THE MEDIA AND ENTERTAINMENT LAW REVIEW

Editors
R Bruce Rich and Benjamin E Marks

THE LAWREVIEWS

THE MEDIA AND ENTERTAINMENT LAW REVIEW

Reproduced with permission from Law Business Research Ltd
This article was first published in December 2019
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors
R Bruce Rich and Benjamin E Marks

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Katrina McKenzie

SUBEDITOR
Martin Roach

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-044-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

© 2019 Law Business Research Ltd

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

AL TAMIMI & CO

BIRD & BIRD

CMS VON ERLACH PONCET LTD

GRÜNECKER PATENT UND RECHTSANWÄLTE PARTG MBB

KIM & CHANG

MAYER LEX

PINHEIRO NETO ADVOGADOS

PINTÓ RUIZ & DEL VALLE

SORAINEN

WEIL, GOTSHAL & MANGES LLP

CONTENTS

PREFACE

We are very pleased to serve as editors and US chapter authors of this important survey work on the ever-evolving state of the law globally as affects the day-to-day operations of the media and entertainment industries.

This work is especially timely given the ongoing challenges to press freedom at the instance of repressive governmental regimes – a phenomenon, it should be noted, that is also testing the strength of free speech traditions in the world's most protective speech regime, the United States. It is equally well-timed in light of the ongoing digital revolution, which has created new challenges in both applying existing intellectual property laws, such as copyright, to the internet setting, and developing appropriate legislative and regulatory responses that meet current e-commerce, and rights holder and consumer protection needs.

This volume should be understood to serve, not as an encyclopaedic 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. Our contributors are subject field experts, whom we gratefully acknowledge for their efforts. Each has used his or her best judgement as to the topics to highlight, recognising that space constraints require selectivity. As will also become plain, aspects of this legal terrain, particularly as relate to the legal and regulatory treatment of digital commerce, is very much in a state of flux, with many open issues of the moment remaining for future clarification.

The usual caveat is in order: of necessity, 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 should continue to serve that function.

R Bruce Rich and Benjamin E Marks
Weil, Gotshal & Manges LLP
New York
November 2019

Chapter 5

GERMANY

Mark Peters[1]

I OVERVIEW

The German media and entertainment industry had a total turnover of €60.6 billion in 2017,[2] and employed approximately 520,000 media workers.[3] In Germany, there is a clear divide between the classical (print) and the digital world, with the former steadily losing business (down 1.8 per cent in 2017 for newspapers), and strong growth for digital media (up 12.1 per cent in 2017). This shift also influences regulation, as the ancillary copyright for press publishers introduced in Germany in 2013 illustrates.[4]

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 radio broadcast media are also regulated by the states based on the Interstate Broadcasting Treaty[5] and their state-specific broadcasting or media acts. Public broadcasting services are supervised by broadcasting councils. Private broadcasters are regulated by 14 different state regulatory authorities,[6] which grant the required licences, allocate frequencies or cable capacity and supervise compliance with applicable legislation. Their focus is on safeguarding diversity of opinion, but also on

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

2 PwC, 'German Entertainment and Media Outlook 2018–2022', www.pwc.de/de/technologie-medien-und-telekommunikation/gemo-2018.pdf.

3 Statista, 'Anzahl der Beschäftigten in der Medienbranche (Media Worker) in Deutschland in den Jahren 2015 bis 2017', https://de.statista.com/statistik/daten/studie/752793/umfrage/beschaeftigten-in-der-medienbranche-in-deutschland/.

4 According to the Court of Justice of the European Union, Case C-299/17, the German Act implementing the ancillary copyright is invalid as the legislative process was not notified to the European Commission. The ancillary copyright for press publishers is now included in Article 15 of the Copyright Directive (Directive (EU) 2019/790).

