Siebeke Lange Wilbert

A question of balance

In Germany, balancing the protection of personal rights with press freedom frequently leads to controversial court judgments

Disputes between celebrities and the popular press about the legality of published images and reports are very common. When examining such issues, it is necessary to weigh the personal rights of the individual against public interest and press freedom.

The Federal Constitutional Court dealt with three rulings of the Federal Court of Justice on photo stories about Caroline, princess of Hanover (BvR 1626/07, February 26 2008). The first case concerned the publication of photographs of Caroline on a winter sports holiday with her husband, Prince Ernst August of Hanover. The article discussed the serious illness of the late Prince Rainier of Monaco, Caroline's father. The Federal Court of Justice ruled that publication of the photographs was permitted, as it was based on a contemporary historical event – namely, how Caroline was able to reconcile her private life with her father's illness.

The second case concerned the publication of photographs of Caroline and Ernst August at a winter sports resort, with the accompanying text discussing the annual 'Rosenball' in Monaco. In this case there was no contemporary historical event angle, as the Rosenball had nothing to do with the skiing holiday, so the published photos were prohibited.

The third case concerned photographs of the couple on a road trip holiday; the accompanying text discussed how Ernst August had rented a holiday villa in Kenya. The Federal Court of Justice prevented publication of the photographs, since neither the images nor the written report provided any contribution to a discussion of general interest or represented a contemporary historical event.

The Federal Constitutional Court confirmed the decisions in the first two cases, but determined an infringement of press freedom in the third, as the general reader may have been interested in the apparent changed behaviour of a small class of well-heeled celebrities (ie, renting a holiday villa suggested that wealthy individuals can also be frugal).

The European Court of Human Rights confirmed that in their interpretation, the German courts had not infringed Article 8 of the European Convention on Human Rights and also highlighted that in such cases, national courts have considerable scope for assessment (40660/08, February 7 2012).

According to the Federal Constitutional Court, entertaining reports about celebrities enjoy the protection of press freedom. However, press freedom cannot be granted without limits; it is especially worthy of protection if the report contributes to issues of general interest. In contrast, personal rights can take precedence if media reporting intrudes on an individual's private life – moments of relaxation that lie beyond the remit of his or her professional obligations and day-to-day duties.

The protection of personal rights with regard to the publication of photographs, as opposed to written articles, can differ significantly (Federal Court of Justice, VI ZR 230/08, October 26 2010). The requirements for permissible photo reporting are more stringent than those for written reporting. As mentioned, the publication of photographs is generally permitted only if the image can be categorised within the area of contemporary history and if a public interest element exists. A written report need not satisfy these requirements; furthermore, there are no requirements to represent celebrities or well-known individuals in a certain way in public reporting, as long as certain limits of reportage (eg, libel or defamation) are not infringed. Anyone who appears as a public figure must expect his or her conduct to be evaluated and discussed in the media to a certain extent.

Advertising with celebrity images

Companies may try to raise the profile of their products among consumers by making references to celebrities in their advertisements. This may involve a celebrity endorsement. Sometimes advertisements can appear to contain a celebrity endorsement, but in actuality the rights holder has not provided his or her consent to the use of his or her image. An advertisement is not necessarily inadmissible if there has been unauthorised use of a celebrity's image; it rather depends on the overall context as to how the rights holder is incorporated in the advertisement.

One such case relates to the world of politics. Car-hire firm Sixt used head shots of government ministers in one of its advertisements. The photo of the finance minister, who had recently resigned after a short-lived term in office, was crossed out and the advertisement displayed the following caption: "Sixt also leases cars to employees during their probationary period."

The former finance minister filed suit against Sixt, claiming compensation for damages. The Federal Court of Justice rejected the lawsuit (I ZR 182/04, October 26 2006). While the image of the former minister in the advertisement constituted an encroachment of his personal rights, Sixt was able to invoke the freedom of opinion as enshrined in the Basic Law (§§ 23 I No 1, 23 II of the Law on the Protection of Copyright in Works of Art and Photographs, Article 5 I Constitutional Law).

