

## **Headnote**

**to the Order of the First Senate of 26 February 2008**

1 BvR 1602, 1606, 1626/07

**On the scope of the fundamental right to the protection of one's personality under Article 2(1) in conjunction with Article 1(1) of the Basic Law in respect of photos of celebrities published as part of entertainment media coverage concerning their private and everyday life.**

# FEDERAL CONSTITUTIONAL COURT

- 1 BvR 1602/07 -

- 1 BvR 1606/07 -

- 1 BvR 1626/07 -

## IN THE NAME OF THE PEOPLE

### In the proceedings on the constitutional complaint of

1. E... GmbH & Co. KG,

– authorised representative: ...

against a) the Judgment of the Federal Court of Justice of 6 March 2007 - VI ZR  
51/06 -,

b) the Judgment of the Hamburg Regional Court of 1 July 2005 - 324 O  
873/04 -,

2. K... GmbH & Cie., represented by its directors

– authorised representative: ...

against a) the Judgment of the Federal Court of Justice of 6 March 2007 - VI ZR  
51/06 -,

b) the Judgment of the Hamburg Higher Regional Court of 31 January  
2006  
- 7 U 88/05 -,

3. Princess von H...

– authorised representative: ...

against a) the Judgment of the Federal Court of Justice of 6 March 2007 - VI ZR  
51/06 -,

b) the Judgment of the Hamburg Higher Regional Court of 31 January  
2006  
- 7 U 88/05 -

the Federal Constitutional Court – First Senate –

with the participation of Justices

President Papier, Hohmann-Dennhardt, Hoffmann-Riem,

Bryde,

Gaier,

Eichberger,

Schluckebier,

Kirchhof

held on 26 February 2008:

- 1. The constitutional complaints are combined for joint decision.**
- 2. The constitutional complaints of complainants nos. 1 and 3 are rejected as unfounded.**
- 3. The Judgment of the Federal Court of Justice of 6 March 2007 - VI ZR 51/06 -, and the Judgment of the Hamburg Regional Court of 24 June 2005 - 324 O 869/04 - violate complainant no. 2's fundamental right under Article 5(1) second sentence of the Basic Law. The Judgment of the Federal Court of Justice is reversed. The matter is remanded to the Federal Court of Justice for a new decision.**
- 4. [...]**

#### **REASONS:**

##### **A.**

The constitutional complaints concern the permissibility of publishing photos in reports on the private and everyday life of celebrities. 1

The initial proceedings concern actions under private law by which complainant no. 3 sought injunctive relief against the publication of photos in a magazine. The actions were brought after the European Court of Human Rights, in a judgment of its Third Section of 24 June 2004 (Application no. 59320/00, *von Hannover v. Germany*, Reports and Decisions 2004-VI, p. 1 *et seq.*; [...]) held that the Federal Republic of Germany was in breach of its obligations under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, given that the German courts had, in several earlier decisions on the permissibility of disseminating photos of complainant no. 3, repeatedly failed to provide protection against the publication of photos in the press. The individual application submitted by the applicant to the European Court of Human Rights concerned, in particular, a landmark decision by the Federal Court of Justice (BGHZ 131, 332), which complainant no. 3 had challenged at the time by way of constitutional complaint. In its Judgment of 15 December 1999 (BVer- 2

fGE 101, 361), the First Senate of the Federal Constitutional Court had partly granted the relief sought, but only in respect of aspects that were immaterial to the decision of the European Court of Human Rights.

## I.

Complaint proceedings 1 BvR 1602/07 and 1 BvR 1626/07 3

1. Complainant no. 3 is one of the daughters of the now deceased Prince Rainier of Monaco and is married to Prince Ernst August von Hannover. The initial proceedings concerned a photo report on the private and everyday life of complainant no. 3 and her husband, which was not related to the exercise of their official duties. 4

a) Complainant no. 1 publishes the weekly magazine *Frau im Spiegel*. In issue no. 9/02 of 20 February 2002, the magazine reported that the father of complainant no. 3, the reigning Prince of the State of Monaco, had fallen ill [...] under the headline: “Prince Rainier – Not Alone at Home”. The article stated: 5

The whole country is concerned, as are his children. Prince Albert (presently in Salt Lake City as a member of the Olympic team), Princess Caroline (on holiday in St. Moritz with Prince Ernst August von Hannover) and Princess Stephanie take turns caring for their father. [...]. 6

The article also included a photo showing complainant no. 3 together with her husband on a street in the Swiss winter sport resort of St. Moritz. 7

In issue no. 9/03 of 20 February 2003, the same magazine ran an article entitled: “St. Moritz – Royal Fun in the Snow” concerning the stay of complainant no. 3 and other well-known members of the European aristocracy at this winter sport resort. The article was accompanied by a photo of complainant no. 3 and her husband on one of the resort’s streets. [...] 8

In issue no. 12/04 of 11 March 2004, the magazine reported under the headline “Princess Caroline – Monaco Awaits Her” that complainant no. 3, who had not appeared in public for some time, was expected to attend the Rose Ball held annually in Monaco. A photo accompanying the article [shows complainant no. 3] with her husband in a ski lift; the caption under the picture reads: “Cosy chat in a chair lift”. [...] 9

b) Complainant no. 3 sought injunctive relief against complainant no. 1 regarding the publication of these photo reports. 10

aa) [...] 11-15

bb) [...] 16

cc) In its judgment [...], the Federal Court of Justice rejected complainant no. 3’s appeal on points of law (*Revision*), thus upholding the appellate court’s rejection of complainant no. 3’s action insofar as it was directed against the publication of a photo in an article on her father’s illness. With regard to the two remaining photos, the Fed- 17

eral Court of Justice reversed the judgment delivered upon the appeal on points of fact and law (*Berufung*) and, by rejecting complainant no. 1's appeal, reinstated the prohibition ordered by the Regional Court.

