanstalten.de.

8 www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/Werberichtlinien_Fernsehen.pdf.

9 www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Interstate_Treaty_on_the_Protection_of_Minors_in_the_Media__JMStV_in_English___19th_Interstate_Broadcasting_Treaty.pdf.

10 www.gesetze-im-internet.de/tmg/.

11 Electronic information and communication services, with the exception of telecommunication and broadcasting services.

12 There has been ongoing discussion since the General Data Protection Regulation entered into force about whether those provisions still apply.

13 Creating an obligation to provide information on the provider of the service as well as the right for information from public authorities.

14 For internet radios only, a notification to the regulatory authority is required.

15 Article 5 German Constitution, Article 11 Charter of Fundamental Rights of the European Union and Article 10 ECHR.

16 www.gesetze-im-internet.de/englisch_urhg/index.html.

17 Section 5, Paragraph 3 MarkenG, www.gesetze-im-internet.de/englisch_markeng/englisch_markeng.html#p0039.

EU directives and the case law of the Court of Justice of the European Union (CJEU), the German Federal Supreme Court (BGH) and Constitutional Court (BVerfG), and the European Court of Human Rights have a strong impact on the media and entertainment industry.

Collecting societies are an important player within the German media and entertainment industry. Based on the Collecting Societies Act[18] and, in general, regulated by the German Patent and Trademark Office, they manage copyright or related rights on behalf of rights holders.

Finally, the draft 10th Amendment to the German Act against Restraints of Competition[19] currently discussed in the German Parliament, intends to create a regulatory framework for the digital economy in particular by specifically addressing platforms and data accessibility.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

Freedom of speech and media freedom are comprehensively protected in particular by the German Constitution (Article 5, Paragraph 1).[20] However, protection is not absolute, but limited by 'general laws, provisions for the protection of young persons, and in the right to personal honour'. The expression of opinion and of fact are protected. Deliberately false statements of fact (fake news) have very limited protection. Expressions of opinion within a (political) public debate are particularly protected, as their legitimacy is generally presumed. Critical, satirical, excessive, polemic and shocking expressions of opinion generally also fall within the scope of protection. Moreover, where several interpretations are possible, a court may not refer to one possible interpretation unless there are valid reasons to exclude others. Accordingly, even hate speech may theoretically fall within the scope of protection. Whether a specific statement is legitimate generally has to be determined by balancing opposing interests against one another. Only where a statement violates human dignity, or constitutes a formal insult or mere invective, will such balancing not be required. It is evident that this weighing of fundamental rights leads to uncertainties, particularly where hate speech is concerned.

Nevertheless, the German legislator has introduced the Network Enforcement Act (NetzDG)[21] applying to social networks, but not to classic media platforms (i.e., those offering journalistic or editorial content). The NetzDG requires the implementation of specific complaint procedures, requiring providers to remove user content infringing a catalogue of criminal provisions, generally within seven days of receipt of notification. Following the introduction of the NetzDG, internet users affected by a content takedown by the platform frequently challenged such measures before the courts.[22] While initially the courts seemed

18 www.gesetze-im-internet.de/englisch_vgg/index.html.

19 https://www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gesetzentwurf-gwb-digitalisierungsgesetz.pdf?__blob=publicationFile&v=6.

20 www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0037.

21 www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2.

22 Higher Regional Court (OLG) Munich, case 18 W 1294/18, judgment of 24 August 2018; OLG Dresden, case 4 W 577/18, judgment of 8 August 2018; OLG Oldenburg, case 13 W 16/19, judgment of

unwilling to accept actions taken by platforms merely based on the platforms' terms, more recent rulings seem to consider such actions as legitimate, provided that the platform terms and their application take the users rights (in particular freedom of speech) appropriately into account.

Recent high-profile cases have addressed the limitations of free speech and media freedom. Notably, the *Böhmermann* case, where German comedian Jan Böhmermann in his weekly satirical programme broadcast an offensive poem about the Turkish President, criticised excessive reactions to a legitimate parody. The Hamburg Court of Appeal prohibited elements of the poem referring to sexual acts as violating human dignity. The BGH rejected an appeal,[23] and now Böhmermann has announced an appeal to the BVerfG.

