Privacy & the media. Traditional and emerging protections in an online world.

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National Report of Germany

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1. Privacy rights

1.1. Are privacy rights statutory rights or are these case-law based?

Privacy rights are statutory rights. The German Constitution, the "Basic Law" (Grundgesetz – GG) protects human rights in Arts. 1-20. There is no explicit right to privacy. The guarantee of human dignity in Art. 1 sent. 1 (*Human dignity shall be inviolable. It shall be the duty of all public authority to respect and protect it.)* and the right to free development of personality in Art. 2 sent. 1 (*Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law),* however, have been held to encompass a "general personality right" which protects reputation, personal information and the private sphere.

In addition to these Basic Rights there are numerous statutory rights on a sub-constitutional level, the most relevant being the following:

- Apart from some exceptions (see question 1.2.1) portraits of persons may not be used in any medium without the consent of the person portrayed (sec. 22 of the Art Copyright Act);
- The purpose of the Federal Data Protection Act is the protection of individuals against his/her right to privacy being impaired through the handling of his/her personal data (sec. 1 para. 1 of the Act);
- Chapter 15 of the Criminal Code (sec. 201 to 206) provides criminal sanctions in case of violations of privacy.

Finally, the legal framework is influenced considerably by decisions of the Federal Constitutional Court (Bundesverfassungsgericht) and the Federal Court of Justice (Bundesgerichtshof).

1.2. What type of information (including pictures, sounds, etc.) would be covered by the concept of "privacy rights" in the legal system of your country?

In general, all kinds of information about a person can be protected by privacy rights. Privacy rights are not limited to tangible information such as portraits (photographs, drawings, sculptures) of a person, but extend to the privacy of the spoken and the written word, and the privacy of data.

The wide extent of privacy rights is owed to their scope. They cover the right to dispose of depictions of one's self, social recognition and personal honor. A significant guarantee of privacy rights is protection against statements which could be detrimental to the reputation of a person, and in particular his or her image in public. The general right of personality protects a person especially from false or distorted

depictions which are not entirely insignificant for the development of one's personality.

1.2.1. Would the information included in that concept, or the extent of the privacy rights, depend upon the celebrity of the person, or upon other elements? Please describe briefly.

German courts make the extent of privacy rights subject to the sphere in which a person is interacting with his/her environment:

- The least protection of privacy rights is given in the *public sphere*. Those actions can be attributed to the public sphere that a person willingly fulfils in public. This includes e. g. interview statements, pictures of celebrities taken on a "red carpet" etc.
- There is a higher level of protection of privacy rights in the *social sphere*. The social sphere extends to all actions that are not considered to be private, such as professional or political actions.
- The next level of protection is given to those actions that take place in the *private sphere*. Those actions relate to the private sphere in which a person is acting privately. In respect of information about a person this information is to be considered part of the private sphere that one would only confide to family members and close friends.
- The *intimate sphere* enjoys absolute protection; no encroachment on this core area of private life can be tolerated.

Besides the aforementioned spheres, the celebrity of a person is affecting his/her privacy rights with respect to the freedom of press. German courts have developed a graded protective concept that has regard both to the need for protection of the person portrayed and to the general public's interest in information. For this purpose, the legal concept of the *figure of the absolute or relative figure of contemporary society* was invented.

A figure of contemporary society "per excellence", also called figure of the absolute contemporary society (e. g. heads of states and members of royal families), had to tolerate photographs of himself/herself except if the pictures were taken at a remote place where the presence of a photographer could not be expected under any circumstances. Relative figures of contemporary society attracted public's interest only in a defined context (e. g. politicians, actors and athletes). The protection of their privacy rights was dependent on the circumstances of the picture taken: A soccer player would have had to stand for himself/herself being photographed on a soccer pitch but not during private activities with his/her family.

In 2004 though, the European Court of Human Rights considered this legal concept to be too vague and indeterminate[1]. The European Court of Human Rights has been seized by Caroline Princess of Hanover (then Caroline of Monaco), who previously has been rated a figure of the absolute figure of contemporary society by German courts. In the previous lawsuits in Germany different photos of Princess Caroline were in dispute, Caroline with the actor Vincent L. and her son in a garden restaurant, Caroline riding a horse together with her kids, Caroline and her daughter doing shopping, Caroline and her family skiing, Caroline and her husband Ernst August of Hanover at a horse show, etc. Only with regard to the photo showing Caroline with the actor Vincent L. the German Federal Court of Justice granted the applied for injunctive relief. The Federal Constitutional Court further granted the applied for injunctive relief regarding the photos showing Caroline's kids. Regarding all other photos the German (highest) courts considered the freedom of the press prevails the privacy of Princess Caroline.

