PROTECTION OF THE HONOUR OF DECEASED PERSONS - A COMPARISON BETWEEN THE GERMAN AND THE AUSTRALIAN LEGAL SITUATIONS

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Introduction

Famous people are often defamed, even if they are already dead, or their images are used after their death for commercial purposes. This paper will discuss how the German and Australian laws deal with this problem. In contrast to Germany, which has one unitary civil law, the Australian defamation legislation differs as between the various States and Territories. There are eight different defamation laws in Australia,[1] which will be looked at.

The first part of the paper will deal with the question of whether a deceased person can be defamed; first, this question will be answered according to German law. The common law and the Australian legislation will be then examined. Some proposals made by the Law Reform Commissions in Australia in relation to these questions will be discussed at the end of part one.

The second part of the paper will deal with the commercial appropriation of individuals, especially when they are already dead. There are some recent developments in Germany, which have tried to improve the protection of deceased persons, which are worth looking at. It will be necessary to examine the common law situation in Australia and England, as well as in America. This paper will not discuss whether a statement is defamatory in Germany or in the different States and Territories of Australia, but it will focus on the situation of the deceased person, so that statements will be taken as defamatory without discussing them. The paper will not focus on the criminal but only on the civil law aspect.

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1 J McLachlan and P Mallam, *Media Law and Practice* (1998) [9.90].

Defamation of deceased persons

Responsibility of Historians Under a Philosophical Point of View

Before starting with the legal aspects, it is interesting to look at some philosophical aspects first. The philosophical question is whether there is any responsibility on the historian when writing about a deceased person.

That question makes it necessary to establish what a historian has to do. According to the common-sense theory, the essential points in history are memory and authority. The historical truth should be found in the ready-made statements of the authorities. Therefore, the historian should not be allowed to tamper with these statements and he must not mutilate them. The historian must not add anything to them and he is not allowed to contradict them when he doubts them. According to this theory the historian must not decide which statements of the authorities are important and which are not.[2]

But that cannot be the task of historians. To write history from his sources, the historian has to select from them what he thinks to be important. He has to interpolate things in them, and he has to criticise them and then reject and amend what in his opinion is wrong and is misinformation.

It is no criterion of historical truth that a statement is made by an authority. The historian has to question the information supplied by the authority in order to find the truth. The historian has to answer these questions for himself, that is, on his own authority. Therefore, the historian is his own authority and his thoughts are autonomous and self-authorising. The autonomy of historical thought can best be seen in the work of selection. Every historian has to select, because nobody can copy every authority and a historian has to leave out some information.

The historian's authorities often tell him of different phases of history and do not tell him about the intermediate phases. It is the duty of the historian to interpolate these phases for himself.

But the historian also has to criticise the authorities. Because the historian is his own authority, there can never be other authorities. These so-called authorities form an opinion, but the historian has to form his own opinion. Therefore, the historian works at a subject others have studied before and the subject increasingly becomes his own work.

The historian has to use his imagination. Often, a historical picture has a sequence of events, which is proved by the historian's authorities. If these events are frequent enough, it is a question of imagination to elaborate on the whole picture.

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2 RG Collingwood, *The Idea of History* (1961) 234-235.

The historian's picture of the past has to justify the sources used in its construction. The critical historian has to discover and correct all possible errors. He has to do this because only thus will he be able to form a coherent and continuous picture of the past. The historian has to localise the picture in space and time, the history must be consistent in itself and there has to be evidence to support this historical picture.

On the whole, one has to state that the historian is responsible for his statements about historical facts. He is responsible for his imagination between the proven historical events, but also for the events themselves. After having accepted, rejected, modified or reinterpreted what the authorities tell him, the historian is responsible for the statements he makes. The historian can never justify himself by relying on the facts given by the authorities.[3]

According to this paper, historians are responsible for what they state about deceased historical persons. They have to prove the authorities before making defamatory statements about historical figures. A good historian has to verify the authorities very carefully before he passes judgement about historical people.

After having recognised the philosophical responsibility of the historians the main part of the paper will deal with the legal responsibility of historians and of everyone else.

German Law

The legal situation in Germany will be described first.

To understand the German position towards the protection of honour, it is necessary to look first at the German Constitution (Grundgesetz). Art 1 GG guarantees the inviolability of the dignity of every human being. That is the key section of the German Constitution, which is the supreme and controlling value of the whole system of basic rights.[4]

At first, one has to depict the legal situation in Germany in general. Articles 1 and 2 of the Grundgesetz confer the right of personality on individuals. The right of personality in Germany has been recognised since 1954. The right of personality guarantees to every person protection of human dignity and a right to free development of one's personality.[5] The right of personality protects, first of all, non-material interests, especially according to the value and the respect for the individual.[6]

3 Ibid, 235-249.
4 BVerfGE 6, 32(41); 27, 1(6).
5 BHG NJW 2000, 2195, 2197.
6 BHG NJW 2000, 2195, 2197.

The German Federal Supreme Court (Bundesgerichtshof) recognises a right to defensive demand, because of the violation of the right of personality.[7] It is possible to demand non-publication of a defamatory opinion or retraction of false statements.[8]

But the German Federal Supreme Court has also recognised an action for damages based on the violation of the right of privacy. However, to give such an action for damages is problematic.

In section 253 of the German civil code (BGB) it is stated that one can only get incorporeal damage if the right to claim compensation for such damage is expressly provided in another section of the BGB. Section 847 of the BGB deals with the compensation for pain and suffering. This section provides such compensation only in cases of physical injury, injury to health and deprivation of liberty. Normally it would not be possible to get compensation for pain and suffering because of defamation. Nevertheless, the German Federal Supreme Court gives compensation for pain and suffering to living persons who have been defamed, because the right of personality will only be protected adequately if there is a sanction against its violation.[9] This violation must be extremely strong.[10] Such a claim is necessary because of the importance of Art. 1 and 2 of the Grundgesetz.[11] That is an example of case law in Germany.

The German Constitutional Court (Bundesverfassungsgericht) held in the well-known Mephisto Judgement,[12] that the protection of human dignity endures after the death of a person.[13]

The German author Klaus Mann, a son of Thomas Mann, wrote the novel 'Mephisto' in 1936 in Amsterdam, after having left Germany because of the Nazis. The novel is about the career of the young actor Hendrik Hoefgen, who worked with the Nazis to improve his own career as an artist. The model for his fictional character was the actor Gustav Gruendgens, who was a friend of Klaus Mann earlier and was married to the sister of Klaus Mann for a brief period. It was easy to recognise Gustav Gruendgens in Hendrik Hoefken because of the similarities between Gustav Gruendgens and Hendrik Hoefken; for example, in relation to the physical appearance of Hendrik Hoefken as described in the book, the plays he acted in and his appointment as State Councillor of the State Theatre of Prussia.[14]

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7 W Seifert, 'Postmortaler Schutz des Persoenlichkeitsrechts und Schadensersatz-Zugleich ein Streifzug durch die Geschichte des allgemeinen Persoenlichkeitsrechts' *NJW* (1999) 1889, 1891.