Widely criticised was a ruling of the Regional Court Berlin in the *Renate Künast* case.[24] Künast, a German politician, had requested the disclosure of personal details of social network users responsible for comments she considered as being insulting. Initially the Court rejected the request, arguing that the comments were partly very polemical and exaggerated and also sexist. Still, in light of a remark Künast had previously made in a debate regarding potential liberalisations on sexual acts with minors, the Court argued that her controversial statement in question, which affected the public to a very considerable extent, had provoked those. Moreover, as a politician, she had to accept criticism to a greater extent. The Regional Court partially revised the ruling, arguing that it had not been aware that the comments were posted in the context of a falsified quote posted by a right-wing extremist user, so in light of the specific context the Court accepted that statements referring to Künast as a 'slut' or stating that she should be 'disposed of' were insulting. On further appeal, the Higher Regional Court of Appeal of Berlin also accepted six further comments as insulting, as these 'made (her) the object of obscene accusations contemptuating women and degrading them'.[25] The Court argued that the rampant insults using particularly drastic terms from the field of faecal language attacked Künast in such an exaggerated manner that the only thing that remained in the foreground was personal abuse. Such defamations clearly exceed the broad limits of permissible expressions of opinion, regardless of the reason. Accordingly, the Court ordered that the personal details of users responsible for these further comments had to be disclosed.

Further, Holocaust denial, dissemination of propaganda and use of symbols of unconstitutional organisations (e.g., a swastika) constitute criminal acts that are not protected by freedom of speech.[26]

In a case concerning online newspaper archives, the European Court of Human Rights confirmed that there was no obligation to remove crime reports regarding the murder of a German actor that identify the perpetrator from the archive in order to protect the reintegration perspective of the perpetrator.[27] The highest German court, the BVerfG, has now handed down two-long awaited rulings, emphasising the importance of complete

1 July 2019; German Constitutional Court, case 1 BvQ 42/19, judgment in a preliminary proceeding of 25 May 2019; OLG Dresden, case 4 U 1471/19 , judgment of 19 November 2019; OLG Schleswig, case 9 U 125/19, ruling of 26 February 2020; OLG Nürnberg, case 3 U 3641/19 judgment of 4 August 2020.

23 BGH, case VI ZR 231/18, judgment of 30 July 2019.

24 Regional Court of Berlin, case 27 AR 17/19 KG, judgments of 9 September 2019, 16 November 2019 and 21 January, 2019

25 Higher Regional Court of Berlin, case 10 W 13/20, judgment of 11 March 2020

26 Section 130 German Criminal Act.

27 ECHR, cases 60798/10 and 65599/10, judgments of 28 June 2018.

archives for public debate and (academic) research.[28] The Court also acknowledged that the possibility to forget was an essential element of personal freedom, whereby this would not result in a general 'filtering' right for the individual. Rather, the individual had a legitimate interest to prevent that 'outdated' news become known through name-based searches, as this could lead to social exclusion. For archive providers, the Court considered measures excluding name-based searches as only reasonable for extreme cases, such as archived reports about violent crimes. In addition, in the parallel proceeding concerning a search engine provider, the Court ruled that no obligation may be imposed on a provider that would effectively restrict the distribution right of the media. However, where an individual may in principle require an archive provider to block name-based searches, but where respective measures were unreasonable, the search engine provider can be required to block name-based searches, as in contrast to archive providers, for search engines it was technically relatively simple to block name-based searches.

Finally, commercial speech and commercial advertising can also be protected. A car rental company was permitted to use the image of a union leader during a railway strike for a commercial advertisement with the title 'Our employee of the month' as a satirical reference to the effects of the strike, which is covered by the freedom of speech.[29]

ii Newsgathering

Regularly also for investigative purposes, the use of illegal means to obtain information is not permitted, although there are exceptions. Entering property against the will of its owner is a criminal act (Section 123 German Criminal Act (StGB)), unless the owner specifically or implicitly consented, even if said consent was fraudulently obtained. Secret recordings of private conversations and the use of eavesdropping devices (Section 201 StGB), as well as accessing data without authorisation (Section 202a, 202b StGB), in general constitute criminal acts, although these rights can only be asserted by the respective persons and not an employer.[30]

Journalists are generally allowed to film and take pictures of people in public spaces as background or part of a meeting, parade, etc. (Sections 22 and 23 Act on Protection of Copyrights in Works of Art and Photographs (KUG)).[31] Since the introduction of the General Data Protection Regulation (GDPR), there has been discussion whether in particular the KUG is still applicable or whether it was effectively repealed by the GDPR. Referring to the media privilege in Article 85 of the GDPR, the Cologne Court of Appeal[32] considered the KUG as applicable for journalistic purposes. Similarly, for newsgathering it is also discussed whether the media are subject to the GDPR. According to the Hamburg Data Protection Authority, the GDPR applies; however, among other things, a recording for journalistic purposes could be justified based on legitimate interests (Article 6(1)f GDPR), and it might also not be necessary to provide the generally required information to the data

28 BVerfG, case 1 BvR 16/13 – Recht auf Vergessen I and BVerfG, case 1 BvR 276/17– Recht auf Vergessen II, judgments of 6 November, 2019.

