Chapter 14
Portrait or Personal Data – The Rivalry of Image and Data Protection Legislation

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I. Introduction

Until the 1990s, photography was largely based on analog methods.[1] However, advancements in technology led to its almost complete digitalization. Today, most photographs are produced, stored, and sent electronically. They are viewed using electronic display devices such as computer screens or smartphones. A photograph is no longer simply a picture, a print, a material entity, but consists of a multitude of electronic data. At the same time, technical development has also impacted the view of images on an immaterial level. This is because the image seems to dissolve and disintegrate into pixels and countless single pieces of information including image data, location data and data on the time of capture.

As it is often the case, technical and social developments impact law. In the days of analog photography, the law was mostly settled: the person depicted in a picture was affected in his or her right to one's image and could assert rights from this protection against the photographer or publisher in case of an infringement.[2] However, the increasing regulation of data processing has resulted in an area of law that also covers images. This has ignited a rivalry between the two regulatory regimes and led to the question of which regime should photographing and publishing personal portraits be assigned to – does it belong to the protection of images, data protection, or both? In the following chapter, this question will first be approached with a brief overview of German image protection law and European data protection law (II.). Then the relationship between the

1 Analog photography encompasses all camera techniques not using a digital storage medium, but chemical processes such as exposing photographic films or hard plates.

2 This applies, of course, only to countries that have provided a protection of images, e.g., Germany (§§ 22, 23 Kunsturhebergesetz), Italy (Legge n. 633/1941, Art. 96, 97) or France (Code Civil Art. 9, via the right to privacy).

two regulatory regimes, which is subject to ongoing legal debates, will be outlined (III.). Irrespective of this specific, detailed legal dispute on a methodical level, the more general question of whether the protection of images is still necessary regarding data protection law will be addressed in the final remarks (IV.).

II. The Collision of Regulatory Regimes in German Law

German law protects the right to one's own image with a specific parliamentary act, the *Kunsturhebergesetz* (German Art Copyright Act, KUG) of 1907. For more than 100 years, it has provided the regulations for the protection of images. Even though the European Data Protection Directive 95/46/EC came into force as early as 1995 and was transposed into national law,[3] there was broad agreement among German courts that the KUG took precedence over data protection law.[4] It was not until the European General Data Protection Regulation (GDPR) entered into force in 2016 that the debate on the relationship between the two regulatory regimes arose again and the precedence of the protection of images was widely questioned.[5]

1. The codification of the right to one's own image in the KUG: an overview

§ 22 KUG requires the consent of the person depicted in an image when the image is distributed or publicly displayed.[6] An image in the sense of this legal provision is a depiction of a person, i.e., the representation of the person in his or her real appearance corresponding to life.[7] Usually, an image is a photograph and includes both analog and digital photographs.[8]

3 In Germany, the Directive was implemented within the scope of the *Bundesdatenschutzgesetz* (German Federal Data Protection Act, BDSG).
4 See, e.g., BGH VI ZR 9/14 of 11.11.2014 = Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2015, 295; Lauber-Rönsberg/Hartlaub (2017) 1058 with further references.
5 Raji (2019) 64–65; Klein (2017) 152.
6 The stage of taking pictures is not regulated in the KUG, but only subject to judge-made law; see also below III.3.
7 Specht-Riemenschneider (2022) § 22 KUG note 1.
8 Further examples of images are drawings or paintings of persons; see, e.g., Fricke (2019) § 22 KUG note 5.

Since the scope of application is very broad according to the wording of § 22 KUG, the courts have attempted to narrow the scope of the act.[9] As an unwritten requirement, the person depicted must be recognizable, which is mainly determined by the fact that the portrait shows the facial features or other personal attributes of the person.[10] The circle of persons relevant for the assessment of recognizability is the wider circle of acquaintances of the person depicted.[11]

Exceptions to the consent requirement are granted, inter alia, for contemporary historical images and for those used for artistic purposes (§ 23 KUG). However, this does not apply if the portrait harms a legitimate interest of the person depicted which requires a balanced assessment of the conflicting positions.[12] If the interest of the person depicted in the image prevails, he or she is entitled to cease-and-desist claims and damage claims.[13]

2. *Images in the scope of European data protection law*

The central regulatory subject matter of the GDPR is the "processing of personal data". Art. 4 No. 1 GDPR defines personal data as "any information relating to an identified or identifiable natural person". When a picture is taken with a digital camera, image data and so-called "Exchangeable Image File Format" data (EXIF data) are stored. The image data records exterior (physical) characteristics of the person pictured[14] and depending on the image, information about his or her economic circumstances, cultural and ethnic origin, religious affiliation or sexual orientation.[15] In addition, the EXIF data capture recording parameters such as the date, the time and – if the camera has a GPS module – the location. Based on the data created

