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UNDERSTANDING CIVIL DEFAMATION LAWS IN GERMANY

When applied legitimately, defamation laws are intended to protect individuals and businesses against false statements that are harmful to their reputation. Yet both civil and criminal defamation laws have the potential to be misused to prevent open public debate.

This Guide provides journalists with a practical understanding of civil defamation laws and the steps they can take to mitigate defamation liability in Germany. There are also various offences of criminal defamation, namely slander, insult and defamation, within the German Criminal Code, which journalists must also take steps to understand and mitigate against. This awareness will help empower journalists to understand their legal rights and obligations and continue to report on issues of vital public interest.



1. WHAT IS CIVIL DEFAMATION?

The German Constitution protects the personality rights of individuals and legal persons.¹

What are personality rights?

The right to privacy and human dignity including protection against commercial exploitation of these rights in the media.

Civil defamation in German libel law mainly occurs when the “personality rights” of the subject of a report are violated by the reporting or when a statutory obligation is violated deliberately, intentionally or negligently. To put the violation of personality rights in other words, they occur if the reporting unlawfully interferes with the subject’s personality rights. To determine this, the personality rights and the freedoms of expression, opinion and the press are weighed against each other. A violation will have occurred if the personality right is predominant.



Example: Comparing a politician to a sexual object or presenting a circumstance belonging to the intimate sphere of this person as the only advantage over a political rival in a satire magazine was found to be in violation of personality rights. See Regional Court of Berlin, judgement from 16th December 2021 – 27 O 195/21.

¹ The freedoms of expression, opinion and the press are protected by Article 5 of the German Constitution.

2. WHEN CAN I BE SUED IN THE GERMAN CIVIL COURTS?

As a media outlet or journalist reporting from Germany, it is important to be aware of the criteria for making a defamation complaint before the German Civil Courts. The claimant must satisfy these three criteria to be able to bring a case (i.e. to have legal standing):

- a) **It must be a 'natural or legal person'** - a civil defamation challenge can be brought by an individual, business or some other legal personality.
- b) **The person must be 'recognisable and identifiable'** - Any natural or legal person living in the European Union can file a civil defamation complaint in Germany so long as they are recognisable and identifiable on the basis of the information given in the publication, even if their name is not explicitly stated. For instance, this might be the case if individualising features such as details from a CV are mentioned.



Example: A news outlet published an article about a trial in which the claimant appeared as a lawyer. His work location and his prior jobs, including his dismissal from civil service in a particular federal state, were mentioned. This was used to shed doubt on whether he was able to carry out his profession properly. The claimant was considered to have legal standing. See German Constitutional Court, decision from 14th July 2004 – 1 BvR 263/03.

- c) **The person must be individually affected by the report** - A civil defamation challenge can generally only be brought by a person who is individually, i.e. directly, affected by the report. Claimants do not have to be German or residing in Germany (but legal persons must not be residing outside the European Union); however, German courts will only assume jurisdiction over defamation claims if the legal interests of the claimant are seriously affected in Germany, for instance if the claimant is well-known in Germany.



Example: The New York Times published an online article about a Russian residing in Germany, and his company, and the investigations against them in the USA due to the alleged bribery of Ukrainian officials. The article mentioned the Russian claimant by name and described him as a gold smuggler and perpetrator of embezzlement. Furthermore, it was mentioned that his company in Germany was part of Russian organised crime according to German and US investigative authorities and that the claimant had links to organised crime in Russia. The claimant made a defamation claim against the New York Times in Germany. The German courts assumed jurisdiction. See German Federal Court of Justice, judgement from 2nd March 2010 – VI ZR 23/09.

3. WHAT DEFENCES ARE AVAILABLE FOR CIVIL DEFAMATION?

There are three key defences against a claim of civil defamation:

A) TRUTH

The first possible defence is the defence of truth. This only applies to statements of facts, not to expressions of opinion, as only factual statements are capable of proof by reference to witness or documentary evidence. In order to decide on the truth of a statement, the court must find out the substance of the statement by interpreting the intended meaning behind the words used. The interpretation of words is undertaken from the hypothetical point of view of the average reader or viewer. Where more than one interpretation is possible, the courts must select an interpretation which protects freedom of expression.

