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# MEANINGFUL JOURNALISM OR “INFOTAINMENT”? THE FAILURE TO DEFINE THE PUBLIC INTEREST IN *AXEL SPRINGER AG v. GERMANY*

KATHRYN MANZA\*

**Abstract:** Although American courts provide wide discretion for freedom of the press, the Convention for the Protection of Human Rights and Fundamental Freedoms ensures that the right to privacy enjoys equal footing with freedom of expression in Europe. When navigating the grey areas between these two frequently opposing rights, the European Court of Human Rights allows private information about a public figure to be published only to the extent the information contributes to the public interest. In *Axel Springer AG v. Germany*, the court missed a valuable opportunity to provide a clear standard for what the public interest encompasses. Although the court seems content with deciding this issue on a case-by-case basis, the resulting ambiguity can be detrimental for both the press and the individuals on whom the press often reports.

## INTRODUCTION

On February 7, 2012, the Grand Chamber of the European Court of Human Rights (ECtHR) issued a judgment in the case of *Axel Springer AG v. Germany*.<sup>1</sup> This judgment could have drastically changed the way Axel Springer AG, a multimedia company with more than 12,885 employees and annual revenue of over 3.1 billion euros, did business.<sup>2</sup> Nevertheless, Axel Springer AG and its flagship German tabloid, *Bild*, the largest newspaper in Europe, prevailed.<sup>3</sup>

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<sup>1</sup> See *Axel Springer AG v. Ger.*, App. No. 39954/08, 55 Eur. H.R. Rep. 183 (2012).

<sup>2</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 109; AXEL SPRINGER AG, 2011 ANNUAL REPORT 1, 29, 42 (2011), available at [http://www.axelspringer.de/dl/516392/Annual-Report-2011\\_Axel-Springer-AG.pdf](http://www.axelspringer.de/dl/516392/Annual-Report-2011_Axel-Springer-AG.pdf) (last visited Apr. 10, 2013, 6:26 PM).

<sup>3</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 110; see also Associated Press, *2 Rulings Uphold Media Rights in Europe*, N.Y. TIMES (Feb. 7, 2012), <http://www.nytimes.com/2012/02/08/technology/08iht-privacy08.html>; Kate Connolly, *Axel Springer's Grandson Claims He Was Cheated Out of His Inheritance*, THE GUARDIAN (Apr. 29, 2012, 3:38 PM), <http://www.guardian.co.uk/media/2012/apr/29/axel-springer-grandson>; Michael Steininger, *German*

The ECtHR held that the German national courts' injunction against the exposure of a celebrity scandal in *Bild* violated the company's freedom of expression, as set forth in Article 10<sup>4</sup> of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>5</sup> The decision sharply contradicted the previous ruling issued by the Hamburg Court of Appeal<sup>6</sup> on March 21, 2006, which affirmed the Hamburg Regional Court's holding that the actor's right to protect his privacy prevailed over the public's interest in his minor offense.<sup>7</sup>

The ECtHR's decision further developed the court's method for resolving the complicated intersections between Article 10 and Article 8,<sup>8</sup> the right to privacy.<sup>9</sup> The court reiterated that the decisive factor in

*Tabloid Bild Takes Down Politicians with Its Unmatched Megaphone*, CHRISTIAN SCIENCE MONITOR (Jan. 18, 2012), <http://www.csmonitor.com/World/Europe/2012/0118/German-tabloid-Bild-takes-down-politicians-with-its-unmatched-megaphone>.

<sup>4</sup> *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 53. Article 10 of the ECHR states: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers." *Id.*

<sup>5</sup> *Axel Springer AG*, 55 Eur. H.R. Rep. ¶¶ 1, 9–10, 17, 38, 110–11 (2012). The Convention for the Protection of Human Rights and Fundamental Freedoms is also known as the European Convention on Human Rights, or ECHR. *See Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 51.

<sup>6</sup> *See The German Court System*, UNIDROIT, <http://www.unidroit.info/mm/TheGermanJudicialSystem.pdf> [hereinafter UNIDROIT]. Articles 92–96 of the German Constitution set up the country's court structure. *Id.* The actor's claims against Axel Springer AG went through the Courts of Ordinary Jurisdiction (*Ordentliche Gerichte*), the Regional Courts (*Landgerichte*), the Higher Regional Courts (*Oberlandesgerichte*) or the appellate court, and the Federal Court of Justice (*Bundesgerichtshof*), the final court of appeals for cases originating in the regional courts. *See Axel Springer AG*, 55 Eur. H.R. Rep. ¶¶ 39–40, 44; *see also* UNIDROIT, *supra* note 6. Axel Springer AG also attempted to appeal the case to the Federal Constitutional Court (*Bundesverfassungsgericht*), the highest court in Germany that exclusively decides issues relating to the Federal Constitution and the protection of individual citizens' fundamental rights. *See Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 45; *see also* UNIDROIT, *supra* note 6.

<sup>7</sup> *See id.* ¶¶ 19, 31, 32, 40.

<sup>8</sup> Article 8 of the ECHR states,

1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

*Von Hannover v. Ger.* (No. 1), App. No. 59320/00, 40 Eur. Ct. H.R. ¶ 43 (2004).

<sup>9</sup> *See Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 90; *Von Hannover v. Ger.* (No. 2), App. Nos. 40660/08 and 60641/08, 228 Eur. Ct. H.R. ¶ 109 (2012); *Von Hannover (No. 1)*, 40 Eur. Ct. H.R. ¶¶ 42, 76; 2 *Rulings Uphold Media Rights*, *supra* note 3.

balancing freedom of the press and the right to privacy<sup>10</sup> lies in the value of the information provided by “the press to a debate of general interest . . . .”<sup>11</sup> Despite the weight the ECtHR places on the public interest, the court has so far failed to provide a clear definition for what the public interest does and does not entail.<sup>12</sup>

This Comment proceeds in three parts. Part I provides a background on the events that led to *Axel Springer AG* and the case’s procedural history through the German court system. Part II explores the ECtHR’s role in developing privacy law for public figures and resolving the tension between Article 8 and Article 10 of the ECHR. Part III argues that the ECtHR missed an important opportunity to clarify the standard for “public interest”—thus creating more uncertainty and risk for both publishers and public figures.

## I. BACKGROUND

On September 24, 2004, the front page of Europe’s best-selling newspaper, Axel Springer AG’s *Bild*, published this headline in large

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<sup>10</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶¶ 51, 83. The ECtHR interprets “the respect for private life” in Article 8 broadly, covering both the right to privacy and the right to protect one’s reputation. See *id.* In *Axel Springer AG*, the court wrote,

The right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life. The concept of ‘private life’ is a broad term not susceptible to exhaustive definition, which covers the physical and psychological integrity of a person . . . [i]t covers personal information which individuals can legitimately expect should not be published without their consent . . . .

*Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 83 (citations omitted). This Comment refers to the protections in Article 8 as “privacy,” but this includes everything that the ECHR protects under this Article. See *id.*

<sup>11</sup> *Axel Springer AG*, 55 Eur. H.R. Rep. ¶¶ 60, 90 (“An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest . . . .”); *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. ¶ 109 (“An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest . . . .”); *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. ¶ 76 (“As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest.”); Barbara McDonald, *Privacy, Princesses, and Paparazzi*, 50 N.Y.L. SCH. L. REV. 205, 222 (2005); Nicolas Nohlen, *Von Hannover v. Germany*, 100 AM. J. INT’L L. 196, 198–99 (2006). Although the ECtHR has routinely used the term “general interest,” scholarship in this area often refers to the “public interest” to indicate the same legal concept. See, e.g., Scott J. Shackelford, *Fragile Merchandise: A Comparative Analysis of the Privacy Rights for Public Figures*, 49 AM. BUS. L.J. 125, 195–96 (2012), see also McDonald, *supra* note 11, at 221.

<sup>12</sup> See Shackelford, *supra* note 11, at 196.

type: “Cocaine! Superintendent Y<sup>13</sup> caught at the Munich beer festival.”<sup>14</sup> A popular television actor—voted second most popular star just two years before—participated in the revelry at Oktoberfest’s celebrity tent.<sup>15</sup> Unlike the police superintendent he played on a popular German detective show, the actor found himself on the wrong side of the law.<sup>16</sup> After he suspiciously tapped his nose while leaving the restroom, plain-clothes police officers searched the man and found 0.23 grams of cocaine in his possession.<sup>17</sup> The actor was then arrested.<sup>18</sup>

Almost a year after the initial story broke, *Bild* reported on the celebrity’s drug possession again on July 7, 2005.<sup>19</sup> The article read, “On TV he plays a superintendent who puts criminals behind bars. Yesterday, it was the turn of the actor . . . to be hauled up in front of the court and confess!”<sup>20</sup> The article reported that the celebrity admitted he took drugs and received an 18,000-euro fine from the Munich District Court.<sup>21</sup> When *Bild* published the story, other press agencies, newspapers, and magazines began to report on his arrest as well, using the article published in *Bild* as a reference.<sup>22</sup> The public prosecutor also confirmed *Bild*’s story to both written media and television channels.<sup>23</sup>

Immediately after the story hit the press, the actor instigated proceedings against *Bild*’s parent company, Axel Springer AG, in the Hamburg Regional Court.<sup>24</sup> The court held that the actor’s interest in protecting his privacy prevailed over the public’s interest in being informed of his arrest for a minor offense at Oktoberfest.<sup>25</sup> The court

<sup>13</sup> See *Axel Springer AG v. Ger.*, App. No. 39954/08, 55 Eur. H.R. Rep. 183 ¶¶ 9, 98 (2012). “Superintendent Y” was the main character and hero of a popular German detective television series in the early twenty-first century. See *id.* The actual name of the character and applicant’s name are both protected in the case. See *id.* ¶ 9.

<sup>14</sup> *Id.* ¶ 13.

<sup>15</sup> *Id.* ¶¶ 13, 65.

<sup>16</sup> See *id.* ¶¶ 12–13.

<sup>17</sup> See *id.* ¶ 13.

<sup>18</sup> *Id.* ¶ 12.

<sup>19</sup> *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 15

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* ¶ 14.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* ¶ 16. The actor brought forth two separate complaints against Axel Springer AG for the two articles published in *Bild*. *Id.* ¶¶ 17–46. The court resolved both complaints in the same way. See *id.*

<sup>25</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 19 (“The court held that in the present case the right to protection of X’s personality rights prevailed over the public’s interest in being informed . . .”).

imposed injunctions on any further publication of the articles detailing the arrest and his plea in court.<sup>26</sup>

The Hamburg Court of Appeals upheld the injunctions against Axel Springer AG.<sup>27</sup> After balancing the conflicting interests involved—public figures’ right to privacy and the public’s right to be informed—the Court of Appeals held that the public’s interest in a minor criminal offense was not sufficient to justify interfering with the actor’s right to decide what personal information should be made public.<sup>28</sup> The court determined that the possession of cocaine was an everyday offense that would not catch the public attention if the perpetrator were not well known, and the possession of small quantities of drugs did not create such an adverse effect on society that the general public needed to be notified.<sup>29</sup> Both the Federal Court of Justice and the Federal Constitutional Court declined to hear the cases.<sup>30</sup>

Axel Springer AG finally lodged a complaint with the ECtHR.<sup>31</sup> The Media Lawyers Association (Association) submitted written comments to the court, arguing that circulating a defamatory article about an individual does not constitute a violation of Article 8.<sup>32</sup> The Association urged the ECtHR to grant the press “wide and strong protection” in order to report on “matters of public interest.”<sup>33</sup> Additionally, the Association argued that the media should enjoy “wide editorial discretion” except in narrow circumstances.<sup>34</sup>

Both Axel Springer AG and Germany agreed that the lower courts’ judicial decisions interfered with Axel Springer AG’s freedom of expression guaranteed by Article 10 of the ECHR.<sup>35</sup> Furthermore, both parties agreed that the interference was supported by German law and protected the reputation of others, a legitimate aim under the ECHR.<sup>36</sup> The ECtHR, however, needed to decide whether the German government’s intervention in the story’s publication was “necessary in a democratic society.”<sup>37</sup>

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<sup>26</sup> See *id.* ¶¶ 13, 15, 17, 38.

<sup>27</sup> *Id.* ¶ 31.

<sup>28</sup> See *id.* ¶¶ 31–35.

<sup>29</sup> *Id.* ¶¶ 32–33.

<sup>30</sup> *Id.* ¶¶ 36–37, 44–45.

<sup>31</sup> *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 1.

<sup>32</sup> See *id.* ¶ 71.

<sup>33</sup> *Id.* ¶¶ 71–72.

<sup>34</sup> See *id.* ¶ 72.

<sup>35</sup> *Id.* ¶ 75.

<sup>36</sup> See *id.* ¶ 77.

<sup>37</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶¶ 77, 110 (quotations omitted).

In this case, the ECtHR found that the German national courts' intervention was not necessary.<sup>38</sup> Unlike the Hamburg Court, which considered the actor's offense too trivial for the public interest, the ECtHR decided "the public do[es], in principle, have an interest in being informed . . . about criminal proceedings."<sup>39</sup> The court also considered the fact that the policemen arrested the actor in a public place, a beer festival tent, which elevated the public interest in the case.<sup>40</sup> Furthermore, the actor enjoyed a high level of popularity and success in Germany and had solicited public attention on several occasions by freely disclosing details about his private life in interviews.<sup>41</sup> The court determined that his actions and career should have diminished his "legitimate expectation" of privacy.<sup>42</sup> Moreover, the court noted that *Bild's* story had a sufficient factual base because it was based on information provided by the Munich public prosecutor's office.<sup>43</sup>

As such, the ECtHR held that the German national courts' injunction was not "necessary in a democratic society" because the public interest in being informed about criminal proceedings prevailed over the actor's already-compromised expectation of privacy.<sup>44</sup> Furthermore, the court decided that the public does, in principle, have an interest in criminal proceedings—such as the crime reported by *Bild*.<sup>45</sup> Thus, the ECtHR held that Germany violated Article 10 by issuing the injunction.<sup>46</sup>

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<sup>38</sup> *Id.* ¶¶ 110.

<sup>39</sup> *See id.* ¶¶ 31–35, 96.

<sup>40</sup> *See id.* ¶ 100.

<sup>41</sup> *Id.* ¶¶ 98, 101.

<sup>42</sup> *Id.* ¶ 101 (citations omitted).

<sup>43</sup> *See Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 105.

<sup>44</sup> *See id.* ¶¶ 96, 98–99, 101, 110.

<sup>45</sup> *See id.* ¶ 96. The court said:

The Court notes that the articles in question concern the arrest and conviction of the actor X, that is, public judicial facts that may be considered to present a degree of general interest. The public do[es], in principle, have an interest in being informed—and in being able to inform themselves—about criminal proceedings, whilst strictly observing the presumption of innocence . . . That interest will vary in degree, however, as it may evolve during the course of the proceedings—from the time of the arrest—according to a number of different factors, such as the degree to which the person concerned is known, the circumstances of the case and any further developments arising during the proceedings.

*Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 96.

<sup>46</sup> *Id.* ¶¶ 1, 110–11.

## II. DISCUSSION

The fact that a German actor even filed a lawsuit against Axel Springer AG for privacy violations seems almost unfathomable in the United States, where the American press provides almost daily updates on the private lives of celebrities with little resistance or controversy.<sup>47</sup> Although the public’s fascination with the lives of celebrities transcends national boundaries, views on privacy in the United States and Europe continue to diverge.<sup>48</sup>

American courts often take the view that almost all information involving a voluntary public figure, such as an entertainer, is newsworthy.<sup>49</sup> On the other hand, the ECtHR has created a more comprehensive approach to privacy protections in Europe.<sup>50</sup> The ECtHR reiterated in *Axel Springer AG v. Germany* that Article 8 of the ECHR does protect public figures’ privacy as long as they could legitimately expect the personal information to remain private.<sup>51</sup> The court, however, also acknowledged that public figures, who often seek out highly visible positions, must expect increased pressure on their privacy due to their special roles in society.<sup>52</sup> Judge Zupancic, a Slovenian judge appointed to the ECtHR, wrote in a concurring opinion for another celebrity case, “[H]e who lives in a glass house may not have the right to throw

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<sup>47</sup> Cf. Shackelford, *supra* note 11, at 144–47 (“[C]ontemporary [American] courts have determined that nearly anyone in whom the public could conceivably be interested is a public figure, and nearly any information regarding a public figure may be by definition ‘newsworthy.’ The convergence of these two factors expands the general public interest exception of the invasion of privacy tort such that it swallows the rule for voluntary public figures.”); Mary Green & Stephen M. Silverman, *Lindsay Lohan Arrested for Leaving Scene of an Accident in New York*, PEOPLE (Sept. 19, 2012 at 1:45 PM), <http://www.people.com/people/article/0,,20631324,00.html>; Dahvi Shira, *Amanda Bynes Charged with Driving with a Suspended License*, PEOPLE (Sept. 21, 2012, 8:05 PM), <http://www.people.com/people/article/0,,20632376,00.html>; Stephen M Silverman, *Fiona Apple Arrested for Hash Possession*, PEOPLE (Sept. 20, 2012, 5:05 PM), <http://www.people.com/people/article/0,,20631711,00.html>.

<sup>48</sup> See Shackelford, *supra* note 11, at 126, 128, 130.

<sup>49</sup> See *id.* at 145.

<sup>50</sup> See *Axel Springer AG v. Ger.*, App. No. 39954/08, 55 Eur. H.R. Rep. 183 ¶ 73; Shackelford, *supra* note 11, at 134;

<sup>51</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 83.

<sup>52</sup> *Id.* ¶ 51 (“[P]ublic figures must recognize that the special position they occupy in society—in many cases by choice—automatically entails increased pressure on their privacy.”).



stones.”<sup>53</sup> Thus, a public person’s realistic expectation of privacy must diminish to some extent—even in a jurisdiction governed by Article 8.<sup>54</sup>

This divergence in privacy law between Europe and the United States has hampered business for American companies caught by surprise at Europe’s strict privacy laws.<sup>55</sup> In the late 1990s, the European Union’s new Data Privacy Directive frustrated e-commerce between Europe and the United States because the United States failed to meet the Director’s new privacy protection standards.<sup>56</sup> In 2010, an Italian court convicted Google executives for violating a child’s privacy when a video posted to Google Video captured an episode of playground bullying.<sup>57</sup> Additionally, media outlets continue to bear fines for privacy infringements, as demonstrated by the September 2012 uproar over intrusive pictures of the Duchess of Cambridge, Kate Middleton, on vacation.<sup>58</sup> This liability puts newspapers on edge and potentially chills the substance of tabloid journalism.<sup>59</sup>

Due to these high financial stakes, a clear standard for balancing privacy and freedom of the press is important for both corporations and public figures.<sup>60</sup> Despite the high priority the ECtHR places on the

<sup>53</sup> Von Hannover v. Germany (No. 1), App. No. 59320/00, 40 Eur. H.R. Rep. (2004) (Zupancic, J., concurring); Shackelford, *supra* note 11, at 197.

<sup>54</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 101 (“[The actor] had therefore actively sought the limelight, so that, having regard to the degree to which he was known to the public, his ‘legitimate expectation’ that his private life would be effectively protected was henceforth reduced.”) (citations omitted); *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. (Zupancic, J., concurring) (“He who willingly steps upon the public stage cannot claim to be a private person entitled to anonymity. Royalty, actors, academics, politicians etc. perform whatever they perform publicly. They may not seek publicity, yet, by definition, their image is to some extent public property.”); Niri Shan & Mark Dennis, *Two European Privacy Judgments Tilt Balance Towards Freedom of Expression*, TAYLOR WESSING LLP (Feb. 2012), <http://www.taylorwessing.com/fileadmin/files/docs/EU-privacy-judgments-freedom-of-expression.pdf>.

<sup>55</sup> See Shackelford, *supra* note 11, at 129–30.

<sup>56</sup> See *id.*

<sup>57</sup> *Id.* at 129–30.

<sup>58</sup> See Shackelford, *supra* note 11, at 130; Nigel Horne, *Has French Mag Risked Closure over Topless Kate Photos?*, THE WEEK (Sept. 14, 2012, 2:40 PM), <http://www.theweek.co.uk/media/kate-photos/49033/has-french-mag-risked-closure-over-topless-kate-photos>; Danielle Paquette, *Topless Kate Middleton Photos: French Mag Fined, Editor May Go to Jail*, THE WRAP (Sep. 18, 2012, 11:30 AM), <http://www.thewrap.com/media/article/topless-kate-middleton-photos-french-mag-fined-editor-may-go-jail-56911>.

<sup>59</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 109 (“[T]he severity of the sanctions imposed on [Axel Springer AG] . . . were capable of having a chilling effect on the . . . company.”); Shackelford, *supra* note 11, at 130; Paquette, *supra* note 58.

<sup>60</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 109; Horne, *supra* note 58; Nick Pisa & