THE MEDIA AND ENTERTAINMENT LAW REVIEW

THIRD 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.

The year 2021, like 2020, has been an unusual and challenging one, as the media and entertainment industries continue to adapt to the ravaging effects of the covid-19 pandemic. While there has been some degree of recovery in many countries, with lockdowns abating and the return of live music, festivals, theatrical performances and live sporting events, attendance at in-person events remains well below the norm. Concert promoters, touring artists and theatre and venue operators remain hard hit by the ongoing effects of the pandemic, but other parts of the media and entertainment industries have fared quite well. Bolstered by the continued growth of on-demand music streaming services, music publishers and record companies are flourishing. The market for on-demand video streaming continues to evolve, with numerous high-profile product launches over the past year, and disruptions to the previously prevailing practice of an exclusive period of theatrical release preceding streaming for high-profile movies. It remains to be seen which changes to the media and entertainment industries in response to the pandemic will prove 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, business, 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 sometimes 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 judgement as to the topics to highlight, recognising that space constraints required some selectivity. As will

be plain to the reader, aspects of this legal terrain, particularly those 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 2021

Chapter 5

GERMANY

Mark Peters[1]

I OVERVIEW

The terms '3G' and '2G' are the new buzzwords. These do not refer to the latest mobile transmission technologies (although 5G has also arrived in Germany at last) but rather describe the path out of the covid-19 pandemic. Most public spaces are open again to those who meet the 3G coronavirus rule, namely they are vaccinated, recovered or tested (*geimpft*, *genesen*, *getestet*). Some German states have also introduced 2G rules, lifting restrictions further for vaccinated or recovered persons and permitting business owners to admit only such persons. Nonetheless, the pandemic has severely impacted the culture and entertainment industry, with losses of €22.4 billion in 2020 and estimated losses of up to €30 billion for 2021.[2]

In contrast, online services, and in particular video streaming services (with an estimated revenue of €1.8 billion in 2021),[3] are still booming and it is likely that covid-19 will further accelerate the shift towards digital media and entertainment.

The German federal legislature has implemented various EU Directives, specifically the controversial Directive on Copyright in the Digital Single Market,[4] (in the German Copyright Liability of Online Content-Sharing Service Providers Act (UrhDAG)[5]), the Digital Content and Services Directive[6] and the Sale of Goods Directive,[7] which take effect in 2022 and will have a significant impact on consumer contracts. The Interstate Media Treaty (MStV)[8] has also been in force since 7 November 2021, finally addressing digital media. Further platform regulation is in prospect, specifically with the EU Commissions

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

2 https://www.ndr.de/kultur/Corona-verursacht-hohe-Schaeden-im-Kunst-und-Kulturbereich,kultureinbrueche100.html.

3 https://de.statista.com/outlook/dmo/digitale-medien/video-on-demand/video-streaming-svod/deutschland.

4 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

5 https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/UrhDaG_ENG.html?nn=6712350.

6 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

7 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

8 https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Medienstaatsvertrag_MStV.pdf.

proposals for a Digital Markets Act and a Digital Services Act.[9] Following the federal elections on 26 September 2021, a three-party government is likely to be formed, with a new legislative 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 radio broadcast media are also regulated by the states on the basis of the MStV 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,[10] 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[11] and regulations for the protection of minors.[12] 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),[13] which applies to telemedia services.[14] The TMG includes provisions on applicable law, information obligations, restriction of liabilities and data protection.[15] The MStV, providing core media regulation, 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.[16] The regulatory authorities supervise telemedia services, for which, in general, no licence is required, with the exception of regular live journalistic video streams.[17]

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).[18] Private parties (e.g., social networks) also need to consider their users' right to freedom of expression when acting

9 https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package.

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

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

12 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.

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

14 Electronic information and communication services, with the exception of telecommunications and broadcasting services.

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

16 Section 74 MStV.

17 A notification to the regulatory authority is sufficient for internet radio-only broadcasting.

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

in respect of content on their platform. Intellectual property rights are protected by the Copyright Act (UrhG)[19] and the Trademark Act (MarkenG),[20] which also protect titles of publications and cinematic or other comparable works. Germany has implemented the Directive on Copyright in the Digital Single Market in the UrhDaG, creating strict obligations that online content-sharing service providers (OCSSPs) must meet to avoid direct liability while also making sure that user rights are protected.[21] 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), the Constitutional Court (BVerfG) and the European Court of Human Rights have a strong impact on the media and entertainment industry.

Collecting societies play an important role within the German media and entertainment industry. On the basis of the Collecting Societies Act[22] and, in general, regulated by the German Patent and Trademark Office, they manage copyright or related rights on behalf of right holders.

Finally, the 10th amendment to the German Act against Restraints of Competition[23] has created a regulatory framework for dominant market participants in 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 Article 5, Paragraph 1 of the GG.[24] 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.

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

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

21 See https://www.lexology.com/commentary/intellectual-property/germany/grnecker/copyright-law-shifts-to-requirements-of-digital-single-market-overview.

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

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

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

The Network Enforcement Act (NetzDG) will help fight hate speech in social media,[25] as it applies 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. In response to criticism, the NetzDG was revised in 2021 to include, for example, a requirement for the introduction of counter-complaint channels and for disclosure requests to be based on court orders. Following the introduction of the NetzDG, internet users affected by measures such as platform-initiated content takedowns frequently challenged these before the courts.[26] While initially the courts seemed unwilling to accept actions taken by platforms based solely on the platforms' terms, later rulings have considered such actions to be legitimate, provided that the platform terms and their application take appropriate account of the users' rights (in particular the right to freedom of speech). The BGH has now confirmed that a platform can establish in its terms stricter content-takedown and user-blocking standards than those provided for in criminal law. Nevertheless, in the cases under consideration, the BGH found that the platform terms in place were invalid, as they did not require the platform to inform the user after the takedown of specific content or before the intended blocking of an account. In the absence of a valid contractual basis for these measures, the BGH ordered the platform to reinstate the content, reactivate the user account and cease and desist from applying those measures again in respect of the content at issue.[27]

Recent high-profile cases have addressed the limitations of free speech and media freedom. Notably, excessive reactions to legitimate parody were criticised in the *Böhmermann* case, in which German comedian Jan Böhmermann in his weekly satirical programme broadcast an offensive poem about the Turkish president. The Hamburg Court of Appeal prohibited elements of the poem referring to sexual acts for violating human dignity. The BGH rejected an appeal[28] and a further appeal to the BVerfG is still pending.

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.[29]

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

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

26 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 (BVerfG), 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.

27 BGH, cases III ZR 179/20 and III ZR 192/20, ruling of 29 July 2021.

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

29 Section 130 German Criminal Act (StGB).

to the effects of the strike, and this usage is covered by the right to freedom of speech.[30] In addition, ratings on an online-platform that were created automatically by an algorithm can qualify as an expression of opinion and be protected by freedom of speech.[31]

ii Newsgathering

Regularly also for investigative purposes, the use of illegal means to obtain information is not permitted, although there are exceptions. According to Section 123 of the German Criminal Act (StGB), entering property against the will of its owner is a criminal act – unless the owner specifically or implicitly consented (even if that consent was fraudulently obtained). Secret recordings of private conversations and the use of eavesdropping devices,[32] as well as accessing data without authorisation,[33] in general constitute criminal acts, although these rights can only be asserted by the persons concerned and not by an employer.[34]