Under German civil procedure a claimant will generally have to prove the entire factual basis of their claim. However, as the remedies of injunction (or halting publication), retraction and damages require the presence of an untrue factual statement, requiring the claimant to prove this would involve them having to prove a negative, for example that they were not at a certain place at a certain time. Therefore, the burden of proving the truth of a published factual statement is placed upon the defendant.

B) PUBLIC INTEREST

If a statement is true, the claimant might base their claim on an infringement of their privacy. In this scenario, the media outlet or journalist may wish to rely on the public interest defence. The necessary degree of public interest depends on how seriously the privacy is invaded: the more serious, the higher the degree of public interest required. In order to determine the degree of invasion, German law has conceptualised different spheres of an individual's life as follows:

The public sphere

The public sphere covers all aspects of life which are intentionally conducted in front of the world at large and directed at the public, for example a public appearance by a politician or celebrity. This sphere is not protected by the general personality rights and thus the public interest defence does not apply.

The social sphere

The social sphere covers all aspects of life which are conducted in front of the public, without being directed to the public, for example an everyday shopping trip carried out by a politician or celebrity, professional activities or participation at public events.

True statements regarding this sphere usually have to be tolerated by the subject due to the press' function as public watchdog. The individual's personality rights will seldom override public interest except in cases where it can be evidenced that the reporting may significantly intrude upon the individual's ability to lead a normal life.

Generally, it is prohibited to publish pictures without the consent of the depicted person. This is also the case if the picture was taken in public, unless there is a legitimate public interest in the publication of the photographs or one of the other cases regulated in section 23 (1) of the German Law on Copyright in works of Art and Photographs apply. For example, if the depicted person is a participant of a public assembly or if the depicted person appears as accessory next to a landscape.

The private sphere

The private sphere covers all aspects of life which are only known to persons who have been granted access to them, for example home, family life, private talks and e-mails and finances.

Generally, the publication of facts relating to the private sphere is, without the consent of the subject, unlawful. However, if an individual person has themselves made private information public, they may no longer invoke the protection of the law, for example where a celebrity has previously invited the media into his/her home.

Protection will also not be afforded where the facts in question relate to matters of major public interest. For example:

- the private e-mails of the Minister of the Interior and Finance Minister, which included reference to being the father of an extramarital child and encouraging the mother to apply for state aid rather than pay child support, were considered of public interest as they raised questions around the suitability of the Minister, whose core functions were to ensure rule of law and manage the state's finances.²
- the purchase price for a private villa of a federal minister was reported as it indicated a discrepancy between the politician's salary and his lifestyle, allowing conclusions to be drawn about his political independence.³
- a report about the private wedding ceremony of a high-ranked politician could be defended with the public interest in the disclosure of contradictions between the politician's self-portrayal and positions and his private lifestyle.⁴
- the assets of the major shareholder of companies which have a dominant position on the market are disclosed in a ranking in a magazine. The public interest might outweigh the subject's interest to keep their financial situation private as the financial situation of shareholders of dominant companies are indicators of economic developments and contribute to discussions about taxation and the influence a person might have.⁵

The intimate sphere

The intimate sphere is the 'last resort', where it can be assumed that everyone generally does not want to share their life with anyone save those closest to them, for instance in health and sexual matters. Therefore, publication of facts relating to this sphere is generally unlawful if published without consent, unless the subject has made the information public before or there is a very strong public interest to do so.

² German Federal Court of Justice, judgment from 30th September 2014 – VI ZR 490/12.

³ Higher Regional Court of Hamburg, decision from 23rd April 2021 – 7 U 16/21.

⁴ Higher Regional Court of Hamburg, judgment from 25th November 2014 – 7 U 42/13.

