

# SCRIPT-ed

*Volume 1, Issue 1, March 2004*

## **Human Dignity and the Commercial Appropriation of Personality: Towards a Cosmopolitan Consensus in Publicity Rights?**

*Olaf Weber\**

### **Abstract**

*This article is concerned with the commercial appropriation of human personality and its regulation in different legal systems. Where accepted, so called “publicity rights” allow for the exclusive commercial exercise of a person’s publicity values. A tradable worth can be found in many personal characteristics such as voice, signature or pseudonym. Predominantly, however, it accrues to one’s name and likeness. It is argued that such potential rights are inherent in every human being.*

DOI: 10.2966/scrip.010104.160

© Olaf Weber 2003. This work is licensed through [SCRIPT-ed Open Licence \(SOL\)](#).

---

\* LL. M.; ass. iur. in Brussels.

## **A) Introduction and Outline**

This article is concerned with the commercial appropriation of human personality and its regulation in different legal systems.<sup>1</sup> Where accepted, so called “publicity rights”<sup>2</sup> allow for the exclusive commercial exercise of a persona’s publicity values.<sup>3</sup> A tradable worth can be found in many personal characteristics such as voice, signature or pseudonym.<sup>4</sup> Predominantly, however, it accrues to one’s name and likeness.<sup>5</sup> It is argued that such potential rights are inherent in every human being.<sup>6</sup>

### **I. From privacy to property: the hybrid character of commercial personality rights**

The law of publicity, historically, is closely linked to the concept of privacy:<sup>7</sup> In an 1890 article Warren and Brandeis postulated a common law right to be let alone in the United States.<sup>8</sup> Their conclusions were based on dignitary rather than on commercial aspects.<sup>9</sup> In 1902, a Mrs. *Roberson* invoked this right before a New York court, complaining that the defendant company had used her likeness as a decoration for flour bags.<sup>10</sup> The question at stake was whether the commercial appropriation of somebody else’s appearance required a licence: the problem of publicity was born. The court rejected the claim. Subsequently, nonetheless, New York state legislation was introduced to protect individuals from the use of their likeness or name for advertising or for products of trade.<sup>11</sup> About fifty years later, a court in Georgia

---

<sup>1</sup> Existing comparative works: B Seemann, *Prominenz als Eigentum* (1996); N Witzleb, *Geldansprüche bei Persönlichkeitsverletzungen durch Medien* (2002); H Beverley-Smith, *The commercial appropriation of personality* (2002); J Adams, *Character Merchandising* (1996).

<sup>2</sup> Federal Court of Appeals (2nd Circuit), *Haelan Laboratories Inc. v Topps Chewing Gum*, 202 F2d 866 (1953); compare M Madow, “Private Ownership in Public Image: Popular Culture and Publicity Rights”, (1993) 81 California Law Review 125; Th Catanzariti, “Swimmer, Surfer and Sue Smith”, (2002) 13 (7) Entertainment Law Review, 135, 139; O Goodenough, “The Prize of Fame: The Development of the Right to Publicity in the United States Part I”, (1992) 2 EIPR 55; J Kahn, “Bringing dignity back to light: Publicity Rights and the eclipse of the tort of appropriation of identity”, Cardozo Arts and Entertainment Journal, [1999] 17, 213, 226 et seq.

<sup>3</sup> M B Nimmer, “The Right of Publicity”, (1954) 19 Law & Contemporary Problems 203, 216.

<sup>4</sup> Catalogues of personality characteristics can be found in R Lerner & J Bresler, *Art Law: A guide for investors, dealers, artists* (1996), 341; A McGee & G Scanlan, “Phantom intellectual property rights”, (2000) 3 IPQ 264, 265; R S Robinson, “Preemption, the Right of Publicity and a New Federal State”, (1998) 16 Cardozo Arts and Entertainment Journal 183.

<sup>5</sup> R Lerner & J Bresler, n. 4 above, 341; R S Robinson, n. 4 above, 183.

<sup>6</sup> J T McCarthy, *The Rights of Publicity and Privacy* (2<sup>nd</sup> ed., 1991), chapter 1-2 to 1-3.

<sup>7</sup> W Van Carnegem, “Different Approaches to the Protection of Celebrities against Unauthorised Use of their Image in Advertising in Australia, the United States and the Federal republic of Germany “, (1990) 12 EIPR 452, 455.

<sup>8</sup> S Warren & L Brandeis, “The Right to Privacy”, (1890) 4 Harvard Law Review 193.

<sup>9</sup> S Warren & L Brandeis, n. 8 above, 196, rejected the idea that the right of privacy might be property based; compare O Goodenough, n. 2 above, 56.

<sup>10</sup> NY Court of Appeals, *Roberson v Rochester Folding Box*, 171 NY 538 (1902).

<sup>11</sup> Sections 50, 51 NY Civil Law (1904).

characterised publicity as a property right based on commercial considerations, thus separating it from the dignity-based concept of privacy.<sup>12</sup> In civil law jurisdictions, the basis for the development of publicity rights was laid in the droit d'auteur codes on the turn of the 19<sup>th</sup> to the 20<sup>th</sup> century,<sup>13</sup> and later influenced by constitutional considerations: some countries accept the concepts of *vie privée* and even personality development<sup>14</sup> as such as a fundamental right. Moreover, the most and surely all truly democratic jurisdictions protect the freedom of expression.<sup>15</sup> Constitutional law, thus, intervenes once more into the construction of publicity rights by setting their limits. Finally, such rights are perceived as intellectual property: just like copyright or trademarks, they create monopolies in intangibles. Beverley-Smith, hence, is right to attest them a “hybrid” character.<sup>16</sup> The law of publicity, hence, forms an odd mélange of intellectual property, privacy and personality concepts. Its importance for trade in media products generated the species of “civil media” lawyers.<sup>17</sup>

## II. Global significance and lacking international regulation

Globally, the market for audio-visual and photo-illustrated media increases.<sup>18</sup> Along with it, the international dimension of publicity rights gains significance. Yet, while intellectual property is protected comprehensively by agreements,<sup>19</sup> the commercial appropriation of human indicia was never addressed on such a global level.<sup>20</sup> This is in spite of the apparent conflict between publicity rights and trade regimes such as the European Community (“EC”) or the World Trade Organisation (“WTO”).<sup>21</sup> Intellectual property rights, in that context, have been exempted from those organizations’ free movement clauses, i.e. Art. 28 EC Treaty (“EC”) and Art. III, XI General Agreement on Tariffs and Trade (“GATT”).<sup>22</sup> These mechanisms have

<sup>12</sup> *Haelan v Topps*, n. 2 above; R S Robinson, n. 4 above, 183; M Madow, n. 2 above, 134.

<sup>13</sup> See for example, Sections 22, 23 German *Kunsturhebergesetz* (Law on Authors’ Rights in Arts) 1907 [KUG]; Dutch *Auteurswet* (Authors’ law) 1912.

<sup>14</sup> See for example, Article 1 (1) and Article 2 (1) *Grundgesetz* (German Basic Law).

<sup>15</sup> See for example 1<sup>st</sup> Amendment to the US-Constitution; Article 10 (1) European Convention on Human Rights and Fundamental Freedoms of 4.11.1950 [ECHR], Article 5 (1) *Grundgesetz*.

<sup>16</sup> H Beverley-Smith, as n. 1 above, 1 et seq.

<sup>17</sup> See for example the books of M Paschke, *Medienrecht* (2<sup>nd</sup> ed., 2000), 279 et seq.; M Prinz & B Peters, *Medienrecht: Die zivilrechtlichen Ansprüche* (1999).

<sup>18</sup> See: R P Bezanson, “The Right to Privacy Revisited: Privacy, News and Social Change 1890-1990”, (1992) 80 California Law Review, 1133, 1166 et seq.

<sup>19</sup> See only the Paris Convention for the protection of industrial property of 20 March 1883, as revised and The WTO Agreement on Trade-related aspects of intellectual property rights. (TRIPS).

<sup>20</sup> WIPO Note, as n. 20 above, 13.

<sup>21</sup> Article 28 EC; Article I, III, XI General Agreement on Trade and Tariffs 1994; see R Rixecker, “Das allgemeine Persönlichkeitsrecht - § 12 Anhang” in Münchener Kommentar zum BGB (2000), §§11-13; To give an example for the trade relevance of publicity rights: The Landgericht Hamburg in the *Oliver Kahn v Electronic Arts* case, (2003) Zeitschrift für Urheber- und Medienrecht 658, issued an injunction against the distribution of the video game “FIFA 2002”. This game was produced in the UK and imported to Germany. Despite the apparent relevance of Article 28 EC, a preliminary ruling of the Luxembourg Court of Justice has not been demanded and Counsels did not ask for it.

<sup>22</sup> Compare Article 30 EC, the TRIPS agreement, n. 19 above, and Article XX d) GATT.

triggered even harmonisation to a certain degree.<sup>23</sup> Personality rights, however, are not listed explicitly as exceptions. While the EC system might tolerate them under the general heading of mandatory requirements of national policy,<sup>24</sup> no such general exception exists within the GATT.<sup>25</sup>

Hence, there is a need for international consensus about the rules relating to the commercial appropriation of personal characteristics.<sup>26</sup>

### III. Topic, scope and outline

This article, therefore, aims at proposing some basic structures of a future trans-national, “cosmopolitan” law of publicity. The legal analysis will be based on German and – to a lesser degree – on English law, however reference will be made to other jurisdictions where appropriate. In order to accomplish this task, the article, firstly, will assess the justifications given in support of exclusive rights vested in the persona (B). Dignity and human rights shall be submitted to form a universal basis for these entitlements. The effect of competing values – chiefly freedom of the press – on such rights shall be evaluated (C). Thereafter, the legal instruments existing in selected jurisdictions concerning the commercial appropriation of personality shall be examined (D). Drawing the conclusions from the results found, this paper finally shall suggest a basic template for a trans-national law of publicity. (E)

The article’s scope will be limited. Firstly, only human personae, but not fictional characters<sup>27</sup> such as “Popeye”<sup>28</sup> or Disney’s ducks,<sup>29</sup> shall be considered;<sup>30</sup> concerning the objects of appropriation, it will focus on the most typical ones, i.e. name and likeness including photographic and painted portraits. Regarding the nature of commercial appropriation of these characteristics, the article will also concentrate on two categories. The first one, merchandising, comprises the use of an image as an integral part of a traded product or service.<sup>31</sup> This group, according to some authors, is

---

<sup>23</sup> See for example: TRIPS, n. 19 above; First Council directive to approximate the laws of the member states relating to trade marks; 89/104/EEC of 21 December 1988 (EC Trademark directive); Council Regulation (EC) No. 40/94 of 20.12.1993 on the Community trade mark (EC trademark regulation).

<sup>24</sup> European Court of Justice (“ECJ”), case 120/78, *Rewe v Bundesmonopolverwaltung (Cassis de Dijon)*, 1979 ECR, 649; for the application of that doctrine in a press case: ECJ, case C-368/95, *Familiapress v Heinrich Bauer Spezialzeitschriftenverlag*, 1997 ECR, I-3689.

<sup>25</sup> Compare Article XX GATT.

<sup>26</sup> Concurring in the respect, that a US federal law is needed: R S Robinson, n. 4 above, 201.

<sup>27</sup> For the legal regime for fictional characters see J Holyoak, “UK Character Rights and Merchandising Rights Today”, (1993) JBL 444, 445 et seq.

<sup>28</sup> Japanese Supreme Court, *Popeye*, 20.6.1990, (1993) GRUR Int. 495; see H Ruijsenaars, “Character Merchandising: A European view on Japanese case law”, (1996) 7 (3) Entertainment Law Review, 110; C Heath, “Popeye Scarves III”, (1994) 25 IIC, 118.

<sup>29</sup> *Radio Corp v Disney*, [1937] 57 CLR 448.

<sup>30</sup> Other works include such fictional characters: M Elmslie & M Lewis, (1992) 8 EIPR 270; J Adams, n. 1 above; WIPO Note, as n. 20 above, 9.

<sup>31</sup> For a definition of merchandising see C Schertz, *Merchandising Rechtsgrundlagen und Rechtspraxis* (1997), § 408; M Madow, n. 2 above, 129.

divided between memorabilia<sup>32</sup> such as “ABBA”-shirts<sup>33</sup> and consumer items such as “Gabriella Sabatini” perfume<sup>34</sup>. They consider that the latter group describes items of daily use which refer to an image or a characteristic of a well-known person while the former includes items whose only use consists in the expression of support. Yet, the fact that most memorabilia serve a function impedes such distinction. The second major category of character appropriation for commerce is advertising. This group uses personal indicia in order to promote a product or service separable from the indicia themselves. It comprises cases of “false endorsement”,<sup>35</sup> the publication of “true” but unauthorised endorsement,<sup>36</sup> the use of personality to create attraction<sup>37</sup> and even anti-endorsement.<sup>38</sup>

## **B) Why protect commercial aspects of personality?**

Michael Madow has reviewed the justifications for publicity rights from a Communitarian point of view<sup>39</sup> and drew a fairly pessimistic conclusion.<sup>40</sup> The arguments in favour of such rights, hence, have to be re-examined. They mainly originate in property (I) or dignity (II).

### **I. Economic incentive and fair distribution: The property argument**

The property order has two main *raison d'être*:<sup>41</sup> firstly, it functions as the basis of market economy by creating incentives for economic growth, the “invisible hand” (Adam Smith).<sup>42</sup> Apart from that, however, property law allocates the resources of a

---

<sup>32</sup> These products serve the main purpose of admiring a celebrity, their practical use is limited, compare WIPO Note, as n. 20 above, 9.

<sup>33</sup> See Oliver J, *Lyngstad et al. v Anabas Products et al. (ABBA)* [1977] FSR 62.

<sup>34</sup> Compare Court of Appeal, *Re Elvis Presley Trade Marks*, [1999] RPC 567.

<sup>35</sup> For a distinction between Merchandising and Endorsement: Laddie J, *Irvine v Talksport*, [2002] EMLR 32; K Sloper & Cordery, “Personality Endorsement New Brands Hatch”, *Entertainment Law Review* 2002, 13 (5) 106, 109; M Elmslie & M Lewis, n. 30 above, 270.

<sup>36</sup> Sometimes celebrities endorse products in private but do not give permission to use such statements in public: Lothar Matthäus, for example, used Puma shoes despite his team, Bayern, contracted with ADIDAS.

<sup>37</sup> Compare OLG München, *Boris Becker v FAZ*, 21 U 2518/03, 27.6.2003 case: Boris Becker was named in a TV advertising for a Sunday paper without suggesting an association, discussed by O Weber in (2003) *Entscheidungen im Wirtschaftsrecht* 1045.

<sup>38</sup> Oskar Lafontaine as a minister of finance was generally disliked by well situated people. A stock broking bank (“DAB”) used the fear of him to advertise their services. The case was settled out of court. In a parallel case of Lafontaine against car rental company, the Hamburg district court, case 324 O 109/02 of 10 January 2004 indicated that a compensation of 100.000 Euro may be thinkable, but rejected the claim because *Lafontaine* had sued the wrong company (holding company instead of the acting subsidiary).

<sup>39</sup> For a very good summary of the Communitarian position see J Boyle, *The Second Enclosure Movement and the Construction of the Public Domain* (Edinburgh Conference Paper, 2000).

<sup>40</sup> M Madow, n. 2 above, 125.

<sup>41</sup> Compare G M Armstrong, “The Reification of Celebrity: persona as Property” (1991) 51 *Louisiana Law Review*, 443, 444 et seq.

<sup>42</sup> Adam Smith, *An Inquiry into the Wealth of Nations* (1776).

society: it separates individual items of property from each other and from the common sphere. Hence, it is subject to demands of fairness. Both aspects – economic incentive and fair distribution – have been invoked to justify exclusive rights in personality.<sup>43</sup>

1. *The copyright analogy: incentives for creation and “fruits of effort and labour”*

A parallel to copyright is relied on to justify publicity rights: copyright creates incentives for creation<sup>44</sup> and, as a result, helps society to achieve a richer culture. From a perspective of fair distribution, copyright is perceived as consideration for the author’s contribution to culture, as the fruits of his labour and effort.<sup>45</sup> *Mutatis mutandis*, celebrities are said to deserve such protection as well.<sup>46</sup> Yet, it is not clear whether this analogy is deemed to succeed.

The remuneration tier of this argument seems *prima vista* plausible. It regards the individual interest of an actor who has invested considerable time into the fine-tuning of his appearance and into his image.<sup>47</sup> Publicity rights can safeguard his market value.<sup>48</sup> An analogy drawn with traders sustains this argument. According to the English principle of passing off, for example, building up goodwill in goods or services bearing a trader’s name or image legitimates exclusive entitlement.<sup>49</sup> However, the products of an actor’s work, i.e. films, pictures and theatre performances are protected already by copyright. The efforts in his genuine field of activity are remunerated appropriately, i.e. on the terms of his negotiated employment contract. As concerns the protection of the persona beyond that, not all fame is commendable: immoral and even criminal conduct can accrue it.<sup>50</sup> Advertisers quite often focus on attention rather than on the transfer of a positive image.<sup>51</sup> Even bad

---

<sup>43</sup> Comprehensively: B Seemann, see n. 1 above.

<sup>44</sup> See S Boyd, “Does English Law recognise the concept of an image or personality right?”, (2002) 13(1) *Entertainment Law Review* 1, 2.

<sup>45</sup> This argument applies at least to civil law jurisdictions such as France or Germany, where some high quality standard for copyright protection exists. In common law jurisdictions such standards are considerably lower. Copyright there rewards rather “effort and labour”. In England, “what is worth copying is worth protecting”, see Chancery Division, *University of London Press v University Tutorial Press* [1916] 2 Ch 601. Therefore, the contribution of a copyright protected work to national culture can be considerably lower than in France or Germany.

