



Reconciling the media's freedom to inform with the personality rights of celebrities

A comparative study of the U.S. and German approaches

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Abstract

This thesis deals with the celebrities' privacy and publicity rights as part of the broader personality rights concept, as it is known in the German legal theory. The origin, scope, and legal protection of privacy and publicity rights, as well as their various aspects is discussed. Conflicts between these rights and the media's right freely to inform the public are discussed, in order to evaluate which will prevail in various contexts. The approaches of the two countries, the United States and Germany, with regard to these issues are compared, highlighting the main similarities and differences, particularly as concerns the balancing process. This comparative study is supplemented by discussion of the relevant statutory and case law of the two countries.

Introduction

The terms „celebrity“, “personality” and “public figure” are often used interchangeably. However, there is still no general consensus about which people or what professions constitute the elitist group of celebrities. From the nature of the term itself, one can infer that the person in question must be celebrated in order to become a celebrity. Whether a person is celebrated for their artistic or political activities or for merely belonging to a well-known and influential family does not play a role. Nevertheless, most people associate the term celebrity with a person famous for their active involvement in show business, e.g. film actors, singers, directors etc. This group of celebrities and their rights is the main focus of this paper.

Looking back in history, there has been a mass of legal actions brought by the so-called rich and famous against the media, be it either press, publishing houses or television channels. However, celebration, which in the 21st century reaches a degree of world-wide fame, is virtually unimaginable without sufficient media coverage. The attention of the media thus becomes absolutely indispensable for the attaining and subsequent maintenance of celebrity status. The media and their „duty to inform“ the general public, as well as the personality rights of celebrities, and the conflicts that arise between these rights and duties, will be the main areas of focus for this thesis.

The media’s freedom of speech is inevitable in every democratic society for the protection and encouragement of open discussion of issues of public interest. This also contributes to the free exchange of information that citizens need in order to make intelligent decisions¹. This

¹ see Labunski, Richard. 1987. *Libel and the First Amendment (Legal History and Practice in Print and Broadcasting)*. New Brunswick, New Jersey: Transaction Publishers, p.134

rights is therefore guaranteed both by the First Amendment to the Constitution of the United States of America and by Article 5 of the German Basic Law. The personality rights concept is a rather broad term, stemming from the German legal tradition.² It encompasses different rights, including right to privacy³, and right to one's image.⁴ These will be discussed in detail in the following chapters. Naturally, the media's interests and the personal interests of celebrities are often in sharp contrast. Nevertheless, to strike a fair balance between the rights and interests of both sides is vitally important for their successful cooperation.

Looking at the relevant case law, one would necessarily raise the question: *which rights should be protected?* Should the media's freedoms of speech prevail against the claims of whimsical stars? Or should personality rights of celebrities be protected against their encroachment by „hateful press“? These pivotal questions will be addressed in the following pages.

The paper is divided into two chapters, one discussing the privacy rights and the other one the publicity rights, as two important aspects of the broader personality rights. Each chapter is subdivided into subchapters, which are discussing the origin and scope of these rights, their legal protection, as well as the countervailing media's freedom of expression. Finally, each chapter is supplemented by the case law, that further elaborates on the issue.

² German Basic Law in its Article 2.1. states: "Everyone shall have the right to the free development of his personality, insofar as he does not infringe the rights of others or offend against the constitutional order or the moral code", see Ruiz, Blanca R. 1997. *Privacy in Telecommunications (A European and American Approach)*. The Hague, The Netherlands: Kluwer Law International. p. 49-51

³ The right to privacy can be broadly defined as a right to be let alone, the right of a person to be free from unwarranted publicity and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned, see Black, H.C., eds. 1990. *Black's Law Dictionary*. St. Paul, Minnesota: West Publishing Co. p. 1195

⁴ The right to one's image, or the so-called publicity rights constitutes a special category of personality rights, that can be described as an individual right to control the commercial use of one's name or image, see Hixson, Richard F. 1987. *Privacy In a Public Society (Human Rights in Conflict)*. New York: Oxford University Press, Inc. p. 148

The comparative study between the American and German approaches to this issue is an integral part of this paper. Although not obvious at first sight, the two countries have influenced one another more than one would expect. For instance, the American courts have created and developed the distinct legal concept of the right to privacy, and its subcategory the publicity rights⁵. Thus, the United States has supplied the world, including Germany, with the largest body of case-law concerning this topic. On the other hand, the German personality rights concept, in turn, inspired the U.S. Supreme Court in defining the general constitutional right to privacy in the *Griswold v. Connecticut*.⁶ Due to its applicability, I borrowed this German concept and used it in the American legal realm.

The relevant literature focuses mainly on the general privacy law, its evolution, and torts redressing the harm caused by violations of the privacy law.⁷ The distinction between public and private figures is essential when it comes to a libel claim as a redress for defamation.⁸ Regarding publicity rights, the literature elaborates mostly on the cases invoking such rights and tries to differentiate the publicity rights from the general privacy law. Emphasizing its strong commercial flavor, publicity rights are thus juxtaposed to copyright and trademark. Additionally, issues of public domain in the celebrities' life stories is discussed.⁹

When addressing celebrities, I made use of the legal term public figures, which includes prominent people from various fields, ranging from politics to show business. This term is widely used in both American and German legal theory. Nevertheless, especially in

⁵ see Smolla, Rodney A. 1986. *Suing the Press*. New York: Oxford University Press

⁶ see Ruiz, Blanca R. 1997. *Privacy in Telecommunications (A European and American Approach)*. The Hague, The Netherlands: Kluwer Law International. p. 49

⁷ see Solove, Daniel J. 2004. *The Digital Person (Technology and Privacy in the Information Age)*. New York: University Press and Ruiz, Blanca R. 1997. *Privacy in Telecommunications (A European and American Approach)*. The Hague, Netherlands: Kluwer Law International

⁸ see Labunski, Richard. 1987. *Libel and the First Amendment (Legal History and Practice in Print and Broadcasting)* Transaction Publishers.

⁹ see Hixson, Richard F. 1987. *Privacy in a Private Society (Human Rights in Conflict)*. New York: Oxford University Press, Inc. , and Smolla, Rodney A. 1986. *Suing the Press*. New York: Oxford University Press, Inc. and Forer, Lois G. 1987. *A Chilling Effect*. New York: W. W. Norton & Company, Inc.

discussing the publicity rights, the focus has been mainly on the celebrities from the field of show business. When addressing the media, both written and broadcast media have been discussed, nonetheless, as the case law regarding the press is more available, I spent more time discussing it.

The topic is of particular interest to me, due to high level of publicity afforded to this kind of cases with “star appeal”. More importantly, however, the issue touches many different areas of law, ranging from constitutional law, to copyright law, to tort law. Finally, the contrast between the two countries and their rather dissimilar approaches to this issue, given in part by their different legal systems, added to the topic’s curiosity.

1. Privacy rights of celebrities

“If you can’t stand the heat, get out of the kitchen”

Harry S. Truman

In this chapter I would like to shed some light on the right to privacy, as part of the celebrities’ personality rights, its origin, scope, legal protection and the related case law, both in the United States and Germany. The right to privacy is shown in the light of the countervailing interest of the media to freely inform the public, with an intention to answer the question whose rights are the ones to prevail. The chapter is concluded with a short comparison of the two countries’ approaches to this issue.

1.1 The origin and scope of privacy rights in the United States

The right to privacy, was first mentioned in an 1890 article published by Samuel Warren and Louis Brandeis in the *Harvard Law Review*. It was written in reaction to the intrusive press which, according to the authors was “overstepping in every direction the obvious bounds of propriety and of decency.”¹⁰ The authors described the right as an individual’s “right to be let alone” by preventing the unauthorized publication and reproduction- absent a compelling public or general interest- of any aspect of his personality be it either his artistic works, image or voice.¹¹ Warren and Brandeis, seeking a legal basis for the protection against such intrusion, argued that this right had already been recognized as worthy of protection at common law, thus it should be elevated to the status of a common-law right.¹² However, the authors did not define the right to privacy clearly, leaving serious doubts about the content and scope of the right. Although mostly defined as a “right to seclusion” or “right to secrecy”,

¹⁰ Samuel D. Warren and Louis D. Brandeis, „The Right to Privacy“, *Harvard Law Review*, vol.4 (December 1890)

Louis D. Brandeis served between years 1916-1939 as an Associate Justice at the U.S. Supreme Court

¹¹ Ruiz, Blanca R. 1997. *Privacy in Telecommunications (A European and American Approach)*. The Hague, Netherlands: Kluwer Law International, p. 23

¹² *Ibid*

there has not been a general consensus on the clear definition of the term right to privacy.¹³ For instance, the U.S. Supreme Court, which recognized a general constitutional right to privacy, defined the right as the right to make one's own decisions, identifying thus this privacy with "autonomy".¹⁴ The "right to be free from intrusion" was thus mixed with the "right to act freely". American courts added also to the ensuing confusion when they started recognizing a "right to one's name or likeness", which is rather a publicity right, separated from the right to privacy.¹⁵ However, as concerns the free flow of information, some assume that "privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"¹⁶ Finally, it is worth mentioning that many scholars consider privacy, especially when defined as a control over information, to be a "property right in information", emphasizing its commercial nature as well as the individual's legal ownership and contractual rights connected with it.¹⁷

1.2 Legal protection of privacy rights in the United States

Rather than the statutory law regulating privacy¹⁸, the common law plays the principal role when it comes to the protection of privacy rights. About seventy years after the Warren and Brandeis' article, William Prosser, after reviewing hundreds of privacy cases, categorized these cases into four different torts "intrusion upon seclusion, misappropriation, false light

¹³ Throughout the years, terms as personhood, solitude, secrecy, control over information, intimacy, limited access to self, personal autonomy, anonymity have all been defined as part of the right to privacy

¹⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965)

The Supreme Court struck down the Connecticut law criminalizing the use of contraceptives as violating the right to marital privacy. The Court also found that the right to privacy is a general constitutional right. As there is no specific constitutional right to privacy the Court created it as a "penumbra" from various rights scattered throughout the Constitution, mostly in the first 10 Amendments known as "Bill of Rights"

¹⁵ Ruiz, Blanca R. 1997. *Privacy in Telecommunications (A European and American Approach)*. The Hague, Netherlands: Kluwer Law International, p. 27-28

¹⁶ Westin, Alan 1967. *Privacy and Freedom*. New York: Atheneum

¹⁷ Solove, Daniel J. 2004. *The Digital Person (Technology and Privacy in the Information Age)*. New York University Press, p. 77

¹⁸ There are many acts passed on the federal law that protect different privacy right, e.g. Privacy Act of 1974, Cable Communications Policy Act, Video Privacy Protection Act etc.

and publication of private facts”¹⁹. These torts serve as the common law grounds for safeguarding the privacy by allowing people to sue others for “privacy invasion”. These rights are recognized by most states either through common or statutory law.²⁰ When the privacy of celebrities is at stake, these torts might prove useful as the tort law is capable of redressing harms done to individuals.²¹ However, the damages to privacy must be substantial so they would create an incentive to sue. Therefore cases such as where nudity is publicly displayed or where members of the press enter a person’s home in order to collect sensational materials have a much higher likelihood to turn into litigation than minor or questionable invasions of privacy.²²

As mentioned, most celebrities do not want to be left completely alone, so the tort of intrusion upon seclusion is rarely invoked. Also the misappropriation of name or likeness - for instance to promote the sell of a certain product – more properly belongs to another category of rights, the publicity rights, which are discussed in the next chapter. Therefore, celebrities are most likely to seek protection against infringement of their rights by the media, by invoking the two remaining torts: false light and publication of private facts.