In answer to this European judicial decision in 2008 the German Constitutional Court declared that courts have to decide what weight should be attached to the public's interest in being informed when balanced against the conflicting interests of the persons concerned (again Caroline Princess of Hanover who has been photographed in several situations)[2]. While assessing the weight to be attached to the public's interest in information, the courts must consider the extent to which a press report may be expected to contribute to the process of forming public opinion. The weight to be attached to the protection of personality rights depends on the situation in which the person concerned was photographed (was he/she captured during moments where he/she has been in a state of relaxation and may be entitled to assume that he/she is not exposed to the view of photographers?) Another important factor that needs to be taken into account is the circumstances in which the image was obtained, such as by means of secrecy or continual harassment.

1.2.2. Would privacy rights also apply in relation to legal persons (vs. physical persons)?

German jurisdiction applies privacy rights to legal persons to the extent that the nature of such rights permits. German courts have recognized the application of privacy rights to legal persons with regard to the revelation of

1 ECHR, Judgment of 24.09.2004, no. 59320/00 (Hannover ./. Germany)

2 Federal Constitutional Court, Decision of 26. 2. 2008, file no. 1 BvR 1602/07 a.o.

secret information by publicly communicating privately spoken words or by disclosing confidential information.

1.2.3. Would privacy rights encompass private information made available only to some chosen persons (authorized recipients). So, for instance, can disclosure to third parties, by one of the authorized recipients of the private information, be part of the privacy rights (e.g. disclosure of private correspondence, private phone calls, information shared on social media, etc.)?

There is no need of information to be totally undisclosed in order to be protected by privacy rights. In the example cited in the question above, the authorized recipient of private information would infringe privacy rights if he/she was obliged to a certain level of confidentiality by virtue of an agreement between the parties, of his/her profession, or of the nature of the information exchanged.

A recent decision of the Regional Court of Cologne should be noted in this context[3]: From 1999 to 2009, a journalist and Helmut Kohl cooperated in order to prepare a biography about the former German chancellor. For that purpose, the journalist had made and taped several interviews with Helmut Kohl. In 2009, Helmut Kohl terminated the cooperation with the journalist, who in 2014 published a book making use – without Helmut Kohl's approval – of quotations by Helmut Kohl that were contained in the previously taped interviews. In November 2014, Helmut Kohl was successful in the first instance with his appeal to prohibit the use of the quotations; the book may no longer be sold.

However, it can by no means be taken for granted that any information made available only to an authorized recipient must not be made available to others. The results obtained in the Helmut Kohl case cannot simply be generalized without consideration of its peculiarities: The Regional Court of Cologne assumed that the journalist must have been aware of the confidentiality of the information though the parties did not sign a non-disclosure agreement. Therefore the publication of the book with the quotations was considered to be a breach of the contractual obligations between Helmut Kohl and the journalist. Additionally, the Regional Court of Cologne identified a violation of Helmut Kohl's privacy rights by stating that Helmut Kohl could assume that the quotations would not be published without his prior consent.

3 Landgericht Köln, Decision of 7.10.2014, file no. 28 O 433/14

1.3. Is there a specific status for "fictional use" of information related to an individual ? And are disclaimers sufficient to allow such use?

A person's privacy rights can be encroached by fictional use as long as the fictional person can be identified as a real person.

In the famous "Esra"-decision the German Constitutional Court stated in 2007[4]:

- The right to artistic freedom and for "fictional use" does include the right to use real-life models.
- There is a correlation between the degree to which an author creates an aesthetic reality divorced from the actual facts and the severity of the violation of the right of personality. The greater the similarity between the copy and the original, the more serious the impairment of the right of personality. The more the artistic depiction touches on the aspects of the right of personality that are afforded special protection, the greater the fictionalization must be in order to rule out violations of the right of personality.

