Introduction

1. *The research questions*

The GDPR's broad scope of application and its supremacy over national law present some challenges for the reconciliation with established national laws regarding the commercial exploitation of personal likenesses for advertising purposes. There is one legal territory that could serve as a model to illustrate this discourse, namely Germany.

The GDPR is devised to enhance one's control over personal data by limiting personal autonomy in private law as consent is increasingly used as a tool to exploit personal data under the cloak of personal autonomy. On the contrary, the German legal regime explicitly recognizes the pecuniary components in the right to one's image and *de facto* confirms the licensability of the right to one's image to cope with the inevitable and widespread market in the commercialization of personal portraits. Therefore, an interesting contrast awaits exploration. Both the German legal regime and the GDPR (partly) are pursuing the same objective of enhancing informational self-determination and they are both purported to tackle the widespread commercialization of personality to some extent. However, they take different legal instruments.

Upon almost identical conditions of application, the GDPR shall take precedence over the German legal regime for the commercial exploitation of personal images for advertising purposes if the leeway provided by the GDPR (Art. 85 GDPR) is inapplicable in this scenario. It raises the following research questions: How would the GDPR regulate the commercial exploitation of personal images for advertising purposes? Are the consequences practically appropriate and theoretically justified? After all, forcing legal relationships between data subjects and controllers to become extremely unstable does not seem to meet the needs of celebrities and businesses to work together. If the GDPR's regulation in this respect is not appropriate or reasonable, a spin-off result could be that the German experience in coping with the monetization of personal indicia is valuable for the GDPR in striking a fair balance between the interests of the data economy by exploiting personal data and the protection of natural persons from negative consequences of the exploitation. All in all, the risk-based approach adopted by the GDPR relies on the clarification and evaluation

of risks in specific sectors, and in this respect, the KUG offers over 100 years of experience in the mature market of the commercial exploitation of personal likenesses for advertising purposes.

2. *Limiting the subject of the research and the terminology*

To present a comprehensive yet focused picture of the discrepancy between the German legal regime and the GDPR in regulating the commercial exploitation of personal images, the present research concerns itself exclusively with the exploitation of the images of models and celebrities for advertising purposes in Germany. This limitation would not weaken the applicability of the argumentation because the German legal regime in regulating the commercial exploitation of personal indicia is pioneered by the regulation of the commercialization of personal images.[1]

It is well known that some German academic literature has used varied terms to describe the commercialization of personal indicia for doctrinal reasons.[2] However, more and more scholarship in Germany denotes an appreciation of the term "merchandising" in order to be in line with the rest of the world.[3] Merchandising, albeit not legally defined, is the most popular and common term to describe the commercial exploitation of one's identity for advertising purposes around the globe. The most authoritative German commentary on personality rights refers to merchandising in the widest meaning as "commercial exploitation of images, characters, names and motifs from audiovisual works."[4]

Despite some disagreements, this concept can be loosely summarized as a collective term for a business practice that signifies commercial exploitation of personal indicia and fictitious characters in functional rela-

1 *Lausen*, ZUM, 1997, 86 (90); *v. Gamm,* Wettbewerbsrecht, Kapital 24 Rn. 17.
2 For instance, *Beuthien and Schmölz,* Persönlichkeitsschutz durch Persönlichkeitsgüterrechte, S. 11, 27; *Götting,* Persönlichkeitsrechte als Vermögensrechte, S. 266 - 267; *Vacca,* Das vermögenswerte Persönlichkeitsbild, S. 165ff.; *Loef,* Medien und Prominenz, S. 242ff.
3 Examples in Büchner, in *Pfaff/Osterrieth*, Lizenzverträge: Formularkommentar, B. VI. Merchandising License Agreement, 407 ff.; Schertz, in *Loewenheim*, Handbuch des Urheberrechts, Merchandising Verträge, § 79 para.6; *McCarthy and Schechter,* The rights of publicity and privacy, § 10:50.
4 *Castendyk,* in *Götting/Schertz/Seitz,* Handbuch Persönlichkeitsrecht, § 35 para. 36.

tion to promoting sales regarding commodities/services.[5] While character merchandising that solely concerns fictitious characters in fairytales and cartoons is no less significant than personality merchandising that exploits personal identities, such as one's images, names, voices, and slogan,[6] this research devotes exclusive attention to personality merchandising spurred by the presumption that the GDPR provides sweeping and much stronger protection for personal data than the German legal *status quo*.

