[DE] Federal Court of Justice Rules on Media Privilege

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In the context of a final appeal of points of law, the *Bundesgerichtshof* (Federal Court of Justice - BGH) recently dealt with the scope of, and limits to, the so-called "media privilege (*Medienprivileg*), which defines the relationship between data protection and freedom of speech. In its judgment of 1 February 2011, the BGH gave media and press freedom priority over the interests claimed by the plaintiff.

The case had been brought by one of the two murderers of the actor Walter Sedlmayr who had been sentenced to life imprisonment (see also IRIS 2010-2/9). He had been released on parole in January 2008 and had complained about an article published by the defendant at its internet news portal on 12 April 2005. That article reported that the *Landgericht Augsburg* (Augsburg Regional Court) was examining the possibility of reopening the criminal proceedings and mentioned the plaintiff's full name. The plaintiff wanted to prevent this as he considered that mentioning his name had an adverse impact on his interest in being reintegrated into society. In his opinion, greater priority should be attached to that interest than to the defendant's interest in publishing the plaintiff's name. The *Landgericht Hamburg* (Hamburg Regional Court) and the *Hanseatisches Oberlandesgericht* (Hamburg Court of Appeal) allowed the claim for injunctive relief against the portal operator.

The BGH set aside the judgments in the final appeal on points of law and made it clear that the public interest in obtaining information and the defendant's right to freedom of speech outweighed the convicted person's interests in the case concerned. The lower courts it said, had not taken sufficient account of the particular circumstances involved. When all the interests were balanced against one another, it became clear that those asserted by the defendant had to be given priority: although the availability of the article constituted interference with the plaintiff's general personality right, it was not unlawful. The convicted individual's interest in becoming reintegrated into society admittedly gained in importance with the passage of time after the event but the harm done by mentioning his name was insignificant: the relevant and objective description of truthful statements about a sensational capital crime committed against a well-known actor was unlikely to "expose (the plaintiff) publicly for all time or to stigmatise him once again". Moreover, the article had been filed in the archive section of the portal and was expressly marked as an old report, so that obtaining knowledge of it presupposed a targeted search. However, the court went on, the

offender had no right to complete “immunisation”. A general requirement to remove all earlier descriptions of the offence identifying the perpetrator would “constrict the free flow of information and communication” and improperly limit freedom of speech and the media. Moreover, the court said, “(a) further aspect in the defendant’s favour is the fact that the public not only has a legitimate interest in information on current affairs but also in the possibility of researching past events [...]. Accordingly, the media keep publications that have ceased to have topical relevance available for interested media users in order also to discharge their task of informing the public by exercising their freedom of speech and becoming involved in the democratic opinion-forming process”.

With regard to the connection with data protection law, the BGH stated that the “media privilege” enshrined in section 57(1) of the *Rundfunkstaatvertrag* (Inter-State Broadcasting Agreement - RStV) was limited in a manner relevant to the instant case, as was, accordingly, the scope of the general provisions of the *Bundesdatenschutzgesetz* (Federal Data Protection Act) (see also section 41 of that Act, which transposes Article 9 of the Data Protection Directive 95/46/EC on the relationship between data protection and freedom of speech). That was because the article had - as required by the Inter-State Broadcasting Agreement - been exclusively made available for its own “journalistic-editorial [...] purposes”. That precondition was met when the publication was aimed at an indeterminate group of people with the intention of expressing an opinion. Accordingly, the important factor for deciding who may invoke the media privilege is not the actual form of the publication but only the activity itself, which must be journalistic in nature. Internet portals, too, can therefore invoke this protection.

The BGH very clearly mentions the need for the media privilege, which has its origin in the constitutional guarantee of freedom of speech, in a key sentence of the judgment: “Without the gathering, processing and use of personal data, even without the consent of those concerned, it would not be possible for journalists to do their work, and the press could not discharge the tasks conferred on it in, and guaranteed by, Article(5)(1), 2nd sentence, of the Basic Law, Article 10(1), 2nd sentence, of the European Convention on Human Rights and Article 11(1) 1st sentence, of the European Union’s Charter of Fundamental Rights”.

Urteil des BGH vom 1. Februar 2011 (Az. VI ZR 345/09)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=55442&pos=7&anz=611

BGH judgment of 1 February 2011 (Case no. VI ZR 345/09)