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

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

compliance with advertising[7] and regulations for the protection of minors.[8] The regulatory authorities have wide regulatory powers at their disposal, ranging from complaints or fines to the revocation of licenses. Core regulation for online media is provided by the Telemedia Act (TMG),[9] which applies to telemedia services.[10] The TMG includes provisions on applicable law, information obligations, restriction of liabilities and data protection.[11] The Interstate Broadcasting Treaty,[12] regulating journalistic aspects, and the State Treaty on the Protection of Minors also apply. The regulatory authorities supervise telemedia services, for which, in general, no licence is required, with the exception of regular live journalistic video streams.[13]

Freedom of expression and freedom of information are comprehensively protected by the German Constitution, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights (ECHR).[14] 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)[15] and the Trademark Act (MarkenG),[16] which also protect titles of publications, cinematic or other comparable works. The Publishing Act regulates the relationship between the publisher and the author.

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 and the European Court of Human Rights have a strong impact on the media and entertainment industry.

Finally, collecting societies are an important player within the German media and entertainment industry. Based on the Collecting Societies Act,[17] and, in general, regulated by the German Patent and Trademark Office, they manage copyright or related rights on behalf of rights holders.

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

8 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.

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

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

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

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

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

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

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

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

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

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 (GG) (Article 5, Paragraph 1).[18] However, protection is not absolute, but is 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. Different from a private dispute, 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, constitutes a formal insult or a mere invective, such balancing is not 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)[19] 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 the provider to remove user content infringing a catalogue of criminal provisions, generally within seven days of receipt of notification. As a recent development following the introduction of the NetzDG, internet users affected by a content takedown by the platform are challenging these measures before the courts, resulting in multiple preliminary injunctions[20] ordering social networks to reinstate content on the grounds that the removal did not appropriately take the user's constitutional right to freedom of speech into account. These decisions emphasise the effect of freedom of speech even on contractual relationships between private parties.

Recent high-profile cases 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, criticising 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,[21] and now Böhmermann has announced an appeal to the German Constitutional Court (BVerfG). The relationship between intellectual property (IP) rights and media freedom has been the subject of the *Afghanistan Papiere* case, where the German government, based on copyright, sued a publisher that had made confidential military reports available on its online

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

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

20 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 1 July 2019; German Constitutional Court, Case 1 BvQ 42/19, judgment in a preliminary proceeding of 25 May 2019.

21 BGH, Case VI ZR 231/18, judgment of 30 July 2019.

platform. The CJEU, answering to a referral from the BGH, questioned whether such reports were copyright protected, although the publication in any event might have been legitimate based on the exception for reports on current events.[22]

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.[23]

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.[24] The BGH emphasised in a further case concerning an online archive that all relevant aspects must be considered, including the public interest that may exist in the matter and whether the identifying report could be found through Google.[25]

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.[26]

ii Newsgathering

As a general rule, 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 the 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) constitute criminal acts, although these rights can only be asserted by the respective persons and not an employer.[27]

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)).[28] Since the introduction of the General Data Protection Regulation (GDPR), there has been discussion on whether the KUG is still applicable. Referring to the media privilege in Article 85 of the GDPR, the Cologne Court of Appeal[29] considered the KUG as applicable for journalistic purposes, but possibly not for advertising. However, where a recording was not made for, but later used for, journalistic purposes, the collection of data could be justified based on Article 6(1)f of the GDPR, whereby it might not be necessary to provide the generally required information to the data subject according to Articles 11(1) and 15(5)b of the GDPR, as this was usually impossible.[30]

22 CJEU, Case C-469/17, judgment of 29 July 2019.

23 Section 130 German Criminal Act.

24 ECHR, Cases 60798/10 and 65599/10, judgments of 28 June 2018.

25 BGH, Case VI ZR 439/17, judgment of 18 December 2018.

26 OLG Dresden, Case 4 U 1822/17, judgment of 21 August 2018.

27 BVerfG, Case 1 BvR 2252/04, judgment of 18 November 2004.

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

29 OLG Cologne, Case 15 U 110/18, judgment of 10 October 2018.

30 Not binding legal analysis by the Hamburg Data Protection Authority, www.filmverband-suedwest.de/wp-content/uploads/2018/05/Vermerk_DSGVO.pdf.

