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The Protection of Personal Names under English and German Law

Supervisor: Professor John Phillips

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Chapter 1: Introduction

This essay deals with the protection of personal names in England and Germany. According to the New Oxford Dictionary of English, the word "name" means "a word by which a person is known, addressed or referred to" as well as "a reputation, especially a good one". The German "Name" has the same two meanings. Both languages clarify that a person's name has a double function. Firstly, it is the most basic and most important means of verbally distinguishing one person from other persons. This can be called the social and economic function of a name. It corresponds to the named person's interest in not being confused with other persons so as to be able to integrate himself in society and to participate in the economy. Secondly, referring to a person's name is a means of referring to that person's reputation. This is the personal function of a name. If a person's name is misused or placed in a false light, this person's reputation is likely to suffer. As a result this person's well-being will be damaged. Everyone therefore has a social and economic as well as a personal interest in his name being protected by the law.

Both functions can be in need of legal protection. On the one hand, a person sometimes will use another person's name to improve his own reputation or business goodwill. Someone might want to be seen as a member of a well-respected family. Alternatively, he might exploit a famous person's name commercially by associating it with his products. In such cases, a person profits from the social and economic value of another person's name. On the other hand, a person sometimes will use another person's name to the detriment of that person's reputation. The recent English press history shows what harm can be done to people by "naming and shaming" them. In such a case, the personal function of the name is affected.

Although the social phenomena described above exist in both England and Germany, both legal systems show very different approaches to the question how and to what extent personal names should be protected. This is partly due to different points of view both administrative systems take towards the importance of name stability. This difference will be shown in chapter 2, which compares the provisions relating to the naming of persons. Apart from that, both systems use very different instruments to prevent the misuse of a name. Name protection is seen as a matter of personality rights law in Germany whereas English law only very recently has acknowledged a right to privacy and traditionally has protected names indirectly through a variety of torts. Besides, it is clear in both countries that not every use of a name to

which the bearer has not consented is illegal. The social importance of names lies in their function as means to refer to people. Being able to refer to people is crucial for every society. It is the result of a balancing of interests which forms of use are permitted and which are not. English and German law value the interests at stake differently and come to different results. The provisions relating to the protection of names in both countries will be set out in chapter 3. In the final chapter the legal situations in both countries will be compared. The importance of a right to privacy for name protection and the influence of codified human rights on the development of such a right will be analysed.

Chapter 2: The Provisions relating to the Naming of People in Germany and England

A) Germany

The parents have the right to choose their child's first name. They are not, however, completely free in their choice. Although there are no statutory provisions relating to first names, it is clear from case law that the parents' right is limited by the interest of the child. The right to choose a child's name is a custody right and under German family law the parents generally have custody rights only with respect to their child's well-being[1]. The parents may therefore not choose a first name that is ridiculous or insulting. Some courts interpret this notion quite stringently; for example, the names "Hemmingway"[2] and "Ronit"[3] were not accepted. Furthermore, the highest German private court, the Federal Court of Justice (Bundesgerichtshof – BGH), has held that, in order to avoid confusion, the first name must correctly indicate the child's sex. An exception applies only to the name "Maria", which may be given to boys, but only when accompanied by a clearly male name[4]; the reason for this exception is a tradition of naming boys "Maria" in catholic regions of the country.

According to § 1616 of the German civil code (Bürgerliches Gesetzbuch – BGB), a person bears his parents' surname. If the parents have different surnames, the child's surname has to be determined according to §§ 1617, 1617a BGB: If the parents have joint custody, they have to agree which of their surnames the child bears; if they have not, the child bears the surname of the parent who has custody.

[1] Gernhuber/Coester-Waltjen Familienrecht § 57 IV 2.
[2] OLG Düsseldorf StAZ 1985, 250 – Hemmingway.
[3] AG Schwerin StAZ 1993, 321 – Ronit.
[4] BGHZ 30, 132 (134-135) – Maria.

The consequences of marriage for a person's surname are regulated in § 1355 BGB: The spouses are supposed to agree on a common surname. They may, however, choose to keep their former names. If they agree on a common name, the spouse whose name is not the common name may attach his or her former name to the common name.

A child's first name and surname are officially registered in accordance with the Civil Status Act (Personenstandsgesetz). Changing first names or surnames is in principle not possible. Name stability is seen as a requirement of an efficient administration[5]. Under § 3 of the Name Changing Act (Namensänderungsgesetz), a first name or surname may be changed if this is justified by an important reason (especially if the name is likely to expose its bearer to ridicule). The change requires an administrative order and is hence governed by public law.

B) England

A person acquires his original name when his name is registered at birth under the Births and Deaths Registration Act 1953. There are in principle no limitations as to what name the parents may choose for their child. It is, however, possible that their choice in extreme cases breaches regulations relating to obscenity or blasphemy.

S 13 of the Births and Deaths Registration Act 1953 provides that it is possible to alter a child's name within twelve months. Although there is a time-limit for the registration, this does not mean that a child's name cannot be changed after this period has expired. Under Common Law, everyone may change his first name and/or surname as he pleases, provided that he does not thereby intend to deceive or defraud another. A person changes his name simply by assuming and using a new name that becomes generally accredited[6]. The parents can change a child's name; the child is not capable of doing so[7].

The change of name can be advertised and evidenced by a deed poll as provided for in the Enrolment of Deeds (Change of Name) Regulations 1983. It should be emphasised that the deed poll itself is not a means of changing the name; names are changed by usage and reputation exclusively.

[5] Staudinger-Weick/Habermann § 12 Rn 148.
[6] *Dancer v. Dancer* [1948] 2 All ER 731.
[7] *Re T. (otherwise H.) (an infant)* [1962] 3 All ER 970.

C) Comparison

The limitations of the parents' right to name their child show the general point of view both legal systems take towards the importance of a person's name as such. In England one's name is a purely private matter with which the state normally does not interfere. In Germany there is much more public interest in personal names. It is remarkable that a change of name is a matter of public law and hard to obtain in Germany but a matter of private law and easy to obtain in England. It is consequent that there are comparatively narrow limitations to what names the parents may choose in Germany since German law does not consider it desirable that a person changes his name. The courts sometimes construe these limitations in an incomprehensibly rigid way, see the "Ronit" case. One explanation for these different attitudes might be that there are compulsory identity papers in Germany but not in England so that name stability is more important for the German administration. For the issue of name protection, the following should be emphasised: A state which limits a person's right to determine his name as strictly as Germany must consider itself under a duty to protect that person's name more than a state like England where such limits hardly exist.

Chapter 3: The Provisions protecting Names in Germany and England

A) Germany

Personal names can gain protection under two legal regimes, personality rights law and trade mark law. Of these, personality rights law is clearly more relevant. Only very seldom is trade mark law invoked in Germany to protect a personal name. I will therefore mainly deal with personality rights law (below I.) and examine only briefly the protection available under trade mark law (II.)

I. Personality Rights Law

1. The History and System of Personality Rights

Under German Law, the protection of personal names is mainly a matter of personality protection. This is remarkable since personality protection as a general concept was alien to German private law until after the Second World War.

The draftsmen of the BGB rejected the idea of granting comprehensive personality protection. When the BGB was drafted in the late 19th century, the opinion prevailed that private law should mainly protect economic rights; public, especially criminal, law should protect non-economic rights. The draftsmen considered it sufficient to protect single aspects of personality, such as freedom of movement and physical well-being[8]. Of those provisions, § 12 BGB, which deals with the protection of names, is of significance for this essay.

Under the impact of the Basic Law (the German Constitution), which was enacted in 1949, German courts construed German delict (tort) law in such a way as to grant injunctions and damages for infringements of personality rights in general. They developed a general clause, known as the General Personality Right, thus granting the comprehensive protection the draftsmen of the BGB had refused to enact.

There are hence today two regimes of personality protection which influence name protection: § 12 BGB and the General Personality Right. Of those, the General Personality Right is subsidiary. It can only apply in cases that do not fall within the scope of § 12 BGB, which is now seen as a Special Personality Right, having in common with the General Personality Right the constitutional basis. If in any case § 12 BGB grants no protection, although the particular case falls within its scope, the General Personality Right cannot help either[9]. I will therefore outline the scope of § 12 BGB first and then analyse the name protection cases covered by the General Personality Right.

2. Protection under § 12 BGB

§ 12 BGB reads as follows:

> "When the right to the use of a name is disputed by another as against the rightful bearer, or when the interest of the rightful bearer is injured by another, who illegally uses the same name, the rightful bearer may demand of the other the discontinuance of this infringement. If further injuries are to be anticipated, he may sue to cause them to be discontinued."

[8] Coing JZ 1958, 558 (559).
[9] MüKo-Schwerdtner § 12 Rn 20.