The background of the decision is the following: German author Maxim Biller had published a novel about the unhappy love story between Jewish Adam and Turkish Esra. The author had been inspired by his own love affair with the first plaintiff called Esra, a Turkish actress. In his book, Maxim Biller gave a detailed description of the fictional character Esra that in many aspects matched real Esra's biography. The novel did also contain many details of Adam's and Esra's sex life including an attempted abortion. Due to the parallelism between the fictional character Esra and the real person of the same name, in the eye of a reader of the novel the fictional Esra's sex life could not be distinguished from real Esra's. Therefore, there was an intolerable encroachment on real Esra's intimate sphere (see question 1.2.1). As a consequence, the sale of the novel had been forbidden in Germany by the German courts and Esra was granted the sum of € 50.000,00 in damages.

Although there was a disclaimer in the novel's epilogue ("All of the characters in this novel are fictitious. Any similarity to persons living or dead is purely coincidental and unintentional."), it did not make any difference in the Esra case. Whether a text is fictional and as such protected by the Artistic Freedom or not must instead be evaluated on the basis of the text itself.

[4] German Constitutional Court, Decision of 13. 6. 2007, file no. 1 BvR 1783/05

2. Freedom of speech

2.1. Is there on the one hand a statutory/treaty based freedom or constitutional recognition of "Freedom of speech" or on the other hand is that freedom based on case-law?

The concept of freedom of speech is a constitutionally guaranteed right. Art. 5 para. 1 sent. 1 of the German Constitution grants every person the right to freely express and disseminate his/her opinions in speech, writing and pictures, and to inform himself/herself without hindrance from generally accessible sources.

However, numerous court decisions have given form to the extent of the constitutionally guaranteed freedom of speech.

2.2. If it is a statutory/treaty/constitution based freedom is it based on domestic or supranational law?

Freedom of speech is based both on domestic and supranational law. It is guaranteed by the German Constitution as shown in question 2.1.

In addition, art. 10 of the European Convention on Human Rights provides the right to freedom of expression. The articles of the European Convention on Human Rights are sub-constitutional law in Germany.

Art. 11 para. 1 of the Charter of the Fundamental Rights of the European Union gives everyone the right to freedom of expression, including freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The Charter of the Fundamental Rights of the European Union is not included in the Treaty of Lisbon but simply annexed to it in the form of a declaration. With Art. 6 para. 1 of the Treaty of Lisbon, the Charter of Fundamental Rights acquires a binding legal force for 25 Member States, including Germany.

2.3. Describe the main characteristics of the "freedom of speech" as recognized in your jurisdiction:

2.3.1. beneficiaries;
2.3.2. extent of the freedom of speech;
2.3.3. exceptions;
2.3.4. specific status for press (including online press)?

Art. 5 para. 1 sent. 1 of the German Constitution grants the right to freely express his/her opinion to every person. Therefore, the protection of this Basic Right is not limited to German citizens. Art. 19 para. 3 of the German Constitution extends the applicability of the Basic Rights of the Constitution to domestic artificial persons to the extent that the nature of such rights permits. The German Constitutional Court has consistently recognized that legal persons may claim a breach of their freedom of speech, too (see question 1.2.2.).

Freedom of speech finds its limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour (Art. 5 para. 2 of the German Constitution). General law limiting the extent of the freedom of speech is e. g. sec. 130 para. 3 and 4 of the German Criminal Code, penalising the approval, the glorification, or justification of National Socialist rule of arbitrary force. Finally, the extent of the freedom of speech is determined by other persons' personality rights as a limit that is inherent in the Constitution (see question 3.1).

Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed by Art. 5 para. 1 sent. 2 of the German Constitution; Art. 5 para. 1 sent. 2 declares that there shall be no censorship. Holder of the right of freedom of the press and freedom of reporting is every natural or artificial person that exercises one of the protected actions.

At first, fundamental rights constitute an essential defence against the state. The state may not prohibit the establishing and realizing of press and media. Yet freedom of press and freedom of reporting is not an unlimited right in respect with the people being reported on (see question 3.).

3. Hierarchy between Freedom of Speech on one side and privacy rights on the other side.

3.1. Under the law applicable in your jurisdiction, is there a clear hierarchy between freedom of speech on the one hand and privacy rights on the other?