[...] 18-23

2. a) Complainant no. 1 claims [...] that the decisions of the Regional Court and the Federal Court of Justice violate its fundamental right to freedom of the press guaranteed by Art. 5(1) second sentence of the Basic Law to the extent that they prohibited it from disseminating photos of complainant no. 3. [...]

b) [...] Complainant no. 3 claims a violation of her right of personality guaranteed by Art. 2(1) in conjunction with Art. 1(1) of the Basic Law to the extent that the Higher Regional Court and the Federal Court of Justice held that publishing a holiday photo in the report on her father's illness was permissible.

[...] 26

## II.

Complaint proceedings 1 BvR 1606/07 27

1. Complainant no. 2 publishes the weekly magazine *7 Tage*. In issue no. 13/02 of 20 March 2002, under the headline "Sleeping in Princess Caroline's Bed – A Dream That Could Come True! – Caroline and Ernst August Rent Out Their Dream Villa", it reported that the husband of complainant no. 3 owned a holiday villa in Kenya, which the couple rents out when they are away. The headline contains the clearly highlighted subtitle "Even the rich and beautiful are frugal. Many rent their villas out to paying guests."

The article listed the names of several private individuals besides complainant no. 3 – Hollywood stars and members of the aristocracy – who had "developed an inclination for thinking economically" and also rented out their palaces or houses when not using them themselves. [...]

In addition to several photos of the holiday villa and its surroundings, the article included a photo showing complainant no. 3 and her husband on a street during a holiday visit. The caption reads "Holidaying – Caroline and her husband".

2. The Regional Court prohibited [...] any renewed publication of this photo. [...] 31

3. The Higher Regional Court reversed the decision of the Regional Court [...] and rejected the action brought by complainant no. 3. [...]

4. The Federal Court of Justice [...] reversed the judgment delivered upon the appeal on points of fact and law and upheld the prohibition issued at first instance, rejecting complainant no. 2's appeal. [...]

5. Complainant no. 2 claims that the decision of the Regional Court and its affirmation by the judgment delivered upon the appeal on points of law rendered by the Fed-

eral Court of Justice violates freedom of press reporting guaranteed by Art. 5(1) second sentence of the Basic Law. [...]

[...] 35

### III.

Complainants nos. 1 and 3 submitted statements on the constitutional complaint lodged by the respective defendants in the initial proceedings. 36

[...] 37-38

### B.

The constitutional complaints of complainants nos. 1 and 3 are unsuccessful. The injunctive relief, upheld by the Federal Court of Justice, prohibiting renewed dissemination of the photos challenged [by complainant no. 3] does not violate the fundamental right to freedom of the press under Art. 5(1) second sentence of the Basic Law. Complainant no. 3's fundamental right to the protection of her personality under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law is also not violated by the fact that the Federal Court of Justice and the Higher Regional Court did not object to the dissemination of a photo of complainant no. 3. 39

However, the order requiring that complainant no. 2 in complaint proceedings 1 BvR 1606/07 refrain from publishing the report with photos violates the fundamental right to freedom of the press. The Judgment of the Federal Court of Justice is reversed. 40

### I.

The orders issued against complainants nos. 1 and 2 in complaint proceedings 1 BvR 1602/07 and 1 BvR 1606/07 interfere with the fundamental right to freedom of the press under Art. 5(1) second sentence of the Basic Law since the publication of certain photos [in their magazines] was prohibited by the courts. 41

At its core, the fundamental right to freedom of the press guarantees the right to freely determine the type and focus, contents and form of a publication. This includes the decision on whether and how a printed product is to be illustrated. Images are covered by the constitutional protection of the report they serve to illustrate [...]. Notably, the protection afforded by freedom of the press also covers publishing photos of persons (cf. BVerfGE 101, 361 <389>; [...]). The protection does not depend on the type or quality of the printed product or the coverage (cf. BVerfGE 34, 269 <283>; 50, 234 <240>). The press has the right to decide according to its own journalistic criteria what it considers worthy of public interest (cf. BVerfGE 97, 228 <257>; 101, 361 <389>). The protection afforded by freedom of the press may not be made contingent on an assessment of the printed product – irrespective of the standards that are applied for such an assessment (cf. BVerfGE 66, 116 <134>). Entertainment me- 42

dia reports, too, including articles on celebrities, are covered by the protection afforded by freedom of the press (cf. BVerfGE 101, 361 <390>). The informative value and the extent to which the coverage is relevant to questions of significant concern to the public only begin to matter where the courts are called upon to balance [such reporting against] opposing personality rights (cf. BVerfGE 34, 269 <283>; 101, 361 <391>).

