***Ernst August von Hannover v. Germany* (ECtHR) | Columbia Global Freedom of Expression**

**Case Analysis #1**

***Meta-Data*:**

* **Case Number**: No. 53649/09
* **Corresponding Law Reference**: ECtHR, Ernst August von Hannover v. Germany, App. No. 53649/09 (2015)
* **Date of decision**: May 19, 2015
* **Featured case**: N/A
* **Region**: Europe and Central Asia
* **Country**: Germany
* **Type of expression**: Pamphlets/ Posters/ Banners; Press/ Newspapers; Non-verbal Expression
* **Judicial Body**: European Court of Human Rights (ECtHR)
* **Type of law**: International/Regional Human Rights Law
* **Main Themes**: Commercial speech; Defamation/Reputation
* **Outcome**: ECtHR, Convention Articles on Freedom of Expression and Information not violated
* **Status**: Closed
* **Tags**: Privacy; Advertising; Personality Rights

***Analysis:***

* **Summary and Outcome**:

The European Court of Human Rights (ECtHR) held, by six votes to one, that Ernst August von Hannover’s (the applicant) right to respect for his private life pursuant to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms had not been violated. The Court found that the German Federal Court of Justice had struck a fair balance between the competing interests at issue, according priority to the right to freedom of expression guaranteed by Article 10, a provision applicable to statements made in the commercial field as well. The application before the ECtHR arose due to the unauthorized use of the applicant’s name in a humorous advertisement campaign for cigarettes launched by British American Tobacco (Germany) GmbH. The Court reasoned that the advertisement, which referred to contemporary events already known in the public domain, was neither degrading to the applicant nor revelatory of details from his private life. It also observed that given that the applicant was a public figure, he would be unable to claim the same level of protection to his private life as other persons unknown to the public. Moreover, it was an advertisement which was capable of contributing to a public debate on the contemporary events relating to the applicant, which is one of the criteria for assessing the manner in which domestic courts enjoying a wide margin of appreciation balance the competing rights of respect for private life against the freedom of expression.

* **Facts**:

On March 27, 2000 the company British American Tobacco (Germany) GmbH, launched an advertisement campaign for Lucky Strike cigarettes. The top half of the advertisement carried the slogan ‘Was it Ernst? Or August?’ while the lower half depicted a crumpled pack of Lucky Strike cigarettes alongside the phrase ‘Lucky Strike. Nothing else.’ The slogan was an allusion to Ernst August von Hannover who had been involved in a series of altercations and scuffles between 1998 to 2000 which were reported in the press. Due to one such scuffle, he had also been convicted of assault. The 10-day campaign was launched in 18 towns and cities, with full-page advertisements being published in magazines and on posters at bus stops and other busy locations. The campaign had the potential to reach approximately 2.97 million people. It was also reported in the media. Ernst August von Hannover asked the commissioning company of the advertisement as well as the advertising agency which had designed it to discontinue the campaign. While the agency agreed, the company refused. On March 31, 2000 the Regional Court granted an interim injunction in favour of the applicant against any further distribution of the advertisement, which was confirmed on April 14, 2000. Subsequently, the company announced the discontinuation of the advertisement, but refused to reimburse costs incurred by the applicant in serving the official notice, and did not respond to the applicant’s request for damages of EUR 250,000.

Thereafter, an application was made on December 23, 2003 by Ernst August von Hannover to the Hamburg Regional Court for an order requiring the company and advertising agency to pay him EUR 100,000 for a ‘notional licence’ as well as at least EUR 500 as compensation for infringing his right to protection of personality rights and to reimburse the costs incurred in serving the official notice. The Regional Court awarded Ernst August von Hannover EUR 60,000 in pecuniary damages as regards the notional licence, as well as costs incurred in serving the official notice. His application as regards compensation in respect of non-pecuniary damage, however, was dismissed. The Regional Court reasoned that while both, the right to protection of personality rights as well as the right to freedom of expression are protected under the Basic Law and deserve equal respect, the right to protection of personality rights shall prevail in cases such as the one before it where a person is used for commercial endeavours such as advertising without his/her/their content. The Court emphasized however, that there had been no serious interference with the protection of the applicant’s personality rights as the event referred to by the advertisement had been caused by him in the first place and was already known to the public. Consequently, while the applicant was not deprived of the right to protection of his personality rights, the degree of interference and level of protection of freedom of expression were affected.