In applying § 12 BGB, problems arise with respect to the questions what is meant by "name", when a name is "used" and when such use is "illegal". In sections a) to c), I will examine these questions separately. However, they have a common thread in that they can be answered only with reference to the function of § 12 BGB. This function is to protect one's identity. The rightful bearer of a name is interested in being looked upon as the person he actually is. He therefore wants to prevent people from mistaking others for him; otherwise, the behaviour of those others could be attributed to him and his accomplishments to those others[10]. Thus, the basis for the application of § 12 BGB is that there is confusion of identity[11]. This concept of confusion is central for the interpretation of § 12 BGB.

a) „Names" in the Sense of § 12 BGB

It is clear that a person's full name, consisting of first name and surname, is a name in the sense of § 12 BGB (e.g. "John Smith"). The surna me as such (e.g. "Smith") also falls within the scope of § 12 BGB. It is more problematic whether first names as such are also protected: The function of § 12 BGB is to prevent confusion of identity, see above. The public does not normally link a first name as such to a certain person. Such confusion, therefore, usually cannot arise if only a first name is used. By contrast, the situation is different if a (usually famous) person becomes known under his first name only (e.g. as a stage-name). In such a case, the first name identifies that person in the same way as usually the combination of first name and surname does. The BGH has therefore acknowledged that exceptionally first names as such can fall within the scope of § 12 BGB[12]. In order for § 12 BGB to apply it must be shown that the public does associate a particular person with the first name used and does attribute the offender's behaviour to that person since there otherwise is no confusion [13].

Pseudonyms can also fall within the scope of § 12 BGB. A pseudonym is not a "natural" name which everyone bears and which is automatically protected under § 12 BGB. It is again the concept of confusion that provides the test whether § 12 BGB is applicable: If the pseudonym is commonly known, it points to a particular person. In that case, confusion of identity may arise if someone else uses the pseudonym[14].

[10] Staudinger-Weick/Habermann § 12 Rn 38.
[11] BGHZ 30, 7 (10) – Caterina Valente.
[12] BGHZ 110, 196 (200) – Boris Becker; BGH NJW 1983, 1184 (1185) – Uwe.
[13] BGH NJW 1983, 1184 (1185-1186) – Uwe.
[14] BGHZ 30, 7 (9) – Caterina Valente

b) Use of a Name

The rightful bearer of a name may prevent others from illegally using the same name. The main question arising in this context is what "using" a name in the sense of § 12 BGB means. To answer this question it is again necessary to consider the function of § 12 BGB to prevent confusion of identity.

Such confusion most obviously arises if someone calls himself by someone else's name. However, it must be clear to the public that the name of one particular person is used. This is less likely if that name is common[15]: If someone calls himself "John Smith", he usually will not be considered one particular John Smith. If he calls himself "William Smith", he will not be considered a relative of one particular John Smith's. There is hence no confusion as to the identity of the person; § 12 BGB does not apply. It is different if the public regards in a certain context the name "John Smith" as pointing to one particular person (who is very famous). If then somebody calls himself "John Smith", thereby alluding to that person, there is danger of confusion and § 12 BGB applies.

By contrast, someone does not "use" a name by simply mentioning one particular person's name in a publication. In that case, the name indicates exactly the person who is the rightful bearer and no confusion arises[16]. For example, if someone writes a press article about the famous John Smith, he uses that name only to specify the person whose name is indeed John Smith. The public cannot be mistaken as to who bears the name of John Smith. § 12 BGB therefore does not apply in such cases. It is a different question whether John Smith has a right not to be mentioned in public. To answer that question, one must refer to the General Personality Right (see below 3. c) (ii)).

It is sometimes difficult to distinguish between the "using" of a name in the sense of § 12 BGB and the simple mentioning of the name, which does not fall within the scope of that provision. This problem is discussed mainly in two contexts:

The one context is literature. Problems with respect to § 12 BGB arise if a character in a work of literature bears a name which actually exists. The author might intend to write about an existing person, e.g. in a *roman à clef*. In that case, there is no confusion and § 12 BGB does

[15] RG DJZ 1906, 543 – Biedermann; Staudinger-Weick/Habermann § 12 Rn 324.
[16] MüKo-Schwerdtner § 12 Rn 112.

not apply. Whether that person has a right "to be left alone" is a matter of the General Personality Right (see below). If, however, the author mentions that name in a purely fictional work, § 12 BGB applies provided there is confusion, i.e. the public has the impression that the literary character is designed after the rightful bearer of the name[17].

The other context is the commercial use of names: Personal names of individuals might be mentioned in advertisements. The names given to products might be identical to personal names of individuals. Whether such commercial use constitutes an infringement of § 12 BGB depends on the danger of confusion. The BGH developed a test for that in its Caterina Valente decision[18]. Caterina Valente is a well-known German singer. In an advertisement for cleaning liquids for dentures, a fictional singer said: "Even though I did not become as famous as my great colleague, Caterina Valente, the stage was my world. (…)" The BGH pointed out that there would only have been danger of confusion if the advertised product had been wrongly attributed to Ms. Valente in any way. This would have been the case if the advertisement had conveyed the impression either that Ms. Valente was the producer of the product or that she had licensed the advertisement[19]. Since this impression was not conveyed, the use of Ms. Valente's name did not fall within the scope of § 12 BGB. However, the BGH granted her an injunction for an infringement of her General Personality Right (see below). The same test of confusion applies to the naming of products. § 12 BGB hence does not apply when the name is commonly seen as a class designation. In such cases, there is no danger of confusion since that word indicates the nature or style of a product rather than its origin. For example, the current Earl of Sandwich could not prevent a grocery from offering "sandwiches" under § 12 BGB.

c) Illegality

The rightful bearer of a name can only prevent someone else from using that name if the use was illegal. It is obvious that the use is not illegal if the rightful bearer has consented. Problems with respect to illegality arise when someone uses his own name, which is also somebody else's name. In principle, everybody has a right to use his name. The use of that name is not illegal.

[17] RG HRR 1938 Nr. 1583 – Großschieber; Staudinger-Weick/Habermann § 12 Rn 265.
[18] BGHZ 30, 7.
[19] The latter possibility is not mentioned in BGHZ 30, 7; however, the BGH has pointed out in BGHZ 119, 237 (246) – Universitätsemblem that it is sufficient for § 12 BGB if the impression is conveyed that the bearer of the name has licensed the use.

However, an exception to that rule applies when a personal name is used to designate its bearer's business: If there are two competitors in the same line of business and in the same place, there is danger of confusion if both use the same name for their businesses. In such cases, the principle of priority applies. The competitor who began to use his name later in that line of business has to make sure that the public is able to distinguish the businesses. For that sake, he must use a characteristic addition to his name[20].

The principle of priority does not apply in a non-commercial context: If the older bearer were able to prevent the younger bearer from using the name without a distinctive addition, the older bearer would be protected against any enlargement of the group of rightful bearers. This is not the aim of § 12 BGB, which is designed only to prevent the bearer of a name from being confused with someone else who does not bear that name[21].

3. Protection under the General Personality Right

The General Personality Right operates under § 823 (1) BGB. This provision reads:

> "One, who designedly or negligently injures life, body, health, freedom, the property or any right of another is bound to indemnify the other for the injury arising therefrom."

The General Personality Right is seen as a "right" in the sense of § 823 (1) BGB. This does not comply with the intention of the draftsmen of the BGB, who did not acknowledge a General Personality Right. The General Personality Right was developed by the BGH in the Schachtbriefe decision[22]. This development was due to the impact of the German Constitution, the Basic Law (Grundgesetz – GG). It is therefore necessary to examine the constitutional dimension of the General Personality Right before examining its structure and its relevance for name protection cases.

a) The Constitutional Dimension of the General Personality Right

From the very beginning, the General Personality Right was derived from the Fundamental Rights as guaranteed in the GG. Personality rights as such are not mentioned in the GG, but it

[20] BGHZ 14, 155 (161) – Farina.
[21] Staudinger-Weick/Habermann § 12 Rn 283.
[22] BGHZ 13, 334.

is universally acknowledged that they follow from the provisions of Art 1 (1) GG, which protects Human Dignity, and Art 2 (1) GG, which protects the Liberty of Action.

The fact that the GG grants personality rights as Fundamental Rights by itself does not imply that there is a General Personality Right against private individuals. The "classic" function of Fundamental Rights is to grant private individuals rights against the state ("vertical effect") and not against other private individuals ("horizontal effect"). There is hence no *direct* horizontal effect of Fundamental Rights under the GG[23]. However, the German Constitutional Court (Bundesverfassungsgericht – BVerfG) held in the Lüth judgment that those Fundamental Rights constitute an "objective order of values". As norms of an objective content, the Fundamental Rights do have an impact on civil lawsuits[24]. This impact is of an indirect nature: The Fundamental Rights of the GG oblige the state to protect their bearers. Because a private individual's personality is threatened both by the state and by other private individuals (e.g. the media), the state must protect personality against those others. This applies to the legislature, which must enact sufficient protective provisions. It also applies to the courts, which must construe existing statutes in accordance with the GG[25]. Therefore, the BGH bases the General Personality Right against private individuals on an indirect horizontal effect of Art 1 (1), 2 (1) GG[26].

b) The Structure of the General Personality Right

The General Personality Right differs from the expressly mentioned rights in § 823 (1) BGB in that it does not have clear boundaries. It is a general clause. Its scope is to be determined in any given case by comprehensively balancing the interests of the parties[27]. This balancing is necessary because the defendant might also invoke Fundamental Rights or other legitimate interests, e.g. the Freedom of Speech. In such a situation neither the plaintiff's Personality Right nor the defendant's right prevail automatically.