29 OLG Dresden, case 4 U 1822/17, judgment of 21 August 2018.

30 BVerfG, case 1 BvR 2252/04, judgment of 18 November 2004.

31 www.gesetze-im-internet.de/kunsturhg/.

32 OLG Cologne, case 15 U 110/18, judgment of 10 October 2018.

subject according to Articles 11(1) and 15(5)b of the GDPR, as this was usually impossible.[33] In contrast, the Court of Appeal of Cologne considers media privilege as also applying to the process of newsgathering, whereby specific aspects of the GDPR (e.g., specifically protected data categories (Article 9 GDPR)) will have to be considered when balancing opposing interests.[34]

Still, as the BGH confirmed in the *Organic chicken* ruling,[35] unlawfully obtained information may also be published in specific circumstances where the public interest prevails over the interest of a commercial entity. The Court considered it relevant that not the broadcaster but the animal activist had committed the illegal act. The broadcaster had only made use of it.

The Higher Regional Court of Cologne had now to decide on undercover investigations and audio-visual recordings directly by a broadcaster in a psychiatric institution.[36] The Court held that also such direct recordings can be legitimate in exceptional circumstances should the public interest in the information prevail over the breach of law. In general, this required that the recordings aim at uncovering unlawful conditions, whereby also serious deficiencies falling short of illegal acts can be sufficient.

The publication of the so-called 'Ibiza videos' showing the then Austrian vice chancellor Christian Strache offering contracts in return for financial election campaign support not only led to a government crisis in Austria, but also involved the German public prosecutors.[37] Criminal investigations against journalists who had published excerpts of the recordings were closed, as the public prosecutors accepted the overwhelming public interest in the exposed appearance of corruptibility of a government member.

New legislation on trade secrets (Section 5(1) German Trade Secrets Act (GeschGehG))[38] clarifies that the use or the publication of trade secrets for legitimate purposes, including media freedom, is permitted. Generally, only the use of trade secrets for legitimate purposes is relevant, and not whether a payment was involved. Trade secrets are also only protected where the owner has a legitimate interest in secrecy (Section 2(1) GeschGehG).

iii Freedom of access to government information

The right of access to information by the media is guaranteed by the German Constitution (Article 5(I)2 GG).[39] Access to German federal government information[40] is regulated by the Freedom of Information Act (IFG);[41] a legal basis for access by the media is also provided by the Press and Media Acts and the Interstate Broadcasting Treaty (RStV).[42] Based on a legitimate interest, access to court files must be granted.[43] The right of access according to

33 Non-binding legal analysis by the Hamburg Data Protection Authority, www.filmverband-suedwest.de/wp-content/uploads/2018/05/Vermerk_DSGVO.pdf.

34 Higher Regional Court of Cologne, 15 W 21/19, judgment of18 July 2019.

35 BGH, case VI ZR 396/16, judgment of 10 April 2018.

36 Higher Regional Court of Cologne, 15 W 21/19, judgment of 18 July 2019.

37 Public Prosecutors Office (StA) München I, case 115 Js 150102/19, decision of 10 December 2019.

38 www.gesetze-im-internet.de/geschgehg/__5.html.

39 German Federal Administrative Supreme Court (BVerwG), case 6 A 2/12, judgment of 20 February 2013.

40 German states have enacted corresponding legislation granting access to the information of their administrations.

41 https://www.gesetze-im-internet.de/englisch_ifg/englisch_ifg.html.