<sup>46</sup> M B Nimmer, n. 3 above, 216; S Boyd, n. 44 above, 2; C Fernandez, *The Right of Publicity* (1998).

<sup>47</sup> See the testimony of Michael Douglas in Lindsay J., *Douglas v Hello (trial)*, [2003] 153 NJL 595.

<sup>48</sup> See S Boyd, n. 44 above, 2.

<sup>49</sup> The English action of passing off, therefore, asks for a genuine connection between the name to be protected and a business. It was denied in *Lyngstad v Anabas*, n. 33 above, 62; *Wombles v Womble Skips*, [1977] RPC 99; *Taverner Rutledge v Trexaplam (Kojak)*, [1977] RPC 27; while attached trade helped the plaintiffs in *Irvine v Talksport*, n. 35 above; *Mirage Studios v Counter-Feat Clothing (Ninja Turtles)*, [1991] FSR 145 and in the Australian cases *Childrens Television Workshop v Woolworths*, 1 NSWLR 273 (1981); *Fido Dido v Venture Stores (Retailers) Proprietary Limited*, 16 IPR 365, compare M Elmslie & M Lewis, n. 30 above, 272.

<sup>50</sup> M Madow, n. 2 above, 179-181.

<sup>51</sup> Benetton for example employed a commercial showing a dead body bearing a rubber stamp “HIV positive”. Legal challenges against this on ethical grounds were rejected by the German Constitutional Court because of the free speech imperative: See: Bundesverfassungsgericht, *Benetton*, BVerfGE 102, 347 (2000).

reputation, therefore, is a valuable commodity.<sup>52</sup> Still, remuneration of effort might offer a case for personality protection – even if it is not a strong one.

The second limb of the argument refers to an alleged public value of the creation of personality, and that publicity rights shall stimulate such creation.<sup>53</sup> Certain products or acts may be associated closely with an artist. Yet, a famous persona as such does not equal the cultural work itself.<sup>54</sup> It is this book, song, performance, act or even this fictional character<sup>55</sup> which constitutes an asset valuable for society. The natural person behind these creations – and her fame – has no further reaching public cultural value. Finally, all sort of people want to become famous for the most trivial reasons anyway. Further remuneration seems superfluous from that perspective.

The effort and labour argument, thus, offers some support for publicity rights, but a comprehensive commercial right of personality should not be based on this concept alone.

## 2. Economic arguments

It is argued, furthermore, that commerce expects property rights in personality:<sup>56</sup> The logic of the argument assumes that companies can buy exclusive licences in a persona, for instance in order to run an exclusive marketing campaign. Such rights are deemed to stimulate economic growth. Yet, exclusive rights or monopolies do not necessarily further competition – economic theory claims rather the contrary. In other areas such as patents or copyright, exclusive rights are justified as stimulus for investment in culture or industrial inventions. But publicity rights, as shown, serve no public interest or higher economic goal. Economic interests, thus, cannot justify their existence.

Nevertheless, markets need transparency. Consumers need to be protected from misleading advertisement.<sup>57</sup> Yet, the commercial infringement of personality rights deceives consumers only in a few cases.<sup>58</sup> Unfair competition law, where it exists, can

---

<sup>52</sup> The Rio-based robber Ronald Biggs, for instance, sold several records. And Harald Juhnke, an infamous alcoholic, earned money advertising for milk.

<sup>53</sup> US Supreme Court, *Zacchini v Scripps-Howard Broadcasting Comp.*, 433 US 562 at 573, [97 S.Ct. 2849; 53 L.Ed.2d 965 (1977)]; compare O Goodenough, n. 2 above, 60; C Fernandez, as n. 46 above, section B.

<sup>54</sup> W Van Carnegem, n. 7 above, 458; see however J Holyoak, n. 27 above, 444, who wants to treat both fictional and non-fictional characters alike, however, without forwarding arguments for such concept.

<sup>55</sup> See Federal Court of Australia per Pincus J, *Hogan and Another v Koala Dundee Pty Limited and others*, 20 FCR 314 [1988]; commented by A Terry, “Image Filching and Passing off in Australia: Misrepresentation or misappropriation? Hogan v Koala Dundee”, (1990) 12 (6) EIPR 219; *Ninja Turtles case*, n. 49 above; see re Duff Beer and Homer Simpson, High Court of Australia, *20th century Fox Film Corp. v South Australian Brewing Company*, [1996] ATTP 41 (Aus) annotated by Morgan, (2002) Entertainment Law Review 113.

<sup>56</sup> J Holyoak, n. 27 above, 456; I Davies & A Terry, “Passing off – celebrity endorsement”, EIPR 2002, N134, N136: “Realities of the market”.

<sup>57</sup> C Fernandez, as n. 46 above, section B); M Madow, n. 2 above, 182.

<sup>58</sup> Indeed, even in cases of pure false endorsement a considerable percentage of consumers will not be misled.

deal with these problems. The consumer argument<sup>59</sup> alone cannot support a wider exclusive right.

### *3. Intermediate result: property alone does not justify publicity rights*

To conclude, neither economic nor cultural reasons demand exclusive rights in personality.<sup>60</sup> The Warren and Brandeis analysis of the right of privacy,<sup>61</sup> therefore, applies to the right of publicity as well: property-based arguments do not justify such exclusive rights. Michael Madow's doubts were justified in that respect. Yet, he disregarded Warren and Brandeis' other argument: dignity.<sup>62</sup>

## **II. The anthropological argument: human identity in the tension between social responsibility and individual freedom**

Since *Haelan*,<sup>63</sup> US doctrine separates publicity from privacy rights. While the latter concept is dignity-based, the former is supported economically.<sup>64</sup> But, economics – as shown – fail in that respect. This article will identify the *Haelan* schism as artificial: as Kahn points out, dignity is submitted to be the rationale for exclusive rights vested in the commercial aspects of personality appropriation in both cases.<sup>65</sup>

The argument is based on human dignity as a fundamental principle in natural law,<sup>66</sup> in national constitutions and in human rights. This principle encompasses, firstly, an individual's private sphere, more specifically his identity and his ability of self-determination on personal matters. This necessitates rights in the appropriation of personal indicia. Reputation will be characterised as another universal aspect of human dignity which justifies portrait and name rights. In a third step, it will be argued that these principles also apply in cases of publicity. The construction of consent is submitted to be decisive in that respect. Hence, it is postulated that a right of publicity derives from dignitary interests.

### *1. From autonomy and identity to privacy*

Since the era of enlightenment, the anthropological image of the human being is dominated by his inherited dignity, which safeguards personal identity and allows

---

<sup>59</sup> This point will be elaborated infra at p. 190.

<sup>60</sup> Disagreeing: G M Armstrong, n. 41 above, 461 et seq.

<sup>61</sup> Already S Warren & L Brandeis, n. 8 above, 196, rejected the idea that the right of privacy might be property based; compare O Goodenough, n. 2 above, 56.

<sup>62</sup> See J Kahn, n. 2 above, 213.

<sup>63</sup> *Haelan v Topps*, n. 2 above.

<sup>64</sup> W Van Carnegem, n. 7 above, 455: To his mind, though, the privacy- or personality based right has transformed into a mere property right. Compare: D Bedingfield, "Privacy or publicity? The enduring confusion surrounding the American tort of privacy", (1992) 55 *Modern Law Review* 108, 109: He sees the common origins but also "widely divergent interests" of privacy and publicity.

<sup>65</sup> J Kahn, n. 2 above, 213.

<sup>66</sup> Already the Georgia supreme court referred to natural law when they accepted personality claims: Georgia Supreme Court, *Pavesich v New England Life Insurance Co.*, 122 Ga. 191, 50 SE 68, 69 (1905); compare O Goodenough, n. 2 above, 58.



autonomous decisions in personal matters.<sup>67</sup> This concept formed the basis of the 1791 Bill of Rights and the 1789 “*Déclaration des droits de l’homme et du citoyen*”.<sup>68</sup> The French document’s Article 2 accepted inherited “natural rights” of citizens. Both documents provide considerable freedoms from state intrusion. In this tradition, French constitutional law accepts personality<sup>69</sup> and privacy<sup>70</sup> as fundamental rights. The US constitution lacks provision for privacy or personality; however it grants certain private spheres to the individual, from which the state is excluded. Despite the debate over a federal law of privacy,<sup>71</sup> a clear constitutional sensitivity for personal freedom exists.<sup>72</sup>

After the horrors of World War II, the need for protection of human dignity was felt even more strongly. The dignitary imperative is inherent in human rights documents such as the 1948 Universal Declaration of Human Rights (“Universal Declaration”)<sup>73</sup> and the European Convention on Human Rights (“ECHR”). The 1949 German Basic Law, the *Grundgesetz* reflects this in proclaiming “Human dignity is inviolable”.<sup>74</sup> Like Article 26 (2) and Article 29 (1) Universal Declaration, it furthermore grants a right in the development of personality.<sup>75</sup> Today, human rights – despite relativist attacks from different sides – are a universal concept.<sup>76</sup> It roots in the respect for human dignity. Even though only few jurisdictions feature a constitutional right of personality, most acknowledge fundamental rights and rank highly self-determination and the identity of human beings. Protection of personality is also found in less abstract legal concepts such as authors’ rights.<sup>77</sup>

The principles of autonomy and privacy shall now be elaborated in their importance for publicity rights.

*a. Privacy as a major aspect of dignity*

Private life is codified in many documents including Article 12 Universal Declaration, Article 17 International Covenant of Civil and Political Rights (“International

<sup>67</sup> See W Brugger, “The Image of the Person in Human Rights concept”, (1996) 18 Human Rights Quarterly 594; Th Gibbons, “The Limits of Personal Accountability”, Yearbook of Media and Entertainment Law 97/98, 53; G Dürig “Article 1” in T Maunz, G Dürig R Herzog & R Scholz, *Grundgesetz* (cont.); J Kahn, n. 2 above, 213; O Goodenough, “Re-Theorising Privacy and Publicity”, IPQ 1997, 1, 37-70.

<sup>68</sup> See the French *Déclaration des droits de l’homme et du citoyen du 26 août 1789*.

<sup>69</sup> E Logeais, “The French Right to one’s image – a legal lure”, (1994) Entertainment Law Review 163, 164; compare S Boyd, n. 44 above, 3.

<sup>70</sup> E Picard “The Right to Privacy in French law” in B Markesinis (ed.), *Protecting Privacy* (1999), 51.

<sup>71</sup> M Madow, n. 2 above, 167 et seq.

<sup>72</sup> W Van Carnegem, n. 7 above, 458.

<sup>73</sup> Universal Declaration of Human Rights (10.12.1948), Resolution 217 (III) in UN.

<sup>74</sup> Article 1 (1) *Grundgesetz*; see G J Twaiete & W Brehm, “German Privacy and Defamation Law” (1994) 8 EIPR 336, 337; G Dürig, n. 67 above.

<sup>75</sup> Compare Article 2 (1) *Grundgesetz*; R Rixecker, n. 21 above.

<sup>76</sup> See C Ovey & R White, *Jacobs & White: European Convention on Human Rights* (3<sup>rd</sup> ed., 2002), 1 et seq.

<sup>77</sup> For instance, the “droit moral” is part of personality: E Derieux, *Droit européen et international des media* (2003), 234; Th Hoeren, *Grundzüge des Internetrechts* (2002), 89.

Covenant”)<sup>78</sup> and Article 8 (1) ECHR.<sup>79</sup> Article 8(1) ECHR, providing that “everyone has the right to respect for his private and family life...” can be relied upon by individuals by application<sup>80</sup> to the European Court of Human Rights (ECtHR) at Strasbourg.<sup>81</sup> The clause has led to significant case law.<sup>82</sup>

As a substitute for the lack of a definition of the term “private life”,<sup>83</sup> the ECtHR measures the degree of privacy and the impact of the interference at stake. There are three levels of privacy: an inner core of intimacy which comprises, amongst others, marriage details and health records<sup>84</sup> is almost untouchable;<sup>85</sup> a second layer, the personal sphere, encompasses other non-public areas of personality, such as the right to stay in a private home; finally, even a social sphere is encompassed protecting, to some extent, interaction with others.<sup>86</sup> The ECtHR’s interpretation of privacy comprises, inter alia, gender identification, name, sexual orientation and sexual life;<sup>87</sup> a person’s moral, physical integrity, personal identity, and information;<sup>88</sup> and philosophical, religious or moral beliefs, family life and friendships.<sup>89</sup>

The second parameter, the level of interference, is determined by various factors of the individual case. Dissemination of private facts on television, for example, has a very immediate and powerful impact.<sup>90</sup> National courts, hence, are flexible to attribute the appropriate weighting to an interference with these rights in a case. On the other hand, this open approach allows the judge’s own morality to enter his judicial review.

---

<sup>78</sup> International Covenant of Civil and Political Rights of 19.12.1966.

<sup>79</sup> Article 8 (1) ECHR: “Everyone has the right to respect for his private and family life...”; see general articles by L Doswald-Beck, “The Meaning of the ‘Right to respect for Private Life’ under the European Convention on Human Rights” (1983) 4 HRLJ 283; L Loucaides, “Personality and Privacy under the European Convention on Human Rights”, (1990) 61 BYIL 175.

<sup>80</sup> Article 34 ECHR as amended by Prot. 11 permits individual applications subject to the criteria in Article 35.

<sup>81</sup> See Article 19-51 ECHR as amended by the 11<sup>th</sup> Protocol.

<sup>82</sup> On the importance of the ECHR for media law: L Herne Hill, M Meier Wang & K P Jayawardena, “The European Convention on Human Rights and Media Law”, Yearbook of Entertainment and Media Law 2001/02, 343 et seq.; L Lester & N Schiffrin, “The European Convention on Human Rights and Media Law”, Yearbook of Media and Entertainment Law 97 /98, 265.

<sup>83</sup> See ECtHR, cases *Peck v United Kingdom*, application no. 44647/98, [2003] EMLR 15, 292, §57; *Niemetz v Germany*, Series A No. 251-B, [1993] 16 EHRR 97, §29.

<sup>84</sup> See ECtHR, *Z v Finland*, Reports of judgments and decisions, 1997-I, §99.

<sup>85</sup> See Commission, *Friedl v Austria*, Series A No. 305-B, Commission Report of May 19, 1994, §§50-51; *Peck v UK*, n. 83 above, §61.

<sup>86</sup> ECtHR, *J.H. v United Kingdom*, No. 44787, ECHR 2001-IX, §56; *Niemetz v Germany*, n. 83 above, §29: It “would be too restricted to limit the notion to an inner circle in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.”

<sup>87</sup> *Peck v UK*, n. 83 above, §57; *Bensaid v UK*, App. No. 44599/98, [2001] 33 EHRR 205, §47.

<sup>88</sup> R Clayton & H Tomlinson, *The Law of Human Rights* (2000), § 12.85-12.94.

<sup>89</sup> Cohen-Jonathan, “Respect for private and family life” in Macdonald, Matscher & Petzold (ed.), *The European System for the Protection of Human Rights* (1993), 405, 407.

<sup>90</sup> ECtHR, *Jersild v Denmark*, Series A No. 298, §31 [1994].

Such interference which is prescribed by law can be justified if it furthers an aim listed in Article 8 (2) ECHR; mainly of the *ordre public*.<sup>91</sup> This defence, moreover, requires the national measure to be “necessary in a democratic society”. This is a balancing act: the closer a state measure is to the core of privacy and the stronger its impact, the more compelling the public aim invoked needs to be. The Court grants a certain margin of appreciation to national policy.<sup>92</sup>

This “private life” case law has produced two major principles: identity and autonomy.

*b. Dignitary protection of identity*

The importance of identity is elaborated by Strasbourg case law on personal names: In one case, two Swiss nationals had married in Germany. The husband, under German law, had combined their last names to “Schnyder Burghartz”. The Swiss authorities refused to accept that name on their return to Switzerland. In this case, the ECtHR identified personal identity as a major element of human dignity. Inherited or lawfully acquired names were found to form part of this concept. Only compelling reasons can justify an infringement.<sup>93</sup>

In another case, the Court admittedly hesitated to support *positive* rights to change personal identity.<sup>94</sup> The court’s majority – against considerable dissent – has also rejected a fundamental right of transsexuals to adjust their administrative identification.<sup>95</sup> The Court’s leading opinion, hence, disapproved claims in a *created* identity. Yet, even this restrictive approach safeguards a *negative* freedom from intrusion into an *existing* identity. Moreover, some factors even support the broader concept of created or chosen identity: the respective minority opinions were “strong and detailed”.<sup>96</sup> Secondly, sensitivity for dignity-based identity claims was shown even by the majority.<sup>97</sup>

It can be summarised that at least a human being’s inherited identity including her name constitutes an integral part of human dignity.<sup>98</sup>

---

<sup>91</sup> Article 8 (2) ECHR reads: “There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others.”

<sup>92</sup> Generally: E Brems, “The margin of appreciation doctrine in the case-law of the European Court of Human Rights“, (1996) 56 *Zeitschrift für ausländisches öffentliches und Völkerrecht* (Heidelberg Journal of International Law), 240.

<sup>93</sup> ECtHR, *Burghartz v Switzerland*, 22.2.1994, Series A, No. 280 B; (1994) 18 EHRR 101.

<sup>94</sup> ECtHR, *Stjerna v Finland*, 25.11.1994, Series A, No. 299 B; (1997) 24 EHRR 195.

<sup>95</sup> ECtHR, *Rees v UK*, 17.10.1986, Series A, No. 106; (1987) 9 EHRR 56; ECtHR, *Cossey v UK*, 27.09.1990, Series A, No. 184; (1991) 13 EHRR 622.