⁵ Regional Court of Munich I, judgment from 6th April 2011 – 9 O 3039/11.

C) COMPLIANCE WITH THE PRINCIPLES OF JOURNALISTIC CARE AND RESPONSIBLE JOURNALISM

Where the media can demonstrate that it observed generally accepted standards of responsible journalism⁶ when researching and publishing the material complained of, it will have a defence, even if elements of the published material transpire to be untrue. In such a case, no damages or injunctions will be ordered, however a correction may subsequently be appropriate.

A wide degree of latitude is given to the media as regards to journalistic standards and the courts have held, for example, that a responsible journalist or editor does not have to confirm the accuracy of reports received from recognised news agencies or of press releases issued by public authorities, such as the police and public prosecutor.

Otherwise, the degree of diligence which must be exercised is dependent upon the seriousness of the material that is at stake: the more serious the subject matter and the defamatory allegation that is to be published, the more detailed and comprehensive the research that must be undertaken and the more careful the language used in publication. For example, it has been held that reliance on a single anonymous source in support of an allegation that a member of parliament took a bribe represented a grave violation of standards of responsible journalism.

The burden of proof that the media has been duly diligent in its research is upon the media.

D) ADDITIONAL DEFENCES AVAILABLE

Reports on the basis of suspicion

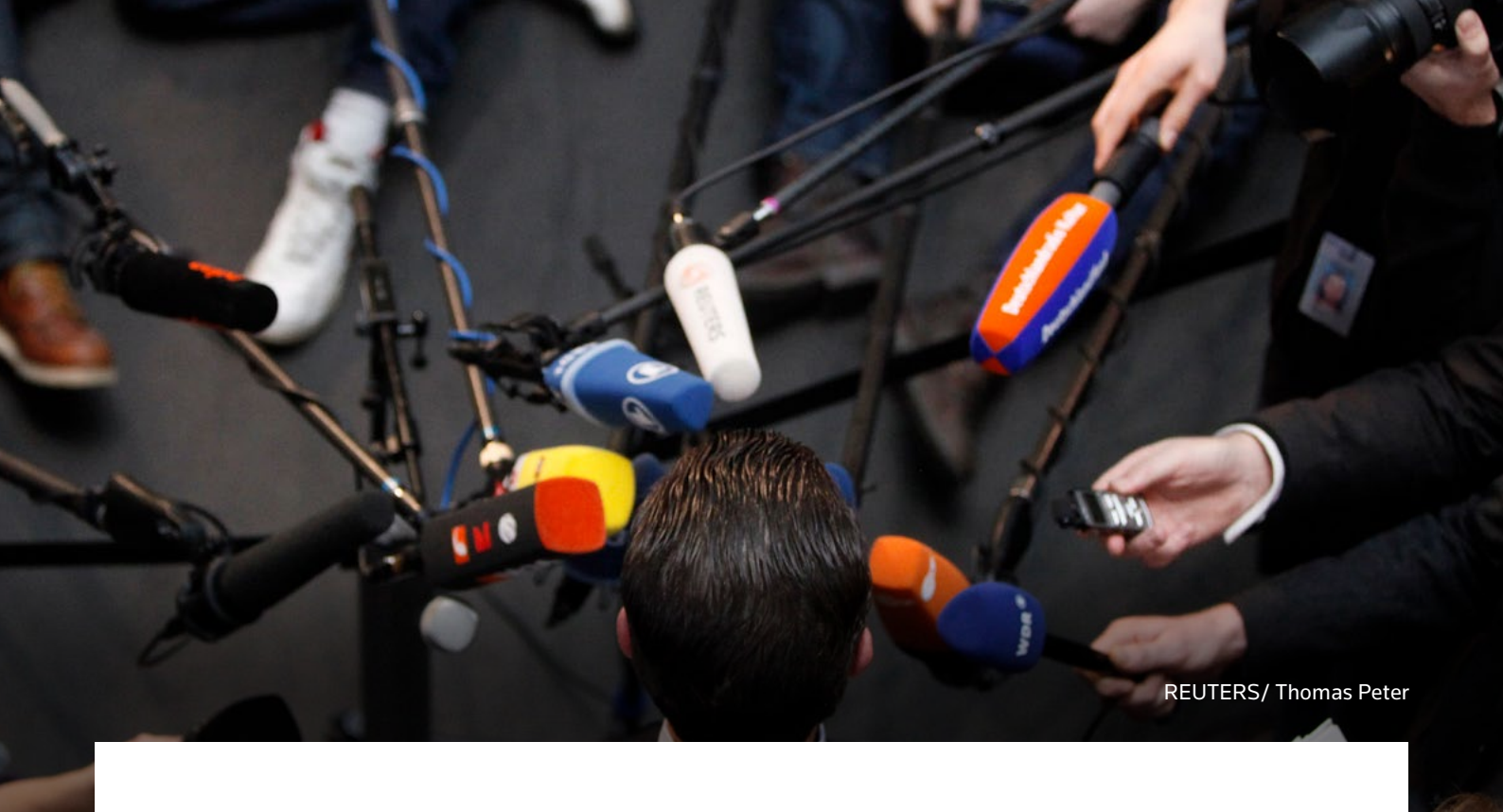
In seeking to balance the legitimate public interest in matters of public significance that is protected by Article 5 of the German Constitution with the personality rights of individuals and businesses protected by Articles 1 and 2, the German courts have also developed a defence which protects reports relating to the existence of suspicion or speculation.