In general, an advertisement that uses the image of a celebrity without his or her consent is admissible if:

- the advertisement deals with an event that has been discussed in the public realm in a satirical or parodic manner (in this case, the finance minister's resignation after a short-lived period in office was compared with an employee who fails probation);
- the image or advertising value of the named person is not exploited through the use of his or her name; and
- an impression is not created of the celebrity identifying himself or herself with or endorsing the product on sale.

According to the Hamburg Higher Regional Court, these principles similarly apply to famous sports personalities, such as Michael Ballack (7 U 125/09, March 2 2010).

Post-mortem personal rights

In its 1999 *Marlene Dietrich* rulings, the Federal Court of Justice decided that the protection of personal rights, such as image rights and naming rights, extends beyond the protection of moral interests to incorporate commercial interests (I ZR 49/97, December 1 1999). The asset-related element of personal rights continues to exist after the rights holder's death, as long as the moral interests continue to be protected. The corresponding rights are passed on to the heirs and can be exercised by them in accordance with the decedent's express or presumed will.

Some years later, in its *kinski.klaus.de* decision, the Federal Court of Justice specified that the duration of protection for the asset-related elements of post-mortem personal rights (eg, claims for damages due to the publication of photographs of the beneficiary) is limited to 10 years after death (I ZR 277/03, October 5 2006). The personal right to a name incorporates not only the name at birth (Klaus Nakszynski) but also, under certain conditions, the beneficiary's artistic name (in this case, Klaus Kinski).

Therefore, the post-mortem protection of general personal rights ends 10 years after the death of the beneficiary. This limited timespan has been criticised in the literature (in comparison, an author's personal copyright lasts for 70 years after his or her death).

In the event of infringement of the moral components of post-mortem personal rights under civil law (eg, in the case of offensive reporting), protection can remain effective for longer than 10 years after the beneficiary's death. In such case, however, the rights holder is entitled only to defensive claims (injunction) and not compensation for damages. Insofar as the injurious activities are stopped and the infringing party has provided a cease and desist declaration with penalty clause, the infringing party need fear no further sanctions from the heir in the event of infringement of moral components of personal rights – which is also viewed critically in the literature.

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Trademark protection for symbols based on a celebrity's name or image

Images or names of celebrities can generally be protected as trademarks. However, the specific goods and services for which a brand can be protected must be evaluated on a case-by-case basis. In its *Marlene Dietrich Image II* decision (I ZB 62/09, March 31 2010) the Federal Court of Justice held that a German figurative mark showing the photographic portrait of Marlene Dietrich could be registered if the mark was understood not as a descriptive reference to the depicted person, but rather as a proof of origin. This is the case for merchandise (eg, items of clothing, shoes and headgear) which contains the mark on a label inside the item of clothing. With other goods, such as audio cassettes, CDs, DVDs, cinema and television movies or books, the mark would be understood not as a brand, but simply as a descriptive reference –in this case, that the goods related to Marlene Dietrich in terms of their contents or subject matter.

Even if applicants have registered the image of a celebrity as a trademark, they are likely to encounter problems. On the one hand, the portrayed person (or his or her heirs) may demand the deletion of the trademark on the basis of the personal rights of the portrayed person and/or the perceived registration of the trademark in bad faith, as well as banning its use or claiming compensation if the applicant did not obtain the rights holder's consent.

On the other hand, in specific cases it may not be possible to assert trademark rights against third parties if the brand is registered and an opponent uses the mark even for identical products. If the countermark is used not as a trademark, but only for the purpose of decoration (eg, as a large image on a t-shirt), or if the mark is used descriptively, the trademark owner must tolerate its use. In addition, in specific cases, third parties which use a registered trademark can invoke the limits of freedom of opinion and artistic freedom, especially if they use the mark in a satirical context. WTR