Journalists are generally permitted to film and take pictures of people in public spaces as background or part of a gathering, parade, etc. under Sections 22 and 23 of the Act on Protection of Copyrights in Works of Art and Photographs (KUG).[35] Since the introduction of the General Data Protection Regulation (GDPR), there has been discussion whether the KUG in particular is still applicable or whether it was effectively repealed by the GDPR. On the basis of the media privilege provided for in Article 85 of the GDPR, the BGH has considered the KUG applicable for journalistic purposes.[36] Similarly, it has also been discussed whether the media are subject to the GDPR in relation to newsgathering. According to the Hamburg Data Protection Authority, the GDPR applies; however, among other things, a recording for journalistic purposes could be justified on grounds of legitimate interest,[37] and it might also not be necessary to provide the information to the data subject as generally required by Articles 11(1) and 15(5)b of the GDPR, as this would usually be impossible.[38] In contrast, the Court of Appeal of Cologne has considered media privilege also to apply to the process of newsgathering, whereby specific aspects of the GDPR (e.g., specifically protected data categories[39]) will have to be considered when balancing opposing interests.[40] With the introduction of Sections 12 and 23 of the MStV, the scope of application for the GDPR is limited. The rules for lawful processing[41] and also the rights of the data subject[42] do not apply to media companies processing personal data for journalistic purposes, although this

30 OLG Dresden, case 4 U 1822/17, judgment of 21 August 2018.
31 BGH, Case VI ZR 496/18, judgment of 14 January 2020.
32 Section 201 StGB.
33 Section 202a, 202b StGB.
34 BVerfG, case 1 BvR 2252/04, judgment of 18 November 2004.
35 www.gesetze-im-internet.de/kunsturhg/.
36 BGH, Case VI ZR 246/19, judgment of 7 July 2020.
37 Article 6(1)f GDPR.
38 Non-binding legal analysis by the Hamburg Data Protection Authority, www.filmverband-suedwest.de/wp-content/uploads/2018/05/Vermerk_DSGVO.pdf.
39 Article 9 GDPR.
40 Higher Regional Court of Cologne, 15 W 21/19, judgment of 18 July 2019.
41 Article 6 GDPR.
42 Article 12 GDPR *et seq.*

is interpreted narrowly and requires a focus on the contribution made to the formation of public opinion.[43] The courts will need to clarify whether only classical media companies can rely on this exception or whether it extends to individual journalists (e.g., operating blogs).

As the BGH confirmed in the *Organic chicken* ruling,[44] unlawfully obtained information may also be published in specific circumstances where the public interest prevails over the interest of a commercial entity. The BGH considered it significant that the animal activist, not the broadcaster, had committed the illegal act; the broadcaster had only made use of it.

The constitutional protection of the media extends not only to the publication of information, but to all aspects of journalistic work, from gathering information to publication. This includes (freelance) journalists taking photos and supplying those to the media.[45]

Legislation on trade secrets[46] clarifies that the use or publication of trade secrets for legitimate purposes, including media freedom, is permitted. Generally, it only matters whether the use of trade secrets was for legitimate purposes, and not whether a payment was involved. Trade secrets are also only protected where the owner has a legitimate interest in secrecy.[47]

iii Freedom of access to government information

The right of access to information by the media is guaranteed by Article 5(I)2 of the GG.[48] Access to German federal government information[49] is regulated by the Freedom of Information Act (IFG);[50] a legal basis for access by the media is also provided by the Press and Media Acts and Section 5 of the MStV.[51] Access to court files must be granted where there are grounds of legitimate interest.[52] The right of access according to the IFG[53] is limited to areas of special public interest and where the decision-making process, personal data and intellectual property rights and trade secrets are affected. A narrow interpretation of these limitations is required. According to the *Afghanistan Papiere* ruling of the CJEU,[54] limiting access to, or publication of, government information by the media on the basis of copyright will generally be difficult, as common copyright exceptions will apply at the least. The BGH confirmed this in *Afghanistan Papiere II*, arguing that the newspaper could rely on the exception for reporting about current events[55] when publishing government documents. In addition, the right of (first) publication[56] was not affected, as the applicable personality right was not aimed at protecting the secrecy of information that might be negative for the government.[57]