The Hamburg Court of Appeal upheld the judgement of the Regional Court, varying it only as regards the order for the company to reimburse the costs incurred by Ernst August von Hannover in serving the official notice. The leave to appeal was granted on the ground that the Federal Court of Justice had not as yet determined whether the use of a famous person’s name for advertising was justified when an advertisement made reference to a person or a contemporary event which was of no interest to the public except from an entertainment perspective. Such a decision was held to be required from the Federal Court of Justice in order to maintain a standard line of authority. In appeal to the Federal Court of Justice, the judgement of the Hamburg Court of Appeal was quashed. The Federal Court of Justice reasoned that insufficient regard had been paid by the Court of Appeal to the fact that the pecuniary components of the right to protection of personality rights were protected only by ordinary law, while freedom of expression was protected under Constitutional Law (Article 5§1 of the Basic Law). The Federal Court of Justice also observed that advertisements, including reports with an entertainment purpose, could play a role in contributing to the shaping of public opinion. The view taken by the Court was that the advertisement by the company was part of the public debate on the applicant’s violent conduct, and was devoid of offensive or seriously degrading content beyond satirical allusions about his conduct as already known to the public. In view of the foregoing, the Court concluded that the applicant’s interest in not being mentioned by the advertisement was outweighed by the company’s freedom of expression.

The Federal Constitutional court declined to accept the constitutional complaint by the applicant, providing no reasons for its decision. Thereafter, an application was lodged by Ernst August von Hannover with the European Court of Human Rights. He alleged that the Federal Court of Justice’s refusal to grant him a notional licence in compensation for the unauthorized use of his name in the advertisement of the tobacco company had infringed his right to respect for his private life within the meaning of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

* **Decision Overview**:

The ECtHR held, by six votes to one, that Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms had not been violated. The argument put forth before it by the Government was that the applicant’s right to respect for his private life had not been interfered with in any unjustified manner as the requisite threshold for severity had not been met. The Government further argued that even if there had been interference, the legal system of Germany conferred the applicant with sufficient protection by providing for the possibility of applying for an injunction. As per the Government’s submission, the applicant had hoped to secure a pecuniary advantage as opposed to protection against the advertisement at issue, despite Article 8 not providing for any such compensation. The Government reiterated and relied on the position of the Federal Court of Justice in its submission to argue against the grant of a notional licence in favour of the applicant. The third party, being the company, asserted that the Court’s case law nowhere suggested that statements made in advertisements enjoyed lesser protection than statements made elsewhere, and that an entity such as itself had the right to make comments on current events or the conduct of an applicant involved in such events much like the press. It argued that the applicant had no grounds to challenge the Federal Court of Justice’s demarcation between the pecuniary and non-pecuniary components of the right to protection of personality rights.

The applicant, contending such argumentation, submitted before the ECtHR that his right to respect for his private life had been unjustly interfered with. The applicant argued that the Federal Court of Justice had deprived the injunction granted by the Regional Court of any effect by finding the advertisement to be lawful. As per the applicant, the decision would allow the company to apply to have the injunction lifted while the applicant would no longer even be entitled to seek discontinuation of the advertisement. He argued further that an artificial demarcation had been made by the Court between the pecuniary and non-pecuniary components of the indivisible right of protection to personality rights, and that in labelling the law protecting the pecuniary components of his application as ordinary law subservient to constitutional law, the Federal Court of Justice had disregarded that Article 8 also conferred on the individual a right to decide to whom and the extent to which he/she/they wished to disclose personal information to. The applicant asserted that the Court had prioritized the commercial interests of the company in conducting the balancing exercise between competing interests, and had protected commercial speech despite its sales-driven vested interests as well as incapability to contribute to the formation of public opinion.

