Part III The comparison between the German legal regime and the GDPR regarding merchandising

1. Introduction

Both unauthorized and authorized merchandising have been scrutinized under the German legal regime and the GDPR. Divergent legal consequences regarding both tortious infringements and a contractual relationship validate the assumption of this thesis: The GDPR would cause a disruption of the right to one's image in Germany.

A problem-oriented comparison presents in Chapter 2. As it focuses on the divergences between the German legal regime and the GDPR in regulating merchandising, similarities such as the unlawfulness of unauthorized merchandising and the construction of consent in light of the principle of purpose limitation are omitted unless necessary. Section 2.1 identifies the problems emerging in unauthorized merchandising cases. While it seems that onerous compliance rules in the GDPR would lead to overprotection for data subjects in unauthorized merchandising, the real and urgent issue is that professional models and celebrities are not likely to be compensated under the GDPR as they seldom suffer from moral damages in merchandising. Issues in authorized merchandising are explored in Section 2.2, including the fact that merchandising contracts are no longer binding, the impact of the autonomous and rigorous conditions of validity of consent under the GDPR, and the consequences of the mandatory data subject's rights. Finally, based on the identified problems and negative long-term consequences, Section 2.3 concludes that the application of the GDPR in merchandising cases is inappropriate as it neither does a good job of curbing unauthorized merchandising nor serves the interest of data subjects. Furthermore, it contradicts the self-determination of data subjects.

Chapter 3 attempts to find possible explanations for the incompatibility of the GDPR in merchandising. Section 3.1 introduces the approach of one size fits for all, reasons for the reticence toward the commercial value of personal data and the resistance held by the EDPS, as well all the data paternalism reflected in the GDPR. After a comparison between merchandising and the data processing envisioned by the GDPR in light of the working papers by its authorities, Section 3.2 concludes merchandising is

forgotten by the GDPR, and the application of the GDPR to merchandising is unreasonable.

Chapter 4 concludes the application of the GDPR to merchandising is inappropriate and unreasonable in light of the consequences flowing from the application of the GDPR in merchandising in contrast with the German legal regime as well as the divergences between merchandising and the data processing envisioned by the GDPR.

2. *The GDPR's regulation in merchandising in contrast with the German legal regime*

2.1 Problems arising from the application of the GDPR in unauthorized merchandising

2.1.1 Overprotection for data subjects?

(1) More moral damages under the GDPR?

As discussed in Part II Section 3.2, the civil liability for data controllers according to the GDPR is regulated independently in Art. 82 GDPR. The detailed and extensive compliance rules in the GDPR facilitate for a more friendly and robust recourse mechanisms for data subjects.

Above all, the GDPR applies to every production link in merchandising, from photographing over editing and disseminating to storing and deleting – as long as the operations are digitalized to some extent. In contrast, the right to one's image merely regulates the publication and dissemination of personal images according to § 22 and 23 KUG. Against this backdrop, the data subject, like the one in the *hair salon* case, is entitled to claim damages occurred in all phases of the data processing, while she could only be protected against publication under the KUG.

Secondly, data subjects who are neither famous nor seriously hurt by unauthorized merchandising are likely get more immaterial damages under the GDPR. The GDPR's threshold for claiming immaterial damages is lower than that of the German legal regime. Data subjects shall no longer demonstrate grave mental damages to sustain the claim for compensation. Furthermore, some parallel decisions in Germany tend to reward immaterial damages ranging from 500 to 1,000 EUR for violations of the rights to information and erasure without onerous burden of proof on the side of data subjects, such as proving concrete damages and causation. As present-

ed in Part II Section 3.2.1, data subjects were rewarded 500 to 1,000 EUR per month for a delay in fulfilling the right to information and 300 to 1,000 EUR for omissions of Art. 17 GDPR when the data processing relates to the online environment

Notably, the interpretation in assessing the damage and quantifying the compensation by the CJEU is still pending. It partially undermines the importance of Art. 82 GDPR for data protection. That is probably why the German civil law still plays a significant role in unauthorized merchandising cases right now instead of the independent remedy clause in the GDPR, even though data subjects have argued for the unlawfulness of processing based on the GDPR. Thus, albeit not yet apparent, the generous attitude of the GDPR in the field of moral compensation needs to be taken seriously, and its impact on the German law regarding moral damages should not be underestimated.

Nevertheless, the highlight of moral interests due to the emphasis on protecting human rights is not particularly problematic. Firstly, the principle of compensation for tort remedies is unchanged: compensation is used to fill the damage, and double compensation is to be avoided. Therefore, data subjects must prove damages at first, and the number of compensation is in accord with the damages. The trend for damages increases the cost of compliance for merchandisers, but it does not raise concerns about overcompensation or violations of the rationale of national tort law. The amount of the damages is only several hundred and should be assessed according to the capacity of the controller. Moreover, it is only rewarded after a delay of one month. Finally, the compliance rules do not order the controller to act as the data subject asks but merely respond to the claim. It is reasonable to encourage controllers to fulfill their obligations in light of the principle of effectiveness and dissuasiveness of the GDPR.

Therefore, though the GDPR gives *vires* for ordinary people without severe ideal damages due to unauthorized merchandising to claim more damages than the German legal regime, it is not particularly problematic.

(2) Overpowering data subject's rights?

The non-monetary remedies under German law are premised on illegal acts. In contrast, data subjects can exercise the data subject's rights to any controller who processes their data, and the unlawfulness of data processing is not the prerequisite. It raises the concern as to whether the

data subject's rights are overpowering since they do not depend on the unlawfulness of data operations.

However, most of the data subject's rights share the same condition with the German remedies including injunction, claim for destruction, correction and publication of a counterstatement, and the auxiliary claim for information and accounting as discussed in Part II Section 3.2.3 (3). In addition, some rights in the GDPR, albeit legally available, are impractical and not preferred for data subjects in merchandising cases, such as the rights to data portability and rectification. In practice, the person depicted is still addressing remedies available in German law, including injunctions and the auxiliary claim for information and accounting while arguing for the unlawfulness of processing personal data under the GDPR. Moreover, the situation that controllers have to respond to claims for data subject's rights promptly in compliance with the GDPR is not a valid argument when problematizing the strength of data subject's rights. To get a response is guaranteed as a fundamental right in Art. 8 of the Charter and further materialized in the principles of transparency and accountability and Art. 12 (1) - (4) GDPR. Thus, the concretization of the right to the protection of personal data is instead an advancement that has not been explicated in German law.[523]

Thus, the concern that the data subject's rights granted by the GDPR are overpowering is superfluous.

2.1.2 Under-protection for professional models and celebrities

(1) Lack of non-monetary remedies in the GDPR?

Since Art. 82 GDPR only grants damages for data subjects who suffer from a violation of the GDPR, it is questionable whether there is a lack of non-monetary remedies for data subjects from the perspective of the GDPR. However, this concern is unrealistic.

On the one hand, some of the data subject's rights, including the right to object, the right to rectification, and the right to erasure, have a similar protective effect on non-monetary remedies in Germany. For instance, the right to erasure, characterized by the deletion of the personal data or the blocking of access to them, can be regarded as an adaption of injunction in § 1004 BGB aimed at eliminating interference in the online environment.

523 Vgl. *Schneider*, ZD, 2021, 1.

Moreover, the right to information and its associated rights is an enabling right in the GDPR and thus highly practical. Although it does not cater to the needs of data subjects in unauthorized merchandising cases like the auxiliary claim for information and accounting, it is purported to obtain information about the data processing itself to determine whether it is legal/compliant with the GDPR. Furthermore, the data subject can claim further rights or damages based on incompliance. On the other hand, the German non-monetary remedies are not prejudiced by the recourse mechanism of the GDPR under recital 146 of the GDPR. For instance, the auxiliary claim for information and accounting to investigate the profitability of the data processing is also available for the person depicted in an unauthorized merchandising case.

Therefore, to achieve a function such as an injunction deriving from § 1004 BGB, the data subject can choose from the GDPR or the German legal regime as they are interchangeable. Moreover, it is recommended that the data subject invoke both the auxiliary claim for information and accounting as well as the right to information in the GDPR because they serve different purposes. The rule of thumb is to adopt the GDPR's narrative in claiming the data subject's rights as much as possible due to timely response and the principle of effectiveness in compensation.

(2) Incomparable material damages under the GDPR to German law

As illustrated in Part II Section 3.2.2 (1), professional models and celebrities who suffer no immaterial damages but only prominent material ones in unauthorized merchandising cases only be compensated for actual losses such as expenses for inquiry, attorney's fees, and litigation costs. The claim for material damages computed on fictive license fees probably falls short under the GDPR. For one, unlike the KUG, it is not clear in the GDPR whether the commercial interests in personal data belong to data subjects. For another, while celebrities can effortlessly demonstrate the existence of a licensing market for their images, it is questionable whether this market belongs to the licensing market of personal data repined by the EDPS. If it is, then the calculation of the commercial interests in personal data is problematic.