43 BGH, case VI ZR 345/09, judgment of 1 February 2021.
44 BGH, case VI ZR 396/16, judgment of 10 April 2018.
45 BVerfG, case 1 BvR 1716/17, ruling of 23 June 2020.
46 Section 5(1) German Trade Secrets Act (GeschGehG); www.gesetze-im-internet.de/geschgehg/__5.html.
47 Section 2(1) GeschGehG.
48 German Federal Administrative Supreme Court (BVerwG), case 6 A 2/12, judgment of 20 February 2013.
49 German states have enacted corresponding legislation granting access to the information of their administrations.
50 https://www.gesetze-im-internet.de/englisch_ifg/englisch_ifg.html.
51 Also applicable for journalistic telemedia services according to Section 18(4) MStV.
52 Section 299, Paragraph 2 German Civil Procedural Act.
53 Sections 3 to 6 IFG.
54 CJEU, case C-469/17, *Afghanistan Papiere*, judgment of 29 July 2019.
55 Section 50 UrhG.
56 Section 12 UrhG.
57 BGH, case I ZR 139/15- *Afghanistan Papiere II*, judgment of 30 April 2020.

The administration may levy charges, but these cannot have a prohibitive effect and must be appropriate.[58]

In connection with the covid-19 pandemic, the administrative courts confirmed that the media can request information about the number of covid-19 infections, including the data broken down by municipality,[59] as no infected individuals could be personally identified on the basis of this aggregated data.

The Federal Administrative Court had to decide on an information request made by the German magazine *Der Spiegel*, which had requested access to all information available in connection with the notorious 1962 *Spiegel* affair, in which 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 that this was necessary to protect its sources and their post-mortem personality rights. The Court rejected this, finding that the protection of sources concerning matters concluded decades ago could only be justified if disclosure would impede the future work of the security authorities.[60]

iv Protection of sources

Press and media freedom[61] also grants protection for sources. Accordingly, professional media representatives have a right to refuse information in a criminal proceeding.[62] According to the German BVerfG, communication data is not protected by press or media freedom, but by the constitutional right protecting telecommunications secrecy. Thus, based on court orders in respect of serious criminal acts, access to communications data by criminal prosecution authorities remains possible.[63] Correspondingly, press and media freedom also limits the right of the prosecution authorities to seize documents.[64] The BVerfG, following a complaint by Reporters Sans Frontières and investigative journalists, invalidated a federal act granting the German Foreign Intelligence Service[65] broad powers regarding telecommunications surveillance specifically affecting foreign media and journalists. The BVerfG held that the state authority is bound by the GG even outside Germany. Although the scope of protection granted outside Germany might be different, the constitutional guarantee of media freedom[66] also protects foreign journalists outside Germany against telecommunications surveillance.

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

59 BayVGH, case 7 CE 20.1822, preliminary judgment of 19 August 2020, Higher Administrative Court Koblenz, 2 B 11397/20, preliminary judgment of 23 November 2020.

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

61 Article 5I, Section 2 GG.

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

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

64 Section 97, Paragraph 5S1 German Criminal Procedure Act.

65 BVerfG, case 1 BvR 2835/17, judgment of 19 May, 2020 invalidating the German Foreign Intelligence Service Act.

66 Article 5, Paragraph iS2 GG.

v Private action against publication

The majority of claims are based on the violation of an individual's personality right. Pursuant to the GG, 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 is protected against indiscretions;
b a person's honour and reputation;
c the truthful presentation of a person in public; and
d finally, the most recent addition is the right of defence against commercial exploitation of a person's characteristic attributes.[67]

The protection granted by the personality right is not limited to private individuals, but also covers commercial and other entities.[68] Commercial entities can also rely on the right in the context of establishing and conducting a business enterprise, particularly in relation to false product reviews and calls for boycotts.

Preliminary injunctions are common in German legal proceedings, particularly under media law. Regularly granted by the court *ex parte*, this 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 circumstances to have an element of particular urgency, so applications generally have to be filed within one month of notice of an infringement. The BVerfG has made clear that a fair trial requires the other side to be granted a hearing.[69] Nonetheless, when an application is filed swiftly, courts may grant an *ex parte* injunction provided that the other side has had the chance to respond to a warning letter and the preliminary injunction corresponds to the warning letter in terms of scope.