The ECtHR noted that the application filed before it required an examination of the fair balance to be struck between the applicant’s right to respect for his private life as protected by virtue of a State’s positive obligations pursuant to Article 8, and the company’s freedom of expression as guaranteed by Article 10. The Court observed that freedom of expression as guaranteed by the Convention applies to statements made in the commercial arena as well, as the right is guaranteed to ‘everyone’ without distinction between a profit-making endeavour and other endeavours. Relying on its case law, the Court reiterated the criteria for assessing the manner in which domestic courts balance the competing rights of respect for private life against the freedom of expression. Among the criteria identified as relevant was the criterion of contribution to a debate of general interest, in pursuance of which the Court opined that the advertisement at issue was capable of contributing to such a debate as it dealt satirically with contemporary events forming the subject of a public debate. The Court also opined that given that the applicant was well known, he would be unable to claim the same degree of protection to his private life as other persons unknown to the public. Moreover, the Court observed that the reference made to the applicant by the humorous advertisement at issue was neither degrading in nature, nor did it mention any details of the applicant’s private life.

On the basis of the foregoing, the Court held that the Federal Court of Justice had struck a fair balance between the competing rights, deciding that priority was to be accorded in this particular case to the right to freedom of expression of the company. It was also in agreement with the decision of the Federal Court of Justice to refuse the grant of a notional licence to the applicant, as the applicant had already obtained an injunction from the Regional Court on any further publication of the advertisement at issue. The Court acknowledged that theoretically the use of the applicant’s name could have been a cause for concern in respect of the right guaranteed to him pursuant to Article 8, particularly due to the controversial nature of tobacco advertising. However, in light of the applicant’s stature as a public figure, the humorous and non-degrading nature of the advertisement, and the wide margin of appreciation enjoyed by domestic courts in weighing competing interests, the Federal Court of Justice had not failed to comply with its positive obligations in practice.

Dissenting Opinion of Judge Zupančič:

In his dissenting opinion, Judge Zupančič differentiates himself from the majority, agreeing largely with the decisions of the German courts below the Federal Court of Justice. He reasons that while, despite its formalism, the placement of the applicant’s personality rights below the right to freedom of expression in the domestic legal order might make sense due to the constitutional status of the latter right, a similar hierarchy cannot be replicated at the international level. He opines that the German provisions which govern personality rights have their international counterpart in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that there can be no “a priori predominance of the freedom of expression over the personality rights protected by Article 8 of the Convention.” [pp. 17] He adds that the demarcation of the compensatory aspect as the aspect which cannot be maintained at par with the freedom of expression artificially separates the remedy from the right. He also opines that the advertisement is “assertive and suggestive” [pp. 17] with solely a commercial purpose.

***Direction:***

* **Outcome**: Expands expression
* **Information**:

The decision of the ECtHR expands expression by holding that there is no reason for domestic authorities to interfere with the freedom of commercial speech as manifested in the form of humorous advertisements in order to protect the personality rights of a public figure. This is particularly so when the advertisement, despite pursuing commercial ends, is capable of contributing to a public debate, and is neither degrading to the applicant nor revelatory of details from his private life beyond those already known in the public domain. Reference to decisions of the ECtHR pertaining to humorous expressions, such as the one at hand, are pertinent to the identification of the criteria undergirding the reasoning of the Court, in particular in relation to its determination of whether restricting certain forms of expression is necessary in democratic societies. From this decision, alongside others like it such as *Bohlen v. Germany*, the following criteria may be deduced as being favorable to a determination of non-interference – the humorous intention of the speech being marked by clear indicators, the potentially offensive message being decipherable by a relatively small audience, and the target being a public figure ([Godioli](https://olh.openlibhums.org/articles/10.16995/olh.571/)). The concern that persists even with these criteria being identified, however, is the element of subjectivity in the interpretation of humorous expression, requiring greater emphasis on the context in which it was published, circulated, and an understanding of it was shaped.

***Perspective***:

* **Outcome**: National Perspective (Pursuant to the note on the Style Guide, Pg. 23)
* **Related International and/or regional laws**:

[ECHR, art. 8](https://www.echr.coe.int/Documents/Convention_ENG.pdf);

[ECHR, art. 10](https://www.echr.coe.int/Documents/Convention_ENG.pdf);

[ECtHR, Markt Intern Verlag GmbH and Klaus Beermann v. Germany, App. No. 10572/83 (1990)](https://hudoc.echr.coe.int/eng#{"fulltext":["Markt%20Intern%20Verlag%20GmbH%20and%20Klaus%20Beermann%20v.%20Germany"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-57648"]});

[ECtHR, Karhuvaara and Iltalehti v. Finland, App. No. 53678/00 (2005)](https://hudoc.echr.coe.int/eng#{"fulltext":["Karhuvaara%20and%20Iltalehti%20v.%20Finland"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-67457"]});