[23] With the exception of Art 9 (3) GG, which expressly mentions such direct horizontal effect of the Freedom of Association.
[24] BVerfGE 7, 198 (205) – Lüth.
[25] Stern, Staatsrecht III/1, 1582-1586.
[26] BGHZ 26, 349 (354-355) – Herrenreiter.
[27] BGHZ 15, 133 (143) – Mephisto.

The advantage of a general clause is that it is more flexible than several special personality rights. Since no one can foresee every situation in which somebody injures someone else's personality, the courts consider such a flexible structure necessary[28].

However, the scope of the General Personality Right has been more precisely determined by case law. The case law of the German courts and especially the BGH can be systematized to derive categories of cases that regularly fall within the scope of the General Personality Right. It is sometimes also possible to determine the process of balancing the interests: In certain groups of cases the General Personality Right normally prevails. The defendant must then claim special circumstances to justify his behaviour[29].

In the next section, I will examine only those categories of cases that are usually mentioned in context with name protection, but it should be emphasised that the General Personality Right in principle grants comprehensive protection against all forms of encroachment of personality, not only in the mentioned groups of cases.

c) Name Protection under the General Personality Right

The General Personality Right applies in name protection cases when somebody mentions a name without using it in the sense of § 12 BGB. Two groups of cases mainly become relevant in context with name protection. They can be called "protection against misrepresentation" and "the right to anonymity".

(i) Protection against Misrepresentation

It constitutes an infringement of the General Personality Right if somebody is misrepresented to the public. It is not necessary that the misrepresentation is defamatory or threatens economic interests. The fact that the misrepresented person is "placed in a false light" and hence his public image is distorted is sufficient. The courts interpret that notion of distortion very broadly. Whenever a person is alluded to in a context that does not suit his image, such an allusion falls within the scope of his General Personality Right. Mentioning a name is one of the most obvious forms of such an allusion.

[28] BGHZ 13, 334 (338) – Schachtbriefe; Staudinger-Hager § 823 Rn C16.
[29] Larenz/Canaris Schuldrecht II/2 § 80 II.

The Caterina Valente case (see above 2. b)) provides an example: The advertisement did not convey the impression that Ms. Valente had anything to do with the advertised cleaning liquid for dentures or that she had licensed the advertisement. According to the BGH, however, the fact that her name was mentioned in an advertisement alone was capable of influencing her public image. The BGH held that it is in principle everybody's right to choose how he is presented to the public. This includes the right to choose whether he wishes to be mentioned in advertisements. Dragging Ms. Valente into the context of an advertisement hence infringed her General Personality Right[30].

A misrepresentation in the mentioned broad sense is in principle illegal and no further balancing of interests is necessary since no one has a legitimate interest to misrepresent another person[31].

The judgment of the BGH in Caterina Valente is now settled case law and not disputed in the recent literature. It is not, however, convincing. The BGH acknowledged that the advertised product was not associated with Ms. Valente in the advertisement. The advertisement did not exploit her fame to improve the impression the product made on the public. The simple mentioning of her name had a purely rhetorical function. Such rhetorical use of a name in advertisements should be allowed for the following reason: Advertisements like any other text are drafted in a particular social context, which is defined by particular places, historical events and persons. Alluding to this context does not place the mentioned person in a false light. A sensible reader of the advertisement could infer from it merely that Ms. Valente was a famous artist and that other artists might see her as a role model. This was true and in line with how Ms. Valente probably wanted to appear to the public. It can therefore hardly be said that there was any misrepresentation. The question the BGH should have asked is whether Ms. Valente had the right to anonymity in context with advertisements (see below (ii) for details of the right to anonymity). The answer should have been in the negative since she was a public figure and defined the social context of the advertisement. The advertisement did not exploit Ms. Valente's reputation, it merely confirmed her reputation. Ms. Valente had deliberately sought publicity to build up that reputation. She hence had chosen to be

[30] BGHZ 30, 7 (12) – Caterina Valente mentions as another condition that Ms. Valente's reputation was likely to suffer because of the nature of the advertised product. This further condition is now obsolete, it is everybody's right to determine in how far his name is used in advertisements, see BGHZ 81, 75 (80) – Carrera.
[31] Larenz/Canaris Schuldrecht II/2 § 80 II 1 b.

represented in just the way she was represented in the advertisement. In trying to suppress the advertisement Ms. Valente acted inconsistently. She therefore should have lost her case.

(ii) The Right to Anonymity

Problems arise when a name is mentioned in public without misrepresenting its bearer, e.g. in correct media reports. The General Personality Right grants protection against the disclosure of information about a person and includes a right to anonymity[32].

However, if private individuals disclose information about other private individuals, a conflict can arise between the General Personality Right and the Right to Freedom of Speech, which also is protected in the Basic Law as a Fundamental Right (Art 5 (1) GG). The Right to Freedom of Speech corresponds with a public interest that the truth about individuals may be told. Because of the outstanding importance of Art 5 (1) GG, which is crucial for the functioning of democracy, the courts hold that in principle the truth may be told. Others may only suppress the truth if overriding legitimate interests justify that. The General Personality Right is capable of constituting such an interest. It does not, however, prevail automatically. In order to determine which right prevails in a particular case, the interests at stake must be evaluated and then balanced.

On the one hand, the extent of the encroachment on the General Personality Right must be determined. The protection gets the weaker the more the person himself has communicated the matter to others. If a person has made a matter public himself, mentioning his name in context with that matter is less harmful to him. In contrast, the protection gets the stronger the more intimate the matter is. Most intimate matters may never be revealed to the public[33].

On the other hand, the public concerns have to be valued. A person may not be mentioned in public if there is no public interest in mentioning him; for example, it is illegal to refer in a book to criminal proceedings against a person after the charge has been withdrawn[34]. By contrast, the BVerfG holds that there is a presumption in favour of the Freedom of Speech when a statement is made concerning a matter that is of considerable public interest[35]. It is

[32] Neumann-Duesberg JZ 1970, 564 (566).
[33] BGHZ 73, 120 (124) – Stern.
[34] KG NJW 1989, 397.
[35] BVerfG NJW 1994, 2943 – Soldaten sind Mörder.

therefore in principle legal to mention a person who is either himself of public interest ("absolute figure of contemporary history", e.g. politicians, football players) or who is in some way connected to a person or matter of public interest if the mentioning concerns this person or matter ("relative figure of contemporary history", e.g. judges in spectacular cases).

How the balancing of interests works can be seen from the Lebach decision of the BVerfG[36], which is the leading case of the right to anonymity. The plaintiff was involved in the murdering of four soldiers in Lebach in 1969. He was sentenced to six years imprisonment as an accessory. Shortly before his release, the defendant television station was planning to broadcast a documentary film about the murders in which his picture was shown and his name was mentioned several times. The plaintiff claimed an injunction. The BVerfG pointed out that there was considerable public interest in information about the spectacular Lebach murders. However, the film would have an immense public effect that was likely to hinder severely the plaintiff's reintegration into society; in the terms of the BVerfG, he would be "stigmatised" when trying to begin a new life. The media had already comprehensively reported on the Lebach murders in 1969, thus satisfying the public interest. Hence, reporting about the murders and the trial had been legal, but the broadcasting of the documentary film would have had a new and especially severe impact on the plaintiff's privacy and therefore constituted an infringement of the plaintiff's General Personality Right.

It should be emphasised that, in the Lebach case, the General Personality Right prevailed only because the plaintiff could be identified using the information given in the documentary (name and picture). In 1996, another television station planned to broadcast a documentary about the Lebach murders in which the murderers were neither shown nor named. The BVerfG held in its Lebach II decision[37] that the General Personality Right does not involve a right not to be confronted with one's past as long as one's reintegration into society is not threatened; the Lebach murderers therefore could not prevent the broadcasting of the documentary.

[36] BVerfGE 35, 202.
[37] BVerfG NJW 2000, 1859; see also Cole NJW 2001, 795.

4. Legal Consequences of Infringements of Personality Rights

The victim of an infringement of any personality right may claim an injunction. This is expressly mentioned only in § 12 BGB, but is also universally acknowledged for the General Personality Right (§§ 823, 1004 BGB)[38].

If the defendant has infringed the plaintiff's personality rights deliberately or negligently, the plaintiff may also claim damages under § 823 (1) BGB. Two kinds of damages may be granted under § 823 (1) BGB, material damages and immaterial damages.

Material damages can be calculated in three ways (triple damages): If the plaintiff names and proves a specific sum he has lost, he may claim that sum. He may claim the profit the defendant has obtained by infringing his name right; in that context, it does not matter whether the plaintiff would have been able to obtain the same sum by exploiting his name himself[39]. The plaintiff may also claim adequate royalties from the exploitation of his name[40]. It is controversial whether a person can claim triple damages even if this person would not have licensed the use of his name and hence would never have realised this commercial interest[41]. The current tendency in the case law of the German courts is that personality rights are more and more seen as economic rights. It can be expected that hence triple damages will in the future always be awarded. This is deplorable since someone who does not want to commercialise on his personality acts inconsistently if he later claims royalties. The fact that such a person has an even stronger interest in being protected against exploitation of his name should be considered when it comes to awarding immaterial damages (see below).