Still, as the BGH recently confirmed in the *Organic chicken* ruling,[31] unlawfully obtained information may also be published in specific circumstances where public interest prevails over the interest of a commercial entity. An association of ecologically working companies sued a German broadcaster for broadcasting video recordings that were made illegally by an animal protection activist. These recordings showed the miserable conditions under which chickens sold under the 'organic' label were kept. It was criticised that the law permitted the labelling of products as organic, even though the actual animal housing conditions were contrary to consumer expectations. The BGH considered the broadcast report legitimate as an accurate documentation based on public interest. Any restrictions would impair the function of the press as a watchdog. The Court also 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 Karlsruhe Court of Appeal similarly rejected an application for a preliminary injunction[32] against the publication of a private chat protocol that contained extremist statements of an employee of a right-wing MP. It was unclear whether the newspaper or a third party had illegally obtained the information. In light of the discussion around right-wing extremist efforts in connection with right-wing parties, the criticised press articles contributed to a discussion essentially affecting the public, and its publication was therefore legitimate.

New legislation on trade secrets (Section 5(1) German Trade Secrets Act (GeschGehG))[33] 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, 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).[34] Access to German federal government information[35] is regulated by the Freedom of Information Act (IFG);[36] a legal basis for access by the media is also provided by the Press and Media Acts and the Interstate Broadcasting Treaty (RStV).[37] Based on a legitimate interest, access to court files must be granted.[38] The right of access according to 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, limiting access to, or publication of, government information by the media based on copyright will generally be difficult.

The administration may levy charges, but they cannot have a prohibitive effect and must be appropriate.[39]

31 BGH, Case VI ZR 396/16, judgment of 10 April 2018.

32 OLG Karlsruhe, Case 6 U 105/18, judgment of 13 February 2019.

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

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

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

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

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

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

39 BVerwG, Case 7 C 6/15, judgment of 20 October 2016.

The German Federal Administrative Supreme Court rejected access to a protocol of a Cabinet meeting of the federal government.[40] However, the Court granted a disclosure request of a newspaper against the Bavarian Parliament concerning the amounts paid to an MP's wife who was employed by him as an assistant. Referring also to Section 6(1)f of the GDPR, the Court granted access arguing that, for disclosure requests, it was also relevant whether this affected the inner personal, private or less protected social sphere. Thus, as it only affected the social sphere, the public interest in obtaining information on family members employed by MPs prevailed over the interest of the MP and his family.[41]

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.[42] According to the German Constitutional Court, 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.[43] Correspondingly, press and media freedom also limits the right of the prosecution authorities to seize documents (Section 97, Paragraph 5S1 German Criminal Procedure Act).

v Private action against publication

The majority of claims are based on the violation of the 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 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.[44]

The protection granted by the personality right is not limited to private individuals, but also covers commercial and other entities.[45] 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 in media law. Regularly granted by the court *ex parte*, this remains an effective tool allowing applicants to obtain a ruling or withdraw the application without the adverse party necessarily becoming aware of it. Preliminary injunctions require a particular urgency, so that applications generally

40 BVerwG, Case 7 C 19/17, judgment of 12 December 2018.
41 BVerwG, Case 7 C 5/17, judgment of 27 December 2018.
42 Section 53, Paragraph 1(5) German Criminal Procedural Act; www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0229.
43 BVerfG, Cases 1 BvR 330/96 and 1 BvR 348/99, judgment of 12 March 2003.
44 Wenzel-Burkhardt and Pfeifer, *Das Recht der Wort - und Bildberichterstattung*, 6th edition, p. 193 et seq.
45 Personality rights for legal entities are also addressed by the CJEU in Case C-194/16, judgment of 17 October 2017.

have to be filed within one month after notice of the infringement.[46] Specifically, the Hamburg and Cologne courts, handling the majority of German media cases together with Berlin,[47] regularly grant *ex parte* preliminary injunctions.[48] The German Constitutional Court made clear that a fair trial required a hearing of the other side.[49] Still, when the application is filed swiftly, courts may grant *ex parte* injunctions, provided that the other side had the chance to respond to a warning letter, and the preliminary injunction corresponds with the scope of said warning letter.

