DAMM & MANN

"German media law in the international environment"

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A. Outline

I. Constitutional Rights

Though individual claims against the media are regulated in a number of different statutes, at the end of the day judgements are the result of a process of weighing up two aspects of human rights as laid down in the German constitution, the *Grundgesetz*, against the background of extensive case law.

Individuals making claims against the media rely on Articles 1 and 2 of the *Grundgesetz*:

> Article 1 states:
>
> *The dignity of a person is absolute. It is the obligation of governmental power to respect and protect it.*
>
> Article 2 provides:
>
> 1. *Every person has the right to the free development of his personality insofar as he does not violate the rights of others and does not violate the constitutional order or good morals.*
>
> 2. *Every person has the right to live and the right of bodily integrity. The freedom of a person cannot be violated. These rights can be limited only on the basis of a statute.*

Freedom of opinion and the press is laid down in *Grundgesetz* Article 5 as follows:

1. Everyone has the right to express his opinion freely – orally, in writing, and in pictures – and to inform himself from generally accessible sources without *hindrance. The freedom of the press and the freedom of reporting on radio and film are guaranteed. There is no censorship.*

2. *These rights find their limits in the provisions of the general laws, the provisions* for protection of young people, and in the right to personal honour.

II. Remedies

Under German media law there are five remedies

- right of reply
- injunction
- retraction
- general damages
- exemplary damages

1. Right of reply

To a common law lawyer, the “right of reply” must look most unusual: The claim is designed on the basis of the idea “audiatur altera pars” (listen to

both sides). An individual affected by a media publication shall be given the opportunity to reply to any allegations etc. in the publication.

(i) Requirements of a right of reply

Thus, the right of reply is irrespective of the truth of a publication. In principle, in the legal proceedings granting the right of reply, truth is not an issue.

A reply has to be published under the same conditions as the publication it refers to. For example, if a headline was published on the front page, then this might result in the publication of the reply on the front page in bold letters.

Because of its character as a burden to the media, the right of reply underlies a number of formal requirements and limitations:

Only individuals affected by a publication are entitled to a right of reply, e.g. a person named in a publication.

The right of reply is limited solely to factual statements. There is no right of reply to opinion.

The content is limited only to a reply to the facts contained in the publication. No additional comments are allowed.

The statements referred to have to be repeated before the reply is made.

In many cases the reply has to be signed by the claimant in person and the original document has to be served to the media. If a lawyer is representing a client making the claim, the claim has to be accompanied by an original power of attorney signed by the client in person (a facsimile would not be considered sufficient), together with the original text of the reply, also signed by the client in person.

The request for a reply has to be served “without delay”, in many cases a service two weeks after knowledge of the publication will not be acknowledged by the courts. There is an absolute limitation period of three months.

(ii) Proceedings

In many cases, if the court rejects the claim, e.g. because the reply contains comment or replies to opinion, the application has to be withdrawn and the service of the amended reply has to be repeated. Thus, a reply has to be carefully drafted, an art in itself, and even experienced lawyers often need several attempts to obtain a court order for the publication of a reply.

If not published voluntarily, upon request, the claimant has to apply for an a court order granting the reply.

Because of the bad experience with centrally steered media under the Nazi Regime the federal states in Germany have the legislative competence for the media. Thus, historically, the right of reply is not

regulated in a statute on a federal level but in numerous press laws in each German state and in separate statutes (state treaties) for the electronic media, such as TV, radio and the internet.

The good news is that claims based on these regulations can only be filed against media which are domiciled where such statutes are operative. Furthermore, in the case of legal proceedings, the claim can only be filed at the court where the media enterprise is domiciled. As the statutes and the jurisdiction of the different courts vary in detail, the formal requirements for a reply are also slightly different, e.g. before the Hamburg courts the reply has to be signed by the claimant in person. In Berlin it may be signed by his lawyer. There is no precedent on the federal level of the German Superiour Court for Civil Law ("*Bundesgerichtshof*") because due to its nature (it has to be recent) a claim for reply can only be filed as part of fast track proceedings ("einstweiliges Verfügungsverfahren"). Against a judgement of first instance of the District Court ("*Landgericht*") only one appeal to the Court of Appeal ("*Oberlandesgericht*") is posible. If you think this is confusing – it is!

In practice most individuals affected by a publication do not invoke their right of reply, and in many cases, if they do, they do not meet the formal requirements. Most claimants do not want the statement which gave cause for their complaint, to be repeated. However, there are always people who go for the spectacular effect of a reply, for example on the front page of a tabloid.