Problems arise with respect to immaterial damages. § 253 BGB states that immaterial damages may only be claimed if this is expressly stated. There is no statutory provision granting immaterial damages for infringements of personality rights. However, the courts do grant such damages on condition that a severe infringement of a personality right has occurred and that other remedies are not sufficient to compensate for it. The BGH has first granted immaterial damages in its Herrenreiter decision[42]. It has later pointed out the reasons for this: Personality forms a central part of the objective order of values as stated in the GG. If there

[38] BGHZ 99, 133 (136); Staudinger-Hager § 823 Rn C 258.
[39] BGHZ 60, 206 (211) – Miss Petite.
[40] BGHZ 20, 345 (353-354) – Paul Dahlke.
[41] Staudinger-Hager § 823 RN C 255.
[42] BGHZ 26, 349.

were no monetary compensation for immaterial damages, personality protection would often fail to fulfil the protective duty which Art 1 (1), 2 (1) GG impose on the state. The impact of the GG hence justifies the construction of a remedy *contra legem*[43]. According to the recent Caroline von Monaco judgment, the amount due as compensation is to be determined with respect both to the satisfaction of the victim and to the preventive effect of that compensation[44]. Such punitive damages were formerly alien to the German legal system; this again illustrates the strength of the impact of Art 1 (1), 2 (1) GG.

II. Trade Mark Law

Names that are used commercially may also gain protection under Trade Mark Law. The Trade Mark Act (Markengesetz – MarkenG), which was enacted under the impact of EC Directive 89/104/EEC, provides in § 3 MarkenG that names can be protected as trade marks and in § 5 MarkenG that they can also be protected as designations of businesses. To be protected as trade marks, names must either be registered or generally recognised in the participating markets. Designations of businesses cannot be registered but gain protection only through recognition.

It is not possible to preclude someone else's name rights by registering his name as a trade mark: Everybody whose name someone else wants to register can prevent this under § 13 MarkenG. The owner of a trade mark that is also somebody's personal name may not prevent that other person from using his name in a commercial context, § 23 MarkenG.

If a trade mark or designation of business is infringed, the owner may claim an injunction and damages under § 14 MarkenG (trade mark) or § 15 MarkenG (designation of business). Damages are calculated in the same way as under personality rights law.

It is not necessary under German law to claim trade mark rights for names since the MarkenG does not preclude the application of § 12 BGB and § 12 BGB is the more comprehensive provision, covering commercial as well as non-commercial uses of names[45]. Where the scopes of the MarkenG and § 12 BGB overlap, the MarkenG does not go further than § 12 BGB[46];

[43] BGHZ 35, 363 (367) – Ginsengwurzel; BGHZ 39, 124 (131-32) – Fernsehansagerin.
[44] BGHZ 128, 1 (15) – Caroline von Monaco; this decision was strongly influenced by Princess Caroline's advocate, Matthias Prinz; see also Prinz NJW 1996, 953 (955).
[45] Althammer/Ströbele/Klaka § 15 Rn 18.
[46] Staudinger-Weick/Habermann § 12 Rn 230/234.

this is especially true because of the possibility to claim triple damages under § 12 BGB. It is hence not astonishing that name protection under Trade Mark Law has only very seldom been claimed before German courts.

B) England

Lord Chelmsford held in *DuBoulay v. DuBoulay*[47]:

"In this country we do not recognise the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. (…) (The) mere assumption of a name which is patronymic of a family by a stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our law affords no redress."

It is still true that there is no name protection as such available in England. However, the torts of passing off (see below section I.), defamation (III.) and malicious falsehood (IV.) can in certain circumstances be applied to protect one's name against improper use. It is also possible to protect one's name by registering it as a trade mark (II.). The equitable remedy of breach of confidence (V.) is sometimes suitable to protect one's anonymity. The scope of confidence law (and thereby of anonymity rights under English law) is currently expanding considerably under the impact of the Human Rights Act 1998 (VI.).

I. Passing Off

The requirements for a passing off action have been set out by Lord Diplock in *Warnink v. Townend*[48] as "(1) a misrepresentation (2) made by a trader in the course of trade (3) to prospective customers of his or ultimate consumers of goods or services supplied by him (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to the business or goodwill of the trader by whom the action is brought or will probably do so". The objective of the tort of passing off is to protect a trader's business goodwill[49].

In order for a passing off action to succeed, there must be a misrepresentation on the part of the defendant that is likely to mislead the public. An obvious example where the

[47] [1869] LR 2 PC 430.
[48] [1979] AC 731.
[49] Young Passing Off 5.

misrepresentation concerns names is as follows: A trader assumes the name of another trader who pursues the same business and markets his products under that assumed name. In that case, it is probable that the public will be misled as to the origin of the products marketed.

Problems arise if a trader uses a personal name to market his products without assuming it, especially in advertisements and in the merchandising industry. The tort of passing off is designed to protect a trader's business goodwill. It is therefore necessary for the plaintiff to claim that his goodwill has been damaged. If, however, soap is named after an actor, his reputation or goodwill in his business (acting) will not suffer whereas he is not involved in the business of producing or selling soap. In such a case, there may therefore be a misrepresentation in that the actor is wrongly associated with certain goods, but no confusion on the side of the public will occur that is likely to lead to damage to that actor's goodwill.

The English courts have hence initially refused to apply passing off in merchandising cases. They developed the doctrine that the plaintiff and the defendant must have a common field of activity. The precedent that initiated this doctrine was *McCulloch v. Lewis A May Ltd*[50]. The plaintiff was a famous broadcaster who used the pseudonym "Uncle Mac". The defendant sold cereal under the name "Uncle Mac". Wynn -Parry J held in his judgment that since the plaintiff was not involved in either the producing or marketing of cereals no confusion could occur. A similar reasoning can be found in *Sim v. H J Heinz Co Ltd*[51]. The plaintiff actor's voice was mimicked in television advertisements for the defendant's food products. It was held that since the plaintiff was in the business of acting and not of making or selling soups and baked beans passing off did not apply.

The reasoning in *Lyngstad v. Anabas Products Ltd*[52] seems to suggest a less restrictive approach. The plaintiffs were a pop group whose names and pictures the defendant had printed on badges. Oliver J stated that the common field of activity is merely an indicator of possible confusion. He held that the test for passing off is whether "reasonable people might think that the plaintiff's activities were associated with the defendant's good or business, at least to the extent of implying some sort of approval on the part of the plaintiff". One might argue that if a name is used on a product the public is misled not as to the source of the product but as to whether the bearer has consented to the use of his name. The public would

[50] [1948] RPC 58.
[51] [1959] 1 All ER 547.
[52] [1977] FSR 62.

then assume a trade connection between the advertiser and the bearer of the name that in fact does not exist. Oliver J, however, applied the test more restrictively: The plaintiffs neither were running a business with which the defendant's goods could be confused nor was it sufficient that the public might think that they had licensed the use of their names. In this situation, passing off could have applied only if it had at least been inferred that the plaintiffs exercised some sort of quality control over the defendant's products. *Lyngstad* is significant because Oliver J stated that the common field of activity is not a rule of law but only one indicator to be considered when assessing the possibility of confusion. That said, by construing the concept of confusion as narrowly as he did, Oliver J made it almost impossible for the plaintiff in a merchandising case to show confusion. The public will not assume that the plaintiff has given his approval to the defendant's goods or business as long as the defendant does not need such approval to be allowed to use the plaintiff's name. Since Oliver J did not acknowledge that the plaintiffs in *Lyngstad* did have a business goodwill in the licensing business, he in effect used a different language from *McCulloch* and *Sim* but did not widen the scope of passing off considerably.

A major change came in *Mirage Studios v. Counter-Feat Clothing Ltd*[53]. The plaintiff in that case was the designer of a cartoon character who also licensed various merchandising activities concerning that character, including its reproduction on goods. The defendant made drawings of characters similar to those of the plaintiff and licensed these to garment manufacturers for reproduction on clothes. Browne-Wilkinson VC rejected the common field of activity as a condition for passing off. He held that there was a misrepresentation in that the buying public expects that where a famous character is reproduced on goods, the owner of the copyright in that character licenses such reproduction. He also held that the plaintiff's goodwill had suffered: Although the plaintiff did not produce or market goods himself, his licensing activities were part of his business. Those licensing activities were likely to suffer because of the defendant's behaviour. The goodwill in the plaintiff's licensing business was protected.

The implications of *Mirage Studios* for name protection cases are unclear. Browne-Wilkinson VC distinguished *Mirage Studios* from *Lyngstad* by stating that there was no property in a name under English law whereas *Mirage Studios* concerned material in which the plaintiff had a copyright. If a property right is a precondition for passing off in licensing cases, *Mirage*

[53] [1991] FSR 145.

Studios indeed does not apply where names are concerned; some commentators consequently take the view that the common field of activity doctrine in effect has to be applied where names are used[54].

Browne-Wilkinson VC did, however, also state that cases such as *Lyngstad* might "require reconsideration" in the light of "the change in trading habits". The distinction between *Mirage Studios* and *Lyngstad* seems quite artificial. The key question in *Mirage Studios* was not whether the material in question was protected by copyright law but whether the plaintiff had business goodwill in his licensing business. Once this question is answered in the affirmative (as was rightly done in *Mirage Studios*) there is no reason not to apply the same reasoning to name protection cases. It is irrelevant in that context that English law does not acknowledge a property right in a name as such since it is not the name itself but its bearer's licensing business that is protected. The public assumption of a licence should therefore be considered sufficient for the application of passing off in name protection cases[55].