There is no clear hierarchy between freedom of speech on the one hand and privacy rights on the other. The same applies to freedom of the press and privacy rights. Both, freedom of speech or freedom of the press and privacy rights, are Basic Rights that are guaranteed under

constitutional law. In order to attempt equilibrium of the two opposing legal positions, the Constitutional Court applies the principle of "practical concordance": One Basic Right does not per se prevail over another Basic Right. Instead, both Basic Rights shall be fairly balanced against one another on a case-by-case basis.

3.2. What would be the most significant criteria allowing freedom of speech or privacy rights to prevail over the other (e.g. public interest argument)?

See question 1.2.1.

4. Remedies available in your jurisdiction to protect individuals against disclosure of information belonging to their privacy

4.1. Are there pre-emptive remedies to avoid disclosure of such information before disclosure occurs ? Describe briefly the main remedies available.

One of the main remedies in case of a violation of privacy right violations is an injunctive relief. Although the German Civil Code does not explicitly provide injunctive relief in cases of privacy right infringements, it is well established that a right to such relief follows from an analogous application of Sec 1004 of the Civil Code, which allows the grant of injunctions in cases of violations of the right to one's name or portrait, or in general a violation of privacy rights.

Such an injunctive relief can be under certain circumstances obtained as a preliminary injunction in a fast-track proceeding ("Einstweilige Verfügung"). In order to obtain an injunction, the applicant must demonstrate to the court that the matter is urgent. The standard usually applied is that the applicant should take action within four weeks after becoming aware of the infringement. Further it has to be shown that there is a clear infringement.

The application must not be served on the infringing party before filing it with the relevant court. Contrary to a regular lawsuit in Germany, the applicant does not need to prove the infringement; he must only make it plausible to the court. This means that an application for an injunction can be prepared and filed at court relatively quickly (provided that all documents and/or affidavits are available) and cost-effectively.

However, it is not unlikely that there is a practical difficulty to obtain a preliminary injunctive relief before disclosure occurs. According to

German Civil Procedure Law, the infringing activity must be described precisely/cited literally in the application letter to the court. If the infringing media has not been published yet, the infringing activity can hardly be described. Sometimes the application may be based on a very detailed announcement (e.g. movie trailer or advertisement for a magazine with extract of one story), but in most of the cases the affected person will have to wait for the disclosure and to start then immediately with legal action.

As a lawyer representing the affected person, I would at least send out a warning letter to the disclosing party even if the information on hand is not sufficient to start legal actions at court. I would inform about the impending infringement, sometimes also about the "real" facts and announce that an injunctive relief and damages will be claimed in case of disclosure/publication. In case that disclosure takes place anyhow after such a warning letter, the disclosure will be considered as intentionally which will later influence the damage claim.

4.2. Are "gagging orders"[5] or "super injunctions"[6] as known in the UK known under the legal system of your country? Describe briefly their main characteristics.

No, these legal actions are not known in Germany.

4.3. Are there other post-disclosure remedies, such as for example damage claims, rectification claims, right of answer. Describe shortly

- **Damage claims**

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

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

[5] See for details : http://en.wikipedia.org/wiki/Gag_order#United_Kingdom
[6] See for details: http://en.wikipedia.org/wiki/Injunction#UK_superinjunctions

Thus, besides the violation of the named rights of the affected individual by the publication, the damages remedy requires that the media act intentionally or negligently. This is not necessary for the remedies described below. The major hurdle for a successful claim for general damages is usually the requirement that the claimant has to prove the causal connection between the objected statement and the damage occurred.

- **Rectification claim**

German media law knows two different types of a rectification. On the one hand a retraction ("Widerruf") and on the other hand a journalistic rectification ("journalistische Richtigstellung")

Against false factual statements, not against opinions, a retraction can be demanded. As a retraction does not only give the affected person the opportunity to publish his point of view in the respective publication, but forces the media to admit in their own publication that they were wrong (which has great impact to the freedom of the press as guaranteed in art 5 of the German Constitution), the retraction has severe requirements. The claimant has to prove that neither a reply nor an injunctive relief would be sufficient to restore his reputation and that a retraction is necessary.

