Part I Substantive legal protection for merchandising in Germany

1. Introduction

Part I builds a framework that explains how the German legal regime has regulated merchandising with a division between unauthorized merchandising under tort law and authorized merchandising under contract law. While advertising using celebrities' names and likenesses seemed hackneyed, its legal regulation in Germany underwent some critical changes. The legal recognition of authorized merchandising, in particular, has not yet been explicitly recognized by the German Supreme Court even now. Therefore, a chronological description of the case law is necessary to pave the way for articulating the judgments of the selected cases that serve as the connection point for comparing the German legal regime and the GDPR.

Chapter 2 recounts the German legal protection of the right to one's image against unauthorized merchandising and the implementation of remedies for such tortious infringements in light of the case law and literature. Subsequently, the *clickbait* case illustrates how the guidelines distilled by German courts were upheld in the network environment. Admittedly, the *clickbait* case is not as classic as the *Paul Dahlke* case. However, as it reflected a new application of merchandising that may become increasingly common, an in-depth study of this case under the GDPR is more informative in the long-term perspective.

The *clickbait* case[24]

The defendant owns a TV magazine and operates a related website. To boost the number of hits, the defendant published portraits of four well-known TV moderators and titled the pop-up window "One of these presenters has to retire from the public due to cancer." Therefore, internet users are intrigued to click the link/portraits to find out which of the four moderators was meant by the title. The plaintiff was one of the other three who were not suffering from cancer and required the defendant to stop showing his likeness in the advertisement and damages.

24 BGH, GRUR 2021, 636 - Clickbaiting.

Chapter 3 completes the framework by discussing merchandising under contract law. Since it is not the objective of this research to discuss the permissibility of merchandising from legal philosophy and policy perspectives, it merely examines the legal recognition of merchandising agreements in light of judiciary decisions with a necessary reflection on scholarly literature. Two cases are significant in providing a standpoint for the subsequent contrast with the GDPR: the *landlady* case and the *company-advertising* case.

The *landlady* case[25]

The plaintiff, a well-known model/actress, had a series of nude photos taken by one of the defendants, the photographer. Although the plaintiff admitted in the court that she authorized the photographer to permit magazines operated by the other defendants to publish the series of photos without an explicit limitation on duration, she would like to revoke the consent and require the defendants to cease publication.

The *company-advertising* case[26]

The defendant operated an air conditioning company and wanted to make a promotional film for his company. By signing his name on a list, the plaintiff agreed that film recordings by him "may be used and broadcast" for free as part of the defendant's public relations work. In the company-advertising film available on the company's internet homepage, the plaintiff was shown for several seconds. After the business relationship ended, the plaintiff sent a lawyer letter to revoke his "possibly" granted consent to use his images and request the defendant remove the video from the company's homepage.

Practical issues about merchandising agreements are also articulated in detail including the taxonomy of merchandising contracts, the advantages of varied contracts, and the contractual rights and privileges for the person depicted.

At last, Chapter 4 presents the findings in previous Chapters awaiting the comparison with the regulation offered by the GDPR.

25 OLG München, NJW-RR 1990, 999 - Wirtin.

26 BAG, GRUR 2015, 922 - Veröffentlichung von Arbeitnehmer-Bildnissen zu Werbezwecken, Rn. 1-3.

2. Merchandising under tort law

2.1 The law against unauthorized merchandising

2.1.1 The right to one's image in German law

As a specific personality right codified in 1907, the right to one's image was purported to close a regulatory loophole without delaying the historical birth of the BGB.[27] Even though most of the KUG was abolished afterwards, provisions for the right to one's image have remained effective for over 100 years. § 22 KUG protects every natural person against disseminating or exhibiting his or her portraits without consent. § 23 KUG limits this extensive ambit to a justified scope. §§ 37 KUG et seq., additionally, grant specific remedies for the depicted person to destroy the illegal depictions as well as the device for such production upon conditions.[28]

With the assistance of abundant cases, the right to one's image has kept pace with technological advancements. Firstly, German courts confirm that personal portraits in § 22 KUG cover every type of image if the reproduction of the external appearance of a natural person is recognizable by friends and relatives.[29] Besides, Germany promotes an extensive interpretation of public presentation (*öffentliche Zurschaustellung*) and dissemination

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27 Vgl. *Helle,* Besondere Persönlichkeitsrechte im Privatrecht, S. 45; In the BGB, there are statutory provisions to protect one's life, body, health, freedom of movement, and name against violations. This limited protection of personality soon presented a deficiency in protecting one's likenesses even before the BGB came into force shown in the case of *Bismarck auf dem Totenbett* in 1899. Two journalists sneaked into Bismarck's ward and photographed his appearance after death. The image of the thin and weak man formed a strong visual contrast with the glory of the "Iron Chancellor". Every German was shocked. The court felt compulsory to condemn this highly offensive act but lacked the necessary basis in positive law to prohibit the publication and dissemination of the photos as the journalists were the copyright holders. See RGZ 45, 170 - Bismarck auf dem Totenbett.

28 There are other effective provisions in the KUG. For instance, § 24 KUG grants exceptions to the right of images mainly for public authorities, §§ 42-44, 48 and 50 KUG offer a more detailed description of the remedies associated with this right.

29 BGH, GRUR 1958, 408 - Herrenreiter, 409; BGH, GRUR 1962, 211 - Hochzeitsbild, the first Guideline; BGH, GRUR 1979, 732 - Fußballtor, 734; BGH, GRUR 2000, 715 - Der blaue Engel, 717-718; *Dreier and Spiecker Döhmann,* Die systematische Aufnahme des Straßenbildes, S. 39 f.

(*Verbreitung*).[30] Dissemination extends from physical transfer to a digital change of control.[31] In this wise, online sales of fan products, using personal photos as a clickbait, and uploading advertising into fan pages in social platforms are falling under the scope of the prohibited acts in § 22 KUG when they are committed without consent.[32]

While the statute of the right to one's image provides clear constitutive elements of an infringement and thus certainty in judiciary decisions, intrusive behaviors such as (re)producing, storing, and uploading personal photos into the Cloud without public display are not covered by § 22 KUG.[33] It is also controversial whether this right is applicable when the identifier is not one's appearance.[34] Against this backdrop, the general personality right (*das allgemeine Persönlichkeitsrecht*), born in the judiciary,[35] has a shining résumé in closing statutory loopholes and completes all-embracing protection of personality.[36] Although the general personality right is not codified in the BGB due to valid legal and practical reasons,[37] it,

30 LG Oldenburg, NJW 1988, 405 - Grillfest, the second Guideline; OLG Düsseldorf, 23.07.2013 - I-20 U 190/12 - Veröffentlichung von Fotos im Pop-Art-Stil, Rn. 18; OLG Hamburg, ZUM 2017, 517 - Haftung eines Onlineshop-Betreibers, para. 42.

31 Specht in *Dreier/Schulze*, Urheberrechtsgesetz, § 22 KUG Rn. 9.

32 *Einwilligung* is the term used in § 22 KUG, and it is dictionary translation is consent. It, in its broadest meaning, can cover varied labels in different scenarios such as license in copyright law, free revocable consent in medicine law, authorization in a contractual relationship, and simple permission in daily life. The maxim *volenti non fit iniuria* in civil law underlining these various labels suggests the fundamental legal principle that a natural person is allowed to dispose of his or her interests and rights. See, *Ohly*, "Volenti non fit iniuria": die Einwilligung im Privatrecht, S. 63, 54-58; Ingman, 26 Jurid. Rev. 1 (1981), at 2.

33 LG Heidelberg, MMR 2016, 481 - Zulässiges Hochladen von Fotos in eine Cloud, para. 30f.

34 OLG Köln, GRUR 2015, 713 - Doppelgängerwerbung, the Guideline.

35 See BGH, GRUR 1955, 197 - Leserbrief, the Guideline; BGH, NJW 1965, 685 - Soraya, 687. An articulation of developments of the general personality right, see *Ehmann*, in: *Stathopulos, Festschrift für Apostolos Georgiades zum 70. Geburtstag*, S. 113ff.

36 BGH, GRUR 2009, 150 - Karsten Speck, Rn. 43 und 26f.; BGH, GRUR 1957, 494 - Spätheimkehrer, the 3. Guideline; BGH, GRUR 2016, 315 - Sexfotos vom Ex-Partner, Rn. 40; *Lettmaier*, JA, 2008, 566.

37 A detailed introduction of the dispute about the incorporation of the general personality right into the BGB, see in *Forkel*, Das allgemeine Persönlichkeitsrecht – Betrachtung einer fünfzigjährigen Entwicklung der Persönlichkeitsrechte im deutschen Privatrecht, S. 9ff.; On the topic about the reasons against the incorporation of the general personality right into the BGB, and the strong resistance by

as a frame right (*Rahmenrecht*), is complementary for statutory personality rights, such as the right to one's image.

The ambit of § 22 KUG is extensive as it seems to grant individuals absolute control over their likenesses. § 23 (1) KUG, at this point, provides four exceptions to § 22 KUG. However, since the exceptions are also broad and abstract to some extent, § 23 (2) KUG requires a balancing of interests when an exception is available in the case. Therefore, courts must weigh the legitimate interests of the person depicted against the counter values gained by such interference concretely. Thus, the unwitting exploitation of the image, albeit meeting the exception in § 23 (1) KUG, is proportionate. The purpose of the balancing test is to ensure that the exercise of freedom of expression, art, and information does not come at the expense of the core interests of the right holder.

In summary, the clear boundary of the right to one's image enables the codification, while sometimes the general personality right with the flexible characteristic is necessary for the protection of personality. The judiciary and scholars work in tandem on interpreting and developing the statutory provisions in §§ 22 and 23 KUG so that they still provide *vires* for personality protection against technological and societal changes after more than one century.

2.1.2 The case law of unauthorized merchandising

The *Paul Dahlke* case is the trend-setting case in Germany regarding unauthorized merchandising. Before it, two major decisions delivered by the highest court in Germany both suggested a narrow understanding of the protective interest of the right to one's image, namely the moral interests.[38] Thus, celebrities, the people from the sphere of contemporary history, were virtually deprived of protection for using their likenesses in public.

In the *Graf Zeppelin* case in 1910, which is a typical merchandising case in today's perspective, the court considered that any "sensitive person" (*ein feinfühliger Menschen*) would feel morally damaged (*moralisch geschädigt*) by

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the media and press against the legislative bill of the Federal Government in 1957 for another attempt to incorporate the general personality right into the BGB. See *Ehmann*, in: *Canaris, Festgabe 50 Jahre Bundesgerichtshof*, 613 (614 und 615f.).

38 The results for unauthorized merchandising were inconsistent. See Götting, in *Götting/Schertz/Seitz*, Handbuch Persönlichkeitsrecht, § 2 Rn. 25.

commercial exploitation of his name and portraits with certain goods.[39] This consideration contradicted to the fact because Zeppelin himself was not feeling mentally aggrieved at all and eager to merchandise.[40] Perhaps being aware of the huge discrepancy between vision and reality, the RG recognized that there was no moral damage for the person depicted and thus denied protection for a famous football player in the *Tull Harder* case.[41] Not only did this thesis resemble closely the right of privacy in the US the only protects a natural person against moral damages, but also rendered almost all merchandising involving celebrities lawful because celebrities usually make a living through publicity: They do not object to merchandising itself, but only to the fact that they cannot get paid accordingly.