It remains to be seen whether the establishment of further specialised chambers for media cases will change the current pattern, in which the vast majority of media cases are heard by only five courts.[70]

Remedies are a claim for publication of a counterstatement[71] or correction regarding an incorrect publication of facts. However, these require the initial incorrect statement to be republished. Thus, cease-and-desist claims are usually more appropriate. Finally, there are also claims for damages and compensation for non-material 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 BGH confirmed in a case concerning the unauthorised use of a picture of a prominent person for the purpose of directing users to an unrelated article.[72] In cases of otherwise serious, culpable and non-recompensable violations of a person's personality rights, compensation claims

67 Wenzel-Burkhardt and Pfeifer, *Das Recht der Wort- und Bildberichterstattung*, 6th edition, p. 193 *et seq.*
68 Personality rights for legal entities are also addressed by the CJEU in case C-194/16, judgment of 17 October 2017.
69 BVerfG, case 1 BvR 2421/17, judgment of 30 September 2018.
70 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.
71 Based on state media acts (e.g., Article 10 Bavarian Act on the Press) and Section 20 MStV.
72 OLG Köln, case 15 U 160/18, judgment of 28 May 2019, awarding €20,000, confirmed by BGH, case I ZR 120/19, ruling of 21 January 2021.

become due not to compensate a loss but to satisfy the party concerned. Their dissuasive effect must also be explicitly accepted.[73] 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 chancellor Helmut Kohl, who passed away while the proceeding was pending.[74]

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. Parliament repealed the criminal provision regarding insults against foreign heads of state.[75] The Berlin Administrative Court rejected a complaint regarding a statement by Chancellor Angela Merkel, who had referred to the poem as 'deliberately violating', finding that because Chancellor Merkel had distanced herself from her previous statement a repeat occurrence was not to be expected.[76]

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 will be removed.

With the Act against Hate and Incitement, significantly stricter penalties for hate crimes, such as threat, insult and slander of politicians are to be introduced,[77] as well as an obligation in Section 3a of the NetzDG for social networks to report to the federal police (BKA) specific serious hate crimes as incitement to hatred.[78] According to press reports, both Google and Facebook have filed actions with the Administrative Court of Cologne opposing this further reporting obligation, as they consider the required transmission and collection of user data to the BKA to be unconstitutional because of its significant impact on their users.[79]

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, with German courts in turn referring a significant number of cases to the CJEU.[80] The German law surrounding work that is protected as a result of an author's intellectual creation,[81] exploitation of work and the related exceptions and limitations is particularly harmonised with EU law.

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

74 OLG Köln, case 15 U 64/17, judgment of 29 May 2018, currently pending appeal before the BGH (cases VI ZR 248/18 and VI ZR 258/18).

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

76 VG Berlin, case 6 K 13.19, judgment of 16 April 2019.

77 Sections 241, 185 and 188 StGB respectively.

78 Section 130 StGB.

79 VG Köln, cases 6 L 1277/21 and 6 K 3769/21.

80 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.

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

On the basis of a referral from the BGH, the CJEU further clarified its case law on linking. In this context, while the embedding of a work on an internet site and making it freely accessible by way of framing is permissible with the consent of the right holder, it constitutes unauthorised communication to the public of the work if it circumvents protective measures against framing taken or arranged by the right holder.[82] Accordingly, the BGH confirmed that collection societies obliged under German law to license content can, in their terms, require licensees to implement protective measures against framing, should this correspond with the interests of the typical right owners the societies represent. The particular matter at issue has now gone to the Berlin Court of Appeal for clarification of the right owners' interests.[83]

The BGH extended its concept regarding the liability of vicarious infringers to include further intermediaries by holding liable a domain registrar that had not de-connected a domain name upon receiving notice of persistent and flagrant copyright-infringing content on a corresponding website, in respect of which the right owner had been unable to enforce its claims against the direct infringer.[84] Even before the BGH ruling, the Court of Appeal of Cologne had held a content delivery network liable as a vicarious infringer.[85] Lastly the Regional Court of Hamburg, also held a provider of domain name services liable as a vicarious infringer.[86]