8 Palandt, *Buergerliches Gesetzbuch* (60th ed, 2000) before § 823 BGB [20, 27, 32, 37].

9 Seifert, above n 7, 1892.

10 BGH NJW 2000, 2195, 2197.

11 BGH NJW 2000, 2195, 2197.

12 BVerfGE 30, 173 <www.alpmann-schmidt.de>.

13 BVerfGE 30, 173 ibid.

14 BS Markesinis, *A Comparative Introduction to the German Law of Torts* (1994) 359.

Klaus Mann admitted that Gustav Gruendgens was one, amongst others, who served as a model for him.

When the novel was about to be published in Western Germany in 1963, the adoptive son and sole heir of Gruendgens, the latter having died a short time earlier, sued to prevent the reproduction, distribution and publication of the novel, because the novel would violate the honour, the reputation and the memory of Gruendgens.[15] Klaus Mann was already dead at this time. He had committed suicide in 1949. The publishing house tried to publish the book.

The first court rejected the claim, but the son of Gustav Gruendgens was successful the next time. The appeal by the publishing house to the German Federal Supreme Court was unsuccessful. After that, the publishing house petitioned the Constitutional Court on the ground of infringement of its Constitutional rights.

The Constitutional Court had to decide whether Klaus Mann's right of artificial freedom (Art 5 III GG) had been violated by the judgement of the German Federal Supreme Court. The Constitutional Court had to balance on the one hand the freedom of the art of Klaus Mann, and on the other hand the human dignity of the deceased Gustav Gruendgens. This procedure was necessary, because the freedom of art is only limited by the Constitution itself and so by the human dignity of Gruendgens.

The Constitutional Court held that it would be against the Constitutional mandate of the inviolability of human dignity, if anybody could make defamatory statements about a person after his or her death. An individual's death does not put an end to the obligation of a country to protect that individual against violation of his or her human dignity.[16]

In the Mephisto case, the Constitutional Court could not recognise that the earlier courts had violated the rights of Klaus Mann by granting the action.[17] The Constitutional Court is not allowed to make its own decision, but it has to determine whether the courts have violated the Constitutional rights of the plaintiffs.

The first question was who was allowed to sue, since the defamatory statements had been made about a deceased person. According to the German Federal Supreme Court, persons should be allowed to sue if they have been told to do so by the deceased person.[18] Normally these persons will be the close relatives, not necessarily his or her heirs.[19] But it could also be an organisation, which has the task of protecting the

15 Ibid 360.
16 BVerfGE 30, 173 above n 12.
17 BVerfGE 30, 173 above n 12.
18 Seifert, above n 7, 1894; BGHZ 107, 384 (389).
19 BGHZ 107, 384 (389).

heritage and the reputation of the deceased person.[20] Furthermore, it is necessary that this third person has an interest which merits protection.[21] There is no fixed order of the heirs who are allowed to sue; moreover, some of them can do so together.[22] Furthermore, it is also possible that all the heirs may select one person to represent them.[23]

The next question was what kind of action could the heirs institute based on the defamation of their deceased relative. It is quite clear that one can petition for a restraining order to prevent the publication of a defamatory statement.[24] As stated in the Mephisto Judgement, the country (in this case Germany) is obliged to protect a deceased person from violation of his or her dignity because of Art 1 of the Grundgesetz. The reputation and the picture of his or her life should be protected against serious distortions.[25] Such a petition for a restraining order is not only possible if someone tries to violate the reputation of a deceased person, but also if a statement is a distortion of the picture of his or her life alone;[26] for example, when a radical political party makes an election advertisement and states that a well-known deceased politician would have voted for this radical party (here: Konrad Adenauer[27]).[28]

More problematic is the question whether the relatives can also sue for compensation for damage caused by the defamatory statement. As mentioned above, the German Federal Supreme Court gives compensation for pain and suffering because of the violation of the right of personality through defamation.

In contrast to this, the German Federal Supreme Court denies such compensation for damage to deceased persons, because compensation for pain and suffering should be a satisfaction for the defamed person him/herself and the relatives are not allowed to demand such compensation.[29] Such compensation could not serve the purpose of compensation for suffered harm because the relatives have not suffered any harm.

The next question to be answered is how long this protection of the deceased person is to last. It is not possible to state the period of this protection exactly. It depends on the particular case. Therefore, the intensity of the defamation as well as the importance and the fame of the defamed person should be considered.[30] The need for

20 Seifert, above n 7, 1894; BGHZ 107, 384 (389).
21 BGHZ 107, 384 (389).
22 OLG Koeln NJW 1999, 1969 (1969).
23 OLG Koeln NJW 1999, 1969 (1969).
24 BVerfGE 30, 173 above n 12.
25 BGHZ 107, 384 (391).
26 OLG Koeln NJW 1999, 1969 (1970).
27 German politician (1867-1967), Bundeskanzler 1949-1963.
28 OLG Koeln NJW 1999, 1969(1970).
29 Seifert, above n 7, 1895.
30 BGHZ 107, 384 (392).

protection decreases according to the diminishing memory of this person and to the interest of not distorting the picture of his or her life.[31] However, the protection of a famous artist can last longer than thirty years, because of his or her fame.[32] For example, the artist Emil Nolde could still be defamed, even thirty years after his death.[33]

It is important to say that such a protection is not limited to famous and well-known persons, but every person the public is interested in is protected; for example, only because of just one incident.[34]

On the whole, German law guarantees quite far-reaching protection for deceased persons which is only limited by a time factor, but the right to sue can last for quite a long time.