## II.

The decisions of the civil courts challenged in complaint proceedings 1 BvR 1626/07 impair complainant no. 3's fundamental right to the protection of her personality under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law insofar as the prohibition on publishing certain photos sought by complainant no. 3 was not granted. 43

1. The fundamental right to the protection of one's personality serves to guarantee the basic conditions of social relationships between the holders of the fundamental right and the world around them (cf. BVerfGE 54, 148 <153>; 97, 391 <405>; 114, 339 <346>). By protecting freedom of conduct and privacy, this fundamental right safeguards aspects of the free development of one's personality that are not covered by the specific freedoms guaranteed in the Basic Law, but are equal to these freedoms in terms of their significance for the individual's personal sphere that is closer to the core of private life (*engere persönliche Lebenssphäre*) as well as for maintaining its basic conditions (cf. BVerfGE 99, 185 <193>; 118, 168 <183>; 119, 1 <23 and 24>). Determining what specific legal protection is invoked in relation to the various manifestations of the protection of one's personality is mainly guided by the type of risk to one's personality at play. It will depend on the circumstances of the specific case and its anticipated impact on fundamental rights, particularly on the development of one's personality and the private life of the persons concerned (cf. BVerfGE 101, 361 <380>; 106, 28 <39>; 118, 168 <183 and 184>). 44

2. Court decisions on the permissibility of publishing photos showing the subject in private or everyday contexts may touch upon different aspects of the protection of one's personality, in particular the guarantee of the right to one's own image and the guarantee to respect of one's private sphere (cf. BVerfGE 101, 361 <380 *et seq.*>). 45

a) Art. 2(1) in conjunction with Art. 1(1) of the Basic Law does not provide for a general, let alone comprehensive, right to determine the portrayal of one's person (cf. BVerfGE 101, 361 <380>). The right to one's own image does, however, grant individuals the possibility of influencing and deciding on the creation and use of images of themselves by others. The need for protection mainly arises from the possibility that the image of a person in a particular context may be taken out of that context and reproduced by third parties at any time under circumstances which the affected person cannot control (cf. BVerfGE 101, 361 <381>). The easier this is, the greater the need for protection may be. Thus, advances in the field of image technology increase the possibility of risks to personality rights (cf. BVerfGE 101, 361 46

<381>). The growing availability of small and portable cameras, such as digital cameras built into mobile phones, for instance, exposes celebrities to the increased risk of being photographed in practically any situation without warning and without their knowledge, and of the photos being published in the media. A particular need for protection can further arise in the case of covert or surprise photography (cf. BVerfGE 101, 361 <394 and 395>). In assessing the need for protection, the situation in which the affected persons are shown is also significant; for instance, they may be photographed while going about their usual routines or in situations in which they relax after work and away from everyday life and in which they may reasonably assume that they will not be exposed to photographers.

b) The fundamental right to the protection of one's personality encompasses both the right to one's own image and the protection of one's private sphere (cf. in this respect BVerfGE 101, 361 <382>). The protection of the private sphere has several dimensions. Thematically, it affects those matters in particular that holders of the fundamental right tend to withhold from public mention or display. Spatially, the private sphere includes a person's refuge, the place where, particularly in their home but also outside, they can clear their mind and relax (cf. BVerfGE 101, 361 <382 *et seq.*>) and where they can satisfy their need "to be left alone" (cf. BVerfGE 27, 1 <6 and 7>; see additionally on Article 13 of the Basic Law BVerfGE 32, 54 <75>; 51, 97 <107>). The boundaries of the protected private sphere cannot be established in general and abstract terms (cf. BVerfGE 101, 361 <384>).

More extensive protection may follow from Art. 6(1) and (2) of the Basic Law, which provides for stronger protection of one's personality in situations where parents are in public places with their minor children (cf. BVerfGE 101, 361 <385>; 119, 1 <23 and 24>).

### III.

The fundamental rights to freedom of the press and to the protection of one's personality are not guaranteed without reservation. Freedom of the press can be limited in the form of general laws pursuant to Art. 5(2) of the Basic Law. Such laws include § 22 *et seq.* of the Art Copyright Act, but also Art. 8 of the European Convention on Human Rights (see 1 below). At the same time, the Art Copyright Act and freedom of expression guaranteed by Art. 10 of the Convention restrict the protection of one's personality, as part of the legal order under the Constitution pursuant to Art. 2(1) of the Basic Law (see 2 below). The interpretation and application of such limitations and their balancing against one another by the ordinary courts must be guided by the significance of the fundamental rights interests affected by the limitations and take into account the relevant guarantees of the European Convention on Human Rights. Review by the Federal Constitutional Court is limited to the question whether the impact of German fundamental rights – with due regard to the guarantees of the Convention – on the interpretation of private law provisions as well as on the balancing of conflicting interests was sufficiently observed [...] (see 3 below).



1. Pursuant to Art. 5(2) of the Basic Law, freedom of the press can be limited through provisions of general laws. The category ‘provisions of general laws’ encompasses all laws that are not directed against the freedoms guaranteed by Art. 5(1) first sentence of the Basic Law themselves, but which serve to protect a legal interest *per se*, irrespective of specific opinions. Such a legal interest must be generally protected within the legal order and thus regardless of whether it can be violated by expressions of opinion or in any other manner (cf. BVerfGE 117, 244 <260>). 50

a) §§ 22 *et seq.* of the Art Copyright Act and the legal principles on the protection of one’s personality under private law enshrined in § 823(1) of the Civil Code are general laws within this meaning (cf. BVerfGE 7, 198 <211>; 25, 256 <263 *et seq.*>; 34, 269 <282>; 35, 202 <224 and 225>). [...] 51

b) Another general law within the meaning of Art. 5(2) of the Basic Law that limits freedom of communication is the right to respect for one’s private life enshrined in Art. 8 of the Convention. In domestic law, the Convention has the rank of ordinary federal law (cf. BVerfGE 74, 358 <370>; 82, 106 <114>; 111, 307 <316 and 317>). Additionally, in constitutional law, the guarantees of the Convention and the case-law of the European Court of Human Rights serve as guidelines for interpretation for determining the content and scope of fundamental rights, provided this does not restrict or lower the level of fundamental rights protection afforded under the Basic Law (BVerfGE 111, 307 <317, 329>), which is not intended by the Convention (cf. Art. 53 of the Convention). 52