The present research chooses the term "merchandising" not only because it vividly describes the process of turning personal indicia into various merchandise, but also because of its simplicity and lucidness. In this wise, the research can present a candid and internationally unambiguous discourse on the substantive rules and gap(s) between the German legal regime and the GDPR in respect of personality merchandising. Moreover, as mentioned above, the present work does not intend to offer an overall discussion about personality merchandising but only focuses on the right to one's image. Therefore, the term merchandising is defined in a much narrower sense to indicate the secondary exploitation solely of personal images.

It is necessary to delineate the right to one's image in Germany – the legal basis of merchandising defined in this work – from the right to publicity in the US. The latter seems, at first sight, quite similar to the German legal position since they both contain commercial value and are exclusive rights as well as licensable. However, the right to publicity is a property right and covers all merchandising objects in various forms,[7]

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5 *Schertz,* Merchandising, para. 1; *Schertz and Bergmann,* in: *Ruijsenaars, Character Merchandising in Europe*, 127; Büchner, in *Pfaff/Osterrieth*, Lizenzverträge: Formularkommentar, Rn. 1151 and 1139; The Cambridge Dictionary explains merchandising as "products connected with a popular film, singer, event, etc., or the selling of these products", <https://dictionary.cambridge.org/dictionary/english/merchandising>; WIPO defines merchandising of character as "the adaptation or secondary exploitation, …, of the essential personality features (such as the name, image or appearance) of a character in relation to various goods and/or services with a view to creating in prospective customers a desire to acquire those goods and/or to use those services because of the customers' affinity with that character". Bureau, Character Merchandising, 1994, at 6.

6 *Ruijsenaars,* Character Merchandising, S. 12f.; The Walt Disney Company as the pioneer in character merchandising business has a turnover of about 57 billion US dollars in 2016, see Brandt, Merchandising ist ein Milliardengeschäft, at https://de.statista.com/infografik/11520/die-zehn-groessten-merchandising-lizenzgeber/.

7 Haelan Labs., Inc. v. Topps Chewing Gum, Inc. 202 F.2d 866 (2d Cir. 1953), 868; Melville, 19 Law and contemporary problems 203 (1954).

while different personality rights regulate different merchandising objects according to corresponding legal statutes in Germany.[8]

There are three typical forms of merchandising.[9] One is to use merchandising objects – personal pictures – as commodities *per se* to allure fans to demonstrate their affection and support for their beloved celebrities. The memorabilia are normally highly substitutable products such as posters, mugs, T-shirts, etc., and their substantial value stems from celebrities' images. In doing this, manufacturers, celebrities, and fans get a triple-win situation by achieving their objectives (i.e., promoting sales, increasing publicity, and expressing self-emotions and identity). This is merchandising in a narrow sense in the US.[10] Another form of merchandising is to register or use one's images as trademarks or trade names. This situation, albeit not uncommon, is generally excluded from this research because it is more entangled with the trademark law than personality rights.[11] The last genre of merchandising is to use personal icons for advertising. Characterized by image-transfer, merchandising objects are used as role models or endorsements to create a persuasive effect on influencing consumer decisions. Nowadays, thanks to the advancement of the attention economy,[12] more and more merchandising objects are simply used as attention-grabbing devices (*Blickfang*) without an effort for persuasion.[13] All in all, both approaches lead to an incentive to consumption.