Legal Situation in Australia

Common Law

To find out how Australian courts deal with the problem of defamation of the dead, this paper will firstly look at the common law situation. The common law is very strict. An action for defamation is not possible when a statement is made about deceased persons.[35] An action for defamation should protect the reputation of a living person only. There is a desire to protect individuals as a part of the society and to preserve their social role.[36] This desire ends with the death of the person.[37] So this personal cause of action should end with the death of the person,[38] 'actio personalis moritur cum persona'.[39]

The courts state that deceased persons have no rights and cannot be violated any longer.[40]

Besides the argument that personal reputation does not survive death, the courts rejected such causes of action, because the boundaries of such an action could not be

31 BGHZ 107, 384 (392); OLG Muenchen NJW RR 1994, 925 (925).
32 BGHZ 107, 384 (393).
33 BGHZ 107, 384 (393).
34 OLG Muenchen NJW RR 925 (925, 926).
35 D Butler and S Rodrick, *Australian Media Law* (1999) 42; S Walker, *Media Law - Commentary and Materials* (2000) 86.
36 L Brown, 'Dead but not forgotten: Proposals for Imposing Liability for Defamation of the Dead' (1989) 67 *TLR* 1525, 1531.
37 Ibid 1531.
38 Walker above n 35, 86; Butler and Rodrick above n 35, 42.
39 JG Fleming, *Law of Torts* (9th ed, 1998) 741.
40 *Queen v Ensor* (1887) 3 TLR 366, 367; Brown above n 36, 1530.

easily defined[41] and such actions could prevent historical research when the historians are threatened with actions for defamation.[42]

According to the common law, it is not possible to defame a deceased person at all. So neither an action for damages nor an action for restoration of the honour of the deceased person is available. Only a living person can bring an action for defamation. Hence, supposing that a living person was defamed and this person died, it is not possible for the relatives to sue.[43] If a living person is defamed and this person brings an action for defamation, this action will come to an end with the death of that person and cannot be carried on by the person's heirs.[44] The action will not survive for the benefit of the person's estate.[45] On the whole, it is not possible for relatives of the deceased person to sue in defamation on behalf of the deceased person.[46]

Because of the strictness of this rule, there have been attempts to circumvent it in the history of the common law.[47] The former English Prime Minister William Gladstone was involved in one case. Captain Wright defamed the deceased former English Prime Minister Gladstone. Because of the English law, the son of Mr Gladstone could not sue for the defamation of his late father. However, both the son of Mr Gladstone and Captain Wright were members of the Bath Club, and the son brought the defamatory statements to the attention of the Club. Captain Wright was expelled from the Club because of 'injurious conduct to the character and the interest of the club', as the son of Mr Gladstone was a club member and Captain Wright had written the defamatory statements on the Club notepaper.[48]

Captain Wright went to court and won because the Club committee did not hear his view of the incident and condemned him unheard. The committee had to give him a hearing, because it was in a quasi-judicial position.[49]'

There was a Scottish judgement in 1904, which was not as strict as the other ones.[50] The Lord Ordinary held that it was not possible for a relative to bring an action for damages because of a defamation of a deceased person. But he also held that 'it might be imagined that such [action for defamation of dead] an action might be sustained; for example, if it were necessary in order to prevent the propagation of a slander'.[51] Lord Young (Second Division) said: 'I am of opinion that the widow and the children

41 Brown above n 36, 1530.
42 *King v Topham* (1791) 100 Eng Rep 931, 933; Brown above n 36, 1530.
43 Butler and Rodrick above n 35, 42.
44 *Calwell v Australia Limited* (1976) 135 CLR 321, 335.
45 Butler and Rodrick above n 35, 42.
46 *Krahe v TCN Channel Nine* (1986) 4 NSWLR 536, 541.
47 RFV Heuston, *Salmond on the Law of Torts* (17th ed, 1977) 138.
48 Walton, 'Libel upon the Dead and the Bath Club Case' (1927) 9 *JCL* 1, 1.
49 Ibid.
50 *Broom v Ritchie* (1904) 6 F 942.
51 Ibid, 947.

of a dead man whose character has been defamed are not only interested to clear the character, but it is their duty to take such measures as are necessary to clear the character and to seek solatium for the injury done to their own feelings'.[52] But this judgement is an isolated case and cannot be taken as an example for the common law way of handling this problem.

In contrast to this, the members of a family may sue if the statement defaming the deceased person also indirectly defames the members of the family themselves.[53] It is obvious that a child or a wife can be attacked by a statement made against the deceased father or husband.[54] Characteristics can be mentioned about parents, which defame the children because they are associated with those characteristics.[55] But it is not sufficient that the plaintiff merely thinks the statement made against deceased relative violates his or her reputation.[56] Instead, it has to be shown that an ordinary and reasonable person reading the published statement would draw a conclusion against the child or wife, although only the deceased father or husband is mentioned.[57] This defamatory statement must be capable of being understood as reflecting upon a person not mentioned.[58]

For example, there is no difference between the statement that one is the son of a murderer and the statement that one's mother is a murderer.[59] In both cases, the statement defames the child.

Legislation in the Different States of Australia

After having recognised that there is no common law right in relatives of a deceased person to sue for the defamation of the deceased, it is time to examine the legislation in Australia. There is no unified defamation legislation in Australia, but every State and Territory has its own defamation legislation. Thus, one has to look at every State and Territory to verify whether the legislation persons differs from the common law rules.

The State in which most of the actions for defamation are brought is New South Wales. In the New South Wales Defamation Act there are some ambiguous phrases, which will be discussed. In section 7(3) it is stated 'Where any right or liability of any person in respect of defamation passes to the executor of his will or to the administrator of his estate or to any other person, a reference in this Act which

52 Ibid, 948.
53 *Krahe v TCN Channel Nine*, above n 46.
54 *Queen v Ensor*, above n 40.
55 Ibid.
56 *Driscoll v Australian Consolidated Press*, unreported, Supreme Court of New South Wales (BC8400254 of 26th September 1984).
57 *Livingstone-Thomas v Associated Newspaper Ltd* (1969) 90 WN(NSW) 223, 235.
58 Ibid.
59 *Queen v Ensor*, above n 40.

applies to the first mentioned person extends except in so far as the context or subject-matter otherwise indicates or requires, to that executor, administrator or other person'. And in section 46(1)(b) is stated 'In this part relevant harm means, in relation to damages for defamation: where the person defamed dies before damages are assessed, harm suffered by the person defamed by way of injury to property or financial loss'. According to the text of the New South Wales Defamation Act, it should be possible to bring actions for damages for defamation, even if the defamed person is already dead. But the Supreme Court of New South Wales held that sections 7(3) and 46(1)(b) are ineffective, because the necessary repeal of these sections in the Act of 1944 did not take place, although nobody knows why.[60] Therefore, the New South Wales Supreme Court applied the common law rules.

In the Queensland Defamation Act 1889 (section 4(1)) and also in the Tasmanian Defamation Act (section 5(1)) a 'defamatory matter' is defined as 'any imputation concerning any person, or any member of the persons family, whether living or dead, by which the reputation of this person is likely to be injured, or by which the person is likely to be injured in the person's profession or trade or by which other persons are likely to induced to shun or avoid or ridicule or despise the person, is called defamatory, and the matter of the defamation is called defamatory matter'. But, it has been held that there are no differences between this definition and the common law rules.[61] The court doubted that this section had such a far-reaching amendment in contrast to the common law concept.[62]

An exception is Tasmania. Tasmania has enacted a statute, which contradicts the rules of the common law. The Administration and Probate Act 1935 deals in section 27(1) and (3) with the question whether a cause of action survives for the benefit of the estate of a deceased. Section 27(1)(b), states that all causes of action shall survive for the benefit of a person's estate.