42 Section 9a RStV for broadcasters and Section 55, Paragraphs 3 and 9a RStV for telemedia services.

43 Section 299, Paragraph 2 German Civil Procedural Act (ZPO).

the IFG is limited (Sections 3 to 6 IFG) where special public interest, the decision-making process, personal data and IP rights and trade secrets are affected. A narrow interpretation of these limitations is required. According to the *Afghanistan Papiere* ruling of the CJEU,[44] limiting access to, or publication of, government information by the media based on copyright will generally be difficult, as at least regularly copyright exceptions will apply. The BGH confirmed this in *Afghanistan Papiere II*, arguing that the newspaper could rely on the exception for reporting about current events (Section 50 UrhG) when publishing government documents. In addition, the right of (first) publication (Section 12 UrhG) was not affected, as the respective personality right was not aimed at protecting the secrecy of information that might be negative for the government.[45]

The administration may levy charges, but they cannot have a prohibitive effect and must be appropriate.[46]

The High Administrative Court of Bavaria had to deal with the access right in context of the covid-19 pandemic. It confirmed that the media can request information about the number of covid-19 infections, including the data broken down by municipality,[47] as based on this aggregated data no infected individuals could be identified.

The Federal Administrative Court had to decide about an information request of the German magazine *Der Spiegel*, which had requested access to all information available in connection with the notorious *Spiegel-Affäre*, where 1962 the magazine's editorial offices had been searched following a negative article about the German army. The federal government had only provided a selection of redacted documents, arguing this was necessary to protect its sources and their post-mortem personality rights. The Court rejected this, as such protection of sources concerning transactions concluded decades ago could only be justified if such disclosure would impede the future work of the security authorities.[48]

iv Protection of sources

Press and media freedom (Article 5I, Section 2 GG) also grants protection for sources. Accordingly, professional media representatives have a right to refuse information in a criminal proceeding.[49] According to the German BVerfG, communication data is not protected by press or media freedom, but by the constitutional right protecting telecommunication secrecy. Thus, based on court orders in respect of severe criminal acts, access to communication data by criminal prosecution authorities remains possible.[50] Correspondingly, press and media freedom also limits the right of the prosecution authorities to seize documents (Section 97, Paragraph 5S1 German Criminal Procedure Act). The BVerfG, following a complaint by Reporters Sans Frontières and investigative journalists, invalidated a Federal Act granting the German Foreign Intelligence Service (BND)[51] broad powers in respect to telecommunication surveillance specifically affecting foreign media and journalists. The Court held that the

44 CJEU, case C-469/17, *Afghanistan Papiere*, judgment of 29 July 2019

45 BGH, case I ZR 139/15- *Afghanistan Papiere II*, judgment of 30 April 2020.

46 BVerwG, case 7 C 6/15, judgment of 20 October 2016.

47 BayVGH, case 7 CE 20.1822, preliminary judgment of 19 August 2020.

48 BVerwG, case 6 A 3/20, judgment of 13 May 2020.

49 Section 53, Paragraph 1(5) German Criminal Procedural Act; www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0229.

50 BVerfG, cases 1 BvR 330/96 and 1 BvR 348/99, judgment of 12 March 2003.

51 BVerfG, case 1 BvR 2835/17, judgment of 19 May, 2020 invalidating the BND Act.

state authority is bound by the German Constitution also outside of Germany. The scope of protection granted outside of Germany might be different. However, the constitutional guarantee for media freedom (Article 5, Paragraph iS2 GG) also protects foreign journalists outside of Germany against telecommunications surveillance.

v Private action against publication

The majority of claims are based on the violation of an individual's personality right. Based on the German Constitution, the personality right grants broad protection of private life and beyond. The German Federal Supreme Court has developed the concept of protection zones to provide some contours for the protection granted. The following are protected:

a the social, private and intimate sphere of a person against indiscretions;
b a person's honour and reputation;
c the truthful presentation of a person in public; and
d finally, as the most recent addition, the right to defend against a commercial exploitation of a person's characteristic attributes.[52]

The protection granted by the personality right is not limited to private individuals, but also covers commercial and other entities.[53] Commercial entities can also rely on the right to the established and exercised business enterprise, particularly in respect to illegitimate product reviews and calls for boycott.

Preliminary injunctions are typical for German legal proceedings, particularly under media law. Regularly granted by the court *ex parte*, such injunction remains an effective tool allowing applicants to obtain a ruling or to withdraw an application without the adverse party necessarily becoming aware of it. Preliminary injunctions require a particular urgency, so applications generally have to be filed within one month after notice of an infringement. The BVerfG has made clear that a fair trial requires a hearing of the other side.[54] Still, when an application is filed swiftly, courts may grant *ex parte* injunctions provided that the other side has had the chance to respond to a warning letter, and the preliminary injunction corresponds with the scope of said warning letter.