In practice, it has become common that media companies which become aware (either by realizing itself or as result of a warning letter) that a mistake happened in the publication, that they voluntarily correct the false statement in form of a journalistic rectification. If such a journalistic rectification has been published, in most of the cases the affected person is not entitled to enforce a retraction any longer.

- **Right of answer**

The right of answer is regulated in numerous press laws in each German state (*"Landespressegesetze"*) and in separate statutes ("*Staatsverträge*") for the electronic media, such as TV, radio and the internet. (Only) individuals affected by a publication are entitled to a right of answer, e.g. a person named in a publication. The right of answer is irrespective of the truth of a publication. An answer has to be published under the same conditions as the publication it refers to (e.g. infringement on first page of a magazine then answer has to be published in the same size on the first page, too). The right of answer is limited to facts. There is no right of answer to opinion. The content is

limited only to an answer to the facts contained in the publication. No additional comments are allowed. The statements referred to have to be repeated before the answer is made.

By claiming a right to answer the answer signed by the affected person must be submitted to the media "without delay" (max. 2 weeks after knowledge of the publication). If not published voluntarily, upon request, the claimant has to apply for a court order granting the answer.

4.4. In the case of damages, how are they calculated ?

The German law on damages is based on the principle of restitution in kind ("*Naturalrestitution*"): the infringer shall compensate any damage in order to put the infringed person in the situation he would be in if no damage had occurred (sec. 249 et seqq. German Civil Code). Also regarding infringements or privacy rights in media it has to be evaluated whether compensation in kind is possible. Only when compensation in kind is not possible, the person concerned has a claim for monetary compensation for the material loss suffered (sec. 251, 252 German Civil Code).

Besides a compensation of material damages which can hardly be proven, a case law developed the remedy of compensation for immaterial damage ("*Geldentschädigung*") in media law derived from the protection of personality rights as protected by art 2 German Constitution[7]. The claim for such damages requires a severe violation of privacy or other personality rights, that the media have acted intentionally or negligently, and that the effects of the violation could not be restored by other means (such as reply, retraction, general damages). The rage of granted grated damages claims is in general, depending of the intensity of the infringement, between € 1.000 to € 100.000. Exceptionally a higher compensation may be granted, as for example to Princesses Madeleine and Victoria of Sweden: € 400.000[8]. That was the maximum ever granted. Here some further examples: As already mentioned, Esra was granted a compensation of € 50.000. A person who has been falsely suspected in a press article of having cooperated with the murders of Jürgen Ponto was granted a compensation of Deutschmark 25.000 in 1979. Princess Caroline's

[7] Federal Court of Justice, Judgment of 15.12.1987, file no. VI ZR 35/87; Jugment of 15.11.1994, file no. VI ZR 56/94 – Caroline von Monaco I and Federal Constitutional Court, Decision of 08.03.2000, file no. 1 BvR 1127/96.

[8] Court of Appeal in Hamburg, Judgment of 30.07.2009, file no. 7 U 4/08.

daughter received for an unauthorized publication of baby photographs a compensation of Deutschmark 150.000 in 2004[9].

Recently, different lawsuits were filed by Jörg Kachelmann, a well-known TV meteorologist, who was suspected to have raped a woman, but the criminal court acquitted him. He is claiming € 1,5 Mio. from the newspaper BILD (Axel Springer) and further € 750.000 from bild.de. From the press company BURDA he is claiming another € 1,5 Mio. (for the magazines FOCUS and BUNTE € 750.000 each). The media lawyers in Germany are curious about the outcome …

4.5. In case of disclosure of private information, who can be held liable for damages, especially online?

The perpetrator is liable for damages caused by intentional or by negligent violations. In classic media the press/TV company, the journalist, and the chief-editor are considered as perpetrators.

The online situation is more complicated: Besides the mentioned perpetrators there are intermediaries, like Internet Service Providers (ISP). Arts 12 – 15 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 have be implemented in Secs. 8 – 10 German Telemedia Act. According to this liability privilege ISPs and other intermediaries are not liable for damages and criminal liability. But in respect of own content the intermediary does not have recourse to the liability privilege.