Publication of private facts, especially the sensitive ones, without a legitimate public concern, seems to be the most suitable mean to address the “excesses of the press”. It allows the celebrities to fight against public disclosure of their personal information. Similarly, the tort of false light might be helpful to protect the celebrities’ reputation against offensive publicity that places them before the public in a false light. This tort is very similar to libel and slander, the defamation torts.²³

¹⁹ Prosser, William L. 1960. „Privacy“. *California Law Review*, vol. 48

²⁰ Solove, Daniel J. 2004. *The Digital Person (Technology and Privacy in the Information Age)*. New York University Press, p. 58

²¹ *Ibid*

²² *Ibid*

²³ *Ibid*, p.59-60

1.3 Privacy rights of public figures v. media's freedom of speech in the United States

The case law addressing specifically the celebrities' privacy rights is still quite scarce. The celebrities mostly sue for violation of their publicity rights, which is discussed in the next chapter. Nevertheless, celebrities, even if they are not involved in any form of governmental or public service, still fall, along with public officials into the category of public figures, because of their involvement in public controversies and their vocal advocacy of public issues. Not to mention, many celebrities are even members of controversial associations. Just to give a few examples: Elizabeth Taylor and her involvement in HIV/AIDS charity through her own foundation, Charlton Heston's²⁴ leadership of the National Rifle Association or Anjelina Jolie's involvement with the UN Refugee Agency. Logically, such celebrities are likely to become victims of media defamation and strong criticism.

Therefore, I would like to address the most important issues, illustrated by the relevant case law that has shaped the relation between the privacy rights of such public figures and the media's freedom of speech.

Actual malice and public officials

In *New York Times v. Sullivan*²⁵, arguably the single most important case regarding public officials and the collision of their privacy rights with the press' freedom of speech guaranteed by the First Amendment, the Court established the "actual malice test". Under this test, the public official may not "recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice- that is with knowledge that it was false or with reckless disregard of whether it was false or not."²⁶

²⁴ Charlton Heston (1925-2008), famous American actor, mostly known from the movie *Ben-Hur* faced strong criticism for his involvement with the *National Rifle Association*, promoting the firearm ownership rights and self-defence. The actor even served as the president of the Association between 1998 and 2003. see <http://www.imdb.com/name/nm0000032/bio>

²⁵ *New York Times v. Sullivan* 376 U.S. 254 (1964)

²⁶ *New York Times v. Sullivan* 376 U.S. 254 (1964)

see Stone G.R., Seidman L.M., Sunstein C.R., Tushnet M.V., Karlan P.S.. 2005. *Constitutional Law*. 5th Edition. New York: Aspen Publishers, p.1167

Moreover, the U.S. Supreme Court, ruling in favor of the *Times* and its protected free speech, decided that an “erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the “breathing space” that they need to survive.”²⁷

Proving the recklessness of publisher is another story. The Court stated in the *St. Amant v. Thompson*²⁸, “failure to investigate or otherwise seek corroboration prior to publication is not reckless disregard for truth unless the publisher acts with a “high degree of awareness of (probable) falsity”.²⁹ Nevertheless, inquiries into thoughts, opinions and conclusions as part of editorial process leading to publishing a purportedly defamatory statement is a permitted way to produce evidence to prove actual malice³⁰

By establishing the actual malice test and recognizing the media’s breathing space, the Court substantially strengthened the media’s First Amendment free speech at the expense of the rights of public officials. Media mistakes and errors are tolerated, even constitutionally protected unless it is proven that the media knew or recklessly disregarded a known falsehood.³¹ Although *Sullivan* dealt with public officials, the term refers to local politicians, judges, state officials, etc. These are not necessarily celebrities widely known across the world. Nonetheless, the case laid the groundwork for cases involving libel of the public officials.³²

Public figures

Although there have been many attempts to define the term “public figure”, there is still no clear definition. Justice Lewis Powell, writing for the majority in the *Gertz v. Robert Welch, Inc.*³³, provided probably the most often cited definition: “those classed as public figures have

²⁷ *Ibid*, p.1166

²⁸ *St. Amant v. Thompson* 390 U.S. 727 (1968)

²⁹ *Ibid*

³⁰ *Herbert v. Lando* 441 U.S. 153 (1979)

³¹ Labunski, Richard 1987. *Libel and The First Amendment (Legal History and Practice in Print and Broadcasting)* New Brunswick, New Jersey: Transaction Publishers, p. 76-77

³² *Ibid*

³³ *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974)

The case dealt with defamation of a private individual, Chicago attorney, Elmer Gertz. The Supreme Court

thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved”³⁴. Public figure is also who “achieves such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.”³⁵ Finally, “in either case such persons assume special prominence in the resolution of public questions.”³⁶

For comparison, in reaction to the death of Princess Diana in 1997, the Council of Europe promulgated a similar definition of public figures: “Public figures are persons holding public office an/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, economy, the arts, the social sphere, sport or in any other domain.”³⁷

Actual malice and public figures

In 1967, the Supreme Court in *Curtis Publishing Co. v. Butts and Associated Press v. Walker*³⁸ went even further and applied the *New York Times* actual malice test in dealing with defamatory statements directed at public figures. The Court observed: “Increasingly in this country, the distinctions between governmental and private sectors are blurred”. Even individuals not holding a public office “are intimately involved in the resolution of important public question,” or, thanks to their fame “shape events in areas of concern to society at large”.³⁹ Due to their similar status, the Court united the categories of public figures and public officials applying the same standards in their treatment against the media’s freedom to

came to the conclusion, that the actual malice test adopted in *New York Times v. Sullivan* does not apply if the defamation of a private individual is involved, since „they are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery“

³⁴ people falling under this category are so-called „limited public figures“. The actual malice test applies to them only as regards the issue they have invited attention about.

see Smolla, Rodney A. 1986. *Suing the Press*. New York: Oxford University Press, p. 59

³⁵ these are so-called „universal public figures“. The actual malice test applies to them no matter what issue they are involved in. see Smolla, Rodney A. 1986. *Suing the Press*. New York: Oxford University Press, p. 59
All the mentioned stars, Elizabeth Taylor, Charlton Heston and Anjelina Jolie fall under this category.

³⁶ see Stone G.R., Seidman L.M., Sunstein C.R., Tushnet M.V., Karlan P.S. 2005. *Constitutional Law*. 5th Edition. New York: Aspen Publishers, p. 1174-1176

³⁷ Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy

³⁸ *Curtis Publishing Co. v. Butts and Associated Press v. Walker* 388 U.S. 130 (1967)

³⁹ *Curtis Publishing Co. v. Butts and Associated Press v. Walker* 388 U.S. 130 (1967)

see. Stone G.R., Seidman L.M., Sunstein C.R., Tushnet M.V., Karlan P.S. 2005. *Constitutional Law*. 5th Edition. New York: Aspen Publishers, p. 1172-1173

publish even falsehoods if the media prove they did not act with actual malice. According to Chief Justice Earl Warren, the different treatment of both groups “has no basis in law, logic, or First Amendment policy”⁴⁰ The *Falwell case*⁴¹ was decided applying the same logic and standard. The parody interview of Jerry Falwell, about an incestuous rendezvous with his mother, was found constitutionally protected under the First Amendment. Although Falwell claimed the article inflicted “emotional distress”, the Court held that as a public figure he must endure such emotional distress, unless he can prove the falsehood made with actual malice.⁴²

Interestingly, in the *Goldwater v. Ginzburg*⁴³ the Second Circuit Court of Appeals, by labeling the *Fact’s magazine’s* article⁴⁴ about the presidential candidate Barry Goldwater⁴⁵, as a “calculated falsehood”, refused to offer it a constitutional protection. As the court ruled, the article was deliberately published before the 1964 Election, the defendant, publisher Ginzburg “was very much aware of the possible resulting harm”. By knowingly publishing defamatory statements, the publisher clearly fulfilled the actual malice test.⁴⁶

Although the Supreme Court in 1970 denied *certiorari* to hear the case, Justice Black, dissenting the Court’s denial, claimed that “the grave danger of prohibiting or penalizing the publication of even the inaccurate and misleading information seem to me to more than

⁴⁰ *Ibid*

⁴¹ *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)

⁴² *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)

see Stone G.R, Seidman L.M., Sunstein C.R., Tushnet M.V., Karlan P.S. 2005. *Constitutional Law*. 5th Edition. New York: Aspen Publishers, p. 1179-1180

⁴³ *Goldwater v. Ginzburg*, 414 F. 2d 234 (1969)

⁴⁴ In his articles, publisher Ralph Ginzburg stated, that Goldwater was “mentally unbalanced and unfit for president”. Ginzburg later admitted that the article contained false information, including fictional psychiatrist questionnaires, and that statements in favor of Goldwater had been deleted.

see see Labunski, Richard. 1987. *Libel and The First Amendment (Legal History and Practice in Print and Broadcasting)* New Brunswick, New Jersey: Transaction Publishers, p. 123

⁴⁵ Barry M. Goldwater (1909-1998), a long-term Republican senator and the party’s 1964 presidential nominee,

⁴⁶ see Labunski, Richard. 1987. *Libel and The First Amendment (Legal History and Practice in Print and Broadcasting)* New Brunswick, New Jersey: Transaction Publishers, p. 124

outweigh any gain, personal or social, that might result from permitting libel awards such as the one before the Court today.”⁴⁷

Actual malice and the public interest

Finally, when it comes to the media’s oft invoked public interest, it is necessary to mention the decision in *Time, Inc. v. Hill*, in which the Court held that “constitutional protection is not limited to utterances that might enhance the resolution of political or governmental questions”.⁴⁸ The Court sided with *Life Magazine*’s assertion that the New York Times’ actual malice test should apply to any story concerning a matter of public interest. This is defined as any matter “the public is interested in,” regardless of its content.⁴⁹

Therefore, it might be inferred that whether the media are reporting about celebrities’ political or governmental involvement or whether they run a story about their cultural or gastronomical habits is irrelevant, unless it is qualifiable as a matter of public interest.⁵⁰

To conclude, the cases mentioned suit well to illustrate the conflict between celebrities’ privacy rights and the media’s freedom of speech. When it comes to a real litigation, the media and their free speech typically prevail. Celebrities do have a harsh time proving the actual malice in order to win. However, absent such a burden, the privacy rights of public figures could have a real chilling effect, thus crippling the media’s freedom of speech. The most effective way for celebrities to protect their privacy rights against the media supposed defamation or heavy criticism does not seem to lie in bringing legal actions against media, but in using the media for voicing their dissatisfaction with such defamation or criticism.

⁴⁷ *Ginzburg v. Goldwater*, 396 U.S. 1049 (1970)

⁴⁸ *Time, Inc. v Hill*, 385 U.S. 374 (1967)

The Life magazine ran a story about the play *The Desperate Hours*, which was inspired by the story of Hill’s family which was held hostage in 1952. The family claimed that the play placed them in false light in the eyes of the public, as it did not mirror the family’s real experiences.

⁴⁹ see Smolla, Rodney A. 1986. *Suing the Press*. New York: Oxford University Press, p. 55-56

1.4 Personality rights in Germany

The right to privacy is not specifically mentioned in the German Basic Law (Constitution), but rather falls under the rather broad and general concept of “personality rights”, outlined in Art. 2.1: “Everyone shall have the right to the free development of his personality, insofar as he does not infringe the rights of others or offend against the constitutional order or the moral code”. Originally, the right was meant to be a general right to act freely without the interference of public authorities, excepting of course the justifiable limits imposed by the law. The right or freedom is thus of a negative in nature.⁵¹

As mentioned, the personality right is a rather broad term, with the potential of turning basically every aspect of an individual’s personality into a separate right: for example, the right to personal honor, the right to one’s image and spoken word and the right to privacy. Moreover, these personality rights are often invoked along with the “right to human dignity” found in Article 1 (1). However, as the Bundesverfassungsgericht (Federal Constitutional Court or BVerfG) has repeatedly stressed, the personality rights as such are undivided and its general object permeates each of the particular rights.⁵² However, the right is of a rather “subsidiary” nature, which means that it applies only if the particular freedom or aspect of the personality is not protected by other, more specific fundamental rights.⁵³

1.5 Privacy rights in Germany

Privacy rights form part of the general personality rights under Article 2.1 of the Basic Law. This privacy encompasses “the right to seclusion and secrecy” as well as “the right to

⁵¹ Ruiz, Blanca R. 1997. *Privacy in Telecommunications (A European and American Approach)*. The Hague, Netherlands: Kluwer Law International, p. 48-50

The right was thus originally recognized as fundamental right to negative freedom.