<sup>96</sup> See the cases cited above and C Ovey & R White, n. 76 above, 246.

<sup>97</sup> ECtHR, *B v France*, 25.3.1992, Series A, No. 232-C, (1994) 16 EHRR 1; ECtHR, *Sheffield and Horsham v UK* (1999), 30.07.1998, 27 EHRR 163.

<sup>98</sup> Concurring: J Kahn, n. 2 above, 215 et seq.; R Clayton & H Tomlinson, n. 88 above, §§ 12.85-12.94; C Ovey & R White, n. 76 above, 221; Cohen-Jonathan, n. 89 above; J A Frowein & W Peukert, *Die Europäische Menschenrechtskonvention* (1996), Article 8.

*Autonomy as guiding principle*

Another key element of dignity is self-determination.<sup>99</sup> Already the medieval “golden rule” acknowledged autonomy in personal matters when it postulated that personal freedom ends where that of others begins. Interpreting human dignity, Günther Dürig determined the ability to take free decisions as the defining element of a human being. The human being, hence, deserves a personal sphere of autonomous decisions. He shall not be made the mere “object” of state administration.<sup>100</sup>

Traces of this dogma of self-determination can be found in all legal orders: for example, the privilege to remain silent is broadly accepted – *inter alia*<sup>101</sup> by the 5<sup>th</sup> Amendment to the US Constitution.<sup>102</sup> This *nemo tenetur* principle shows that human self-determination even outweighs serious social interests such as criminal justice.

Another example of self-determination concerns bans of consensual homosexual activity.<sup>103</sup> Strasbourg found such bans to violate the private life clause; sexual orientation as a purely personal aspect was criminalized unjustly: neither public health nor public morals justified such interference.<sup>104</sup> Conversely, legislation against sadomasochistic acts was held by Strasbourg to be within the state’s margin of appreciation. Maybe this accrued to the fact that – even if consensual – harm was done to others.<sup>105</sup> But still, the case law proves that self-determination as another aspect of human dignity demands protection.

*c. Assembling autonomy and identity to a dignity-based right of privacy*

It is this article’s argument that the combination of identity and autonomy necessitates entitlements in one’s own name and portrait: these individual features form the main part of human identity. Therefore, their bearer shall decide on their appropriation. John Locke’s phrase “[t]hough all the earth and all inferior creatures may be common to all men, yet every man has a ‘property’ in his own person”<sup>106</sup> does not merely recognise the potential commercial value of every person’s identity.<sup>107</sup> It also – and

---

<sup>99</sup> Compare S Boyd, n. 44 above, 2.

<sup>100</sup> G Dürig, n. 67 above.

<sup>101</sup> ECtHR cases: *Saunders v UK*, 17.12.1996, No. 19187/91; *Funke v France*, 27.1.1993, No. 10828/84; EC cases: ECJ, 374/87, *Orkem v Commission*, 1989 ECR 3283; CFI, T-112/98, *Mannesmann Röhrenwerke v Commission*, 2001 ECR II-729; K P E Lasok, „Privilege against self-incrimination in competition cases“, (1990) European Competition Law Review 90-91.

<sup>102</sup> For this right see R H Helmholz, “Origins of the Privilege against Self-Incrimination: The Role of the European Jus Commune”, (1990) 65 NYU Law Review 962, L W Levy, *Origins of the Fifth Amendment: The right against self-incrimination*, (1968); M R T MacNair, “The Early Development Privilege against Self-Incrimination”, (1990) 10 Oxford Legal Studies 66.

<sup>103</sup> ECtHR, *Dudgeon v UK*, 22.10.1981, Series A, No. 45, (1982) 4 EHHR 149; ECtHR, *Norris v Ireland*, 26.10.1988, Series A, No. 142, (1991) 13 EHHR 186; ECtHR, *Modinos v Cyprus*, 22.4.1993, Series A, No. 259 (1994) 16 EHHR 485.

<sup>104</sup> ECtHR, *ADT v UK*, 31.7.2000, No. 35765/97, 31 EHHR 33.

<sup>105</sup> ECtHR, *Laskey, Jaggard, Brown v UK*, 19.2.1997, (1997) 24 EHHR 39.

<sup>106</sup> John Locke, “An essay concerning the true original extent and end of civil government”, in *Two Treatises of Civil Government*, Book 2 Chapter 7 section 27.

<sup>107</sup> J T McCarthy, n. 6 above, sec. 1.11 c).

foremost – acknowledges the dignity of a human being.<sup>108</sup> The individual's dignity, his autonomous status concerning the indicia of his identity does not allow appropriation by others without good reason.<sup>109</sup>

*d. Re-confirming privacy rights empirically*

This result shall be re-confirmed empirically by an examination of selected privacy concepts:

Strasbourg has applied Article 8 ECHR to the reproduction of names and personal photos.<sup>110</sup> In *Peck*, the claimant's suicide attempt had been filmed by a public surveillance camera (CCTV). Subsequently, the recordings had been published in different media including national television. The Court found an infringement of the private life clause. Additionally, the state was held obliged to positively make available remedies for victims of unjustified publication, and that such remedies were not available under English law.<sup>111</sup> The ECHR, hence, grants title in recordings of his name and likeness to the individual – at least for dignitary privacy reasons.<sup>112</sup>

Civil law jurisdictions such as Germany<sup>113</sup> or France<sup>114</sup> protect such rights already for constitutional reasons. Founding on Warren and Brandeis,<sup>115</sup> some US courts have developed a tort of invasion of privacy.<sup>116</sup> In a 1942 Missouri case, for instance, publication of a photograph showing somebody in hospital was identified as an example of such tort.<sup>117</sup> The 1965 Restatement of Torts (2<sup>nd</sup>) recognized the right to privacy in form of four single entitlements.<sup>118</sup> The most dignity-related ones prohibit intrusion upon seclusion and unreasonable publicity given to somebody's private life. The tort restricts reports which are highly offensive to a reasonable person in absence of a public concern. Another privacy-related tort of infliction of emotional distress

---

<sup>108</sup> See W Brugger, n. 67 above, 594; Focusing on children's rights: I Cram, "Minors Privacy, the Courts and the limits of freedom of expression", *Yearbook of Media Law 1997/98*, p. 31 et seq.

<sup>109</sup> D Lindsay, "Protection of privacy under the general law following *ABC v Lenah Game Meats Pty Ltd: where to now?*", 9 (6) *privacy* 101, 107; R P Bezanson, n. 18 above, 1173.

<sup>110</sup> See in general: J A Frowein & W Peukert, n. 98 above, Article 8; C Ovey & R White, n. 76 above, 217 et seq.; *Peck v UK*, n. 83 above, §57; *Z v Finland*, n. 84 above.

<sup>111</sup> *Peck v UK*, n. 83 above, § 57.

<sup>112</sup> Compare: L Doswald-Beck, n. 79 above; L Loucaides, n. 79 above; C Ovey & R White, n. 76 above, 220 et seq.; J A Frowein & W Peukert, n. 98 above, Article 8; R Clayton & H Tomlinson, n. 88 above, § 12.85-12.94.

<sup>113</sup> Article 1 (1) and Article 2 (1) Grundgesetz read together protect personality of individuals for dignitary reasons, see R Rixecker, n. 21 above; G Dürig, n. 67 above.

<sup>114</sup> E Logeais, n. 69 above, 164; compare S Boyd, n. 44 above, 3; E Picard, n. 70 above, 51.

<sup>115</sup> S Warren & L Brandeis, n. 8 above.

<sup>116</sup> Privacy tort in general: Th Catanzariti, n. 2 above, 138; W Prosser, "Privacy", (1960) 48 *California Law Review* 382; H Kalven, "Privacy and tort law – were Warren and Brandeis wrong?", (1966) 31 *Law and Contemporary Problems* 326; A L Goodhart, "Privacy", (1931) *The Law Quarterly Review* 23 et seq.

<sup>117</sup> Missouri Supreme Court, *Barber v Time Inc.* [1942] 159 SW 2d 291.

<sup>118</sup> See Restatement of Torts (2<sup>nd</sup>), 1965, § 652A-I.

will be committed, if someone by extreme and outrageous conduct,<sup>119</sup> intentionally or recklessly causes severe emotional distress to another<sup>120</sup> and is not justified by the press privilege.<sup>121</sup>

English courts, against fierce critique,<sup>122</sup> had ignored privacy before the coming into force of the Human Rights Act 1998 (HRA).<sup>123</sup> The *Kaye* case – in that period – had highlighted “the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens.”<sup>124</sup> The enactment of Section 6 (1) HRA then turned the breach of confidence action<sup>125</sup> into a tool for privacy protection.<sup>126</sup> The relatively recent provision obliges judges to have regard to the ECHR when considering an action for breach of confidence. The ECHR includes both private life (Article 8) and the freedom of the press (Article 10).<sup>127</sup> While the exterior structure of the tort of breach of confidence was kept, its pivotal element now is the balancing between press and privacy, as prescribed in Article 10 (2) ECHR.<sup>128</sup> This balancing has to consider the relevant press code.<sup>129</sup> *Douglas / Hello!* shows that courts under the new rule are prepared to grant relief against photographs of overly personal situations<sup>130</sup> – even if, in that case, the relief was not *ex ante* by way of injunction, but *ex post* in form of compensation. In comparison, the courts hesitate to

---

<sup>119</sup> Compare earlier Restatement of Torts 1946 § 46, where these elements are missing; see Prosser, “Insult and Outrage”, (1956) 44 California Law Review 40, 41.

<sup>120</sup> C Magruder, “Mental and Emotional Disturbance in the Law of Torts”, (1936) 49 Harvard Law Review 1033, 1067 argued, that courts already recognised emotional distress. W Prosser, “Intentional Infliction of Mental Suffering: A New Tort”, (1939) 37 Michigan Law Review 874, 874 went on to announce the birth of a new tort. Today’s formulation stems from Second Restatement of Torts 1965, § 46 (1); NY Court of Appeals accepted this wording for the State of NY in *Freihofer v Hearst Corp.*, 65 NY2d 135, 143.

<sup>121</sup> NY Court of Appeals, *Howell v NY Post*, 81 NY2d 115 [1993].

<sup>122</sup> For example: O Goodenough, “A Right of Privacy in the United Kingdom: Why not the Courts?“, (1993) 7 EIPR 227; B Sherman & F Kaganas, “The Protection of Personality and Image: An Opportunity Lost”, (1991) 9 EIPR, 340; B Markesinis, “Our Patchy Law of Privacy – Time to do Something about it”, (1990) 53 Modern Law Review.

<sup>123</sup> W Houseley, “The Unauthorised Commercial exploitation”, Yearbook of Media and Entertainment Law 1996, 263, 266.

<sup>124</sup> LJ Bingham in *Kaye v Robertson & another* [1991] FSR 62, 70; compare: LJ Glidewell in *Kaye v Robertson*: “It is well-known that in English law there is no right to privacy...”.

<sup>125</sup> See H Fenwick & G Philippon, “Confidence and privacy: A Re-Examination”, Cambridge Law Journal, 55 (3), p. 447 et seq.

<sup>126</sup> Earlier decisions had already opened the action for privacy protection: Ungood J, *Argyll v Argyll*, [1967] Ch. 302 found marriage to create a duty of confidence; and the Court of Appeal in *Attorney General v Guardian* (“Spycatcher”) [1990] 1 AC 109 held that certain pieces of non-trivial, confidential information might trigger an obligation of confidentiality without any special (contractual) relation between the parties.

<sup>127</sup> For an overview on Article 10 ECHR jurisprudence see S Tierney, “Press Freedom and Public Interest - The Developing Jurisprudence of the European Court of Human Rights“, European Human Rights Law Review 1998, p. 419; J A Frowein & W Peukert, n. 98 above, Article 10.

<sup>128</sup> *Douglas v Hello! (trial)*, n. 47 above, § 186 ii.

<sup>129</sup> See Section 12 (1) and (4) HRA; *Douglas v Hello! (trial)*, n. 47 above, § 186 vi.

<sup>130</sup> *Douglas v Hello! (trial)*, n. 47 above, granted damage compensation for the printing of wedding photos, even despite the fact that photos were sold willingly by the claimants to a competitor. See R Dadak, “Privacy Update”, Solicitors Journal 19 April 2002.

limit publication of embarrassing personal facts such as a brothel visit in *Theakston*<sup>131</sup> or a footballer's extra marital affair in *A / B & C*.<sup>132</sup> Even if English law still does not overstress privacy, it now provides at least for an instrument of protection for dignitary aspects of personality. Concerning the necessity of a free standing privacy tort English law stays undecided. In *Douglas v Hello!*, Lindsay J. neither considered that the case at hand was one to establish a free standing right to privacy nor that there was necessity to do so. He observed that the breach of confidence action now has turned into something which comes close to a right to privacy anyway.<sup>133</sup>

Australia embraces this development in England. Australian judges have referred to the most recent English precedent in spite of the fact that Australia is neither bound by the HRA 1998 nor by the ECHR.<sup>134</sup> By that means, the ECHR gains some extra-territorial effects. The Australian *Lenah Game Meat* decision expressed a preference to reject such entitlement,<sup>135</sup> but there are indications that this may be overcome soon. To conclude, even traditional common law countries finally seem to follow civil law jurisdictions towards better protection of privacy.

Privacy gains further support from data protection.<sup>136</sup> The *Bundesverfassungsgericht* accepted such right of control about personal data as early as 1982.<sup>137</sup> Strasbourg concurred,<sup>138</sup> even if they hesitate to enforce it rigorously.<sup>139</sup> Today, most industrialised states feature data protection acts.<sup>140</sup> Some commentators even see data protection as the generic term of privacy.<sup>141</sup> In the *Naomi Campbell* case, the Courts intensively dealt with the issue – yet the details of the case depend too much on specific UK legislation to found a basis for this more general debate.<sup>142</sup>

*e. Intermediate result: privacy interests necessitate titles in portraits and names*

It can be concluded, that the means to protect privacy as an aspect of human dignity – which exists to some degree in most countries as a result of the universal concept of human rights – protects against the public reproduction of likeness. The first and

---

<sup>131</sup> Ouseley J. in *Theakston v MGN Limited*, [2002] EMLR 22 justified a paper's story about a presenter's stay in a brothel, but prohibited the accompanying pictures; see Dadak, Solicitors Journal 19 April 2002.

<sup>132</sup> Lord Woolf, *A / B plc*, [2002] EWCA Civ 337, [2002] 3 WLR 542, 2002.

<sup>133</sup> *Douglas v Hello! (trial)*, n. 47 above, §229: Lindsay J. did neither think the case at hand was one to establish a free standing right to privacy nor that there was such necessity. He observed that the breach of confidence with its equitable stage now has turned into something which comes close to it anyway.

<sup>134</sup> D Lindsay, n. 109, 105.

<sup>135</sup> D Lindsay, n. 109, 104 et seq.

<sup>136</sup> S Rasaiah & D Newell, "Data protection and Press Freedom", Yearbook of Media and Entertainment Law 97 /98, 209.

<sup>137</sup> Bundesverfassungsgericht, *Volkszählung (Census)*, BVerfGE 65, 1.

<sup>138</sup> R Clayton & H Tomlinson, n. 88 above, § 12.85-12.94.

<sup>139</sup> ECtHR, *Leander v Sweden*, 26.03.1987, App. No. 9248/81.

<sup>140</sup> UK Data Protection Act; German *Bundesdatenschutzgesetz*.

<sup>141</sup> See R Wacks, *Privacy, Property and Personality - Do we need them?* (Conference Paper, Edinburgh 2000).

<sup>142</sup> Court of Appeal, *Naomi Campbell v Mirror Group Newspapers*, (2003) EMLR 2, 39.

longest of three steps to a dignity-based argument in favour of publicity rights, hence, has been accomplished.

## 2. Reputation and dignity

Another aspect of dignity assists that finding: personal reputation, as covered by Article 12 Universal Declaration and Article 17 of the International Covenant.<sup>143</sup> Publication of name and likeness in a degrading context can endanger this individual position. Article 10 (2) ECHR accepts instruments to the protection of personal reputation as legitimate limits to free speech.<sup>144</sup> Libel, defamation or malicious falsehood, to name a few actions,<sup>145</sup> safeguard, *inter alia*, the personal name and likeness against certain types of infringement, such as misrepresentation of facts or embarrassment.

The degree of protection varies: in England, *Tolley*, a golfer depicted in an advertisement, won damage compensation, because readers could be misled to doubt his amateur status.<sup>146</sup> Yet, a photo-montage<sup>147</sup> showing two “Neighbours” actors in a porn act was justified, despite its degrading message, for the context clarified the picture’s fictional character.<sup>148</sup> The protection of honour and personal reputation in England, hence, is relatively narrow.<sup>149</sup>

New York law, also, is lenient towards portrait representation in a false light. A random girl, there, can be used to illustrate an article about teenage sex. The same is true for a random family in respect of fertilization.<sup>150</sup>

In contrast, the ECHR provides more protection for reputation.<sup>151</sup> Germany<sup>152</sup> and France<sup>153</sup> even employ criminal law in this regard, and German civil law found in favour of a person whose likeness was used for advertisements of impotence cures.<sup>154</sup> Gruendgens’ heirs gained injunction against a novel by Klaus Mann portraying the actor in (maybe even deservedly) bad light.<sup>155</sup>

---

<sup>143</sup> See in general: S Redant, *Bereicherungsansprüche bei Ausbeutung des guten Rufes* (2000).

<sup>144</sup> For the protection of business reputation: *Markt Intern GmbH and Klaus Beermann v Germany*, 25.10.1989, No. 10572/83.