The protection of private life guaranteed by Art. 8(1) of the Convention, just like the protection of one’s personality guaranteed by the Constitution, also encompasses all personal, social and business relationships that form an integral part of the private life of every individual [...]. In determining the scope of such protection, the extent of the individual’s legitimate expectations of privacy in a given situation must be taken into account [...]. The guarantee of Art. 8(1) of the Convention may also include a right to be protected by the domestic courts against the publication of images of individuals from their everyday life (cf. ECtHR (Third Section), *von Hannover v. Germany*, Judgment of 24 June 2006, no. 59320/00, §§ 50 *et seq.*, [...]). The scope of this right in a specific case is to be determined by balancing it against freedom of expression guaranteed by Art. 10 of the Convention and the limitations thereto listed in Art. 10(2) of the Convention (cf. ECtHR (Fourth Section), *Minelli v. Switzerland*, Judgment of 14 June 2005, no. 14991/02; ECtHR (Second Section), *Gourguenidze v. Georgia*, Judgment of 17 October 2006, no. 71678/01, § 38 *et seq.*). 53

2. The fundamental right to the protection of one’s personality derived from Art. 2(1) in conjunction with Art. 1(1) of the Basic Law is subject to the limitations of Art. 2(1) second half-sentence of the Basic Law. 54

a) The fundamental rights, such as Art. 5(1) of the Basic Law, constitute one limitation that derives from the legal order under the Constitution; other limitations include, in particular, the provisions in § 22 *et seq.* of the Art Copyright Act, which govern the 55

publication of photos of persons (cf. BVerfGE 101, 361 <387>). These provisions set out a multi-tier system of protection, which accommodates both the portrayed person's need for protection and the general public's interest in obtaining information as satisfied by the media (cf. BVerfGE 35, 202 <224 and 225>; 101, 361 <387>). This multi-tier system of protection comprises a requirement of consent to the dissemination of photos of persons in § 22 first sentence of the Art Copyright Act, an exception to this requirement in particular for images portraying an aspect of contemporary society as set out in § 23(1) no. 1 of the Art Copyright Act, and an exception to this exception laid down in § 23(2) of the Art Copyright Act for cases in which the legitimate interests of the portrayed person are violated (cf. BVerfGE 35, 202 <224 and 225>; 101, 361 <387>).

b) Besides these provisions, the freedom to express, disseminate and receive opinions and information, as guaranteed by Art. 10 of the European Convention on Human Rights, restricts the protection of one's personality. 56

Press activity is covered by freedom of expression guaranteed by Art. 10(1) first sentence of the European Convention on Human Rights, and by freedom to hold opinions and to receive and impart information and ideas guaranteed by Art. 10(1) second sentence of the Convention. The protection afforded by Art. 10(1) of the Convention extends, in particular, to the publication of photos to illustrate a media report (cf. ECtHR (First Section), *Verlagsgruppe News GmbH v. Austria* (no. 2), Judgment of 14 December 2006, no. 10520/02, § 29; ECtHR (Third Section), *von Hannover v. Germany*, Judgment of 24 June 2004, no. 59320/00, § 59, [...]; ECtHR (Second Section), *Gourguenidze v. Georgia*, Judgment of 17 October 2006, no. 71678/01, § 55). According to the case-law of the European Court of Human Rights, the question whether restrictions of this right through measures ordered by domestic courts to protect the private life of the portrayed person are permissible must also be decided by balancing this right against the right to respect for one's private life guaranteed by Art. 8 of the Convention (cf. ECtHR (Second Section), *Gourguenidze v. Georgia*, Judgment of 17 October 2006, no. 71678/01, § 37 with further references). 57

In cases where press reporting contributes "information and ideas on all matters of public interest", freedom of expression guaranteed by Art. 10(1) of the Convention must be accorded special weight (cf. ECtHR (Fourth Section), *Karhuvaara and Iltalehti v. Finland*, Judgment of 16 November 2004, no. 53678/00, § 40; ECtHR (First Section), *Tønsbergs Blad and Others v. Norway*, Judgment of 1 March 2007, no. 510/04, § 82) when balancing it against conflicting legal interests, in consideration of the presumption, enshrined in Art. 5(1) of the Basic Law, of the permissibility of press coverage intended to contribute to the formation of public opinion (cf. BVerfGE 20, 162 <177>). 58

c) aa) The right to one's own image, the scope of which is set out in § 22 *et seq.* of the Art Copyright Act and the protection of which is strengthened by the fundamental right under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law, is influenced by 59

whether information is conveyed to the wide audience reached by the mass media and thus does not remain limited to a narrow group of persons ([...]; see also ECtHR (Second Section), *Gourguenidze v. Georgia*, Judgment of 17 October 2006, no. 71678/01, § 55). The weight of freedom of the press, which may restrict personality rights, depends on whether the coverage concerns a matter which significantly affects the public (cf. BVerfGE 7, 198 <212>; established case-law).

According to the case-law of the Federal Constitutional Court, when the media covers celebrities, it is not only the revealing of discrepancies between celebrities' public self-portrayal and their private life that is of public interest. Celebrities can also provide orientation for shaping one's own way of life and serve as role models, or negative examples (cf. BVerfGE 101, 361 <390>). Legitimate interests of the public in obtaining information would be defined too narrowly if they were restricted to behaviour that is scandalous or morally or legally questionable. Normal everyday life and the unobjectionable conduct of celebrities, too, may be brought to the attention of the public if this serves the formation of public opinion on matters of public interest (cf. BVerfGE 101, 361 <390>).