In order to be protected, even if the suspected matters are proven to be untrue, the following principles must be observed:

- The report in question must relate to a matter of genuine public interest and significance.
- The report must have been researched and published in accordance with recognised standards of responsible journalism. The suspicion must be based on a minimum factual basis; for instance, one anonymous source taken together with a criminal complaint is not sufficient. Usually, several sources which are independent from each other and can be used as evidence in court are necessary.
- The affected person must be confronted with the matters at issue and his/her comments must be reported.
- The report has to address the matters at issue in an objective fashion, including any material that is in favour of the subject, i.e. a prejudgment must not be made and the presumption of innocence must be observed.

Again, the more serious the reported subject matter, the greater the degree of diligence that must be shown by the media.

⁶ The Press Code may provide some guidance in this respect: <https://www.presserat.de/pressekodex.html>



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4. WHAT REMEDIES ARE AVAILABLE?

A) INJUNCTIONS

In urgent circumstances requests asking the court to halt publication (injunctions) are usually granted on a temporary basis and confirmed as final following a trial.

An injunction relating to defamatory material will only be granted where the material in question is untrue or, in the case of comment or opinion, where it constitutes vulgar abuse. In interim injunction proceedings the 'untruth' of the material will usually be proved by way of an affidavit sworn by either the individual affected or a potential witness in court proceedings.

An injunction will also only be granted if there is evidence of an intention to publish the material in question. Although the requirement is presumed where publication has already taken place, the German courts are reluctant to grant an injunction prior to publication.



Example: Merely filming in a particular place or recording interviews has been held to be insufficient grounds to order an injunction where the content of the proposed report is still unknown. See Higher Regional Court of Karlsruhe, judgement from 8th October 2014 – 6 U 145/13, margin number 55.

An injunction may be granted by any court where the violation of the rights in question either took place or is likely to take place. In cases where nationwide publication is at issue, any German court can potentially hear the case.

In the case of violation of an injunction the court may impose a fine of up to EUR 250, 000.

B) RIGHT OF REPLY

The right of reply gives an individual affected by a publication in the media the opportunity to reply to the content of the report. The right exists irrespective of the truth or otherwise of the published material.