2. Injunction

The primary remedy in case of a violation of the rights of an individual by the media is an interim injunction. Because of its interim character it has to be confirmed as final after trial.

To secure its rights an individual affected will usually apply for an interim injunction, which will usually be issued within a few days or, in urgent cases, within hours.

Unlike the right of reply, an injunction requires that the objected statement be untrue, or in the case of an opinion, which is vulgar abuse. In the interim injunction proceedings the “untruth” of the objected statement will usually be proved by an affidavit of either the individual affected or a possible witness in the normal proceedings.

Another requirement for an injunction is that there is evidence of an intention to repeat or publish the objected statement or defamation. Once a statement has been published, the courts assume that this requirement is met. On the other hand, courts are very reluctant, to say the least, in granting an interim injunction prior to publication. For example, merely filming in a particular place or recording interviews will not support a preventive injunction since the content of the report is not yet known (Court of Appeal – *Oberlandesgericht* Hamburg ZUM 2000, 163).

The claim for injunction was developed by the courts on the basis of the respective general tort provisions in the German Civil Code (sec 823, 1004

Bürgerliches Gesetzbuch) and the respective basic right for the protection of personality as mentioned above (article 2 *Grundgesetz*).

On the basis of the Civil Procedure Code (sec. 32 *Zivilprozessordnung*) an injunction may be granted by any court where the violation of the rights of the individual affected took place. Because in most media cases the objected statement is published nationwide, literally every court is competent in granting an injunction. However, due to the fact that courts where most of the media enterprises in Germany are domiciled have judges specialised in media cases, claimants normally file an application for an injunction with these courts, namely Hamburg, Berlin and Munich.

An injunction of the District Court Hamburg became quite famous in the UK when upon the application of the German Chancellor, Gerhard Schroeder, the court issued an intermediate injunction against the “Mail on Sunday”. This means that the claimant must have proven to the court that this issue of the “Mail on Sunday” had been distributed in Hamburg (usually the international press is available at the airport or the main station). Currently this case is beeing tried in Hamburg (no. of matter: 324 O 702/04). The last hearing was on 26 August 2005 and a judgement will be handed down on 7 October 2005.

In theory an injunction may be enforced in the UK. In the case of a violation the court may impose a fine of up to EUR 250,000 on the media enterprise. However, enforcement is cumbersome and in many cases where foreign media are concerned the court order is purely for public relations purposes.

3. Retraction

Another remedy under German law is the publication of a correction or retraction also developed by the courts on the basis of the respective general provision in the German Civil Code (sec 1004 *Bürgerliches Gesetzbuch*).

A retraction is only available against false factual statements, not against opinions. Furthermore, the claimant has to prove that neither a reply nor an injunction would be or has been sufficient to restore his reputation and that a retraction is necessary. This also means that it is a misuse of the retraction remedy if the objected statement is so minor that it could not harm a reputation anyway.

A retraction does not only give the individual affected by a publication the opportunity to publish his point of view, but forces the media to admit in their own publication that they were wrong. Because of this severe characteric for the media and in the light of freedom of the press as guaranteed in Art 5 of the German Constitution, unlike the right of reply or the interim injunction, a correction or retraction will only be granted after trial. A judgement to publish a correction or retraction is only enforceable after it has become final. This means that it may take years until the court of final instance (court of appeal or the German Superiour Court for Civil Law) has decided the matter and no further appeal is available.

Like the injunction remedy a claim for retraction may be filed with any court in Germany, if the publication is nationwide (see above).

4. General damages

The claim for general damages is mainly based on the general tort provision of the German Civil Code in sec 823 subsec 1 that obligates a person to compensate for the damage caused if he “intentionally or negligently violates, without justification, the life, bodily integrity, health, freedom, property or other right of another person”. Such right is namely privacy and personality rights.

Liability for damages also exists under sec 823 subsec 2 Civil Code for the deliberate violation of a statutory obligation that is intended to protect the complaining person, such as defamation as ruled in sec 185 et seq German Criminal Code.

Thus, besides the violation of the named rights of the affected individual by the publication, the damages remedy requires that the media act intentionally or negligently. This is not necessary for the aforementioned claims.

The major hurdle for a successful claim for general damages is usually the requirement that the claimant has to prove the causal connection between the objected statement and the damage occurred. Note: It is not sufficient to prove that the damage is caused by the whole publication, if the damage has been caused by a specific part of the publication. The claimant then has to prove that the damage was caused exactly by this part of the publication.

Like the retraction remedy, general damages would only be granted by a final judgement after trial. Also the claim may be filed with any court in Germany if the publication was nationwide (see above).