⁵² *Ibid*, p. 51

⁵³ *Ibid*, p. 55

The example of such a specific fundamental right is the right to privacy of correspondence under Article 10 of the Constitution.

control one's seclusion and secrecy", and in line with the proclaimed "right to self-determination" within one's seclusion and secrecy. Such self-determination might be described, for instance, as a right to decide when - and to what extent - the individual gives away information about himself. The right becomes essentially a right to informational self-determination, closely connected with the personal autonomy to act and exercise one's rights freely.⁵⁴ Privacy, informational self-determination and the autonomy to act freely are thus linked together under the broad heading personality right.

1.6 Freedom of expression under the German Basic Law

Freedom of expression is guaranteed by Article 5 (1) of the Basic Law:

"Everybody has the right freely to express and disseminate their opinions orally, in writing or visually and to obtain information from generally accessible sources without hindrance.

Freedom of the press and freedom of reporting through audio-visual media shall be guaranteed. There shall be no censorship".

The right of free expression encompasses thus various aspects of this right: right to express one's ideas, right to obtain information and most importantly, the freedom of the press and freedom of broadcasting. The importance of the freedom of expression was also emphasized in the famous *Lüth* case⁵⁵, in which the BVerfG stated that freedom of expression "is absolutely fundamental for a liberal-democratic constitutional order because it alone makes possible the constant intellectual debate and the contest of opinions that is its elixir of life".⁵⁶

⁵⁴ *Ibid*, p. 52-53

⁵⁵ *Lüth case*, BVerfGE 7, 198 (1958)

The case dealt with a boycott initiated by Hamburg's director of information Erich Lüth against the film *Immortal Lovers*, directed by Veit Harlan, who gained notoriety for directing Nazi-propaganda films such as *Jud Süß*. The Hamburg Superior Court enjoined Lüth from calling publicly for a boycott of the film. Lüth subsequently turned to the Federal Constitutional Court stating violation of his basic right to free speech. The Court finally ruled in his favour, on the ground of the Superior Court's incorrect application of the standards governing the basic rights and violation of the applicant's free expression rights under Article 5. see Kommers, Donald .P. 1997. *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd

Freedom of the press, an aspect of the freedom of expression, protects journalists and publishers to freely express and disseminate freely their opinions through the press. On the other hand, the readers' right to obtain and freely read the information is protected by another aspect of freedom of expression, the freedom to obtain information.⁵⁷ Nevertheless, freedom of the press "is not reduced to the guarantee of being able to express and distribute one's opinion through the press freely". Such a right guarantees "the institutional independence of the press, from the acquisition of information to the distribution of news and opinions."⁵⁸ The BVerfG came to a similar conclusion also as regards the freedom of broadcasting.⁵⁹

Freedom of the press is guaranteed regardless of the topic, it covers tabloids and investigative journalism as well. According to the BVerfG, "freedom of the press is not limited to the "respectable" press".⁶⁰ Yet, the Court said:

"when balancing freedom of the press against other constitutionally protected interests, it may be taken into consideration whether the press, in the specific case, debates a case of public interest seriously and soberly, so as to satisfy the informational needs of the public and to contribute to the formation of the public opinion, or whether it only satisfies the needs of a more or less broad group of readers for superficial entertainment",⁶¹

The BVerfG thus drew a line between the protections afforded "serious speech" and the protections afforded "tabloid speech". Thus the BVerfG applies a double standard, affording different treatment to different kind of speeches: the tabloid press is inferior to the serious investigative journalism.⁶²

edition. Durham and London: Duke University Press, p. 361-369

⁵⁶ *Lüth case*, BVerfGE 7, 198 (1958)

⁵⁷ Michalowski, S. And Woods, L. 1999. *German Constitutional Law (The protection of civil liberties)*. Aldershot, Brookfield, USA: Ashgate and Dartmouth Publishing Co., p. 209

⁵⁸ see *Exclusion from the Civil Service decision*, BVerfGE 10, 118 (1959)

⁵⁹ see *Seizure of Film Material Case*, BVerfGE 77, 65 (1987)

⁶⁰ see *Soraya Decision*, BVerfGE 34, 269 (1973)

⁶¹ *Ibid*

⁶² Michalowski, S. And Woods, L. 1999. *German Constitutional Law (The protection of civil liberties)*. Aldershot, Brookfield, USA: Ashgate and Dartmouth Publishing Co. p. 211

A further distinction is made between the expression of opinions and statements of facts. Opinions possess universal constitutional protection regardless of content or form. They remain protected whether they are desirable or undesirable, polemic or offensive.⁶³ In *Soldiers are Murderers case*⁶⁴: “Opinions are characterized by the subjective views on a certain topic of the person experiencing them. They contain his judgment on facts, ideas or persons”. Expression of fact, on the other hand are “characterized by an objective relationship between what is expressed and reality”.⁶⁵ The correctness of the opinions cannot be established, as opposed to the statements of facts, whose correctness can be established. Under Article 5, opinions enjoy stronger constitutional protection than statements of facts, since they have “an intellectual effect on the environment, to influence the formation of opinions and to convince”.⁶⁶ Nevertheless, statements of facts do enjoy constitutional protection, provided they contribute to the formation of a certain opinion, or are linked to a certain opinion.⁶⁷ Needless to say, given their subjective nature, opinions – and their intended effects- are protected regardless of their correctness, while statements of fact lose their constitutional protection when proven incorrect. It remains difficult to distinguish clearly between these categories, as statement of facts may also contain value judgments.⁶⁸

1.7 Privacy rights of public figures v. media’s freedom of speech in Germany

Article 5 (2) states that “these rights [freedom of expression, freedom to obtain information, freedom of the press and broadcasting] are subject to limitations embodied in the provisions of general laws, and in legislative provisions aimed at the protection of young persons and the right to personal honor”. Regarding celebrities, the protection of their personal honor (under

⁶³ *Ibid*, p. 200-201

⁶⁴ *Soldiers are murderers case*, BVerfGE 93, 266 (1995)

⁶⁵ *Holocaust denial case*, BVerfGE 90, 241 (1994)

⁶⁶ *Election Campaign Decision*, BverfGE 61, 1 (1982)

⁶⁷ Michalowski, S. And Woods, L. 1999. *German Constitutional Law (The protection of civil liberties)*. Aldershot, Brookfield, USA: Ashgate and Dartmouth Publishing Co. p. 203

⁶⁸ *Ibid*, p. 205

the broader personality rights heading), serves as the most oft-invoked limitation on the media free speech. A careful balancing of the conflicting rights is thus required.

Sections 185-186 of the German Criminal Code (*Strafgesetzbuch* or StGB) prohibit insult and malicious gossip.⁶⁹ In case such information is disseminated through public media, the punishment for breach of these sections is even greater. Additionally, Section 187 of the StGB⁷⁰ recognizes defamation as a criminal offence. The StGB is a “general law” within the meaning of the Article 5 (2). Thus it imposes another set of limitations on the media’s free speech. Section 188 addresses malicious gossip and defamation of persons involved or connected to the political arena, imposing even stricter punishment for committing such an offence. This specific case of defamation is more than likely to be invoked by politicians or persons actively involved in public affairs.

According to the BVerfG’s jurisprudence, such statutory restrictions need to be “interpreted in the light of right to freedom of expression”, so that this fundamental right, essential for the proper functioning of the democratic society and economy is “rendered as effective as possible”.⁷¹ Therefore, if politicians accuse their opponents of incompetency, while discussing controversial matters, their offended person’s honor, (a constitutional limitation to the free expression) yields to free expression. This would not, however, be the case, if a politician’s private life, that which is entirely unconnected with political activities, were attacked by such free expression.⁷²

⁶⁹ §186 of the German Criminal Code reads “Whoever asserts or disseminates a fact in relation to another, which is capable of maligning him or disparaging him in the public opinion, shall, if this fact is not demonstrably true, be punished with imprisonment for not more than one year or a fine.”

⁷⁰ §187 of the Criminal Code reads „Whosoever intentionally and knowingly asserts or disseminates an untrue fact related to another person, which may defame him or negatively affect public opinion about him or endanger his creditworthiness shall be liable to imprisonment of not more than two years or a fine, and, if the act was committed publicly, in a meeting or through dissemination of written materials (section 11 (3)) to imprisonment of not more than five years or a fine.”

⁷¹ Starck, Christian. 1991. *New Challenges to the German Basic Law*. Baden-Baden: Nomos Verlagsgesellschaft, p. 49

⁷² *Ibid*, p. 49

1.8 German case law regarding the celebrities' personality rights

Throughout the years, the German courts, especially the BVerfG, dealt repeatedly with the dichotomy between the media's guaranteed free speech and the celebrities' personality rights. The following landmark cases illustrate well the famous "balancing exercise", carried out by the BVerfG, between two or even more competing fundamental rights. On one side is the media's freedom of expression under Article 5 (1), while on the other side there are personality rights of the celebrities under Article 2 (1), including right to personal honor, privacy rights or rights to one's own words, oft-invoked in conjunction with the right to human dignity under Article 1 (1).

*Mephisto case*⁷³

In *Mephisto*, the BVerfG dealt with freedom of expression, specifically with artistic freedom under Article 5 (3) of one private individual, that were balanced against constitutionally protected personality rights, particularly the right to human dignity under Article 1 (1) of the Basic Law⁷⁴ of another private individual.

In 1963, a publisher, the complainant in this case, announced the publication of the novel *Mephisto*⁷⁵ written by exiled writer Klaus Mann in the 1930's. The main character of the book Hendrik Höfgen was inspired by the writer's brother-in-law Gustav Gründgens, a well-known actor in Nazi Germany, who died in October 1963. Höfger's character and career closely resembled that of Gründgens, and Mann openly admitted that Höfger was modeled after Gründgens. After Gründgens's death, his son turned to the courts, securing an injunction from the Hamburg Court of Appeals against the reproduction, publication and distribution of the book. The injunction against the book was later upheld by the High Court of Justice, claiming

⁷³ *Mephisto case*, BVerfGE 30, 173 (1971)

⁷⁴ Article 1 (1) states: „Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” The case is notorious, as it gave priority to human dignity over the media's free speech.”

⁷⁵ The 1981 German-Hungarian-Austrian film *Mephisto*, directed by Hungarian director István Szabó, was based on Mann's novel. The film won an Academy Award as a best foreign-speaking picture in 1981.

a dishonored good name and memory of the deceased actor as grounds for injunction. Subsequently, the publisher turned to the BVerfG, claiming a violation of his guaranteed freedom of art and science under Article 5 (3) of the Basic Law.⁷⁶

The BVerfG rejected the complaint and ruled in favor of Gründgen's son. As the Court stated, "the individual's right to social respect and esteem does not have precedence over artistic freedom any more than the arts may disregard a person's general right to respect..." Nevertheless, the Court found, that Gründgen's protected sphere of personality would be violated if the book were published, since most readers would readily associate Hödger with Gründgen's persona. Also, numerous details attributed to Gründgen were fictional, and thus the portrayal would be an insult to his persona. The BVerfG upheld the judgment, calling the work a "libel in novel form".⁷⁷

In the Court's view, human dignity is a supreme value, ranking the highest in the value system of the Basic Law. As the Court pointed out, the right to human dignity is inviolable and does not cease to exist upon an individual's death, although it "diminishes as the memory of the deceased fades".⁷⁸ State authorities must thus protect even deceased persons from attacks on their dignity. Gründgen's public memory was thus still alive and worth protecting.⁷⁹

The case thus underlined the importance of human dignity in the established value order. If consistently applied, this leads to the conclusion that a clash between the right to free expression and the right to human dignity (even of a deceased person) would normally result in dignity prevailing.