Therefore, in Tasmania the legal representatives of the deceased person can bring an action for damages because of defamation, even when the person defamed dies after being defamed.

This is an important divergence from the common law according to which, as seen above, such an action would come to end with the death of the defamed person.

On the whole, according to the question of whether a deceased person can be defamed, there is no difference between the common law and the legislation in the different States. The death of the defamed person either brings the action to an end or does not allow an action to be commenced thereafter. Tasmanian legislation provides the only exception to the rule that the death of the defamed person either brings the action to an end or prevent an action in defamation to be commenced

60 *Krahe v TCN Channel Nine* above n 46; Butler and Rodrick above n 35, 42.

61 *Livingstone-Thomas v Associated Newspaper Ltd*, above n 57.

62 *Livingstone-Thomas v Associated Newspaper Ltd*, above n 57.

thereafter; but the legislation in all the other States does not differ from the common law rules.

Proposals of the Law Reform Commissions with Respect to the Defamation of the Dead

There are some people who think that the protection of deceased people in Australia does not go far enough and they advocate the enactment of remedial legislation. The Australian Law Reform Commission (1979) made some proposals, as has more recently the Australian Capital Territory Law Reform Committee. It is worth having a look at these proposals.

The Australian Law Reform Commission proposed in 1979 a national Defamation Law for Australia,[63] as there are a lot of problems caused by the different defamation laws. A defamatory statement can violate one's reputation in more than one State; for example, a newspaper is sold in more than one State. Because of the different defences, a plaintiff in a defamation action can succeed in one State and lose in another one with respect to the same defamatory statement.[64] The likelihood of errors increases and it is also difficult for journalists who have to think of every different piece of defamation legislation of the States in which a published statement may appear.[65] The problem is that the Australian Constitution does not give power to the Commonwealth Parliament to enact a national Defamation Law and all States would have to refer the power to the Parliament of the Commonwealth.[66]

The Law Reform Commission also proposed a modification of the common law rules on the defamation of deceased persons. In respect of the matter of damages, the Commission denied the necessity for a change, because the damage should be a compensation for the loss of reputation and the injury of feelings.[67]

Nevertheless, to protect the reputation of deceased persons the Law Reform Commission wanted to give the relatives the right to obtain a correction order, declaration or injunction with respect to the defamatory statement.[68] They wanted to restrict these rights to a period of three years.[69]

The legal personal representative, a spouse, a parent, a child or a brother or a sister should be allowed to bring these actions.[70] Where a plaintiff in a defamation action

63 Australian Law Reform Commission Report No 11, *Unfair Publication:Defamation and Privacy* (1979) [42-47].
64 Australian Law Reform Commission ibid, [42].
65 Ibid [47].
66 Ibid.
67 Ibid [99].
68 Ibid [100].
69 Ibid [102].
70 Ibid [102].

died before the hearing of the case, the Commission suggested that the action for defamation should survive the death of the plaintiff. It should also be possible to adjust damages according to the circumstances of the particular case, but these damages should be much lower than those for a living person.[71]

More recently in 1995 the Community Law Reform Committee of the ACT suggested to the Attorney General a change in the common law rules regarding defamation of deceased persons.[72]

They suggested that the personal representative of the defamed dead person should have a cause of action on the behalf of the estate. This right should be restricted to defamatory statements made within 12 months after the death of the deceased.[73] Only the personal representative should be allowed to sue. General damages, ie damages for injury to reputation, feelings or health, should not be given.[74]

When a defamed person dies after being defamed and he or she had commenced an action for defamation, the Committee suggested that the right to sue should pass to the executer of the person's will or the administrator of the person's estate. Again, general damages should not be awarded, because the decision of the court alone would vindicate the reputation of the deceased person.[75]

The respective governments have not implemented these proposals to change the legislation up to now. The final part of the paper will examine the issue of whether a change in the legislation would be useful.

Commercial Appropriation of Deceased Persons

It is beyond question that the name, the voice or the image of a popular person has a commercial value and can be used for commercial purposes. Famous actors or sportspeople are able to improve a product's sale by providing their personal support for the advertisements of that product.

That is no problem, as long as the individuals have agreed to the use of their name and they are paid for it. The legal problems start when a company uses the name and the image, without the consent of the person, to market their product. The second part of the paper deals with this problem, especially with the use of the personality of deceased persons.

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71 Ibid [107].

72 ACT Community Law Reform Committee (1995), *Report No 10 Defamation* <http://www.dpa.act.gov.au./ag/Reports/ CLRC/r10/defind.htm>.

73 Ibid.

74 Ibid.

75 Ibid.

Legal Situation in Germany

In Germany, it is necessary to differentiate between actual damage and non-material damage. As mentioned above, it is much more difficult to get non-material damage in Germany according to the German civil code.

The commercial appropriation of a person causes an actual damage. The right to use a person's image or name for commercial purposes is an asset of that person. The person could have used this asset by him/herself if he or she had agreed to the use of the name or image. The money the person would have obtained for his or her consent is the measure of the actual damage when the name or image is used without such consent.[76]

The right of personality (Art 1 and 2 of the Grundgesetz) does not only protect non-material interests of an individual but also commercial interests.[77]

A well-known person can use his or her fame to do advertisements and get money for the consent. The use of the person's fame without his or her consent affects the commercial part of the right of personality.[78] The right of personality should protect the person's decision, whether and how he or she wants to use the name, voice and image for commercial purposes.[79] Therefore, the right of personality is an asset.[80]

In 2000, the German Federal Supreme Court had to decide a case which was brought by the only daughter and sole heir of the deceased German actor Marlene Dietrich. She sued for damages because of the appropriation of her mother's right of personality. Marlene Dietrich died in 1992. The defendant ran a musical about the life of Marlene Dietrich. In doing so he allowed an automobile concern to use the picture and the name of Marlene Dietrich to advertise a car. He also allowed a cosmetic company to advertise with her name and he himself produced merchandise for the musical using the picture and the name of Marlene Dietrich. He did all this without asking the daughter for her consent.[81] The Federal Supreme Court held that the commercial components of the right of personality had passed to the daughter of Marlene Dietrich with her death. In contrast to this, the non-materiel elements of the right of personality are not inheritable, because they are not reasonably connected with the individual.[82]

It was necessary to acknowledge the inheritability of the commercial component of the right of personality to protect the use of the individual according to his or her

76 Seifert above n 7, 1893.
77 BGH NJW 2000, 2195, 2197.
78 Ibid.
79 Ibid.
80 Ibid.
81 Ibid.
82 Ibid.

personality traits. An effective protection of the deceased person is only guaranteed if the heir is entitled to sue against the use of the personalty traits without consent.[83] It would be inequitable if everybody could use the accomplishment of a deceased person after his or her death. It is more appropriate if the heirs can use these advantages because they had a relationship with the deceased person.[84] Only the heirs have the possibility to sue because the estate of the deceased person passes to them alone. There is an important difference between the action for damages because of the appropriation of the personality and the right to petition for a restraining order because of the defamation of deceased persons. Relatives and also organisations which protect the reputation of the dead person, could sue because of defamation (see above) and they are not necessarily the heirs.[85]