It remains to be seen whether the newly introduced requirement for establishing specialised chambers for media cases from 1 January 2021 that can also be centralised for one or several states will change the current pattern that the vast majority of media cases are heard by only five courts.[55]

Remedies are a claim for publication of a counterstatement[56] or correction in respect to an incorrect publication of facts. However, these require the initial incorrect statement to be republished. Thus, cease-and-desist claims are generally more appropriate. Finally, there are also claims for damages and compensation for immaterial damage, which can only be asserted in a main proceeding. Damage claims can also be calculated on the basis of the licence fee

52 Wenzel-Burkhardt and Pfeifer, *Das Recht der Wort - und Bildberichterstattung*, 6th edition, p. 193 et seq.
53 Personality rights for legal entities are also addressed by the CJEU in case C-194/16, judgment of 17 October 2017.
54 BVerfG, case 1 BvR 2421/17, judgment of 30 September 2018.
55 In 2019 on an Appeal Court level Berlin heard 196 cases, Hamburg estimated 150, Frankfurt 93, Cologne 78 and Munich 46 according to Jürgens, NJW 2020, 1846.
56 Based on states' media acts (e.g., Article 10 Bavarian Act on the Press) and Section 56 RStV 'TV/radio and journalistic telemedia'.

that would have become due for a legitimate use of a picture, as the Cologne Court of Appeal recently decided in a case concerning the use of a picture of a prominent person for the purpose of directing users to an unrelated article.[57] In cases of otherwise severe, culpable and non-recompensable violations of a person's personality rights, compensation claims become due not to compensate a loss, but to satisfy the party concerned. Their dissuasive effect must also be explicitly accepted.[58] The compensation claim expires with death. Accordingly, the Cologne Court of Appeal lifted a ruling awarding compensation of €1 million for the personality right-infringing publication of a biography of the former German Chancellor Helmut Kohl, who died while the proceeding was pending.[59]

vi Government action against publication

In the *Böhmermann* matter, discussed in Section III.i, not only civil but also criminal and administrative courts were employed. Following a criminal complaint from the Turkish President, criminal investigations against the comedian were started, but later dropped by the prosecution. The German parliament repealed the criminal provision regarding insults against foreign heads of state.[60] The Berlin Administrative Court rejected a complaint regarding a statement of the German Chancellor Angela Merkel who had referred to the poem as 'deliberately violating', since Merkel had distanced herself from her previous statement so that a repetition of said statement was not to be expected.[61]

The NetzDG requirement for social media platforms to remove illegal content within seven days, or within 24 hours for extreme cases, also creates a risk that legitimate journalistic content is removed.

With the Act against Hate and Agitation, significantly stricter penalties for hate crimes, such as threat (Section 241 StGB), insult (Section 185 StGB) and slander of politicians (Section 188 StGB), as well as an obligation for social networks to report specific severe hate crimes as agitation to hatred (Section 130 StGB) towards the police, are to be introduced. The German parliament passed the Act on 18 June 2020 despite severe criticism by the parliament's own Scientific Service that the obligation to report hate crimes to the police was unconstitutional.[62] The President, whose signature is required for the Act's entry into force, seems to share these concerns.[63]

57 OLG Köln, case 15 U 160/18, judgment of 28 May 2019, awarding €20,000, currently under appeal before the BGH, case I ZR 120/19.

58 BGH, case VI ZR 323/95, judgment of 26 November 2016.

59 OLG Cologne, case 15 U 64/17, judgment of 29 May 2018, currently under appeal before the BGH.

60 A chronology is available at www.ndr.de/kultur/Der-Fall-Boehmermann-eine-Chronologie,boehmermann212.html.

61 Berlin Administrative Court, case 6 K 13.19, judgment of 16 April 2019.

62 https://cdn.netzpolitik.org/wp-upload/2020/09/WD-10-030-20-Gesetz-Hasskriminalitaet.pdf.

63 The *Süddeutsche Zeitung* reports that Frank-Walter Steinmeier, the President, who can reject the signature of an evidently unconstitutional act, is currently examining the constitutionality of the Act: https://www.sueddeutsche.de/politik/hate-speech-hasskriminalitaet-gesetz-steinmeier-1.5034929

IV INTELLECTUAL PROPERTY

i Copyright and related rights

German copyright law is largely harmonised with EU law. Accordingly, the case law of the CJEU plays a significant role, whereby German courts also refer a significant number of cases.[64] The German law surrounding protected work as a result of an author's intellectual creation,[65] exploitation of work and the related exceptions and limitations is particularly harmonised with EU law.

