Part V Conclusions

1. The traditional German approach

Thesis 1: Ever since the 1950s, German courts and scholars have established that the right to one's image in § 22 KUG encompasses both commercial and moral interests, and the person depicted has the sole right to decide whether to make the image available as an incentive for the sale of goods regardless of his or her social role if the exploitation serves – exclusively the commercial interests of the merchandiser. In this wise, autonomous commercialization is gradually facilitated to protect against heteronomous commercialization.[765]

Thesis 2: The person depicted is entitled to claim the fictive license fee for his or her persona based on the law of unjust enrichment as unauthorized usually presents "an inadmissible encroachment on the depicted person's economic exclusive right". Alternatively, he or she can claim delictual liability according to § 823 BGB. The injunctive relief and the auxiliary claim for access to information and accounting are seemingly the customary non-monetary reliefs in unauthorized merchandising because they meet the plaintiff's needs best by providing them practical tools to maximize their economic benefits.

Thesis 3: Illustrated by *the ladder of permissions* developed by *Ohly*, consent prescribed in § 22 KUG may lead to a *quid pro quo* contract that creates a legally protected status for the counterparty to enable the commercial exploitation of personal images or an exclusive license to let a third party operate merchandising and sue other infringers in its name. In short, consent in merchandising is legal but revocable with due cause. The theory of purpose transfer is analogous to interpreting the authorization in case of doubt so that it can be limited to the necessary extent concerning the contractual purpose.

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765 *Götting* has summarized the legal regime in regualting merchadnsing as "protection from commercialization by commercialization" *(Schutz von Kommerzialisierung durch Kommerzialisierung*). See, *Götting* in *Götting/Schertz/Seitz,* Handbuch Persönlichkeitsrecht, § 10 Rn. 14. However, a more positive way of understanding is favored here to highlight the autonomy.

Thesis 4: In practice, different merchandising agreements cater to different needs. The triple functions provided by agencies – namely management, sub-licensing, and career planning – make agency agreements for merchandising popular among professionals, while a standard merchandising agreement focusing on one specific authorization is often used in the scenarios of sub-licensing.

Thesis 5: Several contractual rights and privileges for the person depicted are often prescribed in merchandising agreements to secure the licensor's financial and ideal interests, including the right to access information and accounting, the right to reservation for approval, and the right to quality control, and the extraordinary opt-out right. Albeit optional, these rights and privileges are essential benchmarks for measuring the fairness of a merchandising contract. The more extensive, intensive, and lengthier the merchandising contract for the person depicted is, the more reasons there are to encourage the inclusion of these rights in that contract.

Thesis 6: Two messages can be distilled from these legal developments when "transitions that constitute life" have been discovered in social and technological development: Scholars must identify the doctrinal solution that best meets the parties' needs without dismissing the inalienability of personality rights. Moreover, recognizing the active exploitation of the property interest residing on the right to one's image would not objectify the personality and cause the consumption of the personality; instead, it can effectively and actively curb unauthorized merchandising by giving the person depicted economic incentives to take care of his or her images and monitor unlawful exploitation.

2. Merchandising under the GDPR

Thesis 7: The GDPR takes precedence over KUG in regulating merchandising that uses personal likenesses, especially celebrities', to encourage consumers to spend on goods/services. Some exceptions exist based on the exceptions to the territorial applicability of the GDPR and the opening clause in Art. 85 (2) GDPR, but they are not the mainstream of merchandising.

Thesis 8: In unauthorized merchandising, data processing is unlawful according to Art. 6 (1) (f) GDPR. The purely commercial interests pursued by the controller, albeit legitimate, still need to yield to the right to informational self-determination and reasonable expectations of the data

subject irrespective of his or her social role. The reasonable expectations of the data subject, as prescribed factors for the balance of interests by the GDPR, invite a national and cultural perspective into the overall assessment of the commercial interests pursued by the controller and rights and freedoms of the data subject.

Thesis 9: German courts still rely too heavily on Germany's legal concepts and rules even when they apply the GDPR directly to unauthorized merchandising cases. More than often, they ignore the principle of accountability, the "test grid" of Art. 6 (1) (f) GDPR, and the right to claim compensation granted to data subjects under the GDPR. This is why the current "harmony approach" adopted by some German courts is not supported here.

Thesis 10: Coupled with the detailed and extensive compliance rules in the GDPR, Art. 82 GDPR facilitates a more friendly and robust recourse mechanisms for data subjects. However, the contested judiciary practices in Germany undermines its expected performance.

Thesis 11: While average data subject who suffers moral damages from the data processing would be better off under the GDPR, celebrities who are used to publicity and want to get a fair share from the unlawful data controller would run into difficulties in claiming fictive license fees according to Art. 82 GDPR due to the equivocal attitude of the GDPR towards the commercial interests contained in personal data and the strong resistance of the EDPS towards the commercialization of personal data.

Thesis 12: In light of a reflection on the legislative history and the academic controversy over the protection for sensitive data, the application of Art. 9 GDPR should follow the subjective approach with an emphasis on the reverse burden of proof. Therefore, merchandisers can exclude the application of Art. 9 GDPR by demonstrating that no sensitive information about the data subject's race, ethnic origin, or health status that could be revealed from the stage photos is processed in the sense of the GDPR.

