

Media & Entertainment - Switzerland

Violation of personality rights in tabloid newspaper photomontage

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April 17 2014

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Introduction

On October 29 2013 the Swiss Federal Court – the highest court in Switzerland – decided on a personality rights infringement case involving *Blick*, Switzerland's most prominent tabloid newspaper.

The basis of the dispute was a photomontage. After the poor performance of Swiss singer Michael von der Heide at the 2010 Eurovision Song Contest – he received only two points and was placed last – the newspaper published a photomontage displaying von der Heide's head on the body of Lena Meyer-Landrut – the German singer who won the song contest – with the claim (in translation) "We also want to have a Lena! But no von der Heide". A subsequent article entitled "He is incapable" discussed von der Heide's underperformance at the song contest.

The Zurich District Court awarded von der Heide Sfr5,000 in damages for moral tort. It stated that the photomontage, in connection with the related articles, constituted a violation of personality rights and denigrated his professional reputation as a singer. The decision was confirmed by the Zurich Superior Court.

Violation of personality rights

The Federal Court confirmed the violation of personality rights pursuant to Article 28 *et seq* of the Civil Code.

The court confirmed that the claimant's personal perception with regard to personality rights infringement in connection with media articles was irrelevant. What was relevant was the perception and understanding of the average reader. From a procedural viewpoint, the understanding of the average reader is a legal question and not a factual one. Therefore, the court could rely on general experience only. According to the court, pursuant to general experience, it could be assumed that the average reader was aware that von der Heide is homosexual, as he talks openly about his sexual preferences.

Based on these assumptions, the court concluded that the photomontage of von der Heide's head posted on Meyer-Landrut's body in a short and tight dress exposed von der Heide to ridicule as a self-confessed homosexual.

The court qualified the denigration by the photomontage as sufficiently intensive to constitute a violation of personality rights.

Not justified as satire

The court held that the personality rights infringement was not justified by satire or public information interests.

The court assumed that *Blick* was not known for satire or parody. The average reader would therefore not expect a satirical article on the first page. The court held that the photomontage and title were intended primarily to deride, ridicule and mock the singer and his failure. The photomontage was pure abusive criticism and therefore could not be qualified as satire or parody. The court held that there was no satirical intention.

Further, the court held that personal injury was also not justified by information interests. The abusive criticism was entirely inappropriate given the importance of the

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Eurovision Song Contest in Switzerland and the poor performance of other Swiss performers in previous years. The criticism was not only inappropriate, but also unnecessarily degrading to the claimant, even if as a singer he had to accept a degree of public criticism.

Denigration of professional reputation

The court finally confirmed that the photomontage constituted a violation of personality rights, but also concurrently denigrated von der Heide's business interests as a singer.

The court held that the general protection against the violation of personality rights in Article 28 of the Civil Code may not serve to provide remedies which are entirely excluded in special statutes. However, if the special statute does not exclude such remedies, general protection against personality right infringements may be claimed in addition to the remedies set forth in the special statutes.

Consequently, the court assessed whether the photomontage denigrated von der Heide's professional reputation as a singer pursuant to Article 3(a) of the Unfair Competition Act. It confirmed its case law that false, misleading or denigrating media articles may significantly affect professional reputations. As a professional singer von der Heide could be affected in both his reputation and business interests.

The court concluded that the photomontage and titles contained unnecessarily denigrating comments about the claimant's profession as a singer. It held that it was unnecessary to prove that the claimant was effectively no longer booked for events or was booked less frequently after publication of the photomontage.

Average reader

The court qualified the perception or understanding of the average reader – important in cases of media-related personality rights infringement – as a legal and not a factual question. Therefore, in general a respondent cannot provide evidence regarding reader perception (eg, surveys). Rather, the court will use general experience as a basis for reader perception. However, this general experience is highly problematic, as it may be affected by previous understanding or even prejudices.

The courts should be transparent regarding the basis for their assumptions. 'General experience' should not lead to a lack of transparency. Assumptions should be realistic and the courts should accept surveys provided by respondents as evidence, even if the perception of the average reader is a legal question.

Even tabloid newspapers are not limitless in their sensationalist presentation of information. Although tabloid readers understand that articles in these newspapers often overstate the facts, this does not allow pure abusive criticism and denigrations of the professional reputation of well-known individuals.

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