The following formal requirements and limitations generally apply when filing a right to reply (subject to variation between states):

- Only individuals named by a publication or otherwise directly affected by it are entitled to a right of reply.
- There is no right of reply to an expression of opinion – only statements of fact.
- The reply must address the facts that appeared in the publication and those facts alone.
- The required reply has generally to be signed by the claimant or his attorney and the original copy must be served on the publisher without delay and within three months at a maximum.

Where these conditions are met, the publisher must publish the reply and must do so promptly and in a similar manner as it published the original item. For example, if the original article was published on the front page of a newspaper under a bold headline, then the court may take the view that the reply should also be published on the front page under a bold headline.

The protection and enforcement of the right of reply is a matter for the states and is governed by various press laws and similar statutes relating to the electronic media that have been passed at state level. Claims alleging a failure to publish a requested reply must be filed in the District Court ('Landgericht') of the place of domicile ('the permanent or principle residence') of the relevant media enterprise.

C) RETRACTION

Retraction or correction is only available in cases involving untrue factual statements (as opposed to opinions) and the claimant must also prove that a retraction is necessary to restore their reputation, i.e. that the untrue statement is significant enough to have harmed their reputation.



Obtaining a retraction: Retraction does not merely involve the complainant expressing his own point of view but obliges the media entity to admit in its own publication that it was wrong and to do so in clear terms. Hence a retraction or correction will only be ordered after a full trial and the order only becomes enforceable when the publisher has exhausted all other avenues for appeal.

D) GENERAL DAMAGES

General damages act as compensation for the damage caused where a person 'intentionally or negligently violates, without justification, the life, bodily integrity, health, freedom, property or other right of another person'. General damages can also follow a deliberate violation of a statutory obligation. For example, the prohibition of defamation under section 185ff. of the Criminal Code brings such a case within the boundaries of this provision. The violation is required to be committed deliberately, intentionally or negligently.

General damages will only be awarded by way of final judgment after trial. In order for such an award to be made the claimant must prove a causal connection between the published material and the damage suffered.

E) EXEMPLARY DAMAGES

A claim for exemplary damages can only be brought where:

- There has been a severe violation of privacy or other personality rights
- The defendant has acted intentionally or negligently, and
- The consequences of the violation could not be remedied by other means (such as reply, retraction, or the general damages that would otherwise be awarded).

Such an award can again only be made by way of final judgment after trial.



PRACTICAL STEPS JOURNALISTS CAN TAKE TO MITIGATE THE RISK OF DEFAMATION LIABILITY IN THEIR WORK

Summary

It is worth remembering that truth is a complete defence to a defamation action. There may be other limitations on publishing information, but to the extent that the information is and can be proved to be true, a defamation action will not be successful. A good rule of thumb is to only report what you are confident you can prove.

A rigorous focus on fair and accurate reporting at each stage, and verifying the truth of the matters reported will put you in the best possible position if faced with legal threats or claims. The suggestions below are intended to help you to think about practical means of achieving this. There are also other defences to a defamation claim which may be available to you depending on the jurisdiction, some of which are mentioned below.

Gathering Information

- Gather information early – as time passes and memories fade, information and sources can become less reliable.
- Use confidential sources with caution – if you are reliant solely on information from a confidential source in respect of certain allegations or statements in your reporting, be aware that proving the truth may be more difficult.
- Do not make promises to confidential sources that are not within your power to keep.
- Be careful with legal advice. In particular, do not claim a (false) legal fact in order to get information from a source.
- Nondisclosure agreements are permissible and effective to protect journalists from disclosing their source. If you do not conclude such an agreement – expressly or impliedly – you are not contractually (although you may be ethically) obligated to protect sources and maintain confidentiality.
- If you anticipate needing releases, obtain them early.
- Use public records to your advantage. You can use them to verify information you received from other sources.
- If you choose to utilise audio or visual recording, always pause to consider whether you can record without permission, or whether permission is required. When in doubt, ask for consent.
- When putting something in writing, know that should you be sued, you may be required to disclose sources and means of obtaining information.
- Keep a good record of your notes, meetings, etc.
- Research carefully. Verify sources and double-check your facts to ensure accuracy. Generally, you may only adopt communications from authorities and recognized agencies without further verification where you clearly attribute the source of the information.