The heirs are allowed to bring actions because of the use of the personality traits without consent, but that does not mean that they are allowed to use the image of the deceased person themselves. The heirs are only allowed to use the commercial value of the deceased person according to his or her wishes.[86]

It is not necessary for the claim that the violation of the right of personality is extremely strong. Any violation is sufficient to cause damage. In contrast to this, the plaintiff needs to prove a strong violation to bring an action for compensation for pain and suffering.[87]

The last question is how the court calculates the damage. There are several possibilities open to the court. One possibility is to get the damage the heir has suffered. Another possibility would be to demand the amount of money the heir would have got if he or she had agreed to the use of the personality of the deceased person. The damages would be like a licence fee. The last possibility would be to demand the profit the violator has gained because of the appropriation.[88]

Legal Situation in the Common Law and Australian Statutory Provisions

It is necessary to distinguish between different countries, because according to the question of whether there is a right of privacy or publicity, the common law rules differ from country to country.

It is useful to begin with the legal situation in the United States, because there the common law is much further developed than in Australia or England. American

83 BGH NJW 2000, 2195, 2198.
84 Ibid.
85 BGH NJW 2000, 2195, 2199; Seifert above n 7, 1894; BGHZ 107, 384(389).
86 BGH NJW 2000, 2195, 2199.
87 BGH NJW 2000, 2195, 2200.
88 BGH NJW 2000, 2195, 2201; Seifert above n 7, 1891.

courts recognised a right of privacy quite early.[89] At first, it was defined as a right to be let alone, but Dean Prosser divided the right of privacy into four different types: (1) intrusion upon one's seclusion or solitude, (2) public disclosure of embarrassing private facts, (3) publicity, which places one in a false light, and (4) appropriation of one's name and likeness for the defendant's advantage.[90]

The last aspect deals with the commercial use of one's name, image or voice without the consent of the person. The American courts and literature now distinguish between the appropriation of a private person's personality and that of a famous person for commercial purposes. This last aspect is now acknowledged as the right of publicity.[91]

The right of publicity has been recognised in twenty-five States by statute or the common law.[92]

The right of publicity is a property right. There is the idea that the personality has a value, which can be used for the promotion of products, and the person has an interest to protect this property against commercial appropriation.[93] On the whole, the right of publicity can be defined as the right to control the commercial use of one's identity.[94]

The action will be successful if two requirements are fulfilled. Firstly there has to be an appropriation, ie a use without the consent of the owner. This can happen through photographs, drawings or the name of the person. Secondly a use of personality is necessary. The person's name, likeliness, image or voice must have been used.[95]

In contrast to the Australian law, it is not necessary to prove that misrepresentation (tort of passing off) or deception or misleading conduct (section 52 of the Trade Practices Act) has occurred.[96]

Therefore, Bette Midler sued Ford successfully, because Ford chose a singer for their advertisement who sounded like Bette Midler and who sang a hit of Bette Midler sounding like her.[97]

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89 T Frazer, 'Appropriation of personality - A new tort?' (1983) 99 *The Law Quarterly Review* 281, 308.

90 Ibid, 295; J McMullan, 'Personality Rights in Australia' (1997) 8 *AIPJ* 86, 94.

91 Frazer above n 89, 308.

92 JT McCarthy, 'The Human Persona as Commercial Property: The Right of Publicity' (1996) 7 *AIPJ* 20, 21.

93 McMullan, above n 90, 94.

94 McCarthy, above n 92, 23.

95 M Hylton and P Gildson, 'The new tort of appropriation of personality: Protecting Bob Marley's face' (1996) 55 *CLJ* 56, 57, 61.

96 Ibid 61.

97 McCarthy, above n 92, 20.

Vanna White sued Samsung successfully, because they used a look-alike robot participating in one of their advertisements.[98]

The next important question is whether the right of publicity is transmissible upon the death of the person. The position is not the same in all American States. Eleven States recognise the post mortem right of publicity.[99] There are some States like New York, which do not recognise a post mortem right of publicity.[100] But for instance the Court of Appeal of Tennessee decided in favour of a post mortem right of publicity according to the right of Elvis Presley.[101] The Court held that the right of publicity is transmissible and that the right of publicity survived his death and was enforceable by his estate.[102] If the right of publicity is treated as an intangible property right while the person was alive, it cannot be less a property right after his death. The celebrity would expect that the right of publicity is transmissible and that his or her heirs would benefit from the value of this right, which he or she had created during his or her lifetime. It would be unfair if other persons who have had nothing to do with the success of the career could also benefit. The effort and the financial commitment the celebrities make in their career deserve as much protection as their materiel assets.[103]

By recognising the post mortem right of publicity, the persons who have acquired the right to use the name and the likeness of the celebrity are protected, because otherwise the value of such a contract would be small.

Finally, the recognition that the right of publicity is transmissible would discourage people from using similar corporate names and therefore it would militate against unfair competition.[104]

Also, the American Court of Appeal acknowledges that under Georgian law the right of publicity survives the death and that it is inheritable and devisable.[105] The Court held that the trend has been to recognise survivability since the early common law.[106] They also held that the person did not necessarily have to exploit his or her personality during his or her lifetime to make the right of publicity inheritable. There is no reason why such a protection should be limited to those who have already

98 Ibid 21, 24, 25.

99 Ibid 21.

100 Ibid 22.

101 *The State of Tennessee, Ex Red. The Elvis Presley International Memorial Foundation v Gentry Growell* (1987) 733 SW (2d) 89.

102 Ibid 90.

103 Ibid 98.

104 Ibid 97-99.

105 *The Martin Luther King, Jr, Center for social change v American Heritage Products* (1983) 694 F (2d) 674, 694.

106 Ibid 105, 682.

exploited their fame.[107] In this particular case, Martin Luther King did not exploit his name and likeness during his lifetime.

On the whole, in a lot of American States it is possible for the heirs or an organisation which has the task of protecting the deceased celebrity, to sue. They can bring a prohibitory action to restrain the appropriation of the personality of the deceased person or they could bring an action for damages. The damages can be the fair market value of the person's identity, unjust enrichment, the profit of the infringer or the damage to the business of licensing the identity.[108]

Also in Canada and in Jamaica, the tort of appropriation of personality is acknowledged. In the case of Bob Marley, the Jamaican Supreme Court acknowledged a property right of personality, which has survived his death.[109]

After having looked at the well-developed legal situations in America, Canada and Jamaica, the next step will be to look at the legal situation in Australia. In Australia, there is no general right of privacy recognised by common law.[110] Therefore, there is no tort of privacy and no special right of action for appropriation of a person's name, image or voice in Australia.[111] Several proposals have not been enacted and the result of the legislative inaction is the lack of a right like this.[112]

Nevertheless, some tortious (defamation or passing off) or statuary (section 52 of the Trade Practices Act) actions may provide some protection against appropriation of personality.