9 Tausch (2016) 68 with further references.
10 BGH I ZR 151/56 of 14.02.1958 = Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 1958, 458; I b ZR 126/63 of 09.06.1965 = Neue Juristische Wochenschrift (NJW) 1965, 2148 (2148–2149); Tausch (2016) 69.
11 Dreyer (2018) § 22 KUG note 6; Specht-Riemenschneider (2022) § 22 KUG note 4; OLG Köln, 15 U 133/13 of 06.03.2014 = Gewerblicher Rechtsschutz und Urheberrecht – Rechtsprechungs-Report (GRUR-RR) 2015, 318.
12 See, e.g., Eichenhofer (2022).
13 For further details, see Fricke (2019) § 22 KUG notes 23–39.
14 Sundermann (2018) 439.
15 Cf. Herbort (2017) 101; Schnabel (2008) 660.

by means of a photograph, a person can be identified or identifiable.[16] Images can therefore qualify as personal data.[17] However, the GDPR also partially narrows its scope of application by excluding activities for family or personal purposes, such as taking pictures in the context of leisure, holiday or hobby.[18]

The lawfulness of processing image data is based on art. 6 GDPR and the grounds for lawfulness listed which include, inter alia, the consent of the data subject (art. 6 (1) a) GDPR) or the exercise of legitimate interests pursued by the controller[19] of the data (art. 6 (1) f) GDPR). The interests of the controller must be balanced against the interests or fundamental rights and freedoms of the data subject – an assessment which is similar to the one in § 23 of the German KUG. If the data processing is found unlawful, the data subject has, inter alia, the right to erasure (art. 17 GDPR) and to compensation (art. 82 GDPR). Furthermore, administrative fines can be imposed by the authorities (art. 83–84 GDPR). Irrespective of the lawfulness, the controller must provide the data subject with all relevant information about the data processing (art. 12–15 GDPR).

III. The Relationship Between the GDPR and the KUG

The GDPR and the KUG regulate the same factual situation, i.e., the protection of people being depicted in images, but to some extent, they result in contradictory legal consequences.[20] In general, a European regulation such as the GDPR is directly applicable in all Member States pursuant to

16 The question of when a person can be considered identifiable by means of data has not yet been definitively settled. It could be required that the data controller himself is able to identify the person concerned, or it could suffice if anybody can identify the person concerned. The CJEU seems to take a compromise position. In the Breyer decision, it declared that additional knowledge of third parties can be taken into account if this knowledge is likely to be used to identify the data subject (CJEU, case C-582/14 of 19.10.2016, ECLI:EU:C:2016:779 – Breyer).

17 Specht-Riemenschneider/Jennessen (2019) 114; Dregelies (2019) 299.

18 Cf. Ernst (2021) Art. 2 DSGVO note 18.

19 Art. 4 No. 7 GDPR defines "controller" as the natural or legal person, public authority, agency or other body which determines the purposes and means of the processing of personal data. The controller is the addressee of the obligations and liabilities of the GDPR; see Raschauer (2018) Art. 4 DSGVO note 120.

20 This concerns, e.g., information requirements, conditions for a consent to data processing and damage claims. For further details, see Bienemann (2021) 15.

art. 288 (2) TFEU and, if a collision of two provisions occurs, as is the case here, European law takes precedence over national law.[21]

1. *Opening clauses in the GDPR*

However, the GDPR contains special provisions that further define its relationship with the national law of the Member States and allow them, in limited ways, to establish their own standards that deviate from the GDPR (so-called opening clauses). The most important of these special provisions is stipulated in art. 85 GDPR, although the relationship between the first two paragraphs of art. 85 GDPR has not yet been clarified. Pursuant to art. 85 (1) GDPR, Member States shall, via legislation, reconcile the right to protection of personal data under the GDPR with the right to freedom of expression and information, including processing for journalistic purposes and for scientific, artistic, or literary purposes. According to art. 85 (2) GDPR, Member States shall provide for derogations or exemptions from the main chapters of the GDPR for processing carried out for journalistic, scientific, artistic or literary purposes, if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.