Against this backdrop, in contrast with the German practice, where a reward for a fictive license fee for professional models and celebrities in unauthorized merchandising is very much one of the standard claims, professional models and celebrities have far less protection under the

GDPR in terms of material damages. The main reason is that German law recognizes the commercial interests contained in personal pictures and attributes these interests to the person depicted.

Noteworthy, as the 4th sentence of recital 146 GDPR states that the Art. 82 GDPR "is without prejudice to any claims for damage deriving from the violation of other rules in Union or Member State law", the prevailing opinion among scholars is that claims for damages under national law including § 823 BGB are permissible provided that the violation is not against rules in the GDPR, such as contractual obligations, the general personality right beside the right to informational self-determination.[524] In this wise, it seems possible to adapt some national law to solve the under-protection problem for professional models and celebrities, such as § 823 II BGB in combination with the KUG. However, it is contested because the "other rules" in the Member State law stated in recital 146 GDPR should not be broadly understood so that it undermines the supremacy of the GDPR. In this sense, one cannot maintain that the GDPR takes precedence over the KUG in merchandising on the one hand, but on the other hand, applies the claim for damages based on § 823 BGB in combination with the GDPR.

Nevertheless, the claim for restitution according to the law of unjust enrichment seems applicable to improve the situation for professional models and celebrities, as he claim according to § 812 BGB is not a claim for damages but gratuitous gain by the infringer.[525] One may argue that the data subject could claim the law of unjust enrichment to restore the commercial interests gratuitously gained by the controller through the unlawful data processing since Art. 82 GDPR only regulates the civil liability

524 Nemitz, in *Ehmann and Selmayr,* DS-GVO, Art. 82 Rn. 7; *Kühling, Martini and al.,* Die DSGVO und das nationale Recht, 2016, S. 351 ff.; Frenzel, in *Paal and Pauly,* DS-GVO BDSG, Art. 82 Rn. 20; Moos/Schefzig, in *Taeger, et al.*, DS-GVO - BDSG - TTDSG, Art. 82 Rn 105; Quaas, in *Brink/Wolff,* BeckOK Datenschutzrecht, Art. 82 Rn 8; Bergt, in *Kühling/Buchner,* DSGVO/BDSG, Art. 82 Rn. 12; Gola/Piltz, in *Gola,* DSGVO, Art. 82 Rn. 25ff.; Laue/Kremer, *Laue, et al.,* Das neue Datenschutzrecht in der betrieblichen Praxis, § 11 Rn. 17; Boehm, in *Simitis, et al.,* Datenschutzrecht, Art. 82 Rn. 6; Piltz, in *Gola,* DSGVO, Art. 82 Rn 20. It is stressed that Art. 82 GDPR shall not be circumvented through claims based on § 823 II BGB in combination with rules in the GDPR. See Boehm, in *Simitis, et al.,* Datenschutzrecht, Art. 82 Rn. 32. The opposite opinion, see Kreße, in *Schwartmann, Jaspers, Thüsing, Kugelmann and Leutheusser-Schnarrenberger,* DS-GVO/BDSG, Art. 82 Rn. 27.

525 Vgl. Bergt, in *Kühling/Buchner,* DSGVO/BDSG, Art. 82 Rn. 67

of controllers.[526] However, this proposition is questionable. According to the law of unjust enrichment regarding *Eingriffskondiktion* explained in Part I Section 2.2.1, the restitution presupposes that the economic benefits of personal data should be attributed to the subject. Once again, as the GDPR is equivocal about the attribution of the commercial interests encompassed by personal data, this claim would fall short. Nevertheless, the person depicted could claim the law of unjust enrichment to restore the commercial interest gratuitously gained by the infringer through the unauthorized merchandising under German law since the GDPR does not touch upon the question about the commercial value of personal data, either.

This pure German claim based on the law of unjust enrichment may be contestable under the EDPS's opinion that *a market for personal data is as tragical as a market for live human organs*. However, the influence of this opinion should not be overestimated due to its flaws in many aspects (see below). As long as the GDPR does not reject the attribution of the commercial interests encompassed by personal data to data subjects, the claim for restitution based on the law of unjust enrichment can solve the under-protection problem because it does not resort to any rules in the GDPR.

(3) The long-term consequences of the reticence

Although the application of the law of unjust enrichment in national law can improve the compensation for professional models and celebrities in unauthorized merchandising cases significantly, this "outside the box" solution would hide some serious problems in the long run.

Firstly, the effectiveness of civil damages granted by the GDPR would be undermined due to the lack of economic incentives for data subjects to bring such claims. As more and more data subjects tend to value the commercial value of personal data, the inadequacy of the GDPR for material compensation would become apparent. While it is true that some data subjects, such as the one in the *hair salon* case, might feel morally offended by merchandising, it is also true that some people do not feel distressed about the processing of personal data but only exploited and thus want to claim a fair share of the controller's advertising revenues. Therefore,

526 Thüsing/Pötters, in *Thüsing and Forst*, Beschäftigtendatenschutz und Compliance, § 21 Rn. 40.

it would be questionable why the preference of the EDPS should hinder them.

In this wise, if data subjects would like to claim more monetary damages, they would either deploy national remedies as they do right now so that they can get pecuniary damages that controllers have yielded from the unlawful data processing, or they have to pretend to be morally offended to get moral compensation. The latter solution is of course not feasible. As a result, the solution provided by national law instead of finding solutions within the recourse mechanism offered by the GDPR itself would undermine the effectiveness of the GDPR in civil practice.[527]

Another consequence is related to the deficiency of Art. 82 GDPR in terms of material damages. Though the law of unjust enrichment would improve the situation for professional models and celebrities, ordinary data subjects would not be able to benefit from this because they cannot demonstrate the value of their images. Of course, they are likely to have more moral damages, but this builds on their good comprehension of the GDPR's provisions, especially the data subject's rights. Take the *hair salon* case as an example, the data subject only claimed injunction based on German law even though she addressed the GDPR to argue for the unlawfulness of data processing. As mentioned, damages for a violation of the right to information without proving concrete damages or causality are only available for more than a month after the request for information, and damages for omission to the right to erasure presuppose the request.

Therefore, until there is sufficient education about the GDPR, data subjects would suffer from continuous exploitation despite the seemingly generous moral compensation as unauthorized merchandising of ordinary people is lucrative for controllers, unless DPAs start to intervene by conducting investigations and imposing fines, according to Art. 83 (5) (a) GDPR. One may argue that even if the GDPR assigns the commercial value of personal data to data subjects, it will not change the fact that data from ordinary people is not worth much,[528] and they still find it difficult to demonstrate the value of their data. However, no matter how cheap the data is, forcing the controller to surrender the money it saved from the violation is an effective way to stop the violation, as the *Herrenreiter* case demonstrates. Moreover, if a licensing market for personal data would be

527 Frenzel, in *Paal and Pauly,* DS-GVO BDSG, Art. 82 Rn. 21. It warns not to devalue Art. 82 GDPR regarding the dogmatics in national laws, thus leaving it empty.

528 See *Lewinski,* in: *Datenschutz, Dateneigentum und Datenhandel*, 209 (210).

facilitated by acknowledging the attribution of the commercial value of personal data, then there would be a basis for calculating fictive license fees.[529]

Thirdly, the antipathy to the commercialization of personal data held by the EDPS would lead to the general insensitivity of data subjects to the commercial value of their data. Without the emphasis on compensation for the commercial value of personal data from the EU level, ordinary data subjects would not realize that their data is worth money. This problem would be more prominent in authorized merchandising scenarios as they give consent for free not because they do not want remuneration but simply because they do not know there could be remuneration, or they do not know how to ask for reasonable remuneration.[530]

2.1.3 Interim summary

If data subjects in unauthorized merchandising are knowledgeable about the GDPR and correctly assert Art. 82 GDPR in combination with data subject's rights, they will get more compensation for moral damages than those under the KUG. Undoubtedly, this premise is not easy to meet. In addition, the mandatory data subject's rights are powerful in the context of the principles of accountability, and effectiveness and dissuasiveness for compensation. However, both changes in contrast with the German legal regime are not problematic. As the principle of compensation for tort remedies is unchanged: Compensation is used to fill the damage, the enforcement of the right to the protection of personal data by breaking down into data subject's rights and lowering the threshold for moral damages is rather a legal advancement than overprotection. Moreover, the data subject's rights that are suitable in unauthorized merchandising are similar to the non-monetary remedies under German law.

The difficulty of professional models and celebrities in obtaining adequate material compensation under the GDPR needs to be addressed urgently. This resistance to the commercialization of personal data held

529 Paal/Piltz, in *Gola*, DSGVO, Art. 82 Rn. 11; *Plath*, DSGVO/BDSG, Art. 82 Rn. 4.

530 OLG München, GRUR 2021, 1099 - Klarnamenpflicht bei Facebook, para.17f. The lack of an established merchandising market (transparency) is detrimental for data subjects to claim restitution because they cannot demonstrate the market value of personal data.

by the EDPS is reminiscent of the *Zeppelin* case.[531] During that time, the German court had to fabricate mental distress to grant adequate compensation. Though the German legal regime solved this issue as early as the middle of the last century, its application is questionable after the GDPR came into force. A significant drawback in merchandising scenarios presents itself by dragging people back to a half-century-old debate: Whether celebrities can be compensated without moral damages when the right to control the commercial use of their likeness is infringed.

