



Protecting the freedom of the press

THE CASE:

Bunte GmbH v Princess Caroline of Hanover

Federal Constitutional Court of Germany (Bundesverfassungsgericht)

8 December 2011

Bardehle Pagenberg's **Dr Philipe Kutschke** reports the modern tale of Princess Caroline's fight for personality and privacy rights and how this time, *Bunte* magazine prevailed

In its most recent decision regarding the balancing of conflicting fundamental rights, namely the right of freedom of opinion on the one side and personality rights on the other, the Federal Constitutional Court of Germany provided further guidance and clarification.

The court found that the criteria regarding admissibility of reports about celebrities applicable for photographic reports are not *per se* applicable for text reports, because the standards of evaluation are different. The significant factor is the correct consideration of the information interests of the general public and the meaning and scope of the right of freedom of opinion.

The case involves an article published by the German press magazine *Bunte*, which broadly described across six pages, the landscape, the hotels and the celebrities holidaying in the skiing resort of Zürs. In two passages, the article referred to Princess Caroline of Hanover, née Princess of Monaco, as follows, "Regular guest Caroline of Monaco goes on skiing-holidays in Zürs every year – mostly with her family. Not to attract attention, she is carrying her skis herself".

Further to that, "A few kilometers further: the sportive and elegant resort Zürs. The familiar terrace of the "Lorünser" where a lunch buffet, including delicious salads, is

served as always. This includes, like every year, the very inconspicuously behaving Princess Caroline, wearing a ski suit".

The Princess initiated court proceedings against further publication of the article by *Bunte* by way of interim proceedings and main action. The Princess focused on the two text passages whereas the photos of the Princess used in the article were not subject of the proceedings.

"The Appeal Court, without even holding a hearing, rejected *Bunte's* appeal against this decision, arguing that the contested text passages illegally invade the Princess' privacy, because the text provides details about her holiday patterns."

In the first instance of interim proceedings, the Berlin District Court had ordered *Bunte* to omit publication of the first of the quoted text passages, because it infringed the Princess' personality rights (the right of an individual to control the commercial use of his/her name, image, likeness or other aspects of one's identity). The right of freedom of opinion

claimed by *Bunte* had to stand back, because the contested text neither included an event of general interest nor an event of "current history". Upon appeal filed by the Princess, the Appeal Court ordered that *Bunte* also had to cease publication of the second text passage.

In main proceedings, the Berlin District Court ordered that *Bunte* had to cease publication on both of the mentioned text passages. The Appeal Court, without even holding a hearing, rejected *Bunte's* appeal against this decision, arguing that the contested text passages illegally invade the Princess' privacy, because the text provides details about her holiday patterns³.

Bunte filed a constitutional complaint against the decision of the Appeal Court in main proceedings. The Federal Constitutional Court allowed the constitutional complaint and, contrary to the lower instances, decided in *Bunte's* favour, overruling the lower instance and remanding the case to the Appeal Court for further consideration⁴.

According to the Federal Constitutional Court, the District Court of Berlin and the Appeal Court had misconceived the meaning and scope of the right of freedom of opinion (Article 5 (1) Sentences 1, 2 of the German Constitution) in their decisions and erroneously considered that the Princess' personality right should prevail (Articles 2 (1) and 1 (1) German Constitution).

In particular, the Appeal Court had not adequately considered that the reference to the Princess in the contested text passages was not the main focus of the report. Rather, the comments referring to the Princess of Monaco merely served to illustrate the report. The main intention of the report was to introduce the ski region of Arlberg, informing about its landscape, hotels and their owners and the fact that many celebrities spend their vacations in this region. Under such circumstances, it is not admissible to consider the information interests of the public as being irrelevant, the public having a legitimate interest in knowing which celebrities spend their holidays in Arlberg, because celebrities are subject to the general public's interest. Therefore, many people want to learn where celebrities go on vacation, because they may want to choose a holiday resort visited (or even not visited) by these celebrities.

The Princess was only mentioned in two short passages of the report (comprising over six pages in total) and these passages did not concern her privacy in a strict sense, which is protected under Articles 2 (1) and 1 (1) German Constitution. This was because her holiday habits were only briefly mentioned and the information of the contested text merely includes trivialities, whereas the text does not disclose the exact place or time regarding the Princess' holiday stays in Arlberg.

The Federal Constitutional Court criticised the Appeal Court for applying the legal criteria applicable to photographs, although the matter in dispute strictly concerned text passages of the article. For instance, the Appeal Court had simply stated that the contested text neither includes an event of general interest nor a "current history" event, which are criteria typical for the case law on photographic reports, but not *per se* applicable in cases concerning the text of an article.