First, an action for defamation is acknowledged as a measure of protection. A manufacturer of chocolate used a photograph of an amateur golfer for an advertisement without his consent.[113] The court held that the use of the photograph was defamatory, because publication endangered his status as an amateur because he appeared to be prostituting this status for commercial gain.[114]

In another case, a photograph of a professional footballer appeared in a magazine. The picture showed him showering and his genitals could be seen. His action for

107 Ibid 105, 683.
108 McCarthy at above n 92, 23.
109 Hylton and Gildson above n 95, 63.
110 McLachlan and Mallam above n 1, [12.50]; *Ettinghausen v Australian Consolidated Press* (unreported NSW CA, Gleeson CJ, Kirby P, Clarke JA, 13 October 1993); *Cruise and Kidman v Southdown Press Pty Ltd* (1993) 26 IPR 125, 125.
111 *Ettinghausen v Australian Consolidated Press* ibid; McLachlan and Mallam above n 1, [12.1560].
112 *Ettinghausen v Australian Consolidated Press,* above n 110.
113 *Tolley v J S Frey and Sons Ltd* (1931) Ac 333.
114 Ibid 347.

defamation was successful because of the imputation that he would be a person whose genitals have been shown to the multitude of readers of that magazine.[115]

Defamation only fits for very few cases of appropriation. *Tolley v Fry and Sons Ltd* was a special case, and today amateur sportsmen do a lot of advertisements and it would probably not be defamatory any more for an amateur to be used for an advertisement.

It is beyond question that an appropriation can occur without it being a defamation at the same time.[116] The commercial use of a public figure will not normally be defamatory, but will be defamatory only if the person is used together with an illegal or immoral product.[117]

Another possibility to handle appropriation cases in Australia is the tort of passing off. The elements for passing off are that the plaintiff's goods or business have some goodwill and reputation, the defendant's action must cause customers to believe that his goods are that of the plaintiff and the plaintiff must suffer injury in his or her trade or business.[118] A person may bring an action for passing off, because the defendant uses his or her name in connection with its products. This action for damage is successful if a manufacturer or seller uses the name or the reputation of a famous person and so the suggestion arises that the famous person recommends or approves the defendant's goods or is in another way connected with these goods.[119] The plaintiff must prove a misrepresentation by the unauthorised user.[120] Earlier, the courts demanded a common field of activity between the plaintiff and the defendant. According to these judgements, the passing off action would only be successful when the plaintiff and the defendant carry on the same sort of business.[121]

In 1969 the High Court of New South Wales delivered a very important judgement. The Court no longer required that the plaintiff and the defendant work in a common field of activity.[122] The plaintiffs were a couple of well-known ballroom dancers and the defendant used a picture of the plaintiffs on a cover of a dance music record without their consent. The Court held that the existence of a common field of activity is an important factor to consider the misrepresentation and the damage, but the absence of the common field of activity would not necessarily make the action unsuccessful.[123] The false representation that the plaintiffs are able to complain about

115 *Ettinghausen v Australian Consolidated Press*, above n 110.
116 Frazer, above n 89, 290.
117 Ibid.
118 Walker, above n 38, [18.14.1].
119 Hylton and Gildson, above n 95, 57-58.
120 McMullan, above n 90, 87.
121 Frazer, above n 89, 288-289.
122 *Henderson v Radio Corporation* (1969) RPC 218.
123 Ibid 242.

can be made either in relation to the plaintiffs' goods, their services, their business, their goodwill or their reputation.[124]

In the case *Hogan v Pacific Dunlop*,[125] a company used a caricature of the main character in the film 'Crocodile Dundee' without the consent of the actor Paul Hogan for an advertisement. The court held that a common field of activity was not necessary, because a famous person would be connected with the goods and the services of the company, even if the person did not offer similar goods and services.[126] The court admitted that there is an interest of the plaintiff to protect his skills, efforts and investment and the action dealt with misrepresentation of the plaintiff's reputation, because the company conveyed a non-existing connection between it and the plaintiff.[127]

Another measure of protection in Australia is section 52 of the Trade Practices Act 1974 (Cth) or equivalent sections in State and Territory.[128] In section 52(1) Trade Practices Act is stated: 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.

The plaintiff must prove deception by the unauthorised user.[129] Misleading is defined as 'to lead astray in action or to lead into error'.[130] Deceiving is defined as 'to cause to believe what is false'.[131] This misleading and deceptive conduct consists of representations, which can be either expressed explicitly or impliedly.[132] It was held that a misleading and deceptive conduct is to influence a customer in favour of a trader's product by using some false assumptions.[133]

There is some overlap between the action based on passing off and the action based on the Trade Practices Act.[134]

In one case, Telstra had used the picture of the Australian swim star Kieren Perkins for an advertisement without his consent. The Supreme Court of Queensland awarded as damage $15,000, based upon the premise that the publication had

124 Ibid 239.
125 *Hogan v Pacific Dunlop Ltd* (1988) 83 ALR 403.
126 Ibid 428.
127 Ibid 426.
128 Ibid; *Hutchence v South Sea Bubble Co Pty* (1986) 8 ATPR 40-667 .
129 McMullan, above n 90, 87.
130 Walker, above n 38, [7.3.1].
131 Walker, above n 38, [7.3.1].
132 *Pacific Dunlop Ltd. v Paul Hogan & Ors* (1989) 11 ATPR 40-948, 50,348.
133 Ibid 50,349; RV Miller, *Miller's Annotated Trade Practices Act 2000/21st Edition* (2000) [1.52.285].
134 Walker, above n 38, [18.14.4].

diminished the opportunity of Perkins to use the name or the picture commercially.[135]

But the actions based on passing off and the actions based on section 52 of the Trade Practices Act will fail if an advertisement uses the image of a famous person, but it is obvious that the actor is only a look-alike[136] or if an individual is used but there is no misrepresentation. Australian Airlines used a famous sportsman on the cover of a poster. The court held that the poster did not convey a connection between the airline and the sportsman, but that the poster had only been a piece of work to support sports.[137]

Another possibility to protect one's image, name or voice from commercial use without consent could be by trade marking a celebrity's image.[138]

But the problem is that protection can only be guaranteed when a trademark is registered. The celebrity who did not register his or her image as a trademark will never be protected from appropriation.