The law of unjust enrichment in German law may be a suitable solution here, but it is questionable whether it is reasonable and desirable to look outside the framework of the GDPR to solve a systemic problem within the GDPR itself, especially given its long-term consequences. For instance, the circumvent of Art. 82 GDPR as well as the substantial protection offered by the GDPR, and increased pressure on the public sector. More importantly, the GDPR's reticence and the EDPS's resistance toward the commercial value of personal data would contribute to the negligence of data subjects in understanding and controlling these interests. After all, failing to protect the identified person simply because the harmed interest is pecuniary would encourage data controllers to have endless exploitation of (commercial interests of) personal data.[532]

In summary, the overprotection is a pseudo-question, while the underprotection for models is a real problem and the reliance on the national remedy based on the law of unjust enrichment would present more long-term consequences.

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531 From a century ago, America also tended to stress moral damages more than material ones. See Roberson v Rochester Folding Box Co 171 NY 538 (NY 1902). In the case, the plaintiff claimed to be teased by her friends because her (beautiful) back was used to advertise the flour, and she was also called the "flour of the family" in the advertisement. However, the *Zeppelin* case is more noteworthy because the court made up Mr. Zeppelin's moral damages since he had also authorized another tobacco company to use his name and images.

532 Bietti, 40 Pace law review 310 (2020), 377.

2.2 Prominent challenges to merchandising contracts in contrast with German law

2.2.1 From pacta sunt servanda to the anytime revocability

In light of the theory of the *ladder of permissions*, consent specified in § 22 KUG is subject to different conations except for assignment. This interpretation gives dogmatic support for German rulings that consistently indicate the binding nature of merchandising contracts, and the consent given by the person depicted is only revocable for due cause (*supra* Part I Section 3.1.1). By doing so, it not only accords to the will of the person depicted but also protects the reliance interests of the merchandiser who needs a stable legal position to encourage investments in time and money in a not insignificant manner to facilitate merchandising. Consent in merchandising is revocable under exceptional circumstances to protect the ideal interests encompassed by the right to one's image. Based on the analogy of the German Copyright Law, consent is revocable when a changed belief of the person depicted is demonstrated regarding the commercial exploitation, and the right to self-determination must be executed in a contradictory way to protect the core personality interests (see Part I Section 3.1.1 (2))

In contrast, data processing prescribed in merchandising contracts can only resort to Art. 6 (1) (a) GDPR as its lawful ground. The ambit of Art. 6 (1) (b) GDPR, according to the mainstream opinion, does not extend to the data processing that is the main performance of the contract. Otherwise, controllers would flee from the anytime revocable consent to Art. 6 (1) (b) GDPR. As a consequence, merchandising contracts are no longer binding because consent given by data subjects shall be free revocable pursuant to Art. 7 (3) GDPR (see Part II Section 4.2.3). One can convincingly argue that data processing is absolutely necessary for contractual purposes and voluntarily agreed upon by data subjects in merchandising. However, the EDPB maintains that independent commercial purposes of the controller would undermine the protective objective of the GDPR for data subjects and objects to the idea of commercializing personal data, while merchandising contracts are virtually commercializing personal data (see Part II Section 4.3.1 (2)).

Consequently, the data subject's control over personal data is enhanced at the expense of a stable legal position for merchandisers. Furthermore, since the GDPR appears to limit the manifestation of consent only in the anytime revocable form, controllers are obliged to cease data processing

and delete personal data when data subjects claim Art. 17 (3) GDPR at the same time when they withdraw consent. Moreover, controllers are not compensated when data subjects withdraw consent without reason. As a consequence, controllers would likely shy away from making extensive and substantial investments because the relationship between them and data subjects is too volatile. This result also falls foul of the willingness of data subjects as they wish to increase publicity and get income by allowing others to commercialize personal data.

2.2.2 Stricter conditions for valid consent under the GDPR

Failure to meet the requirements for voluntariness or adequate clarification could result in the invalidity of consent and thus render data processing unlawful, even though the data subject wants personal data to be processed. Furthermore, the excessive pursuit of formality increases the burden on the data subject and controller in expressing their will and drafting the contract. In addition, the legal regulation of consent in the GDPR cannot effectively protect models including the young and powerless even though it advocates a high-level of data protection.

As argued in the *company-advertising* case, the omitted notification of the revocability of consent invalidated the consent and the whole data processing, even though the data subject supported the data processing during the employment but merely wanted to withdraw consent after he quit the job. Instead of inquiring about the indication of the data subject, the GDPR negates the lawfulness of the data processing outright. The GDPR incurs additional costs for the controller (communicating one-on-one with data subjects and documenting, asking lawyers to review statements, etc.) to produce a simple commercial promotion for the company. On the contrary, without imposing many requirements for validity, German courts analyze the true meaning of the parties based on facts and balance the conflicting interests. In the same case, the German court saw the real issue here, i.e., a misunderstanding regarding the duration of consent due to the equivocal declaration. Thus, the merits of the dispute were whose understanding and interests were more worthy of legal protection, and in no case, it should affect the validity of the previous data processing since the agreement to advertise the company (free of charge) was completely voluntary.

Therefore, merchandisers not only have to accept that data subjects may withdraw consent at any time but also the risk that the validity of consent

may well be invalidated by its somewhat defective duty to inform. Given that merchandising concerns an equal partnership, these mandatory and protective measures in the GDPR neither consider the reliance interests of the controller nor faithfully fulfill the data subject's will. Moreover, the principles of transparency, data minimization, and accountability pose serious challenges to contract-drafting, and the execution of the principles themselves is still unclarified. Thus, controllers need to explicate every detail in contracts, even though this is self-explanatory among professionals. Minor flaws would put the cooperation in danger. For instance, in the *landlady* case, even though the ambiguity about the means and duration of the merchandising was innocuous, it qualified as a violation of the compliance rules in the GDPR, and repeated violations on a systematic and large scale are likely to result in huge fines. Thus, an additional annex of the merchandising contract seems in need. *Vice versa*, data subjects also need to read more of the terms and be extra careful about the terms that deviate from business practices because explicit consent to data processing that touches the core interests of personality is valid based on the *"stink fingers"* case.

Thus, it is likely to lead the jurisprudence established in that case to the opposite of what it sought – to help the controller "ambush" the data subject when the data subject signs the unconventional exploiting acts without reading. After all, overly complex and lengthy information reduces the comprehension of data subjects and the efficiency of collaboration.[533] In other words, complete reliance on contracts without trusting the experience and self-sufficiency of professionals in proven business practices does not always lead to results that meet the expectations of the parties. In doing so, it significantly reduces efficiency and considerably increases the burden on both sides in the established merchandising business. Thus, data subjects would find it more difficult to establish cooperation or get lower income due to the higher compliance costs taken by the controllers. Neither result is desirable for data subjects because it does not fulfill their merchandising needs.

Compared with German law, high-level data protection is generally very costly and ill-suited to authorized merchandising and likely to make it unsustainable.

533 Solove, 126 Harvard Law Review 1880 (2013), 1885. He argues that more granularity in drafting privacy policies creates a greater risk of confusion.

2.2.3 The excessive burden for merchandisers imposed by the data subject's rights

Since the data subject's rights in Art. 12-22 GDPR are indisposable in merchandising contracts, controllers shall take these rights seriously with the help of professionals. For instance, a merchandiser is suggested to store personal data about the identity of the data subject, the raw data about original photos and the data of the final advertising image separately from its management and accounting data to meet requirements for the right to information with the right obtain a copy, the right to rectification, the right to erasure and the right to data portability.

Admittedly, some of these rights do not make sense in merchandising scenarios. However, the right to erasure in Art. 17 GDPR, coupled with the free revocable consent, is too powerful in a merchandising relationship. Although the withdrawal of consent does not affect the legality of the previous data processing, the merchandiser should delete all personal data when the data subject revokes the consent. Consequently, all advisements, except for printed ones, must be taken down because it is detrimental to the investments of the controller.

Therefore, it is a compelling illustration of how the mandatory data subject's rights are excessive and unnecessary in a merchandising contract. Nevertheless, the data subject's rights require no small compliance costs but are not well-tailored to the specific expectations of the data subject in authorized merchandising scenarios. Moreover, it is conceivable that the controller would share the costs with data subjects who seek cooperation.

2.2.4 Interim conclusion

The challenges brought by the GDPR in merchandising present themselves in two main aspects compared to the German legal regime. First, the inapplicability of Art. 6 (1) (b) GDPR and the anytime revocability of consent in Art. 7 (3) GDPR renders merchandising contracts no longer binding. Secondly, the mandatory protective measures, including the rigorous conditions for validity of consent and data subject's rights in the GDPR, place a significant burden on both sides.