<sup>145</sup> W Houseley, n. 123 above, 267 et seq.; see also § 824 BGB (Civil Code) which protects against false reports which can impede a person’s credit.

<sup>146</sup> *Tolley v J.S. Fry & Sons Ltd* [1931] AC 333; see A L Goodhart, n. 116 above.

<sup>147</sup> On photo montage in general: P Jones, “Manipulating the Law against Misleading Imagery: Photo-montage and Appropriation of well-known personality“, (1999) EIPR 28.

<sup>148</sup> *Charleston v News Group Newspapers*, [1994] 2 AC 64, 73B per Lord Bridges.

<sup>149</sup> W Houseley, n. 123 above, 272.

<sup>150</sup> New York Court of Appeal, *Joseph Finger et al. v Omni Publications Int. Ltd.*, 77 NY2d 138, 566 NE2d 141, 564 NY S 2d 1014; *Messenger v Gruner*, 2000 NY Int. 0001.

<sup>151</sup> ECtHR *Bergense Tidende*, 02.05.2000, No. 26132/95 (Reputation of a physician); *Markt intern v Germany*, n. 144 above.

<sup>152</sup> See §§ 185-187 *Strafgesetzbuch* [German Criminal Code].

<sup>153</sup> Article 29 de la loi de 1881; P Bilger & B Prévost, *Le droit de la presse* (13th ed., 1995), 53 et seq.

<sup>154</sup> Bundesgerichtshof, *Herrenreiter*, 14.2.1958, BGHZ 26, 349.

<sup>155</sup> Bundesverfassungsgericht, *Mephisto*, 24.2.1971, BVerfGE 30, 173 upheld the ban in a 4:4 decision.



Reputation, apart from privacy, is another dignitary reason to grant persons control over their public appearance, which is accepted globally to a certain degree.

### 3. *Transferring dignity to the public sphere*

My argument has so far concluded that the dignitary aspects of privacy and reputation advocate an individual's entitlement in his or her characteristics of identity. In private and in absence of conflicting interests, hence, the individual has control over the appropriation of her name and likeness.

Yet, the question remains, whether these considerations remain valid in the public sphere. This transfer causes two problems. Firstly, common needs such as press or arts become more important in this sphere. They now might necessitate the making public of certain personal aspects. Nevertheless, this problem has to be dealt with at the level of justification, not on that of the existence of a right. There, the question will be asked, how the interest spheres can be divided, which position prevails and whether the exceptions are too broad to recognise a right in the first place.<sup>156</sup>

The second aspect, conversely, concerns the genesis of publicity rights: Privacy has been identified as their *raison d'être*. It protects its bearer against the public. So, does it vanish if he decides himself to step into the social sphere? The pivotal point, in that respect, is the concept of consent. In privacy cases, the person does not agree to public reproduction at all. In publicity, consent is split: the individual concerned wants to choose the audience, the ways of publication – or the proper remuneration. Unquestionably, a licence to publish his image or name, obtained from an adult as informed consent for a specific task, constitutes a defence to any infringement of privacy: Self-determination and, thus, dignity itself, supports this idea - *volenti non fit iniuria*.<sup>157</sup>

But the question of how scalable consent is will remain: a proposed “all or nothing” approach meant that voluntary publication of one aspect of personality rendered the whole of it public. According to this conception, anyone who consents to be filmed for a movie can be filmed for everything else,<sup>158</sup> at least if aspects such as intimacy or defamation are not touched. But on this basis, a celebrity's portrait could be used freely – for instance that of a TV presenter for advertising the glasses he wears.<sup>159</sup>

If consent is scalable, however, an individual could control the way her name and picture are appropriated in public. Each single use of personal indicia then would – in the absence of justification – require a licence. This construction of consent would equal a right of publicity.

The opponents of such scalable approach ask, how celebrities, who regularly exploited their names and images for money were “... to explain hurt feelings ...” because of unwarranted publicity. They sold “themselves most of the time to the highest bidder”.<sup>160</sup> Yet, such argumentation disregards private autonomy. Taking this

<sup>156</sup> See *infra*, part C, for the discussion of the conflicting goals and p. 195 respectively p. 199 for the solutions to the conflict.

<sup>157</sup> *Peck v UK*, n. 83 above, §§80-81.

<sup>158</sup> *Naomi Campbell v Mirror Group Newspapers*, n. 142 above.

<sup>159</sup> Compare the facts of: Bundesgerichtshof, *Fuchsberger*, (1992) *Neue Juristische Wochenschrift* 2084.

<sup>160</sup> D Bedingfield, n. 64 above, 112.

point to its limits meant that a bank, who “gives money away most of the time to the highest bidder“, could not complain about theft. Likewise, a prostitute could not be the victim of a rape. These examples illustrate the importance of autonomy. The proposed treatment of an individual’s personality as a common good would degrade him to a mere object and constitute “an affront to dignity”.<sup>161</sup> Dignity, thus, necessitates some degree of publicity control, even if this right may be subject to abuse.<sup>162</sup>

It simply is not plausible that an actor, who earns his money making films, should have waived all dignitary aspects of his personality: private autonomy still allows him to choose or reject roles as he wishes. The example of the actor gains special importance in the digital age: was it possible for an actor to control his assets in the old days by simply not posing or playing in a certain film; soon, some photos of Arnold Schwarzenegger may be enough to digitally sample a whole Terminator 4 movie without Arnie’s active participation. It is private autonomy – the freedom to choose in personal matters – that prevents such a scenario.

Admittedly, one who voluntarily seeks the light of publicity has to endure more critique than a person who remains in the private sphere.<sup>163</sup> The free market place of ideas may necessitate the right to disagree in public with what another person has said and done; and culture will have a legitimate claim to deal with public events and figures in some way. As indicated, however, these considerations are best dealt with on the level of justification, not on that of existence of a right.

Dignity, hence, survives a transfer to the public sphere.<sup>164</sup> Its aspect of autonomy advocates a scalable construction of consent. It is part of this concept that an individual cannot only choose whether to do commercials at all but also for what product and in what form. The decision to be associated with a certain commercial product is part of the inner core of personality. Subject to public interest challenges, a commercially valuable publicity right must be presumed as a reflex, a derivative of respect for human dignity and self-determination.

#### *4. Conclusion: dignitary interests as raisons d’être for publicity rights*

To conclude, subject to exceptions for press and artistic use, a person’s ability to commercially exploit personality follows from dignitary – and not from commercial considerations. The intellectual property analogy, hence, is limited, for its rationale does not apply in the personality rights context. Yet, human self-determination in aspects of personal identity supports personality rights.<sup>165</sup> Free commercial appropriation of a persona by others is not satisfactory from this dignitary point of view.

---

<sup>161</sup> W Houseley, n. 123 above, 294.

<sup>162</sup> W Houseley, n. 123 above, 295.

<sup>163</sup> Council of Europe; Res. 1165 / 1998 on public figures; Lord Woolf in *B & C / A*, (2002) HRLR 25, 703, 714.

<sup>164</sup> D Lindsay, n. 109, 107 on *Lenah Game Meats* case.

<sup>165</sup> J Kahn, n. 2 above, 319; O Goodenough, n. 67 above, 45.

### **C) The democratic and communitarian challenge of publicity rights**

As indicated, important public interests from the common sphere such as press reporting, artistic freedom and commercial access to resources conflict with an alleged right to publicity. These values will be qualified here. Solutions to the conflict, however, will be offered *infra*, in the discussion of the main case groups.

#### **I. Press reporting and publicity rights**

A serious challenge originates from the right to freedom of the expression, as protected by the 1st Amendment to the United States Constitution, Article 10 ECHR and Article 5 *Grundgesetz*.<sup>166</sup> Most publicity statutes, too, acknowledge exceptions for “newsworthy” content<sup>167</sup> or for public figures<sup>168</sup> respectively persons “of contemporary history”.<sup>169</sup> Mainly utilitarian reasons support free publication.<sup>170</sup> In a democratic society, the media are part of the system of checks and balances. Independent from the state, they fulfil a “watchdog function” by critically reporting on legislation and administration.<sup>171</sup> Moreover, a free press furthers the political debate: in Oliver Holmes’ view, only a free market place of ideas allows the public to build and weigh opinions.<sup>172</sup> Elaborating this argument, Habermas advocates institutional safeguards for a pressure-free political discourse. The results of this process, he thinks, will match society’s needs best.<sup>173</sup> The freedom of speech, hence, allows self-government and self-fulfilment<sup>174</sup> of the people, as Meiklejohn put it.<sup>175</sup> These democratic functions demand the strongest protection for the dissemination of political opinion and for reporting of facts. Conversely, a purely utilitarian view does not rank commercial speech particularly highly:<sup>176</sup> in most regimes, it still finds some

<sup>166</sup> J Kahn, n. 2 above, 249 et seq.

<sup>167</sup> § 51 NY Civil Law; California Civil Code.

<sup>168</sup> Council of Europe Resolution 1165 / 1998 on public figures; See A McGee & G Scanlan, n. 4 above, 266 et seq. for different categories of public figures.

<sup>169</sup> Compare §23 *Kunsturhebergesetz*.

<sup>170</sup> E Barendt, *Freedom of Speech* (1987), 1 et seq.

<sup>171</sup> A J Jeffery, “Free Speech and Press: An Absolute Right“, (1986) *Human Rights Quarterly* 197, 198.

<sup>172</sup> Holmes J in *Abrams v US*, 250 US 616 (1919).

<sup>173</sup> Habermas, *Faktizität und Geltung*, (Paperback 1997) 272 et seq. refers to Dworkin when he establishes his theory of a pressure free discourse. His work builds on the benefits of a clash of arguments, see John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1643 / 1927), 29; compare A J Jeffery, n. 171 above, 198-199.

<sup>174</sup> A Nicol, G Millar & A Sharland, *Media Law & Human Rights* (2001), 3.

<sup>175</sup> A Meiklejohn, “The First Amendment is an Absolute” (1961) *Supreme Court Review* 245, 257; compare W J Brennan, “The Supreme Court and the Meiklejohn interpretation of the First Amendment”, (1965) 79 *Harvard Law Review* 1, 12; S L Carter, “Technology, Democracy and the Manipulation of Consent”, 93 *Yale Law Journal* 581, 600; S J Ungar “The role of a free press in strengthening democracy” in J Lichtenberg (ed.), *Democracy and the mass media* (1990), 368 et seq.

<sup>176</sup> Concerning commercial speech, the ECtHR grants states a wider margin of appreciation, see *Casado Coca v Spain*, 24.02.1994, App. No. 15450/89, § 47-56; *Markt intern v Germany*, n. 144 above, §§ 32-38; The US SCT. concurs, 44 *Liquormart v Rhode Island*; some even argue against recognition of commercial speech: Swiss government’s submission in ECtHR, *Autronic v Switzerland*, 22.05.1990, No. 12726/87 (1990), § 44.

protection,<sup>177</sup> chiefly because free commerce, which requires advertising,<sup>178</sup> is safeguarded.<sup>179</sup>

Publicity rights potentially interfere with the freedom of the press, even if this freedom mainly protects against state intrusion.<sup>180</sup> Like copyright or trademarks, personality rights create exclusive rights. Such entitlements – enforced by national courts – potentially form barriers to trade in information. Press freedom, therefore, has to be exempted from publicity rights. Admittedly, judicial self-restraint finds it difficult to decide substantively about speech:<sup>181</sup> in particular, US courts feel unable to decide between “good” and “bad” speech. It has to be discussed if the press privilege leaves space for exclusive rights in the commercial appropriation of personality with its two major categories merchandising and advertising.<sup>182</sup>

## II. Artistic freedom

Even more complex is the conflict between publicity rights and the arts. In Article 10 ECHR and the 1<sup>st</sup> Amendment to the US Constitution, artistic freedom is a subcategory of expression, while the *Grundgesetz* makes special provision in Article 5 (3). Art is a form of reflection. Artists in their work communicate with their social environment. Public figures are part of the established culture. Art, in reflecting and developing culture, requires public images. Alternative forms of culture such as satire require such appropriation in order to criticize and question the mainstream.<sup>183</sup> Publicity rights would endanger this role of the arts, if they barred artists from creating films, songs or paintings about such persons of general interest. Copyright and trademark law face the same problem: they solve it by means of fair use exceptions for the arts.<sup>184</sup> They comprise, inter alia, new creations (adaptations),<sup>185</sup> citations<sup>186</sup> and reporting.<sup>187</sup> The example proves that the conflict can be handled. The

---

<sup>177</sup> *Autronic v Switzerland*, n. 176 above, §47.

<sup>178</sup> The European Community with its market freedoms (Article 28 EC) protects advertising see C-470/93, *Verein gegen das Unwesen in Handel und Gewerbe Köln v Mars*, 1995 ECR I-1923. The directive “Television without frontiers” 89/552/EEC of 3 October 1989 as amended by Directive 97/36/EC of 30 July 1997, however, restricts commercial speech (in TV) quite rigorously. C-292/92, *Ruth Hühnermund v Landesapothekerkammer Baden-Württemberg*, 1993 ECR I-6787 also limited safeguards for advertising by not applying the stringent Keck-rules to not product related speech. C-376/98, *Germany v Parliament & Council (Tobacco Advertising)*, 2000 ECR I-8419 did not clarify whether tobacco advertising is protected under human rights.

<sup>179</sup> Commerce is protected predominantly by Article 28 EC, but also in national constitutions, see Article 12 *Grundgesetz*.

<sup>180</sup> The 1<sup>st</sup> Amendment is addressed to “Congress” which “shall make no law...”. And G Madison in “On the Press”, (1794) 4 *Annals of Congress* 934, thought “the censorial power is in the people over the Government, and not in the Government over the people.”; compare US SCt., *NY Times v Sullivan*, 376 US 254 at 274f.

<sup>181</sup> D Bedingfield, n. 64 above, 166.

<sup>182</sup> See *infra*, p. 195 and p. 199.

<sup>183</sup> M Madow, n. 2 above, 135 et seq.

<sup>184</sup> S Fraser, “The Conflict between the First Amendment and Copyright Law and its Impact on the Internet”, (1998) 16 *Cardozo Arts and Entertainment Journal* 1.

<sup>185</sup> UK: sec. 76 CDPA 1988; Germany: §24 UrhG 1965.

<sup>186</sup> UK: sec. 20 CDPA 1988; Germany: §51 UrhG 1965.

exceptions neither question the very existence of intellectual property, nor that of dignitary publicity rights.<sup>188</sup> The details of how advertising can be brought into concordance with the arts will be discussed below.<sup>189</sup>

### III. Legitimate business interests of others: fair use doctrines

Finally, there might be some commercial wish to use certain names or portraits. In some cases, the exercise of an exclusive personality right can distort a secondary market. For instance, if a sportsman dominating his discipline – golf – such as Tiger Woods granted a licence to only one producer the relevant secondary market such as that of golf video games with real players would be affected. In such cases, the essential facilities doctrine, as available under EC competition law<sup>190</sup> and national laws,<sup>191</sup> might help. In the EC, compulsory licensing, as known from patent law,<sup>192</sup> is accepted for all kinds of intellectual property in some circumstances,<sup>193</sup> as known from patent law.<sup>194</sup> The argument cannot be elaborated further and there is a vivid discussion how far this doctrine can be stretched, but it shows that business-related exceptions might ease the burden of the monopolies proposed here.<sup>195</sup>

### IV. Result: conflict between publicity rights, freedom of the press and arts

To summarise, publicity rights conflict with important interests, predominantly with the freedom of the press and with the freedom of arts.<sup>196</sup> Yet, these conflicting rights do not sweep away commercial personality rights altogether, even if they very well may limit their range.

---

<sup>187</sup> UK: sec. 30 CDPA 1988; Germany: §50 UrhG 1965.

<sup>188</sup> M Madow, n. 2 above, 238 et seq., however, assumes that.

<sup>189</sup> See *infra* p. 197 (advertising) and p. 199 (merchandising).

<sup>190</sup> ECJ, Case C-241 and C-242p, *RTE & ITP v Comm. (Re: Magill)*, ECR 1995, I-743; compare C-7/97, *Oscar Bronner v Mediaprint*, 26.11.1998, 1998 ECR I-7791.

<sup>191</sup> Sec. 19 para. 4 no. 4 *Gesetz gegen Wettbewerbsbeschränkungen* [German Antitrust Law].

<sup>192</sup> See Article 5 (A) Paris Convention, n. 19 above; UK Patents Act 1977, s. 48 et seq.; §24 Patentgesetz 1980 [German Patent Act].

<sup>193</sup> ECJ, *CICRA & Maxicar v Renault* [1988], ECR 6039; ECJ, *Volvo* [1988] ECR I, 743; CFI, *Ladbroke*, [1997], II-923; see also AG Tizziano, case C-418/01, opinion of 3 October 2003, who distinguishes between the primary market and secondary markets.

<sup>194</sup> See Article 5 (A) Paris Convention, n. 19 above; UK Patents Act 1977, s. 48 et seq.; §24 Patentgesetz 1980 [German Patent Act].

<sup>195</sup> Compare A Lober & O Weber, “Zur Grenze zwischen entgeltlicher und freier Nutzung von Persönlichkeitsrechten zu kommerziellen Zwecken im deutschen und englischen Recht - Oliver Kahn / Electronic Arts“, (2003) *Zeitschrift für Urheber- und Medienrecht* 658.

<sup>196</sup> For the solutions proposed see *infra*, p. 195 et seq. and p. 199 et seq.

## ***D) The empirical case: how legal instruments of selected jurisdictions solve the conflict between publicity rights and other interests***

In order to further elaborate the tension between publicity rights and other interests, this article now will employ an empirical approach by examining how legal instruments of different jurisdictions deal with the problem.<sup>197</sup>

### **I. Statutory portrait and name rights**

In many countries, portrait rights and their exceptions are protected by statute.