Germany has implemented the Directive on Copyright in the Digital Single Market in the UrhDaG. Platform operators that fall under the definition of a service provider in Section 2 of the UrhDaG (known as online content-sharing service providers, or OCSSPs) fulfil the criterion of 'communication to the public' if they provide the public with access to copyrighted works that have been uploaded by users of the service.[87] As a result, they become directly liable as perpetrators for content uploaded by their users if they do not obtain comprehensive licences from the authors in advance[88] nor proactively take sufficient measures to counteract the upload of infringing content.[89] At the same time, there are numerous exceptions for legally permitted[90] and presumed permitted uses,[91] including the option for the user to flag content as permitted[92] according to an exception. Where content is presumed permitted, the works or parts of works in question are to be communicated to the public on the basis of a rebuttable presumption of their permissibility until a complaint procedure

82 CJEU, case C-392/19, judgment of 9 March 2021.
83 BGH, case I ZR 113/18, judgment of 9 September 2021.
84 BGH, case I ZR 13/19, judgment of 15 October 2020.
85 OLG Köln, case 6 U 32/20, judgment of 9 October 2020.
86 LG Hamburg, case 310 O 99/21, judgment of 15 May 2021.
87 Section 1(1) UrhDaG.
88 Section 4 UrhDaG.
89 Section 7(1) UrhDaG.
90 Section 5 *et seq.* UrhDaG.
91 Section 9 *et seq.* UrhDaG.
92 Section 11 UrhDaG.

provided by the platform operator is carried out.[93] The Online SatCab Directive[94] was also implemented to facilitate a technology-neutral, cross-border (and domestic) retransmission of television and radio programmes.

The Internet Copyright Clearing House[95] started to operate in 2021. Founded by German internet access providers and right owners it aims to examine and advise on the implementation of applications for blocking access to structurally copyright-infringing websites.

ii Personality rights

The concept of personality rights under German law is broad (see Section II.v), covering not only the commercialisation of an individual's identity but also protecting a person's right to live as an equal within society. This right is also protected by criminal law (e.g., Section 130 of the StGB, prohibiting incitement to hatred and protecting individuals or parts of society from being subject to such incitement for belonging to a certain group). On the basis of the incitement-to-hatred provision, election campaign posters of a German right-wing party with the text 'Hang the Greens' were ultimately prohibited by the Higher Administrative Court of Bautzen (overruling the court of first instance). The Court considered the slogan to be a clear call for violence against members of the Green party and rejected the defence that the slogan merely expressed that posters backed with green colour were to be put up.[96]

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.[97] The issue returned with the increasing popularity of ad blocker tools allowing users to block advertisements on websites. The BGH accepted[98] that an ad blocker that permitted advertising matching certain criteria that was accordingly whitelisted upon payment did not infringe the German Unfair Competition Act.[99] The saga continues with the BGH's *Adblock III* ruling,[100] based now on the German Competition Act.[101] The BGH rejected the assessment of the Munich Court of Appeal[102] excluding a market dominant position of the 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.

93 Section 14 UrhDaG.

94 Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC.

95 https://cuii.info/.

96 OVG Bautzen, case 6 B 360/21, judgment of 21 September 2021.

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

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

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

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

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

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

V COMPETITION AND CONSUMER RIGHTS

An increasing number of influencer marketing cases are reaching German courts[103] 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. Three cases have now been decided by the BGH, which made it clear that an Instagram post containing 'tap tags' with references or links to manufacturers did not necessarily qualify as an advertisement nor have to be designated as one. Such a designation was only required where the influencer received compensation (not necessarily financial) or the post contained excessive promotion of the products concerned.[104]

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 the incentive provided by participation in a raffle meant that users' ratings could be no longer be considered neutral.[105]

Net neutrality is addressed by Article 3 *et seq.* of Regulation (EU) 2015/2020 and in German law by Section 41 of the German Telecommunications Act, which provides a legal basis for technical regulation. German courts had already held that mobile phone tariffs allowing users to stream content from certain media partners without data traffic limitations (zero-rating) violated the principle of net neutrality,[106] and this has now also been confirmed by the CJEU.[107] The Regional Court of Munich held that a provision in the general terms of a telecommunications provider, permitting the use of a certain tariff only in connection with mobile devices, as did not comply with the concept of net neutrality and was therefore invalid.[108]