As models must be allowed to opt out from the relationship at any time without restrictions or compensation to merchandisers, it is difficult, if not impossible at all, for them to establish a partnership because no merchandisers as data controllers would risk a massive administrative penalty

under the GDPR to enter into a contract that excludes the data subject's right of withdrawal. Not only would this deadlock harm merchandisers' legitimate business interests, but it also deals a devastating blow to the development of models' careers and even affects the operation of the market and people's entertainment life.

In summary, the mandatory protective measures in the GDPR deviate from the genuine wish of data subjects and do not do an excellent job of protecting data subjects. Thus, the acute and detrimental incompatibility aroused by the GDPR with merchandising needs a solution urgently.

2.3 Inappropriate application of the GDPR in merchandising

Based on the comparison, it is argued that the direct application of the GDPR in merchandising is not appropriate and likely to make merchandising unsustainable.

Under the German legal regime, the genuine wish of the individual in a merchandising scenario – to get profits by granting the controller a relatively stable legal status to exploit the commercial value of his or her data by exhibiting and sometimes sub-licensing – is recognized and respected. Upon this premise, varied monetary and non-monetary remedies have been developed to help the person depicted curb unauthorized merchandising by recovering the license fees he or she is entitled to and thus make the infringer unprofitable. On the flip side, by interpreting consent, German law provides the model with varied tools for disposition of his or her rights including establishing a binding, cooperative (and long-term) relationship through a legal act. Thus, the merchandiser with a stable status shall combine its image with the model's image to increase sales, and simultaneously the model is allowed to use the merchandiser's social and pecuniary resources to gain higher exposure and career development opportunities. At the same time, the law intervenes only when it is necessary to defend the core personality interests. The analogies with the German Copyright law regarding revocability of consent and the construction of consent in case of doubt strike a fair balance between the person depicted and the merchandiser without dismissing the inalienability of personality rights.

However, under the GDPR, the high-level protection for data subjects deviates from the genuine wish of the individual in a merchandising scenario. As the attribution of personal data for data subjects is not clear under the GDPR, professional models and celebrities are challenged to

obtain adequate material compensation under the GDPR. By the same token, merchandising contracts do not bind data subjects. Instead, they are "forced" to enhance the position in controlling personal data by making the lawfulness of data processing by the controller dependent on their anytime revocable consent. The data subject's autonomy is restricted because the GDPR deprives the data subject of the possibility to express willingness to be bound by his or her commitments to merchandising. Hence, it becomes increasingly difficult for the data subject to find partners willing to invest consistently in a state without protection. Moreover, even if the data subject finds a partner, the mandatory protective measures, including the rigorous conditions for validity of consent and the data subject's rights, make the partner assume all risks arising from the cooperation to enforce uneven protection for the data subject. The controller needs to account for any ambiguities in the agreement. Furthermore, any trivial incompliance with the GDPR is eligible for civil damages and administrative fines, not to mention how excessive and unnecessary the data subject's rights are in a merchandising contract.

Before diving into the solutions, here is the right place to explore the reasons for the main divergences. In doing so, it can prove whether the direct application of the GDPR in merchandising is reasonable, on the one hand, and provide starting points for solutions to address the inappropriate results deriving from the severe discrepancies between the German legal regime regulating merchandising and protection provided by the GDPR, on the other.

3. Possible explanations for the incompatibility

3.1 Possible reasons for the high-level data protection of the GDPR

3.1.1 The approach of one size fits for all

One of the reasons is that the GDPR treats all forms of data processing for varied purposes equally. By conceptualizing varied operations regarding personal data by the term "processing", not only are legal overlaps emerging hand in hand as automated processing technologies become widespread, but challenges also as individuality and characteristics in different scenarios regarding the claims of data subjects, the interests of data subjects and controllers, and data processing are all ignored.

Such a mindset of an integrated view for data processing has its roots in the history of the data protection law in the EU as well as the Council of Europe. As discussed in Part II Section 2, the need for personal data protection stemmed from the concern about the risks that automated data processing technologies might pose to individual freedoms and rights. Automated data processing technology is perceived as particularly risky as it facilitates the construction of integrated information systems for individual persons through an integration of data collection, recording, analysis, combination (transmission), and storage.[534] Thus, the GDPR, from its inception, was intended to control every aspect of the processing of personal data and to treat every processing method and link equally. Its reason resides in the consideration that fundamental rights, particularly the right to informational self-determination, are affected by all forms of data processing regardless of its material and territorial characteristics; and the risks posed by data processing are so great that they warrant some preventive protection norms.[535] For this precise reason, the GDPR leans on compliance requirements and the accountability of controllers.

On the contrary, the KUG has been able to regulate merchandising for more than a century effectively because its regulatory purposes are catering to the need of the right holders in light of the specific scenarios. The KUG always provides suitable protection without fabricating or neglecting damages, be it economic or moral interests, celebrities or ordinary people, celebrities or ordinary people. The enrichment of the connotation and disposability of the right to one's image rights is facilitated by constant refinement of norms and legal development (*Rechtsfortbildung*) by differentiation. In this sense, the risk-based approach adopted by the GDPR could be a tool to alleviate tensions arising when the obligations are disproportional to the data processing. However, the equivocal description of risks and their assessment under the GDPR does not lend it to easy execution.

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534 BVerfG, NJW 1984, 419 - Volkszählung, para. 145; Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, European Treaty Series (ETS) No. 108, Art. 2 (b); Evans, 29 THE AMERICAN JOURNAL OF COMPARATIVE LAW 571 (1981) (578); Zech, 11 Journal of Intellectual Property Law & Practice 460 (2016) (461); OECD, Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value, OECD Digital Economy Papers, No. 220, 10-13.

535 BVerfG, NJW 2000, 55 - Telekommunikationsüberwachung I, the 4th Guideline; *Roßnagel*, in: *Hill, E-Transformation. Veränderung der Verwaltung durch digitale Medien*, 79 (89).

Thus, the jurisprudence of the KUG is acclaimed because it has already paved the way in concretizing some contexts of data processing in light of the risk-based approach.

3.1.2 Reasons for the reticence towards the commercial value of personal data

The focus of the EU data protection law is consistently on the damages and threats that digitalization might pose to individual freedoms and rights instead of noticing what digitalization might bring to individuals. The starting point for data protection – the rights and freedoms of individuals anchored in Art. 8 ECHR and Art. 7 and 8 of the Charter – further supports the empowerment of data subject with substantial defensive rights, such as the right to erasure, rectification, object, portability, and the enabling right – the right to information. One can only ask to delete personal data upon the right to erasure or to withdraw consent according to Art. 7 (3) GDPR (i.e., negative consequences based on negative rights).[536] On the flip side, the person can decide when personal data do not need to be deleted and under what conditions he or she would not withdraw consent. However, the GDPR is reticent about this positive aspect of the rights of data subjects. Though recital 7 of the GDPR states that "natural persons should have control of their own personal data", it is achieved through negative rights. Some scholars even argue that "the GDPR *de facto* assigns property rights (the "residual right") on personal data to the data collector",[537] since the GDPR only carves out some (moral) rights such as the right to information and erasure for data subjects and does not mention economic rights at all.

Yet, it would be a misconstruction that the EU data protection law overlooks the commercial value of personal data. From the inception of the 108 Convention, the omnibus approach to governing both public and private sectors alike became the principle of the subsequent legislation in the EU. In recital 6 GDPR, private companies are mentioned before public

536 Vgl. *Dickmann*, r+s, 2018, 345 (350).

537 Duch-Brown, et al., The economics of ownership, access and trade in digital data, 2017, 17.

authorities in respect of making use of personal data.[538] As the commercial value of personal data is indisputably the core, if not the only, reason to drive private companies in collecting, processing, and storing data,[539] the precautions against the use of data by private companies at the EU level is a clear indication of the importance the GDPR places on the economic benefits of personal data.

Moreover, even those scholars who argue that the GDPR has assigned the commercial value of personal data to controllers *de facto* admit that the GDPR by law *(de jure)* does not assign property rights on personal data to the data controller.[540] Reading from the context, the gist of their argument would rather be that since personal data are easily transferred to data collectors the absence of defined ownership right regarding personal data in the GDPR may be beneficial in avoiding anti-common problems in data among controllers.[541] Furthermore, the intrinsic value of personal data is the natural person identified or identifiable.[542] Thus, any exploitation of that value, be it financial or spiritual, will inevitably pass on the harm to the identified person. Given the fact that one's consent is increasingly used as a tool to exploit the commercial value of personal data,[543] the denial that individuals can protect the commercial value of personal data is

538 It states, "technology allows both private companies and public authorities to make use of personal data on an unprecedented scale in order to pursue their activities".