⁷⁶ see Kommers, D.P. 1997. *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edition. Durham and London: Duke University Press, p. 301

⁷⁷ *Mephisto case*, BverfGE 30, 173 (1971)

⁷⁸ *Ibid*

⁷⁹ *Mephisto case*, see Kommers, Donald P. 1997. *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edition. Durham and London: Duke University Press, p. 301-304

*Stern-Strauss case*⁸⁰

The case of the late Bavarian Prime Minister Franz Josef Strauss also deals with these issues. During his political career Strauss reached such a degree of notoriety and fame, that he can daringly be called a celebrity.⁸¹ This is a landmark case because of its discounting the *Mephisto* precedent. If a public figure, unlike private figure, invokes his or her personality rights against the statements, even highly critical ones, about his character or political orientation, his personality rights will most likely yield to such an expression. From the Court's distinguishing between statements contributing to issues of essential importance to the public and those pursuing private interests, like in *Mephisto* case, one might infer, that the Court has endorsed a double standard in balancing the freedom of expression and the personality rights' of public figure.

In the complainants' articles Strauss was described as a personification of the so-called "coerced democrats". This term describes politicians, who followed the German democratic tradition more out of compulsion and expediency, than out of conviction. Although, the authors explicitly excluded any comparison between Strauss and Hitler, they repeatedly mentioned that Strauss had become a focal figure of those who within the German society, who were still yearning for a strongman. Strauss turned to the court invoking a violation of his personality rights and human dignity, stating that the magazine article was an "insulting criticism", an unprotected form of expression. The lower courts ruled in his favor, enjoining the journalists from disseminating such statements in the press. Since Strauss died while the case was pending, his heirs decided to continue in the litigation.⁸²

The journalists subsequently turned to the BVerfG, invoking the violation of their right to free expression under Article 5 (1). The BVerfG ruled in their favor, finding no violation of

⁸⁰ *Stern-Strauss Case (Coerced Democrat Case)*, BverfGE 82, 272 (1990)

⁸¹ *Franz Josef Strauss* (1915-1988), German politician, member of the Christian Social Union of Bavaria, served as Bavarian Minister President between 1978 and 1988 and before as a German Minister of Defence between 1956 and 1963. In 1992, *The Franz Josef Strauss Airport* in Munich was named after him.

⁸² *Stern-Strauss Case (Coerced Democrat Case)*, BverfGE 82, 272 (1990)

Strauss's personality rights. The Court states, that the lower courts carried out an "incorrect categorization of the statement as an insulting criticism." As the Court stated, "a statement of opinion does not become an insult simply due to its belittling effect on others".

Moreover, "belittling statement takes the character of an insult only when it places in the foreground defamation of the person, rather than debate over an issue. It must stray beyond polemical and overstated criticism into belittlement of the person".⁸³ Following this logic, the Court held that "contributions to debate concerning issues that are of essential importance to the public enjoy greater protection than statements that merely serve the pursuit of private interests...the former enjoy a presumption in favor of free speech"⁸⁴ Finally, the Court reasserted the protection of the human dignity of the deceased person, although only to a limited extent.

Böll case⁸⁵

In this decision the BVerfG discussed the "general right of intimate sphere," which includes "personal honor" and "the right to one's own words", as protecting the person against having words attributed to him which he did not say.⁸⁶

Famous writer, Heinrich Böll,⁸⁷ brought a complaint against a television commentator for remarks made, accusing Böll of "laying down the groundwork for political terrorism." The commentator quoted Böll as having characterized the German state as "dung heap defended with ratlike rage by the remnants of rotten power".⁸⁸ Böll subsequently sued the commentator for the violation of his personal honor, as the quotation was false or taken out of context, with the intention to give it a meaning the writer had never intended. After the Federal High Court

⁸³ *Ibid*

⁸⁴ *Ibid*

⁸⁵ *Böll case*, 54 BVerfGE 208 (1980)

⁸⁶ Kommers, Donald P. 1997. *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edition. Durham and London: Duke University Press, p. 422

⁸⁷ *Heinrich Böll* (1917-1985), the Nobel prize winning German writer, author of such classics as *The Train Was On Time*, *Billiards at Half-past Nine* or *The Lost Honour of Katharina Blum*. He was a strict opponent of the Nazi regime.

⁸⁸ see Kommers, Donald P. 1997. *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edition. Durham and London: Duke University Press, p. 420

of Justice upheld the remarks as justifiable under the free speech provision of Article 5, the writer turned to the BVerfG for redress. The BVerfG ruled in his favor, stating that both his claims were justifiable, declaring the commentator's remarks as unprotected free speech.⁸⁹

The BVerfG held that an individual may invoke his personality rights against his statements being "falsified, distorted or rendered inaccurate".⁹⁰ As the Court noted, "one may not allow criticism to seep into one's citation so as to distort the content of what the speaker actually said". If this happens, then the "speaker's right to his own words" is violated, along with his "right to determine how he will present himself to another person or to the public."⁹¹ A quotation is perceived as a statement of fact and not as a subjective opinion, becoming thus unprotected speech if false. Therefore, "if by misquotation one impairs another's general right to personality, this misdeed is not protected under Article 5 (1) of the Basic Law...The person quoting someone else is duty-bound to make it clear that he is employing his own interpretation of a statement open to several interpretation."⁹²

Although, the BVerfG thus held that an exaggerated emphasis on the media's "duty to tell the truth" could "restrict and even cripple them" from fulfilling their function, nonetheless, they are still obliged to "report correctly and accurately", including an "obligation to quote someone correctly".⁹³

Generally, when it comes to "balancing exercise", the personal honor will always prevail over untrue statements of fact, which were made with knowledge of their falsity. Such statements, as mentioned above, possess no constitutional protection. If these statements are true, a careful balancing will take place. If intimate personal sphere of an individual is

⁸⁹ *Ibid*, p. 420

⁹⁰ *Böll case*, 54 BVerfGE 208 (1980)

⁹¹ *Ibid*

⁹² *Ibid*

⁹³ Kommers, Donald P. 1997. *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edition. Durham and London: Duke University Press, p. 422

invaded by true statements of fact, then again personal honor is more likely to prevail, as opposed to the situation when true statements of fact invade the social sphere of an individual, which again requires careful balancing.⁹⁴ When it comes to opinions, then in case that they cause a serious injury to the dignity of an individual, than the personal honor of the individual will tend to prevail over the media free speech. However, if the injury to the dignity is only slight, the court will turn again to careful balancing⁹⁵

1.9 Comparison between the U.S. and German approaches to privacy rights

The approaches of the two countries share many common features. As mentioned, the German personality right concept influenced the American Supreme Court, in deciding *Griswold* and recognizing the constitutional right to privacy. The personal autonomy to make individual decisions was considered a basis of this right to privacy. This is similar to the German privacy concept of a right to act freely, as part of the broader concept of the “free development of one’s personality”.⁹⁶

The principal difference between the two systems lies in the levels of individuality, through which the right is approached. Under the American approach the right of privacy is considered solely an individualist right, protecting the exclusive interests of the individual. Its primary aim is to conceal the private information from the public eye. Freedom from intrusion is thus the most common understanding of the American approach.⁹⁷ Although the government is required to refrain from invading the individuals’ privacy rights, in case of their collision with the protected free expression, the latter is more likely to prevail.⁹⁸

⁹⁴ See Grimm. „Meinungsfreiheit“ in Kommers, Donald P. 1997. *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edition. Durham and London: Duke University Press, p. 424

⁹⁵ *Ibid*

⁹⁶ Ruiz, Blanca R. 1997. *Privacy in Telecommunications (A European and American Approach)*. The Hague, Netherlands: Kluwer Law International, p. 36

⁹⁷ *Ibid*, p. 35 and 54-56

Limits imposed upon the right to privacy, such as the rights of others, protection of the constitutional order or moral code further strengthens the protection of the country’s democratic order and values.

⁹⁸ Cate, Fred H. 1997. *Privacy in the Information Age*. Washington, D.C.: Brookings Institution Press, p. 99

Germany, on the other hand, considers privacy is considered a prerequisite for the individual's free participation in politics and for the free exercise of his fundamental rights. Privacy is thus indispensable for the preservation of the German democratic order.⁹⁹

When it comes to defamation of public figures, the U.S. Supreme Court's actual malice standard has freed the media from their obligation to impart only correct and accurate information. Interestingly enough, the BVerfG came to a similar conclusions, like in *Stern/Strauss case*, when it held that "a statement of opinion does not become an insult simply due to its belittling effect on others", as the public official must endure even highly critical remarks about his character of political activities. If however a belittling statement is used predominantly to defame the person, then it becomes an unprotected insult.¹⁰⁰ Nevertheless, in contrast to the U.S. Supreme Court, the BVerfG, in *Böll case*, emphasized the media's obligation to "report correctly and accurately", including an "obligation to quote someone correctly".¹⁰¹

⁹⁹ Ruiz, Blanca R. 1997. *Privacy in Telecommunications (A European and American Approach)*. The Hague, Netherlands: Kluwer Law International, p. 54-56

¹⁰⁰ *Stern-Strauss Case (Coerced Democrat Case)*, BVerfGE 82, 272 (1990)

¹⁰¹ *Böll case*, 54 BVerfGE 208 (1980)

see Kommers, Donald P. 1997. *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edition. Durham and London: Duke University Press, p. 422

2. Publicity rights of celebrities or copyright of personality?

“Being a movie star, and this applies to all of them, means being looked at from every possible direction. You are never left at peace, you’re just fair game”

*Greta Garbo*¹⁰²

This chapter is devoted to another part of celebrities’ personality rights, to publicity rights and their origin, scope and legal protection, both in the United States and Germany. These rights are contrasted with the media’s claims for free speech, with the case law offering an interesting insight into the balancing of these two often contrary interests. The short comparison at the end of the chapter distinguishes the two countries’ approaches.

2.1 The origin and scope of publicity rights in the United States

The origin of the right to publicity, as a special category of privacy rights, can be traced back well into the 1950’s. In 1953, in the case *Harlan Laboratories v. Topps Chewing Gum*, Federal Circuit Judge Jerome N. Frank, identified the right to publicity, arguing that “individuals have a right to control the commercial use of their name or likeness”¹⁰³ As the Court put it, prominent persons “far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorizing their countenance, displayed in newspaper, magazines, buses, trains and subways”¹⁰⁴. From the wording of the decision it might be inferred that the new right pertains exclusively to prominent and famous people, who have generated an interest in their lives and likenesses through public exposure. “It is the personality that creates the asset, and

¹⁰² The Swedish actress Greta Garbo was famous for shunning any form of publicity, in line with her most famous statement “I want to be left alone”.

see <http://www.imdb.com/name/nm0001256/bio>

¹⁰³ See Hixson, Richard F. 1987. *Privacy in a Public Society (Human Rights in Conflict)*. New York: Oxford University Press, p. 140

¹⁰⁴ *Harlan Laboratories v. Topps Chewing Gum*, 202 F 2nd 866 (1953)

consequently the personality that is being exploited”¹⁰⁵ Therefore “stardom”, as a prerequisite of the public and media interest, gives the celebrity the right to fight against the exploitation of his or her celebrity status by applying the publicity right. The manner of attaining stardom, be it through in show business, politics or sports is irrelevant.

By emphasizing the commercial value of the right to publicity, the court drew a clear line between the newly created right to publicity and established right to privacy, focusing primarily the individual’s feelings. As the Court put it, “this right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertisers from using their pictures”¹⁰⁶.