4.6. Are there special defences to a cause of action for information disclosed by the press/ media?

In press articles about persons the privacy right of that person conflicts regularly with the Basic Right of Freedom of the Press (art. 5 subsec. 1. sent. 2 German Constitution). Freedom of the Press means the right of the press and the braodcasting to report freely on everything of public interest without any censurship. It is obvious that the privacy of any single person cannot be unlimited as this would make the reporting of current affairs impossible. In case of a collission of these Basic Rights an equilibrium has to be achieved by a fair balancing (see question 3.1.). On a case-by-case basis it has to be found out which Basic Right prevails in the specific case taking the circumstances of the case into account.

[9] Federal Court of Justice, Judgment of 05.10.2004, file no. VI ZR 255/03.

4.6.1. As part of your answer please explain what is range of news information organisations is covered by the definitions press/ media?

The definition of "press/media" is formal, broad and subject to development. Press includes all kind of printed matters which are intended for distribution like books, newspapers, magazines, CD-Roms, other memory media, etc. If the visuell element dominates, it will be considered as a film. Online media, which means a combination of texts, pictures and sounds will fall in the scope of braodcast.

4.6.2. Is there a specific protection offered to informants/sources?

Art. 5 subsec. 1 German Constitution provides to a certain extent a protection of the confidential relationship between the press and the informant as the press need information from private persons. Therefore, according to German law the press company cannot be forced to disclose the source of information (so-called "protection of journalistic sources")[10].

4.7. Are the principles described in your answers above also applicable to the online world ? Is there any specific case-law in your country relating to social media, and if so please summarise this?

The principles described above also apply to online issues.

The Federal Court of Justice confirm with judgment of 17.12.2013[11] that a compensation for damages suffered due to a privacy violation in an online publication is not per se higher or lower than for a violation in classic print media. The determination criteria are the same for offline and online privacy infringements. The facts of that case were the following: The plaintiff, an inhouse counsel, had been suspected in two printed press articles published by defendant no. 1 of pedophilia. Some weeks later this accusation was repeated by defendant no. 2 on an online portal giving the full clear name of the plaintiff.

10 Confirmed in OLG Frankfurt a. M., judgment of 28.07.2009, file no. 16 U 257/08.

11 file no. VI ZR 211/12

4.8. Are there specific remedies against disclosure of information that (could) damage an individual reputation (such as slander or libel) ? Describe these remedies briefly.

As mentioned above to question 4.4., the court may grant for intensive infringements a compensation for immaterial damage ("*Geldentschädigung*"). An intensive infringement will have to be assumed if the disclosure damages an individual reputation, in particular if the disclosure is classed as slander or libel.

Slanders or libel can also be subject to a criminal complaint. However, punitive damages are not known under German law.

4.9. Forum and applicable law

4.9.1. Describe shortly what rules are exist in your jurisdiction for the determination of the forum and the applicable law.

According to Art. 40 subsec. 1 sent. 2 Introductory Law of the Civil Code ("*Einführungsgesetz zum Bürgerlichen Gesetzbuch"*/EGBGB) a violated person can demand regarding claims for tort that the law at the place where the harm arose ("Erfolgsort") applies instead of the law at the place where the event which gave rise to the harm occurred ("Handlungsort"). Therefore, if the violated person's reputation was harmed in Germany, the person may request an application of German law.

For complaints regarding torts, like privacy right violation, sec. 32 of the German Civil Procedure Code ("*Zivilprozessordnung*") provides that complaints can also (besides the place of seat of the defendant) be filed at any place where the event which gave rise to the harm occurred ("Handlungsort") or where the harm arose ("Erfolgsort"). For example, in case of a privacy right violation in a regional newspaper, competent court is at the seat of the press company and at any place where the newspaper is distributed. As the plaintiff can freely choose between all courts within the newspaper distribution area, it is called "flying jurisdiction" ("*fliegender Gerichtsstand*").

4.9.2. Are there specific rules for breaches caused online (when the information is accessible from different jurisdictions) ?

Different court decisions have been issued as to the above mentioned "flying jurisdiction" does also apply to privacy

right violations in the internet. For example, the court of appeal (*Oberlandesgericht*) of Frankfurt/Main refuses that the plaintiff may choose between all courts in Germany to bring action against an online privacy infringement[12]. According to the Frankfurt judges an obvious relation to the place where the court is located must be proven to have jurisdiction. The Regional court (*Landgericht*) in Hamburg, however, accepts the "flying jurisdiction" also for privacy right violations in the internet[13].