539 In an enterprise environment, personal data have always been likened to the "new oil" because they are raw material to conduct digital transformation in respect of developing customer networks, building platforms, keeping innovating, etc. Instead of citing many, see *Schefzig*, K&R Beihefter, 2015, 3; *Rogers,* The Digital Transformation Playbook: Rethink Your Business for the Digital Age, 89 et seq.

540 Duch-Brown, et al., The economics of ownership, access and trade in digital data, 2017, 17; Cf. Körner, GDPR – boosting or choking Europe's data economy?, 2018, at https://www.dbresearch.de/servlet/reweb2.ReWEB?rwnode=NAVIGATION&rwsite=RPS_EN-PROD&rwobj=ReDisplay.Start.class&document=PROD0000000000470381.

541 Duch-Brown, et al., The economics of ownership, access and trade in digital data, 2017, 31.

542 Art. 1 (1) GDPR states, "This Regulation lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data"; BVerfG, NJW 1984, 419 - Volkszählung, para. 94; Hornung/Speicker gen. Döhmann, in *Simitis, et al.*, Datenschutzrecht, Art. 1 Rn. 3; *Büchler,* AcP, 2006, 300 (324).

543 *Rogosch and Hohl,* Data Protection and Facebook: An Empirical Analysis of the Role of Consent in Social Networks, 63.

virtually to turn a blind eye to the data market that exists.[544] To recognize and protect the commercial interests encompassed by the right to the protection of personal data can thus better protect data subjects from exploitation by controllers driven by commercial motives.

The free flow of personal data, as one of the dual objectives of the GDPR, may be used to make some interpretations in light of the commercialization of personal data since a functioning market is purported to allocate recourses efficiently.[545] However, the materialization of the free flow of personal data in specific provisions is difficult to find.[546] A fortiori, the free flow of personal data is suggested to be understood as guaranteed as the GDPR has harmonized data protection laws across the Member States at a higher level.[547]

Against this background, a possible reason for the reticence on behalf of GDPR can be deduced from the history of the regulation based on the KUG over merchandising. After the recognition of the commercial value of personal data, the next logical step is to alienate personal data from the person identified to some extent.[548] Otherwise, people would wonder why they could only be compensated when the third party illegally exploits their data but cannot legally profit from letting the third party exploit actively. Therefore, one should be very cautious in opening the floodgate because the consequences for data subjects are not as certain, established, and obvious as the ones of merchandising. Even though personal data *per se* could be non-transferable without prejudicing the tradability of its ma-

544 Most data brokers have already traded data since the 1970s for direct marketing. See Ramirez, Brill, Ohlhausen, Wright and McSweeny, Data Brokers: A Call For Transparency and Accountability, 2014, 1 and 12 et seq.; Simonite, MIT Technology Review (2014)at https://www.technologyreview.com/2014/02/12/174259/sell-your-personal-data-for-8-a-month/; Abraham and Oneto, Berkley School of Information W231-1 (2015)1 et seq, at https://www.ischool.berkeley.edu/sites/default/files/projects/abraham-oneto-final-paper.pdf.

545 Vgl. Radin, 15 Journal of Law and Commerce 509 (1996) (514-516).

546 See *Sattler, in: Lohsse/Schulze/Staudenmayer, Data as Counter-Performance – Contract Law 2.0?*, 225 (233).

547 Recital 10 of the GDPR; CJEU, Lindqvist, C-101/01, para. 96; CJEU, European Commission v. Germany, C-518/07, para. 20; CJEU, ASNEF, Joint cases C-468/10 and C-469/10, para. 29; Schantz, in *Brink/Wolff*, BeckOK Datenschutzrecht, Art. 1 Rn. 3.

548 An example, see the right to one's image Part I Section 3.1.1. BGH, GRUR 1956, 427 - Paul Dahlke,429; BGH, GRUR 2000, 709 - Marlene Dietrich, para. 31. The pecuniary components of personality rights are not indissolubly linked to the person in the same way as the ideal ones. See *Sattler*, JZ, 2017, 1036 (1045).

terial interests, the serious power and informational asymmetry between controllers and average data subjects would easily distort the licensing of data that is supposed to be fair.[549]

Thus, the focus of the entire regulatory complexity of the GDPR is on passive defense rather than being active in elucidating the commercial value of personal data.

The EDPS further highlights the concerns about the consequences of the commercialization of personal data because it contends that internet users are fraught with cognitive deficiency and tend to give (access to) their data for trivial benefits.[550] By illustrating the situation in which users of web services allow the operators to collect personal data in return for (free) services, the EDPB shares similar opinions.[551]

Upon this conception, the GDPR takes the priority to guarantee the data subject's unbreakable control over data rather than facilitating a property right that would be transferred to the controller ultimately and easily.[552] Thereby, the GDPR limits the ability of data subjects to dispose of personal data by fixing their consent as revocable anytime. In other words, the GDPR establishes a system analogous to moral rights that are inalienable from the data subject yet can break through the relative relationship of

549 Cf. *Lanier, Weyl and McQuaid*, Harvard Business Review, 2018, 2 (5 et seq.), at http://eliassi.org/lanier_and_weyl_hbr2018.pdf. Out of similar concerns, it advocates establishing MIDs (mediators of individual data) to help ordinary people assert their economic rights vis-à-vis large data-driven companies.

550 *Preibusch, Kübler and Beresford*, Electronic Commerce Research, 2013, 423. Verified by experiments, most consumers would give up privacy for 1 dollar discount; Solove, 126 Harvard Law Review 1880 (2013) (1883-1893), with further references.

551 EDPB, Guidelines 2/2019 on the processing of personal data under Article 6(1) (b) GDPR in the context of the provision of online services to data subjects, para. 4.

552 There is an American case to demonstrate that the alienability shall not be attributed to interests or rights that "constitute the person and the general essence of his or her self-consciousness" (*welche meine eigenste Person und das ihr allgemeine Wesen meines Selbstbewusstseins ausmachen*). See *Hegel*, Grundlinien der Philosophie des Rechts, § 66. In the case, Brooke Shields, an American actress, sought to dissolve a contract for the transfer of her right of publicity regarding nude photographs signed by her mother when Brooke was a teenager. The New York court held that the right of publicity was freely transferable as a property right, and thus that once the holder transferred it, he or she had no right of withdrawal because promises must be kept. See Shields v Gross 58 N.Y.2d 338 (N.Y. 1983).

contracts.[553] Thus, even though data subjects do not possess any negotiation power in the face of data-driven companies, they can walk away with their data at any time felicitated by flanking measures including the data subject's rights, the principles of data processing, and some default privacy rules to ensure the high level of data protection.[554] This protection is effective and reasonable because data subjects are *de facto* not given any possibility to negotiate with controllers. In practice, pre-drafted, standard contracts filled with legal and technical jargon prevail in the online environment aiming to collect as much data as possible, profile individuals for targeted advertising, and store data for future needs.

3.1.3 Protective provisions stemming from the data-paternalism

Paternalism, albeit lacking legal definition, has two significant characteristics: To protect people for their good by (partially) negating their decisions.[555] Restricting private autonomy to protect the fundamental rights and freedoms of individuals is not a new legal phenomenon. *Dworkin* has even summarized a list of legal provisions in different legal areas that protect people from being harmed by their own decisions.[556] Specified in the legal area of personality rights, the boundary of legal paternalism seems to be the eternal theme,[557] which outlines the boundary of the disposition of personality rights.[558] Therefore, as the history of the development of the jurisprudence of the KUG shows, the requirements of protecting personal images change with the conception and moral values of people that are underpinned by advancements of economy and technology. In this sense, one should always ask why his or her dispositive power should be limited.

Under the data protection law, there has been a growing acceptance of "data paternalism" (*Datenpaternalismus*) in the face of data-driven

553 Calabresi and Melamed, 85 Harvard Law Review 1089 (1972), 1111 et seq.
554 See *Lauber-Rönsberg,* AfP, 2019, 373 (376).
555 *Eidenmüller,* Effizienz als Rechtsprinzip, S. 359.
556 *Dworkin*, The Monist, 1972, 64 (65 et seq.)
557 Vgl. BGH, GRUR 2000, 709 - Marlene Dietrich, para. 34; *Götting,* Persönlichkeitsrechte als Vermögensrechte, S. 7f.; *Ohly,* AfP, 2011, 428 (431).
558 *Eidenmüller,* Effizienz als Rechtsprinzip, S. 385f. He addresses that a series of problems come up when the untransferable and indispensable part of the personality is immaterial and ideal instead of a pound of flesh like Shylock asked from Antonio.

practices.[559] Reasons in economic and political aspects are briefly introduced as follows:[560]

Sometimes, data subjects are unable to make a true and rational judgment because of structural problems.[561] In practice, long, complex, and obscure privacy policies hinder data subjects from making knowingly and rational judgments – if they had enough information and time to deliberate their decisions concerning the processing, their choices would be different.[562] It nudges data subjects to give their data freely to data controllers for unnecessary purposes and to be fed up with profiling, targeted advertising, etc. Thus, data subjects cannot and shall not self-incriminate for the decisions that they would not make if they had the choice and information.[563] Moreover, as people are more attempted toward short-term preferences over long-term ones, they would give up their data for trivial benefits, though they know privacy is important and valuable.[564]

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559 *Krönke*, Der Staat, 2016, 319.