However, passing off has its limits even under this broad construction: For the plaintiff's goodwill to be damaged, the plaintiff must be in the licensing business (as was the case in *Mirage Studios*) or at least be planning to pursue such business[56]. Passing off if construed broadly thus protects not the name but its bearer's own merchandising activities. It is not possible for someone who does not want his name to be used at all to protect his interest by bringing a passing off action. The reason for this is that English law does not recognise a property right in one's name as such.

The plaintiff in a passing off action may claim an injunction and damages. Damages are based upon the actual loss attributable to the passing off. It is not possible to calculate damages on a royalty basis[57].

II. Trade Mark Law

S 1 (1) of the Trade Marks Act (TMA) 1994, which was enacted under the impact of EC-Directive 89/104/EEC, expressly mentions the possibility of registering personal names as

[54] Bainbridge Intellectual Property 625. The decision in *Nice and Safe Attitude Ltd v. Piers Flook,* [1997] FSR 14 supports this point of view.
[55] Drysdale/Silverleaf Passing Off 3.55.
[56] See Drysdale/Silverleaf Passing Off 3.54.
[57] *Dormeuil Frères SA v. Feraglow Ltd,* [1990] RPC 449.

trade marks if they are capable of distinguishing goods or services of one undertaking from those of other undertakings. Trade marks are registered for certain classes of goods or services in accordance with s 32-34 TMA 1994.

Difficulties may arise with respect to s 3 (1) (b) TMA 1994, which precludes the registration of trade marks which are devoid of any distinctive character. A name may be inherently distinctive (if it is unusual) or acquire distinctiveness through use (although it is common).

However, a name that was once distinctive can lose distinctiveness if it becomes so well-known through use as to be a household word. In such a case, the name no longer refers to the origin of a product but it describes the product or some quality of the product. It was thus held in *TARZAN Trade Mark*[58] that the word "Tarzan" had passed into everyday language by 1965, when the estate of its inventor applied to register the mark, and the registration was denied.

A related reasoning can be found in *Elvis Presley Trade Marks*[59]. The successor in title of Elvis Presley's merchandising activities applied for trade mark registration of the words "Elvis" and "Elvis Presley" and the signature "Elvis A Presley". The plaintiff had a registered trade mark "Elvisly Yours" and opposed th e application. The Court of Appeal held that customers who buy products with the word "Elvis" on them do not expect those products to be "genuine" in the sense that Elvis Presley's estate has produced them or licensed the use of the name "Elvis". They buy an "Elvis" product because "it carries the name or likeness of Elvis and not because it comes from a particular source".

It seems doubtful whether the judgment in the *Elvis* case is in line with the reasoning in *Mirage Studios* (see above 1.). Walker LJ in his judgment called *Mirage Studios* "clear and convincing" but stressed that it "does not give a green light to extravagant claims based on any unauthorised use of a celebrity's name, but makes clear (...) the relatively limited scope of the principle on which it proceeds". One might try to distinguish both cases in that *Mirage Studios* concerned a passing off action whereas *Elvis* was about trade mark law. However, the key question is the same in both cases: Do customers rely on the "genuineness" of a merchandising product they buy? This question is answered in the affirmative in *Mirage Studios* with regard to the circumstances of the case (especially the fact that the plaintiff had a copyright in the turtle characters). It is answered in the negative in *Elvis* where merely the

[58] [1970] RPC 450, decided under the old TMA 1938.
[59] [1999] RPC 567, decided under the old TMA 1938.

protection of a personal name is concerned. The judgment in *Elvis* therefore indicates that the reasoning in *Mirage Studios* might be more confined to the particular case than some commentators assumed (see above I.).

However, this reasoning leads to the astonishing result that someone with a very common name (e.g. "John Smith") may not register his name as a trade mark because it lacks distinctiveness until he has become famous, but if he is too famous his name loses the acquired distinctiveness again and may not be registered.

Apart from that, the protection which trade mark law provides concerns not the name itself but its commercial exploitation. By registering a name, someone may prevent others from using it in the field of business where he wishes to commercialise on it himself. Registering a name is not a means of protecting a name against any kind of exploitation by anyone since s 32 (3) TMA 1994 requires that the applicant uses or intends to use the trade mark.

The proprietor of a trade mark may restrain others from using identical or similar marks for goods or services identical with those for which the trade mark is registered, s 10 TMA 1994. The proprietor may bring an action for infringement according to s 14-21 TMA 1994 and claim an account of profits, the erasure of the sign, the destruction of the infringing goods or the delivery up to him.

III. Defamation

The tort of defamation protects a person's reputation against a statement of fact that exposes him to hatred, contempt or ridicule or lowers him in the esteem of right-thinking members of society[60]. There are two forms of defamation, libel and slander. The difference between them is that libel concerns statements in a permanent form, slander oral statements. This distinction is important because the plaintiff in a libel action does not have to prove special damage whereas the plaintiff in a slander action usually does.

Defamation can operate in name protection cases if someone assumes someone else's name and then either acts in a disreputable way or makes a disreputable statement. It has for example been held that printing a story of inferior quality under the name of a well-known

[60] *Parmiter v. Coupland*, [1840] 151 ER 340.

author may be defamatory[61]. A similar case has, however, been solved by applying passing off[62]. Such cases now fall under s 84 Copyright, Designs and Patents Act 1988, which prohibits attributing a work of art to a person who has not produced it. This does not depend on the quality of the work. This solution seems more convincing than applying passing off: It is not desirable that judges have the task to value a piece of art when settling a dispute. The quality of a poem or a painting should be judged by later generations of art lovers and experts, not by contemporary lawyers.

Defamation is sometimes invoked to protect a name against commercial exploitation. The leading case for this is *Tolley v. Fry Ltd*[63]. The plaintiff, an amateur golfer, was pictured on an advertisement poster with a slab of the defendant's chocolate protruding from his pocket. The accompanying caddy compared the quality of the chocolate with the plaintiff's excellent performance. The plaintiff claimed that the defendant thus had committed a special kind of defamation called innuendo. Innuendo means that the words used by the defendant affect the plaintiff's reputation only when seen together with other facts known to the recipient of the statement. The House of Lords held that the advertisement conveyed the impression that the plaintiff had agreed to the advertisement for gain and had hence violated his amateur status.

This reasoning has been called "an ingenious use of the tort of defamation to combat the commercial appropriation of personality"[64]. It is, however, clearly confined to the circumstances of the particular case since it would not apply to a professional sportsman. Besides, even amateurs (such as Olympic athletes) do license merchandising activities today; therefore, *Tolley* would probably be decided differently. It cannot be inferred from this decision that the unauthorised use of a personal name is generally defamatory. The mere fact that someone seems to have authorised such use does not damage his reputation[65]. Defamation is hence no suitable means to protect one's name against improper use in advertisements if there are no special circumstances that render the advertisement defamatory.

One might finally consider applying the tort of defamation to protect one's anonymity against the disclosure of true disreputable facts. This is normally not possible because the truth of the

[61] *Ridge v. English Illustrated,* [1913] TLR 592.
[62] *Lord Byron v. Johnson,* [1816] 2 Mer. 29.
[63] [1931] AC 333.
[64] Markesinis/Deakin, Tort Law, 652.
[65] See *Sim v. H J Heinz Co. Ltd.,* [1959] 1 All ER 547.

reported matter justifies its publication[66]. There is one exception to this rule: Under the Rehabilitation of Offenders Act 1974, people who have committed certain minor offences have the right that their spent convictions be not mentioned in public after a certain period has elapsed. S 4 (1) of the Act provides that the offender must be treated for all purposes in law as a person who has not committed the offence that was the subject of the conviction. However, s 8 of the Act limits the protection granted as regards defamation because the ordinary rules of justification apply if the publication was not made with malice. In effect, the Act only protects against malicious publications.

The plaintiff who successfully brings a defamation action may claim an injunction as well as damages. Damages are not restricted to the monetary loss flowing from the lost reputation but include an enlarged award in cases of outrage (aggravated damages) and possibly even a punitive element[67].

IV. Malicious Falsehood

The tort of malicious falsehood protects the plaintiff against a maliciously made false statement that causes financial loss. It differs from defamation in that the plaintiff has to prove that the statement is false and that it was made with malice; if he succeeds in doing so, however, he need not show that his reputation has suffered.

Malicious falsehood is potentially relevant in name protection cases since such cases often concern statements that do not harm the plaintiff's reputation, see above III. It was therefore applied in *Kaye v. Robertson*[68]. The plaintiff was an actor who had undergone brain surgery after a car accident. The defendant journalists interviewed him in hospital while he was recovering from that surgery and took photographs of him. When they announced their intention to publish the interview and photographs, the plaintiff claimed an injunction because he had not consented to the interview, of which he had no recollection shortly afterwards. The Court of Appeal held that the publication was libellous, its reasoning being based on *Tolley v. Fry Ltd*. However, it hesitated to grant interlocutory relief on this ground since it considered the case arguable. It therefore went on to apply malicious falsehood. The false statement was that the plaintiff had consented to the interview.