The BGH applied its case law for internet-based video recordings, and now also to internet-based music recordings of certain songs, arguing that for the exception for private recordings (Section 53 UrhG) to apply it was sufficient that the recording was created by a completely automated process initiated by the user.[66] In *„HHole (for Mannheim)"*, the BGH had to deal with the question of whether an artist, based on Section 14 UrhG protecting an author's right against distortion of his work, could request a museum to restore an installation that had been removed during a renovation. The Court accepted that in the case of works of architecture or works of art inextricably linked to buildings, the owner's interests in any other use or development will generally take precedence over the author's interests in preserving the work.[67]

The implementation of the Directive on Copyright in the Digital Single Market (DSM Directive)[68] is due by 7 June 2021. Germany and the German reporter Axel Voss supported the Directive, despite the broad controversy created among public and legal experts by Articles 15 and 17 DSM Directive.[69] Germany had agreed to the Directive with a protocol note that the implementation shall make upload filters as far as possible unnecessary.[70] The German Federal Ministry of Justice published in January and June 2020 drafts for the potential implementation of the Directive into German law, and has asked stakeholders for comments.[71] According to the draft in respect to the publisher's right exceptions will apply, in particular for the use of the headline, a small-format preview image with a resolution of up to 128 by 128 pixels and sound or video sequences up to three seconds. Regarding platform liability, according to Article 17 DSM Directive a pre-flagging mechanism is suggested, which would allow users to flag content as falling under an exception. Flagged content would in general be directly published. The draft also provides for a complaint process for a rights owner or a potentially affected user, whereby the platform provider would in general be exempted from liability until the complaint process was completed. In addition, parodies,

64 For example, the following three judgments of 29 July 2019: CJEU, case C-469/17, *Afghanistan Papiere*; case C-516/17, *Spiegel Online*, on limitations for the media's quotation right; and case C-476/17, *Metall auf Metall*, on sampling.

65 CJEU, case C310/17, *Levola v. Smilde Foods BV*, judgment of 13 November 2018.

66 BGH. case I ZR 32/19, judgment of 5 March, 2020.

67 BGH, case I ZR 98/17, judgment of 21 February, 2020.

68 Directive (EU) 2019/790.

69 Article 15 (Protection of press publications concerning online uses) and Article 17 (Use of protected content by online content-sharing service providers).

70 www.urheberrecht.org/news/w/richtlinie/p/1/i/6221/.

71 Draft concerning protection of press publications published on January 15, 2020 (https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_Anpassung%20Urheberrecht_digitaler_Binnenmarkt.pdf?__blob=publicationFile&v=1) and on further aspects published on 24 June 2020 (https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht_digitaler_Binnenmarkt.pdf?__blob=publicationFile&v=2).

caricature and pastiches are now defined as copyright exceptions. Moreover, the draft provides for non-commercial use for a *de minimis* limit (20 seconds (image or sound), 1,000 characters (text) or 250 kilobytes (photo or graphic)) for which platforms would have to pay an adequate compensation to collection societies.

Following discussions with stakeholders, the first modifications of the initial drafts are being discussed. Pre-flagging shall now only be necessary when the respective work is not contained in respective databases as blocked or as already licensed. Moreover, the compensation obligation shall be extended to pastiches and also to a temporary use of a work determined as unjustified in a complaint procedure.[72]

The Federal Ministry also provided in draft suggestions for the implementation of the Online-SatCab Directive[73] to facilitate a technology-neutral, cross-border (and domestic) retransmission of television and radio programmes.

ii Personality rights

The concept of personality rights under German law is broad (see Section II.v), and also covers the commercialisation of an individual's identity.

In a recent ruling, the BGH had to decide whether it was legitimate for the press to report about the publication of intimate pictures of a famous singer stored on her boyfriend's stolen notebook, which had after an unsuccessful blackmail attempt been published on the internet. The Court accepted a public interest for a report about the risks of storing intimate information that can be potentially leaked on the internet, in particular as the newspaper had provided advice on how to mitigate this risk. Still, in light of the severe effects for the victim's inner private sphere that was further intensified by the article pointing out that the pictures were still available on the internet, the Court accepted a violation of personality rights and upheld the injunction.[74]

iii Unfair business practices

Technical solutions allowing users to block advertisements in TV recordings ('spot-stop functionality') had already been permitted by the BGH in its first ad blocker ruling.[75] The issue returned with the increasing popularity of ad blocker tools allowing users to block advertisements on websites. The BGH accepted[76] that an ad blocker that permitted advertising matching certain criteria that was accordingly whitelisted against a payment did not infringe the German Unfair Competition Act.[77] The saga continues with the BGH's *Adblock III* ruling,[78] based now on the German Competition Act.[79] The BGH rejected the assessment of the Munich Court of Appeal[80] excluding a market dominant position of the

72 https://www.spiegel.de/netzwelt/netzpolitik/lambrecht-macht-neue-vorschlaege-zu-uploadfiltern-und-leistungsschutzrecht-a-6a59ed39-d4da-44dd-b63e-1cb53a2c952f.