5. Exemplary damages

The term “exemplary damages” is used here for the sake of better understanding by a common law lawyer, though it is not exactly correct. Under German civil law doctrine based on Roman law, there is no room for elements of punishment in civil law as this is finally regulated in the criminal law provisions. However, the German courts have developed the remedy of compensation for immaterial damage in media law as classical case law derived from the protection of personality rights as protected by Art 2 German Constitution. In recent years this claim has developed more and more the character of exemplary damages, as in calculating the damages the courts consider that the amount should prevent the defendant from further violations in the future (German Superiour Court for Civil Law – *Bundesgerichtshof* NJW 1996, 984 – “Caroline I”).

The claim for exemplary damages requires

- a severe violation of privacy or other personality rights,
- that the media have acted intentionally or negligently, and
- that the effects of the violation could not be restored by other means (such as reply, retraction, general damages).

After a period of relative reluctance to award huge amounts as compensation for immaterial damage, since the 1996 Caroline decision of the German Superiour Court for Civil Law where the court awarded DM 180,000 (equals EUR 93,000), the courts are more and more willing to award amounts with exemplary character.

Like the claim for general damages, exemplary damages will only be granted by a final judgement after trial. Also the claim may be filed with any court in Germany, if the publication is nationwide (see above).

III. Defence issues

1. Opinion ("Fair comment")

What is protected by freedom of the press?

- opinion, irrespective if "right" or "wrong", not defamation
- true statements, however, not if they violate the privacy of others

As the protection of opinion is much broader than publication of statements, it is crucial to distinguish opinion from factual statements.

In general, a factual statement is subject to proof (e.g. by witnesses, documents etc.), while opinion is not.

Example: Legal terms such as “illegal”, “fraudulent”, etc., in principle, are “opinion”. However, where specified they may have a factual core which may be subject to proof and thus is a “factual statement”.

The interpretation of a statement has to be made from the point of view of an average reader, spectator, etc. In practice the judge is the “average” person. Where more than one interpretation is possible, judges have to chose such interpretation which is protected by freedom of opinion/press.

2. Burden of proof

As the remedies of injunction, retraction and damages require a false factual statement (besides cases of formal defamation) the question - who bears burden of proof - is crucial when defending against a claim.

Under German civil procedure, in principle, a claimant has to prove the factual basis of his claim.

However, as this would result in the fact that a person affected by a false statement would have to prove that the statement is false, i.e. that he was not at a certain place at a certain time, burden of proof in libel and slander cases swings back to the media. This means that in principle the media has to prove the facts of an objected statement which, if false, would be slanderous.

However, in cases where the media can prove that they have observed the due diligence in their research (standards of responsible journalism; see below) the burden of proof swings back to the claimant.

3. Standards of responsible journalism

Where the media has observed the standards of responsible journalism their publication was justified, which means that remedies for injunction and damages are not given, even if in the aftermath the publication was false.

In principle courts do not require the media to research the veracity of reports from recognised news agencies such as Reuters, AP, dpa, etc., nor of press releases from public authorities, notably the police and prosecutors. Thus, if the media can prove that they took the news from the press release of a public prosecutors office it is usually justified.

The extent of diligence depends on the seriousness of the personality right at stake. In matters which are potentially defamatory the standard is higher than in normal matters. For example, relying on a single anonymous source for an allegation that a member of parliament took a bribe was held to be a grave violation of standards of responsible journalism (German Superiour Court for Civil Law – *Bundesgerichtshof* NJW 1977, 1288).

4. Reports on suspicion ("***Reynolds*** Privilege")

In matters of political or criminal character the facts are rarely undisputed prior to the first publication. Thus, the German courts have developed a defence similar to the "*Reynolds* Privilege".

Again the courts had to balance the public interest in matters of great importance protected by Art 5 of the German constitution on the one hand, and the personality rights of the individuals affected by such publication on the other hand. The more severe the allegations the higher the public interest, but also the more devastating the effect for the individual when the allegations turn out to be false.

Thus, the report about a suspicion is only justified when

- the subject of the report is a matter of justified public interest (e.g. alleged corruption of a politician) instead of insignificant matters (e.g. assumed pregnancy of a celebrity)
- the standards of responsible journalism have been observed:

Basic rule: The more severe the allegation, the higher the standards.

Never sufficient:

- just one anonymous source
- hearsay

Always required:

- statement of the individual affected

- the suspicion is reported as such, i.e. the publication does not result in a prejudice: This means that also such facts have to be published which are in favour of the suspect. Their statement must not be made worthless by an ironic comment.