[66] Gatley on libel and slander, 11.1.
[67] *Rookes v. Barnard,* [1964] AC 1129.
[68] [1991] FSR 62.

The judgment in *Kaye v. Robertson* shows the limits of the tort of malicious falsehood in name protection cases: There would have been no false statement if the defendants had published the interview and photographs while admitting that the plaintiff had not consented. The tort of malicious falsehood hence grants no right to be "left alone"; it merely guarantees that if facts about a person are revealed and those facts were acquired by an invasion of that person's privacy, the intruder cannot state that he acquired the facts with the person's consent. This concerns the form of the statement, not its content.

Kaye v. Robertson is finally remarkable because although the Court of Appeal only granted an injunction in that case Glidewell LJ mentioned the possibility of awarding damages on a royalty basis. He stated that the plaintiff had "a potentially valuable right to sell the story of his accident and his recovery when he is fit enough to tell it". The value of this right would have been lessened if the defendants had been allowed to publish their story. This is remarkable since English courts refuse to award damages on a royalty basis in name protection cases when they apply passing off (see above I.). The tort of malicious falsehood might be of interest for plaintiffs even in cases where the conditions for a passing off action are fulfilled.

V. Breach of Confidence

The law of breach of confidence protects against the disclosure of confidential information. It can be used to protect one's anonymity: Whereas one's name as such is not confidential, a person can prevent others from naming him in context with confidential information. Megarry J proposed a test in *Coco v. A N Clark Ltd*[69], according to which three conditions must be satisfied for breach of confidence to apply: (1) The information must have the necessary quality of confidence about it. (2) The information must have been imparted in circumstances importing an obligation of confidence. (3) There must be an unauthorised use of that information to the detriment of the party communicating it.

The owner of some piece of information cannot simply state whether that information is confidential. Matters that lie within the public domain are not protected. Confidentiality is destroyed if the information was communicated to the public or to third parties in the absence of an obligation of confidence. Apart from that, overriding public interests may justify the

[69] [1969] RPC 41.

publication of confidential information. Since there is also a general public interest in maintaining confidences, both interests must be balanced to assess the confidentiality of the information. Factors that influence this assessment are for example whether the plaintiff has sought favourable publicity himself (in that case he cannot complain if the public is given true information that is less favourable)[70] or the scope of the disclosure (it might be appropriate to inform a responsible body but not the media)[71].

Further problems arise with respect to the condition that there must be an obligation of confidence. There is clearly an obligation of confidence if this is expressly stated in or can be derived from implied terms of a contract between the parties. For example, employers and employees owe each other duties of confidence that result from the contract of employment. These duties can even survive the termination of the contract, although then the former employee has an interest in being allowed to use the skills and experience he has built up in his former employment and this interest must be considered when assessing the obligation of confidence[72].

There can also be an obligation of confidence without a contract. In *Argyll v. Argyll*[73], the plaintiff was the former wife of the defendant, who had published details of her personal conduct and financial affairs. Ungoed-Thomas J held that an obligation of confidence could arise independently of any right of property or contract. He went on to state that "there could hardly be anything more intimate or confidential than is involved in that relationship {i.e. marriage}". The scope of breach of confidence is considerably expanded in *Argyll v. Argyll*. However, it seems still clear from Ungoed-Thomas J's reasoning that there must be a relationship between the confider and the confidant. If construed in that way, breach of confidence provides protection against betrayal, but not against intrusion into one's privacy and hence confers only a partial right to anonymity.

The plaintiff who successfully brings an action for breach of confidence may claim an injunction or damages. If the information has been exploited commercially, the plaintiff may be awarded an account of profits.

[70] *Woodward v. Hutchins*, [1977] 2 All ER 751.
[71] *W v. Egdell*, [1990] Ch 359.
[72] *Faccenda Chicken Ltd v. Fowler*, [1986] 1 All ER 617.
[73] [1967] Ch 302.

VI. Widening the Scope of Confidence Law

The scope of confidence law has been further expanded in two recent decisions. Under the impact of the Human Rights Act (HRA) 1998, which implements the European Convention on Human Rights (ECHR), the courts have applied the principles of confidence law in order to create a right to privacy. This is remarkable since English law had not acknowledged a right to privacy before – the Court of Appeal had stated and heavily deplored that in *Kaye v. Robertson* (see above IV.).

In its judgment in *Douglas* (see below 1.), the Court of Appeal has held that an obligation of confidence can arise even though there is no relationship between the confider and the confidant – thus protecting one's privacy against intrusions as well as betrayal. In *Venables and Thompson* (see below 2.), the High Court has declared that information is confidential if it requires "a special quality of protection" – thus perhaps laying the foundation of a right to anonymity under English law.

1. The Obligation of Confidence

The Court of Appeal granted protection against intrusion under confidence law in *Douglas and Zeta-Jones v. Hello! Ltd*[74]. The plaintiffs were famous actors; the defendant had published non-authorised photos of their wedding. It was not clear whether an intruder, with whom no relationship of trust or confidence existed, had taken these photos. The Court of Appeal held that even then the publication of the photos would not be permitted since it would infringe the plaintiffs' privacy rights.

The court put forward two arguments for acknowledging a right to privacy: Firstly, it held that English law had developed since *Kaye v. Robertson* and was now "in a position to respond to an increasingly invasive social environment by affirming that everybody has a right to some private space." Secondly, the court considered the impact of the right to privacy as guaranteed in Art 8 ECHR. Under s 6 (1) HRA 1998 the court was obliged to give effect to the Convention rights. It pointed out that although Art 8 ECHR lacks horizontal effect, the obligation imposed on the state in s 6 (1) HRA 1998 included considering the right in civil lawsuits. The right to privacy as stated in the ECHR therefore does have an indirect impact on

[74] [2000] WL 1841643 at http://westlaw.co.uk.

private law. On the other hand, the right to freedom of speech as guaranteed in Art 10 ECHR also has to be considered, see s 12 HRA 1998. Both rights are subject to qualifications, see Art 8 (2) and 10 (2) ECHR. The boundaries of the private right to privacy hence have to be assessed by balancing it with the right to freedom of speech. This assessment has to follow the principle of proportionality and to take into consideration the circumstances of the particular case. In the words of Sedley LJ: "Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court."

After *Douglas* the law, according to Sedley LJ, "no longer needs to construct an artificial relationship of confidentiality between intruder and victim". The right to privacy protects against any disclosure of confidential information if in the particular case this right overrides the right to freedom of speech. The scope of confidence law has thus been widened as concerns the necessary obligation of confidence.

2. Confidentiality and Anonymity

The question that now arises is whether the concept of confidentiality can similarly be expanded: Otherwise, confidence law would still only protect against the disclosure of a certain type of information. A person's name and identity as such can normally hardly be called confidential. Under English law, therefore, there is no general right to anonymity: A person does not have a right "to be left alone" in the sense that this person may in principle prevent the media from disclosing any information about him, subject to justification through overriding public interest.

There are, however, certain statutory anonymity rights. The Rehabilitation of Offenders Act 1974, which prohibits the reporting of certain minor offences, has already been mentioned (see above III.). Another statutory right to anonymity is provided for in the Sexual Offences (Amendment) Act 1992. S. 1 of the Act states that the identity of the victims of certain sexual offences may not be disclosed through publication. Such publication is made a criminal offence in s. 5 of the Act.

It is highly controversial if there should also be some protection available for offenders who do not fall within the scope of the Rehabilitation of Offenders Act 1974. In a recent decision,

the High Court has expanded the concept of confidentiality and thus perhaps laid the foundation to a more general approach to anonymity.

This issue had first been raised in *Re X*[75]. Mary Bell, who had killed two boys when she was 11, had been living under a new identity after her release from prison and had given birth to a daughter when a Sunday paper found out her identity. Balcombe J in the High Court granted an injunction prohibiting the paper to disclose Mary Bell's identity because this was necessary to protect Mary Bell's daughter, who was a ward of court. Mary Bell's anonymity therefore was protected, but only indirectly because of the court exercising its wardship jurisdiction to prevent harm from her daughter. The question was not raised whether Mary Bell had a right to anonymity herself.

However, confidence law was applied to protect an offender's right to anonymity in the recent judgment in *Venables and Thompson v. News Group Ltd*[76]. The plaintiffs had murdered a two-year-old boy when they were ten years old. They sought and were granted an injunction *contra mundum* to prevent the disclosure of the new identities they were to be given on their future release from prison. Butler-Sloss J applied *Douglas* and stated that "a duty of confidence may arise in equity independently of a transaction or relationship between parties". She then turned to the crucial question whether the plaintiffs' identities as such were confidential. She held that the duty on the court to protect Convention rights also involved expanding the concept of confidentiality where this was necessary to safeguard those rights. She hence widened the scope of confidentiality: "Under the umbrella of confidentiality there will be information which may require a special quality of protection".

This need for protection has to be assessed by proportionately balancing the interests at stake. Butler-Sloss J stated that the plaintiffs' interest in their anonymity outweighed the public interest in being informed about their identities and whereabouts because their lives would be in danger if their identities were disclosed. Her Honour therefore resolved the case by balancing the right to life (Art 2 ECHR) and the right to freedom of speech (Art 10 ECHR).