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8 § 12 BGB stipulates the right to one's name, while §§ 22-24 KUG explicitly provides the scope, conditions, and limitations of the right to one's image. The merchandising objects of personal indicia besides their names and images have to resort to the general personality right (*das allgemeine Persönlichkeitsrecht*) based on Section 823 I BGB and art. 1 and 2 GG. The general personality right is developed by the judiciary after the World War II, and stems from the fundamental principles of the untouchable human dignity in art. 1 GG and the free development of personality in art. 2 GG.

9 *Schertz and Bergmann*, in: *Ruijsenaars*, *Character Merchandising*, 127 (128f.).

10 See ETW Corp. v. Jireh Publ'g, Inc. 332 F.3d 915, 922 (6th Cir. 2003); See Dougherty, 27 Colum. J.L. & Arts 1 (2003), at 62; Dogan and Lemley, 58 Stanford Law Review 1161 (2006), 1176 et seq.

11 In early days, the right of trade names was regarded as a personality right but nowadays it is regulated entirely in the German Trademark Law (*Markengesetz*) in §§ 7, 27 I MarkenG. See RGZ 9, 104 - Befugnis des Konkursverwalters zur Veräußerung der Firma des Gemeinschuldners, 105 f.; RGZ 69, 401 - Nietzsche-Briefe, 403.

12 See *Franck*, Ökonomie der Aufmerksamkeit, S. 115ff.; *Loef*, Medien und Prominenz, S. 88f.

13 OLG München, 25.6.2020 – 29 U 2333/19 - Blauer Plüschelefant; BGH, GRUR 2013, 196 - Playboy am Sonntag.

Given the prevalence of social networks nowadays, one does not have to be a person *par excellence*[14] to make his or her identity valuable for advertising agencies. As the vision of "making your customers your marketers" has turned into the golden rule of the new Internet business,[15] the use of one's likeness in advertising is no longer the preserve of celebrities.[16] While this user's merchandising scenario is intriguing and is increasingly thriving, it differs from the merchandising defined above in many ways (Part I Section 2.1.3). Therefore, users' merchandising is excluded from this dissertation. It may be employed now and then to address the difference between the self-sufficient models and average internet users who are suffering from information and power asymmetry against online platforms.

3. *The current state of research regarding the regulation of the GDPR in merchandising*

There are three monographic works that offer excellent results for some parts of the present research: the works of *Barath*, *Bienemann*, and *Voigt*. Based on a critical appraisal, the present research provides a reflection on their findings to some extent.

Barath develops a general dogmatic framework on the contractual disposition of personality rights to respond to real-world needs – in particular regarding the commercialization of sportsmen and sportswomen.[17] By analogy with the transfer of rights of use in copyright law, the legal

14 There is a list of occupations that are candidates for persons *par excellenc,* such as religious figures, politicians, athletes, artists, musicians, and business executives, summarized by German scholars, see Strobl-Albeg, in: *Wenzel, Burkhardt, Gamer, Peifer and Strobl-Albeg,* Das Recht der Wort- und Bildberichterstattung, § 8 Rn. 11.

15 Quoting from Facebook COO Sheryl Sandberg, see Fraley v. Facebook, Inc. 830 F. Supp. 2d 785, 808 (N.D. Cal. 2011), para. 792.

16 More and more ordinary people's likenesses are involved in advertisements recently. In Germany, an employee asked his former employer to stop showing the promotional video of the company that includes him on the company website. See BAG, GRUR 2015, 922 - Veröffentlichung von Arbeitnehmer-Bildnissen zu Werbezwecken; A hair salon published an advertising video clip on its Facebook fan page staring by a customer who was neither a professional model nor someone famous. See LG Frankfurt am Main, 3.09.2018 - 2-03 O 283/18 - Friseursalon. In the US, similar lawsuits brought up by ordinary people are common. See Fraley v. Facebook, Inc. 830 F. Supp. 2d 785, 808 (N.D. Cal. 2011); Perkins v. LinkedIn Corp. 53 F. Supp. 3d 1190 (2014).

17 *Barath,* Kommerzialisierung der Sportlerpersönlichkeit, S. 25ff.

concept of the "license of personality" is developed and embedded in the general dogmatics of civil law.[18] This study's empirical analysis of various types of commercial contracts (advertising, sponsorship, sales of fan products, and agency-agreements) within the sports sector provides meaningful research material for the present study. It helps to analyze the specific rights and obligations of contracting parties (the marketer on the one hand and the holder of the rights of personality on the other hand) in comparison with the rights and obligations under the GDPR.

Bienemann examines whether digitalization has triggered a need for a reform of the KUG on the premise of the unrestricted applicability of the KUG alongside the GDPR due to the optional general opening clause (*fakultative allgemeine Öffnungsklausel*) of Art. 85 (1) GDPR.[19] In this respect it relates to the current study. *Bienemann's* conclusion that the GDPR itself and its legislative history are inconclusive and intentionally ambiguous as to the nature of Article 85 (1) GDPR is largely agreed upon by the present research.[20] However, in the absence of an explicit notification by the Member State (art. 85 (3) GDPR), this paper argues for a more cautious approach that excludes the purely commercial exploitation of personal portraits (advertising, sales of fan products, etc.) – merchandising – from the scope of Art. 85 GDPR.[21]

The work of *Voigt*, unlike the above-mentioned two studies, researches a sheer question of the GDPR, namely the extent to which consent in the data protection law achieves the goals it sets out.[22] While her answer and suggestions largely focus on how to improve the informational self-determination envisioned by the GDPR – facilitating fully informed and truly free consent, her discourse on the digital economy and the need to dispose of economic elements embedded in personal data provides inputs for the present study.[23] Given that the present thesis maps out the challenges (and impediments) that the GDPR's consent model poses to the established commercial practice of personality merchandising, it searches for a solution of the possible incompatibility between the GDPR and the practice instead of improvements of the GDPR's efficiency.

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18 *Ibid*., S. 27.
19 *Bienemann, Reformbedarf des Kunsturhebergesetzes im digitalen Zeitalter,* S. 17ff.
20 *Ibid.,* S. 71.
21 Instead, Bienemann argues for a continued application of the KUG (*lex specialis*) under the GDPR provided on an extensive reform of the KUG. *Ibid.,* S. 242ff.
22 *Voigt,* Die datenschutzrechtliche Einwilligung, S. 38.
23 *Ibid*., S. 489ff.

4. Methodology and structure of the dissertation

Part I builds a framework that explains how the German legal regime has regulated merchandising with a division between contract and tort law. Part II explores the application of the GDPR to unauthorized merchandising and authorized merchandising. The regulatory differences between the German approach and the protection provided by the GDPR are reflected in Part III. Against this backdrop, Part IV offers solutions in manners of *de lege lata* and *de lege ferenda* to the identified inconsistencies. Part V, finally, concludes the dissertation in 25 theses.

Given that this dissertation aims to propose concrete solutions to a very practical problem, case studies are essential. Therefore, several German merchandising cases are listed at the beginning of Part I and studied throughout the thesis because they serve as a good standpoint for comparing different legal regimes. On the one hand, by revisiting the same cases decided by German courts under the GDPR, problems revolving around the regulation of the GDPR on merchandising present themselves vividly. In this wise, insights into the incompatibility are reliable and convincing. On the other hand, the solutions proposed in Part IV can be tested in real cases to see which one is robust enough to provide a regulatory result that is not inferior to that of the German legal regime.

To ensure that the whole picture of the German legal regime and the GDPR is not compromised by the recount of cases in great detail, a historic and extensive reflection on the case law and literature regarding both legal regimes is always presented in the first chapters of Part I and Part II. After all, the case study is merely a tool for pinpointing the regulatory differences. The proposal for solutions, nevertheless, relies on a comprehensive and in-depth understanding of the principles and objectives of the GDPR and German law in regulating personal data processing for merchandising purposes.