Remedies are a claim for publication of a counterstatement[50] 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 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.[51] In cases of otherwise severe, culpable, 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.[52] 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.[53]

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. German parliament repealed the criminal provision regarding insults against foreign heads of state.[54] 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.[55]

46 There is no unanimous practice; some courts grant up to two months.

47 Between 2010 and 2012, almost two-thirds of appeal court rulings were decided by the Berlin (29 per cent), Hamburg (22 per cent) and Cologne (12 per cent) courts. Munich passed 7 per cent and Frankfurt passed 2 per cent of court rulings during this period (Jürgens, *NJW* 2014, 3061, 3064).

48 According to Section 32 ZPO, the court where the effect of the infringement occurs (i.e., where the content can be accessed by internet users) is also competent (known as the 'flying jurisdiction').

49 BVerfG, Case 1 BvR 2421/17, judgment of 30 September 2018.

50 Based on states' media acts (e.g., Article 10 Bavarian Act on the Press) and Section 56 RStV 'TV/radio and journalistic telemedia'.

51 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.

52 BGH, Case VI ZR 323/95, judgment of 26 November 2016.

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

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

55 Berlin Administrative Court, Case 6 K 13.19, judgment of 16 April 2019.

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. The *Afghanistan Papiere* case in which the German government unsuccessfully tried to prevent publication of military documents based on copyright is discussed in Section III.i.

A proceeding before the German Constitutional Court filed by Reporters Sans Frontières and other investigative journalists against an act granting broad supervisory powers in respect of foreign media and journalists to the German Foreign Intelligence Service (BND)[56] is still pending.

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.[57] The German law surrounding protected work as a result of an author's intellectual creation,[58] exploitatation of work and the related exceptions and limitations is particularly harmonised with EU law.

Several recent cases concern the act of public communication. Following a ruling of the CJEU, the BGH confirmed[59] that uploading a picture on a website, even if it had been made available on another website with the rights owner's consent without protection against download, consituted an act of public communication. Merely providing TV sets for hotel guests did not qualify as act of public communication, unless the hotel was involved in the transmission of the signal,[60] contrary to a hospital that provided not only radio sets, but also transmitted the signals via its internal cable network.[61] Another public communication ruling by the Cologne Court of Appeal[62] concerned a TV show using content of mishaps in other shows. The Court held that the producers could not rely on limitations and exceptions, since unaltered use of the original material would neither qualify as parody nor could it rely on the quotation exception, as said exception requires a discussion of the quoted content.

The question of whether use of a two-second sound sample without a licence was legitimate ignited a 20-year legal battle that led to a ruling of the German Constitutional Court[63] overturning the BGH as not having sufficiently considered freedom of art, and referring the matter back. The BGH, dealing with the case for the third time, referred the

56 BVerfG, Case 1 BvR 2835/17, concerning the BND Act.

57 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.

58 CJEU, Case C-310/17, *Levola v. Smilde Foods BV*, judgment of13 November 2018.

59 BGH, Case I ZR 267/15, *Cordoba II*, judgment of 10 January 2019, based on CJEU, Case C-161/17, judgment of 7 August 2018.

60 BGH, Case I ZR 127/17, judgment of 19 July 2018.

61 BGH, Case I ZR 85/17, judgment of 11 January 2018.

62 OLG Cologne, Case 6 U 116/17, judgment of 20 April 2018, referring in respect of parody to BGH, Case I ZR 9/15, *Auf fett getrimmt*, judgment of 28 July 2016 – and quotation limitation to BGH, Case I ZR 42/05, *TV-Total*, judgment of 20 December 2007.