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The entertainment value of media content or the way it is presented is often important for attracting public attention and thus also for contributing to the formation of public opinion. If an article was deemed insignificant for the formation of public opinion merely because of its entertaining presentation, this might also violate the content of the guarantee under Art. 10 of the Convention (cf. ECtHR (Fourth Section), *Wirtschafts-Trend-Zeitschriften-Verlagsgesellschaft mbH v. Austria*, Judgment of 13 December 2005, no. 66298/01 *inter alia*, §§ 49-50).

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Even in respect of 'mere entertainment', its relevance to the formation of opinions cannot be denied from the outset. Entertainment is an essential part of media activity that is covered by the protection afforded by freedom of the press in its subjective and objective legal dimensions (cf. BVerfGE 35, 202 <222>; 101, 361 <390>). The journalistic and commercial success of a printed product that competes with other available media and entertainment offers can hinge on its entertaining content and corresponding photos. In fact, the significance of visuals for press reporting has even increased in recent years (cf. BVerfGE 101, 361 <392>).

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It would be one-sided to assume that the public's interest in entertainment is always focussed exclusively on satisfying a desire for amusement and relaxation, a departure from reality and distraction. Entertainment can also convey images of reality and provide subjects for debate that may spark a process of discussion relating to life philosophies, values and habits; it thus serves an important purpose in society. For this reason, entertainment in the press is not insignificant, let alone without value, with regard to the interests that freedom of the press aims to protect (cf. BVerfGE 101, 361 <390>).

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The scope of protection of freedom of the press also includes entertainment media coverage on the private and everyday life of celebrities and their social relationships,

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particularly persons who are close to them. Restricting all coverage of these persons to their exercise of official functions would constrain freedom of the press to a degree that is incompatible with Art. 5(1) of the Basic Law.

bb) However, particularly where contents are entertaining, the conflicting legal interests must be taken into account and balanced. When the interest in obtaining information is weighed against the conflicting interest of the protection of one's personality, the subject matter of the reporting has decisive significance – for instance, it is crucial to examine whether private matters are covered merely to satisfy curiosity (cf. BVerfGE 34, 269 <283>; 101, 361 <391>). Where photos are concerned, the occasion and the circumstances under which they were obtained are significant, too.

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cc) It does not automatically follow from the recognition of the importance of press reporting for the formation of public and individual opinion that the special protection of one's own image afforded the portrayed persons that is derived from the right of personality must always stand back, and thus that any illustration of media products is protected under constitutional law.

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(1) The balancing must take into account the right of the press to decide in accordance with its journalistic criteria what attracts public interest; this right falls within the scope of protection of Art. 5(1) second sentence of the Basic Law (cf. BVerfGE 101, 361 <392>). However, this right of the press to self-determination does not also include the decision on how to weigh the interest in obtaining information when balancing it against conflicting legal interests and on how to reconcile the legal interests concerned [...]. When deciding to print an image of a person and to use it as part of a particular report, the mass media use their constitutionally protected right to decide themselves what they consider worthy of coverage. In so doing, they must take into account the protection of personality rights of affected persons. In the event of a dispute [...], it is incumbent upon the courts to carry out the decisive balancing of the [public's] interest in obtaining information against the conflicting interests of the affected persons. [...] When weighing the interest in obtaining information, however, the courts must refrain from assessing the contents of the coverage in question as to its value and seriousness; they have to limit themselves to reviewing and determining to what extent the coverage might contribute to the formation of public opinion.

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To the extent that the image as such does not contain a significant message for the formation of public opinion, its informative value must be derived from the accompanying written article (cf. BGHZ 158, 218 <223>; Federal Court of Justice, Judgment of 19 October 2004 - VI ZR 292/03 -, NJW 2005, p. 594 <595 and 596>). Thus, images can complement an article and serve to expand on its message, for example by confirming its authenticity. Another purpose of information protected by Art. 5(1) of the Basic Law might consist in drawing the reader's attention to the article by adding images of the persons involved in the reported event. Where it is also permitted to use images that were not taken in the context of the reported event, this can help prevent those disturbing effects on the affected celebrities that might arise if the arti-

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cle could only be illustrated with images obtained in the context of the reported event [...]. However, if [the purpose of] the accompanying article is solely to furnish some occasion for publishing a celebrity photo, then a contribution to the formation of public opinion is not ascertainable. In such cases, constitutional law does not require giving the interest in publication precedence over the protection of an individual's personality.

(2) In order to determine the weight of the interest in protection of an individual's personality, the situation in which they are photographed and how they are portrayed is also significant, as are the circumstances under which the photo was taken, for instance in secret or as a result of persistent tracking. The impairment of personality rights resulting from the publication of the photos is more severe where the visual portrayal affects the private sphere by disseminating details of the [subject's] private life which are usually beyond the reach of public debate. The same holds true if the affected person, in the circumstances under which the photo was taken, could in general reasonably expect not to be shown in the media, for instance because they are in a private space, especially in a particularly protected space (cf. BVerfGE 101, 361 <384>). The need to protect the general right of personality can, however, take on greater weight even if affected persons are not in a secluded space, with, for instance, media coverage showing the subject relaxing or letting go outside the context of professional or everyday life.

[...]

dd) It is for the ordinary courts to determine the informative value of coverage with photo illustrations in the specific case on the basis of its relevance to the formation of public opinion, and to balance freedom of the press against the impairments of the right of personality resulting from taking and disseminating the photos. In such decisions that require a balancing, the courts have a margin of assessment. In accordance with these considerations, the case-law of the European Court of Human Rights recognises that domestic courts have an independent margin of appreciation also with regard to the requirements of the European Convention on Human Rights that are relevant to interpreting German fundamental rights (cf. ECtHR (Grand Chamber), *Dickson v. the United Kingdom*, Judgment of 4 December 2007, no. 44362/04, §§ 77 *et seq.*).