Butler-Sloss J expressly left open whether the plaintiffs' right to privacy (Art 8 ECHR) alone would have been sufficient to grant an injunction but doubted that it would:

[75] [1984] 1 WLR 1422.
[76] [2001] WL 14890 at http://westlaw.co.uk.

"Serious though the breach of the claimants' right to respect for family life and privacy would be, once the journalists and photographers discovered either of them, and despite the likely serious adverse effect on the efforts to rehabilitate them into society, it might not be sufficient to meet the importance of the preservation of the freedom of expression."

The decision in *Thompson and Venables* might itself well be in breach of Human Rights: Third parties not involved in the proceedings possibly have not had the chance to submit their opinions on the case. The injunction *contra mundum* is, however, legally binding for such third parties. It seems doubtful whether such a procedure satisfies the requirements of the right to a fair trial as guaranteed in Art 6 ECHR.

This problem set aside, it is remarkable that Butler-Sloss J did not openly value the public interest in the disclosure of the plaintiffs' identities. Her Honour merely held that it was her task "to take measures, within the scope of (her) powers, which might (be) expected to avoid" the risk to the plaintiffs' lives. However, what measures can be expected depends among other factors on whether there is public interest in those measures not being taken. It can hardly be assumed that the right to life is a "trump card that always wins" in the balancing of interests. One would otherwise have to conclude from the judgment in *Thompson and Venables* that whenever the disclosure of information threatens a person's life this person may seek an injunction. This is clearly not correct since there may be overriding reasons for disclosing such life-threatening information. For example, a corrupt politician should not be able to prevent the media from reporting his corruption on the ground that otherwise some people might try to lynch him. The decisive difference between this hypothetical case and *Thompson and Venables* lies not in the rank of the rights threatened by the disclosure: Art 2 ECHR does not distinguish between more valuable and less valuable lives. The difference is that the politician is a public figure and his corruption a public matter of essential importance for the functioning of democracy whereas the plaintiffs' identities in *Venables and Thompson* are of purely sensational interest. The balancing exercise the courts are bound to perform under the extended law of breach of confidence therefore necessarily includes valuing the information that is to be suppressed. It is regrettable that Butler-Sloss J did not expressly do so.

Since Butler-Sloss J did not rule on the right to privacy itself, it cannot be said that English law has acknowledged a privacy right to anonymity yet. The reasoning in *Venables and Thompson* is confined to the circumstances of the particular case, where the atrocity of the plaintiffs' crime had raised media interest and public demands for revenge to an extraordinary

extent. This judgment can hardly be seen as a precedent allowing every major offender to invoke anonymity rights. Its real significance probably lies in the expansion of the concept of confidentiality: This notion is now a means to balance the interests at stake. If a person seeks anonymity for overriding reasons (which will only seldom be the case) anonymity will be granted. Confidence law is now a suitable means to fulfil the duties imposed on the courts by s. 6 HRA 1998 whenever the disclosure of information threatens Convention rights.

Chapter 4: Comparison

The chapters on the substantive law of England and Germany had to follow the structures implicit in each legal system. For the sake of comparison it seems more appropriate to start from the social phenomena that are common to both countries. Three groups of cases have to be solved in each legal system: A person assumes another person's name (see below A). A person commercially exploits another person's name (B). A person names another person in public and hence encroaches on that person's anonymity (C).

Both legal systems now acknowledge a right to privacy. In both legal systems this is due to the impact of human rights. This impact will be analysed and evaluated in section D. A final conclusion will summarise the results obtained.

A) Protection against the Assumption of a Name

In Germany the bearer of a name can prevent somebody else who does not bear that name from assuming and using it if such use causes the possibility of confusion, § 12 BGB[77]. For two reasons this is a sound consequence of the general attitude towards names the German legal system takes: Firstly, a merely assumed name is not considered a person's name legally[78]; the person who has assumed the other person's name has no legal interest in being protected when using the assumed name. Secondly, the bearer of the name cannot change or modify his name to do away with the confusion; he needs to be protected.

In England the bearer of a name cannot prevent the use of that name by another person. This is as sound a consequence of the fact that everyone is free to change his name as he likes

[77] Chapter 3 A) I. 2.
[78] Chapter 2 A).

under Common Law[79]. If in a particular case confusion arises to the detriment of third parties, the law relating to fraud may help those third parties.

Neither system protects the interest of the bearer of a name in exclusively bearing his name. He cannot prevent others from lawfully bearing the same name. This again seems reasonable if law is seen as a mechanism to secure the functioning of society since the social function of a name is to distinguish people from each other and not to be a source of pride.

The existing differences between both legal systems are due to different administrative law systems: The German one is based on the necessity of name stability, the English one is not.

B) Protection against the Commercial Exploitation of a Name

This group of cases is based on two phenomena to be found in every modern market economy: Firstly, products are advertised to increase sales, "advertising" in that sense including the naming of the product. Secondly, celebrities are suitable means for such advertising. A celebrity may have two different interests in being able to control the commercial exploitation of his name: He might want to commercialise his name and to secure his market value by ensuring that others may only use his name with his permission. Alternatively, he might not want his name to be exploited commercially at all.

German law does not distinguish between these interests. It offers comprehensive protection against any commercial use of a name. § 12 BGB and the General Personality Right enable a celebrity to prevent every non-consented use of his name in advertisements or product names[80]. According to the hardly convincing decision of the BGH in Caterina Valente, this is even true for the mere mentioning of a name in an advertisement.

The bearer of the name has powerful tools at hand to protect his interest in his name not being used. He can claim an injunction and in severe cases even immaterial damages. Furthermore, everyone whose name is used commercially can claim triple damages. The effect of awarding triple damages is that the economic interest a person has in his name is comprehensively protected. The German courts have not yet fully acknowledged that personality rights are economic rights but the case law relating to the legal consequences of infringements of such

[79] Chapter 2 B).
[80] Chapter 3 A) I. 2. and 3. c).

rights clearly points in that direction. This notion should, however, be only expanded cautiously to avoid supporting inconsistent behaviour[81].

English law is ambiguous as regards the commercial interests of the bearer of the name but quite clear when it comes to his interest that his name be not used at all.

The bearer of a name who wants to exploit his name himself by licensing its use might obtain some protection under the law of passing off[82]. This is unclear because it is not certain whether the common field of activity doctrine still applies in name protection cases. If this doctrine is decisive for such cases, licensing activities will almost never be protected under passing off. The decision in *Mirage Studios* points in that direction since it links the application of passing off to an underlying property right. It is, however, not convincing to restrict passing off in such a way: Passing off is an economic tort and should be adjusted to changing economic contexts. The courts should accept that a celebrity can have goodwill in the business of licensing the use of his name since this business is now sufficiently known in Western economies to gain protection under economic torts.

The bearer furthermore may register his name as a trade mark[83]. The judgment in *Elvis Presley Trade Marks* restricts this possibility because the requirement of distinctiveness of the name is construed very stringently; this construction is based on the assumption that the public will not expect the use of a name to be licensed when products are advertised using that name. This assumption contradicts the assumption in *Mirage Studios* that people who buy clothes with certain cartoon characters on them do believe the owner of the copyright in those characters has licensed their use. It is even less in line with the assumption in *Tolley* that a sportsman who is depicted and named in an advertisement has consented to the use of his picture and name. Apart from leading to a doubtful result, the judgment in *Elvis Presley Trade Marks* is regrettable because it is paradoxical if the same factual question (what does the public expect when seeing a name associated with a product?) is answered differently in different branches of the law. Besides, it leads to a circular argument if this question is made a precondition for the protection of names against non-consented use: Whether the public expects that the use of a name is licensed or not broadly depends on whether it is a requirement for legal use that it be licensed. The crucial question really is if the law should

[81] Chapter 3 A) I. 4.
[82] Chapter 3 B) I.
[83] Chapter 3 B) II.

acknowledge and therefore protect the licensing business. This question should be answered in the affirmative in all the relevant areas of law if one does not want to ignore recent economic developments.

As to the bearer of a name who does not want his name to be used at all, his situation does not seem satisfactory under English law as it stands. He is no trader and therefore is not protected by passing off and trade mark law: He might have the opportunity to license the use of his name, but this is exactly what he does not want to do. The case law so far does not suggest that someone who merely could be a trader if he chose so can invoke economic torts. Defamation only applies in exceptional circumstances. Besides, even in such circumstances defamation applies only if the public thinks that the bearer has licensed the use of his name[84]. The bearer of a name who publicly announces that he does not want his name to be commercially exploited cannot later base a claim on defamation: There is no innuendo since the public certainly cannot assume that he has licensed the use of his name. The same would be true for malicious falsehood even if one - quite boldly - saw in the mere use of a name the false statement that this use had been licensed (which is not a view the English courts have taken so far).

The result is astonishing: A person who has declared that he does not want his name to be exploited commercially cannot do anything against such commercial exploitation. This is so even though no one has a stronger or more legitimate interest in his name not being used than such a person. Furthermore, it seems possible to adjust existing remedies to provide the bearer of a name with sufficient protection as regards his economic interests. By contrast, applying passing off or trade mark law to the situation of someone who merely wants "to be left alone" with his name does hardly seem possible and neither does it seem possible to extend the scopes of defamation or malicious falsehood without totally blurring the boundaries of these torts.