If other jurisdictions are involved, the Federal Court of Justice decided on 29.03.2011 that German court do not have automatically jurisdiction only because the online article which infringes privacy right of a German citizen can be accessed also from Germany. Jurisdiction of German courts requires that there is an obvious link to Germany. According to the court it was neither sufficient that the violated person lived in Germany or that the server was located in Germany. As argument against jurisdiction of German courts the court put forward that the article was published in Russian language and the content was addressed to people living in Russia[14].

But then, the European Court of Justice decided[15] that also the courts in the country where the center of interest of violated person is have jurisdiction according to art. 5 no. 3 Brussel II-Regulation (now art. 7 no. 2 Regulation 1215/2012). The violated person can also file a complaint in any European member state, but there he can only demand part of damages related to that country. Finally, jurisdiction is in the country where the online service provider is seated.

This judgment changed German jurisdiction[16].

4.10. From your experience, what reforms should be made to the legal system of your country to better protect individual privacy, if any?

12 Judgment of 07.02.2011, file no. 25 W 41/10.

13 Judgment of 11.11.2011, file no. 324 S 8/11.

14 Judgment of 29.03.2011, file no. VI ZR 111/10, also Federal Court of Justice, Judgment of 02.03.2010, file no. VI ZR 23/09 regarding the publication of an article in the online archive of The New York Times.

15 Judgment of 25.10.2011, C-509/09 and C-161/10 - eDate Advertising ./. X, Olivier Martinez ./. MGN Limited.

16 Federal Court of Justice, Judgment of 12.12.2013, file no. I ZR 131/12

I consider the German system of protection of privacy right well established and efficient. There is a reasonable balance between freedom of speech/freedom of press on the one hand and privacy rights on the other hand.

A problem that is occurring with the increasing frequency are leakages in public authorities (including prosecutor's office) and companies so that (very) confidential information are passed over to press/media companies and enable those to publish "hot" stories. In cases where criminal investigations are pending I see the problem that such unilateral press can cause a prejudgment in the society.

Often the leakage cannot be identified, so I am afraid that any change in law would not solve the problem.

5. Interplay between data protection rules and privacy rights

5.1. Summarise how does data protection law in your jurisdiction protects privacy or other personal data being used in online media?

As the principle of free self-determination – also regarding personal data – is fundamental in Germany, the consent in an important legal basis for the use of data. German data protection law requires an "informed consent". Difficulties occur in practice in particular regarding the combination of using services (only) while giving a waste consent regarding the use of data.

5.2. Is there an effective a right of opposition to collection of data?

Art. 20 of the German Data Protection Act grants for the affected persons a right of opposition against the collection, storage and use of data. With this provision Art. 14 of the Directive 95/46/EG of the European Parliament and Council of 24 October 1995 has been implemented in German law. Upon opposition the data processor is obliged to assess whether a protection-worthy interest of the affected person prevails the interest of the data processor. If that is the case, the collection and use of the data is to be stopped immediately. But according to German case-law, the opposition must be well founded. The affected person can not only argue that the collection and use of his data is displeased. As the data collection is originally lawful, the

affected person must bring forward good argument why the collection and use causes negative effects in his specific personal situation.

6. Right to be forgotten

6.1. Is there a statutory or case-law based "right to be forgotten" in your jurisdiction (whether under domestic or supranational law)? Describe it briefly.

According to the prevailing academic opinion in Germany, a clearly outlined "right to be forgotten" did not exist before the European Court of Justice issued its Google decision in May 2014 (see question 6.3). Opinions differ as to whether the "right to be forgotten" can be understood as a new Basic Right on European level or whether it is no more, but no less than an evolution of the previous jurisdiction of the Court regarding the protection of personal data.

Although a "right to be forgotten" is not statutory based, it does not come out of the blue: It can be traced back to the European Data Protection Directive 95/46/EC and to art. 7 and 8 of the Charter of the Fundamental Rights of the European Union (see question 2.2.), which read ad follows:

- Art. 7 (Respect for private and family life): *Everyone has the right to respect for his or her private and family life, home and communications.*
- Art. 8 (Protection of personal data):

  1. *Everyone has the right to the protection of personal data concerning him or her.*
  2. *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
  3. *Compliance with these rules shall be subject to control by an independent authority.*

Germany has implemented the European Data Protection Directive in the Federal Data Protection Act. This Act provides a claim for the erasure of private data in its sec. 35 para. 2 sent. 2.