B. Privacy – Recent developments in Germany after the Caroline decision of the ECHR

1. The principle

The blueprint for the protection of privacy under German law is laid down in the regulation of the right in one's own picture in sec. 22 Art Copyright Act ("*Kunsturhebergesetz*"). This statute goes back to 1907 and was motivated by the illegal photographing of the late Bismarck on his deathbed. It says:

Sec. 22:

Pictures of a person may only be disseminated or exposed to the public eye with the express approval of the person represented ...

Sec. 23:

(1) Without approval as mentioned in sec 22 above images may be disseminated or exposed to the public eye

(i) Pictures relating to contemporary society ...

(2) This exception does not apply where the dissemination or exposition to the public eye interferes with a legitimate interest of the person represented.

2. *Hanover v Germany* ECHR 24 June 2004

In *Hanover v Germany* the ECHR held that three judgements of the German Constitutional Court (*Bundesverfassungsgericht)* of 4 April 2000, 13 April 2000 and in particular the landmark decision of 15 December 1999, violated Article 8 of the European Convention On Human Rights (“ the Convention”).

The major subject of the judgements were so called paparazzi - photos taken of the Princess Caroline of Hanover (formerly Caroline of Monaco) published in German magazines showing scenes from her daily life, although in public, such as riding, leaving a restaurant or on holiday.

In its landmark decision of 15 December 1999 the German Constitutional Court held:

... Within the centre of the guarantee of freedom of the press is the unrestrained right to define kind and scope, content and form of a publication. This also covers the decision of if and how to illustrate a publication ... This guarantee is neither subject to the character nor to the standard of the publication or a report in detail. Every distinction of this kind would in the end result in judging and steering through the State, which would be inconsistent with the nature of this human right.

Freedom of the press serves the purpose of free creation of individual and public opinion. Such can only be successful under conditions which neither dictate nor withhold certain subjects or ways of presentation of information. In particular the creation of opinion is not limited to the political area. It is true that in this area it has specific meaning in the interests of a well functioning democracy. However, the creation of political opinion is embedded in a comprehensive process of communication which may not be split into relevant and irrelevant areas ... It is up to the press to decide what is of public interest and what is not.

... Nor can mere entertainment be denied any role in the creation of opinions. That would amount to unilaterally presuming that entertainment merely satisfies a desire for amusement, relaxation, escapism or diversion. Entertainment can also convey images of reality and propose subjects for debate that spark a process of discussion and assimilation relating to philosophies of life, values and behaviour models. In that respect it fulfils important social functions ... . When measured against the aim of protecting freedom of the press, entertainment in the press is neither negligible nor entirely worthless and therefore falls within the scope of protection of this human right ... .

The same is true of information about people. Personalisation is an important journalistic means of attracting attention. Very often it is this which first arouses interest in a problem and stimulates a desire for factual information. Similarly, interest in a particular event or situation is usually stimulated by personalised accounts. Additionally, celebrities embody certain moral values and lifestyles. Many people base their choice of lifestyle on their examples. They become points

> of crystallisation for adoption or rejection and act as examples or counter-examples. This is what explains the public interest in the various ups and downs occurring in their lives.
>
> As regards politicians this public interest has always been deemed to be legitimate from the point of view of transparency and democratic control. Nor can it in principle be disputed that it exists in respect of other public figures. To that extent it is the function of the press to show people in situations that are not limited to specific functions or events and this also falls within the sphere of protection of freedom of the press. It is only when a balancing exercise has to be done between competing personality rights that an issue arises as to whether matters of essential interest for the public are at issue and treated seriously and objectively or whether private matters, designed merely to satisfy the public's curiosity, are being disseminated ... .
>
> ... Privacy does not require that publications that are not subject to prior consent are limited to pictures of figures of contemporary public interest in the exercise of their function in society. Very often the public interest aroused by such figures does not relate exclusively to the exercise of their function in the strict sense. It can, on the contrary, by virtue of the particular function and its impact, extend to information about the way in which these figures behave generally – that is, also outside their function – in public. The public has a legitimate interest in being allowed to judge whether the personal behaviour of the individuals in question, who are often regarded as idols or role models, convincingly tallies with their behaviour on their official engagements.

Contrary to this the ECHR ruled in its *Hanover v Germany* judgement:

> Para 63: “The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of “watchdog” in a democracy

> by contributing to "impart[ing] information and ideas on matters of public interest (*Observer and Guardian*, cited above, ibid.) it does not do so in the latter case. ...
>
> Para 66: In these conditions freedom of expression calls for a narrower interpretation (see *Prisma Presse*, cited above, and, by converse implication, *Krone Verlag*, cited above, § 37).