73 Directive (EU) 2019/78.

74 BGH, case VI ZR 360/18, judgment of 30. April 2019.

75 BGH, case I ZR 26/02, *Werbeblocker I*, judgment of 24 June 2004.

76 BGH, case I ZR 154/16, *Werbeblocker II*, judgment of 19 April 2019.

77 www.gesetze-im-internet.de/englisch_uwg/index.html.

78 BGH, case KZR 57/19-Adblocker III, judgment of 10 December, 2019.

79 www.gesetze-im-internet.de/englisch_gwb/index.html.

80 OLG Munich, case U 2225/15 Kart, judgment of 17 August 2017; BGH, case I ZR 158/17, pending.

defendant, but referred the matter back to the Munich Court to examine further a potential dominant position on the relevant market and whether in light of all relevant circumstances the ad blocker was unfairly hindering or discriminating the plaintiff.

V COMPETITION AND CONSUMER RIGHTS

An increasing number of influencer marketing cases are reaching German courts[81] concerning the question of whether and how postings concerning a certain product have to be designated as commercial advertisements, as well as the liability of the company whose products are advertised. The common practice of requesting users to like, comment or share posts in return for participation in a raffle was held to be misleading as, due to the incentive provided by participation in the raffle, users' ratings could be no longer be considered neutral.[82]

Net neutrality is addressed by Article 3 et seq. of Regulation (EU) 2015/2020, as well as in German law by Section 41 of the German Telecommunications Act, which provides a legal basis for technical regulation. German courts already considered mobile phone tariffs allowing users to stream content of certain media partners without data traffic limitations (zero-rating) as violating the principle of net neutrality (Article 3 Regulation (EU) 2015/2020),[83] which now has also been confirmed by the CJEU.[84]

VI DIGITAL CONTENT

The BGH developed the concept of liability as a vicarious infringer to address liability of internet service providers in respect of third-party infringements. Accordingly, an internet service provider could be held liable as a vicarious infringer should this not be stopped (and future infringements prevented) after receipt of a notice of an obvious infringement, whereby the provider violates reasonable examination obligations. Cases have concerned access and hosting providers, particularly file-sharing and social media platforms, whereby liability is limited for cease-and-desist claims. A vicarious infringer is not liable for damages. In terms of linking, the criteria developed by the CJEU in *GS-Media*[85] apply (i.e., links to legitimate content are permitted). Should the referenced content be unauthorised, the person responsible for the link can be held directly liable under specific circumstances (i.e., in respect of a search engine only if it knew or reasonably should have known that a picture was published without the consent of the rights owner).[86]

81 OLG Karlsruhe, case 6 U 38/19 judgment of 9 September 2020; Regional Court (LG) Berlin, case 52 O 101/18, judgment of 24 May 2018; OLG Braunschweig, case 2 U 89/18, judgment of 8 January 2019; LG Heilbronn, case 21 O 14/18 KfH, judgment of 8 May 2018; OLG Frankfurt, case 6 W 35/19, judgment of 28 June 2019; KG Berlin, case 5 W 149/18, judgment of 27 July 2018.

82 OLG Frankfurt, case 6 U 270/19, judgment of 20 August 2020 (not legally binding).

83 Münster Administrative Appeal Court, case 13 B 1734/18, *Telenor Magyarország Zrt v. Nemzeti Média,* judgment of 12 July 2019; LG Düsseldorf, case 12 O 158/18, judgment of 8 May 2019.