It can be concluded that English law if construed adequately can protect the interests of a person who wants to commercialise on his name as well as German law does but fails to protect the legitimate interests of a person who does not wish to exploit his name at all. This is so because English law does not recognise a property right to one's name or a right to privacy (at least not in this context); the protection a personal name gains against commercial

[84] See the judgment in *Tolley v. Fry Ltd.*

exploitation under English law is mainly a corollary of the protection of its bearer's economic activities.

C) Protection of Anonymity

The concept of anonymity can be legally approached in two ways. One might take the view that a person's name may not be mentioned in a particular (dishonourable) context. The right to anonymity would then depend on and stem from the circumstances of the mentioning of the name. It is also possible to imagine a right to anonymity that does not depend on such circumstances. Its content is that a person's name may in principle not be mentioned to the public at all unless there is some substantial overriding public interest.

English law recognizes only a right to anonymity dependent on context under the law relating to breach of confidence. After the scope of confidence law had been widened in *Michael Douglas* and *Venables and Thompson*[85] it can be said that a person's anonymity is protected against the disclosure of information that "requires a special quality of protection". In assessing that special quality of protection it is necessary to balance the interests of the person who wants to remain anonymous against the right to freedom of speech of the person who wants to disclose the information in question. The outcome of that balancing exercise will mainly depend on the circumstances of the case at hand.

By contrast, German law does acknowledge a general right to anonymity under the General Personality Right[86]. The BVerfG held in the Lebach decision: "Everyone has the right to determine himself alone whether and to what extent others may represent in public an account of his life or of certain incidents thereof." If someone wants to mention someone else's name to the public he will have to show an overriding legitimate interest to do so. The right to freedom of speech provides such an interest. To assess which interest outweighs the other, they have to be balanced in the light of the circumstances of the particular case.

The main difference between the English and the German approaches can be expressed in terms of how the general rule and the exception are stated. A German who wants to make a public statement about another person in theory should always balance the interests at stake and continue to make his statement only if he is satisfied that his interests outweigh the other

[85] Chapter 3 B) VI.
[86] Chapter 3 A) I. 3. a) (ii).

person's. An Englishman in the same situation only has to check if the situation is so exceptional that such a balancing exercise seems necessary. This is the same point Brooke LJ made in his judgment in *Michael Douglas* when comparing English law and the ECHR. He stated that English law was based on freedoms rather than on rights:

"Whereas Article 10 of the Convention, in accordance with its avowed purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of freedom of speech, and turn to our law to discover the established exceptions to it."

Although both legal systems differ in their starting points, when there is a dispute they both require the judge to balance the interests at stake. It might be argued that the existing methodical difference is of no practical relevance. When comparing the leading cases of the right to anonymity in both countries, however, one encounters remarkable differences in the weight both legal systems accord to the conflicting interests. *Venables and Thompson*, which is very controversially discussed in England, would be seen as a clear case of the General Personality Right prevailing in Germany. On the other hand, it seems unlikely that an English court would have granted the plaintiff anonymity in the Lebach case, which is clearly in a very different category of case to *Venables and Thompson* in terms of imposing an obligation of confidentiality. The different approaches can therefore be seen as expressing different points of view both legal systems take towards the right to freedom of speech. An English lawyer might argue that the German courts interfere with this right far too much and thus in Germany there is no genuinely free press, which is an indispensable institution in every democracy. His German counterpart might answer that every institution in a democracy must be limited in its powers and that it is desirable to protect people's privacy against the kind of sensational journalism that seems to be common in England. The future will perhaps show which concept prevails in a European legal order.

D) The Impact of Human Rights

From the very beginning, the German courts have based the (private) General Personality Right on the impact of constitutional Fundamental Rights, namely Art 1, 2 GG[87]. Since the Lüth judgment they have held that although the main addressee of those rights is the State, they constitute an "objective order of values" that has to be considered when settling private

[87] Chapter 3 A) I. 1.

disputes. According to the BVerfG, the Fundamental Rights are the normative basis of the German legal system. Every public authority must consider them whenever it makes a decision. The effect of the Lüth judgment is that this is true even in the field of private law. The General Personality Right was therefore developed to fulfill a protective duty on the State.

Similarly, the English courts speak of an indirect horizontal effect of the ECHR[88]. In his judgment in *Michael Douglas* Brooke LJ relied on both the recent developments of the Common Law and the impact of the HRA 1998 to conclude that English law now recognized a right to privacy. This is in line with the approach of the European Court of Human Rights, which held in *Botta v. Italy*[89] that "there may be positive obligations inherent in effective respect for private and family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves." Brooke LJ concluded that positive duties on the State to protect the rights set out in the Convention arise from those rights themselves and must now be considered by the English courts. It was therefore in his view irrelevant that Art 1 ECHR, which imposes on the contracting states a duty to secure the rights set out in the Convention, was not implemented by the HRA 1998. It seems clear that the Act served as a welcome springboard for the English courts to establish the right to privacy.

The English and the German legal systems now both recognise that there is an indirect impact of human rights on private lawsuits and that the courts must consider human rights when deciding such lawsuits. This has led both systems to acknowledge a right to privacy. The question that remains is whether this development should be seen as a progress or not. Here lawyers in both countries take quite different points of view.

In Germany there is a Constitutional Court which in personality protection cases often serves as a guide that assesses the balancing of interests the ordinary courts have performed. For example, the decision of the BGH to award immaterial damages for infringements of personality rights was brought before the BVerfG, which upheld it[90]. The BVerfG is not, however, a court of review. It only has jurisdiction to examine whether decisions of the ordinary courts infringe provisions of the GG, which is the case only if the ordinary courts

[88] Chapter 3 B) VI. 1.
[89] [1998] RJD-I 412.
[90] BVerfGE 34, 269 – Soraya.

severely misjudge the impact of those provisions on a particular case. The BVerfG may not simply substitute its own judgment for that of the ordinary courts if there is no such infringement. Some commentators fear that the BVerfG tends to exceed this limit to its jurisdiction and to decide how to construe the law or even to make the law itself, thus laying the foundation for an "oligarchy of the constitutional court"[91]. This is the main concern when it comes to scrutinising judgments in private lawsuits in Germany. No one in Germany doubts today that the Fundamental Rights do have an impact on private lawsuits as well as no one doubts that the General Personality Right is necessary.

By contrast, many commentators in England have concerns that are far more fundamental. Some people see the implementation of the ECHR as a threat to democracy. They argue that the courts are given too much power to scrutinise whether acts of public authorities comply with the ECHR although judges are not appointed democratically. The self-restraint that is visible in the judgments in *Michael Douglas*, where Brooke LJ tries to show that the right to privacy was not alien to the English legal system before that judgment, and in *Venables and Thompson*, where Butler-Sloss J refuses to apply the right to privacy to the case, may well be due to such concerns. In the light of those concerns it is not clear if the English courts will generalise the right to privacy to cover cases which clearly fall outside the scope of confidence law. The unauthorised commercial exploitation of names is an example.

E) Conclusion

People feel a need for protection of their names. In numerous cases in England and Germany, persons have wanted to ensure that they are not without their consent dragged into the public by media reports or advertisements. The social phenomenon that people's names are frequently used without their consent in different ways is a challenge both legal systems need to respond to.

In Germany the most important decision has been made in the 1950s under the impact of the newly enacted GG. By recognising the General Personality Right the German courts enabled themselves to address every case which concerns one's personality, be it through intrusion, appropriation of one's likeness or the damaging of one's reputation, under the same heading. The General Personality Right provides a flexible mechanism that can be adjusted to the

[91] See for example Brohm NJW 2001, 1.

particularities of the case at hand. Despite its flexibility its scope is not intolerably uncertain since it has been clarified by case law.

The traditional English approach was to apply several torts, many of them originally designed to protect economic interests, in name protection cases. While this somewhat patchy method often has led to just results, its limits have become clear in some cases where the English courts could not protect a person's privacy although there was a clear need to do so. For example, if the defendants in *Kaye v. Robertson* had not conveyed the impression that the plaintiff had consented to the interview, the plaintiff would have lost his case although he still would have had a legitimate interest in being left alone while recovering from brain surgery. The judgments in *Michael Douglas* and *Venables and Thompson*, however confined to the circumstances of the particular case they may be, are significant because they show that English judges are willing to use the HRA 1998 as a springboard for the introduction of a right to privacy into English law. It remains to be seen whether the English courts will confine this right to anonymity cases or will also reconsider their restrictive approach towards the protection against commercial exploitation.

The introduction of a right to privacy into English law should be welcomed. A right to privacy enables the judges to address cases which mainly concern a person's privacy under that heading rather than under the heading of an economic tort. The deplorable gaps in the protection of people who only want to prevent commercial exploitation of their names without wishing to commercialise their names might finally be filled. It is quite a different question whether the right to privacy should be acknowledged as an economic right. There are good reasons for answering this question in the affirmative.

The introduction of a right to privacy means that judges have to balance the interests at stake. This balancing exercise includes valuing these interests. It seems probable that the English courts will be more reluctant than the German courts to restrict the right to freedom of speech when non-defamatory statements are concerned. This difference is essentially due to a difference in political culture. It will have to be considered if one day perhaps the privacy laws of both countries are harmonised.