#### *1. Germany: portrait rights and the general tort clause*

Anticipating the constitutional right to development of personality,<sup>198</sup> the German 1907 *Kunsturhebergesetz* [KUG] grants rights to a person portrayed.<sup>199</sup> While copyright rests with the photographer, the individual depicted can decide on publication, §22 KUG.<sup>200</sup> This right encompasses all appropriation of personal likeness in any form whatsoever. §12 of the 1900 Civil Code [BGB] furthermore protects a person's good name.<sup>201</sup>

##### *a. How the general tort clause protects statutory portrait and name rights*

These rights gain effect by means of the civil code's general tort clause (§823 BGB), which features two paragraphs. The first one grants the right to compensation, if freedom, health, property or another listed position is infringed wilfully or negligently, and pecuniary damage was caused. This clause is semi-open, since it refers explicitly to (not listed) "other rights", but such undefined rights are required to have the importance of the ones named. The constitutional privilege of personality in Article 2 para. 1 GG read in conjunction with Article 1 para. 1 GG is ranked as such a right. Its infringement leads to tort liability under section 823 para. 1 BGB.

Alternatively, sec. 823 para. 2 BGB recurs to laws which protect a certain addressee. Whoever infringes such a protective law and causes damage is held liable by this second paragraph of sec. 823 BGB to pay compensation as well. The portrait right of §22 KUG and the name right of § 12 BGB constitute such protective laws which trigger sec. 823 para. 2 BGB.

The total range of protection granted by both paragraphs of sec. 823 BGB is quite comprehensive, but a gap remains in the absence of culpa.<sup>202</sup>

---

<sup>197</sup> See other comparative works: N Witzleb, n. 1 above; Neumann-Klang 1998; H Beverley-Smith, as n. 1 above.

<sup>198</sup> Article 2 (1) and Article 1 (1) *Grundgesetz*.

<sup>199</sup> On German publicity law: G Thwaite & W Brehm, "German Privacy and Defamation Law: The Right to Publish in the Shadow of the Right to Human Dignity", (1994) 8 *EIPR* 336; B Kormanicki in J Adams (ed.), as n. 1 above, chapter 16.3.

<sup>200</sup> For intense treatment of §22 KUG see: M Prinz & B Peters, n. 17 above, 544 et seq.; M Paschke, n. 17 above, 285 et seq.; J Petersen, *Medienrecht* (2003), 38 et seq.; N Witzleb, n. 1 above, p. 19; B Kormanicki in J Adams, as n. 1 above, chapter 16.9.

<sup>201</sup> On § 12 BGB: C Schertz, n. 31 above, §353 et seq.; B Kormanicki in J Adams, as n. 1 above, chapter 16.6.

<sup>202</sup> §812 BGB (unjust enrichment): closes the gap: *Fuchsberger*, n. 159 above.

*The justifications for press and artistic use*

Justifications countering this right are available – mainly for artistic use and reporting about events of contemporary history, §23 KUG. The leading dogma of this provision distinguishes between *absolute* and *relative* public figures. The former category includes persons such as the Queen or the Pope. In the borders of intimate privacy and defamation, they can be subject of any report. Conversely, the latter can be appropriated only in relation to the matter or event they are famous for: an amateur footballer, for instance, can be named in match reports of a local paper, but his extra-marital affairs are taboo. If §23 KUG applies, a balancing test between the portrait right and the public interest follows.

*b. §23 KUG and commercial appropriation of likeness*

German courts have exempted most commercial use of portrait rights from the privilege of §23 KUG. Advertising<sup>203</sup> and merchandising of memorabilia,<sup>204</sup> in general, require a licence. Edited journal articles<sup>205</sup> and pieces of art, however, are safe, without a licence, even if they pursue a commercial aim at the same time.<sup>206</sup> This dogma has proven to be easy in application, at least as far as the two main categories here under review are concerned:

Unlicensed endorsement is only allowed for press organs which promote edited articles with a photo of their very subject, be it on the title or in other media. A tennis book, thus, could depict *Boris Becker* on the title without his permission.<sup>207</sup> The Bundesgerichtshof affords the press privilege high protection: it has held that even a company or customer magazine, produced for PR reasons only, can use celebrities on the title, unless association with the company is alleged falsely.<sup>208</sup> Lower courts, however, have deviated from this liberal line and prohibited a paper from using an agent's picture for the promotion of an article about the East German secret service.<sup>209</sup> In another case, Boris Becker won compensation from a newly founded paper which used his photograph on an unpublished test issue for TV advertisements.<sup>210</sup>

Personality merchandising, also, is perceived as an exclusive right of the person depicted. But §23 KUG, in this domain, justifies more cases of appropriation: if a product, aside from the portrait, produces a message or an opinion, it does not require a licence by the person depicted. An older, more restrictive decision had required Panini sticker albums of footballers to obtain licences to use the images of the footballers shown.<sup>211</sup> Yet, recent decisions are more lenient: a collector medal

---

<sup>203</sup> *Fuchsberger*, n. 159 above.

<sup>204</sup> Bundesgerichtshof, *Nena*, (1987) *Neue Juristische Wochenschrift* RR 231.

<sup>205</sup> Bundesgerichtshof, *Kundenzeitschrift*, 14.3.1995, (1995) *Neue Juristische Wochenschrift* RR 789.

<sup>206</sup> Bundesgerichtshof, *Marlene Dietrich*, 1.12.1999, BGHZ 143, 214.

<sup>207</sup> OLG Frankfurt, *Boris Becker (Tennis Book)*, (1989) *Neue Juristische Wochenschrift* 402.

<sup>208</sup> *Kundenzeitschrift*, n. 205 above.

<sup>209</sup> LG Berlin, *Schalek-Golodkowski („Stasi“)*, (1996) *Neue Juristische Wochenschrift*, 1142.

<sup>210</sup> *Boris Becker v FAZ*, n. 37 above; see O Weber, n. 37 above.

<sup>211</sup> Bundesgerichtshof, *Panini (football collector stickers)*, 20.6.1968, BGHZ 49,1988.

depicting Willy Brandt<sup>212</sup> and calendars of footballers did not require a licence<sup>213</sup> - for they were accompanied by certain facts about the depicted persons' life. Minimal informational character, hence, is sufficient to trigger the press privilege. Commercial consumer items, cups and T-Shirts, however, still need a licence by the person depicted.<sup>214</sup>

The art privilege was at the core of a case where a private company had produced a musical about Marlene Dietrich. They also licensed her name to commercial operators such as Fiat and L'Oreal. Her heir sued for compensation, alleging Marlene's personality rights had passed over to her and had been infringed. The Bundesgerichtshof distinguished between the musical itself and the marketing around it. They found the musical to be a piece of art which qualified for exemption under §23 KUG. The licensing of the trade name, however, was characterized as purely commercial, and it infringed Dietrich's personality right.<sup>215</sup> Merchandising, hence, is not subject to as many personality law restrictions as endorsement under the KUG.

Interestingly, the same regulatory technique is applied in Japanese law: a general tort clause is used to regulate dignitary and commercial aspects of personality appropriation.<sup>216</sup> Article 709 Civil Code has common roots with the German one, with similar results, advertising and merchandising requiring a licence in most cases.<sup>217</sup>

§§ 19-21 of the 1912 Dutch *Auteurswet*<sup>218</sup> quite similarly acknowledge an exception for portraits. Publication of a portrait made on order is not allowed unless consent by the person portrayed was given. If the portrait was not made on order, the person depicted will be able to veto publication if she – or after her death her relatives – show a “redelijk belang”, i.e. a legitimate interest. The consequences of this statutory portrait right are close to the ones in Germany.

## 2. New York and California: commercial rights but no privacy

In New York, the above-mentioned 1902 *Roberson* case led to the introduction of §§50, 51 Civil Law.<sup>219</sup> The law gives actionable rights to persons whose name, portrait or picture is used for purposes of advertising or trade.<sup>220</sup>

---

<sup>212</sup> Bundesgerichtshof, *Willy Brandt*, 8.9.1994, (1996) *Neue Juristische Wochenschrift*, 593.

<sup>213</sup> Bundesgerichtshof, *Football calendar*, 6.2.1979, (1979) *Neue Juristische Wochenschrift* 2293; against: OLG Hamburg, *Backstreet Boys calendar*, (1996) *Zeitschrift für Urheber- und Medienrecht* 214.

<sup>214</sup> *Nena*, n. 204 above.

<sup>215</sup> *Marlene Dietrich*, n. 206 above.

<sup>216</sup> H Ruijsenaars, n. 28 above, 111.

<sup>217</sup> Japanese Supreme Court, *Mark Lester v Tokyo Daiichi Film, Tokky* (Patent and Enterprise) Sep. 1976, at 47; Japanese Supreme Court of 11.6.1986, *Minsh* 40-4, at 872.

<sup>218</sup> Wet van 23.9.1912 houdende nieuwe regeling van het auteursrecht (Author's right statute).

<sup>219</sup> *Roberson v Rochester*, n. 10 above; see *supra*, p. 161.

<sup>220</sup> § 50 (“Right to privacy”) states: “A person, firm or corporation that uses for advertising purposes, or for purposes of trade, the name, portrait or picture of any living person without first having obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.” § 51 then moves on to grant the victim corresponding civil court action.



The statute's scope is broad enough to tackle certain aspects of the press privilege: fictionalised biographical facts, for instance, are prohibited.<sup>221</sup> Yet, in the light of constitutional considerations, the exemption of newsworthy events and other public interests nears the absolute.<sup>222</sup> Even limited newsworthiness wins over most severe privacy interests: for example, a person staying at the same mental institution as a woman whose daughter was killed in strange circumstances could be portrayed without her authorisation.<sup>223</sup>

Pictures accompanying edited articles are legal, unless they constitute an "advertisement in disguise"<sup>224</sup> or they lack a "real" relationship to the article.<sup>225</sup> Not much is needed to make a link "real": as mentioned above, a random photo of a large family can legally illustrate an article on fertility research<sup>226</sup> as well as one of a random girl can accompany a story discussing teenage sex, alcohol abuse and pregnancy.<sup>227</sup> Only one judge, in a dissenting view, has considered that creating a false impression might be actionable under the statute.<sup>228</sup>

Under the "advertising in disguise" prong, the appropriation of human likeness in a commercial context is much more limited.<sup>229</sup> The statute was tailored to prohibit endorsement of the kind found in the *Roberson* case.<sup>230</sup> But merchandising is also restricted: baseball-cards, for instance, were held to fall into the exclusive sphere of the players.<sup>231</sup> New York law, hence, is tough on commercial, and lenient on press, appropriation of personal indicia.

The Californian Civil Code,<sup>232</sup> as well, prohibits the use of one's name, voice, signature, photograph or likeness in any manner on or in products, merchandise or goods, or for purposes of advertising.<sup>233</sup> The duration of this right was recently prolonged to 70 years after the person's death.<sup>234</sup> As can be guessed from the

---

<sup>221</sup> See NY Court of Appeals, *Binns v Vitagraph of America*, 210 NY 51 (1913); NY Court of Appeals, *Spahn v Julian Messner*, 21 NY2nd 124 (1967).

<sup>222</sup> NY Court of Appeals, *Stephano v News Group Pub.*, 64 NY2nd 174 (1984); NY Court of Appeals, *Arrington v NY Times*, 55 NY 2nd 433 (1982); *Finger v Omni Publications*, n. 150 above; *Messenger v Gruner*, n. 150 above; see D Bedingfield, n. 64 above, 110.

<sup>223</sup> *Howell v NY Post.*, n. 121 above.

<sup>224</sup> Examples for plain advertisement include text and pictures on products: See *Roberson v Rochester*, n. 10 above.

<sup>225</sup> *Stephano v News Group Pub.*, n. 222 above; *Arrington v NY Times*, n. 222 above; *Finger v Omni Publications*, n. 150 above; *Messenger v Gruner*, n. 150 above.

<sup>226</sup> *Finger v Omni Publications*, n. 150 above.

<sup>227</sup> *Messenger v Gruner*, n. 150 above.

<sup>228</sup> See Bellascosa J. in *Messenger v Gruner*, n. 150 above.

<sup>229</sup> R S Robinson, n. 4 above, 198.

<sup>230</sup> *Roberson v Rochester*, n. 10 above.

<sup>231</sup> NY Court of Appeals, *Gautier v Pro-Football*, 304 NY 354 (1952).

<sup>232</sup> California Civil Code §3344: Misappropriation of likeness.

<sup>233</sup> See S Boyd, n. 44 above, 2.

<sup>234</sup> R Badin, "USA & Germany: publicity protection – recent developments", (2000) 11(4) *Entertainment Law Review*, N43.

importance of the film industry in California, the courts tend to be more restrictive in relation to fair press use than in New York.

### 3. France: comprehensive protection privacy and publicity

In France, the commercial and dignitary aspects of personality are protected by the private life clause of Article 9 Code Civil (“CC”).<sup>235</sup> Article 226-1 Code Penal further introduces criminal sanctions for intrusion of privacy.<sup>236</sup> The fixation and transmission of a person’s image taken in a private place is prohibited explicitly. Article 9 CC also protects commercial interests of celebrities.<sup>237</sup> Recently, the clause helped goalkeeper Barthez to claim damages for underpants which reproduced his name and likeness.<sup>238</sup> Interestingly, French personality cases have been decided on the basis of these specific privacy provisions<sup>239</sup> rather than on the basis of Article 1382 CC.<sup>240</sup> The concept of this general comprehensive clause of *délit* is to grant damage for all wrong doing. This regulatory technique is – in essence – common to all Romanic jurisdictions.<sup>241</sup> Endorsement and merchandising, hence, depend on a licence in France, since all appropriation is seen as an infringement of privacy.

### 4. Result: statutory rights require licence for merchandising and endorsement

To summarise, jurisdictions acknowledging written personality rights concur in prohibiting commercial appropriation. They vary, however, considerably in their approach to deal with newsworthy exceptions. Not even in New York, the bastion of the press privilege, is false endorsement or merchandising possible without a licence. Two regulatory techniques are available: either specific provisions provide for rights and remedies themselves or they refer to general tort clauses. But they all have constituting elements which define certain personality rights as a first layer; the interests of the press or the arts then act as defences on a second one.

---

<sup>235</sup> J Mazaltov in J Adams (ed.), n. 1 above, 265 et seq.

<sup>236</sup> B Markesinis, “The Calcutt Report must not be forgotten”, (1992) 55 *Modern Law Review* 118, 120 who deals with older French law.

<sup>237</sup> See for example the cases of the actresses: *Brigitte Bardot*, JCP 1966 II, 14521 (24.11.1965), D. 1967, 450 (23.2.1967); *Catherine Deneuve*, D. 1976, 291 (14.5.1975); *Romy Schneider*, JCP 1980 II, 19343 (5.6.1979), *Philippe*, JCP 1965 II, 14223 (14.3.1965); compare: B Markesinis, n. 236 above, 120.

<sup>238</sup> F Ponthieu, “France: Sport – Right to protection of your own image”, (2001) 12 (6) *Entertainment Law Review* N59.

<sup>239</sup> F Ponthieu, n. 238 above.

<sup>240</sup> Art. 1382 CC: “Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.”

<sup>241</sup> Art. 1902 Spanish *Código Civil*: “El que por acción u omisión causa daño a otro, interviniendo culpa o negligencia, está obligado a reparar el daño causado”, Real Orden De 29 De Julio De 1889; Art. 2043 Italian *Codice Civile*: “Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno (Cod. Pen. 185).”, R.D. 16 marzo 1942, n. 262 Approvazione del testo del *Codice Civile* (Pubblicato nella edizione straordinaria della *Gazzetta Ufficiale*, n. 79 del 4 aprile 1942).

## II. Specific publicity torts

Statutory portrait and name rights are used frequently but not everywhere. Some jurisdictions in the US and Canada have instead developed specific publicity torts.

A right of publicity has been accepted in many US states. According to it a celebrity's identity can be valuable for advertising, and the celebrity can restrict the unauthorised commercial exploitation of that identity.<sup>242</sup> The Georgia Supreme court accepted such a tort against the reproduction of somebody's likeness for advertising as early as 1905, as a part of privacy.<sup>243</sup> As indicated above, publicity then was first acknowledged separately from privacy in *Healan*, where baseball players were given title to exclusively market their images on bubble gum packs.<sup>244</sup>

In *Zacchini*, the US Supreme Court held that publicity rights in a show can restrict the freedom of the press.<sup>245</sup> The 1965 Restatement of Torts (2<sup>nd</sup>) recognized, in §652A-I a, a "right to privacy." In one alternative, it qualifies the commercial appropriation of another's name and likeness as a tort: such entitlement encompasses both merchandising and endorsement.

Publicity rights, consequently, are arguably more widely accepted than privacy rights in the US.<sup>246</sup> Nonetheless, only about half of the jurisdictions within the US protect portrait rights – be it by means of judge-made tort law or by means of a legislated instrument.<sup>247</sup>

Canada, however, acknowledges a person's right "in the exclusive marketing for gain of his personality, image and name" as a separate tort since the *Krouse v Chrysler* case.<sup>248</sup> Such right is actionable there and includes the right to prevent merchandising and endorsement.<sup>249</sup>

It has to be concluded that some common law jurisdictions have developed specific torts of publicity. Substantively, they are similar to the statutory provisions considered above.