In the 1950s, the BGH faced an unauthorized merchandising case again. In the *Paul Dahlke* case, in which the photos of a famous German actor had been used in advertisements for a motorcycle. The BGH concluded that such merchandising practice, which was motivated by purely commercial interests and pursued sales increase, was excluded from the exception in § 23 KUG.[42] According to the systematic reading of § 23 (1) (a) and (2) KUG, the freedom of personal depiction belonging to contemporary history should have an inherent limitation, namely the depiction must present public interests in accessing that information. The BGH argued, on the one hand, it must be left to the individual to decide freely whether he or she wished to use images as an inducement to purchase goods based on the *Graf Zeppelin* case. On the other hand, this "natural consequence of his personality right" must be balanced with the general public's need for information.[43] The BGH concluded that the advertising in the *Paul Dahlke* case lacked the information value compared with the *Tull Harder* case since the picture of Paul Dahlke had been exclusively used as an incentive for consumers to buy the goods through "image transfer".[44] Thus, unauthorized merchandising violated the free decision of the individual

39 See RGZ 74, 308 - Graf Zeppelin.
40 The plaintiff had authorized another tobacco company to register his name and portraits as its trademarks against a license fee. See Götting in *Götting/Schertz/Seitz,* Handbuch Persönlichkeitsrecht, § 2 Rn. 23.
41 See RGZ 125, 80 - Tull Harder, 82f.
42 BGH, GRUR 1956, 427 - Paul Dahlke.
43 *Ibid*.
44 *Ibid*., 430.

about whether to make his image an inducement for purchasing goods without a justified reason.[45]

On the surface, the BGH reached a convincing verdict in the *Paul Dahlke* case without dismissing the previous case law. In essence, it indicated a changed mindset that the right to one's image also protects economic interests besides the moral ones.[46] By viewing the *quid pro quo* relationship between the exploitation of celebrities' indicia and consideration as a norm, the BGH asserted that unauthorized merchandising was "an inadmissible encroachment on the depicted person's economic exclusive right" in the *Paul Dahlke* case.[47] Thus, unauthorized merchandising also impinged the free decision of the individual as to whether and in what way he or she wished to make images serviceable for the business interests of third parties.

Ever since the *Paul Dahlke* case, German courts have ruled unauthorized merchandising cases by the same token. Solely commercial interests of the third party, as in general merchandising scenarios, are subordinated to the personality interest protected by the right to one's image because the person depicted has the right to self-determination about whether, when, and how his or her persona is exploited as incentives for consumers to purchase goods/services.[48]

The underlined rationale of this guideline forecasted the stance taken by the ECtHR in the case of v*on Hannover v Germany*.[49] In fact, it is a valid opinion that the proposition of the ECtHR simply brought the implicit protective purpose purported in § 23 (1) (a) and (2) KUG to the

45 *Ibid*.

46 *Götting,* Persönlichkeitsrechte als Vermögensrechte, S. 49f.; Specht in *Dreier/Schulze,* Urheberrechtsgesetz, Vorbemerkung § 22 Rn. 1; BGH, GRUR 1968, 552 - Mephisto, 555; BGH, GRUR 2000, 709 - Marlene Dietrich, Rn. 27; The previous understanding that this right protected the right to honor, or privacy is overturned by valid arguments. See *Dasch,* Die Einwilligung zum Eingriff in das Recht am eigenen Bild, S. 10ff.

47 BGH, GRUR 1956, 427 - Paul Dahlke, 430.

48 For instance, see BGH, GRUR 1979, 732 - Fußballtor; BGH GRUR 1992, 557 - Talkmaster; BGH GRUR 2000, 715BGH, GRUR 2000, 715 - Der blaue Engel; OLG Hamburg, ZUM 2004, 309 - Oliver Kahn; BVerfG, GRUR-RR 2009, 375 - Sarah Wiener; OLG Köln, MDR 2020, 112 - das Traumschiff, confirmed by the Supreme Court in BGH, GRUR 2021, 643 - Urlaubslotto.

49 ECtHR, von Hannover v Germany (no 2), Application No. 40660/08 and 60641/08, § 102.

forefront,[50] since the public role played by the person depicted is not and never was a determinant but merely a factor in an overall assessment. Therefore, the guideline distilled in the *Paul Dahlke* case remains effective after the case of v*on Hannover v Germany*.[51]

2.1.3 Cases at the margins

Merchandising, seemingly hackneyed, is full of surprise. Some merchandising might contribute to a debate of public interest in society as it fulfills the public's need for information (*Informationsbedürfnis*),[52] or revolves around self-promotion of the press;[53] Some may infringe moral interests of the person depicted more prominently.[54] While the lawfulness of the first category must be assessed in a concrete manner due to the public interest

50 Vgl. *Ohly*, GRUR Int, 2004, 902 (905). It argues that there were some apparent misunderstandings by oversimplifying the German legal protection for the right to one's image from the ECtHR's perspective.

51 The new approach adopted by German jurisprudence, the graduated protection (*abgestuftes Schutzkonzept*), essentially integrates the last two steps - the rebuttable exception and a subsequent balancing test - into one overall assessment rather than replacing them. Instead to cite many, see BGH, GRUR 2007, 523 - Abgestuftes Schutzkonzept I.

52 Cf. *Zagouras*, IIC, 2011, 74; *Götting*, GRUR Int, 2015, 657; *Andersen*, Gesellschaftspolitische Meinungsäußerungen in der Werbung, S. 166 ff.; See BGH, GRUR 2007, 139 - Rücktritt des Finanzministers, para. 20. The court found that the satiric statements involving celebrities did not allude misleading or wrongful indication of an image transfer or endorsement, but since the advertisement depicted a recent public event in "a satirical and mocking manner" (*in satirisch-spöttischer Form*), it served public's need for information intentionally; similar cases see BGH, GRUR 2008, 1124 - Zerknitterte Zigarettenschachtel; BGH, WRP 2008, 1527 - Dieter Bohlen.

53 Despite the commercial nature of such an advertising campaign, the press privilege it enjoys and the public interest in promoting and boosting newspaper sales *per se* cannot be generally ruled out. So, courts tend to assess details in contexts and exercise a balancing test between the public interest in having the information against the concerned personality interests. See OLG Köln, AfP 1993, 751 - Kundenzeitschrift, Rn. 25; BGH, NJW-RR 1995, 789 - Chris Revue. 790-791; BGH, GRUR 2009, 1085 - Wer wird Millionär, para.27; *Lettmaier*, WRP, 2010, 695 (701); *Ladeur*, ZUM, 2007, 111.

54 See BGH, GRUR 1958, 408 - Herrenreiter; BGH, GRUR 1959, 430 - Caterina Valente; BGH, GRUR 1962, 105 - Ginsengwurzel; BGH, GRUR 2007, 139 - Rücktritt des Finanzministers.

conveyed by the merchandising,[55] the latter merely proves, from the other direction, that the right to one's image contains moral and property interests simultaneously (more details in Section 2.2.1). Moreover, they do not prejudice the distilled guideline for unauthorized merchandising: in the absence of information interest, one has the sole right to decide whether to make own images as an incentive for merchandise, regardless of his or her social role. As they are rather exceptional cases in merchandising, an overemphasis on these cases would lead to a weakening of the topic of this research. It is necessary to forgo the complex between freedom of expression and the right to one's image and data protection to avoid unwarranted discussion about applicability issues arising from Art. 85 GDPR. Thus, merchandising of the focus of this research is the one-sidedness of economic exploitation of the personality.

Another questionable scenario is users' merchandising. It depicts the trend that more and more ordinary people participate in promoting the platforms' own business or third parties' services/goods via functions like fan pages and the "Like-button" on social platforms such as Facebook, Instagram, and Tiktok.[56] Enlightened by "making your customers your marketers", the strategy of inviting ordinary people to advertise is promised with success because it highlights a new kind of influence, namely credibility, affinity, and closeness to life. A leveling-down in merchandising seems to be ongoing and calling for attention.[57]

On the one hand, the right to one's image in Germany protects everyone. As users' merchandising is by no means a bad business given the fact that users usually get consideration against such commercial exploration such as coupons, free WLAN services, or generally "free" services provided by the platform,[58] the commercial exploitation of portraits of ordinary people implies that their portraits contain some economic value that has been attributed to the person depicted by law. In this wise, the jurisprudence regarding celebrity's merchandising, on which this dissertation focuses, appears to be applicable here. The economic value of one's likeness is to be calculated based on the market mechanism, i.e., supply and de-

55 Vgl. *Götting,* GRUR Int, 2015, 657 (663).

56 LG Frankfurt am Main, 3.09.2018 - 2-03 O 283/18 - Friseursalon; VG Hannover, 27.11.2019 - 10 A 820/19 - Fanpage einer Partei bei Facebook; Cf. 830 Fraley v. Facebook, Inc. 830 F. Supp. 2d 785, 808 (N.D. Cal. 2011).

57 *Peifer*, JZ, 2013, 853 (854).

58 See Dancel v. Groupon, Inc. 940 F.3d 381, 383 (7th Cir. 2019).

mand, instead of law.[59] On the other hand, most merchandising cases concern famous people. The more prominent the person is, the more likely his or her image is used in connection with goods and/or services as an attention-grabbing or image-transfer device for advertising purposes. Moreover, users' merchandising differentiates from merchandising of celebrities in respect of means, context, purpose, effects, and the dynamic between the participants.[60] Firstly, internet users, unlike celebrities, are in a significantly weaker position relative to the platform. For one, they usually do not understand the business logic of merchandising, nor are they aware of the commercial value of their images. Thus, internet users usually allow the platform to use their images to promote products/services for free unconsciously. Second, neither the platform nor the user expects or needs a stable partnership. The promotion/invitation sent by the user to his or her friends is often instantaneous, and the friends do not bind the user to the product/service in a way that is similar to the strong connection between a celebrity and the endorsed product. Thirdly, users' merchandising allows the platform to access users' social relationships and thus establish social graphs of them. It means significantly more personal data than images are open to platforms, which needs to be scrutinized according to the content and nature of the personal data. Fourth and most importantly, users have different purposes than celebrities in merchandising. In social networks, the impulse and expectation of ordinary users to share information may include commercial interests, but they are generally not the main purpose. Social needs and personality expression are the mainstream.

A direct application of the jurisprudence regarding merchandising defined in this dissertation in users' merchandising is likely to ignore these differences. In terms of unauthorized merchandising, as noted in the third point above, this approach can leave out the additional damages for, say, intrusion to privacy.[61] In the case of authorized merchandising, more incompatibilities are evident in light of all points argued above. Therefore,

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59 The statement of *Nimmer* also indicates the same rationale that damages should be dependent upon the "value of the publicity appropriated". See Melville, 19 Law and contemporary problems 203 (1954), at 217.

60 Different opinion, See Bruni, 41 CARDOZO LAW REVIEW 2203 (2020).

61 There is an interesting case in China in 2019. The user claimed that Tiktok had illegally pushed marketing information to his friends in his contacts book, causing privacy violations, especially Tiktok had pushed information to his ex-girlfriend, causing him serious mental distress. See "凌某某诉北京微播视界科技有限公司隐私权、个人信息权益网络侵权责任纠纷案"，(2019) 京 0491 民初 6694 号(Mr. Ling v. Beijing Microvision Technology Co., Ltd. regarding tort

given these significant differences between the contexts of celebrity and users' merchandising, an undifferentiated discussion would easily lead to a disguise of the real needs of data subjects and, eventually, misplaced protection for them. Users' merchandising is, hence, excluded from the scope of this research.

On the contrary, sales of fan products printed or painted with celebrities' indicia are merchandising cases included in the scope of this research. Some American scholars argue that sales of fan products may constitute a quasi-fair use if it involves a transformative use, i.e., the deployment of one's persona is mainly for expressing opinions or emotions rather than for commercial purposes.[62] In the view of German courts, commercial interests pursued by the merchandiser in sales of fan products typically outweigh the information value. There was a tendency in German jurisprudence to draw a clear line between unlawful advertising and lawful sales of fan products because a legitimate interest of the public in the dissemination of the photos might surface in the latter scenario. For instance, the BGH ruled in the *Ligaspieler* case that the sale of card packs bearing famous football players violated the commercial interests of their right to one's image. In contrast, after about ten years, it reached the opposite decision that the sale of calendars with photos of (football) matches was legal because of the public interest in disseminating and receiving information conveyed by celebrities' images.[63] This argument might seem plausible at first glance. Celebrities' images might constitute social icons and thus be essential to foster cultural diversity,[64] and the dissemination thus might convey particular informational and aesthetic value.[65] However, as individuals may invoke the freedom to express self-identity, affections, aesthetic, or political views by showing the cards and calendars bearing their beloved celebrities, merchandisers who exploit consumers' desire for expression by

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against privacy and personal Information rights, (2019) Peking 0491 Civil First Instance No. 6694).

