[DE] Federal Constitutional Court on the Inheritability of Assets Pertaining to the Right of Privacy

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The Federal Constitutional Court arrived at a decision on 22 August 2006 on a case in which there was a judicial initiative by the court, relating to the inheritability of assets pertaining to the right to privacy. The Court's decision was the outcome of a lawsuit involving the use of a picture of Marlene Dietrich for advertising purposes.

In 1993 the defendant in the original proceedings and subsequent plaintiff who deals in photocopying machines promoted the environmental friendliness of her equipment in a newspaper advertisement using a photograph of a well-known scene from the film „The Blue Angel" with Marlene Dietrich being represented by a similarly dressed person and making reference to the "Blue Angel" environmental label. The daughter and sole heir of Marlene Dietrich thereupon sued, initially unsuccessfully, for damages in the civil courts asserting the right to payment of a licence fee. This was not appropriate, however, either in the view of the defendant or in that of the State and Regional Appeal Court, as even in the case of an infringement of the postmortem right to privacy there was no case for damages.

The Federal Court, on the other hand, found for the plaintiff, arguing that the general right to privacy served to protect not only ideal but also commercial interests of privacy (see IRIS 2000-1: 14). The owner of the right to privacy was accordingly entitled to claim damages, if assets pertaining to the right to privacy had been culpably violated by unauthorised use being made of the picture. The corresponding powers to authorise were transferable to the heirs of the owner of the right to privacy.

The defendant then lodged an appeal on a constitutional issue, objecting that there had been an infringement of her civil liberties under Art. 2 paragraph 1 GG (general freedom of action) in conjunction with Art 20. paragraph 3 GG (the judiciary subject to the law), since the Federal Court had not observed the limits imposed on the judiciary. In accordance with this decision the Federal Constitutional Court now dismissed the complaint. The legal recognition of the possibility of commercialising the rights to one's own likeness was constitutionally just as unobjectionable as the assumption by the Federal Court that the assets pertaining to the right to one's own likeness should pass to the heirs after the

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death of the owner.

It is true that the judicial initiative could not be justified on the grounds that the binding requirements of the Constitution were thereby made concrete, as the Basic Law recognised no postmortem protection of privacy from commercial exploitation which did not constitute at the same time an offence against human dignity. However the Basic Law did not prevent the simple recognition of such protection. In the view of the constitutional judges, the courts concerned must have felt that the legal situation arising from copyright law (KUG) required supplementation. Originally §§ 22 f (KUG) (protection of likenesses) referred simply to the protection of ideal interests. Nowadays, however, the right to one's own likeness has developed beyond that ideal protective position. As a result of technical developments and the enhanced significance of the media, the possibility of commercialising assets pertaining to the right to privacy has increased in frequency, scale and intensity. The commercialisation of the likeness of a celebrity for advertising purposes is now seen as commonplace. Similarly, like the recognition of assets pertaining to the right to privacy, in the view of the court the determination of who is entitled to the assets and particularly whether this should only be those entitled to give consent is a matter for judicial initiative.

In this connection, the appraisal by the Federal High Court of Justice is likewise not open to criticism, it being more in line with the key thinking of the civil code to concede such pecuniary interests to the heirs.

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