560 A comprehensive and thorough discourse on this issue is neither possible nor necessary for this dissertation (the data paternalism reflected in the GDPR would amount to another dissertation). This part only briefly introduces the ones that are relevant for making a distinction between the data processing envisioned by the GDPR and merchandising. A general elucidation for the legitimacy of legal partialism in terms of efficiency and politic policy as well as the respective counterarguments, see *Eidenmüller,* Effizienz als Rechtsprinzip, S. 365-373.

561 Solove, 126 Harvard Law Review 1880 (2013), 1888 et seq.

562 Another study reckons that if people read the privacy policies of the websites they visit verbatim over a year, the lost productivity is worth $781 billion. See McDonald and Cranor, 4 A Journal of Law and Policy for the Information Society 543 (2008), 564. These studies, despite revolving around privacy policies online, reveal the common problems raised by the stricter duty to inform under high-level protection for data subjects: in addition to higher compliance costs, a more transparent policy, while beneficial for the data subject to have sufficient information, also requires more effort and time on his or her part. Thus, effective self-management/determination is difficult to achieve with transparent policies alone if there is a lack of proactive participation by the data subject.

563 This justification must be distinguished from the one for prescribing default rules in the GDPR, such as the default-privacy and design-privacy model in Art. 25 GDPR. In short, the latter requires a stronger rationale than guaranteeing the voluntariness of self-decisions, such as to protect third parties, social welfare, and the public interest, because the law needs to justify why it needs to "nudge" the data subject into choosing something for the sake of a better outcome he or she would not otherwise choose voluntarily. See *Krönke*, Der Staat, 2016, 319 (329).

564 *Acquisti and Grossklags*, in: *Acquisti, Digital Privacy: Theory, Technologies, and Practices*, 363 (372); The contradiction between short-term and long-term prefer-

Pricing (the consideration for personal data) cannot be left to the market either because data subjects themselves would largely underestimate the commercial value of personal data.[565] Some scholars have likened the production of personal data to domestic work (often performed by women), arguing that they both contribute significantly to productivity but are grossly undervalued.[566] Moreover, even if the valuation of the data is accurate, there is still a risk that price inequities between the poor and rich exists, and the former are more vulnerable in becoming "data slaves" catering to all needs of controllers including those not yet determined.[567] In this scenario, what being called as the external moral cost, proposed by *Calabresi*, plays a non-negligible role in assessing the cost of legislation; if it is large enough, there is more reason to argue that the protection for personal data shall not be alienated from the data subject.[568]

Anchored in the text of the GDPR, the protection for personal data is inalienable from data subjects due to the imperative of fundamental rights including personality as well as the right to privacy (recital 1 GDPR).[569] Based on the *categorical imperative (Kategorischer Imperativ)*, the assignment of personality rights is forbidden. For one, the protection of personal data is so treasured that the loss of it would undermine the dignity and personality of a human being. Secondly, the controller over personal data should be warranted because data subjects should be given an opportunity to learn from their mistakes regarding disposing of their data.[570] Another

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ences as one of the justifications for legal paternalism, see Cooter, 64 Notre Dame Law Review 817 (1989) (825).

565 While people tend to give their data for 1 dollar or discounts for pizza, Google (Alphabet), Amazon, Facebook, Apple, as well as Alibaba, Tencent and ByteDance are becoming monopiles or oligopolies relying on large datasets of personal data. See *Posner and Weyl*, Radical Markets: Uprooting Capitalism and Democracy for a Just Society, 234-235.

566 *Jarrett*, in: *David and Christian, Digital Objects, Digital Subjects: Interdisciplinary Perspectives on Capitalism, Labour and Politics in the Age of Big Data*, 103 (107); Cf. Bruni, 41 CARDOZO LAW REVIEW 2203 (2020) (2233); *Posner and Weyl*, Radical Markets: Uprooting Capitalism and Democracy for a Just Society, 209 with further references.

567 *Posner*, Regulation: the Cato review of business and government, 1978, 19 (20).

568 *Calabresi*, The Future of Law and Economics: Essays in Reform and Recollection, 46-48.

569 *Oostveen and Irion*, in: *Bakhoum, Personal Data in Competition, Consumer Protection and IP Law - Towards a Holistic Approach?* , 7 (9); Bietti, 40 Pace law review 310 (2020) (368).

570 *Eidenmüller*, Effizienz als Rechtsprinzip, S. 384-385; If it is foreseeable from the outset that the lender is unlikely to be free from the burden of the debt

reason that has recently received increasing attention is that personal data have a collective value and thus the disposal of personal data is beyond the capabilities of individuals.[571] Reflected in the Cambridge Analytica scandal,[572] a person's decisions regarding privacy settings not only affect other people (his or her "friends") directly but also indirectly affect society due to their contribution of the data analysis results. In summary, the constitutive value of personal data to society speaks for their market-inalienability.

3.2 Unreasonable direct application of the GDPR in merchandising

3.2.1 Merchandising is forgotten by the GDPR

Leaving the question of whether the high-level protection in the GDPR can be justified by the reasons aside,[573] there are significant differences between merchandising and the envision that the EU legislator holds in deploying data protection.

Both the EDPB's and the EDPS' opinions revolve around the model of "data against service" in the online environment. The foundation of this business model is the well-developing two-sided market. In the market of service providers versus web users, providers attract more users by offering more appealing services (collecting more data to build a more accurate profile), whereas users are increasingly locked in by service providers while enjoying free digital services and (inadvertently) providing data; in the market between service providers and advertisers, providers are paid to "introduce" users' characteristics to advertisers and provide them with ad

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assumed for the rest of her life, the preconditions and reasons for entering into the contract need to be carefully examined, see BVerfG, NJW 1994, 36 - Bürgschaftsverträge, 39.

571 Janger and Schwartz, 86 Minnesota Law Review 1219 (2002) (1247); Schwartz, 52 Vanderbilt Law Review 1609 (1999), 1613.

572 Badshah, Facebook to contact 87 million users affected by data breach, The Guardian, at https://www.theguardian.com/technology/2018/apr/08/facebook-to-contact-the-87-million-users-affected-by-data-breach.

573 For instance, some scholars have convincingly argued that the high standard of consent required by the GDPR (encompassing ready revocability and a high degree of transparency) is hardly effective to ensure that the data subject's right to informational self-determination is not distorted by the power asymmetry with platforms; In essence, the attention of the question should enhance platform justice instead of the revocability and disclosure of information of consent. See Bietti, 40 Pace law review 310 (2020) (349).

space (on the platform), while advertisers have a higher chance of success by placing targeted ads.[574]

The data processing consented by average internet users in light of the model of "data against service" differs from merchandising significantly. Above all, the lack of a two-sided market in merchandising makes the agreement between models and advertising agencies on the commercial use of personal data unmistakable, while such an expression of intent is hardly ever seen in privacy agreements.[575] Furthermore, the two-sided market leads to severe information asymmetry, which makes it almost impossible to obtain a transparent market to assess the value of personal data.[576] On the contrary, the market for merchandising is relatively clear so that it is always used as the criterion to compute the fictive license fee. Lastly, the purpose of data collection and exploitation of service providers are multi-layered. Profiting from advertisers is one essential purpose to make the free services on the internet sustainable after the tech bubble cooled down in the late 20th century.[577] The other is to increase the number of users and the attractiveness of services to achieve a monopoly.[578] These aims are facilitated by unrestricted collection and profiling, which is completely absent in merchandising. Significant differences in terms of the content, volume, method, and duration of data processing are extant, which also indicate different levels of risks and impacts of data subjects.

Admittedly, an imbalanced structural relationship due to power asymmetry may exist in scenarios like time-for-print contracts. The market dictates that their images are not as valuable as those of a supermodel, and thus allowing free use of their photos for photographs might be the only opportunity for new models to get free photographs by professionals. Newcomers to the show business including models, actors, singers,

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574 Metzger, 8 JIPITEC 2 (2017); Duch-Brown, et al., The economics of ownership, access and trade in digital data, 2017, 40; *Dewenter and Rösch,* Einführung in die neue Ökonomie der Medienmärkte, S. 115; Dewenter, Rösch and Terschüren, Abgrenzung zweiseitiger Märkte am Beispiel von Internetsuchmaschinen, 2014, Diskussionspapier, No. 151, Hamburg, S. 3.

575 See *Hacker*, ZfPW, 2019, 148 (169f.); *Wendehorst and Graf v. Westphalen*, NJW, 2016, 3745 (3748).

576 *Jentzsch*, in: *Datenschutz, Dateneigentum und Datenhandel*, S. 177 (179).