62 See *McCarthy and Schechter,* The rights of publicity and privacy, § 8:72.

63 BGH, GRUR 1968, 652 - Ligaspieler. "Es ist nicht einzusehen, daß die Kl. einseitig den Ruhm der Spieler in Geld ummünzen darf", 654; BGH, NJW 1979, 2203 - Fußballkalender, 427.

64 *Biene*, IIC, 2005, 505 (523); Dogan and Lemley, 58 Stanford Law Review 1161 (2006), at 1176.

65 BGH, GRUR 1968, 652 - Ligaspieler; BGH, NJW 1979, 2203 - Fußballkalender, 2204; OLG München, NJW-RR 1990, 1327 - Werbung für eine Gedenkmedaille; *Schertz,* Merchandising, Rn. 341; *Thalmann,* Nutzung der Abbilder von Personen des öffentlichen Interesses zu Werbezwecken, S. 155f.

selling fan products in pursuit of profit can hardly be justified by the defense of public interests. It is not saying that German courts do not attach great attention to the information value that merchandising may contain as American courts do. As pinpointed above, many satire-advertising and self-promotion of newspapers are justified by their contributions to the public debate.

As *Götting* and *Schertz* aptly pointed out, the clash between the public interest in information and the commercial interests of celebrities in their images remains probably in every unauthorized exploitation. It is thus critical to examine which motive of the merchandiser is in the superior position.[66] Thus, in the landmark *Nena* case, the BGH recognized fan products sales (named merchandising in the case) as a form of commercial exploitation of personal indicia the same as advertising. It made more apparent in the *Abschiedsmedaille* case that fan products sales presented an outright purpose of making a profit.[67] As a consequence, the judiciary guideline for advertising cases is also applicable for fan products sales.[68]

2.2 Remedies for tortious unauthorized merchandising

2.2.1 Monetary remedies

The claim to monetary remedies in merchandising cases is usually based on delictual liability pursuant to § 823 BGB or restitution for the unjust enrichment according to §§ 812 and 818 II BGB.[69] While the amount of compensation flowing from these two legal bases is equivalent to the license fee that the person depicted could have demanded in a similar

66 *Götting,* Persönlichkeitsrechte als Vermögensrechte, S. 60; *Schertz,* Merchandising, Rn. 341.

67 BGH, AfP 1996, 66 - Abschiedsmedaille, 68; Vgl. *Lauber-Rönsberg*, GRUR-Prax, 2015, 495 (497).

68 See *Schertz,* Merchandising, Rn. 342.

69 BGHZ 169, 340 - Rücktritt des Finanzministers, para. 12; BGH, GRUR 2009, 1085 - Wer wird Millionär, para. 38.

situation according to the licensing analogy (*Lizenzanalogie*),[70] the logic and constitutive elements for the claims are fundamentally different.[71]

§ 823 BGB is the common monetary remedy in German law if the damaged interests of the victim are economical. It reads,

> *A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property, or any other rights of another person is liable to make compensation to the other party for the damage arising from this.*

Since the right to one's image as a specific personality right in written law belongs to "*other rights*" in this paragraph,[72] and its economic attributes are exploited by the infringer in unauthorized merchandising, the victim is entitled to claim damages if she or he can further prove the fault of the infringer and the causality between the infringement and damages. According to § 249 I BGB, the damage suffered by the victim is calculated based on a hypothetical comparison between the reality and the situation where the victim would have been had the violation not occurred. In this wise, the licensing analogy is generally regarded as an abstract rather than a concrete comparison that § 249 I BGB requires.[73] The liability is usually established in unauthorized merchandising cases when the merchandiser fails to prove due diligence in examining the authorization certificate of the person depicted provided by the third party.[74] Therefore, it is recommendable for agencies, photographers, and enterprises who commence with merchandising to prepare complete documentation.[75]

The claim for delictual damages faces problems when the damages flowing from merchandising are not substantial but immaterial. First of all, the claim basis is slightly different. The BGH abandoned the legal basis for a solatium according to § 253 BGB because the right to one's images is not stipulated in § 253 II, and § 253 I BGB prohibits a broad reading of this claim. The current legal basis is § 823 I BGB in combination with Art. 1 I,

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70 See *Beverley-Smith, Ohly and Lucas-Schloetter,* Privacy, Property and Personality, 140 et seq.; *Götting,* Persönlichkeitsrechte als Vermögensrechte, S. 54f.

71 *Kraßer*, GRUR Int, 1980, 259; *Sack,* in: *Forkel and Kraft, Beiträge zum Schutz der Persönlichkeit und ihrer schöpferischen Leistungen: Festschrift für Heinrich Hubmann zum 70. Geburtstag*, 373f.

72 See Schertz in *Götting/Schertz/Seitz,* Handbuch Persönlichkeitsrecht, § 12 para.1.

73 *Beverley-Smith, et al., Privacy, Property and Personality,* 142 et seq.

74 BGH, GRUR 1965, 495 - Wie uns die anderen sehen, 497; OLG Hamm, NJW-RR 1997, 1044 - Nacktfoto, 1045; *Schippan*, ZUM, 2011, 795 (799f.); *Lettl*, WRP, 2005, 1045 (1082).

75 Specht, in *Dreier/Schulze,* Urheberrechtsgesetz, § 22 KUG Rn. 39.

2 I GG.[76] Secondly, the licensing analogy would not be reconciled to the claim for delictual damages in this scenario. The person depicted would not have received the remuneration if the violation had not occurred because he would never grant such humiliating exploitation. In this sense, the method of calculating compensation would no longer be the fictive license fee but actual moral damages. While some exceptions about sky-high immaterial damages exist,[77] immaterial damages are generally significantly lower than fictive license fees.[78] This thus led to a "cynical result" in practice that people who suffered from grave mental damages would have to claim the fictive license fee to get more compensation, which, however, implied that he or she would like to authorize such exploitation given an opportunity in light of § 823 I BGB.[79]

In this respect, the law of unjust enrichment suits better. It differs from the logic of delictual damages in focusing on the increase in the assets of the infringer instead of the reduction in the assets of the right holder.[80] As the observation from the perspective of the infringer orders: The merchandiser cannot on the one hand benefits financially by illegally exploiting the rights of others, and on the other hand deny restitution of the benefits he has received by claiming that the rights are non-substantial.[81] Therefore, the claim for restitution based on the law of unjust enrichment enables the licensing analogy as a "hypothetical device" to quantify the compensation.[82]

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76 BGH, GRUR 1995, 224 - Caroline von Monaco I, 230; BGH, NJW-RR 2016, 1136 - Kein "Schmerzensgeld" wegen Beleidigung per SMS, Rn. 3;

77 See OLG Hamburg, NJW 1996, 2870 - Caroline von Monaco, 2871. The amount of the monetary compensation was DM 180,000 in total; LG Köln, - Eine Million Euro Schadensersatz für Altkanzler Kohl.

78 In practice, the amount of solatium for infringements to personality rights would range from 1,000 to 7,000 EUR. See *Wybitul, Neu and Strauch*, ZD, 2018, 202 (206); Vgl. *Pietzko*, AfP, 1988, 209 (220). That is probably why the claimant in the famous *Herrenreiter* case asked for a fictive license fee instead of a solatium despite a clear insult suffered by the advertising. BGH, GRUR 1958, 408 - Herrenreiter.

79 *Beverley-Smith, et al.*, Privacy, Property and Personality, 141; *Götting*, GRUR, 2004, 801; *Beuthien and Schmölz,* Persönlichkeitsschutz durch Persönlichkeitsgüterrechte, S. 44.

80 *Ettig,* Bereicherungsausgleich und Lizenzanalogie bei Persönlichkeitsrechtsverletzung, S. 99f.; *Beverley-Smith, et al.*, Privacy, Property and Personality, 143.

81 *Götting,* Persönlichkeitsrechte als Vermögensrechte, S. 53.

82 BGH, GRUR 1958, 408 - Herrenreiter, 409; *Götting,* Persönlichkeitsrechte als Vermögensrechte, S. 54f.; See *Beverley-Smith, et al.*, Privacy, Property and Personality, 141.

The German legal academia developed various types of unjust enrichment upon the law of unjust enrichment in § 812 BGB. The relevant one in merchandising is the encroachment on a legal position that assigns certain commercial benefits to its holder (*Eingriff in eine Rechtsposition mit Zuweisungsgehalt - Eingriffskondiktion*).[83] This method spread out in unauthorized merchandising cases ever since the BGH recognized the commercial interests of the right to one's image in the *Paul Dahlke* case and upheld that infringer was obliged to restore what he had gratuitously gained (*Erlangten*) at the expense of the person infringed.[84] To clarify, what the merchandiser has gained without a legitimate reason is the unauthorized exploitation of the pictures of the person depicted, which cannot be surrendered by nature. Hence, the merchandiser should compensate the license fee that the person depicted could have demanded in a similar situation according to § 818 II BGB.[85] The calculation is critical to ensure that the fictive license fee is equivalent to the value of the exact unauthorized exploitation. As the German judiciary continues to specify the relevant indicators and exclude the irrelevant ones over time, some rules can be distilled.[86] The market value of the personal image, the content, means, and circulation of the advertising campaign are indispensable indicators,[87] while how much the merchandiser has factually obtained as a result of the commercial use of the celebrity's persona,[88] and the willingness of the person depicted for merchandising[89] should be excluded from consideration.

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83 *Beverley-Smith, et al.*, Privacy, Property and Personality, 140.

84 BGH, GRUR 1956, 427 - Paul Dahlke, 430; BGH, GRUR 1979, 732 - Fußballtor, 734; BGH GRUR 1987, 128 - Nena, 129; *Götting,* Persönlichkeitsrechte als Vermögensrechte, S. 50; See *Beverley-Smith, et al.*, Privacy, Property and Personality, 140.

85 *Kleinheyer*, JZ, 1970, 471 (473-474); Seitz, in *Götting/Schertz/Seitz,* Handbuch Persönlichkeitsrecht, § 47 Rn. 34;

86 BGH, GRUR 2000, 715 - Der blaue Engel716; BGH, GRUR 2007, 139 - Rücktritt des Finanzministers, para. 12; BGH, GRUR 2009, 1085 - Wer wird Millionär, para. 34.

87 An overview of the relevant criteria, see *Ettig,* Bereicherungsausgleich und Lizenzanalogie bei Persönlichkeitsrechtsverletzung, , S. 181f.

88 Vgl. BGH, GRUR 1961, 138 - Familie Schölermann, 141.

89 Vgl. *Götting and Lauber-Rönsberg,* Aktuelle Entwicklungen im Persönlichkeitsrecht, S. 30. Once upon a time, the BGH has created an additional *proviso* to enable restitution in the amount of a fictive license fee that the man depicted needed to be willing to authorize such commercial exploitation in the first place (*die Lizenzbereitschaft*), and thus denied the approach of fictive license fees in untypical merchandising cases where the advertising was humiliating and ridiculous for the person depicted. See BGH, GRUR 1958, 408 - Herrenreiter, the 2. Guideline;

Note that even being called the fictive license fee, the restitution is not an *ex post* consent to the merchandising. After all, instead of filling the victim's loss from his point of view, the law of unjust enrichment is aimed to force the infringer to surrender his gratuitous gain so that "no one should be placed in a better position" because of his or her violation against the law than observance.[90] In addition, according to § 687 II BGB, the victim can ask for the profits flowing from the violation if the infringer violates the law intentionally. Since it is unlikely that all the profits acquired by the merchandiser are attributed to the related advertising campaign,[91] the claim based on § 687 II BGB is seldom in merchandising cases.

The practical differences between claims based on § 823 BGB and §§ 812 and 818 II BGB are not evident in the absence of grave mental damages since they both rely on the licensing analogy. Moreover, as damages for unauthorized merchandising were developed based on the analogy with the ones available to IP rights in the *Paul Dahlke* case,[92] the remedies against infringements to IP rights are also gradually introduced and applied in unauthorized merchandising cases. Consequently, the person depicted may choose from three alternatives to calculate the compensation, namely the actual loss, the fictive license fee, and the lost profits.[93] Among them, the fictive license fee that has "the status of customary law" in the IP field is the most common remedy in unauthorized merchandising cases.