## III. Passing off

Other common law jurisdictions such as England<sup>250</sup> or Australia<sup>251</sup> neither provide for statutory<sup>252</sup>, nor for specific publicity, torts.<sup>253</sup> Interestingly, this traditional judge-

---

<sup>242</sup> G M Armstrong, n. 41 above, 443; see *Carson v Here's Johnny Portable Toilets Inc.*, [1983] 698 F. 2d 831.

<sup>243</sup> *Pavesich v New England Life Insurance*, n. 66 above.

<sup>244</sup> *Haelan v. Topps*, n. 2 above.

<sup>245</sup> *Zacchini v Scripps-Howard Broadcasting Comp*, n. 53 above; compare *O Goodenough*, n. 2 above, 60.

<sup>246</sup> *D Bedingfield*, n. 64 above, 112; *Th Catanzariti*, n. 2 above, 139.

<sup>247</sup> Compare *J T McCarthy*, n. 6 above, 6-3; *S Boyd*, n. 44 above, 2.

<sup>248</sup> *Athans v Canadian Adventures Company Ltd.* [1977] O.R. 2d 425, 435; Ontario Court of Appeal, *Krouse v Chrysler Limited Canada* [1973] DLR (3d) 15 and *S Boyd*, n. 44 above, 2.

<sup>249</sup> See *H Beverley-Smith*, n. 1 above, 115 et seq.; *P Tackaberry*, "Canada: Copyright – Misappropriation of personality", (1998) *Entertainment Law Review* N38.

<sup>250</sup> See *J Holyoak*, n. 27 above, 444.

made common law has developed slower than statute-based law<sup>254</sup> towards the recognition of publicity rights. However, the re-interpretation of passing off<sup>255</sup> may provide a perspective to do so.

### 1. UK: classical passing off

In *Advocaat*,<sup>256</sup> the classical form of passing off is defined. According to Lord Tullybelton, the action roots in the plaintiff's goodwill. His trade name is eligible for protection, if he used it exclusively for goods of a certain quality. The requirements of the tort are met, if the defendant confuses the public by using that very name for his goods and damage is at least likely.<sup>257</sup> Lord Diplock, on the other hand, found that the defendant in course of his business has to be guilty of a misrepresentation to potential customers of the plaintiff. This misrepresentation must be calculated to injure the business or goodwill of the plaintiff and must be likely to lead to damage.<sup>258</sup>

In short, three key elements are necessary for a promising action: goodwill acquired by the plaintiff in his goods, name, mark etc; a misrepresentation by the defendant leading to confusion of the public and plaintiff's damage resulting from this action.<sup>259</sup> Some cases have tested the applicability of this tort to the commercial appropriation of likeness.<sup>260</sup>

#### a. Confusion

The pivotal point there was the element of confusion. Passing off will apply only if the public is misled about a quality of the goods or services, foremost about their

<sup>251</sup> Th Catanzariti, n. 2 above, 139.

<sup>252</sup> See the limited case of sec. 85 CDPA 1988 (privacy in commissioned portraits and films).

<sup>253</sup> B Markesinis, *The German Law of Torts* (2<sup>nd</sup> ed., 1990), 315, criticises the system of specific torts: "English Law, on the whole, compares unfavourably with German law. True, many aspects of the human personality and privacy are protected by a multitude of existing torts but this means fitting the facts of each case in the pigeon hole of an existing tort, and this process may not only involve strained constructions; often it may also leave a deserving plaintiff without a remedy." Compare Bingham LJ in *Kaye v Robertson*, n. 124 above, 70.

<sup>254</sup> Compare Scott LJ in *Haseldine v Dew*, [1941] 2 KB 343, 362-363: "The common law has throughout its long history developed as an organic growth, at first slowly under the hampering restrictions of legal forms of process, more quickly in Lord Mansfield's time, and in the last one hundred years at an ever-increasing rate of process as new cases, arising under new conditions of society, of applied science, and of public opinion, have presented themselves for solution by the courts."

<sup>255</sup> On the action see Bently & B Sherman, *Intellectual Property Law* (2001), Chapter passing off; B Sherman & F Kaganas, n. 122 above, 341; J Adams, n. 1 above, 89.

<sup>256</sup> House of Lords, *Erven Warnink B. V. v J. Townend & Sons (Hull) Ltd. And Another*, [1980] RPC 31, 99 ff.; Compare M Elmslie & M Lewis, n. 30 above, 270.

<sup>257</sup> *Erven Warnink v Townend*, n. 256 above, 99 et seq. Per Lord Fraser of Tullibeltton.

<sup>258</sup> *Erven Warnink v Townend*, n. 256 above, 89 et seq. per Lord Diplock; compare H Beverley-Smith, n. 1 above, 60-1.

<sup>259</sup> Compare H Beverley-Smith, n. 1 above, 60-1; *Lyngstad v Anabas*, n. 33 above, 66.

<sup>260</sup> On Appropriation of likeness and passing off in England in general: H Beverley-Smith, n. 1 above; N Witzleb, n. 1 above, 208 et seq.; H Carty, "Character Merchandising and the law of Passing-Off", (1993) 13(3) *Legal Studies* 289.

origin.<sup>261</sup> Since the 1947 *MacCulloch v May* case, the courts had denied a risk of confusion unless both parties were engaged in the same “field of activity”.<sup>262</sup> Yet, famous persons, in general, are not active in the trade of products; all they do is to market their reputation or to sell it in advertising. This led Oliver J. to conclude that the unlicensed production and sale of ABBA memorabilia did not join the requirements of passing off: the band was not famous for producing goods, but for singing.<sup>263</sup> Consequently, merchandising of memorabilia was not within the law of passing off<sup>264</sup> – at least as far as living persons are concerned and subject to certain exceptions.<sup>265</sup> As a result, there was no need to obtain consent for use of an image etc on a product.

False endorsement was not prohibited either:<sup>266</sup> In *MacCulloch v May*, a radio presenter’s *alter ego* had been used to advertise breakfast cereals. Wynn-Parry J. rejected passing off, because there was no common field of activity.<sup>267</sup>

Recently, in the landmark decision *Irvine v Talksport*, Laddie J. was prepared to rethink the issue.<sup>268</sup> He interpreted the element of confusion as broader than a “common field of activity”: to him, the action’s prerequisites are met if the public is misled about the fact, that a product or service is endorsed by a person having sufficient goodwill. Under this new approach, confusion can appear not only on the products market, but also on the advertising market. On this market, both parties are present. The major obstacle for the protection of commercial personality rights, hence, is removed nowadays.

#### *b. Goodwill and damage*

The interpretation of passing off after *Irvine* focuses on goodwill,<sup>269</sup> the attractive force that brings in custom.<sup>270</sup> Reputation is qualified as an intangible commodity.<sup>271</sup> This focus restricts passing off to famous people; lost dignity is not perceived as the requisite damage. A punter, who suffered from false endorsement, therefore cannot claim that he has suffered damage, as he does not have the necessary goodwill in his image.<sup>272</sup> An unpleasant result from a dignitary point of view.

---

<sup>261</sup> I Davies & A Terry, n. 56 above, N135.

<sup>262</sup> See *MacCulloch v May*, [1947] 2 All E. R. 845.

<sup>263</sup> *Lynstad v Anabas*, n. 33 above, 62.

<sup>264</sup> Compare H Carty, n. 260 above, 289.

<sup>265</sup> *Ninja Turtles case*, n. 49 above.

<sup>266</sup> See definition by Laddie J. in *Irvine v Talksport*, n. 35 above, §12.

<sup>267</sup> *MacCulloch v May*, n. 262 above.

<sup>268</sup> *Irvine v Talksport*, n. 35 above; annotated by K Sloper & Cordery, n. 35 above, 106; A Learmonth, “Eddie, are you ok? Product endorsement and passing off”, IPQ 2002, 306; D Farnsworth, “A false impression?”, Legal Week 11.4.2002.

<sup>269</sup> On goodwill: S Burley “Passing Off and character Merchandising: Should England lean towards Australia”, (1991) 7 EIPR 227, 228; I Davies & A Terry, n. 56 above, N135.

<sup>270</sup> M Elmslie & M Lewis, n. 30 above, 275.

<sup>271</sup> *Irvine v Talksport*, n. 35 above.

<sup>272</sup> On the issue of damage: S Burley, n. 269 above, 229.

## 2. Australia: the extended action of passing off

Passing off was extended in Australia<sup>273</sup> to “meet new circumstances involving the deceptive or confusing use of names, descriptive terms or other indicia...”<sup>274</sup> In *Henderson v Radio Corp.*, the appropriation of reputation was characterized as “an injury in itself, no less, in our opinion, than the appropriation of... goods or money”.<sup>275</sup> The instrument is tailored to commercial cases. It encompasses merchandising of fictional characters such as Crocodile Dundee<sup>276</sup> or puppets from Sesame street.<sup>277</sup>

## 3. Conclusion: passing off as a purely commercial instrument of protection

Passing off is an instrument for commercial purposes. It lacks dignitary aspects. In its traditional mode of application, the instrument was useless for the protection of commercial personality rights.<sup>278</sup> In its recent version, however, it can deal quite adequately with these cases,<sup>279</sup> at least as long as they involve famous people. Plaintiffs outside the traditional sphere of passing off, however, still must rely on a confusing number of analogies and neighbouring doctrines.<sup>280</sup> In Australia, the extended action prohibits companies from free riding by using other people’s personal indicia for endorsement and merchandising comprehensively.<sup>281</sup> Still, it has to be concluded that the action is not based on the dignitary rationale promoted in this article.

## IV. Unjust Enrichment

Apart from unlawful action or *délict*, a few other extra-contractual actions apply to the appropriation of personality: One of those is unjust enrichment.<sup>282</sup> According to this principle, transfers of property-like positions can be undone, if they are not accepted by law, i.e. “unjust”. German courts used the relevant clause, §812 BGB,<sup>283</sup> to protect individuals against faultless (i.e. unintentional and not negligent) use of their likeness

---

<sup>273</sup> For passing off in Australia see: A Terry, n. 55 above; Th Catanzariti, n. 2 above, 136; S Burley, n. 269 above, 227; J Adams, n. 1 above, 249 et seq.

<sup>274</sup> High Court of Australia, *Moorgate Tobacco v Philip Morris*, 156 CLR 414, at 445 [1984].

<sup>275</sup> Supreme Court of New South Wales per Evatt CJ and Myers J., *Henderson v Radio Corporation Pty Ltd*, SR (NSW) 567, at 595 [1960].

<sup>276</sup> *Hogan v Koala Dundee*, n. 55 above; see A Terry, n. 55 above, 219.

<sup>277</sup> *Children’s Television Workshop v Woolworths*, n. 49 above.

<sup>278</sup> S Burley, n. 269 above, 230 (in favour of moderate revision); M Elmslie & M Lewis, n. 30 above, 275 (arguing the scope of action sufficed).

<sup>279</sup> The judgment *Irvine v Talksport*, n. 35 above, hence, was welcomed by legal practitioners, see: S Lockyear, “Image Rights – Irvine / Talksports“, [www.davenportlyons.com](http://www.davenportlyons.com); R Renshaw, “What’s in a Picture“, [www.legamedia.net/legapractice/addleshaw-booth](http://www.legamedia.net/legapractice/addleshaw-booth); Cantrill, [www.walkermorris.co.uk](http://www.walkermorris.co.uk).

<sup>280</sup> O Goodenough n. 67 above, 65.

<sup>281</sup> S Simpson, “The price of fame revisited”, (1989) 63 Australian Law Journal 281; A Terry, n. 55 above, 221.

<sup>282</sup> Critically: M Madow, n. 2 above, 125, 196.

<sup>283</sup> See W Van Carnegem, n. 7 above, 456.

by third parties.<sup>284</sup> Some US jurisdictions employ the action as well.<sup>285</sup> By definition, the instrument only reflects otherwise existing property considerations. So, if a property order protects personality rights, unjust enrichment re-allocates the benefits derived – regardless of fault.

## V. Unfair competition

Another tool is unfair competition.<sup>286</sup> In the US, §43 of the Federal Lanham Trademark Act prohibits any false or misleading designation of origin, description or representation of a product. This applies to appropriation of personality as well. Under the 1995 Restatement of Torts (3<sup>rd</sup>), “unfair competition” comprises the unlicensed use of personal indicia for advertising.<sup>287</sup> Exceptions are available for news reports, commentary, entertainment, works of fiction or non-fiction. In Australia, section 52 (1) of the Trade Practices 1974 Act<sup>288</sup> bans deceptive conduct in trade by corporations generally.<sup>289</sup> Yet, this clause is quite flexible. Section 53 c), as *lex specialis*, prohibits false representation “that goods or services have sponsorship, approval, performance, or affiliation”. This latter clause features even criminal sanctions. But both clauses did not reach the significance of the extended version of passing off in regulating the commercial appropriation of personality.<sup>290</sup> Germany also employs a general clause against unfair competition: § 1 UWG.<sup>291</sup> It protects, *inter alia*, against the direct infringement of a competitor’s achievement.

Unfair competition mainly serves to keep the market transparent, i. e. free from deceit, in the public interest for cheap prices.<sup>292</sup> Actionable rights for competitors and consumers are only instruments to further this public interest. In some countries, unfair competition therefore is prosecuted by state authorities as administrative offence or even as a crime. Unfair competition is not primarily directed at protecting the persons whose personality was appropriated. A trans-national law of commercial personality rights should not be based on it.

---

<sup>284</sup> See J Petersen, *Medienrecht* (2003), 80 et seq.; *Fuchsberger*, n. 159 above; Bundesgerichtshof, case *Paul Dahlke*, 8.5.1956, BGHZ 20, 345.

<sup>285</sup> M Madow, n. 2 above, 196.

<sup>286</sup> Compare Article 10bis Paris Convention, n. 19 above; WIPO Note, as n. 20 above, 22.

<sup>287</sup> § 47, 1995 Restatement of Torts (3<sup>rd</sup>).

<sup>288</sup> The provision reads: reads „A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.“

<sup>289</sup> On that section: Th Catanzariti, n. 2 above, 136

<sup>290</sup> See W Van Carnegem, n. 7 above, 454.

<sup>291</sup> *Gesetz gegen den unlauteren Wettbewerb* [German Act against unfair Competition].

<sup>292</sup> This is acknowledged by the ECJ, case C-34-36/95, *De Agostini v Konsumentombudsmannen*, 1997 ECR I –3890, however: *Verband Sozialer Wettbewerb v Clinique*, 1994 ECR I-330; *Mars*, n. 178 above did not recognize too strict a standard. See also *Casado Coca v Spain*, n. 176, above; *Markt intern v Germany*, n. 144 above.

## VI. Trademark registration

Trademarks globally have developed into a piece of freely transferable property,<sup>293</sup> unattached to a certain producer or place of production.<sup>294</sup> They may provide a final anchor for the protection of name and portrait rights.<sup>295</sup> Yet, registrations concerning characteristics of individuals face problems.

In the UK, under the Trade Marks Act 1938 (“the 1938 Act”), marks had to be used as a badge of origin only. Section 28 (6) prohibited their use independently from a product. Character trademarks, therefore, could not be registered.<sup>296</sup> Some restraints on character trademarks survived in the more lenient UK Trade Marks Act 1994 (“1994 Act”):<sup>297</sup> a trademark “Elvis” for Elvis memorabilia was refused as descriptive.<sup>298</sup> According to the English courts, a soap depicting “Elvis” is not a soap, but an Elvis-product. For the latter, the mark was descriptive. The English courts, hence, prohibited the registration of personal indicia for commercial products by and large. Yet, it is unlikely that the ECJ will accept such a concept which sees all Elvis memorabilia as like products. Luxembourg found an Arsenal scarf to be a scarf, despite some English courts characterized it as an Arsenal support item.<sup>299</sup> In the meantime, the Court of Appeal has adapted the English jurisprudence to the European requirements.

In Germany, the 1994 *Markengesetz* has removed earlier burdens for the registration of personal indicia.<sup>300</sup> The problem here is that dignitary interests may conflict with the trademark, especially if ownership differs. The Bundesgerichtshof found that personality rights destroy the effect of a trademark – if it was registered by someone not associated with the person whose name or portrait was used.<sup>301</sup> Japanese law

---

<sup>293</sup> See F I Schechter, “The Rational Basis for Trade Mark Protection“, (1927) 40 Harvard Law Review 813; M Groves, “Trademark – deliver us from days of old”, 1991 EIPR 355.

<sup>294</sup> The 1994 German *Markengesetz* did away with the required connectivity, whereby a trademark could be sold only together with the company producing the product the mark was attached to.

<sup>295</sup> Compare J Holyoak, n. 27 above, 447 et seq.; W Houseley, n. 123 above, 279; WIPO Note, as n. 20 above, 21; Indeed, firms try to utilise trademarks to register characters, see *20th century Fox Film v South Australian Brewing*, n. 55 above.

<sup>296</sup> See *Re Holly Hobbie* [1984] RPC 329; Section 28 (6): “The Registrar shall refuse an application under the foregoing provisions of this section if it appears to him that the grant thereof would facilitate trafficking in a trade mark:”

<sup>297</sup> See Trade Marks Act 1994, c. 26; compare EC trademark directive, n. 23 above.

<sup>298</sup> *Elvis Presley trade marks*, n. 34 above, 567; see B Cordery & J Watts, “Character Merchandising – All Shook Up? (Court of Appeal Re-Mix) Case Comment on Elvis Presley Trade Marks case”, (1999) Entertainment Law Review 155; H Porter, “Character Merchandising: Does English law recognize a property right in name and likeness?”, (1999) 10 (6) Entertainment Law Review 180.