From this it is clear that the publicity right, in contrast to the privacy right, is a property right in one’s face, name or image. Thus misappropriation is prohibited. As the *Price v. Hal Roach Studios, Inc.* reads: “When determining the scope of the right of publicity ...one must take into account the purely commercial nature of the protected right”.¹⁰⁷ Similarly, as the Court put it in *Carson v. Here's Johnny Portable Toilets, Inc.*, „a celebrity has a protected pecuniary interest in the commercial exploitation of his identity”.¹⁰⁸

As mentioned, most people, including celebrities, do not want to be left alone. Rather, people tend to what “to manipulate the world around them by selective disclosure of facts about themselves.”¹⁰⁹ By extension, celebrities do not mind publicity at all, or at least would not mind it if they were in absolute control of the disclosure of information about their lives. Moreover, most celebrities do not shun publicity, where there is a profit available. As Justice White states, in the pivotal *Zacchini v. Scripps-Howard Broadcasting Co.*, “an

¹⁰⁵ see Lazar, E.D. “Towards a Right of Biography: Controlling Commercial Exploitation of Personal History” in Hixson, Richard F. 1987. *Privacy in a Public Society (Human Rights in Conflict)*. New York: Oxford University Press, p. 141

¹⁰⁶ *Haelan Laboratories v. Topps Chewing Gum*, 202 F 2nd 866 (1953)

¹⁰⁷ *Price v. Hal Roach Studios, Inc.*, 400 F.Supp. 836 (S.D.N.Y.1975)

¹⁰⁸ *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F. 2d 831, 837 (6th Cir. 1983)

¹⁰⁹ Judge Richard Posner in Hixson, Richard F. 1987. *Privacy in a Public Society (Human Rights in Conflict)*. New York: Oxford University Press, p. 149

entertainer...usually has no objection to the widespread publication of his act so long as he gets the commercial benefit of such a publication.”¹¹⁰

2.2 Legal protection of publicity rights by the U.S. statutory law

In the United States, publicity rights are protected on the state level by statutory law, and by common law. Since the individual states control this protection, the legal regulation may vary from state to state, as contrasted with copyright and trademark laws that offer uniform protection on the federal level. For example, only about half of the states specifically recognize publicity rights. Some of these protect publicity rights by their name, while others protect them along with other privacy rights and others still use unfair competition law for this purpose.¹¹¹ Nevertheless, in states which do not recognize and protect publicity rights through any of these methods, violators may still be sued under the federal Lanham Act.¹¹²

Of the states directly regulating the publicity rights, the California Civil Code (known commonly as the “Celebrities Rights Act”¹¹³, Indiana Code¹¹⁴ and the New York Civil Rights Law¹¹⁵ are the best known. Given, that the permanent address of most of the celebrities is either in California or New York, the laws of these two states are the most likely to be invoked.

¹¹⁰ *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)

¹¹¹ See <http://topics.law.cornell.edu/wex/Publicity>

¹¹² Title 15, chapter 22 of the United States Code, the *Lanham Act* regulates the federal trademark law, prohibiting for example trademark infringement, trademark dilution or false advertising.

¹¹³ Section 3344 of the California Civil Code protects the publicity rights of living persons, including among others their names, voices, likenesses or photographs.
see <http://caselaw.lp.findlaw.com/cacodes/civ/3344-3346.html>.

¹¹⁴ §32-36 of the Indiana Code affords even broader protection of publicity rights, protecting besides the name, likeness and image also for example the signature, the photograph, gestures or even mannerism..
see <http://www.in.gov/legislative/ic/code/title32/ar36/ch1.html>

¹¹⁵ The New York Civil Rights Law in its § 50 and 51 prohibits an unauthorized use for advertising or trade purposes, of the name, portrait or picture of any living person.
see <http://law.onecle.com/new-york/civil-rights/index.html>

2.3 U.S. case law regarding publicity rights

Case law forms the second and perhaps even more important pillar of the legal regulation of the publicity rights. More than fifty years have already passed since the decision in the 1953's *Haelan Laboratories* case, the first important case dealing with publicity rights. From the mass of cases the American courts have already decided on this issue, I selected those that not only address the crucial problems regarding these rights, but also show their different aspects.

Zacchini v. Scripps-Howard Broadcasting Co.¹¹⁶

Zacchini is a highly important case dealing with publicity rights, as it encompasses statements on privacy, publicity, and copyright.¹¹⁷

Entertainer Hugo Zacchini was recorded during a performance by a freelance reporter despite his explicit wish not to be filmed. The fifteen-second shot was subsequently run by an Ohio television station during a news report.¹¹⁸ Zacchini sued the TV station for invasion of his privacy, specifically for unlawful appropriation of his professional privacy.¹¹⁹ The Ohio Supreme Court rejected Zacchini's claim, stating that, although he had the right to publicity, the public had a legitimate interest in seeing his act. This was thus an authorization to the station to show the clip. Citing the *Time Inc. v Hill*¹²⁰ the court stated that "freedom of press inevitably imposes certain limits upon an individual's right to privacy".¹²¹

Nevertheless, the U.S. Supreme Court reversed the decision, stating, that "the First Amendment does not give the media a right to broadcast a performer's entire act without his

¹¹⁶ *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)

¹¹⁷ Hixson, Richard F. 1987. *Privacy in a Public Society (Human Rights in Conflict)*. New York: Oxford University Press, p. 143

¹¹⁸ Smolla, R.A. 1986. *Suing the Press*. New York: Oxford University Press, p. 126-127

¹¹⁹ Hixson, Richard F. 1987. *Privacy in a Public Society (Human Rights in Conflict)*. New York: Oxford University Press, p. 143

¹²⁰ *Time Inc. v Hill* 385 U.S. 374 (1967).

In this case, the U.S. Supreme Court found, that in absence of a malicious intent on the side of the publisher, he can, under the Free Speech clause of the First Amendment, include in its publishings even otherwise false or inaccurate statements, if the story includes a matter of „public interest“.

see http://www.oyez.org/cases/1960-1969/1965/1965_22/

¹²¹ Hixson, Richard F. 1987. *Privacy in a Public Society (Human Rights in Conflict)*. New York: Oxford University Press, p. 144

consent. The Constitution no more prevents a State from requiring the respondent to compensate the petitioner for broadcasting his act on television than it would privilege the respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner”¹²²

This decision raised many interesting issues. First of all, the Court upheld the existence of the publicity rights and the need for their protection. Second, the Court reemphasized the economic nature of these rights. As Justice White, writing for the majority, stated “the broadcast of the petitioner’s entire act poses a substantial threat to the economic value of that performance” and such a broadcast “goes to the heart of petitioner’s ability to earn a living as an entertainer”.¹²³ Since “if the public can see the act free on television, it will be less willing to pay to see it at the fair“, with the effect of „preventing the petitioner from charging an admission fee“. ¹²⁴ The Court clearly likened the violation of Zacchini’s right to publicity to economic deprivation, distinguishing it from false-light privacy.¹²⁵ Thus, in the case of a conflict between a celebrities’ publicity rights and the media’s free speech, publicity rights seem to take precedence.

Most importantly, the Court did not recognize the broadcaster’s freedom even to report factual news, if this would violate the performer’s right to publicity. The „public interest“ is irrelevant and inapplicable when the publicity rights of performers are at stake.¹²⁶ This is a sharp contrast to *Time Inc. v. Hill*, in which celebrity rights were held to go unprotected when confronted with the news concerning matters of public interest.

¹²² 433 U.S. 562 (1977)

¹²³ *Ibid*

¹²⁴ *Ibid*

¹²⁵ Hixson, Richard F. 1987. *Privacy in a Public Society (Human Rights in Conflict)*. New York: Oxford University Press, p. 146-147

¹²⁶ *Ibid*

Elizabeth Taylor v. ABC and Elizabeth Taylor v. NBC

The star Elizabeth Taylor brought two notable legal actions against American media, trying to prevent them from producing and broadcasting unauthorized biographical films about her life.

In 1982, Elizabeth Taylor¹²⁷ sued the American Broadcasting Corporation (ABC)¹²⁸, to stop the production of a “docudrama” about her life. Taylor argued, that her life story is not public domain, but her own private property and hers is the decision when and how to exploit it financially. A docudrama, by its very nature a mixture of facts and fictions about her life, would portray her in a false light in the eyes of the public.¹²⁹ As Taylor said, “my livelihood depends on—and don't laugh—my acting, the way I look, the way I sound. If somebody else fictionalizes my life that is taking away from me.”¹³⁰

The Taylor case is important for two reasons. First, the actress tried to stop the production of the docudrama before it even started, attempting to impose a prior restraint on unwanted publicity. Second, the case raised the question whether the media are *free* to dramatize real life events and people, despite the fact that each dramatization involves distorting certain facts. Conversely, are the media obliged to adhere strictly to the historical records, without inventing any dialogue?¹³¹

Taylor did not claim that the docudrama would fabricate real life events, but rather that it would falsely depict her. She thus raised objection to the form rather than to the content of the programme. The actress portraying her would naturally look different than her and use words

¹²⁷ Elizabeth Taylor (1932), British-born American actress, two times Academy Award winner, famous both for her acting abilities and flamboyant lifestyle. Appeared in numerous famous pictures as *Cleopatra*, *Who's Afraid of Virginia Woolf?*, *Cat on a Hot Tin Roof* or *Suddenly Last Summer* see <http://www.imdb.com/name/nm0000072/>

¹²⁸ *Elizabeth Taylor v. ABC*, 82, Civ. 6977 (S.D.N.Y. 1982)

The actress sued the ABC at the Southern District Court in Manhattan. The place was probably chosen deliberately, since the 1903 far-reaching New York state privacy statute protects everyone from an unauthorized use of his or her name or picture for advertising or trade purposes.

¹²⁹ Smolla, Rodney A. 1986. *Suing the Press*. New York: Oxford University Press, p. 131-134

¹³⁰ http://www.time.com/time/magazine/article/0,9171,925855,00.html?iid=digg_share

¹³¹ Smolla, Rodney A. 1986. *Suing the Press*. New York: Oxford University Press, p. 132-133

not actually spoken by her.¹³² On the other hand, if no dramatization is allowed, the whole format of docudrama is endangered, as each docudrama involved some dramatic licence with facts. According to the production companies, the decisive factor, in such cases, is the truthfulness of the underlying facts and absence of real lies,¹³³

Granting the celebrity an absolute right to control and exploit his or her life story is not the best solution. Most celebrities, including politicians and athletes, should be more than grateful to the public for persistent publicity. Without the public, there would be no celebrity and no life story to exploit in the first place. Therefore, the public should also be given the right to make use of such a life stories, as they have become part of the public domain, along with the personality concerned. Moreover, each docudrama made without explicit consent of the public figure would be banned from projection. Needless to say, securing consent might prove difficult, particularly when the person is deceased. Ultimately, this case was about money, not privacy, as Taylor put it: „by doing this, ABC is taking away from my income“. ¹³⁴ And when it comes to falsehoods, Taylor can still seek redress and sue the production company for defamation, after docudrama is competed, if necessary.

Interestingly enough, Elizabeth Taylor initiated similar law suit, this time against the National Broadcasting Company (NBC)¹³⁵. This time she sought to enjoin the NBC from broadcasting an unauthorized biographical film. As actress Sheryl Fenn (who portrayed Taylor in the film), only generally resembled Taylor, no one familiar with Taylor's appearance would mistake the two. The court denied Taylor's claim, holding, that „surely a dramatic presentation of the life of the plaintiff will not be construed as being actually played by the plaintiff“¹³⁶. In connection with these case, *Whitehead v. Paramount Pictures*¹³⁷,

¹³² *Ibid*

¹³³ *Ibid*

¹³⁴ Hixson, Richard F. 1987. *Privacy in a Public Society (Human Rights in Conflict)*. New York: Oxford University Press, p. 134

¹³⁵ *Taylor v. NBC*, 1994 WL 762226 (Cal.Sup.1994)

should also be mentioned. In *Whitehead* the court found that „there is no tort for invasion of privacy for appropriating the story of another person’s life“.¹³⁸ Similarly, *Matthews v. Wozencraft* states that „the narrative of an individual’s life, standing alone, lacks the value of a name or likeness that the misappropriation tort protects.“¹³⁹

In summary, although Elizabeth Taylor ultimately succeeded in blocking the ABC docudrama production,¹⁴⁰ in the NBC case the Court sided with the production company. Thus if publicity rights are invoked against the media’s freedom to portray or narrate the public domain, the life stories of celebrities, the media will be the ones to succeed in protecting their rights.

Unlike *Zacchini*, where factual news was involved, the two Taylor cases included also fictional elements. However, financial claims were ultimately the main motive in both cases.

Onassis v. Dior*¹⁴¹ and *Midler v. Ford

The Onassis case, concerning the iconic Jacqueline Kennedy Onassis raises another interesting question. Can a person bearing a striking resemblance to a well-known celebrity (a look-alike) be prevented from using his or her face for a commercial advertisement invoking the privacy rights doctrine? The American courts say yes.