BGH, GRUR 1959, 430 - Caterina Valente, 434; BGH, GRUR 1962, 105 – Ginsengwurzel, 107. After receiving compelling criticism from the literature, German courts have abandoned this artificial *proviso* since the *Lafontaine* case (BGH, GRUR 2007, 139 - Rücktritt des Finanzministers). The criticism see *Götting,* Persönlichkeitsrechte als Vermögensrechte, S. 53f.; *Beuthien and Schmölz,* Persönlichkeitsschutz durch Persönlichkeitsgüterrechte, S. 44; *Schlechtriem,* in: *Fischer, et al., Strukturen und Entwicklungen im Handels-, Gesellschafts- und Wirtschaftsrecht: Festschrift für Wolfgang Hefermehl zum 70. Geburtstag am 18. September 1976*, 445 (456f.).

90 BGH, GRUR 1956, 427 - Paul Dahlke, 430

91 Vgl. *Hubmann,* in: *Roeber, Der Urheber und seine Rechte: Ehrengabe für Eugen Ulmer*, 108 (121).

92 The BGH made an analogy between the inadmissible encroachment on the right to one's image and the infringement of IP rights, the methods for assessing monetary remedies for IP rights, especially §§ 97ff. UrhG. BGH, GRUR 1956, 427 - Paul Dahlke, 430. See *Beverley-Smith, et al.,* Privacy, Property and Personality, 144; §§ 11, 29 I and 31 UrhG clarify that German copyright contains both economic and moral interests of the author, thus it cannot be assigned entirely *inter vivos* but licensable.

93 Schertz, in *Götting/Schertz/Seitz,* Handbuch Persönlichkeitsrecht, § 12 para.197; Specified in BGH, GRUR 2000, 709 - Marlene Dietrich, para. 53.

2.2.2 Non-monetary remedies

Injunction and the auxiliary claim for access to information and accounting are widely used in unlawful merchandising cases, whereas claims for destruction, rectification, and publication of a counterstatement are, albeit legally available, not very common in practice.

The basis of an injunction lies in the 2. sentence of § 1004 I BGB.[94] It has two requirements, namely an unlawful interference and danger of further interferences simultaneously, which are often met in unauthorized merchandising cases.[95] Upon an injunctive relief, the infringer must stop (online) exhibition or distribution of the merchandising objects.[96] Thus, injunctive reliefs are of great importance in unauthorized merchandising cases because they provide the person depicted a negotiating edge by immediately stopping all promotional activities conducted by the merchandiser. Moreover, when taking interlocutory injunction (*einstweilige Verfügung*) into account, which is devised to maintain a specific condition until the final settlement of a dispute,[97] the swiftness and convenience of this relief make it the most popular relief in practice even compared to monetary remedies.

94 The legal text of § 1004 BGB only grants injunction to owners of (material) property against (potential) interferences, whereas such protection for owners of immaterial rights such as IP rights and the right to name in § 12 BGB is provided in respective specifical laws. However, this "intentional" loophole has been closed in case law. See *Beverley-Smith, et al.*, Privacy, Property and Personality, 138.

95 BGH, GRUR 1997, 379 - Wegfall der Wiederholungsgefahr II, 380; *Henry*, International Privacy, Publicity and Personality Laws, para. 12.88 et seq.; *von* Hutten, in *Götting/Schertz/Seitz,* Handbuch Persönlichkeitsrecht, § 42 Rn. 4f.

96 LG Frankfurt am Main, 3.09.2018 - 2-03 O 283/18 - Friseursalon, para. 60.

97 The German legal basis for this claim rests on §§ 935, 940 ZPO. For a brief introduction to its conditions and consequences, see *Beverley-Smith, et al.*, Privacy, Property and Personality, 139. It is noteworthy that the granting of an interlocutory injunction requires a balancing of interests of both parties.

A claim for elimination of interference (*Beseitigung der Beeinträchtigung*) is provided by § 37 KUG[98] and the first sentence of § 1004 I BGB.[99] In scenarios of personality infringements revolving around false reports about facts, the claim for rectification (*Berichtigungsanspruch*) stemming from § 1004 I BGB is also very important.[100] This claim might be applied in false endorsement cases where the merchandiser claims that a celebrity favors something, but he or she does not. Along the same line, the claim to publish a counterstatement stated by the victim is also available in German law (mostly state laws) for cases involving infringements of reputation.[101]

Noteworthy, claims for destruction, rectification, and publication of a counterstatement are not very common in unauthorized merchandising cases. It is not surprising because most of these claims focus on moral interests that are not at issue in unauthorized merchandising cases. Moreover, if the celebrity frowns on the low-grade advertising, as in the situation in the *Herrenreiter* case, the last thing he or she wants to do is to increase its exposure by issuing a condemnation statement or recycling all advertising brochures with great fanfare. It is also the reason why many state laws in Germany exclude the applicability of the claim for publication of a counterstatement in merchandising that only impinges on economic interests.[102] Plaintiffs in unlawful merchandising cases also seldom deploy the claim for destruction even though they would destroy all illegal merchandising objects, such as printed advertising brochures.[103] Reasons are two-folded. The claim cannot provide more advantages than

98 § 37 KUG prescribes a claim for destruction when portrait copies are unlawfully produced, distributed, performed, or publicly displayed without the risk of repetition. In addition, the ambit of § 37 KUG extends to the devices exclusively for manufacturing unlawful exemplars of personal portraits. It resembles the claim for the destruction of devices that are exclusively for producing IP rights-infringing products.See § 98 UrhG; BGH, GRUR 1960, 443 - Orientteppich, para. 37; *von* Strobl-Albeg, in *Wenzel, et al.*, Das Recht der Wort- und Bildberichterstattung, § 9, Rn. 11. § 38 KUG provides a claim for delivery-up of the unlawful copies.

99 See *Beverley-Smith, et al.*, Privacy, Property and Personality, 139; *Golla and Herbort*, GRUR, 2015, 648.

100 See Gamer/Peifer, in *Wenzel, et al.*, Das Recht der Wort- und Bildberichterstattung, § 13 para. 7.

101 *Seitz and Schmidt*, Der Gegendarstellungsanspruch, § 1 para. 27.

102 Ibid.§ 5 para. 230. However, some scholars see this exclusion being unconstitutional. See Burkhardt, in *Wenzel, et al.*, Das Recht der Wort- und Bildberichterstattung, § 11 Rn. 47 and 48.

103 BGH, GRUR 1961, 138 - Familie Schölermann, para. 26. It might be the only one in which the claim for destruction has been applied.

injunctive relief. More importantly, as persons depicted in merchandising cases, often celebrities, also pursue commercial benefits and live partially or even mainly on merchandising,[104] they do not want to get into such a complete standoff with potential business partners. Therefore, claims for destruction, rectification, and publication of a counterstatement are, albeit available legally, withdrawing from the stage of merchandising.

The claim for access to information and accounting is an auxiliary claim that presupposes a valid principal claim such as an injunction, restitution, damages, etc. Its legal basis rests on the principle of good faith in § 242 BGB.[105] In this sense, the plaintiff must, on the one hand, demonstrate that the access to information and accounting is necessary to compute the amount of fictive licenses fee and stop the circulation, and, on the other, exercise this claim in good faith to ascertain that the execution does not impose an excessive, unreasonable, or disproportionate difficulty on the infringing party.[106] This claim must be distinguished with the right to inspection of accounts (*Bucheinsichtsrecht*) that appears in almost every merchandising contract (see below). Even though they are both useful tools for quantifying and verifying royalties, the claim for access to information and accounting is a remedy upon a violation of the right to one's image, while the other is a contractual right.

2.3 The judgment in the *clickbait* case

After a chronological review of the German legal regime regarding unauthorized merchandising, it is time to explore how the judgment in the *clickbait* case followed the guidelines distilled from the jurisprudence despite new characteristics emerging in the online environment.

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104 Based on the anatomy of the music industry, singers make most of their income not from records but concerts and merchandising in the broad meaning, including endorsements, commercials, etc. See *Passman,* All You Need to Know About the Music Business, 94 et seq., and 424 et seq.; *Fisher,* Promises to Keep: Technology, Law, and the Future of Entertainment, 54 et seq., and Appendix I. By presenting tables showing "where did the money go" in the record business in Appendix I, the author argues that the amount of money a singer can get from an album is grossly exaggerated. Some singers never even receive a bill that they do not owe the record company money (at 35, quoting from Janis Ian, "The Internet Debacle – An Alternative View").

105 Burkhardt, in *Wenzel, et al.,* Das Recht der Wort- und Bildberichterstattung, § 15 Rn. 4.

106 Freund, in *Götting/Schertz/Seitz,* Handbuch Persönlichkeitsrecht, § 48 para.14.

The *clickbait* case was at first labeled as "atypical" merchandising for two reasons: The merchandiser used the celebrities' icons in the opening credits (*Vorspann*) to attract internet users' attention, and advertising revenues for the website flowed in directly from the internet traffic at the time curious internet users click.[107] In this wise, the *clickbait* case differed from the classic mechanism of "image-transfer" in typical merchandising cases and the traditional device of "attention-grabbing" reflected in the case of *Wer wird Millionär*.[108] However, by revealing the thin veil covering the same commercial logic deployed by the device of "attention-grabbing", it was rightfully contended by German courts that clickbait was rather an adapted form of merchandising in the online environment.[109] Moreover, clickbait online was not necessarily as frightening as the one in the present case ("cancer", "to retire from the public"). The clickbait here was on the borderline of fake news.[110]

Against this backdrop, the German courts followed the guidelines for unauthorized merchandising that the person depicted has the sole right to decide the exploitation of his or her images in the absence of informative value. The article discussing the retirement of a public person due to a severe disease might present a legitimate interest of the public in knowing such information, but the merchandiser obviously downplayed this information by using pictures of irrelevant but famous persons, especially the plaintiff who was more popular than others, to create a riddle alluring internet users to click and open his website.[111] In this wise, even though the article and the depiction of the moderator planning to retire from the public might be legal due to public interests, the commercial interests pursued by the merchandiser in using the plaintiff's picture were in the foreground. It thus rendered the exploitation without the plaintiff's authorization unlawful.

Regarding remedies, the claim for destruction would be meaningless, while the injunction is critical in the digital age since advertising increasingly takes place online.[112] In computing the fictive license fee, the BGH rightfully rejected the argument advanced by the merchandiser. He man-

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107 BGH, GRUR 2021, 636 - Clickbaiting, para. 28 and 30.

108 *Ibid*., para. 68. In the *Wer wird Millionär* case, the picture of the moderator took up almost 1/3 of the magazine cover.

109 *Ibid*., para. 30.

110 *Ibid*., para. 48.

111 *Ibid*., para. 56.

112 In the *clickbait* case, the merchandiser deleted this post within 3 hours after pushing this message.

aged to avoid the restitution of a fictive license fee by deliberately mixing up the revenue earned from the unlawful advertising and the unjust enrichment – the unauthorized exploitation of personal images.[113] One cannot be exempt from paying the license fee that he should have paid just because the unlawful merchandising was a failure, and one certainly cannot avoid the payment for license by paying (small) proceeds. The victim cannot shoulder all in all, the business risk in merchandising. The plaintiff could also claim the advertising revenue mentioned by the merchandiser based on § 687 II BGB in addition to the fictive license fee according to § 812 and 818 II BGB. Now, based on the commonly used model of "pay-per-click" (PPC) for calculating the advertising revenues, it is possible that the person depicted can claim the restitution for the fictive licensee fee plus the gaining by internet trafficking. The technical advancement in calculating specific advertising revenues helps facilitat the application of § 687 II BGB.