63 BVerfG, Case 1 BvR 1585/13, judgment of 31 May 2016.

matter to the CJEU. The CJEU[64] has now clarified that this was not within the scope of the distribution right. It accepted that the reproduction right could be affected, unless the modified use in the new work is unrecognisable to the ear. Even if the use of the sample was recognisable, the quotation limitation might apply, requiring a user to enter into 'dialogue' with the original work (i.e., an interaction between the quoting work and the work quoted is necessary). Finally, the CJEU made clear that no other exceptions and limitations than those contained in Article 5 of the InfoSoc Directive[65] can be applied, rejecting the free use exception provided by German law in Section 24 of the UrhG.

The implementation of the Directive on Copyright in the Digital Single Market[66] is imminent. Germany and the German reporter Axel Voss supported the Directive, despite the broad controversy created among the public and legal experts by Articles 15 and 17.[67] Germany had agreed to the Directive with a protocol note that the implementation shall make upload filters as far as possible unnecessary.[68] Based on a consultation process, it is intended that the European Commission will publish guidelines for the implementation of the Directive, which is due by 7 June 2021 (i.e., shortly before German federal elections in autumn 2021).

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 highlighted that different standards must be applied in respect to word and photojournalism.[69] The plaintiff, the husband of a Swedish princess, sued regarding publication of an article that included a photo of the family feeding their baby in a public park. The Court accepted a legitimate interest in the daily life of public persons, but argued that the care of the parents for their child was specifically protected by the parents' personality rights, and that the parents had a legitimate interest that the details were not fixed in a photo and presented to the public. However, the very general text of the article would only affect the outer private sphere and was so general that the public interest prevailed against the personality rights, so that the publication was considered legitimate.

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.[70] The issue returned with the popularity of ad blocker tools, allowing users to block advertisements on websites. The BGH accepted[71] that an ad blocker that permitted advertising matching certain criteria that was accordingly whitelisted against a payment neither constituted an act of unfair hindrance nor an aggressive commercial practice, or otherwise infringed the

64 CJEU, Case C-476/17, *Metall auf Metall*, judgment of 29 July 2019.

65 Directive 2001/29/EC.

66 Directive (EU) 2019/790.

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

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

69 BGH, Case VI ZR 56/17, judgment of 29 May 2018.

70 BGH, Case I ZR 26/02, *Werbeblocker I*, judgment of 24 June 2004.

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

German Unfair Competititon Act.[72] A further case is currently pending before the BGH, where claims are, in particular, based on the German Competition Act.[73] The Munich Court of Appeal rejected an abuse of a dominant market position and also saw no agreement restricting competition.[74]

V COMPETITION AND CONSUMER RIGHTS

An increasing number of influencer marketing cases are reaching German courts,[75] 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.

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 also have to deal with net neutrality. A German mobile phone provider offered the 'stream on' product, allowing users in Germany to stream content of certain media partners without data traffic limitations (zero-rating) but with a limited bandwidth (1.7 Mb/s). The German regulator prohibited the product. Because the bandwidth limitation was incompliant with net neutrality and only available within Germany, it violated European roaming regulations. The Münster Administrative Appeal Court confirmed this in a second instance ruling in a preliminary proceeding.[76] The Regional Court of Düsseldorf, in a civil law case, prohibited a similar product of a competitor applying zero-rating only to specific apps of media partners, whereby the Court indicated that a zero-rating offer might comply with net neutrality should the range of media partners be sufficiently broad.[77]

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*[78] apply (i.e., links to legitimate content are permitted). Should the referenced content be unauthorised, the person responsible

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

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

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

75 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.