The courts must take into account that the guarantee of freedom of the press serves not only to uphold the subjective rights of the press, but equally protects the process of public opinion-forming and thus individuals' freedom to form opinions (cf. BVerfGE 20, 162 <174 *et seq.*>; 66, 116 <134>; 77, 346 <354>). Statements in or by the press generally seek to contribute to the formation of public opinion; therefore, the initial presumption is that they are permissible, even if they affect the sphere of other persons' rights (cf. BVerfGE 20, 162 <177>). According to the case-law of the European Court of Human Rights, too, there is only little scope for subordinating the guarantee of Art. 10(1) of the Convention [to other interests] if a media report is relevant to a

debate in matters of public interest (cf. ECtHR (Grand Chamber), *Lindon and Others v. France*, Judgment of 22 October 2007, no. 21279/02 *inter alia*, § 45; ECtHR (Grand Chamber), *Pedersen and Baadsgaard v. Denmark*, Judgment of 17 December 2004, no. 49017/99, §§ 68 and 69).

Yet the fundamental right in Art. 5(1) of the Basic Law does not prescribe that any visual depiction taken from the private and everyday life of celebrities is generally assumed to contribute to the formation of opinion, and is in itself sufficient to justify its precedence over the interest in protection of one's personality. The Federal Constitutional Court has thus far not recognised that the press may unrestrictedly take photos of figures of contemporary society; rather, it has only considered the publication of photos to be justified to the extent that the general public would otherwise be deprived of opportunities to form opinions, for example, on whether persons who are regarded as idols or role models can convincingly reconcile their official and private conduct (cf. BVerfGE 101, 361 <393>). However, constitutional law does not guarantee that figures of contemporary society may be photographed at any time without restriction for media purposes in all situations except when they are in a secluded space.

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3. In interpreting and applying the private law provisions on the balancing of different interests protected by law, it primarily falls to the civil courts to have regard to the fundamental rights laid down in the Basic Law while also taking into account the requirements of the European Convention on Human Rights. [...]

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The role of the Federal Constitutional Court is limited to reviewing whether the ordinary courts, in interpreting and applying ordinary law provisions, particularly when balancing conflicting legal interests, have sufficiently taken into account the impact of fundamental rights (cf. BVerfGE 101, 361 <388>). The same applies to the review by the Federal Constitutional Court of whether the ordinary courts have fulfilled their duty to integrate the decisions of the European Court of Human Rights into the respective part of the domestic legal order.

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The fact that different conclusions could be reached in the balancing of legal positions in complex cases of conflicting legal interests, particularly in multipolar ones, is not sufficient to justify a correction of the ordinary courts' decisions by the Federal Constitutional Court. [...] A violation of the Basic Law, which renders a challenged decision objectionable under constitutional law, exists where the scope of protection of a relevant fundamental right was incorrectly or incompletely determined, or where its weight was not accurately established and it was thus not correctly taken into account in the balancing, or where the balancing ran counter to other requirements of constitutional law, in particular where the standards of the Convention, which must also be observed under constitutional law, were not sufficiently taken into account.

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#### IV.

The Judgment of the Federal Court of Justice (VI ZR 51/06) challenged in proceed-

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ings 1 BvR 1602/07 and 1 BvR 1626/07 satisfies the constitutional requirements. [...] By contrast, the decision of the Regional Court challenged by complainant no. 2 in complaint proceedings 1 BvR 1606/07 and the related judgment delivered upon the appeal on points of law by the Federal Court of Justice (VI ZR 52/06) do not satisfy the constitutional requirements.

1. It is not objectionable under constitutional law that the Federal Court of Justice carries out the legal assessment of the requirements of § 22 *et seq.* of the Art Copyright Act on the basis of a concept of protection it developed for this purpose. [...] 78

[...] 79

a) In particular, constitutional law does not prevent the Federal Court of Justice from dispensing with the application of the legal concept of figures of contemporary society that was previously developed by the court with reference to legal scholarship. It was within its powers to instead seek a solution to the case purely in the context of a balancing and weighing of interests [...]. 80

Doing away with the concept of figures of contemporary society '*par excellence*' or 'relatively' public figures does not contradict the previous case-law of the Federal Constitutional Court. The Federal Constitutional Court, however, did not object to the use of such a legal concept for the purposes of determining the weight to be attributed to the informative value of celebrity photos for the public, which is important for the balancing to be conducted [...]. 81

As the concept of figures of contemporary society is not laid down in constitutional law, the ordinary courts are free under constitutional law not to make use of the term at all in future or to only make limited use of it, and to decide instead by means of a balancing on a case-by-case basis whether the image concerned belongs to the "domain of contemporary society" (§ 23(1) no. 1 of the Art Copyright Act). [...] 82

b) The general standards on which the challenged decisions of the Federal Court of Justice are based [...] are not objectionable under constitutional law. 83