Against this background it cannot be denied that the interpretation of the human right of freedom of expression by the ECHR is narrower than that of the German Constitutional Court. This raises the question which interpretation has to be followed in Germany.

3. The legal impact of the judgement of the ECHR in Germany

At first glance the answer seems simple: According to Art. 46 para 2 of the Convention

> "the High Contracting Parties undertake to abide the final judgement of the Court in any case to which they are parties."

As the German government has decided to let the judgement become final it has the obligation under international law to abide by this decision.

However, the German Constitutional Court is not an instrument of the German government. Under German law, contrary to the anglo-american system, we do not know the doctrine of stare decises". Art. 97 of the German Constitution guarantees that the judiciary is independent with the

consequence that lower courts are not bound by decisions of superior courts. With one exception: According to sec. 31 of the Act on the Constitutional Court (*Bundesverfassungsgerichtsgesetz)*

> "all constitutional organs of the federation and the states and all courts and offices are bound by judgements of the Constitutional Court."

Needless to say the German government is also a "constitutional organ" in this respect. Whereas the binding effect is not limited to the operative provisions of a judgement, it also covers the reasoning.

This results in a problem for the German government: On one hand it is obliged under international law to abide by the judgement of the ECHR; on the other hand it is still bound by the judgement of the German Constitutional Court of 1999, which does not become null and void by a decision of the ECHR (*German Constitutional Court - BVerfG 11 November 1985, 2 BvR 336/85, NJW 1986, 1425)*.

Also the courts have a problem: According to the Constitutional Court (*German Constitutional Court - BVerfG 14 October 2004, 2 BvR 1481/04, NJW 2004, 3407 confirmed by the decision of 5 April 2005 1 BvR 1664/04, NJW 2005, 1765)*

> "it is the duty of the national courts to carefully implement any judgement of the ECHR into the affected part of the German legal system"

by interpreting – where possible - the national law in accordance with international law.

However, the Constitutional Court also made very clear in this decision, which was handed down after the *Hanover v Germany* decision of the ECHR, that the effect of a judgement of the ECHR is limited to the boundaries set by the German constitutional framework. Quote:

> "The German Constitution is aiming to fit Germany into the legal community of peaceful and liberal states, however, this does not waive sovereignty as established by the right of the last word of the German Constitution."

And:

> "If a violation of basic principles of the Constitution cannot be avoided, it is not contrary to the principle of being interpreted in accordance with international law, if the legislator does not observe international law."

As the German Constitutional Court reserves the right of the last word for itself and as the freedom of the press is a "fundamental element of each liberal state" (*German Constitutional Court – BVerfG 5 August 1966, 1 BvR 586/62, NJW 1966, 1603)* it is quite clear that it is only up to the German Constitutional Court itself to decide whether it will follow the narrower interpretation of the freedom of expression by the ECHR in its *Hanover v Germany* decision.

4. Court decisions in Germany after the "Caroline decision" of the ECHR

With a view to the legal situation as described in para 2 above, German courts have developed a very sophisticated way of finding differences in their cases to the "Caroline case" of the ECHR and the decision of the German Constitutional Court, very similar to the skill of minor courts in the anglo-american system, where they do not want to follow judgements of superior courts. Whenever possible they try to avoid a clear statement to the binding effect of either decision.

However, in a decision of 29 October 2004 the Berlin Court of Appeal (ninth senate) (*Kammergericht)* decided differently (*KG 29 October 2004, 9 W 128/04, NJW 2005, 605*):

The facts are brief: A nationally well-known German singer was photographed while shopping with his girlfriend in Rome.

According to German standards before the "Caroline decision", the singer is a public figure. His girlfriend accompanying him, is a public figure in this context. Thus, the photo could be legally published in Germany before *Hanover v Germany.* Consequently, only weeks before, the Berlin Court of Appeal had held that photos of the couple, taken while they were having a coffee in a London café, were not violating their privacy (*KG 22 June 2004, 9 U 53/04, NJW 2005, 603*)

After the Caroline-decision the Berlin Court of Appeal held:

> "Hence, the judgement of 24 June 2004 (i.e. *Hanover v Germany*) has to be observed and to be implemented in the German privacy law. This is not easy, since the ECHR considers exactly those decisions of the superior German courts as violation of Art 8 of the Convention, i.a. the aforementioned judgement of the *Bundesverfassungsgericht* of 15 December 1999, which reasoning is binding according to sec 31 of the Act on the Constitutional Court (*Bundesverfassungsgerichtsgesetz*). From the point of view of this senate this dilemma has to be resolved as follows:
>
> It has to be adhered to the existing constitutional principles ... This includes that also the entertainment press may invoke freedom of the press, that privacy is reduced once a person has commercialised its privacy, and ... if they perform intimate behaviour in public. The senate also sees no reason to refrain from the legal term "figure of absolute public interest" (*absolute Person der Zeitgeschichte*), meaning that the general public interest in the lifestyle of such people should not be considered – or to be reduced to people who hold a political office ...
>
> On the other hand it does comply with the importance of human dignity (Art 1 sec 1 German Constitution) and the right of freedom of personality (Art 2 sec 1 German Constitution) if the ECHR intends to protect celebrities from being stalked when doing purely private things in their everyday life. As said before, if possible, the German Constitution has to be interpreted in such a way as to avoid Germany violating its obligations arising from international law. In the light of the decided and convincing considerations of the ECHR regarding this point, it does comply with the freedom of the press to extend the protection of privacy of celebrities and their regular companions .... In this respect the binding effect of the judgement of the *Bundesverfassungsgericht* of 15 December 1999 is loosened with a view to the principle of being interpreted in accordance with international law."

It is most remarkable that there is no reasoning whatsoever for this fundamental position.

On this basis the Berlin Court of Appeal ruled regarding the specific photos:

> "... in the present case the interest of the plaintiff and her friend to spend their holiday in Rome unobserved and to be left alone by the media is prevailing ...
>
> It is out of the question that there is no contribution to a debate of general public interest, even if one considers the importance of a famous artist as a figure of identification for others ..."

This decision is even more remarkable against the background of a more recent decision of the tenth senate of the Berlin Court of Appeal. This senate took a completely different attitude with view to the effect of ECHR decisions and held in a decision of 14 April 2005 (*KG 14 April 2004, 10 U 103/04, NJW 2005, 2320*):

> "The question whether publications with mere entertaining character fall within the scope of the freedom of the press has been decided by the decision of the *Bundesverfassungsgericht* of 15 December 1999 with binding effect for all German courts. In this respect there is no room for interpretation. Decisions of the Bundesverfassungsgericht are binding for all courts, sec. 31 of the Act on the Constitutional Court (*Bundesverfassungsgerichtsgesetz).* ... Also the aforementioned decision of the *Bundesverfassungsgericht* is still binding, where the court held that the freedom of the press as guaranteed in Art 5 sec 1 German Constitution (*Grundgesetz*) does also cover entertaining publications .... . This is also valid for the

> publication of photos, showing public figures in their every day or private live."

The German Superior Court for Civil Law (*Bundesgerichtshof*) has, up to now, been more cautious when it comes to the implementation of the "Caroline decision" of the ECHR into German law. There is only one case where the competent VI. senate merely mentioned the decision (*BGH 28.09.2004, VI ZR 302/03, NJW 2005, 594*):

The facts of the respective case are also quickly told: Charlotte Casiraghi (the 15), daughter of Caroline of Hanover, was photographed riding a horse, on the occasion of a riding competition in Monaco. The accompanying text did not mention the riding competition but only the appearance and beauty of the girl.

Even on the basis of "pre-Caroline law", the publication of the photos in question in this context was violating the rights of the girl:

A possible consent in the publication was limited to reports about the riding contest. The daughter of Caroline is not a public figure. Only in this context did the Superior Court mention, in an affirmative way, the "Caroline decision":

> "The interest of the public and of the press in reporting about the plaintiff, using photographs, needs less protection in such cases where it is only supported by belonging to a royal family, while the person shown does not serve any official function even if she has

been introduced into “international society” (jet set) (see ECHR NJW 2004, 2647, 2650, sec 72).”

Even if the riding contest was of public interest, in the specific context, the Superior Court held that the publication of the photos were illegal, because the accompanying text was not about the riding competition, but only about the appearance of the girl.

The German Constitutional Court itself has not yet declared its position with a view to the ECHR judgement. In a most unusual interview on 9 December 2004 in the “Frankfurter Allgemeine Zeitung”, the president of the Constitutional Court, Hans-Juergen Papier, underlined “one cannot accuse German courts of a lack of balance of interest.” And ... he appealed to the ECHR to exercise more judicial self-restraint with regard to such decisions which are already the result of several stages of appeal including judicial review.

C. Self-regulatory systems

I. The German Press Council (www.presserat.de)

The German Press Council is the self regulatory body of the print media in Germany.