Finally, the court held that in the process of weighing conflicting interests, it is also important to consider the informational value of the article. The greater the informational value for the general public, the more the personality rights of the person concerned must stand back to this interest in information. Conversely, the personality rights weigh more the less informational value the report provides for the general public⁵.

The present decision is in conformity with the case law of the European Court of Human Rights (ECHR), emphasising the importance of the freedom of press.

As a rule, the right of freedom of expression and freedom of the press does not only protect expression of opinion, but also statements regarding facts if the latter are true and if they can be the basis for formation of opinion⁶. The

protected sphere of freedom of the press also includes entertaining reports concerning the private and everyday life of celebrities and the social circles in which they move, particularly concerning persons maintaining a close relationship to them⁷. According to earlier case law of the Federal Constitutional Court, "In a democratic society, this may well be an occasion for a factual debate of interest to the general public⁸". In this respect, "The courts are called upon to take account of the fact that the guarantee of freedom of the press serves not merely the subjective rights of the press, but serves equally to protect the processes of public opinion-forming and thus the citizens' freedom to form opinions⁹."

Moreover, one has to distinguish between the publication of photographs on the one side and the reporting without any photographs on the other, because protection of the personality right (Articles 2 (1) and 1 (1) German Constitution) is not unitary, but subject to a varying scope of protection. Whereas publication of the picture of a person always requires a justified restriction of the personality right, the publication of a text report referring to a person requires justification only under particular circumstances, depending on the specific facts of the case¹⁰.

The Federal Constitutional Court strengthens the rights of the press by clearly stating that the mere fact of mentioning the name of a celebrity together with everyday events does *per se* not amount to infringement of personality rights. The general public's interest regarding events involving or surrounding celebrities is a legitimate interest as far as it does not affect the inner core of the right of privacy. Consequently, celebrities are generally not entitled to prevent being mentioned in the text of an article in a newspaper or magazine where the names are included as an illustrative side aspect of the article.

In this context, it is also worth mentioning that the ECHR only recently dismissed two applications filed by the Princess and Prince August of Hannover who had accused German courts of infringing Article 8 ECHR by not granting an injunction against the publication of holiday photos of them, taken in the middle of a street in St Moritz, the famous ski resort in Switzerland. The court *inter alia* argued that the Princess and her husband are not ordinary people and that the photos themselves were not offensive to the point of justifying their prohibition. In this context, the ECHR confirmed that the German graduated system regarding the right to the personal image (§ 23 German Artistic Copyright Act [KUG]) complies with Article 8 ECHR¹¹. On the same day, the ECHR decided that German

courts had erroneously granted an injunction against publication of an article reporting about a celebrity who had been caught at the Oktoberfest with drugs. Consequently, the ECHR came to the conclusion that German courts had infringed Article 10 ECHR¹².

Footnotes

1. *Bunte*, Edition No 7/2007 dated 8 February 2007. [In German].
2. *Bunte*, Edition No 7/2007 dated 8 February 2007. [In German].
3. District Court of Berlin, decision of 28 February 2008, case no 10 U 263/07 – *Caroline of Monaco v Bunte*.
4. German Federal Constitutional Court, decision of 8 December 2011, case no 1 BvR 927/08 – *Caroline of Monaco v Bunte*.
5. German Federal Constitutional Court, decision of 26 February 2008, case no 1 BvR 1602/07 – *Caroline of Monaco v Spiegel*.
6. German Federal Constitutional Court, decision of 14 November 2007, case no 1 BvR 1555/88 – *Coordination v Bayer-Gefahren eV*.
7. German Federal Constitutional Court, decision of 26 February 2008 (64), case no 1 BvR 1602/07 – *Caroline of Monaco v Spiegel*.
8. German Federal Constitutional Court, decision of 26 February 2008 (13), case no 1 BvR 1602/07 – *Caroline of Monaco v Spiegel*.
9. German Federal Constitutional Court, decision of 5 August 1966, case no 1 BvR 512/64 – *Spiegel-Verlag Rudolf Augstein GmbH & Co KG v Germany*.
10. German Federal Constitutional Court, decision of 15 December 1999, case no 1 BvR 653/96 – *Caroline of Monaco v Bunte*.
11. ECHR, decision of 7 February 2012, application nos 40660/08 and 60641/08 – *Hannover v Germany*.
12. ECHR, decision of 7 February 2012, application no 39954/08 – *Axel Springer AG v Germany*.

Author



The practice of Philippe Kutschke comprises advice and litigation in IP-related matters, in particular in the field of trademarks, copyrights and designs. Besides his work as a lawyer, he lectures on trademark and design law at the Technical University of Munich and regularly publishes articles concerning IP-related topics.