It is arguable whether the court's quantification of the fictive license fee is convincing. As mentioned above, the compensation should be equivalent to the license fee that the plaintiff could have demanded for exploitation under similar conditions, such as the size of the image, the manner, extent, and time of distribution, etc. Therefore, the merchandiser challenged the analogy drawn by the court to the *Wer wird Millionär* case because the size of images, the means and scope of distribution in that case were markedly different from his merchandising; Thus, he argued that the calculation of the fictive license fee was unfair.[114] The BGH did not respond to this accusation but stated that the amount was reasonable given the shocking and quasi-fake content of the advertising in the *clickbait* case.[115] It seemed that the court held the opinion that though the scope of distribution of the advertisement was relatively limited, the ample license fee was justified because of its serious impact on the plaintiff's moral interests. Apparently, the court's reasoning deviated from the law of unjust enrichment – to even out the increase including saving in the assets of the

113 BGH, GRUR 2021, 636 - Clickbaiting, para. 60. The merchandiser advanced that the amount it ought to restore should be the advertising revenue earned from the unlawful use of the plaintiff's likeness. Since the revenue was max. 300 euros the compensation ordered by the first two instances quantified as 20,000 euros was too high.

114 *Ibid*., para. 68. In the *Wer wird Millionär* case, the picture of the moderator took up almost 1/3 of the magazine cover, and its distribution was significantly extensive than the *clickbait* case.

115 *Ibid*., para. 69.

infringer.[116] Rather, it was to compensate the moral damages of the plaintiff. As *Ettig* argues, it presents, in essence, a confusion between solatium and unjust enrichment.[117]

All in all, while some improvements in calculating the compensation are conceivable, main guidelines regarding the unlawfulness of unauthorized merchandising and remedies are still followed in merchandising cases occurring online.[118]

2.4 Preliminary summary

The legal developments in unauthorized merchandising cases build on the recognition of economic components in the right to one's image. From one side, it enables protection for celebrities who were *de facto* deprived of any rights against commercial exploitation by advertisers. On the other side, it triggers material claims for fair compensation that significantly enhances the level of protection.[119]

In this wise, *Ulmer*'s famous metaphor for copyright is noteworthy and analogous here: the right to one's image is like the trunk of a tree.[120] Its moral and economic interests are the roots of the tree growing underground, and the commercial exploitation of the portrait is one of the branches. It reflects both moral and pecuniary interests, and the infringement of it – the free decision of the individual about whether to make his or her image an inducement for purchasing goods – harms the two types of interests simultaneously.[121] While it should accord to the perspective of the person depicted about the nature of the impinged interest standing in the foreground, the application of the claim based on unjust enrichment is not undermined as this claim is assessed from the infringer's perspective.

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116 *Götting,* Persönlichkeitsrechte als Vermögensrechte, S. 53; *Ettig,* Bereicherungsausgleich und Lizenzanalogie bei Persönlichkeitsrechtsverletzung, S. 99f.

117 *Ettig*, NJW, 2021, 1274 (1277).

118 More examples, see BGH, GRUR 2021, 643 - Urlaubslotto.

119 It is especially beneficial regarding the personality rights of the deceased. Whereas the moral components of the right to one's image are not descendible, the economic interests are inheritable, and thus, the successor is legitimate for claiming compensation or restitution for unauthorized merchandising of the ancestor. See BGH, GRUR 2000, 709 - Marlene Dietrich, para. 37.

120 *Rehbinder and Peukert,* Urheberrecht: ein Studienbuch, S. 170, Rn. 543.

121 *Schlechtriem,* in: *Fischer and Ulmer, Strukturen und Entwicklungen im Handels-, Gesellschafts- und Wirtschaftsrecht*, 455 (465); *Götting,* Persönlichkeitsrechte als Vermögensrechte, S. 266.

This consideration complies with the ideological and constitutional basis of personality rights. The rights root in the autonomy to free develop one's personality and unfold one's value.[122] Also, it leads to several effects. First, it sets Germany on a completely different path than America, where a new property right emerged.[123] On the one hand, the persistent controversy among American scholars about the justification of the right to publicity thus never took place in Germany.[124] The German legal protection for the economic interests residing in the right to one's image is the natural result of the self-determination guaranteed by personality rights and a gift from advancements of technologies and markets. The right to one's image hence cannot be alienated from the natural person unlike the right to publicity in the US (discussed below).[125] However, on the other hand, as merchandising becomes more popular and independent from other practices, such as journalistic reports, Germany borrows the term "merchandising" directly from the English vocabulary and devotes to integrating merchandising into the legal regime of personality rights.[126] Secondly, unlike the right of publicity, different merchandising objects have to obey peculiar legal statutes as well as case law for respective personality rights, such as the right to name, the right to one's image as well as the general personality right. Last but not least, it must be conceded that the German statutory law has been left largely behind in this regard. Instead, one has to look into a body of case law to draw a counter to merchandising licensing in Germany.

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122 See *Hubmann,* Das Persönlichkeitsrecht, S. 82.

123 Haelan Labs., Inc. v. Topps Chewing Gum, Inc. 202 F.2d 866 (2d Cir. 1953); Melville, 19 Law and contemporary problems 203 (1954); William, 48 California law review 383 (1960); Gordon, 55 Northwestern University law review 553 (1960); Zacchini v. Scripps-Howard Broad. Co. 433 U.S. 562 (1977).

124 Since the right of publicity is an intangible and exclusive right with only economic value, its justification must demonstrate incentives for creating the intangible goods or a market deficiency in lacking the exclusive right. On the contrary, the right of publicity fails to provide both. However, it is doubtful that people would not want to be celebrities if the right of publicity did not exist.

125 Bergmann, 19 Entertainment law journal 479 (1999) (480-482); *Götting,* in: *Götting and Schlüter, Nourriture de l'esprit: Festschrift für Dieter Stauder zum 70. Geburtstag*, S. 69 (73-74).

126 See BGH GRUR 1987, 128 - Nena; OLG Köln, GRUR-Prax 2021, 114 - Tina Turner, para. 20, 38; *Magold,* Personenmerchandising, S. 1; *Ruijsenaars,* Character Merchandising, S. 1; *Schertz,* Merchandising, para.1

3. Merchandising in contract practice

3.1 Consent in merchandising agreements

3.1.1 The legal nature of consent

(1) Consent as a legal act and *the ladder of permissions*

The second sentence in § 22 KUG has long recognized the exchange relationship between money and consent by stating (in case of doubt), "the consent shall be deemed to have been granted if the person shown received a consideration to produce the image". However, the lack of a definition of consent raises disputation about the legal nature of consent.[127] From a historical perspective, the tradability of the right to one's image was inherently contradictory to its nature as a personality right because it would seem to equal natural persons with objects. However, as *Hubmann* wrote poetically, life consists not of sharp boundaries but transitions; while there are some untransferable and indispensable interests underlining one's personality, some interests of the person pass slowly into the distance.[128] The *Paul Dahlke* case let German courts admit that merchandising has long been common practice in the advertising industry. Turning a blind eye to the fact that many people are willing to exploit their identities for publicity, fame, and money cannot make this phenomenon disappear. Rather, it would create confusion and increase transaction costs.[129] Moreover, an outright exclusion of the tradability of the right to one's image could not withstand the question: since merchandising is not illegal, why the right holder only has the right to claim compensation in the face of unauthorized merchandising by others, but not the freedom to enter into merchandising contracts on own initiative.[130]

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127 A review of conflicting opinions, see *Dasch,* Die Einwilligung zum Eingriff in das Recht am eigenen Bild, S. 82 ff.

128 *Hubmann,* Das Persönlichkeitsrecht, S. 133.

129 For instance, lawsuits in the UK about the triangular relationship among Mr. and Ms. Douglas, the magazines OK!, and Hello! illustrates not only that a denial of legal protection for one's images cannot eliminate the trade of them but also how complicated the construction of such contracts and the disputes afterwards (the transaction cost) can be. See Douglas v Hello! Ltd [2007] 2 WLR 920.

130 Vgl. *Götting,* Persönlichkeitsrechte als Vermögensrechte, S. 66.

Against this backdrop, consent in § 22 KUG must be interpreted in a way that can not only enable the right holder to dispose the right to some extent for remuneration but also provide a fair balance between the personality interests (including the ideal ones that appear to be withdrawn in merchandising cases) of the right holder and reliance interests of the merchandiser who must invest money, time, and resources in a not insignificant manner. Noteworthy, a protection model that is overly biased in favor of the person depicted may lead to a lose-lose situation as he or she will never find a partner to work with.[131] In the literature, while a few authors generally object to the idea of commercial exploitation of personal indicia including images,[132] scholars who accept merchandising business also recognize the validity of merchandising agreements and thus view consent in this scenario as a legal act or at least a quasi-legal act.[133]

The licensing of the right to one's image was admitted as "controversial" (*umstritten*) in the BGH in the *Nena* case in 1986.[134] Subsequently, the BGH actively discussed the tradability of personality rights in the trend-setting decision in the *Marlene Dietrich* case. It argued that the law, instead of being a set-in-stone mechanism, needs to adjust to the changing reality regarding the tradability of objects that are protected by subjective rights.[135] Taking the occurred legal shifts as examples,[136] an incontestable task of civil law faced with an innovative marketing model is to provide a regulatory framework that adheres to the principle of private autonomy

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131 Vgl. *Ohly,* "Volenti non fit iniuria": die Einwilligung im Privatrecht, S. 160.

132 See Schack, AcP, 1995, 594 (599, 600); Schack, Urheber- und Urhebervertragsrecht, Rn. 51; Peifer, Individualität im Zivilrecht, S. 315f., 325f.

133 *Klippel,* Der zivilrechtliche Schutz des Namens, S. 523 ff.; *Forkel*, GRUR, 1988, 491; *Helle,* Besondere Persönlichkeitsrechte im Privatrecht, S. 117; *Freitag,* Die Kommerzialisierung von Darbietung und Persönlichkeit des ausübenden Künstlers, S. 165 ff.; *Ruijsenaars,* Character Merchandising, S. 497, 506; *Schertz,* Merchandising, Rn. 380 und 388; *Hahn*, NJW, 1997, 1348 (1350); *Lausen,* ZUM, 1997, 86 (92); *Götting,* Persönlichkeitsrechte als Vermögensrechte, S. 149ff.; *Ernst-Moll*, GRUR, 1996, 558 (562); *Ullmann*, AfP, 1999, 209 (210 ff.); *Beuthien and Schmölz,* Persönlichkeitsschutz durch Persönlichkeitsgüterrechte, S. 32 ff. u. 62 f.; *Dasch,* Die Einwilligung zum Eingriff in das Recht am eigenen Bild, S. 85ff.; von Strobl-Albeg, in *Wenzel, et al.,* Das Recht der Wort- und Bildberichterstattung, § 7 Rn. 204; *Damm, Rehbock and Smid,* Widerruf, Unterlassung und Schadensersatz in den Medien, Rn. 169; *Hermann,* Der Werbewert der Prominenz, S. 45.

134 BGH GRUR 1987, 128 - Nena, the Guideline.

135 BGH, GRUR 2000, 709 - Marlene Dietrich, para. 38.

136 The judgment took the change of whether a trade name separately (from the business) was transferable as an example, see *ibid*., para. 32f.

within the confines set by higher-ranking legal or ethical principles.[137] Upon the distinction between moral and economic interests in the right to one's image, the BGH conceded that the pecuniary components of personality rights are not indissolubly linked to the person in the same way as the ideal ones.[138] While a definitive legal recognition of the nature of consent in merchandising agreements is stalled till today in the BGH, judgments handed out by regional courts have admitted that consent of the person depicted is a legal act (*Rechtsgeschäft*) or at least a quasi-legal act (*rechtsgeschäftsähnliche Erklärung*).[139]

For instance, in the *landlady* case mentioned in the Introduction, the court at the outset underlined that the consent in this scenario was a legal act that included the declaration of will (*Willenserklärung*) of the person depicted because she intended to achieve a legal result by granting the receiver a protectable legal position.[140] Thus, when the offer proposed by the model that she was willing to license any subsequent publications of her photos for no less than 30% of the revenues had been accepted by the photographer on the telephone, the contract between them concluded in any case ("*ohnehin*"), and the consent for publishing photos was not freely revocable.[141] Moreover, since this contract was open-ended due to the lack of a time limit clause, the withdrawal of consent was only permissible provided on significant reasons or the principle of change of circumstances. In the *company-advertising* case, although no remuneration was granted against the commercial exploitation of the plaintiff's images (see Introduction), the BAG denied consent as a real act (*Realakt*) commonly seen in medicine law but viewed consent as a legal act or a quasi-legal act by. The court addressed that the consent should be applied and interpreted in accordance with the provisions about the declaration of will in the BGB in any case.[142]

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137 *Ibid*., para. 38, with further references.