Just as in the proceedings leading to the landmark decision of 15 December 1999 (BVerfGE 101, 361), the present constitutional dispute does not concern the permissibility of the written report as such. [...] In the present case, it must only be decided to what extent [...] articles may be illustrated using photos showing celebrities in their private life. 84

aa) In its balancing of the interest of the public in obtaining information against the legitimate interests of the portrayed person, the Federal Court of Justice attributes the images to the "domain of contemporary society" – in accordance with the constituent elements of § 23(1) no. 1 of the Art Copyright Act – in a manner that is in principle not objectionable under constitutional law. In doing so, it must be ensured that the right to obtain information guaranteed by Art. 5(1) of the Basic Law is comprehensively taken into account in the context of "images from the domain of contem- 85

porary society” (§ 23(1) no. 1 of the Art Copyright Act) (cf. BVerfGE 101, 361 <391>; [...]). The other element which may be affected by fundamental rights is the “legitimate interest” of § 23(2) of the Art Copyright Act, which, from the outset, relates only to figures of contemporary society and thus cannot sufficiently incorporate the interests of freedom of the press if these were not taken into account at the earlier stage where the group of persons concerned was delimited (cf. BVerfGE 101, 361 <391 and 392>).

bb) In the challenged decisions, the Federal Court of Justice noted that a possible basis for assessing informative value is whether a report contributes to a debate of general interest or portrays events of general interest. In doing so, it indicated in the constitutionally required manner that the interest in protecting one’s personality may be outweighed by an interest in obtaining information not only in respect of spectacular and unusual events, but also in the context of circumstances typical of the times and of life situations, and that the portrayal of the private and everyday life of celebrities outside the realm of state and political functions does not have to be excluded from this context if it is of public interest. 86

cc) [...] 87-88

2. In accordance with the standards set out above, the constitutional complaints of complainants nos. 1 and 3 in proceedings 1 BvR 1602/07 and 1 BvR 1626/07 are unfounded. In its decision, which was challenged by both parties to the initial proceedings (VI ZR 51/06), the Federal Court of Justice balanced the affected interests in a manner that is unobjectionable under constitutional law and also took into account the relevant requirements arising from the case-law of the European Court of Human Rights. 89

a) Complainant no. 1’s fundamental right under Art. 5(1) of the Basic Law is not violated by the Judgment of the Federal Court of Justice of 6 March 2007 (VI ZR 51/06), in which it found, in accordance with constitutionally tenable standards, that the dissemination of the photo of complainant no. 3 as part of a report on her winter holiday in the 9/03 issue of the magazine *Frau im Spiegel* was impermissible. 90

The Federal Court of Justice took into account the fact that complainant no. 3 had been photographed during an appearance in public and not in a secluded space. [...] It was within its margin of assessment to accord significance to the fact that complainant no. 3 was exposed to photojournalists on a holiday during which she wanted to relax. The Federal Court of Justice, in a manner which is not objectionable under constitutional law, concluded that in respect of the report there was no public interest in obtaining information that went beyond the satisfaction of mere curiosity about the private affairs of complainant no. 3. 91

[...] 92

b) [...] 93



c) The decision of the Federal Court of Justice (VI ZR 51/06) which held that the photo story published in issue no. 9/02 of the magazine *Frau im Spiegel* was not objectionable, and which is challenged in complaint proceedings 1 BvR 1626/07, did not fail to recognise the significance of complainant no. 3's fundamental right to the protection of her personality guaranteed by Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. [...]

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The Federal Court of Justice did not fail to recognise the constitutional requirements relating to the weight of the informative value of a report needed to justify the publication of an image when it held that the illness of the reigning Prince of Monaco constitutes an event of public interest and that the press should be allowed, in connection with such an event, to also report on the way his children, including complainant no. 3, managed to reconcile their family duties with the legitimate needs of their own private lives, including the desire to go on holiday. [...]

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The Federal Court of Justice took into account that the interest in protection of one's personality may take precedence [over freedom of the press] in cases where the photo was taken under particularly burdening circumstances, for instance in secret or as a result of persistent tracking by photographers. [...] Complainant no. 3, [however,] [...] did not assert that the photo she objected to had been taken under circumstances which had constituted a burden for her.

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d) The claim by complainant no. 3 that the Federal Court of Justice disregarded or did not sufficiently take into account the case-law of the European Court of Human Rights in its decision does not hold. While such a claim – based on the relevant domestic fundamental right – can be brought before the Federal Constitutional Court (cf. BVerfGE 111, 307 <323 *et seq.*, 329 and 330>), it is unfounded in the proceedings at hand.

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The Federal Court of Justice took into account both the Judgment of the European Court of Human Rights of 24 June 2004, and another decision of the Court of 16 November 2004 (*Karhuvaara and Iltalehti v. Finland*, no. 53678/00 [...]). In interpreting this case-law, the Federal Court of Justice recognised that there is scope for a differentiated assessment of the photos. There are no indications to suggest that, in its assessment, the Federal Court of Justice breached its obligation to observe the standards of the European Convention on Human Rights.

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aa) The European Court of Human Rights, too, considers it necessary that a decision concerning the permissibility of the publication of images of persons for the purpose of press reporting must balance the interest in protection of the private sphere against freedom of expression, which essentially corresponds to the protection afforded the press guaranteed in Art. 5(1) of the Basic Law. According to the European Court of Human Rights, the decisive element is to what extent the photo and the other information provided contribute to the formation of public opinion (cf. ECtHR (Second Section), *Gourguenidze v. Georgia*, Judgment of 17 October 2006, no. 71678/01, § 59). The Court distinguishes between politicians and other public figures and

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the ordinary person in order to set out standards for the balancing. It emphasises that reporting on ordinary persons is subject to greater restrictions than reporting on public figures, with the protection of politicians being weakest. According to this case-law, complainant no. 3 does not belong to the group of politicians, but to the group of public figures. In later decisions, the European Court of Human Rights cited the judgment of 24 June 2004 on the protection of the image of complainant no. 3 as an example of a decision on public figures (cf. ECtHR (Second Section), *Gourguenidze v. Georgia*, Judgment of 17 October 2006, no. 71678/01, § 57; ECtHR (Fourth Section), *Sciacca v. Italy*, Judgment of 11 January 2005, no. 50774/99, §§ 27 *et seq.*).