577 *Posner and Weyl*, Radical Markets: Uprooting Capitalism and Democracy for a Just Society, 212 and 213; *Buchner*, DuD, 2010, 39.

578 The education about the monopoly brought about by the lock-in effect in internet companies, see Ewald, in: *Wiedemann,* Handbuch des Kartellrechts, § 7, Rn. 70; *Bunnenberg,* Privates Datenschutzrecht: über Privatautonomie im Datenschutzrecht, S. 267-268.

and internet influencers who are not as successful as Cathy Hummels[579] are undoubtedly subjected to powerful merchandisers. They are relatively young and inexperienced, and their comprehension of merchandising contracts, especially agency-merchandising contracts as well as voluntariness of making binding decisions may be impaired.[580] Since this seems to be a necessary path for professionals, it cannot be claimed to be an extreme case.[581]

This may raise concerns about inequality, but such concerns are dissipated by many factors. Above all, although young models do not have strong negotiating power, they enter the industry voluntarily. More or less, they understand the basic rules of merchandising given the wealth of information available on the Internet. Even in several controversial cases regarding pornographic photos, the models were not tricked into the business but willingly engaged.[582] Second, models who are new to the business are also very cautious about their authorization. They would fight against unwittingly commercial use,[583] disgraceful presentation and equivocal contracts.[584] More importantly, there are also flanking measures developed in jurisprudence and practice, such as the theory of purpose transfer in constructing the authorization, the contractual rights and privileges for the person depicted ensuring an appropriate level of personality protection. They stem from the practice rather than legislation. Conceivably, they are targeted and useful. Last but not least, as argued consistently in Part II Sections 4.2, 4.3, and 4.5, the rigorous conditions for the validity of consent, the restricted ambit of Art. 6 (1) (b), and the mandatory data subject's rights are neither effective nor necessary for even young models who are a disadvantaged position. This intervention is too much

579 OLG München, 25.6.2020 – 29 U 2333/19 - Blauer Plüschelefant.

580 See Part I Section 3.2.2 (4). For instance, "idol trainees" in Korea as well as in China and Japan are teenagers. Their contracts are signed by their parents who are usually not well educated. Many lawsuits have been filed in China by idol trainees and their parents claiming that the contract is invalid based on their insufficient knowledge.

581 TV shows like "Germany's Next Topmodel", "America's Next Top Model, "Australia's Next Top Model", etc. are vivid illustrations of how young models who might be easily manipulated become top models who are significantly more professional and experienced.

582 OLG München, NJW-RR 1990, 999 - Wirtin; LG Köln, AfP 1996, 186 - Model in Playboy, 188.

583 See LG Düsseldorf, AfP 2003, 469 - Veröffentlichung von Fotografien einer Modenschau.

584 See LG Frankfurt/Main, 30.05.2017 - 2-03 O 134/16 - Stinkefingers.

and unwelcomed in merchandising because it deprives models of career developments. After all, no one needs to be forced to improve his or her protection status.[585]

Perhaps a spectrum can be used to illustrate the level of awareness of data subjects of the purpose, means, and consequences of the data processing they are facing. The average web users acquire the least knowledge, while professional models are self-sufficient and often businessmen by themselves. Young models who are new in the business are somewhere in between.

Moreover, the discrepancy in the attitude of the persons depicted in these two scenarios is prominent. It roots in the different expectations and purposes of data processing between celebrities and ordinary internet users. As the bulk of celebrity income, at least a large portion, comes from what is referred to in this article as merchandising, they wish to maximize the profits from their images in a sustainable way. Therefore, they have a specific vision for the content and purpose of merchandising so that their images would not be misrepresented or distorted. It is hardly possible that professionals would inadvertently authorize others to exploit their data. More likely than not, they would fight for an adequate licensee fee as long as the exploitation exceeds their expectation.[586] This differs from ordinary internet users fundamentally. Their data are valuable only viewed from the big data perspective,[587] and they do not make a living by exploiting personal data. These factors determine that ordinary internet users usually do not understand how data processing should be reasonable in terms of content, purpose, and time, and they usually do not take such trifles to heart. Furthermore, the purpose of the permission for data processing is different. It is unusual for a user to allow a controller to use data for commercial benefits. Normally, it is for other reasons such as socializing, watching videos, surfing the web, etc. Even if it is for some commercial benefit, such as a free pizza, the user is usually unaware of what his or her consent means.[588]

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585 Vgl. *Ohly*, "Volenti non fit iniuria": die Einwilligung im Privatrecht, S. 173.

586 For instance, BGH GRUR 1992, 557 - Talkmaster.

587 Vgl. *Riemensperger and Falk,* in: *StiftungDatenschutz, Dateneigentum und Datenhandel*, S. 261.

588 Buchner/Petri, in *Kühling/Buchner,* DSGVO/BDSG, Art. 6 Rn. 26. They use the scenario regarding a smart TV to illustrate the integration of different contracts in one purchase to get as many permissions of the data subject as possible. It is also a prime example showing that users of the smart TV neither allow the

Against this backdrop, reasons for data paternalism rooting in the imperative of fundamental rights are not so pertinent in merchandising as they are for the data processing for average internet users.

Human dignity especially protection for core and ideal interests of personality rights is indispensable and inviolable. The freedom of personality development and autonomy cannot be exercised in an irreversible way that they are completely abandoned by the individual.[589] These freedoms and rights are crucial to individuals as an opportunity must be given to people to learn from their mistakes and to make improvements from mistakes.[590] However, some emancipation of certain personal data from the data subject for certain purposes does not necessarily deploy an assignment. Merchandising of personal indicia including images, names, voices and even secrecy is an established market.[591] The soft-licensing model in merchandising based on the monistic approach in the German Copyright Law is well acknowledged by scholars and implied by courts (see Part I Section 3.1.1). In light of the *ladder of permissions* that visualizes all possibilities of disposition of rights and interests with corresponding preconditions and results, there are varied forms of commercialization of personal data. The market-inalienability of personal data can be fully warranted by, for instance, the soft-licensing model as it allows models to commercialize personal data to some extent without dismissing the control over his or her likeness.

In summary, the self-sufficiency of models in merchandising differs significantly from the general insensitivity of internet users in disposing of their data. The soft licensing model is the genuine choice of models because both they and merchandisers need a stable relationship to develop their careers and business. Moreover, the established market for merchandising regarding celebrities further guarantees the fairness of the consideration for data licensing. Likewise, the mature market reduces the cost of legal estimation of compensation amounts. Thus, the development of the

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processing for money nor do they know exactly what they have authorized to the controller.

589 *Mill*, On Liberty, 212.

590 That is also the reason why Mill, on the one hand, argues against paternalism because it deprives people of the opportunity to make mistakes and thus prevents them from learning from their mistakes and growing up so that they will always be children in a paternalist society; but, on the other hand, supports the restriction of freedom in some specified situations like voluntary slavery. See

591 A factual and legal discourse, see *Götting/Schertz/Seitz*, Handbuch Persönlichkeitsrecht, Teil 7 Das Persönlichkeitsrecht im REchtscerkehr S. 644~705.

KUG in respect of merchandising is not a surrender of one's personality to commercialization, but rather a concession of paternalism to individual autonomy.

3.2.2 Unsuitable explanations for merchandising

Against the differences between merchandising and online services including direct marketing, it is argued here that the explanations for the high-level data protection in the GDPR are not suitable for merchandising.

Above all, cognitive problems for data subjects and structural problems between data subjects and controllers are persuasive to confine the private autonomy of data subjects in agreements concerning the commercialization of personal data. In response, important information is required to be presented in a simple, clear, and conspicuous manner, non-necessary data processing must be distinguished from necessary data processing, and most importantly, contract-related data processing is restricted to auxiliary types, while consent must be revocable.[592] In contrast, professional models and celebrities generally have deep background knowledge of merchandising and take their rights and obligations seriously. Merchandising contracts stem from negotiation between the parties on an individual basis which is distinct from the privacy policies that internet users usually "check" the box without reading.

Secondly, the soft-licensing model in merchandising is consistent with the long-term preferences of the data subject, and the pricing is fair. The efficiency consideration apart from the cost of moralism is ill-founded. Admittedly, the cost for estimation of personal data could be too high,[593] but it is the exact reason why legal scholars/courts should not take the cost but rather leave it to the market.[594] The analogy with the women's chore is

592 See EDPB, Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, para. 16 and the examples.

593 See OECD, Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value, OECD Digital Economy Papers, No. 220, 18. It proposes 6 methods to estimate the economic value of personal data but admits that all these methods are pre-mature and not able to capture all aspects of the economic value of personal data. Vgl. *Lewinski, in: Datenschutz, Dateneigentum und Datenhandel*, 209 (212f.).