Fashion mogul Christian Dior launched an advertising campaign featuring three people known as the “Diors”, two men and one woman. In one of the ads the two of the “Diors” are celebrating their wedding in the presence of many well-known personalities, including.

¹³⁶ *Taylor v. NBC*, 1994 WL 762226 (Cal.Sup.1994),
see Beard, Joseph. J. 2001. *Clones, Bones and Twilight Zones: Protecting the Digital Persona or the Quick, the Dead or the Imaginary*
<http://www.law.berkeley.edu/journals/btlj/articles/vol16/beard/beard.pdf> page 40

¹³⁷ *Whitehead v. Paramount Pictures, Corp.* 53 F. Supp. 2d 38, 53 (D.C. Cir.1999)

¹³⁸ see Beard, Joseph J. 2001. *Clones, Bones and Twilight Zones: Protecting the Digital Persona or the Quick, the Dead or the Imaginary*
See <http://www.law.berkeley.edu/journals/btlj/articles/vol16/beard/beard.pdf>
page 40, footnote 205

¹³⁹ *Matthews v. Wozencraft*, 15 F.3d 432, 438 (5th Cir.1994)
see <http://www.uakron.edu/law/docs/stohl352.pdf> page 262, footnote 41

¹⁴⁰ The actress managed to stop the production of the docudrama, since the ABC finally, under pressure, dropped the program. see Smolla, Rodney A. 1986. *Suing the Press*. New York: Oxford University Press, p. 134

¹⁴¹ *Jacqueline Kennedy Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S. 2d. 254 (1984)

Jacqueline Onassis. On closer examination, it becomes apparent that it is not Onassis, but rather someone closely resembling her, New York secretary Barbara Reynolds. Dior, knowing that Onassis would never pose for such a commercial, used a look-alike to create the impression of Onassis attending the Diors' wedding.¹⁴² Onassis, sought an injunction against further publication of the ad on the basis of the New York Civil Rights Law,¹⁴³ which she subsequently obtained.

Since none of the elements of the law (name, portrait or picture) was misused, the court had to use a broader interpretation of the law, reading it to protect also the "essence of the person, his or her identity or persona from being unwillingly or unknowingly misappropriated for the profit of another."¹⁴⁴ This broader protection of the essence as well as the identity thus enables a ban on the exploitation of the personality itself, not just when an actual picture or name is involved, but also when the exploitation is performed using a look-alike.

Barbara Reynolds was thus prevented from appearing as Onassis, at least in commercial advertising, where this might mislead people to think, that Onassis had in fact endorsed the product. As the court stated "commercial hitchhiker seeking to travel on the fame of another will have to learn to pay the fare or stand on his own two feet"¹⁴⁵ Nevertheless, nothing can prevent Reynolds from using her resemblance to Onassis, she could appear at parties, on TV programs or even in docudramas, even when hired to portray Onassis.¹⁴⁶

Aside from the look-alike issue, the Onassis case is interesting because of the fact that Onassis did not directly invoke her publicity rights. Rather she based her claim on the violation of her privacy rights. The case thus shows that the two rights, privacy and publicity, are closely connected.

¹⁴² Smolla, Rodney A. 1986. *Suing the Press*. New York: Oxford University Press, p. 118-123

¹⁴³ already mentioned §50 and 51 of the *New York Civil Rights Law* prohibits an unauthorized use, for advertising or trade purposes, of the name, portrait or picture of any living person

¹⁴⁴ *Jacqueline Kennedy Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S. 2d. 254 (1984)

¹⁴⁵ *Ibid*

¹⁴⁶ Smolla, Rodney A. 1986. *Suing the Press*. New York: Oxford University Press, p. 118-123

In this context, the case *Midler v. Ford*,¹⁴⁷ is also worth mentioning, as it dealt with somewhat similar issue, except that the “look-alike” was replaced by a “sound-alike”, when Ford used a voice, which closely resembled that of Bette Midler, in its commercial. None of the existing statutes regarding privacy or publicity rights was strictly applicable to this case. The judge applied California case-law, banning “the appropriation of the attributes of one’s identity.”¹⁴⁸ Midler’s voice was thus recognized as an attribute of her identity – something usually associated with her, that had been misused to create an impression that she endorsed the product.¹⁴⁹ In the words of the court „the defendants here used an imitation to convey the impression that Midler was singing for them“, in order to sell the product, which amounted to „piracy of her identity“ and was therefore considered a torturous misappropriation of Midler’s identity.¹⁵⁰

Both these cases dealt with a similar issue, though with different aspects. In both cases attributes of personalities of famous celebrities were misused commercially with the intent to boost the sale of products in commercial advertising, to which the American courts said clearly no, protecting the rights of the celebrities over those of a business’s artistic freedom.

When it comes to imitations of famous people, the court repeatedly upheld bans on such activities. Elvis Presley and Groucho Marx¹⁵¹ were among those, whose publicity rights were upheld against the professional imitations of their personalities. In the cases of these two American icons, the courts found that such imitations lacked „their own creative component“ and were primarily aimed at a commercial exploitation and appropriation of their likeness or

¹⁴⁷ *Bette Midler v. Ford Company*, 849 F.2d 460 (1988)

¹⁴⁸ the case invoked was *Motschenbacher v. R.J. Reynolds Tobacco Co*, 498 F.2d 821 (9th Cir. 1974), even though it dealt with physical likeness.

¹⁴⁹ See <http://www.law.ed.ac.uk/ahrc/personality/uscases.asp#Midler>

¹⁵⁰ *Bette Midler v. Ford Company* 849 F.2d 460 (1988)

¹⁵¹ *Groucho Marx Productions, Inc. v. Day & Night Co.* (S.D.N.Y. 1981) 523 F.Supp. 485

character, lacking „significant value as pure entertainment“, to protect them under First Amendment.¹⁵² However, this is not necessarily the rule in the United States today.

As the California Supreme Court ruled in *Comedy III Prods., Inc. v. Gary Saderup, Inc.* „a reproduction of a celebrity image, that contains significant creative elements is entitled to as much First Amendment protection as an original work of art.“¹⁵³ On this issue, *ETW Corporation v. Jireh Publishing, Inc.* involving Tiger Woods, held that „a celebrity’s name may be used in the title of an artistic work so long as there is some artistic relevance“.¹⁵⁴

Cary Grant¹⁵⁵, Clint Eastwood and Mohammed Ali

In these cases, the American courts entertained the issue whether the media are free and if yes, then under what circumstances to „report on news“ concerning celebrities.

In 1971, the Esquire magazine published a picture of Hollywood legend, Cary Grant,¹⁵⁶ obtained with the actor’s consent for a publication in 1946. However, in this instance, the actor’s face was used, superimposed on the body of a model wearing clothes showing fashions of the 1970’s. The picture also contained the name of the clothing manufacturer and the price tag. Grant subsequently sued the magazine under the oft-invoked New York law.¹⁵⁷

The court sided with him, rejecting the Esquire’s argument, that the article with the actor’s picture in it was a mere “fashion news” about the longevity of tradition. Although the photograph was not used for advertising, it was used for purposes of trade, as it showed the name of the manufacturer and the price tag. Grant was misused as a professional model without obtaining his consent for this instance or being paid for such a service. Finally, since

¹⁵² Smolla, Rodney A. 1986. *Suing the Press*. New York: Oxford University Press, p. 124-126

¹⁵³ *Comedy III Prods., Inc. v. Gary Saderup, Inc.* 25 Cal. 4th 387, 21 P.3d 797 (Cal.2001)

¹⁵⁴ *ETW Corporation v. Jireh Publishing, Inc.* 99 F.Supp.2d 829 (June 20, 2003)

¹⁵⁵ case *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973).

¹⁵⁶ Cary Grant /1904-1986/, was one of the biggest stars of the Hollywood golden age, starring in such classics as *The Philadelphia Story* or Hitchcock’s *North by Northwest* or *To Catch a Thief*

¹⁵⁷ Smolla, Rodney A. 1986. *Suing the Press*. New York: Oxford University Press, p. 127-130

Grant had never worn the clothes pasted to his old picture, this could not be categorized as fashion news, since it never actually happened.¹⁵⁸

The most important result of this decision is the necessity to draw the line between the use of the person's photograph for its news value and its use for the sake of advertising and purposes of trade. When a picture is used for reporting and selling the news – the main task of the free press – this use is offered a First Amendment protection, in contrast to unprotected use for advertising or trading purposes. However, as seen above, “news” must really happen to become protected, leaving the “fictional news” out of the scope of the First Amendment protection.¹⁵⁹

In *Eastwood v. Superior Court*¹⁶⁰ the court held that placing the picture of the actor on the cover of the magazine could be categorized as commercial exploitation “if the underlying story about the actor was knowingly or recklessly false,” as such false information cannot be categorized as news and therefore cannot be protected.¹⁶¹

While *Grant* established that publicity rights prevail against news that never actually happened, *Eastwood* went further by holding that false news deserves no protection under the free speech clause, at least in California.¹⁶²

Other cases deal with celebrity pictures, used for the mere purpose of attracting attention to the publications and boosting sales. For example, on this ground Mohammed Ali¹⁶³ won an

¹⁵⁸ *Ibid*

¹⁵⁹ *Ibid*

¹⁶⁰ *Eastwood v. Superior Court*, 149 Cal. App 3d 409, 422 (Ct. App. 1983)

Actor Clint Eastwood sued the National Enquirer for the article about the love triangle he was supposed to be involved in, claiming that the newspaper willfully and maliciously disgraced him, as the article was false. Together with the libel claim he also invoked his publicity rights stating that the newspaper commercially exploited his name and likeness by placing him on the cover of the magazine without his permission.

¹⁶¹ see Smolla, Rodney A. 1986. *Suing the Press*. New York: Oxford University Press, p. 135

¹⁶² see also *Joseph Finger et. Al v Omni Publications Int*, 77 N.Y.2d 138 (1990) case, in which New York Court of Appeals similarly decided that newsworthy articles are protected speech and §50 of the New York Civil Rights Law does not apply to them. Accompanying pictures of persons are also protected if there is a „real“ relationship with the article.

see http://www.law.cornell.edu/nyctap/190_0233.htm

¹⁶³ *Ali v. Playgirl, Inc.*, 447 F.Supp. 723 (S.D.N.Y.1978)

action against *Playgirl* magazine for placing a nude heavyweight boxer closing resembling Ali on its cover.

So, how to balance these two seemingly irreconcilable rights? Should the publicity rights of the celebrities prevail over the media's First Amendment free speech? The above-mentioned cases show various aspects of publicity rights and a rather unstable approach of the American courts, once these aspects are confronted with the media's free speech. Although, when it comes to a pure commercial exploitation of the celebrities' personalities and stardom, the courts seem to favor the celebrities over the media, but when it comes to news reporting, the opposite is true. The decision in *Comedy III* can thus offer a fair answer by stating:

“When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist“.¹⁶⁴

2.4 U.S. publicity rights v. Copyright

Because of their financial aspect, publicity rights in many ways resemble copyright, which is a variant of property law. The goal of copyright is twofold: it encourages the artistic endeavor of authors of the creative works, and it secures compensation for artistic effort. On the other hand, it also protects „society's interest in having access to the works of its creative citizen.“¹⁶⁵ Both copyright and publicity rights protect against the unauthorized usage of the original works. Although copyright is meant to protect the more tangible expression, publicity rights attempt to protect intangible fame and identity. Additionally, both allow financial

¹⁶⁴ *Comedy III Productions Inc v Gary Saderup INC.*, 25 Cal. 4th 387 (2001)

¹⁶⁵ Hixson, Richard F. 1987. *Privacy in a Public Society (Human Rights in Conflict)*. New York: Oxford University Press, p. 142-143

compensation when infringed.¹⁶⁶ Also both bodies of law contain the same dichotomies between the individual rights of celebrities and the right of the society to know. The 1976 Copyright Act¹⁶⁷ tries to resolve these conflicting interests in its Section 107, a regulation concerning the fair use.¹⁶⁸ Nevertheless, society's interest in access in artistic works seems to be superior to the creator's compensation. The statement that, "copyright law provides monopolies in expression while simultaneously encouraging competition of ideas" illustrate this.¹⁶⁹ Finally, there is a slight difference between the two doctrines regarding the direct threat posed to the freedom of expression and free flow of information and ideas. Since the copyright law is applied after-the-fact, once an expression has taken place, its direct threat to the free speech is not as substantial as the prior restraint limitations that publicity rights might pose.¹⁷⁰ Such prior restraint was, as mentioned, achieved for example by Elizabeth Taylor in her attempt to stop the ABC's docudrama production. However, Howard Hughes¹⁷¹ lost a case attempting to block the publication of a biography about him. In this case, the court prioritized the public's interest to be informed, stating, "public interest should prevail over the possible damage to the copyright owner."¹⁷²

In conclusion, copyright and publicity rights are very similar. Both protect the economic interests of celebrities and provide incentive for artistic work (regardless of the medium of expression: song, film or publicity image). Therefore calling publicity rights a "copyright of personality"¹⁷³ is more than eloquent. The major difference is that traditional copyright law is

¹⁶⁶ *Ibid*, p.153-154

¹⁶⁷ The Copyright Act, which entered into effect in 1978, is the primary legislation dealing with the copyright law in the USA.