6.2. Is there relevant case law in your jurisdiction regarding the right to be forgotten and/or are there other guidelines (whether under

domestic or supranational legal procedure) for a successful claim under the "right to be forgotten".

There is case law involving online reviews portals. These portals give users the opportunity to rate almost any kind of goods and services, including the services of e. g. physicians and teachers. German jurisdiction takes the view that physicians and teachers have to accept being publicly rated, even being publicly rated a bad physician or a bad teacher. The provider of the reviews portal though is required to delete a rating that heavily infringes on personality rights of the person being rated. This jurisdiction is based on the assessment of privacy rights on the one hand and freedom of speech and public's interest in being informed on the other hand. The keyword "right to be forgotten" is not contained in these decisions, but if privacy rights do prevail about freedom of speech and public interest, the critical evaluation must be deleted – in other words: forgotten.

Not exactly a "right to be forgotten" is affected by the controversy over telecommunications data retention, however the core issue is not that different. It shall only be shortly highlighted here: Germany has not implemented the European Data Retention Directive 2006/24/EC. In April 2014, this Directive was declared invalid by the Court of Justice of the European Union for violating fundamental rights[17]. Therefore, there is no obligation of the member states any more to implement the directive into national law. However, Germany could establish a national law dealing with telecommunications data retention, but currently there seems to be insufficient political support for such a law. Nonetheless, not only a few believe that telecommunications data retention would be useful in order to fight crime and terror. Others point out that the storage of all traffic data is a massive intrusion into privacy. De lege lata, traffic data (the numbers called, time and duration of the connections, the amount of data being transmitted etc.) may not be stored for longer than seven days.

6.3. Did the view on the right to be forgotten change in your jurisdiction due to the European Court of Justice Case in Google Spain v. AEPD and González (C-131/12)? Is there any case law arising from this decision in your jurisdiction?

There already are three published court decisions that refer to the recent decision of the European Court of Justice in the Google case:

[17] Judgment of 08.04.2014 - C-293/12, C-594/12

In a decision issued in August 2014, the Regional Court of Berlin ("*Landgericht Berlin*") dismissed a complaint against Google Germany GmbH. The plaintiff claimed the deletion of some information about him that was available on Google. According to the Court, he would have had to sue Google Inc. instead of Google Germany GmbH[18].

The Regional Court of Hamburg (*"Landgericht Hamburg"*) decided differently in November 2014. Untruthful and slanderous assertions about the plaintiff could be found on the internet. When searching for the plaintiff's name on Google, the search engine displayed the links and little snippets of the websites containing the untrue statements. Google was sentenced to delete the links and snippets[19]. The Court reasoned that in general a search engine operator has no obligation to check whether the search hits contain untruthful assertions. However, in case of an infringement on privacy rights the search engine operator shall balance between privacy rights and public interest and not display slanderous information. In consequence, a search engine operator does not need to undertake an initial check of the search hits but is obliged not to display those hits that severely infringe on privacy rights. But how can a search engine operator know when not checking the search hits?

Finally, the Regional Court of Heidelberg (*"Landgericht Heidelberg"*) had to decide whether a search engine is obliged to delete search results. The Court published its decision in December 2014. The Heidelberg Court submitted arguments similar to those advanced by the Regional Court of Hamburg. However, the two cases were different in an important detail: The Heidelberg plaintiffs had previously informed Google about the search hits and requested their deletion. Initially Google did so, but the information was published again and could be retrieved under a different link (albeit on the same site) that Google did display again. Google did not fulfil the plaintiffs' request to entirely ban the entire site from the search results. The Regional Court of Heidelberg decided that such a request is going too far, but Google must ensure not to display search hits that refer to sites with content that infringes the plaintiffs' personality rights[20].

7. Are there other aspects to take into consideration in your jurisdiction in relation to freedom of speech, the privacy right and the right to be forgotten?

18 Judgment of 21.08.2014, file no. 27 O 293/14

19 Judgment of 07.11.2014, file no. 324 O 660/12

20 Judgment of 09.12.2014, file no. 2 O 162/13.