Drafting and Vetting the Article

- Familiarise yourself with defamation law in the countries you're working in (see above). Be aware that there may be more restrictive laws in some countries – for example, in some countries it is easier for a company to bring a defamation challenge than in others.
- Familiarise yourself and comply with your news organisation's ethics guidelines and policies.
- Use credible sources to verify the accuracy of any potentially defamatory statements.
- Ask yourself whether there are any statements directed to identifiable individual(s) or companies that could be reputationally damaging. Confirm accuracy, and if doubt remains, weigh the benefits of keeping the statement in versus taking it out.
- Make your reliance on trustworthy and non-confidential sources transparent (for example, by hyperlinking to or otherwise disclosing the relevant reports or public records).
- A cornerstone of responsible journalism is seeking comment from the subject(s) of the reporting you intend to publish, particularly where you intend to make allegations about them or their conduct – you should clearly put the substance of allegations to the subject in advance and invite their response.
- Ensure, especially where you are engaging in investigative reporting, the subjects of your reporting have sufficient time to respond and have enough information to respond adequately. You should not show them a draft of your intended reporting but you should be prepared to share the substance of the intended publication.
- Reflect the comment /response in the article (you may use your editorial discretion in doing so). Even noting "no comment" or source "did not respond to requests for information" will go a long way in showcasing the steps the journalist took to report factual information.
- Be precise with your language and the meaning you intend to convey. Avoid any ambiguity, over-exaggerations or speculations. To the extent that you've made any assumptions, disclose them clearly as such.
- Always reproduce quotations correctly and attribute them clearly.
- Consider exculpatory circumstances and avoid one-sided reporting. Reporting should be balanced and not create a distorted picture of reality.
- Do not spread mere rumours, whether about public or private matters. Report only when a minimum body of evidence is available and feel comfortable in saying what you don't know, where applicable.
- Consider how litigious and risky the subjects of your reporting are, and plan accordingly. If it is someone with a history of litigious activity toward the press, engage your news organisation's legal/compliance team early.
- Consider whether you are making an assertion of fact or a potentially protected opinion. There must be sufficient evidence for a statement of fact. If there is any uncertainty or doubt, consider formulating it as an expression of opinion (based on true facts) or presenting it as an assumption.
- Beware of republication liability. If you take information from another medium for your reporting, you assume responsibility for its content.

- Consider whether any available defences to defamation – for example truth, public interest reporting, qualified or absolute privilege, fair and accurate reports of certain proceedings – apply.
- There are several defences to a defamation action other than truth / justification, some of which may be particularly applicable to journalists – for example, in some countries there is defence for reporting in the public interest. There may also be defences available where an article expresses an opinion and are written in public interest. However, these defences are not fool-proof and will usually involve satisfying a number of requirements. If you intend to rely on a defence, consult your legal team or research precedent to ensure that the defence is likely to be available.

After Publication

- Stay informed of any developments in the subject matter that might change, call into question, or shed new light on the published information. Originally permissible reporting may generally be kept in the online archive. You typically have no active duty to investigate or update the reporting. Only if an affected party raises a qualified complaint about the reporting, you may be required to add supplementary information or take reasonable precautions to prevent the reports from being found in search engines in name-related search queries (“right to be forgotten”).
- Consider whether to keep your notes and relevant communications and, if so, for how long – knowing the limitation period for defamation claims in the relevant jurisdiction may assist.
- Be willing to correct or retract your mistakes and issue an apology to the extent necessary for the justification/truth defence. You may be required to correct factual allegations that have subsequently proven to be incorrect and have a lasting effect on the personal rights of the person concerned. This is usually done via a supplement/correction in the next issue or on the website.

Please note that journalists must also remain cognisant of emerging trends in other areas of the law that place their wellbeing at risk, or which could create legal risk – such as applicable privacy laws.



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