bb) According to the case-law of the European Court of Human Rights, belonging to this group of persons makes it possible for the press to publish photos of the subject where there is a public interest in the report, even if they are taken in the context of public everyday life. According to its case-law, in particular reports facilitating public scrutiny also of the private conduct of influential persons, for instance from the commercial, cultural or media sector, may amount to a report of public interest protected by Art. 10 of the European Convention on Human Rights (cf. ECtHR (First Section), *Tønsbergs Blad and Others v. Norway*, Judgment of 1 March 2007, no. 510/04, §§ 87 and 88; ECtHR (First Section), *Verlagsgruppe News GmbH v. Austria*, Judgment of 14 December 2006, no. 10520/02, § 35 *et seq.*; ECtHR (Fourth Section), *Minelli v. Switzerland*, Judgment of 14 June 2005, no. 14991/02). The European Court of Human Rights has objected to decisions by domestic courts that apply a standard that is too strict with regard to the question whether media reporting on the private life of a person that is not part of official or political life is of public interest (cf. ECtHR (First Section), *Tønsbergs Blad and Others v. Norway*, Judgment of 1 March 2007, no. 510/04, § 87). In accordance with this case-law, it is sufficient that the report deal with political or other significant questions at least to some degree (cf. ECtHR (Fourth Section), *Karhuvaara and Iltalehti v. Finland*, Judgment of 16 November 2004, no. 53678/00, § 45).

cc) The Federal Court of Justice specifically assessed the informative content of the relevant article and concluded that it dealt with factual topics of relevance for a democratic society. [...] It is not objectionable under constitutional law that the Federal Court of Justice found, in the context of the balancing and weighing of interests incumbent on it, and in taking into account and specifying the case-law of the European Court of Human Rights, that the informative value was sufficient in the present case.

3. However, the decisions of the Regional Court and of the Federal Court of Justice challenged by complainant no. 2 violate the fundamental right to freedom of the press under Art. 5(1) second sentence of the Basic Law.

a) The proceedings concerned a photo of the plaintiff in the initial proceedings, complainant no. 3, and her husband in the context of a report on their renting out their villa in Kenya. [...] The Federal Court of Justice limits itself to the finding that the article concerning the dwelling and its renting out is not an event of public interest, even

if broad standards are applied – here, it cites the decision of the European Court of Human Rights of 24 June 2004 – and does not concern an event of contemporary society [...].

The challenged decisions failed to assess the article more closely as regards its informative content. The relevant article did not describe the scene of a holiday as part of private life. Rather, it was reported that complainant no. 3 and her husband rent out a villa on an island in Kenya, which they occasionally use for holidaying, to third parties. This fact was commented with value judgments that could give rise to social criticism on the part of readers. The thrust of the article is summed up in the words that were highlighted in bold print and at the centre of the article: “Even the rich and beautiful are frugal. Many rent their villas out to paying guests.” [...]

Where readers are thus provided information in an entertainment media report on changing behaviour patterns within a small group of affluent celebrities, who in other contexts are the focus of public attention through their own efforts and consequently serve as role models for a large part of the population or in fact display a lifestyle others may object to, this may spark a factual debate that is of interest to the general public in a democratic society and it can also generally justify showing an image of the celebrity landlords of the property who are the subject matter of the article.

b) The Federal Court of Justice’s blanket statement to the effect that the, in principle, protected core of the private sphere of celebrities – complainant no. 3 included – also encompasses holidays is not conducive to making clear the overriding interests in the protection of the right of personality. Complainant no. 2 used a small photo to illustrate the article which, according to its caption, shows complainant no. 3 and her husband “holidaying” in casual clothing and among other people and portrays them at a location that cannot be identified by readers. [...] The situation shown, being together with other people, does not suggest [...] that complainant no. 3 was photographed in the course of an activity that is particularly typical of relaxation and consequently requires a greater degree of protection from media attention and portrayal. Such greater need for protection is not derived from the holiday as such, but must be derived from and specified by the circumstances of the situation shown. Ordinary courts cannot simply refrain from specifying this need for protection by reason of the margin of appreciation and assessment granted to them in the context of balancing the circumstances of the case; in the interests of a substantive fundamental rights protection, it must be ascertainable from their decisions that they considered the decisive circumstances in their balancing by disclosing the reasons decisive for its outcome. Neither the considerations of the Federal Court of Justice nor those of the Regional Court satisfy these requirements.

c) The prohibition on disseminating the photo, upheld by the Federal Court of Justice, must therefore be reviewed again in light of the constitutional aspects set out above. It cannot be ruled out that a review of the publication of the photo on the basis of these standards in consideration of the accompanying article may lead to a differ-

ent outcome.

The judgment of the Federal Court of Justice is thus reversed and the matter is re- 108  
mandated to it for a new decision.

[...] 109

Papier	Hohmann-Dennhardt	Hoffmann-Riem
Bryde	Gaier	Eichberger
Schluckebier		Kirchhof

**Bundesverfassungsgericht, Beschluss des Ersten Senats vom 26. Februar 2008 -  
1 BvR 1602/07, 1 BvR 1626/07, 1 BvR 1606/07**

**Zitiervorschlag** BVerfG, Beschluss des Ersten Senats vom 26. Februar 2008 -  
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