The journalistic principles of the German Press Council, which was founded in 1956, define the professional ethics of the press. This comprises the duty of

maintaining the standing of the press and standing up for the freedom of the press within the framework of the constitution.

1. Legal basis of the German Press Council

There is no statute or regulatory framework to set up a press council in Germany. The press's self-monitoring is based on the constitutional framework and, thus, the work of the German Press Council is provided by Article 5 para. 1 of the German Constitution (see above). It ensures freedom to express opinions and freedom of information, guarantees the freedom of the press, broadcasting and film and expressly emphasises the prohibition of censorship. These "basic rights of communication" are countered by other legal positions on basic rights of the constitution such as the principle of human dignity contained in Article 1, the general right to personal freedom in Article 2 and the right for self-determination as regards the information derived from this by the Federal Constitutional Law, which is also reflected in current data protection legislation.

Freedom of the press guarantees that special measures of any type that restrict the freedom of the press are prohibited and professional organisations of the press with compulsory membership and a jurisdiction over the press are not permitted. Nevertheless, the principle of professional self-monitoring of the press system has been familiar for a long time. The argument for self-monitoring: Effective self-monitoring makes third party control by the state superfluous and, thus, ensures the freedom of the press from the state. This is where the task and the work of the German Press Council begin. Thus, the German Press Council is an institutionalised organ

of the major associations of the press under private law, the powers of which are based on the image of the qualified private critic and to which every individual can appeal.

2. Historical development

In 1952 the German Ministry of the Interior submitted a draft Federal Press Act, which provided for the establishment of a self-monitoring instance in the form of a body under public law. Due to the planned state monitoring this draft met with tremendous opposition from the journalist and publisher associations and was not carried through. Following the example of the British Press Council of 1953, the journalist and publisher associations formed the German Press Council on 20. November 1956.

3. Structure of the German Press Council

The German Press Council is a non-profit association (*eingetragener Verein, e.V.*) in accordance with the Civil Code and thus a legal person under private law. Its structures and duties are governed in its statutes of 25 February 1985. According to these, the "*Trägerverein des Deutschen Presserats e.V.*" (association of sponsors of the German Press Council) is a conglomerate of the publisher and journalist associations (*Bundesverband Deutscher Zeitungsverleger e.V. (BDZV), Verband Deutscher Zeitschriftenverleger e.V. (VDZ), Deutscher Journalistenverband e.V. (DJV)* and *Deutsche Journalisten Union in Ver.di (dju)* with the purpose of

standing up for the freedom of the press in Germany and of maintaining the standing of the German press.

As a specialist body, the association of sponsors maintains the plenary (Plenum) of the German Press Council (the actual "Press Council") as well as the two complaints committees *(Beschwerdeausschuss)* elected from the 28-member plenary: the general complaints committee with two chambers and 6 members each and the complaints committee for editorial data protection with also 6 members. All of the bodies of the German Press Council are voluntarily staffed by publishers and journalists for a period of two years in office upon the appropriate proposal of the sponsor organisation. The chair of the bodies changes every two years among the four organisations. Unlike various press self-monitoring bodies (Ombudsman in the Scandinavian countries, Dutch Press Council or the English Press Complaints Commission), this is a pure self-monitoring institution, i.e. no external expert is the chairman of the German Press Council and its bodies.

4. Duties of the German Press Council

According to Article 9 of the statutes of the German Press Council, it has the following duties:

- to determine irregularities in the press and to work towards clearing them up,
- to stand up for unhindered access to the sources of news,
- to give recommendations and guidelines for journalistic work,

- to stand against developments which could endanger free information and formation of opinions among the public,
- to investigate and decide on complaints about individual newspapers, magazines or press services and
- self-regulation of editorial data protection

The Press Council expressly does not involve itself with two areas of duties: with issues relating to tariff policy and with unfair competition.

In performing its duties the Press Council issues recommendations and guidelines for journalistic work. At this point, the journalistic principles, the so-called Press Code, and the guidelines for journalistic work must be pointed out. Since its foundation in 1956, the Press Council has continuously developed a catalogue of guidelines that are to serve editors and publishers. The question as to whether a new guideline is to be drawn up for a specific problem, frequently comes up in the course of a complaint procedure. This body of rules is thus "case-law" in the real sense. In recent times there were several specific occasions when the guidelines were expanded and updated. For example, issues that occurred within the framework of complaints work where the permissibility of stating people's names when reporting on crimes, detection and criminal procedures (Figures 8 and 13 of the Press Code) became topical and were answered conclusively. Furthermore the German Press Council further defined the glorification of violence and the prohibition of discrimination (Figures 11 and 12 of the Press Code) as well as the prohibition of bribes (Figure 15 of the Press Code).

