[DE] Federal Supreme Court rules on use of celebrity images as clickbait

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In judgments issued on 21 January 2021, the first civil chamber of the *Bundesgerichtshof* (Federal Supreme Court – BGH) ruled on two cases (nos. I ZR 120/19 and I ZR 207/19) concerning the use of images of celebrities for commercial purposes and the related intrusion on image rights.

In the first case (no. I ZR 120/19), the image of a celebrity had been used in an editorial article that had no connection with the person depicted. The dispute had arisen after a press company published a Facebook post containing a link to an article about cancer and four images of famous television presenters, one of whom took the case to court. By clicking on the post, readers were taken to the press company's website, which contained an accurate report about the illness of one of the other three TV presenters. The plaintiff demanded that the press company pay a fictitious licence fee for use of his image, referring to the enrichment provisions of Articles 812(1) and 818(2) of the *Bürgerliches Gesetzbuch* (Civil Code – BGB) and image rights protected under Article 22 of the *Kunsturhebergesetz* (Art Copyright Act – KUG) as a special form of personality right. Since the defendant had used the plaintiff's image without his permission, thereby intruding on his image rights, its actions should have been justified under Article 23 KUG. Exemptions from the requirement to obtain the permission of public figures under Article 23(1)(1) KUG must be granted after weighing up the opposing interests (see Article 23(2) KUG). The Federal Supreme Court held that, in this case, the celebrity's personality right took precedence because the image had been used without any editorial justification. It had only been used to draw readers' attention to the press publication. Known as "clickbait", this practice was similar to deliberate misreporting. The fictitious licence fee of EUR 20 000 granted to the plaintiff by the lower-instance courts was deemed appropriate by the BGH because it needed to take into account the plaintiff's exceptionally high market and advertising value.

The second case (no. I 207/19) concerned the use of the image and name of a famous actor from the ZDF series *Das Traumschiff* in an article about "Urlaubslotto", a competition featuring holidays and cash as prizes. A picture of the actor in his role as a ship's captain in the aforementioned series had appeared beneath the headline. The lower-instance courts had upheld the plaintiff's subsequent multi-stage claim for an injunction, information and the

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reimbursement of dunning costs. The Federal Supreme Court also ruled that the plaintiff's image rights had been breached. He had not given permission under Article 22(1) KUG. Regarding the exemption permitted under Article 23(1)(1) KUG, the court weighed the plaintiff's privacy rights against the public's interest in information. It found that the defendant's interest in information was supported by the link between a competition in which the prizes included holidays and the symbolic nature of an image from the series *Das Traumschiff*. However, this was outweighed by the absence of any noteworthy contribution to the formation of opinion and the primarily commercial purpose of the image's use. The plaintiff's personality rights were therefore predominant.

Pressemitteilung vom BGH zur Rechtssache Az. I ZR 120/19

https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=4c8bb952a01afb45571b564f8d41662c&anz=1&pos=0&nr=113838&linked=pm&Blank=1

Federal Supreme Court press release on case I ZR 120/19

Pressemitteilung des BGH zur Rechtssache Az. I ZR 207/19

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021014.html

Federal Supreme Court press release on case I ZR 207/19

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