Another problem of this protection is that it is not clear if a celebrity's image can be registered as a trademark anyway. In section 41(2) of the Trade Marks Act is stated that an 'application for the registration of a trade mark must be rejected if the trade mark is not capable of distinguishing the applicant's goods or services in respect of which the trade mark is sought to be registered...from the goods and services of other persons'.

Therefore, the celebrity's image must be distinctive from other products. The English Court of Appeal decided that the names 'Elvis' and 'Elvis Presley' could not be registered, because they did not distinguish the goods of one trader from another.[139] Elvis products 'are not associated with any particular manufacturer and did not serve to designate the origin of the goods'.[140]

The UK Trade Mark Office refused to register the trademark of Lady Diana's image after her death[141] because Lady Diana's name or image could not be used to distinguish goods or services of one trader from those of another one.[142]

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135 *Talmax Pty Ltd v Telstra Corp Ltd*, unreported Supreme Court of Queensland-Court of Appeal (QCA of 25 October 1996) per Fitzgerald, Davies and Moynihan.

136 *Newton-John v Scholl-Plough (Australia)* Ltd (1986) 8 ATPR 40-697.

137 *Honey v Australian Airlines Ltd* (1989) 18 IPR 185, 190.

138 L Weathered, 'Trade Marking Celebrity Image: The Impact of Distinctiveness and Use as aTrademark Requirements' (2000) 12 *Bond Law Review* 162, 162.

139 Ibid 169; *Elvis Presley Enterprises INC v SID Shaw Elvisly Yours* (unreported 12th March 1999, Courts of Appeal of England and Wales) (Webdocument) Availability:www.bailii.org.

140 Ibid.

141 B Lyons, 'Diana, Princess of Wales- an IP retrospective' (1998) 11 *IPLB* 31, 33.

This question has still to be discussed and developed and therefore a trademark does not provide a sufficient protection against appropriation today.

The English common law did not acknowledge a right of privacy or a right of publicity until recently. The English common law also extended the tort of passing off. In *Mirage Studios v Counter Feat Clothing Co Ltd*, the court held that the tort of passing off should not be limited to those who market or sell the goods themselves.[143]

In 1999 the Diana, Princess of Wales Memorial Fund sued against the Franklin Mint Company in California.[144] This Fund was set up after the death of Princess Diana to commemorate her and to carry out activities in the United Kingdom and abroad.[145] The Fund sued because the defendant had filed for trademark applications for products relating to Diana. The Fund argued that the defendant would infringe their right of publicity of Princess Diana. The court held that under Californian choice of law rules English rules as the law of the descendant's domicile govern. The court held that no right of publicity exists under English law and so the action was unsuccessful.[146]

This position could have been changed through the European Human Rights Act 1998. Great Britain enacted the Human Rights Act in 2000. According to Art. 8 of the Act 'everyone has the right to respect his private and family life, his home and his correspondence'.

In December 2000 the Court of Appeal (Civil Division) had to decide the case of *Michael Douglas, Catherine Zeta-Jones v Hello! Ltd*.[147] The Hello! magazine took unauthorised pictures of the wedding of Douglas and Zeta-Jones, who had given this right exclusively to another magazine. The court of first instance granted an injunction, according to which Hello! was not allowed to publish the pictures. The Court of Appeal discharged the injunction because of the selling of the pictures to another magazine. The privacy rights had already been object of commercial transactions. So the claimants could be left to their remedy in damages.[148]

Nevertheless the judges had to answer the question if a right of privacy can still be refused, after having considered Art 8 of the Human Rights Act.

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142 Weathered, above n 139, 167-168.

143 (1991) FSR 145; Hylton and Goldson above n 92, 59.

144 Unreported United States District Court, Central District of California (16 October 1999).

145 H Stallard and J Dennis 'Personality Rights - the Contrasting Approaches of the US and the UK'(1999) *Intellectuell Property Forum* issue 37 (1999) 16, 16.

146 Ibid 16-17.

147 21.12.2000 Availability <http.//wood.ccta.gov.uk/courtser/judgeem>.

148 *Douglas, Zeta-Jones v Hello! Ltd* (21 December 2000) .

The Court held that the common law grows and develops reactively in response to events and long-term sense. The common law has now reached a point at which it will recognise and protect the right of personal privacy. On the one hand, the Human Rights Act 1998 requires that the courts of Great Britain respect the private and family life according to Art. 8. On the other hand, the court held that a right of privacy is necessary to respond to an 'increasingly invasive social environment'. Therefore, it is no longer necessary to construct an arterial relationship between intruder and victim, but the right of privacy can be recognised as a legal principle itself.[149]

This is a very important new development. That does not mean that the English law also now accepts the right of publicity and the tort of appropriation. But the acknowledgment of a right of privacy could be the beginning of a development, which could end in the acknowledgment of the right of publicity. Also in the United States, the right of privacy was acknowledged first.

The next question would be how the Australian common law deals with the cases of appropriation of the personality of deceased persons today.

As stated above, the tort of appropriation of the personality is not yet acknowledged in Australia and so there cannot be a post mortem protection of the personality either.

The tort of defamation does not provide protection by defamatory statements against deceased persons, as stated above in the first part of the paper.

Also according to the common law an action for damage because of passing off will not be successful because the common law does not acknowledge a tort against a deceased person. Personal representatives are not allowed to sue for any tort committed against a deceased person.[150]

The last possibility would be to bring an action for damage based on section 52 of the Trade Practices Act. But section 52 of the Trade Practices Act is a kind of statutory tort and therefore an action because of character merchandising of deceased persons is not possible.

The Australian Legislation does not deal with this question.

There are a lot of Commonwealth and State Acts, which deal with special aspects of privacy; for example with credit reporting or listening devices,[151] but there is no special protection for the commercial use of one's personality.

149 Ibid.

150 Fleming, above n 39, 741.

151 McLachlan and Mallam, above n 1, [12.50].

The new Private Amendment Act 2000 deals with private sector organisations and how they appropriately collect, hold, use, correct, disclose and transfer personal information and not with the questions discussed above.

The Australian Law Reform Commission suggested in 1979 to enact legislation against appropriation of personality. An action should be brought by any person, ie. individual persons and corporations. The plaintiff should prove that there was a design to exploit his or her name. The exploitation should have been either for commercial purposes or candidature for office and the defences according to publication of private facts should not apply to these cases.[152]

Analysis and Suggestions

In the last part of the paper, the advantages and disadvantages of the different legal situations are discussed and analysed.

According to the Question of Defamation of the Dead

As depicted above, the relatives of a deceased person are allowed to sue in Germany because of the defamation of a deceased relative. That is possible, because according to the German Constitutional Court, the human dignity of a human being does not end with his or her death. It is the duty of the country to protect the deceased person from defamation. This protection will last as long as the person is still in the minds of the population and the memory of this person has not yet diminished. The relatives are only allowed to bring a prohibitory action and not an action for damages, because a compensation for pain and suffering can only be received by the defamed person him/ herself.