There appears to be general consent that art. 85 (2) GDPR provides for an opening clause for national law.[22] In contrast, it is disputed whether art. 85 (1) GDPR also contains such an opening clause.[23] Since the wording is not clear in this respect, the first paragraph could also be understood as a mere general adaptation mandate and the second paragraph could provide for the only opening clause in art. 85 GDPR.[24] The answer to this

21 ECJ, case 6/64 of 15.07.1964, ECLI:EU:C:1964:66 – Costa/E.N.E.L.; case 106/77 of 09.03.1978, ECLI:EU:C:1978:49 – Simmenthal; see also Kruis (2013) 98 with further references.

22 Pauly (2021) Art. 85 note 5; Pötters (2018) Art. 85 note 4; Lauber-Rönsberg/Hartlaub (2017) 1060.

23 In favor of qualifying Art. 85 (1) GDPR as an opening clause see, e.g., Bienemann (2021) 58; Lauber-Rönsberg (2019) 377; Cornils (2018) 64; Ziebarth/Elsaß (2018) 583; Frey (2018) Art. 85 note 2; Schulz/Heilmann (2018) Art. 85 note 7; Michel (2018) 842.

24 In favor of classifying Art. 85 (1) GDPR only as a general adaptation mandate to balance data protection rights and freedom of expression and information Pauly (2021) Art. 85 DSGVO notes 4–5; Buchner/Tinnefeld (2020) Art. 85 DSGVO note 12; Pötters (2018) Art. 85 notes 2 and 14; Klein (2017) 209; Kühling/Martini et al. (2016) 286.

question directly impacts the applicability of national law because art. 85 (1) GDPR – unlike art. 85 (2) GDPR – does not know any limitation to journalistic, scientific, artistic and literary purposes of processing and to specific chapters of the GDPR.

Three main arguments are submitted to classify paragraph 1 of art. 85 GDPR as a general regulatory mandate without an opening clause. However, all these arguments can be refuted with good reasons, especially when considering the history of the drafting of the GDPR. The first argument refers to the duty of the Member States to notify the Commission pursuant to art. 85 (3) GDPR if they have adopted legal provisions based on art. 85 (2) GDPR. Art. 85 (1) GDPR, on the contrary, is not mentioned here.[25] Although this appears to be a substantial systematic argument against the qualification of paragraph 1 as an opening clause, it is probable that an extension of the notification obligation under paragraph 3 to the first paragraph was simply missed in the urgency of the last weeks of the legislative process.[26]

Moreover, this oversight would not be the only one in the GDPR, as for example, the GDPR had originally referred to the non-existent art. 15 (1)(b) GDPR in art. 15 (4) GDPR.[27]

Secondly, it is argued that only art. 85 (2) GDPR contains detailed provisions on the conditions under which Member States may derogate from the GDPR by national law. Art. 85 (1) of the GDPR would therefore be too far-reaching if it were understood as an opening clause for member state regulations.[28] However, this objection can be countered with a restrictive interpretation of the opening clause.[29] Together with an increased burden of justification in the event of the enactment of national legislation, this opening clause can be limited so that there is no risk of the GDPR regulations being undermined. Thirdly, it is argued that art. 85(2) GDPR would be redundant if all cases were already covered by the broad scope of art. 85 (1) GDPR.[30] However, art. 85 (2) GDPR will not become obsolete if the first paragraph is also interpreted as an opening clause. This is at least true if the second paragraph is understood as a mini-

25 Kühling/Martini et al. (2016) 288.
26 Cornils (2018) 53–54; Lauber-Rönsberg (2018) 419.
27 Specht-Riemenschneider/Jennessen (2019) 116.
28 Buchner/Tinnefeld (2020) Art. 85 DSGVO note 12; Kühling/Martini et al. (2016) 287; see also Lauber-Rönsberg/Hartlaub (2017) 1061.
29 Specht-Riemenschneider/Jennessen (2019) 117.
30 Raji (2019) 65.

mum standard for particularly important purposes, such as the freedom of communication and art.[31]

Moreover, classifying art. 85 (1) GDPR as a general adaptation mandate without an opening clause would be pointless. Without an opening clause, Member States could not bring communication rights in line with data protection rights as required by art. 85 (1) GDPR since the GDPR would take precedence over any national law.[32] This outcome would also be contrary to the objective pursued by the Member States with the insertion of a more general opening clause. In the context of the Council Presidency's GDPR proposal, the Member States feared that an overly narrow opening clause such as art. 85 (2) GDPR would create the false impression that fundamental communication rights rank below data protection law.[33] It is therefore more convincing to additionally qualify art. 85 (1) GDPR as an opening clause for national law. However, definitive legal certainty will only be reached with a decision by the Court of Justice of the European Union (CJEU).