594 Calabresi and Melamed, 85 Harvard Law Review 1089 (1972) (1109-1110).

creative and leads to this result as well.[595] Though the external psychological cost of people by letting poor people be subordinated to the economic interests of the platform must be warranted in the scenario of merchandising, it is inapplicable to celebrity merchandising.[596] In essence, the inadequacy of economic interpretation stems from its deliberate avoidance of value judgments, while legal paternalism is emblematic of the efforts of legislators to "nudge" or "push" people towards a life that conforms to the objective value order (*objektive Wertordnung*) consistent with fundamental rights.[597] Thus, the changed mentality and improved knowledge about merchandising of professional models cannot support the application of efficiency reasons for data paternalism.

Thirdly, it is well acknowledged that selling personal data is prohibited by the fundamental right in Art. 8 of the Charter because it would lead to an ultimate deprivation of protection, which defeats the very purpose of allowing individuals the freedom to dispose of their personal data.[598] Personal data shall not be reduced as freely tradeable money *per se*. However, it does not an exclusion of any active use of personal data (commercialization). In merchandising, one is not selling personal data but disposing of them by licensing, granting binding permission, or giving an anytime

595 According to *Engels* in 1884, it was the emancipation of women from home into social production that gave real value to women's labor in both terms of housework and social production. See *Engels,* The Origin of the Family, Private Property and the State, 104-105; In this direction, see *Posner and Weyl,* Radical Markets: Uprooting Capitalism and Democracy for a Just Society, 209; Bruni, 41 CARDOZO LAW REVIEW 2203 (2020) (2233). Even data controllers successful in exploiting personal data are beginning to advocate the marketization of data to increase the quality of personal data. They argue that given the importance of personal data to AI, a family of four in the US should receive $20,000 annually by providing personal data. See *Lanier, et al.*, Harvard Business Review, 2018, 2 (16).

596 Also, the efficiency reason for the moral cost is questionable in general. It does not explain how this externality emerges and why it should be shared by all people at the cost of diminishing the free choice of the poor.

597 See *Thaler and Sunstein*, Nudge: improving decisions about health, wealth, and happiness, 5 and 6; With reference to the critical comments that despite the best efforts of the advocates of liberal paternalism to avoid it, the value judgment – the appeal to the maintenance of an objective value order – is still necessary, i.e., the substance of health, wealth, and happiness. See *Eidenmüller*, JZ, 2011, 814 (820); BVerwG, NJW 1982, 664 - Peep-Shows.

598 Cf. *Mill,* On Liberty, 257-258; Feinberg, 1 Canadian Journal of Philosophy 105 (1971)(120).

revocable consent as Art. 6 (1) (a) GDPR described. These patterns all preserve the control of data subjects over personal data to some extent.

In essence, celebrities are using personal data in the same way as they are using their labor to make money instead of treating data as money *per se*. Moreover, since the parties of merchandising contracts are usually professionals, consumer protection is not a relevant topic here. When considering the *quid pro quo* relationship between the licensing of personal data and the "free" service provided by a professional photographer in a time-for-print contract, the similarity with the business model "data against services" might be more evident. Compared with celebrities, the personal data of the models in time-for-print contracts are more like money. However, they are not consumers, either.

Last but not least, if personal data has some collective value that does not belong to the identified or identifiable natural person by that data, then not only is commercialization impermissible but all disposition including consent shall be prohibited. In other words, over-reliance on the collective value of personal data suggests an outright prohibition of individual disposition, which would destabilize the self-autonomy in the EU data protection law. However, the GDPR sets forth numerous requirements to guarantee a free flow of personal data in a fair and reasonable manner. The data subject's rights and the principles of data processing guarantee that data subjects do not exercise the right to information self-determination at the expense of losing it. Not only are the conditions of disposing of personal data under the scrutiny of the GDPR, but the principle of accountability also obliges the controller to bear the negative consequences including remedies and fines when it fails to prove its legitimacy or to be responsive to the data subject's rights. Against this consideration, though the collective value of personal data deserves more attention and deeper exploration, it exceeds the scope of this dissertation. Moreover, anonymized data that fall outside the scope of the GDPR are normally sufficient to draw a demographic analysis. One may argue that personal data are usually not necessary for controllers in a big data scenario like the one in the Cambridge Analytica case, which is, however, the prime case presenting the collective value of personal data. In this sense, the consideration that personal data contain collective values is more helpful in explaining why individuals must provide data in certain situations – even against their will. After all, if the data collection is important for society, such as the census, individuals are obliged to provide data.

In summary, the EU data protection law primarily uses the scenario between data subjects and platforms in the online environment as the

starting point for interpreting and guiding the application of the GDPR. Notwithstanding the effectiveness of these restrictions on data subjects, the rationale is untenable in a merchandising scenario where the data processing is, in general, a genuine result of the private autonomous decision stemming from free negotiations between two equal parties.[599] Rather than arguing that the EDPS and EDPB deny the binding effect of merchandising contracts under the GDPR, it seems more compelling to contest that they overlook merchandising scenarios at all.

4. Conclusions

In light of the divergences between the KUG and the GDPR in regulating merchandising, serious challenges need to be addressed urgently, and less significant ones that only require the attention of merchandisers in practice for compliance. The more generous moral damages under the GDPR and the compliance requirements for merchandisers in delivering data subject's rights belong to the latter category. They are tolerable and justified. Nevertheless, there is a caveat for merchandisers in practice: to ensure compliance in the organizational structure and business operations, especially concerning the principle of transparency and the data subject's rights. It is meaningful for avoiding unnecessary litigation and administrative fines.

Based on the findings in the previous chapters, it is argued that the application of the GDPR in merchandising is inappropriate because the GDPR is subject to problems including under-protection for celebrities and the negation of the binding force of merchandising contracts. While the reliance on the national remedy based on the law of unjust enrichment would fix the first problem, the reticence for the commercial value of personal data would lead to some meaningful problems in the long term. The restitution for the fictive license fee in the German legal regime regarding merchandising, which is effective in combating unauthorized merchandising, is based on a mature and relatively transparent licensing market for personal images. The valuation of merchandising is objectively determined and accepted by both parties as well as the court. Without such a market, the valuation of data processing is troublesome and might be infeasible. In this wise, the lack of sufficient financial incentives will not only reduce the incentive for data subjects to proactively assert their rights

599 Vgl. Petri, in *Kühling/Buchner,* DSGVO/BDSG, Art. 6 Rn. 26.

and increase pressure on the public sector but will also likely fail to curb illegal data processing by private controllers effectively. More importantly, it will result in data subjects being negligent in understanding and controlling these interests.

The failed binding effect of merchandising contracts is an acute and detrimental incompatibility aroused by the GDPR with merchandising. After all, no businessman would want to invest time, money, and other resources into a relationship that is not protected by law without *publicity* (leave charity aside). Yet, a direct application of the GDPR in merchandising is unappreciated.

The approach of one size fits for all, the reticence of the commercial value of personal data, and data paternalism are possible reasons for the regulation of the GDPR. However, while they may be imperative and efficient in restoring the unbalanced relationship between data subjects and data controllers in big data scenarios, they do not offer a self-explanatory application in merchandising.

The EDPB and EDPS may well treat the business model "data against service" prevailing between internet users and platforms differently because of the insufficient information, excessive data use, unfair consideration, etc.[600] However, merchandising differs from the situation the EU data protection law envisaged in contents, means, purposes, and risks. Models in merchandising are also distinct from average internet users in terms of knowledge, attitudes, purposes, and negotiation power. More importantly, the market-inalienability of personal data cannot lead to an outright prohibition of any forms of commercialization of personal data, and this imperative can also be guaranteed by the soft-licensing model prevailing in merchandising business in Germany. While the merchandising law aims to prevent one's images from unexpected/unremunerative exploitation due to publicity, the high-demanding requirements in the GDPR are devised to enhance the control of data subjects over personal data to prevent data subjects from becoming the object of opaque and unfair data processing. Thus, the fears of commercialization of personal data,

600 Some scholars have convincingly argued that the high standard of consent required by the GDPR (encompassing ready revocability and a high degree of transparency) is hardly practical to ensure that the data subject's right to informational self-determination is not distorted in his or her significantly unequal relationship with platforms; In essence, the attention of the questions of power and platform justice instead of focusing on the voluntariness and disclosure of information of consent should be called upon. See Bietti, 40 Pace law review 310 (2020) (349).

devaluation of personality, and the necessity of data-paternalism tend to lose their conditions and exceed their boundaries in merchandising. More importantly, the market-inalienability of personal data cannot lead to an outright prohibition of any forms of commercialization of personal data, and this imperative can also be guaranteed by the soft-licensing model prevailing in merchandising business in Germany. Therefore, it validates the idea of this dissertation that the GDPR forgets merchandising, and the direct application of the GDPR in merchandising is unreasonable.

In short, the direct application of the GDPR in merchandising is neither appropriate nor reasonable. Solutions must be sought to address the lack of material remedies for celebrities and the "dysfunctionality" (*Dysfunktionalität*)[601] of transactional relationships in merchandising under the GDPR.

601 Vgl. Albers/Veit, in *Brink/Wolff*, BeckOK Datenschutzrecht, Art. 6 Rn. 29.