The key task of the Press Council is, thus, to investigate and to decide on individual complaints on publications in the press. This is done on the basis of a complaints order that ensures that everybody can turn to the Press Council free of charge in order to receive help from there. In 2004 roughly 700 people, associations, institutions, etc. wrote to the German Press Council seeking help and making complaints. They are complaining about publications due to possible infringements against the duties of care, due to research methods by journalists or due to the infringement of the right to personal freedom, for example within the framework of court reporting. Often questions in connection with the publication of readers' letters or satirical contributions have to be answered and investigated as to whether contribution contains discriminatory information on groups of people.

Approximately two thirds of all complaints can be dealt with at an early stage without a formal decision by the complaints commission. Mostly the central office of the German Press Council can successfully mediate between the parties concerned. In justified cases the complaints commission of the German Press Council issues editorial notes, censures and - in the case of severe journalistic infringements - public reprimands. The latter have to be published in the publication complained about within the framework of a voluntary undertaking.

These measures of the German Press Council, in the event of infringements of the Press Code being detected, in particular censures and reprimands, are a form of the "peer scolding" that is particularly unpopular in publishing houses and newspapers and which is to be avoided at all costs.

From 1 January 2002 onwards the German Press Council took on responsibility for self-regulation of editorial data protection in the press. If a reader believes that his or her data have not be handled properly in an editorial office he or she can make a complaint about this to the Press Council. The complaints about the violation of individuals' rights are then dealt with according to the expanded Press Code. In addition, there is also a catalogue that takes precautions for data security in editorial offices which was issued in June 2003.

II. TV and radio complaints system

The fact that the media are within the legislative competence of German states (see above) results in another patchwork legislation regarding TV and radio stations.

Like in the UK, Germany has a dual system meaning that there are publicly funded TV and radio stations and privately financed stations.

The legal basis of the publicly funded stations is a state treaty between the German states and a statute for each local station.

Here is an example of the regulation on complaints regarding the programme of a publicly funded station: Sec. 10 of the Act on the West German Radio Station ("*WDR-Gesetz*") stipulates that everybody may file a complaint about a programme with the director of the station who has to decide about the complaint within one month. If the director rejects the complaint, the claimant may file an appeal to the supervisory board ("Rundfunkrat"). Members of the supervisory

board are representatives of “relevant groups” such as political parties, unions, churches, etc, who also appoint the director. However, there is no formal system of sanctions in the event of a violation of the programme principles.

The privately financed stations are supervised by a supervisory authority in each state (“Landesmedienanstalt”) established again on the basis of a state statute, which also licenses the private stations. According to sec 42 of the Act on the Media in Northrhine Westphalia (“Mediengesetz NW”) anybody can file a complaint about a programme with the station. The station has to respond to the complaint within one month. If the complaint is rejected the claimant may appeal against this decision to the supervisory authority. Again, there is no formal system of sanctions in the event of a violation of the programme principles.

There are similar regulations for each station.

III. Voluntary self monitoring of multimedia service providers (www.fsm.de)

The “association for the voluntary self monitoring of multimedia service providers” (“Freiwillige Selbstkontrolle Multimedia-Diensteanbieter e.V.”) has been organised along the lines of the German Press Council and is competent for “content which is available on the Internet or any other networks or via online services” (sec 1 Complaint Rules for the Association).

It was founded in 1997.

The Association has issued a Code of Conduct for its members, which are companies like AOL, Google, T-Online, Yahoo, Lycos Europe, etc.

Anyone is entitled to file a complaint with the complaints office. Complaints may only be sent to the e-mail address of the association or by completing an electronic form on the website of the association and should refer to a specific content. Anonymous complaints will not be processed (sec 3 subsec 2).

If a complaint is levied against a foreign content provider and if there is a voluntary self control organisation for multimedia content in the country in which the provider is domiciled, the association's commissioner shall forward the complaint to such self-administrating body (sec.4 subsec.1).

Complaints which are not obviously unjustified will be forwarded to the content provider by the commissioner along with the request for a statement (sec. 4 subsec. 5).

After an initial review the commissioner will forward the complaint together with all statements to the chairperson of the complaints office, which is staffed by the members of the association.

If the complaint is justified on the basis of the association's code of conduct the following sanctions can be implemented:

- notification with demand to take remedial action, or
- expression of disapproval, or
- reprimand.

A reprimand has to be published by the provider on the website concerned for a period of one month.

Hamburg, 1 September 2005