[ECtHR, Hachette Filipacchi Associés (ICI PARIS) v. France, App. No. 12268/03 (2009)](https://hudoc.echr.coe.int/eng#{"itemid":["001-93788"]});

[ECtHR, Alves da Silva v. Portugal, App. No. 41665/07 (2010)](https://hudoc.echr.coe.int/eng#{"itemid":["001-95154"]});

[ECtHR, Flinkkilä and Others v. Finland, App. No. 25576/04 (2010)](https://hudoc.echr.coe.int/eng#{"fulltext":["Flinkkilä%20and%20Others%20v.%20Finland"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-98064"]});

[ECtHR, Saaristo and Others v. Finland, App. No. 184/06 (2011)](https://hudoc.echr.coe.int/eng#{"fulltext":["Saaristo%20and%20Others%20v.%20Finland"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-101017"]});

[ECtHR, Von Hannover v. Germany (no. 2), App. Nos. 40660/08 and 60641/08 (2012)](https://hudoc.echr.coe.int/eng#{"fulltext":["Von%20Hannover%20v.%20Germany%20(no.%202)"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-109029"]});

[ECtHR, Tănăsoaica v. Romania, App. No. 3490/03 (2012)](https://hudoc.echr.coe.int/eng#{"itemid":["001-111503"]});

[ECtHR, Mouvement raëlien suisse v. Switzerland [GC], App. No. 16354/06 (2012)](https://hudoc.echr.coe.int/eng#{"fulltext":["Mouvement%20raëlien%20suisse%20v.%20Switzerland"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-112165"]});

[ECtHR, Axel Springer AG v. Germany [GC], App. No. 39954/08 (2012)](https://hudoc.echr.coe.int/eng#{"fulltext":["Axel%20Springer%20AG%20v.%20Germany%20[GC]"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-109034"]});

[ECtHR, Neij and Sunde Kolmisoppi v. Sweden, App. No. 40397/12 (2013)](https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22001-117513%22]%7D);

[ECtHR, Eon v. France, App. No. 26118/10 (2013)](https://hudoc.echr.coe.int/eng#{"fulltext":["Eon%20v.%20France"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-117742"]});

[ECtHR, Ashby Donald and Others v. France, App. No. 36769/08 (2013)](https://hudoc.echr.coe.int/eng#{"itemid":["001-115845"]});

[ECtHR, Von Hannover v. Germany (no. 3), App. No. 8772/10 (2014)](https://hudoc.echr.coe.int/eng#{"itemid":["001-126362"]});

[ECtHR, Bohlen v. Germany, App. No. 53495/09 (2015)](https://hudoc.echr.coe.int/eng#{"fulltext":["Bohlen%20v.%20Germany"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-152647"]})

* **National law or jurisprudence**: [Ger., Basic Law art. 5](https://www.iuscomp.org/gla/statutes/GG.htm#5)
* **Other national law or jurisprudence**: N/A

***Significance***:

* **Binding or persuasive precedent within jurisdiction**; **Decision establishes influential or persuasive precedent outside jurisdiction**; **Explanation**:

Standard I: The decision establishes a binding or persuasive precedent within its jurisdiction.

Information: Judgments of the European Court of Human Rights are binding upon parties to the decision.

Standard II: Decision (including concurring or dissenting opinions) establishes influential or persuasive precedent outside its jurisdiction.

Information: The decisions of the European Court of Human Rights have precedential value on the interpretation of the right to freedom of expression for other States Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

* **Related Cases**: Self-generated
* **Date updated**: Tuesday, September 22, 2020

***Docs***:

* **Official Case Documents**:

Judgment (ECtHR) (in English) [Attached]

Press Release issued by the Registrar of the ECtHR dated 19.02.2015 (in English) [Attached]

* **Amicus briefs and other legal authorities**:

Guide on Article 8 (Right to respect for private and family life) of the ECHR (in English) [Attached]

* **Reports, Analysis, and News Articles**:

European Court of Human Rights: Bohlen and Ernst August von Hannover v. Germany (IRIS 2015-5/1) – Dirk Voorhoof [Attached]

Cartoon Controversies at the European Court of Human Rights: Towards Forensic Humor Studies – Alberto Godioli [Attached]