138 *Ibid*., para. 31.

139 OLG München, NJW-RR 1990, 999 - Wirtin, 1000; LG Köln, AfP 1996, 186 - Model in Playboy, 188; OLG Frankfurt, ZUM-RD 2011, 408 - Einwilligung zur Bildveröffentlichung kann nicht ohne Weiteres widerrufen werden, Rn. 37; OLG Düsseldorf, I-20 U 39/11 - Widerruf einer Einwilligung nach § 22 KUG, Rn. 8; BAG, GRUR 2015, 922 - Veröffentlichung von Arbeitnehmer-Bildnissen zu Werbezwecken, Rn. 37f.

140 OLG München, NJW-RR 1990, 999 - Wirtin, 1000

141 Ibid..

142 BAG, GRUR 2015, 922 - Veröffentlichung von Arbeitnehmer-Bildnissen zu Werbezwecken, Rn. 23.

In light of the practical need and the judiciary controversy for consent in the KUG, scholars kept finding doctrinal solutions for interpreting consent and incorporating it into legal doctrines in civil law. Enlighted by *the ladder of permissions* (*die Stufenleiter der Gestattungen*) developed by *Ohly*, the legal term of consent stipulated in § 22 KUG provides an all-embracing normative starting point.[143]

According to *the ladder of permissions,* the term consent, in its broadest meaning, is a sophisticated concept that covers almost all patterns of exercising rights underlying the maxim of *volenti non fit iniuria* – loosely translated, one who consents cannot complain[144]. According to the theory, consent may indicate an assignment of right (*translative Rechtsübertragung*), a constitutive transfer (*konsitutive Rechtsübertragung*) that facilitates a third party's use by creating a right of use on the object, such as an exclusive license, contractual permission (*schuldvertragliche Gestattung*), and a bare and freely revocable consent like provisional parking permission.[145] The abovementioned varied patterns to exercise rights show a decreasing intensity of restraint on the subject. however, not all "steps" of the ladder need to be available to dispose of a right or interest attributed by law. Rather, the pattern(s) of exercising the right is (are) prescribed by the nature of the right, the higher-ranking law, ethical principles, and probably the need for legal paternalism.[146] Accordingly, the exclusion of a pattern can only lead to the exclusion of the pattern(s) above it residing on *the ladder of permissions*, but not lead to the exclusion of the pattern(s) below it. For instance, the inalienability of the right to one's image from the person depicted shall exclude an assignment of right because one cannot demonstrate the right of self-determination by giving it up entirely. After all, it would lead to an ultimate loss of autonomy. However, since the person depicted does not lose the specific personality right if he or she licenses a right to use images to others while holding the ultimate control over the right to one's image, they should not be deprived of other possibilities for disposition, such as through a revocable consent, contracts, and (in)exclusive licensing.[147] In other words, scholars who are adherents to excluding other steps of *the ladder of permissions* except for an anytime revocable consent must

143 See *Ohly,* "Volenti non fit iniuria": die Einwilligung im Privatrecht, S. 147.
144 See Bachmann, 4 German Law Jounral 1033 (2003).
145 See *Ohly,* "Volenti non fit iniuria": die Einwilligung im Privatrecht, S. 147.
146 *Ohly,* "Volenti non fit iniuria": die Einwilligung im Privatrecht, S. 97ff.
147 *Götting,* Persönlichkeitsrechte als Vermögensrechte, S. 279; *Forkel,* GRUR, 1988, 491; *Peukert*, ZUM, 2000, 710 (719ff).

demonstrate other reasons than the inalienability of personality rights.[148] Otherwise, it would present an unjustified legal paternalism restricting private autonomy unduly.

From another angle, the varied connotations of consent make its interpretation critical especially when both parties do not explicitly clarify its nature. Nevertheless, consent is more likely to be binding rather than readily revocable in merchandising scenarios. The parties conclude a *quid pro quo* contract to establish a relatively long cooperative relationship. Furthermore, celebrities sometimes want to be free from the day-to-day management of their merchandising business by entrusting some professionals to help them negotiate licensing fees and develop their careers. In this situation, the soft-licensing model (*gebundene Rechtsübertragung*) based on the analogy with the German Copyright Law in light of the monistic theory is the most suitable solution to cater to this need: The person depicted transfers the right of use of the commercial interests in the right to one's image that derives from the right of personality, and thus establishes the right of action of the licensee against third parties, which ensures him a secure legal position; The advantages of the soft-licensing model are, for one, that the right to use is limited in content, time and space, and serves the specific contractual purpose, and for another that the licensor can release the authorized right at any time for justified reasons because of the inseparability of the personality right from him or her and the close link between moral and commercial interests.[149] In short, the right to one's image is transferable as a right of exploitation.[150] Without surprise, the soft-licensing model is preferred by agencies.

The principle of *pacta sunt servanda* is respected in merchandising agreements in German courts, and the *ladder of permissions* paved the way for the judicial interpretation of consent in § 22 KUG by providing a proper doctrinal foundation.

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148 See *Ohly,* "Volenti non fit iniuria": die Einwilligung im Privatrecht, S. 162.

149 *Ibid*., S. 160 et seq.; *Forkel,* GRUR, 1988, 491; *Forkel,* Gebundene Rechtsübertragungen: ein Beitrag zu den Verfügungsgeschäften über Patent-, Muster-, Urheber- und Persönlichkeitsrechte, § 6 VII, S. 44ff.; Specht, in *Dreier/Schulze,* Urheberrechtsgesetz, § 22 Rn. 36; *Specht-Riemenschneider,* Konsequenzen der Ökonomisierung informationeller Selbstbestimmung, S. 78f.; *Wandtke*, GRUR, 2000, 942 (949); *Ullmann,* AfP, 1999, 209; *Ernst-Moll,* GRUR, 1996, 558 (562); *Götting,* Persönlichkeitsrechte als Vermögensrechte, S. 66f.; *Hubmann,* Das Persönlichkeitsrecht, S. 132f.

150 A paraphrase for the statement of „das Urheberrehct ist als Nutzungsrecht übertragbar", see *Rehbinder,* Schweizerisches Urheberrecht, Rn. 155.

(2) The revocability of consent for merchandising

The revocability of consent is sensitive. For one thing, consent in merchandising scenarios is not like consent in medicine law as a real act that is freely revocable. Rather, it is a legal or quasi-legal act, containing a declaration of will. For another, the revocability of consent in merchandising cannot be excluded because the exploitation of personal photos simultaneously involves both ideal and commercial interests, according to the monistic theory. The difference is that commercial interests stand in front of the stage in the eyes of the person depicted.[151] Thus, scholarly literature and German courts advocate an analogy with § 42 UrhG because the monistic theory also undergirds the ideal-interest-friendly construction for authors.[152] In this wise, courts allow the withdrawal of consent for merchandising but only provided on the due cause.[153] In other words, the person depicted must demonstrate a change of belief to persuade the court that the contract must be terminated now otherwise the integrity of her personality would be inevitably compromised. In addition, a balancing of interests between the two parties may also take place to assess the personality interests of the person depicted against the reliance interests that trigger substantial investments of the merchandiser.

This approach was reflected in the *landlady* case, which became the seemingly model case for jurisprudence. Although *OLG München* acknowledged the sensitivity of the publications of nude photos in the case as they normally involve the core interests of one's personality,[154] it denied the model's claim to withdraw her consent because she did not present a change of her belief or attitude towards nudity.[155] In a similar case in *LG*

151 Götting, in *Götting/Schertz/Seitz*, Handbuch Persönlichkeitsrecht, § 10 Rn. 15; *Götting*, Persönlichkeitsrechte als Vermögensrechte, S. 52; *Büchler*, AcP, 2006, 300 (324).

152 Vgl. *Frömming and Peters*, NJW, 1996, 958 (960).

153 OLG München, NJW-RR 1990, 999 - Wirtin, 1000; LG Köln, AfP 1996, 186 - Model in Playboy, 188; OLG Frankfurt, ZUM-RD 2011, 408 - Einwilligung zur Bildveröffentlichung kann nicht ohne Weiteres widerrufen werden, Rn. 37; OLG Düsseldorf, I-20 U 39/11 - Widerruf einer Einwilligung nach § 22 KUG, Rn. 8; BAG, GRUR 2015, 922 - Veröffentlichung von Arbeitnehmer-Bildnissen zu Werbezwecken, Rn. 37f.

154 Specht, in *Dreier/Schulze*, Urheberrechtsgesetz, § 22 Rn. 6; BGH, GRUR 2016, 315 - Sexfotos vom Ex-Partner, the guideline. The BGH considered that the consent to possessing nude photographs was limited to the duration of the romantic relationship.

155 OLG München, NJW-RR 1990, 999 - Wirtin, 1000.

Köln in 1995, the court not only followed the guideline outlined in the *landlady* case, but also explained how to understand the change in one's attitude in scenarios of merchandising.[156] The BAG in the *company-advertising* case also adopted this approach and denied the withdrawal as well because the plaintiff did not present convincing reasons why he needed to exercise the right to informational self-determination in the exact opposite way of his previous behavior.[157]

Noteworthy, a balance of interests was exercised in all abovementioned cases. If the person depicted wants to deprive the legally protected interests of the merchandiser by withdrawing the consent, he has to convincingly demonstrate that the need for personality protection trumped those interests. In the *landlady* case and the similar case in Cologne, it was submitted that the personality interests, especially the ideal ones, were prone to inferences, and the damages were likely irreversible. However, the persons depicted, professional models, knew exactly the lifestyle they opted into and were willing to allow the third party's commercial use in return for money. The reliance interests of merchandisers in trusting this thoughtful decision warranted protection. In the *company-advertising* case, the BAG also spent a lot of ink on the balance of interests. As the merchandiser exploited the images for free, it might seem fair that the person depicted could withdraw his consent under less restrictive conditions. However, the court emphasized the fact that the employee – the person depicted was aware of and agreed on the binding nature of the consent by singing the unlimited timewise statement.[158] His voluntariness to give consent could be challenged due to the context of an employment relationship, it was

156 The court has listed plenty of interviews with the plaintiff to demonstrate that she has never changed her positive attitude towards nude portraits, and there was also no guarantee that she would not present similar portraits as well. Furthermore, the model's argument that "the old nude portraits … belong to a closed capital, from which she has long since turned away as an actress" cannot justify an exceptional termination of a long-term and synallagmatic contract because it is, in essence, a wish to conceal her past to avoid negative and judgmental opinions instead of an indication of a change of beliefs. LG Köln, AfP 1996, 186 - Model in Playboy, 187f.

157 See BAG, GRUR 2015, 922 - Veröffentlichung von Arbeitnehmer-Bildnissen zu Werbezwecken, Rn. 38.

158 On the one hand, there was no time limit on the statement's content. On the other hand, the portrayal of the plaintiff in the advertisement did not highlight his personality but rather as a "typical" employee of the company. See ibid., Rn. 34-36.

neither brought up by him nor proved on the court's initiative.[159] Moreover, the content of the advertising film suggested that the employee's personality interests were not prominent considering that his appearance was extremely short and mostly in a group.[160] The time point of the withdrawal further supported the view that the affected personality interests, if any, were not significant for the employee himself because he had waited too long (10 months) before he raised the claim.[161]

In light of the judiciary advancements especially developed by lower instances in Germany, it is discernable that consent in merchandising is a (quasi-)legal act and neither irrevocable nor freely revocable. The close cooperation between the academic and practical communities is significant and conducive. It must be borne in mind that the special protection of personality rights by law and the freedom of contract based on individual autonomy are in strong tension. The guideline in the revocability of consent, qualified as "good law", is a reasonable solution to alleviate this tension as it guarantees the private autonomy without dismissing human dignity and personality.[162]

3.1.2 The construction of consent in merchandising agreements

Even in merchandising scenarios where participants are generally professional models and actors who understand the business model very well and benefit significantly from it, their consent also needs interpretation now and then. A possible reason could be that since their photos are valuable, merchandisers often attempt to maximize their interests by interpreting the scope of authorization as widely as possible. Unfortunately, in doing so, it is likely to exceed the scope of the authorization that the person depicted envisioned when he concluded the contract, thus creating a dispute.