Thesis 13: The high-level data protection in the GDPR is generally very costly and unfriendly to authorized merchandising and likely to make it unsustainable. Since Art. 6 (1) (b) GDPR is not appliable in merchandising as data processing is the primary performance of these contracts, the anytime revocable consent according to Art. 6 (1) (a) in combination with Art. 7 (3) GDPR renders merchandising contracts not binding anymore.

Thesis 14: The rigorous conditions for validity of consent are likely to render consent deviating from the genuine will of the individual, and *vice*

versa, controllers are shying away from making a significant and sustained investment in merchandising. Furthermore, although the data subject's rights are applicable and non-negotiable in merchandising contracts, they are neither suitable nor effective.

3. *Divergences and problems*

Thesis 15: While unauthorized merchandising cases are still illegal under the GDPR, compensation for models who suffer no immaterial damages would be significantly less than the previous. An independent recourse system relying on German law would be helpful but may lead to long-term consequences, including the ineffectiveness of civil damages granted by the GDPR and the general insensitivity of data subjects to the commercial value of their data.

Thesis 16: The GDPR almost restricts authorized merchandising to "dysfunctionality", while merchandising contracts have been given considerable respect under German law without prejudice to the untransferable and indispensable parts of the personality.

Thesis 17: Merchandising is forgotten by the GDPR as it differs from the data processing envisioned by the GDPR 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.

Thesis 18: 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. The approach of one size fits for all, the reticence for the commercial value of personal data, and data paternalism do not offer a self-explanatory application in merchandising given the differences between merchandising and the data processing envisioned by the EU data protection law.

Thesis 19: The application of the GDPR in merchandising cases is inappropriate and unreasonable

4. Solutions

Thesis 20: The continued application of the KUG based on Art. 85 (1) GDPR as an independent opening clause is advantageous. It would make all the divergences and incompatibilities of the GDPR in merchandising disappear. In addition, it offers future-oriented protection for data subjects in the increasingly popular users' merchandising scenarios. However, the legal basis of this solution is under severe objections from both theoretical and practical perspectives. Interpreting Art. 85 (1) GDPR as an independent opening clause would result in a complete hollowing out of the GDPR's effect as a directly applicable EU Regulation. Moreover, the significantly larger (material and territorial) applicable scope of the GDPR would lead to legal fragmentation in Germany. Moreover, some advantages of this solution can also be realized without the overly stretched interpretation of Art. 85 (1) GDPR.

Thesis 21: Solution 2, namely treating Art. 6 (1) (f) GDPR as the lawful ground for authorized merchandising by taking reliance interests of the controller triggered by the contract into account, does not stand up to close inspection, either. Art. 6 (1) (f) GDPR may unlocking the deadlock between the data subject and the controller in an authorized merchandising scenario by giving the merchandiser a relatively stable position. However, it is more like an illusion because the final decision on the balance test is in the hands of courts not the data controller, and the compliance requirements for the controller are more rigorous. Legal uncertainty and high compliance costs are not welcomed in practice. Moreover, this solution distorts the role of the data subject from the decider to the recipient of merchandising – from individual autonomy to heteronomy. The extensive use of Art. 6 (1) (f) GDPR as a "safe harbor" for merchandisers also contradicts the function and purpose of general clauses.

Thesis 22: The application of Art. 6 (1) (b) GDPR to merchandising contracts in the B2B context allows merchandisers to rely on valid contracts with professional models to process their personal data and even grant sub-licenses for purposes of merchandising without fearing the anytime revocable consent prescribed in Art. 6 (1) (a) and 7 (3) GDPR. However, there are two detrimental objections to this approach. For one, it can be easily stretched to a general clause for fair contracts as there is hardly a legal basis to limit this approach in merchandising contracts, not to mention this type of contracts is formulated under national law. For two, there is no hard line between the B2B and B2C contexts. As micro-influencers in social media increasingly emerge, the line is more blurring.

Thesis 23: A two-tier interpretation of consent can also provide merchandisers a stable legal position by differentiating the anytime revocable consent and the binding consent as a legal act under the GDPR. The strongest arguments of the two-tier interpretation of consent are the omission of revocability of consent in its definition, the boundaries of data paternalism, and its universally acknowledged theoretical ground – multi-meaning consent in light of *the ladder of permissions* stemming from the maxim of *volenti non fit iniuria.* Nevertheless, its weakest position is the intra-systematic interpretation and the opinions of the authorities. Moreover, the cost for compliance and the high possibility of incompliance would seriously discourage controllers from using this method. It is conceivable that controllers would still stick to the anytime revocable consent and keep in developing more attractive digital services.

Thesis 24: The first two solutions are distinctly flawed and impractical. The last two, namely the application of Art. 6 (1) (b) GDPR to merchandising contracts in the B2B context and the two-tier interpretation of consent are comparably reasonable, despite some legal and practical objections. Nevertheless, while the two-tier interpretation of consent is more malleable and future-oriented, the application of Art. 6 (1) (b) GDPR to merchandising contracts in the B2B context is relatively conservative but not contrary to the interpretation of the data protection authorities at the EU level. A muster of merchandising contracts in the B2B context at the EU level might alleviate their objections by providing legal certainty and reducing compliance costs.

Thesis 25: Every solution has an Achilles heel, and they are imperfect. On the road to finding the least imperfect solution, the title of this dissertation is validated that some insoluble conflicts emerge between personality merchandising and the GDPR.