84 CJEU, joined cases C-807/18 and C-39/19, judgment of 15 September, 2020.

85 CJEU, case C-160/15, *GS-Media v. Sanoma*, judgment of 8 September 2016.

86 BGH, case I ZR 11/16, *Vorschaubilder III*, judgment of 21 September 2017.

VII CONTRACTUAL DISPUTES

Disputes regularly concern adequate remuneration for artists and authors. According to Section 32 of the UrhG, authors have a claim for appropriate remuneration. Should the contractually agreed remuneration be inadequate, authors can claim a change of contract to provide for appropriate remuneration. Inadequate remuneration, in particular in a buyout contract, will not affect the validity of a transfer of rights[87] but might lead to supplemental claims.[88]

VIII YEAR IN REVIEW

Covid-19 was the predominant factor in 2020, creating a plethora of new legal questions for the media and entertainment industry, in particular whether lockdown or other regulations aimed at limiting the spread of the pandemic were legitimate. In general, courts accepted respective regulations as necessary to protect public health.[89] Only where courts found measures not proportionate were those lifted, so with a judgment of 27 May 2020 the Higher Administrative Court of Mannheim permitted the opening of outdoor areas for bars and pubs based on appropriate health concepts considering the already existing permission for restaurants.[90] However, whisky tastings remained prohibited, as those served not gastronomical but educational and advertising purposes, so they could not rely on the permissions in place for restaurants and pubs.[91]

In addition, where company owners had made provisions for a close of business and took out corresponding insurances, they have been regularly unpleasantly surprised, as insurance companies have regularly rejected claims. The Regional Court of Munich has now granted a compensation claim to a Munich restaurant against its insurer, arguing that it was sufficient that the restaurant had been closed, that it was not necessary to offer takeaway services if economically unreasonable and that it was also irrelevant whether the regulation ordering the closure was valid or not.[92]

87 BGH, case I ZR 73/10, judgment of 31 May 2012, *Honorarbedingungen Freie Journalisten*; BGH, case I ZR 41/12, judgment of 17 October 2013.

88 BGH, case I ZR 176/18- *Das Boot*, judgment of 20 February 2020 on participation of a cameraman; BGH case I ZR 114/19, judgment of 23 July 2020 referring to the collective agreement for employee-like freelance journalists as basis for the calculation of the adequate remuneration of a freelance photographer.

89 Administrative Court of Bayreuth, case B 7 S 20.223, ruling of 11 March, 2020 regarding a regulation concerning schools, nurseries; Administrative Court of Stuttgart, case 16 K 1466/20, ruling of 14 March 2020, rejecting a complaint against the prohibition of a late shopping night; Higher Administrative Court of Kassel, case 8 B 913/20.N , rejecting a request for reopening of a fitness studio; Higher Administrative Court of Munich, case 20 NE 20.926, judgment of 7 May 2020, rejecting a complaint concerning the obligation to wear masks.

90 Higher Administrative Court of Mannheim, case 1 S 1528/20, judgment of 27 May 2020.

91 Administrative Court of Aachen, case 7 L 366/20, ruling of 8 June 2020.

92 Regional Court of Munich, case 2 O 5895/20, judgment of 1 October 2020 (not legally binding). Further 86 corresponding proceedings are pending before the Court.

IX OUTLOOK

Digitalisation will remain the driving force for media and entertainment, with the pandemic accelerating this even further. For the classical media and entertainment industry, the future course of the pandemic will be decisive in terms of the short and mid-term perspective, which is certainly challenging. From the perspective of the regulator, this imbalance might make it even more difficult to strike a fair balance between the bricks-and-mortar and digital worlds when implementing new regulations, such as, in particular, the Copyright Directive.

Whatever the outcome of this balancing act will be, it must ensure that the rights and interests of third parties involved, namely users and citizens, are also appropriately taken into consideration. Another lesson taken from covid-19 is that people can learn, and that they are (in general) willing to accept rules when they understand their purpose and necessity. The pre-flagging mechanism envisaged in the current draft implementation act for the Copyright Directive might be a good example of this. Involving users in assessing whether content falls under a copyright exception could not only facilitate automatic processing for a platform, but could also help to create an understanding of the interests of right owners and the limitations provided by copyright exceptions. This should, at least, make it clear that this is not about censoring opinions.

Appendix 1

ABOUT THE AUTHORS

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Mark Peters is counsel on IT and IP law in the Munich office of Grünecker. Mark has been advising clients, including publishers, social networks and other internet service providers, on online-related matters for more than 15 years. His specific focus is on assisting with the implementation of new legislation, advising in connection with liability for user-generated content and on user contracts and policies.

Mark is a certified IT and IP attorney. He obtained an LLM on information technology law from the Carl von Ossietzky University of Oldenburg. He regularly holds seminars, with current ones being on the new European Trade Secrets Directive and the German Implementation Act for a German legal publisher.

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