In contrast to this, the common law does not recognise a cause of action based on the defamation of a deceased person. The reputation of this person cannot be violated after his death. A deceased person has no rights and cannot be violated.

Because of this very strict position of the common law, only an amending statute could create a cause of action for the defamation of a deceased person.

The German position could be criticised, because the boundaries of such an action are difficult to ascertain. The court has to consider if the deceased person is still so important and famous as to be the target of defamation.

But a court often has to resolve these types of legal questions. In a lot of cases, it is the task of a court to find out what the public morals are and how the population thinks about different topics. Therefore, the courts have to recognise a change in the attitudes of the population and they always have to be up to date.

152 Australian Law Reform Commission above n 63, [250].

According to this, it is a similar question whether the population still commemorates the deceased person and how important he or she still is in the minds of the population. This question is neither easier nor more difficult than other legal questions.

Others could criticise the fact that the possibility of defaming deceased persons could reduce the value of historical research. As in the philosophical introduction depicted, historians have a huge responsibility when they write about historical events and persons. For historians who work carefully and prove their authorities before they state an opinion, the work will not be more difficult because they do not act carelessly and therefore they are not liable for what they state.

The question of history is to be mentioned in another context. The importance of Art. 1 of the German Constitution (Grundgesetz) has a historical background. In the Nazi era, the people in power did not respect the human dignity of the population at all. After the Nazi dictatorship it became very important in Germany to respect the dignity of human beings and that is why this human dignity is recognised, even when the person is deceased.

There are some arguments, which can be raised against the common law position.

On the one hand, there is the desire of the relatives to set the record straight.[153] They want to communicate the truth to the public. The public interest is best served by honest information. One can argue that dishonest information should not be placed in the public, only because the person who is involved in the statement is dead.[154] One could ask why defamation should be possible, just only because the addressee cannot defend him or herself any more.[155]

According to these arguments, it has to be discussed, if it is desirable to enact defamation legislation in Australia, which would also protect deceased persons.

The Australian Law Reform Commission and the ACT Community Law Reform Committee have suggested to enact legislation, which protects deceased persons. They have suggested to give this protection for a defined period of time after the death.

One cannot take the German position as a model for Australian legislation because of the different histories of these two countries. Australia does not need to compensate for historical guilt to Germany's extent. Nevertheless, in the opinion of the writer, it is necessary to protect the reputation and dignity of persons, even when they are dead.

153 Brown, above n 36, 1556.

154 ACT Community Law Reform Committee, above n 72.

155 Ibid.

The public is interested in getting honest information about the past. For that, it is necessary that nobody can make dishonest statements about deceased persons without the possibility for the relatives to sue. To form one's opinion, it is necessary according to political and historical facts that someone can contradict dishonest statements.

One has to agree with the opinion that the relatives have a legitimate interest in the correction of dishonest information. The population remembers a person even after his or her death. As long as the population holds a person in their memory, it is appropriate to protect this person from defamation.

According to the proposals of the Law Reform Commissions, there should be a possibility to get an injunction against a defamatory statement or to sue for correction. Actions for damage are not appropriate, because the person defamed cannot get the compensation any more.

The Australian Law Reform Commission suggested a period of three years after the person's death to bring an action. This period might be a little bit short, because the importance of a deceased person can also be maintained after this period. It would be better to have a more flexible solution like in the German law.

On the whole in the opinion of the writer the different States of Australia should think about enacting new defamation legislation based on the proposals of the Law Reform Commission in 1979.

According to the Question of Commercial Appropriation

As depicted above, the German Federal Supreme Court has recently recognised a post mortem right of the commercial part of the personality. This right guarantees protection against commercial appropriation after death. This commercial component of the right of personality is inheritable and survives for the benefit of the heirs. The heirs are entitled to bring an action for damages because of the commercial use without consent.

Such a post mortem right of publicity has been acknowledged in several States of the United States and in Canada for years. Heirs or some organisations which protect the heir of the deceased person, are entitled to sue because of the commercial appropriation of the deceased. Recently, Jamaica also has recognised such a right.

Australia does not recognise either a right of privacy or a right of publicity. The Court of Appeal in England recently showed a tendency to recognise a right of privacy in England because of the European Human Rights Act 1998. That might be the beginning of a development to acknowledge a right of publicity too.

Maybe such an English development could serve as a model for Australia. But Australia still deals with the cases of appropriation of the personality in another way; defamation, the tort of passing off and section 52 of the Trade Practices Act are the solutions for the Australian courts. One could criticise this Australian position, because these ways of resolving the problem of appropriation do not cover all possible cases of appropriation.

As seen above, there are instances of commercial use of personality without consent, which are not defamation and which are neither misinterpretation nor misleading and deceptive conduct.

The world is getting more and more global and new media like the Internet is becoming increasingly important. The personality of individuals can be used much easier than some years ago and advertisements can be placed all around the world. Therefore it is necessary to protect the commercial component of one's personality as well as possible. The common law has to take the changing commercial development into account to resolve the problems of the present time.[156]

The Australian Law Reform Commission suggested enacting a statutory provision that would deal with the appropriation of the name, identity, image or likeness of a person. It would be the easiest way to enact changes in this area of law. The right of privacy and publicity could also emerge with the development of the common law. But this can take a long time, although the English development might accelerate the Australian one.

In the opinion of the author, it is also necessary to protect these commercial components of one's personality after the death of the person. A person can use his or her personality for commercial purposes as long as he or she is alive. It is incomprehensible why after the death of the person everybody should be capable of using the image, name, likeliness or reputation of this person. If one recognises the right of publicity as a property right in life there is no reason to deny such a right after the death.[157]

It is appropriate to transmit this right to the heirs. Also, the person would expect that the valuable asset of his or her life's accomplishment would benefit the heirs.[158] It will respect the individual's accomplishment, if persons benefit from the valued asset as the deceased person would have wished.

The only way to protect this post mortem right of publicity is to give the heirs a way to sue against appropriation.

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156 Hylton and Gildson, above n 92, 64.

157 *The State of Tennessee, Ex Red. The Elvis Presley International Memorial Foundation v Gentry Growell*, above n 101, 98.

158 Ibid.

An unrestricted commercial use of the personality of a deceased could violate the picture of this person in the public arena, because the unrestricted use could make the population forget what important things this person really did in his or her life. Therefore, it is appropriate that the heirs are entitled to restrain such an unrestricted use.

On the whole, there is a necessity to improve the protection given to a deceased person with respect to the commercial part of his or her right of personality.

Finally one can state that the protection of deceased persons is further developed in Germany and therefore one can argue that it might be desirable to improve that protection in Australia, too.