<sup>299</sup> The ECJ, case C-206/01, *Arsenal FC v Reed*, (2003) European Trade Mark Reports 19, concerned infringement rather than registration. The ECJ rejected the idea, that the print “Arsenal” on a scarf was no infringement of the trademark “Arsenal”. The English court had held that, because “fan use” was no “trade mark use” and no confusion had happened. The language of the decision does not support the English line in the *Elvis* case, n. 34 above: It perceives trademarks as valuable commodities independent from their association with a product or a certain use.

<sup>300</sup> C Schertz, n. 31 above, §414 et seq.

<sup>301</sup> *Marlene Dietrich*, n. 206 above.



concurr.<sup>302</sup> How these concerns influence the transferability of a personality trademark has not yet been decided.

To conclude, there are still some difficulties with using trademark law as a tool for the protection of personality interests.

## **VII. Result: similar regulatory concepts, differing substance**

This survey of some influential jurisdictions has shown that there is a multitude of different instruments in order to protect commercial rights in one's own portrait and name. Interestingly, both in civil law jurisdictions and in the US, similar instruments such as unjust enrichment, unfair competition and statutory portrait and name rights exist. The details, however, differ considerably. Substantively, a broad consensus exists to prohibit false endorsement. England in that respect was the last stronghold which allowed free riding. Concerning merchandising, however, the concepts differ more.

### ***E) Commercial appropriation of name and portrait rights – basic structures for a trans-national regulation***

This final section shall – based on the results found – suggest basic structures for a trans-national, cosmopolitan law of commercial personality rights. As indicated, it will focus on the two standard categories of merchandising (I) and endorsement (II). It, then, shall address some general questions (III).

#### **I. Advertising with famous persons**

##### *1. Constituting elements*

A comparison of major jurisdictions has revealed some common constituting elements for an instrument concerning advertising which appropriates personal characteristics.<sup>303</sup>

##### *a. The protected positions: likeness and name*

The objects protected by personality law, as indicated, are numerous,<sup>304</sup> but the name and likeness form part of a minimum consensus:<sup>305</sup> the *personal name* has a long cultural history as a cornerstone of human identity. In “The Crucible”, Arthur Miller lets his main character die in order to save his “good name”. The “name of the lord” is unspeakable, and the human being is made after his likeness.<sup>306</sup> In secular terms, the name is a short representation of somebody's identity. It is protected globally,<sup>307</sup> at least in trade.<sup>308</sup> The same is true for the portrait of a human being. In ancient cults

<sup>302</sup> H Ruijsenaars, n. 28 above, 111.

<sup>303</sup> For a description of this category see already supra, p. 163.

<sup>304</sup> See supra, p. 161.

<sup>305</sup> WIPO Note, as n. 20 above, 23.

<sup>306</sup> Exodus 20:4.

<sup>307</sup> See §12 German Civil Code [BGB]; §§50, 51 NY Civil Rights Law.

<sup>308</sup> See the law of passing-off in the common law; §824 BGB [German Civil Code].

such as voodoo, obtaining a form of likeness of an individual equaled power over him.<sup>309</sup> The commandment "Thou shalt not make ... any likeness of any thing that is in heaven above or that is in the earth beneath..."<sup>310</sup> may be based on similar reasons. The examination of different jurisdictions as well as an analysis of human rights law<sup>311</sup> has confirmed these cultural considerations. Firm legal ground exists to accept both the name and the image of a human being as protected objects.

*b. Prohibited conduct: advertising*

More critical is the question whether appropriation for use in advertising should be prohibited comprehensively.<sup>312</sup> The passing off action<sup>313</sup> and a few other legal avenues<sup>314</sup> require an element of confusion: the public must be misled about the fact that an individual has endorsed a product.<sup>315</sup> Making up an association between the product advertised and a person, after *Irvine*,<sup>316</sup> is prohibited in all reviewed jurisdictions.<sup>317</sup>

Yet, New York, French, and German law go further and prevent all unlicensed use of personal indicia for advertising. The difference may be decisive sometimes, for example, if "true" but private endorsement is made public without licence: this was the case in *Fuchsberger*, where the TV presenter regularly wore glasses as sold in the advertising shop.<sup>318</sup> This would also be the case with negative endorsement, that portrays celebrities in a bad light, and does not mislead the public: no reasonable person would have thought that *Oskar Lafontaine* had consented to a commercial which portrayed him as a "dangerous" politician.<sup>319</sup>

True, the consumer market is not distorted in such cases, but from the dignitary perspective promoted here, personal autonomy was disregarded. The advertiser in all cases abused the victim for commercial advertising without his consent.<sup>320</sup> Confusion, as far as this goes beyond the lack of a licence, thus, should be refused as being a constitutive element for a publicity right in advertising.

*c. Commercial goodwill*

---

<sup>309</sup> Sir James George Frazer, *The Magic Art*, (1913 / 1980), 64, 175.

<sup>310</sup> King James Version, Exodus 20,4; reiterated in Deuteronomy 5, 8.

<sup>311</sup> See the ECHR law on identity and privacy, p. 170 and p. 171.

<sup>312</sup> Compare the broad scope of this paper, p. 163.

<sup>313</sup> See supra, p. 187.

<sup>314</sup> For example consumer protection, see p. 190.

<sup>315</sup> I Davies & A Terry, n. 56 above, N135.

<sup>316</sup> England closed the gap: I Davies & A Terry, n. 56 above, N135.

<sup>317</sup> *Herrenreiter*, n. 154 above; *Roberson v Rochester*, n. 10 above; *Irvine v Talksport*, n. 35 above; *Tolley v Fry*, n. 146 above.

<sup>318</sup> *Fuchsberger*, n. 159 above.

<sup>319</sup> For the case details, n. 38 above.

<sup>320</sup> Compare the concept of autonomy, supra p. 171 et seq.

The necessity of goodwill is another problem.<sup>321</sup> According to Houseley, the valuable commodity of publicity, as a general rule, only accrues to famous persons. Exceptionally, it accrues to a not famous person who is involved in some newsworthy event or features some special physical or personality characteristics.<sup>322</sup> A more restrictive opinion further demands that endorsement takes place in the field of expertise of the person concerned,<sup>323</sup> as is the case of professional dancers promoting a ballroom record.<sup>324</sup> Such endorsement allows for the transfer of reputation to a product.<sup>325</sup>

However, modern advertising techniques seek nothing but attention from appropriating personality.<sup>326</sup> Sometimes, even inverse strategies are used: a celebrity known for bad taste may express public dislike of a product. Bad reputation, hence, can be valuable as well. From the commercial point of view, it does not matter, whether good or bad reputation is utilized and whether the commercial is set on a field of expertise. In any event, it is likely that Houseley's test is met in all these cases.

Yet, contrary to his concept, this article advocates protection for the man on the street as well.<sup>327</sup> This is supported, firstly, by the fact that advertising is a well developed business. If a regular chap is chosen for a campaign, he *must* have some commercial value – and it may be his mere mediocrity: that is worth appropriating is worth protecting.<sup>328</sup> The case that a person has no goodwill, thus, is unthinkable; the Houseley criterion, hence, will always be satisfied and is redundant. However, continental systems refer to a “fictive licence” to calculate the compensation due. It will be cheaper in the case of a punter than in that of, let's say, a footballer. After all, there is only one Michael Owen, while there are many people who can play a mediocre looking guy on the street. On the other hand, dignitary considerations apply to Joe Bloggs even more than to any celebrity, for he is drawn involuntarily into the light of public.<sup>329</sup> Goodwill, accordingly, is not a constitutive element of an action against unlicensed advertising either; but it remains important for damage calculation.

#### *d. Culpa*

Finally, the significance of culpa, i.e. wilful or negligent acting, has to be determined. Cases of faultless infringement are rare, but may occur.<sup>330</sup> At least for injunctive relief, culpa cannot be mandatory: After a letter of complaint, and especially after initiation of judicial action, every further infringement is done knowingly and, thus, in culpa. Human dignity demands that a judicial system protects personality rights

---

<sup>321</sup> See H Beverley-Smith, as n. 1 above, 61 et seq.; H Porter, n. 298 above, 180.

<sup>322</sup> W Houseley, n. 123 above, 264.

<sup>323</sup> Compare K Sloper & Cordery, n. 35 above, 109.

<sup>324</sup> *Henderson v Radio Corporation*, n. 275 above.

<sup>325</sup> For the Australian law, see above, p. 186.

<sup>326</sup> *Boris Becker v FAZ*, n. 37 above; O Weber, n. 37. above.

<sup>327</sup> Concurring: M B Nimmer, n. 3 above, 222.

<sup>328</sup> Compare: *University of London Press v University Tutorial Press*, n. 45 above.

<sup>329</sup> A fact, that is especially true for children. See I Cram, n. 108 above, 31 et seq.

<sup>330</sup> See *Fuchsberger*, n. 159 above.

against infringement, even if the infringement is only done negligently. Excessive compensation despite good faith of the infringing party, however, is not mandatory from that perspective – journalists, indeed, could become too cautious otherwise. *Culpa*, hence, should be a mandatory requirement at least for claims which go beyond reimbursement for loss suffered; this caveat especially concerns punitive or deterrent damage as available in some US jurisdictions and – against all odds – in Germany.<sup>331</sup>

## 2. Defences to advertising

### a. The licence and its scope

A licence, i.e. the qualified consent to use personality rights, justifies the appropriation of personal characteristics everywhere.<sup>332</sup> However, the requirements and the breadth of consent differ. In most countries, the speaking into a camera or the posing for a photographer joins the requirements of consent for publication.<sup>333</sup> Yet, how specific has the consent to be? Does consent into commercial use include all sorts of advertising? Of course, this question can be nailed down by contract. But practice shows, that not all agreements are specific enough.

The interpretation of an unspecific contract was at stake in a German case, where a student had modelled for underwear in the 1960ies. In the 1980ies, a magazine bought the copyright in these pictures and advertised “retro-erotic” movies with it. Having turned into a professor of economics, the former student model brought judicial action and succeeded: his consent was interpreted as restricted to the underwear catalogue. In medical law, consent has to be informed and specific in most jurisdictions.<sup>334</sup> Advertising, likewise, has to be agreed on specifically. This is a derivative of personal autonomy.<sup>335</sup> Implicit consent, as is appropriate in reporting cases, e. g. where a person answers questions into a visible camera, cannot apply to advertising. This principle also demands the restrictive interpretation of a publication license.<sup>336</sup>

### b. News reporting

Newsworthiness, next to consent, is the most important defence. It even is argued that it destroys the validity of publicity rights.<sup>337</sup> Yet, a closer look at the conflict reveals that publicity interferes less with the press privilege than privacy. Mere privacy cases – by definition – concern personal issues such as sex and bank accounts. Yet,

---

<sup>331</sup> Bundesgerichtshof, *Caroline von Monaco I*, 15.11.1994, BGHZ 128, 1 accepted the argument that damage compensation should be preventive and thus punitive – German doctrine does not accept punitive damages in other areas. Interestingly, in the US press cases do not permit punitive damages because of the 1<sup>st</sup> amendment.

<sup>332</sup> See J Adams, n. 1 above, 111 et seq.

<sup>333</sup> §23 KUG, for instance, presumes consent into publication if the person portrayed has accepted remuneration for the painting / photographing.

<sup>334</sup> See for the medical parallel: A Laufs & W Uhlenbruck, *Handbuch des Arztrechts* (3<sup>rd</sup> ed., 2002): “Einverständnis”, for the need of informed consent to surgery; G Laurie / J K Mason, “Dealing with Body Parts”, 64 (5) *Modern Law Review* 710.

<sup>335</sup> Compare supra, p. 171.

<sup>336</sup> Concurring: B Kormanicki in J Adams (ed.), n. 1 above, chapter 16.19.

<sup>337</sup> M Madow, n. 2 above 238.

democratic discourse as the main reason for the press privilege<sup>338</sup> may demand discussion of such controversial issues: the public, for instance, deserved to know about Profumo's affair with Keeler and Hillary Clinton's finances concerning Whitewater. Courts, in such situations where intimacy meets legitimate public interest, struggle. They have to scrutinize content substantively in separating political opinion and newsworthy content from privacy infringement: this balancing is a difficult test for judicial restraint, and results differ grossly.

For instance, a Missouri court found photos of a hospitalised person *not* newsworthy.<sup>339</sup> In Massachusetts<sup>340</sup> and England,<sup>341</sup> the opposite was held. Even under the HRA, a celebrity's drug use<sup>342</sup> and another's brothel visit<sup>343</sup> were held to be of due public concern in England. In New York, trespassing into a mental clinic did not prohibit the publication of photos of inmates which happened to accompany photos of a person of public concern.<sup>344</sup> Continental jurisdictions, on the other hand, even restrict the press in reporting about criminals, after they served their time in prison.<sup>345</sup> To conclude, privacy strikes at the heart of the press privilege.<sup>346</sup> It, nevertheless, may be too valuable to refrain from a substantive scrutiny. The English *Spycatcher* case,<sup>347</sup> furthermore, taught that not all interest existent in the public is in the public interest. But this discussion is outside the scope of this article.

Ironically, prohibition of unlicensed advertising does not interfere that much with the freedom of the press. No democratic necessity exists as to why it should be legal to portray a person falsely as supporting a certain commercial product. Also, economic arguments strike against such practices: any market can flourish only without deception of consumers.<sup>348</sup> Moreover, even advertising outside false endorsement does not deserve exemption: commercial speech, as shown, is not as valuable as political.<sup>349</sup> There is no democratic need for a company to use a specific person for advertising. Personal dignity, hence, outweighs the press privilege. Finally, in distinguishing reporting from endorsement, courts can rely on rather formal criteria and do not have to go too deeply into balancing. The dogma of judicial self-restraint towards substance of press reporting is not at stake. As a whole, the press privilege is not endangered by publicity restraints on advertising. Alleged definitional problems

---

<sup>338</sup> See *supra*, p. 178.

<sup>339</sup> *Barber v Time Inc.*, n. 117 above.

<sup>340</sup> *Kelly v Post Publishing*, (Mass., 1951) 98 NE 2d 286 (fatal car accident).

<sup>341</sup> *Kaye v Robertson*, n. 124 above.

<sup>342</sup> *Naomi Campbell v Mirror Group Newspapers*, n. 142 above.

<sup>343</sup> *Theakston v MGN Limited*, n. 131 above.

<sup>344</sup> *Howell v NY Post*, n. 121 above.

<sup>345</sup> Bundesverfassungsgericht, *Lebach*, 5.6.1973, BVerfGE 35, 202; See however case *Lebach 2*, 25.11.1999, (2001) *Neue Juristische Wochenschrift* 795.

<sup>346</sup> D Bedingfield, n. 64 above, 166.

<sup>347</sup> See n. 126 above.

<sup>348</sup> See *supra*, p. 190.

<sup>349</sup> See the discussion, *supra*, page 182.

are overstressed.<sup>350</sup> Even the jurisdiction of New York, where the 1<sup>st</sup> amendment to the US Constitution is highly regarded, agrees with that result.<sup>351</sup>

From this rule, however, appropriation with a genuine link to an edited article must be exempted: This concerns self-advertising of media, magazine titles,<sup>352</sup> commercial leaflets and company journals.<sup>353</sup>

### *c. Arts and advertising*

Advertising restraints can also conflict with the arts, see the limerick in *Tolley v Fry*.<sup>354</sup> In the already mentioned *Lafontaine* case, the bank invoked satire as a defence.<sup>355</sup> In an Australian case concerning a fictional character, a commercial caricatured a scene from the movie "Crocodile Dundee" to advertise shoes. In spite of the artistic effort of the advertisement, the Australian court did not find this sort of use justified.<sup>356</sup>

Indeed, the purely commercial character of such bespoke art argues in favour of publicity rights:<sup>357</sup> the dilemma is that all art is commercial, for artists have to make a living.<sup>358</sup> A distinction concerning the way art is used commercially seems appropriate: the sale or marketing of a piece of art *itself* should be encompassed by the arts privilege and therefore should not require a licence by the persona appropriated.<sup>359</sup> This, of course, is only the general rule. It is subject to the absence of other factors which may strike decisively in favour of the person displayed such as libel, hate speech or privacy.

A Californian court, hence, rightly, accepted licence-less self-advertisement for a film on *Fred Astaire*.<sup>360</sup> If the film itself is not subject to consent by Astaire's heirs, neither should the commercial for it. The Bundesgerichtshof concurred: entrance fees and commercial advertising of the mentioned Marlene Dietrich musical was allowed free of royalties for her successor in law.<sup>361</sup> But such "fair use" has to be distinguished from art which is ordered to promote a *third* commercial interest, i.e. the advertising of consumer items or services. Further business interests by the musical company, such as the marketing of a Fiat "Marlene", hence, can not be based on the arts

---

<sup>350</sup> B Markesinis, n. 236 above, 122.

<sup>351</sup> See *supra*, p. 183.

<sup>352</sup> J V Muhonen, "Right of Publicity", (1997) 8 (3) Entertainment Law Review 103, 104.

<sup>353</sup> *Kundenzeitschrift*, n. 205 above.

<sup>354</sup> *Tolley v Fry*, n. 146 above.

<sup>355</sup> See n. 38 above.

<sup>356</sup> Federal Court (Sheppard, Beaumont and Burchett JJ), *Pacific Dunlop Ltd. v Hogan*, 25.5.1989, 23 FCR 553.

<sup>357</sup> Doubting this result for parodies in Finnish law: J V Muhonen, n. 352 above, 104.

<sup>358</sup> M Madow, n. 2 above, 225 et seq.

<sup>359</sup> Compare an equivalent provision in copyright, UK: sec. 63 CDPA 1988.

<sup>360</sup> Reported by R Badin, n. 234 above, N43.