VI DIGITAL CONTENT

The BGH developed the concept of the liability of vicarious infringers to address the liability of intermediaries 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, for which liability is limited to cease-and-desist claims – a vicarious infringer is not liable for damages. More recently there has been a tendency to extend liability to more distant intermediaries such as domain registries or content delivery networks (see Section IV.i). In terms of linking, the criteria developed by the CJEU in *GS-Media*[109] apply (i.e., links to legitimate content are

103 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.

104 BGH, cases I ZR 126/20 (Hummels), I ZR 125/20 (Hanne) and I ZR 90/20 (Huss)), judgments of 9 September 2021.

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

106 Article 3 Regulation (EU) 2015/2020; see OVG Münster, 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.

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

108 LG München, case 12 O 6343/20, judgment of 28 January 2021 under appeal before OLG München, case 29 U 747/21.

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

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 right owner).[110]

With the implementation of the Digital Content and Services Directive, the German Civil Code (BGB)[111] now contains comprehensive regulations for digital content. Consumer protection provisions apply, including where the consumer provides 'merely' personal data and does not pay for the services received.[112] Updates, including security updates, required for access to the digital content will have to be provided for the relevant period[113] (although the relevant period is not specified). Also public communication on behalf of and with knowledge of the manufacturer or seller (e.g., an influencer post), will be relevant in determining the contractually bound properties of digital content.[114]

VII CONTRACTUAL DISPUTES

Disputes regularly concern adequate remuneration for artists and authors. According to Section 32 of the UrhG, authors can 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[115] but might lead to supplemental claims.[116] If remuneration is only a fraction of comparable tariffs, this clearly indicates that it is inadequate.[117]

VIII YEAR IN REVIEW

Covid-19 was the predominant factor for at least the first half of 2021. In general, courts accepted restrictions on public life, including the prohibition of public events such as concerts, if this was proportionate and required in light of health risks arising, in particular from more aggressive virus variations. As the Higher Administrative Court of Munich pointed out, when determining whether measures are proportionate, public compensation payments for affected business are also a consideration.[118] A plethora of cases regarding compensation claims by businesses affected by the lockdowns against their insurers are pending. So far, the outcome

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

111 Effective from 1 January 2022.

112 Section 312(1a), 327(3) BGB.

113 Section 327f BGB.

114 Section 327e(3) BGB.

115 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.

116 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.

117 OLG Hamm, case 4 U 3/18, judgment of 8 June 2021.

118 VGH München, cases 20 NE 20.2601, judgment of 16 November 2020 and 20 NE 21.919, judgment of 15 April 2021.

of these proceedings has depended on the specific contractual terms and, at court of appeal level, compensation claims were regularly rejected, but it is clear that the BGH will have the final say.

IX OUTLOOK

For 2022, digitalisation will remain a driving force in the media and entertainment industry, but the classic entertainment industry should also revive, with a return to large public events and a pledge of €2.5 billion from federal government to support cultural events.[119]

After 16 'Merkel years', a new chancellor and government will take over. Innovation and digitalisation will be high on the agenda, with high-speed gigabit internet becoming available for all users. In addition, European technological sovereignty across the digital industry, from chip manufacturers to digital platforms, will be an important issue. With the European Parliament discussing and likely to pass the Digital Markets Act and the Digital Services Act, new regulations specifically addressing online intermediaries and platforms are on the cards.

As challenging as the introduction of, and compliance with, new regulations may be, the example of the GDPR and similar laws now being introduced across the globe show that these legislative developments are important not only for establishing new digital products and services, but also for the acceptance of these products by consumers. In any event, for all legal professionals in the field of media and entertainment law, further new regulations mean at least that 2022 is guaranteed not to be boring.

119 https://www.bundesregierung.de/breg-de/bundesregierung/staatsministerin-fuer-kultur-und-medien/sonderfondskulturveranstaltung-1917654.

Appendix 1

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