¹⁶⁸ Under §107 the fair use of a copyrighted work, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright,

¹⁶⁹ Apfelbaum in Hixson, Richard F. 1987. *Privacy in a Public Society (Human Rights in Conflict)*. New York: Oxford University Press, p. 154

¹⁷⁰ *Ibid*, p.153

¹⁷¹ Howard Hughes (1905-1976) was a famous millionaire, aviator, film producer and industrialist. see <http://history1900s.about.com/od/people/p/hughes.htm>

¹⁷² *Rosemont Enterprises Inc. v. Random House*, 366 F. 2d 303 (82 Cir. 1966)

¹⁷³ Richard Hixson, in his often cited book *Privacy In a Public Society (Human Rights in Conflict)*, named the chapter dealing with publicity rights on page 133 a "copyright of personality".

more settled and uniform, as it is regulated by the federal government. Furthermore, public interest in access to artistic works is more pronounced in the copyright law than in publicity rights,¹⁷⁴ leading to the conclusion that the copyright is easier to attack on this ground. Yet, public interest in being informed also plays an important role when publicity rights are at stake. Therefore, it is likely that as in copyright the public interest to be informed through free media will gain power and eventually prevail over the celebrities' publicity rights.

2.5 Succession of publicity rights in the United States

Since the publicity rights are in fact property rights, they are assignable as well as devisable, which means that the holder of these rights may assign his name or likeness to others or they may be received by heirs or devisees.¹⁷⁵ The assignability of the publicity rights was confirmed also in *Price v. Hal Roach*¹⁷⁶, in which the widows of Stan Laurel and Oliver Hardy brought a claim against the Hal Roach Studios, which held the copyright on many of Laurel & Hardy¹⁷⁷ films. The issue was who controls the specific value of the characters the actors created, a right considered independent of any specific film in which they participated. The court, siding with the widows, reasoned that the publicity rights are of commercial nature and thus assignable. Since they are assignable by contract, they should logically be assignable upon death as well.¹⁷⁸ In the words of the court "there appears to be no logical reason to terminate this right upon death of the person protected."¹⁷⁹

The succession of publicity rights is permitted under many relevant state laws. For instance, California Civil Code extends the protection of these rights to 70 years after the concerned

¹⁷⁴ see Hixson, Richard F. 1987. *Privacy in a Public Society (Human Rights in Conflict)*. New York: Oxford University Press, p. 154

¹⁷⁵ *Ibid*, p.142

¹⁷⁶ *Price v. Hal Roach Studios, Inc.*, 400 F.Supp. 836 (S.D.N.Y.1975)

¹⁷⁷ Duo consisting of Stan Laurel /1890-1965/ and Oliver Hardy /1892-1957/ famous mostly for the string of comic pictures shot in 1920's and 1930's, see <http://www.imdb.com>

¹⁷⁸ see <http://www.law.ed.ac.uk/ahrc/personality/uscases.asp#Price>

¹⁷⁹ *Price v. Hal Roach Studios, Inc.*, 400 F.Supp. 836 (S.D.N.Y.1975)

person's death.¹⁸⁰ Interestingly enough, several years before the adoption of the Code, the California Supreme Court, decided *Lugosi v. Universal Studios*,¹⁸¹ coming to the conclusion that „the right to exploit one's name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime." However, under the California Civil Code the existence of postmortem protection of publicity rights depends on the domicile of the celebrity at the time of his or her death. Therefore celebrity's heirs and advisees cannot invoke the postmortem protection of publicity rights if the celebrity was domiciled in other country, since the "California's post-mortem right of publicity statute does not contain a choice of law provision"¹⁸² The Indiana Code goes even further in guaranteeing the post-mortem protection of publicity rights for up to 100 years upon the person's death.¹⁸³ It is worth mentioning that the most often invoked New York Civil Rights Law does not grant such a post-mortem protection, though there have been recent proposals to amend it to allow this.¹⁸⁴

2.6 The origin of publicity rights in Germany

Although publicity rights, as defined in the previous subchapter, are predominantly an American invention, Germany has a long tradition of recognizing and protecting them as well. When the German Chancellor Otto von Bismarck died in 1898, two photographers took his picture after entering his room through the window. The pictures were subsequently sold in Berlin causing a public outrage and leading to a debate about the need for legislation that

¹⁸⁰ see section 3344.1

¹⁸¹ *Lugosi v. Universal Studios*, 603 P.2d 425 (Cal. 1979). Lugosi's heirs sued the Universal Studios for exploiting Bela Lugosi's personality rights without their permission. Bela Lugosi (1882-1956), Hungarian actor most famous for playing Count Dracula in 1931 film *Dracula*. By playing the role, Lugosi set the lasting image of on-screen Count Dracula. see <http://www.imdb.com/name/nm0000509/>

¹⁸² *Cairns v. Franklin Mint Co.*, 292 F.3d 1139 (9th Cir. 2002), The Court in California declined the postmortem protection of Princess Diana's publicity rights under the California Civil Code as she was domiciled in England, which does not offer such a protection.

¹⁸³ see §32-36 of the Indiana Code

¹⁸⁴ http://www.dwt.com/practc/entertain/bulletins/08-08_RightofPublicity.htm

would protect personality and its rights. Shortly thereafter, in 1907, the Kunsturhebergesetz (Copyright Act), was adopted to protect the individual's image.¹⁸⁵ When it comes to modern German jurisprudence, the commercial value of personality rights was first recognized in 1958, in the *Gentleman Rider case*,¹⁸⁶ which corresponds with the time the American courts started recognizing these rights.

2.7 Legal protection of publicity rights in the German statutory law

In Section 22, the Copyright Act, contains a “right to one's portrait”, which may be publicly displayed only with the person's consent. Needless to say, the term portrait does not represent only a picture in a narrow sense, but any representation of persons that would make their appearance recognizable to others, be it either photograph, film shots, drawings, paintings, or even using a look-alike. Such image rights are nowadays considered a part of the broad concept of personality rights.¹⁸⁷

Under Section 23 of the Copyright Act, consent is not needed in the case of pictures of people who are “continuously or temporarily in the public eye”, if the interest of the general public outweighs their own rights. This provision thus grants the media the right to use an unauthorized picture of a well-known person for specific purposes, for instance press coverage of an event of contemporary history. Nevertheless, as the BVerfG held in *Nena case*,

¹⁸⁵ Hamacher, K. and Schumacher, J. (Jonas Rechtsanwaltsgesellschaft mbH) *Germany's approach to publicity and image rights*. published in Country Correspondents section of World Trademark Review. September/October 2008, p. 72
see <http://www.worldtrademarkreview.com/issues/Article.ashx?g=f3d00b81-c278-4c7a-b787-1b65047459a8>

¹⁸⁶ *Gentleman Rider case (Herrenreiter)*, BGHZ 26, 349 (1958)

¹⁸⁷ Hamacher, K. and Schumacher, J. (Jonas Rechtsanwaltsgesellschaft mbH) *Germany's approach to publicity and image rights*. published in Country Correspondents section of World Trademark Review. September/October 2008, p. 72
see <http://www.worldtrademarkreview.com/issues/Article.ashx?g=f3d00b81-c278-4c7a-b787-1b65047459a8>

Section 23 exception does not apply if the portrait is used for advertising or commercial purposes only.¹⁸⁸

For a long time, the German courts distinguished between “absolute persons of contemporary history” (people well-known for their achievements or position, e.g. well-known politicians or artists) and “relative persons of contemporary history” (people known only because of their current involvement in a specific incident, such as victims of accidents or scandals). Given the pervasive and general interest of the public, the absolute persons were afforded less individual protection than relative persons, whose unauthorized image could only be used in an objective connection with the recent incident.¹⁸⁹ Nevertheless, nowadays this approach is largely abandoned, being replaced by a more flexible approach, placing in the forefront the relevance and the informative value of the image or social incident for contemporary history. Simply put, the more relevant and informative the image to the general public, the less protection of the personal rights available.¹⁹⁰ As the Hamburg Court of Appeal held in the *Kahn case*¹⁹¹, even if a person is in the public eye, and thus subject to Section 23 exemption, such a person need not accept the commercial exploitation of his portrait and name, if the basic aim of such exploitation is profit making. Otherwise, the person’s right to self-determination about the use of his portrait would be violated.¹⁹²

Finally, Section 812¹⁹³ of the Bürgerliches Gesetzbuch (German Civil Code) offers another type of protection of the property aspect of the personality rights. The court in *Fuchsberger*¹⁹⁴

¹⁸⁸ *Nena case*, VI ZR 10/86

¹⁸⁹ *Ibid*

¹⁹⁰ *Ibid*

¹⁹¹ *Kahn v Electronic Arts GmbH*, JurPC WebDok. 113/2004

In this case, the portrait and the name of the popular German soccer goalkeeper Oliver Kahn was used by the producer of a computer game to make the product more attractive and boost the profit.

see <http://www.law.ed.ac.uk/ahrc/personality/gercases.asp#Fuchsberger>

¹⁹² JurPC WebDok. 113/2004

¹⁹³ §812 reads: „A person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so is under a duty to make restitution to him. This duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur.“

¹⁹⁴ *Fuchsberger case*, VI ZR 285/91

found that the unauthorized use of a person's portrait is considered an unjust enrichment under Section 812, for which no severe intrusion is needed.¹⁹⁵

2.8 German case law regarding publicity rights

The German case law regarding publicity rights is not as extensive as its American counterpart, although German courts have also repeatedly dealt with purported violations of these rights. The following three cases dealt with essential problems regarding these rights and set standards for their protection.

*Gentleman Rider case (Herrenreiter)*¹⁹⁶

This ground-breaking case from 1958 is of paramount importance as it established the necessity to financially compensate the invasion of personality rights. Although it did not explicitly recognize the publicity rights, it marked, similarly to *Haelan Laboratories* case in the United States, the beginning of the judicial protection of these rights in Germany.

As to the facts, the picture of the plaintiff, an amateur show jumper, was used in an advertisement poster for an aphrodisiac without his consent. The plaintiff sued for damages asking for a sum that he would have obtained if he had authorized the use of his picture. Although the defendant, a pharmaceutical manufacturer, claimed that the plaintiff is unrecognizable on the poster and that the picture had been obtained from an advertising agency, the lower courts ruled in favor of the plaintiff. The Court of Appeal agreed, holding that the plaintiff's personality rights were injured, specifically his right to deal with his portrait, and by extension his right to self-determination. The Court held that the suffered damage was of an immaterial nature, "expressed in a degradation of personality".¹⁹⁷ Therefore such an unauthorized invasion needs to be protected and compensated, otherwise such right becomes merely "illusory". The final amount of the compensation was assessed on the basis

¹⁹⁵ <http://www.law.ed.ac.uk/ahrc/personality/gercases.asp#Fuchsberger>

¹⁹⁶ *Gentleman Rider case (Herrenreiter)*, BGHZ 26, 349 (1958)

¹⁹⁷ *Ibid*

of the hypothetical satisfaction the plaintiff would have obtained, had the contract authorizing the use of his photograph existed. Thus the license fee that would have normally been charged served as the basis for assessing the proper amount of compensation.¹⁹⁸

Von Hannover¹⁹⁹

In a series of cases brought before the German courts, Princess Caroline of Monaco sought injunction against the publication of the pictures of her in German magazines, *Bunte*, *Freizeit Revue* and *Neue Post*. The BVerfG not only addressed many important issues regarding privacy and publicity rights, is also, in line with the European Court of Human Rights ruling, adopted a new approach when balancing these rights against the media's freedom of speech.