76 Münster Administrative Appeal Court, Case 13 B 1734/18, judgment of 12 July 2019.

77 LG Düsseldorf, Case 12 O 158/18, judgment of 8 May 2019.

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

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).[79]

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 an appropriate remuneration. An inadequate remuneration, in particular in a 'buy-out' contract, will not affect validity of the transfer of rights[80] but might lead to supplemental claims.[81]

VIII YEAR IN REVIEW

The years 2018 and 2019 were dominated by new legislation. The GDPR and the NetzDG have already had, and the Copyright Directive will have, a significant impact on the media and entertainment industry. Lessons can be learned from the implementation of the GDPR. Seemingly minor details, such as the media privilege of Article 85 of the GDPR, can have a profound impact on long-established industry practices. What is the legal basis for publishing pictures of individuals? Does the KUG, a law enacted in 1907 following disputes about pictures of Bismarck on his death bed,[82] still apply or can publication be based on legitimate interests (Article 6(1)(f) GDPR)? If so, how can the information obligations (Article 12 GDPR) be fulfilled? Certainly, these questions can be resolved by the courts,[83] but the legal uncertainty and associated costs created by even a minor issue, can be substantial. The discussion about Article 17 of the Copyright Directive, particularly on the effects of filtering on free speech, illustrates a far more significant and complex upcoming issue with the implementation of the Directive. Of course, the Copyright Directive makes perfectly clear that it does not affect freedom of speech or other exceptions or limitations to copyright law,[84] although it is unclear how this can be technically achieved. The European Commission is aware of this and has commenced a stakeholder dialogue,[85] which shall establish best practices and eventually lead to guidelines for the implementation of the Directive into national law.

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

80 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.

81 OLG Stuttgart, Case 4 U 2/18, judgment of 26 September 2018, on participation of a cameraman; Federal Labour Court, Case 5 AZR 71/18, judgment of 27 March 2019, regarding additional payment for use of articles in a database.

82 www.spiegel.de/spiegel/print/d-7933529.html.

83 LG Frankfurt, Case 2-03 O 454/18, judgment of 29 August 2019; OLG Cologne, Case 15 W 27/18, judgment of 18 June 2018.

84 Article 17, Paragraphs 7, 9 and 10 referring to works covered by an exception or limitation that are not affected by the Directive.

85 https://ec.europa.eu/digital-single-market/en/news/organisation-stakeholder-dialogue-application-article-17-directive-copyright-digital-single.

IX OUTLOOK

Digitalisation will remain the driving force. In addition to the implementation of the Copyright Directive, the Interstate Media Treaty that will replace and develop the Interstate Broadcasting Treaty further, is about to be concluded.[86] The Interstate Media Treaty shall implement the Audiovisual Media Services Directive[87] and provide a modern legal framework for broadcasting and telemedia services. An interesting ruling can also be expected from the CJEU, which will have to decide, based on a referral from the BGH,[88] whether the YouTube service qualifies as an act of public communication, and therefore, YouTube may potentially be directly liable for an infringement of copyright law. Should the CJEU reject this, it will need to clarify whether the hosting privilege (Article 14 E-Commerce Directive) applies to YouTube.

86 www.heise.de/newsticker/meldung/Staatssekretaerin-Medienstaatsvertrag-ist-kurz-vor-dem-Abschluss-4536236.html.

87 Directive (EU) 2018/1808.

88 BGH, Case I ZR 140/15, judgment of 13 September 2018.

Appendix 1

ABOUT THE AUTHORS

MARK PETERS

Grünecker Patent und Rechtsanwälte PartG mbB

Mark Peters is a 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 on the new European Trade Secrets Directive and the German Implementation Act for a German legal publisher.

GRÜNECKER PATENT UND RECHTSANWÄLTE PARTG MBB

Leopoldstrasse 4
80802 Munich
Germany
Tel: +49 89 21 2350
Fax: +49 89 22 0287
peters@grunecker.de
www.grunecker.de

an LBR business

ISBN 978-1-83862-044-8