<sup>361</sup> *Marlene Dietrich*, n. 206 above; compare however Bundesgerichtshof, *Bob Dylan*, 1.10.1996, (1997) Neue Juristische Wochenschrift 1152, where the cover of a (legal) bootleg CD was prohibited because Bob Dylan had not licensed it.

exception and as a result, demand a licence by the person appropriated. As a general rule, therefore, artistic effort in product advertising cannot justify the appropriation of personal indicia.

### 3. Result: Exclusive rights in advertising

To conclude, dignitary considerations demand an exclusive right to market one's own portrait and name for advertising.<sup>362</sup> This right should not be dependent of goodwill or deceit. The press privilege is not disturbed by such use. Art, however, will have to step back if it furthers a commercial goal outside itself.

## II. Merchandising: the commercial use of personality as integral part of products or services

The second major category of publicity rights concerns cases where personal indicia form an integral part of a commercial product or service.

### 1. Constituting elements of merchandising

The category of merchandising overlaps partially with the category of advertising: If a product falls into the depicted person's "field of expertise"<sup>363</sup> or an association can be assumed legitimately by the public, such cases should not be treated differently from endorsement. Yet, as case law shows, that is not necessarily the case: memorabilia, such as NENA shirts,<sup>364</sup> ABBA posters<sup>365</sup> or Fabien Barthez underwear,<sup>366</sup> may express mere fan support.<sup>367</sup> Commercial consumer items, on the other hand, are not bought primarily as a sign of fan-ship, but transfer a certain image to a product.<sup>368</sup> New items, such as computer games featuring *Oliver Kahn*,<sup>369</sup> "Panini" stickers<sup>370</sup> and cooking competitions<sup>371</sup> fall outside the distinction between consumer items and memorabilia.

A general rule, hence, should be supported, which accepts the right to prevent unauthorised use of a name or image in merchandising. Such a right would have to encompass all products or services for sale, which depict a person or use her name.

---

<sup>362</sup> Concurring: P Prescott, "Kaye v Robertson – A reply", (1991) 54 *Modern Law Review* 451; criticised by D Bedingfield, n. 64 above, 108.

<sup>363</sup> K Sloper & Cordery, n. 35 above, 109.

<sup>364</sup> *Nena*, n. 204 above.

<sup>365</sup> *Lyngstad v Anabas*, n. 33 above, 62.

<sup>366</sup> M Ponthieu, n. 238 above.

<sup>367</sup> Compare Laddie J's view with *Arsenal FC v Reed*, n. 299 above.

<sup>368</sup> *Elvis Presley trade marks*, n. 34 above.

<sup>369</sup> *Kahn v EA*, n. 24 above, annotated by A Lober & O Weber, n. 195 above.

<sup>370</sup> *Panini (football collector stickers)*, n. 211 above.

<sup>371</sup> M H Polo, "Italy: Trade Marks – well-known trade marks – right to name and to the image", (1999) 21 (4) *EIPR*, N-58, 59.

## 2. Defences to merchandising

Distinctions have to be made, however, in respect of the defences. A specific licence, again, justifies merchandising as an infringement of personality rights.<sup>372</sup>

### a. News reporting and merchandising

Press products have to be exempted.<sup>373</sup> Most memorabilia, such as bed covers or cups bearing a star's image, cannot invoke the press privilege, for neither an opinion nor facts are disseminated. Biographies, fan booklets and like products, on the other hand, constitute edited works and are, thus, exempted.

A difficulty relates to products that have only a short message, such as memory coins with certain facts about a person<sup>374</sup> or illustrated calendars.<sup>375</sup> Prima facie, these items form mere memorabilia. However, all information or opinion constitutes dissemination of information. A minimal level of information, hence, should trigger the press privilege.<sup>376</sup> Scrutinizing the information substantively would limit editorial freedom too much. On the other hand, courts should distinguish cases where the freedom of expression component is only attached to a product in order to circumvent the necessity to obtain a licence from the persons depicted. In such cases, the intention to take part in the social discourse is lacking. An added "I like" under the picture of a star, thus, does not justify the sale of a T-Shirt without approval of the star.

Untypical products require a decision in every single case: for instance, the video football game in the *Kahn* case. On the one hand, it reports information: all "real" teams of the 2002 World Cup were included. The games played, however, were purely fictional. The press privilege seems not to apply.<sup>377</sup> Indeed, most cases of merchandising do not further the interests of a free press.<sup>378</sup>

### b. Artistic value and fair use

As elaborated above,<sup>379</sup> fair artistic use forms a legitimate defence. This, it is contended, is the pivotal point of merchandising. In parallel to copyright law,<sup>380</sup> individual autonomous works of art which use the personality right as a basis, should remain free, i.e. not subject to consent by the person depicted.<sup>381</sup> On the other hand, every cup, every T-shirt is designed somehow. If all these products could invoke the freedom of art, the merchandising action would lose meaning substantially. Human dignity does not allow, however, overly comprehensive use by third parties. The problem in balancing arts and merchandising is that the content of art should not be

<sup>372</sup> See supra, p. 195.

<sup>373</sup> Compare §23 KUG, §51 NY Civil Law (1904).

<sup>374</sup> *Willy Brandt*, n. 212 above.

<sup>375</sup> *Football calendar*, n. 213 above.

<sup>376</sup> *Willy Brandt*, n. 212 above.

<sup>377</sup> *Kahn v EA*, n. 24 above.

<sup>378</sup> C Schertz, n. 31 above, § 418.

<sup>379</sup> See supra, p. 197.

<sup>380</sup> Compare §24 *Urhebergesetz* (1965).

<sup>381</sup> M Madow, n. 2 above, 220 explains the value of common goods for arts.



scrutinized. Judges, then, would be tempted to take their views on what is worth of being art as a measure.

A more formal test, hence, is needed. The criterion proposed for advertising is of help in merchandising as well: if a piece of art furthers a third interest outside itself, the art privilege has to step back. As Madow points out, the mere fact that art is commercial for its own sake, however, cannot be decisive:<sup>382</sup> every artist has to make a living. Neither can whether a piece of art is unique or mass reproduced be decisive: films, music or musicals otherwise would be precluded per se. It is the nature of art that it is addressed to the public.

A third interest, in merchandising, however, is the sale of a product for other than artistic use. Commercial consumer items per se have a utilitarian purpose: A car is used for transport, no matter how artistic it may be designed. Naming it “Marlene Dietrich”, hence, requires a licence.<sup>383</sup> Also, memorabilia, which serve profane purposes such as clothing, cups or bed covers, do not further purely artistic goals. Even if an opinion promotes art in products of daily use, the person concerned does not need to tolerate the use of her identity on such items. This dogmatic line does solve most cases. On the edge might be a postcard, for instance one depicting John Wayne with a lipstick as a parody.<sup>384</sup> Here, the utilitarian use in sending is negligible compared with the artistic value. Also on the border is the video game in *Oliver Kahn*: the game as such can be classified as a form of article, however, the Hamburg court found “playing” was not artistic but utilitarian use.<sup>385</sup>

After application of this “mere artistic use” test, only items without “profane” daily use remain within the scope of the privilege: this group ranges from Warhol’s Marilyn prints and the Marlene musical to simple posters. German dogma tries to exclude the latter as “single pictures” from the arts justification.<sup>386</sup> Yet, this is difficult, because it demands a qualitative scrutiny of art.

The only material standard which could have been relevant in assessing whether a work qualifies for protection is that of copyright law.<sup>387</sup> Yet, it differs considerably between jurisdictions.<sup>388</sup> Already photographs meet the requirements for protection.<sup>389</sup> Single pictures, thus, should form part of the arts privilege in general.

### 3. Result: limited exclusive rights in merchandising

Merchandising, as a general rule, requires the producer to obtain a licence from the person depicted.<sup>390</sup> Without it, only pure artistic use without further utilitarian aims

<sup>382</sup> M Madow, n. 2 above, 206 et seq.

<sup>383</sup> *Marlene Dietrich*, n. 206 above.

<sup>384</sup> M Madow, n. 2 above, 144.

<sup>385</sup> *Kahn v EA*, n. 24 above.

<sup>386</sup> *Nena*, n. 204 above; *Football calendar*, n. 213 above.

<sup>387</sup> See Sec. 1, 1988 Copyright, Design and Patents Act.

<sup>388</sup> *University of London Press v University Tutorial Press*, n. 45 above: Labour and effort (low level); §2 (2) UrhG (1965): Personal intellectual creation (high level).

<sup>389</sup> §72 Urhebergesetz

<sup>390</sup> Concurring: WIPO Note on Character Merchandising WO/INF/108 [1994], p. 10; J V Muhonen, n. 352 above, 103 for Finnish law; C Schertz, n. 31 above, § 418 for German law

remains possible. Culture in daily items, hence, is restricted. However, this is necessary to protect the dignitary interests of the persons portrayed: They cannot prohibit artistic review of their work, but they can prohibit art to be used as a cover for the sale of other products which appropriate their image.

### III. General considerations

Some considerations apply generally.

#### 1. Relation with libel /defamation / privacy

The results just postulated do not exclude the application of privacy law, libel or defamation. Products which constitute artistic use can still endanger the reputation of somebody; the press privilege does not preempt privacy considerations.

#### 2. Transferability

One of the major dilemmas of the publicity right as it is promoted here is its transferability.<sup>391</sup> Dignity, on the one hand, requires far-reaching personal autonomy over the appropriation of likeness. This advocates the option to waive, transfer or at least license such rights.<sup>392</sup> On the other hand, this leads to conflicts between licensor and licensee in fundamental areas of personality. For instance, if a former porn actor embraces religion at a later point in his life, dignity and commerce will battle over the remaining in force of the publication rights in his old movies. The issue is too wide to be treated here comprehensively, but a dignity-based buy-back right for the licensor with full pecuniary compensation of the licensee might offer a just solution.

#### 3. Term of protection and post mortem rights

Another interesting question concerns post mortem rights.<sup>393</sup> Clearly, some aspects of dignity will survive death.<sup>394</sup> What part of the publicity rights remains, however, is outside the scope of this article. The same is true for the exact length of protection after death. California enacted seventy years,<sup>395</sup> Germany ten years.<sup>396</sup> The alleged parallel to copyright<sup>397</sup> is not convincing given the dignity-based approach of this article.

#### 4. What remedies?

In terms of remedies,<sup>398</sup> mainly compensation and injunctive relief would be options. Concerning compensation,<sup>399</sup> the question is whether emotional suffering<sup>400</sup> or lost reputation can lead to pecuniary compensation. Some jurisdictions accept that.

---

<sup>391</sup> See Kormanicki in J Adams (ed.), as n. 1 above, chapter 16.17; *Marlene Dietrich*, n. 206 above.

<sup>392</sup> See *supra*, p. 171.

<sup>393</sup> See A Joss, "Life after death? Post mortem protection of name and likeness under German law with specific reference to 'Marlene Dietrich'", (2001) *Entertainment Law Review* 141.

<sup>394</sup> See *Mephisto*, n. 155 above; *Marlene Dietrich*, n. 206 above.

<sup>395</sup> R Badin, n. 234 above.

<sup>396</sup> Compare Germany: §22, 23 *Kunsturhebergesetz*.

<sup>397</sup> C Schertz, n. 31 above, §389.

<sup>398</sup> On remedies: WIPO Note, as n. 20 above, 27 et seq.; N Witzleb, n. 1 above, 487 et seq.

In the commercial cases examined here, lost income, as accepted by most jurisdictions, results in “real” damage. The expenses saved on not taking a licence enrich the defendant unjustly and can be re-transferred. Such damage does not depend on whether the person appropriated refuses licensing generally: A priceless good is not worthless. Alternatively, disgorgement of profits should be available for the claimant.<sup>401</sup>

Since dignity is at stake, the degree of interference should have an impact on damages calculation. The UK accepts aggravated damages in exceptional cases:<sup>402</sup> Even procedural behaviour after the infringement can influence amount of damage compensation.<sup>403</sup> US jurisdictions hesitate to grant punitive damages, but against the general approach of its civil law and *contra legem* German courts allow them if the interference was committed willingly and the impact was severe.<sup>404</sup>

Furthermore, injunctive relief should be available. National concepts differ, but in general allow for preliminary action and the obtaining of a temporary injunction until the matter can be fully determined at a hearing of evidence.<sup>405</sup> In the England, injunction in general is subject to several factors, including a serious issue to be tried and a balance of convenience.<sup>406</sup> In press cases, however, the courts are more flexible.<sup>407</sup> This is because compensation forms only a secondary relief: it cannot undo the harm to the public interest in publication which is suffered when the publication has been delayed.<sup>408</sup>

## **F) Conclusions**

To conclude, this article started with the discrepancy between the importance of appropriation of personality for international trade and the lack of international regulation. Assessing the field, it has examined the justifications given for publicity rights of natural persons. It has established that at least name and portrait rights find support in the universal concept of human dignity as the basis of human rights. The significance of justifications for free speech and fair use has been identified.<sup>409</sup> But scrutinizing the conflict of publicity and these justifications has revealed that there is ample scope for exclusive rights in one’s name and portrait without endangering these

---

<sup>399</sup> On damage: M B Nimmer, n. 3 above, 222; M Prinz & B Peters, n. 17 above, 272; H Beverley-Smith, n. 1 above, 97 et seq.; WIPO Note, as n. 20 above, 28 et seq.; P R Handford, “Moral Damage in Germany”, 27 *International and Comparative Law Quarterly* 849.

<sup>400</sup> See P R Handford, n. 399 above.

<sup>401</sup> N Witzleb, n. 1 above, 487 et seq.

<sup>402</sup> *Naomi Campbell v Mirror Group Newspapers*, n. 142 above, §§ 139-140.

<sup>403</sup> Court of Appeal, *Campbell v News Group*, [2002] EMLR 43, §§ 117-119.

<sup>404</sup> *Caroline von Monaco I*, n. 331 above.

<sup>405</sup> Germany: §§935, 936 *Zivilprozessordnung*.

<sup>406</sup> Court of Appeal, *American Cyanamid v Ethicon Ltd*, [1975] AC 396.

<sup>407</sup> Kerr LJ in *Cambridge Nutrition Ltd. v BBC* [1990] 3 All ER 523, 535.

<sup>408</sup> Keene LJ in *Douglas v Hello! (injunction)*, [2001] 2 All ER 289 §147.

<sup>409</sup> C Fernandez, as n. 46 above, section B).

valuable positions.<sup>410</sup> Differing national concepts of publicity rights have been compared.

On the basis of the results found, two potential causes of action of commercial appropriation of personality, firstly, advertising and, secondly, merchandising, have been formulated to suggest basic concepts for trans-national regulation of both categories.

**Advertisements** using the name or likeness of a natural person in whatever context, hence, should require a licence by the person depicted. The right should not depend of goodwill or confusion. Advertising use should remain free only if a press article or a piece of art is advertised, which is free itself. The artistic value of a commercial advertising itself cannot justify it.

**Merchandising** of products which appropriate the name or likeness of a natural person should also trigger exclusive personality rights and thus demand a licence by the person depicted. Every editorial work, however, is eligible for exemption, even if the information or opinion disseminated is very limited. Artistic works also do not require a licence, as long as they are only for artistic use, and not further other daily purposes.

Of course, this structure is only a broad concept. However, it is not unthinkable that a trade dispute involving publicity rights will be placed before the WTO dispute settlement body or the ECJ. Computer games such as FIFA 2000, for example, are, in general, produced in one member state of the EC and sold in another one. Personality rights, if exercised, thus might get into conflict with the market freedoms for goods (Article 28 EC) and services (Articles 49 and 50 EC). The ECJ, in such scenario, had to ask whether such limitation of market freedom was justified under a clause such as Article 30 EC, which exempts, inter alia, intellectual property. In the absence of an explicit exception, the *Cassis*<sup>411</sup>-test would open another chance for justification. In any event, the ECJ would be asked to define a minimum standard of mandatory requirements. A similar scenario is thinkable in a WTO context under Article III, XI GATT with Article XX forming the general exception clause.

As shown, the universal concept of human rights, at least, provides a common starting point for the analysis of a court in this task. Nevertheless, the reasons behind the protection of personality rights differ: Continental jurisdictions stress human dignity in that respect while common law jurisdictions concentrate on economic analysis.

But most importantly, the comparative evaluation of selected jurisdictions has shown that the regulatory techniques of major jurisdictions which accept personality rights, such as France, the Netherlands, Germany, Japan and some jurisdictions of the USA do not differ too strongly from each other: If a publicity right is infringed, exceptions for press use and for artistic freedom exist. Arguably the outcome of individual cases will vary considerably – not least due to different concepts on how the freedom of the press should be construed.

After *Irvine v Talksport*, even England, the last major bastion to refuse publicity rights, has fallen. Yet here, as well as in Australia and Canada, no separate tort but an

---

<sup>410</sup> J Kahn, n. 2 above, 319.

<sup>411</sup> ECJ, *Cassis*, n. 24 above.

extended version of passing off is used – an approach which is not entirely suitable to deal with the dignitary problems arising.

It still can be proclaimed as the major result of this article that the trans-national consensus concerning the appropriation of personal name and likeness is nowadays broader than expected. The growing international trade in commercial items which use such indicia may ultimately lead to a harmonisation pressure in publicity rights. This article has shown that a systematic codification of this area is possible without opening a Pandora's box to the disadvantage of civil liberties. After all, human dignity as the mother of all civil liberties has also been shown to form the rationale of the publicity rights promoted here.

### **EDITOR'S NOTE**

**In this issue of *SCRIPT-ed* you will also find the ARHB Centre database on [Personality law] to which the author of this article contributed. The database provides an overview of leading cases in key jurisdictions in this field and posits questions to be considered by readers, on the basis of these and other decisions, with a view to developing the law in this field. This article has of course considered one such question in developing the rights in respect of advertising and merchandising.**