Once again, scholarly literature and courts resort to the German Copyright Law in interpreting the consent for disposing of one's likeness.[163]

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159 *Ibid*., Rn. 31-33. Thus, the court has ruled out a challenge based on the unlawful threat (§ 123 (1) BGB), even though the plaintiff has not raised the claim.

160 *Ibid*. Rn. 39.

161 *Ibid*. Rn. 40.

162 *Sattler,* in: *Lohsse/Schulze/Staudenmayer, Data as Counter-Performance – Contract Law 2.0?*, 225 (235).

163 Castendyk, in *Wenzel, et al.,* Das Recht der Wort- und Bildberichterstattung, § 35 Rn. 15; Götting, in *Schricker/Loewenheim,* Urheberrecht, § 22 Rn. 16; *Schertz,*

Stemming from the principle of purpose limitation (*Zweckbindung*),[164] § 31 (5) UrhG undergirded by the theory of purpose transfer requires that, in case of doubt, the ambit of the grant of the right of use must be interpreted to the extent that is necessary to achieve the purpose of the contract. Thereby, authors can participate in the profits that the work yields in an appropriate manner.[165] Against the background of merchandising, the analogy means that, in constructing the ambit of consent in case of doubt, one should inquire into the purpose of the contract concluded by the parties, while a blanket authorization must be carefully assessed against the contractual purpose agreed by both parties. If the contractual purpose is not prescribed in the contract, other factors including preliminary negotiations, customary practices, business style, and the usual course of business can be deployed to determine the purpose.[166] It is discernible that the theory of purpose transfer does not require an interpretation following the preference of the right holder of personality rights.[167] The contractual purpose stated in or implied from the contract is foremost decisive.

According to the guidelines, consent from professional models and actors/actresses without a clear intention or remuneration generally does not legitimize merchandising.[168] As merchandising provides substantial incomes for celebrities, it is uncommon for them to grant merchandising without consideration. In addition, the theory of purpose transfer helps in developing the restrictive permission for interferences with ideal interests underlying one's images caused by the commercial exploitation.[169] Since merchandising is mainly involved with the allocation of economic interests, consent also extends to standard forms of presentation in light of the commercial practice, which should be anticipated by the person

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Merchandising, Rn. 382; OLG Köln, ZUM 2014, 416 - Werbekatalog, Rn. 50; BGH GRUR 1992, 557 - Talkmaster, 558.

164 *Burda*, Die Zweckbindung im Urhebervertragsrecht, S. 9.

165 Ohly, in *Schricker/Loewenheim*, Urheberrecht, § 31 Rn. 52, with further references.

166 Ohly, in ibid.§ 31 Rn. 65; *Burda*, Die Zweckbindung im Urhebervertragsrecht, S. 112f.

167 *Schricker/Loewenheim*, Urheberrecht, , § 31 Rn. 64.

168 For instance, consent of celebrities to shoot pictures for interviews, restore memories, or during public events, does not constitute a free pass for commercial exploitation. See BGH, GRUR 1956, 427 - Paul Dahlke; OLG Frankfurt, GRUR 1986, 614 - Ferienprospekt; BGH GRUR 1992, 557 - Talkmaster, 558.

169 Castendyk, in *Wenzel, et al.*, Das Recht der Wort- und Bildberichterstattung, § 35 Rn. 15-17.

depicted.[170] Instead, a severe interference with ideal interests must be legitimatized by informed and explicit consent. For instance, the *LG Frankfurt am Main* found it inexcusable when the merchandiser posted a nude photo online with stink fingers pasted on the breasts even when the plaintiff granted a blanket authorization regarding the nude photos because this presentation was "distasteful" (*geschmackslos*) and constituted an affront to the model undermining her personality.[171] A blanket authorization cannot legitimatize it.

In addition to these two general rules in constructing consent in merchandising, the theory of purpose transfer can also work on a small granularity. An illustrative example presents the *landlady* case. As the duration of consent was not clear in that case, it should be constructed in the way necessary to fulfill the purpose agreed upon by both parties, i.e., the remuneration for publication should be no less than 30%. Accordingly, the business practice in the publishing industry for pornographic pictures should be considered: if high payouts are only possible in the first five years of the publication, then the permissible duration of consent should be limited by this range.

A more meaningful embodiment of the theory of purpose transfer is in the *"stink fingers"* case. Both parties agreed on a time-for-print contract, according to which models do not have to pay photographers for shooting pictures. In contrast, photographers can keep the negative films of the images produced as remuneration.[172] This type of contract is very popular in the modeling community.[173] Given the intensive competition in this business, such an allocation of interests and rights is meaningful for young models to start their careers as they usually cannot afford the photography provided by professional photographers. Against this backdrop, the German court keenly observed that the time-for-print contract

170 Some scholars argue that the combination of the core theory and the theory of foreseeability suggested by the theory of purpose transfer is warranted here. See ibid., § 35 Rn. 19.

171 LG Frankfurt/Main, 30.05.2017 - 2-03 O 134/16 - Stinkefingers, para. 53 and 54.

172 Ibid. para. 68 and 70 with further references.

173 Time-for-print contracts are also popular in China. There are Chinese cases concerning similar questions including the ambit of the legitimate use of nude photos by the photographer. However, the Chinese court did not consider the photographer's use of self-marketing legitimate. See 壹飞视觉摄影（广州）有限公司、白利益等一般人格权纠纷民事二审，（2021）粤01民终16859号 (the Second Civil Judgment on the Dispute over the General Personality Rights of Bai Liyi, etc., and Yifei Photography (Guangzhou) Co., (2021) Guangzhou 01 civil final no. 16859).

reflected a reciprocal relationship between photographers and models. If consent in this scenario was not allowed because young models seem to be caught in unfair exploitation,[174] photographers, especially professional ones, would be reluctant to devote time, money, and professional sets to young models entering the industry. It would ultimately deny their career possibilities. Therefore, the court argued that the possibility of both parties making some commercial use of the photographs is the basis for such a contract. Otherwise, neither models nor photographers would like to conclude these agreements. Accordingly, this purpose should be anticipated and agreed upon by the model who wishes to develop her modeling career with minimal cost. Conceivable objections would be that the authorization exceeds the necessary extent to obtain the free service, or the model does not understand the scope of her authorization due to lack of experience.[175] These were, however, not visible in the case.

While the theory of purpose transfer can regulate merchandising at a suitable granularity to reach an accurate result, it is an *ex post* measure to construct consent, which can be accused of undermining legal certainty.[176] Maintaining consent is difficult, a written contract is thus always recommended with proper documentation about the purposes, means, rights, and obligations of merchandising.

3.2 Merchandising agreements

3.2.1 Types of merchandising agreements

There are different types of merchandising agreements to cater to the different needs of the merchandisers and the owner of the right to one's

174 *Vogler*, AfP, 2011, 139 (141).

175 LG Frankfurt/Main, 30.05.2017 - 2-03 O 134/16 - Stinkefingers, para. 70 with further references.

176 For example, *LG Düsseldorf* ruled that a model's performance in a public fashion show does not include authorization for advertising purposes of that show. See LG Düsseldorf, AfP 2003, 469 - Veröffentlichung von Fotografien einer Modenschau, para. 23 und 24; In contrast, the BGH constructed an actor's smile at cameras wearing a fashion house's glasses at its opening ceremony as consent to advertising this very fashion house using that image. However, it did not extend to other chain stores of that fashion house. BGH GRUR 1992, 557 - Talkmaster.

image. Nevertheless, the core of a merchandising agreement is to specify which portraits are to be used, how, and for what consideration.

The time-for-print agreement in the "*stink fingers*" case is a variant of the standard merchandising agreement (*Standardlizenzvertrag*). Under the standard merchandising agreement, the merchandiser is allowed to commercially use one's likenesses in a fixed manner, be it in the form of posters, advertisements, or fan products.[177] On the contrary, the so-called agency-merchandising agreement (*Agenturvertrag*) is more common for professional models and actors/actresses by facilitating a blanket authorization for commercial exploitation of one's images for merchandising purposes.[178] As the name indicated, this type of agreement is generally concluded with an agency, a professional organization specializing in managing and operating merchandising for models and actors/actresses. In this case, the agency-merchandising agreement provides convenience by taking care of operations for merchandising and profound and professional business planning for models and actors/actresses.

Taking the "Merchandising-Sponsor-Promotion-Contract" in the *Nena* case as an example, the famous singer who performs under the stage name NENA has transferred all her commercially exploitable rights, especially her right to images, to the plaintiff, the agency. Coupled with the template for an agency-merchandising agreement provided in literature by professional lawyers in the industry,[179] the main content in a typical agency-merchandising agreement is:

> *The agency is authorized worldwide and exclusively to operate merchandising for XX (the licensor – the person depicted) as well as to conclude sponsorship and promotion contracts....*
> *XX hereby assigns all rights necessary for the commercial use of the acoustic and visual environment of XX to the agency, in particular the right to the own picture, the right to the name XX, the right to the logo (Trademark)…*
> *This contract is concluded for ... years. During this period, it can only be terminated for good cause. It shall be extended by 2 years at a time if it is not terminated with one year's notice....*

177 Büchner, in *Pfaff/Osterrieth*, Lizenzverträge: Formularkommentar, B. VI, Rn. 614 ff.
178 *Schertz,* Merchandising, Rn. 393.
179 Büchner, in *Pfaff/Osterrieth*, Lizenzverträge: Formularkommentar, B. VI. Rn. 635.

Therefore, the agency is not only authorized to conclude standard merchandising agreements with others but also allowed to press charges against infringers in its name instead of the licensor. The agency's multiple roles, including bargaining, quality certification, supervision, and business strategizing, render agency-merchandising agreements doubtless the most popular type of merchandising agreements for professionals. Noteworthy, given the restrain of the person depicted from an exclusive licensing, the duration is usually shorter than standard merchandising agreements.

3.2.2 Typical contractual rights for the person depicted in merchandising agreements

To achieve the primary purpose of a merchandising contract, i.e., that the licensor transfers the right of commercial exploitation of images, and the licensee pays consideration, there are some ancillary rights and obligations for both parties. For instance, given the ambiguous legal recognition about the licensability of the right to one's image, the licensee is usually obliged not to challenge the licensor's legal status.[180] Moreover, the licensor must provide necessary assistance to the exclusive licensee against infringements by third parties.[181]

Several contractual rights from the licensor's perspective are highlighted below. Besides being common and essential in practices, they share similarities with some of the rights granted to data subjects by the GDPR. It thus provides an exciting perspective for making comparisons.

(1) The right to access information and accounting

Qualified as rights to inspect accounting (*Bucheinsichtsrechte*), some view this contractual right as essential to securing the licensor's financial interest because the calculation model for license fees often relies on the dealer's selling price or revenues.[182] In this spirit, the merchandiser must

180 The contract usually states that the agency acknowledges the XX's ownership of the rights.

181 Büchner, in *Pfaff/Osterrieth*, Lizenzverträge: Formularkommentar, B. VI, § 7 Books of Account and Audits in a merchandising license agreement template, Rn. 648.

182 Vgl. *Schertz*, Merchandising: Rechtsgrundlagen und Rechtspraxis, Rn. 405; With the rise of E-commerce live streaming in China, the commercial value of each

maintain not only complete and accurate books of account concerning all transactions regarding the merchandising objects but also aid with the licensor's audit.[183] Nonetheless, it is supported here to consider the right to access information and accounting an enabling right. After all, the portrait owner's control depends on the mastery of the circumstances of the authorization, including merchandising marketing timetable, status quo of the sales as well as projections, and so on.[184] Thus, the licensor must have a holistic yet detailed understanding of the market plan to exercise the right to self-determination and fully realize his or her personality.

(2) The right for reservation for approval

The right for reservation for approval (*Genehmigungsvorbehalt*) stems from the inseparable personality interests underlying the right to one's images. Upon this, licensors reserve the right to veto the specific form of merchandising, namely the presentation of their images in the advertising or fan products.