The pictures in question, depicted her in various situations, such as riding a horse, socializing in a far end of a restaurant, shopping, accompanied by her children. Princess Caroline sued the magazines, invoking her right to privacy according to Article 2 (1) and 1 (1) of the Basic law. She also claimed that her right to control the use of her image guaranteed by section 22 of the Copyright Act was infringed.²⁰⁰ The lower courts dismissed her claims, holding that as she is a „contemporary figure par excellence“ and as all the pictures were taken in public, she must tolerate the publication of the pictures without her consent, even if they depict her private daily life rather than official functions. Only the publication of one picture, depicting her sitting in the far end of a restaurant was enjoined, as this was considered „secluded place,“ where her privacy was protected.²⁰¹ Upon appealing to the BVerfG, the Court delivered a landmark decision on issues concerning celebrities' privacy and publicity rights. First, the BVerfG held that the pictures depicting her with her children did violate her personality rights, reinforced by her right to family protection under section 6 of the Basic

¹⁹⁸ *Ibid*

¹⁹⁹ *Von Hannover case*, 1 BvR 653/96

²⁰⁰ see <http://www.echr.coe.int/eng/Press/2004/June/ChamberjudgmentVonHannover240604.htm>

²⁰¹ *Von Hannover case*, 1 BvR 653/96

Law.²⁰² The appeal regarding the publication of the other pictures was however rejected.²⁰³ Second, the BVerfG ruled that the publications, along with the images they contained, did indeed contribute to the formation of the public opinion and were matters of public interest. As such, they were protected under the freedom of the press provisions of Article 5 (1).²⁰⁴ The BVerfG also held that the right to publish pictures of absolute persons of contemporary history without their consent, under section 23 of the Copyright Act, is not limited to pictures relating to the discharge of their official functions, but also covers pictures depicting their private life, as in this case. The BVerfG stressed that the public has a right to know how such person behaves in her private life outside of the representative functions.²⁰⁵ According to the BVerfG absolute person of contemporary history do also have a right to privacy, but privacy is afforded only when such persons „retired to a secluded place with the objectively perceptible aim of being alone and in which, confident of being alone, they behave differently from how they would have in public.“²⁰⁶ However, as the Court put it „the mere desire of the person to be alone“ is not sufficient by itself.²⁰⁷

The privacy of the celebrities thus does not stop once they open the doors of their houses. The BVerfG thus restricted the media’s freedom of speech once the celebrity has objectively retired to a secluded place, even outside of his or her domestic sphere.²⁰⁸ However, by dismissing Princess Caroline’s claims regarding most of the pictures complained of, the BVerfG sided more with the media’s freedom to inform about the everyday activities and the lifestyle of celebrities.

Since this decision in 1999, Princess Caroline has repeatedly turned to the German courts trying to prevent the publication of pictures of her. Nevertheless, the BVerfG, in a later case

²⁰² Section 6 of the Basic law reads “marriage and the family enjoy the special protection of the State”

²⁰³ *Von Hannover case*, 1 BvR 653/96

²⁰⁴ *Ibid*

²⁰⁵ *Ibid*

²⁰⁶ *Ibid*

²⁰⁷ *Ibid*

²⁰⁸ *Ibid*

in 2000, refused to entertain her constitutional complaint about any similar issues. She then turned to the European Court of Human Rights (ECtHR), claiming the violation of Article 8 of the European Convention on Human Rights, which states that „everyone has the right to respect for his private and family life, his home and his correspondence“.²⁰⁹

The ECtHR ruled in Princess Caroline’s favor, holding that „the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant’s private life“.²¹⁰ In the Court’s opinion „anyone, even if they are known to the general public, must be able to enjoy a legitimate expectation of protection of and respect for their private life“.²¹¹ Moreover, the Court pointed out that when it comes to balancing the protection of the private life and the freedom of expression, the decisive factor should be „the contribution that the published photos and articles make to a debate of general interest.“²¹² The Court found no such contribution of the published pictures concerned, since they were related only to the applicant’s private life, moreover the applicant does not even discharge any official function. The picture thus served only to satisfy the curiosity of the magazine’s readership.²¹³

Interestingly, this ECtHR decision has had a great impact on the BVerfG, which has since abandoned its long-term approach of distinguishing between absolute and relative persons of contemporary history. Instead, it adopted a new approach, in line with this ECtHR ruling, placing an emphasis on the informative contribution of the published article and image to the matter of public interest.²¹⁴

²⁰⁹ *Von Hannover v. Germany*, ECtHR, application no. 59320/00 (2004)

Since Germany is a party to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, each citizen may, after exhausting all the domestic legal remedies, turn to the *European Court of Human Rights* to seek protection against the violation of his rights under the Convention.

²¹⁰ *Von Hannover v. Germany*, ECtHR, application no. 59320/00 (2004)

²¹¹ *Ibid*

²¹² *Ibid*

²¹³ *Ibid*

²¹⁴ Hamacher, K. and Schumacher, J. (Jonas Rechtsanwaltsgesellschaft mbH)

Germany’s approach to publicity and image rights. published in Country Correspondents section of World Trademark Review. September/October 2008, p. 72

see <http://www.worldtrademarkreview.com/issues/Article.ashx?g=f3d00b81-c278-4c7a-b787-1b65047459a8>

*Marlene Dietrich case*²¹⁵

When it comes to financial compensation for an unauthorized commercialization of the publicity rights under the civil law and to their inheritability, the *Marlene Dietrich case* is of essential importance as it resolved both issues.

In 1993, one year after Marlene Dietrich's death, Lighthouse GmbH produced a musical about Dietrich, using her name and life story. The company also registered „Marlene“ as a trademark. Since the musical proved to be a flop, Lighthouse granted FIAT and Ellen Betrix the right to advertise, using the mark and Dietrich's picture, name and signature. Dietrich's daughter, the executrix of her estate, sued the former Lighthouse's CEO for violation of her mother's personality rights, seeking financial compensation for such this use and an injunction against further use.²¹⁶

The case is important for several reasons. First, the BVerfG upheld the entitlement of the owner of the personality rights to claim compensation for unauthorized commercialization of these rights as unjust enrichment under Section 812 of the German Civil Code.²¹⁷ Second, the Court held that under Section 823 of the German Civil Code, financial compensation is available, in the case of commercialization of the personality rights, if such commercialization willfully or negligently intrudes into the personal sphere of another person.²¹⁸ Third, the BVerfG acknowledged the inheritability of the commercial aspect of personality rights. Heirs and devisees can thus control the use and license the commercial use of the deceased's personality rights, in contrast to their moral aspect which was found nontransferable upon

²¹⁵ *Marlene Dietrich case*, I ZR 49/97 (1999)

Marlene Dietrich (1901-1992), German-American actress and singer, who gained world fame for starring and singing in such notable films as *The Blue Angel*, *A Foreign Affair* or *Stage Fright*
see <http://www.imdb.com/>

²¹⁶ *Marlene Dietrich case*, I ZR 49/97 (1999) see <http://www.law.ed.ac.uk/ahrc/personality/germany.asp>

²¹⁷ An already mentioned *Fuchsberger case* established concept under which an unauthorized use of a person's portrait amounts to unjust enrichment according to §812 of the German Civil Code

²¹⁸ §823 (1) reads „A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or *another right* of another person is liable to make compensation to the other party for the damage arising from this“
In the previously mentioned *Herrenreiter case*, the BVerfG subsumed the personality rights as *another rights* under the protection of §823 (1)

death, because of their close link to the living person. Finally, the BVerfG upheld the media freedom to use Dietrich's name and image under Article 5 (1), to satisfy the public's right to obtain information. However, the present case involved mere commercial use of Dietrich's trademark, unrelated to the freedom of the press or arts.²¹⁹

2.9 Comparison between the U.S. and German publicity rights

Both countries show similarities regarding the definition and scope of the publicity rights, either as a control of the commercial use of the name or likeness (as in the American case *Harlan Laboratories v. Tops Chewing Gum*) or as a right to one's portrait, covering in the broad perspective any attribute of a person's image (as protected by Section 22 of the German Copyright Act). The first American case recognizing these rights was the *Harlan Laboratories v. Tops Chewing Gum*, decided in 1953, and the first German case was the *Gentleman Rider case (Herrenreiter)* decided in 1958. Both countries have thus recognized the existence of these rights, as well as the need to provide an effective remedy in the case of their unlawful violation by the media, in approximately the same time. Moreover, both United States and Germany offer financial compensation for unauthorized violations of these rights.

Nevertheless, there are still certain differences distinguishing the two countries' approaches. Most importantly, in Germany, the right to publicity is recognized rather as a commercial value of the personality rights, closely associated with the privacy rights and right to self determination. However, from the American legal point of view, publicity rights, though also remotely connected with privacy rights, form a clearly separate category of rights, with the strong emphasis on their commercial value. Many of the U.S. states offer, in their statutes a separate protection of these rights, another evidence of their independent existence from privacy rights. Finally, the right of the public to be informed, which is an important argument

²¹⁹ *Marlene Dietrich case*, I ZR 49/97 (1999) see <http://www.law.ed.ac.uk/ahrc/personality/germany.asp>

often invoked against publicity rights, is given more weight under the German law. The American case law does however also recognize such a right of the public, especially when it comes to informing on real and truthful news and artistic works of significant creative elements.²²⁰

²²⁰ see the *Cary Grant*, *Clint Eastwood* and *Comedy III*. cases,

Conclusion

So whom, then, to protect? Does the media's freedom of speech prevail over the celebrities' personality rights, or is it the other way around? What are the main similarities and differences between the approaches of the United States and Germany on this issue? These questions have been repeatedly raised in the previous pages, with subsequent attempts to provide an answer. Nevertheless, it still remains quite difficult to find a clear and exact answer. However, having a closer look at this problem, the following conclusions can be drawn.

The main theoretical difference noticed lies in the fact that, in Germany, both privacy and publicity rights fall under the broad personality rights concept, while in the United States the two rights constitute separate entities. From the practical point of view, Germany offers protection of these rights on the federal constitutional level, through the Basic Law and the Copyright Act, while the American personality rights are protected mostly by various statutes on the state level, although there are some background constitutional guarantees. Both countries have considerable case law regarding both privacy and publicity rights, which serves, next to statutory law, as another important source of their legal protection.

When it comes to privacy rights separately, the definition and scope of these rights tend to protect similar values in both countries, such as the right to seclusion and secrecy and one's control over such seclusion and secrecy.

By eliminating the distinction between public officials and public figures, American legal theory seems to allow the media to treat all the celebrities the same regardless of whether the celebrity is a politician, artist, or other figure. In contrast, the German approach seems to offer

higher protection of personality rights against the media's freedom to inform regarding public figures not involved in politics (such as Heinrich Böll or Gustav Gründgens). Their right to privacy and human dignity seem to prevail over the right of the public to obtain information. Therefore, in general, when there is a clash between the celebrities' privacy rights and the media's freedom to inform, the U.S. approach seems to favor the media over celebrities, while Germany does the opposite, protecting the celebrities' privacy rights more, especially of those not-involved in public issues with their rights invoked in conjunction with the right to human dignity.

Where the treatment of publicity rights is concerned, the difference between the two countries' approach is not as significant as in case of privacy rights. Both countries favor celebrities against the media when it comes to a pure commercial exploitation of their personalities and fame. However, when it comes to reporting news, or to a matter of important public interest, both the United States and Germany emphasize the public right to be informed as well as the media's right to impart information freely. Nevertheless, taking Section 23 of the German Copyright Act into account, Germany seems somewhat more protective of the media's rights than the United States.

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