2. The KUG and the opening clauses of the GDPR

The conclusion that both paragraphs (1) and (2) of art. 85 GDPR provide for opening clauses leads to the follow-up question of whether the KUG fulfils the conditions of these clauses.

a) Journalistic and artistic purposes

As art. 85 (2) GDPR requires, §§ 22 and 23 KUG deviate from the GDPR regarding, inter alia, the lawfulness of data processing. Also, the KUG creates a reasonable balance between the freedoms of communication and art

31 Cornils (2018) 60–61.

32 Lauber-Rönsberg (2018) 420.

33 Council of the European Union, 24/04/2013, Doc. Nr. 8825/13 (p. 11). Similarly, the European Parliament had expressed its view that a restriction of Art. 85 GDPR to journalistic, artistic and literary purposes would not do justice to the right of freedom of expression (European Parliament, Draft Report on the proposal for a regulation of the European Parliament and of the Council on the protection of individual with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 16/01/2013, p. 196).

and the right to protection of personal data.[34] This is because § 23 KUG provides exceptions to the consent requirement of the person depicted unless the interests and rights of the person depicted take precedence. Therefore, it may be argued that §§ 22 and 23 KUG fulfil the requirements of art. 85 (2) GDPR in principle.[35] However, the opening clause in art. 85 (2) GDPR is restricted to data processing for journalistic and artistic purposes.[36] Thus, only § 23 (1) no. 1 KUG which provides an exemption for images portraying an aspect of contemporary history[37] and § 23 (1) no. 4 KUG which stipulates an exemption for images for artistic purposes, are covered by the opening clause. In contrast, § 23 (1) no. 2 and no. 3 KUG do not usually fall within the scope of art. 85 (2) GDPR.

It might appear problematic that the KUG not only covers the purposes mentioned in art. 85 (2) of the GDPR – in particular journalistic and artistic purposes – but also applies to images for other purposes. It is occasionally argued that a restriction of the respective norm, in this case the KUG, to journalistic and artistic purposes is required to effectively comply with the opening clause of art. 85 (2) of the GDPR.[38] As such a limitation has not yet been undertaken, it might be inferred that the opening clause does not apply at all and that the GDPR takes precedence over the KUG in its application. However, it seems more convincing to conclude that the KUG, although not applicable in its entirety, does apply in cases of privileged purposes.[39] If a part of a law does not fall under art. 85 (2) GDPR, the GDPR does not state at any point that a precedence of application is not possible for other parts. This also complies with the regulatory purpose of art. 85 GDPR which aims at protecting and strengthening the freedom of expression and art, as underlined by recital 153 of the GDPR. Besides, even if one still considers this result as problematic,

34 OLG Köln I-15 W 27/18 of 18.06.2018 = Zeitschrift für Datenschutz (ZD) 2018, 434 (435).

35 Lauber-Rönsberg/Hartlaub (2017) 1060–1061; Fricke (2019) § 22 KUG note 3; Dregelies (2019) 302–303; Ziebarth/Elsaß (2018) 583; BGH VI ZR 250/19 of 07.07.2020, para. 10; OLG Köln I-15 W 27/18 of 18.06.2018 = Zeitschrift für Datenschutz (ZD) 2018, 434 (both court decisions with regard to journalistic purposes). Disagreeing, however, *Klein* (2017) 152; Raji (2019) 64–65.

36 The other two purposes mentioned in Art. 85 (2) GDPR are not relevant with regard to the application of the KUG.

37 Images of contemporary history will usually fall within the term "journalistic purposes", which is to be interpreted broadly, as recital 153 GDPR states. See also CJEU, case C-345/17 of 14.02.2019, ECLI:EU:C:2019:122 – Buivids.

38 Klein (2017) 223–225.

39 Lauber-Rönsberg/Hartlaub (2017) 1061.

a continuing application of the KUG – regardless of the purpose – would then still be possible via art. 85 (1) GDPR.[40]

b) Other purposes

As explained, the use of personal images for certain purposes, such as photographs in the area of private individual communication or in social networks, are not covered by art. 85 (2) GDPR.[41] Therefore, the application of the KUG to the processing of images for other purposes is only possible if one classifies art. 85 (1) GDPR as an opening clause, as it is assumed in this article.[42]

c) Opening clauses and already existing laws

One question that arises for both opening clauses of art. 85 GDPR is whether they require newly enacted legislation. It might be argued that only new or at least amended laws could restrict the GDPR through the opening clauses in art. 85 GDPR.[43] Indeed, the KUG, which has remained practically unchanged for more than 100 years, can hardly be described as an adaptation and reaction to the GDPR. Nevertheless, the objection can be countered by the fact that the GDPR does not explicitly require a newly created law at any point. A parallel can be drawn with the implementation of European secondary law into national law. Here, it is possible that a (national) law that has already entered into force can also act as an implementing statute.[44] Besides, it can be beneficial for the purpose of legal certainty that an already existing, functioning regulatory system, which has also been developed by case law over the decades, can continue to remain in force.[45] Therefore, it should be irrelevant whether the scope granted to