The right usually supports the right to reservation for approval for quality control (*Qualitätskontrolle*), which contains both aesthetic control and quality control over the goods. To prevent the personal image from distortion[185] and the reputation from being devalued by negative news about the goods,[186] this right with associated controls is beneficial for licensors in the long run. Consequently, celebrities who care about their reputation and the commercial value of their images are advised to have the right to quality supervision regulated in the contract.

In summary, the right for reservation for approval, together with the right for quality control, are, in essence, a right to object when the core interests protected by the right to one's image are harmed or the image

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celebrity can be quantified by the amount and value of goods he or she sells live. For instance, an internet influencer could sell 15,000 lipsticks in 5 minutes and become one of the most valuable celebrities in China.

183 Schertz, in *Götting/Schertz/Seitz*, Handbuch Persönlichkeitsrecht, § 38 Rn. 50.

184 Büchner, in *Pfaff/Osterrieth*, Lizenzverträge: Formularkommentar, B. VI, § 8 (1) Marketing Plan, Rn. 651.

185 Bureau, Character Merchandising, 1994, WO/INF/108, 1994, 21.

186 *Ruijsenaars*, GRUR Int, 1994, 309 (311); In merchandising agreements in the US, the right for quality control in a technical manner is of great importance. See Büchner, in *Pfaff/Osterrieth*, Lizenzverträge: Formularkommentar, B. VI, Rn. 652.

of the licensor may thus face distortion and devaluation. If the dispute raised by the right to objection cannot be reasonably solved, a claim for an extraordinary opt-out right is conceivable.

(3) An extraordinary opt-out right

As stated in the "Merchandising-Sponsor-Promotion-Contract" in the *Nena* case, a contractual clause for an extraordinary opt-out right is common in merchandising contracts irrespective of the length of the contract. Therefore, it leads to the termination of that contract.

It could be argued that this clause might be superfluous from the perspective of the person depicted because the consistent German case law recognizes the revocability of consent upon the due cause. However, the extraordinary exit clause serves both licensor and licensee because the licensor's malfeasance could undermine the licensee's products' value.[187] In a sense, a merchandising contract binds the image of the product/company to the image of the star. An endorsement contract creates a closer relationship, whereas a merchandising contract regarding fan products may have a far more significant impact on the star than the manufacturer. The celebrity's image can either reinforce or undermine the goodwill of the agency, company, or manufacturer, and *vice versa*.

In essence, while the most involved interests in merchandising are economical, the ideal interests of both sides also need protection, which gives *vires* for the claim for opt-out of the contract following the similar rationale underlined the revocability of the consent given by the licensor.

(4) Disposable contractual rights

Considering that most of them benefit only the licensor and restrict the licensee's freedom, it is conceivable that the licensee, if it has greater power or financial resources, would be willing to omit these rights or at least

187 Vgl. Schertz, in *Götting/Schertz/Seitz*, Handbuch Persönlichkeitsrecht, § 39 Rn. 25-26; The District Court Munich (*LG München*) has given a strict interpretation of the licensor's "duty of good performance" (*Wohlverhaltenspflichte*) in the contract to protect the rights of the portrait owner by reasonably limiting the merchandiser's extraordinary opt-out right. See LG München II, ZUM-RD 2007, 542 - Wohlverhaltenspflichten eines Testimonials, the Guideline.

make some derogation in exercising the rights. Against the backdrop that these rights mainly stem from the personality interests, especially the ideal ones protected by the right to one's image, it is arguable whether these contractual rights should be regulated as mandatory.

Arguments for this legal innovation would be two-folded. For one, these rights are indispensable to protect the personality interests of the person depicted. As argued above, the right to access information and accounting is the enabler for controlling the merchandising for the person depicted. Consent without necessary information cannot sustain an effective execution of the right to self-determination. The right for reservation for approval coupled with the right for quality control is devised to prevent one's personality from distortion and devaluation. The extraordinary opt-out right is the final guarantee for the portrait owner to protect their personality. For another, the unique investment model in merchandising business indicates mandatory rights of the person depicted to develop a fair and reasonable contractual relationship. The person depicted, especially a celebrity, needs uneven protection provided by the contract because his or her losses are often irreparable and catastrophic. In practice, the licensee – be it an agency, a manufacturer, or a company – invests in phases, and each investment is negligible. In contrast, once the celebrity consents to the merchandising, his or her image is tied with the licensee. Thus, the investment pattern of the person depicted is to place all his or her "bets" at once. If something goes wrong, the agency and manufacturer can stop their investment in time, but the popularity and reputation embodied in the celebrity's image, which builds on years, even decades of dedicated work, can disappear entirely and quickly.

However, the principle of freedom of contract coupled with the uneven protection of personality interests incites confrontations. Counterarguments to regard these rights as indisposable are also evident and cogent. First, the absence of these rights does not indicate a severe infringement of personality interests. For instance, in a time-for-print contract like the one in the *"stink fingers"* case, the contractual rights such as the right to access information and accounting, the right for reservation for approval, and the extraordinary opt-out right are hardly necessary because the relationship is provisional, the form of merchandising is straightforward, and the impact on the person depicted is determined and insignificant. In other words, given the simplicity of this merchandising relationship, the person depicted does not need these rights to assist him in exercising individual self-determination free from compromise. Legal intervention is thus unwarranted and ineffective and a burden to both parties.

Secondly, contrary to a standard merchandising agreement, the agency-merchandising agreement is relatively long and extensive so that it can impact and restrict the free development of personality in a more significant deal. Thus, these rights are likely indispensable in striking a fair balance between the freedom of contracts and protection for personality interests in an agency-merchandising agreement. However, in this case, the person depicted, especially a celebrity, would have a strong incentive to take these rights seriously. As admitted by lawyers in this business, celebrities are usually assertive in fixing these rights down. Thus, the more significant the possible impact of the merchandising contract on the personality interests of the person depicted, the more incentive there is to encourage the inclusion of these rights in that contract. Lastly, there is a lack of clear statutory and jurisprudence on the mandatory nature of these contractual rights.

Nevertheless, it can be argued that the absence of these rights could be seen as a benchmark for measuring the fairness of standard contracts that have been drafted by one party, say, the agency and the counterparty can only take it or leave it (§§ 305 and 307 BGB). For instance, contracts signed between young people and large agencies in Korea's developed "idol trainee" industry are labeled as "slave contracts". They usually last for more than ten years and prescribe no rights for the trainees. Still, large amounts of money for breach of contract.[188] However, this case is rather extreme and concerns performance management contracts that include agency contracts, service (provision of training), and merchandising contracts. Albeit interesting, it is not the subject of this thesis.

All in all, these contractual rights are disposable in merchandising, albeit essential and meaningful. At most, the absence of these rights could play a role in measuring the fairness of standard contracts according to §§ 305 and 307 BGB.

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188 Williamson, Lucy, The dark side of South Korean pop music, BBC News, 06-15-2011, at https://www.bbc.com/news/world-asia-pacific-13760064; John Seabrook, Factory Girls: Cultural technology and the making of K-pop, The New Yorker, 10-01-2021, at https://www.newyorker.com/magazine/2012/10/08/factory-girls-2. "Idol trainees" are refereed to young people, normally teenagers who wish to be idols or celebrities in the field of K-pop in fandom culture and thus sign contracts with agencies which provide them with necessary training and competition opportunities. After the training, the winners normally form a team or band and make their official debut. At this point, they may sign with another company and use the signing fee to pay their previous agency a significant amount to end that contract. As one can imagine, their chances of success are not very good. That is why the agency's contract with them usually includes very strict revenue sharing rules.

3.3 Preliminary summary

Stemming from the monistic theory, several analogies to the German copyright have been drawn to protect personality interests, especially the ideal ones of the person depicted. For instance, consent in merchandising, albeit legal, is subject to revocability with due cause. The theory of purpose transfer also helps construct the authorization in case of doubt so that interferences to the self-determination regarding one's images would be limited to the necessary performance of the contract. Thus, written and specialized counsel-drafted merchandising agreements are essential for a complex and continuous cooperative relationship.

According to the prevailing classification, standard merchandising agreements and agency-merchandising agreements for merchandising are common and cater to different situations. A blanket license is popular among professional models and actors/actresses because of the triple functions provided by agencies, namely negotiation power, management via sub-licensing, and career planning. Despite different taxonomy, the objective is to specify which portraits will be used, how, and for what consideration. In doing so, some synallagmatic clauses have evolved in practice and become the principal contents in merchandising agreements, including the exchange of licenses and fees, recognition of the licensor's rights by the licensee, and the provision of judicial assistance by the licensor, etc.

Highlighted are the contractual rights in favor of the person depicted. The right to access information and accounting, the right to reservation for approval including the right to quality control, and the extraordinary opt-out right are the common rights for a licensor in a merchandising agreement. Although these contractual rights are important and meaningful as they derive from and serve the personality interests protected by the right to one's image, they are optional in merchandising because of the principle of freedom of contract. However, the greater the possible impact of the merchandising contract on the personality interests of the person depicted, the more reasons there are to encourage the inclusion of these rights in that contract.

4. Conclusions

Upon the legal recognition that the right to one's image contains economic and moral components, the uniform legal regime of the right to one's

image provides an all-embracing right to self-determination regarding personal pictures.

From a defensive perspective, models who do not suffer from moral damages by unauthorized merchandising are protected against commercial exploitation as the economic and moral interests are working in tandem. Irrespective of the nature of the damages, one always has the right to claim restitution computed on the fictive license fee based on the law of unjust enrichment because the commercial interests have been attributed to the person depicted. In practice, claims for fictive license fee, injunctive relief, and the auxiliary claim for access to information and accounting are virtually the customary reliefs in unauthorized merchandising cases. On the other hand, claims for destruction, correction, and publication of a counterstatement, albeit legally available, are hardly visible because they do not fulfill the needs of the exploited person.

From an active perspective, the dual interests of the right to one's image pave the way for legitimizing the *de facto* authorized merchandising. Merchandising has long been a reality, and no higher-ranking law or moral values prohibit it in general, especially regarding the transferability of the commercial interests protected by the specific personality right. The soft-licensing model developed in the German Copyright Law in light of the monistic theory is prevailing in merchandising business because it enables a stable cooperative relationship between models and merchandisers in commercially exploiting images while preserving the control of the person depicted over the images to some extent.

Therefore, the lack of an independent legal basis to govern commercial exploitation of personal indicia – like the right of publicity in the US – does not hinder the widespread merchandising in Germany and insulates German scholars from endless debates about the legitimacy of legal protection for merchandising. In this scenario, merchandising constitutes a right of use in respect of the right to one's image.

To strike a fair balance between private autonomy and special protection for personality interests, "the action is in the details".[189] Consent given by the person depicted is a legal act revocable with due cause. The analogy with the theory of purpose transfer rooted in the German Copyright Law mandates that consent, in case of doubt, should be limited to the necessary extent of the contractual purpose. While there are different merchandising agreements, agency-merchandising agreements are welcomed among professionals due to the triple functions provided by agencies, namely man-

189 *Williamson,* The mechanisms of governance, 6.

agement, sub-licensing, and career planning. Moreover, several rights and privileges for the person depicted deriving from and serving personality interests are common in these merchandising agreements, such as the right to access information and accounting, the right to reservation for approval, including the right to quality control, and the extraordinary opt-out right, to protect personality interests of licensors.

From the developments described above, both the defensive and active perspectives are indispensable to guarantee the legal rule in merchandising, namely, the person depicted has the sole right to decide whether to make his or her image available as an incentive for the sale of goods regardless of the social role if the exploitation serves the commercial interests of the merchandiser exclusively. In this wise, the legal recognition of the licensability of personal images is not surrendered to the market but instead granted a doctrinal success in facilitating more private autonomy. As technology and social advancements reduce the controversy over the separability of personal photographs and their depicted persons, legal paternalism in prohibiting any forms of disposing of the right to one's image appears increasingly groundless. After all, a market based on private property and voluntary exchange – restricted in the right to one's images – is also indispensable and significant for the thriving and sound progress of art and culture.[190]

190 *Cowen*, In praise of commercial culture, 2, 15-43 discussing the reasons, and 83-128 illustrating this argument by history.