40 This is, of course, only possible if Art. 85 (1) GDPR is considered as an opening clause.
41 Cf. Specht-Riemenschneider/Jennessen (2019) 125–126.
42 Cf. Lauber-Rönsberg (2018) 430–431; see above III.1.
43 Klein (2017) 182.
44 Benedikt/Kranig (2019) 5.
45 Ziebarth/Elsaß (2018) 580; Lauber-Rösberg/Hartlaub (2017) 1061; Roßnagel (2017) 279.

the Member States is filled by newly created or – as in this case – already existing regulations.[46]

3. *The (legal) discrepancy between capturing images and their publication*

The KUG regulates the distribution and public display of images. Regarding the act of photography, German image law offers protection only based on case law through the general right of personality (*allgemeines Persönlichkeitsrecht*). Therefore, in the absence of sufficient codification, it can be argued that no opening clause is fulfilled and that the GDPR takes precedence. The taking of images and their further processing would then be covered by two different regulatory regimes.

The precedence of the GDPR when capturing images could lead to unreasonable results if their publication is permitted under the KUG – which is not superseded by the GDPR –, whereas the taking of a picture would be unlawful under the GDPR. Taking a picture can be usually classified as the lesser infringement of the right of personality in comparison to its publication or distribution. Such a contradiction could be partly avoided by basing the balancing of interests according to art. 6 (1) f) GDPR on the same principles as they were already applied by courts in the context of the general right of personality and the KUG. However, this approach remains without a legal basis, finds no support in the GDPR, and does not resolve the dichotomy of image protection. Against this background, it would therefore only be sensible and legally certain to resort to a legislative intervention.[47]

IV. *Concluding Remarks: The Future of Image Protection Law*

The analysis of legal details in the relationship between the GDPR and national protection of images such as the KUG is important, but it also obscures the view of fundamental questions. Regardless of the specific controversial legal points, the more general and abstract question of how to regulate images, i.e., the depiction of persons in photographs, arises. Is

46 Krüger/Wiencke (2019) 77; Roßnagel (2017) 278 (with regard to Art. 6 (2) GDPR); a more critical view is taken by Hildebrand (2018) 589.

47 Ziebarth/Elsaß (2018) 584; see below IV.

the right to one's own image obsolete? Are all images just data, and thus should be regulated under data protection law?

On the one hand, today's photography is indeed very similar to other forms of extensive data processing. Most people always have a device capable of taking pictures at their disposal, such as smartphones or digital cameras, and use them very frequently.[48] In this regard, the reason why data protection law was established – the increasing use of automated data processing and enormous data volumes[49] – also applies in principle to the processing of images. Moreover, the proximity of taking pictures of peoples' faces and data processing is most obvious in the cases of both biometric passport photographs[50] and video surveillance.

On the other hand, merely because an area such as the right to one's own image falls under a broader legal framework does not mean that it is a perfect fit. For example, information requirements of data protection laws such as the GDPR often cannot be fulfilled in a sensible way for photographers and the threat of administrative fines in case of GDPR infringements could have chilling effects on photographic activities. Also, the reasons for lawfulness in processing image data depend on vague and undefined requirements ("legitimate interests of the controller"). This is an even bigger problem when considering that there is no extensive case law for the assessment of image data. Even the GDPR recognizes that there are areas, especially including journalism, communication, science, and art, which should be regulated in special (non-data) laws. These laws can take the special characteristics and particularities of the nature of image protection into account and offer protection to persons depicted in images when it is really needed.

What does this mean for the legal framework in Germany? A legal intervention by the German parliament appears to be advisable to clarify the relationship between the KUG and the GDPR. Here, it would seem reasonable to regulate the right to one's own image in special legislation and to adapt it to technical developments. Further, the stage of taking a picture could also be regulated to prevent a divergence of the legal frameworks for images.

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48 A striking example for the use of cameras and the inflation of images nowadays is the current number of 995 pictures uploaded on the social network Instagram per second, which totals up to 86 million pictures per day (https://www.omnicoreagency.com/instagram-statistics/).

49 Cf. BT-Drucksache 7/1027, pp. 1 and 17.

50 Dreier (2019) 71 et seq.

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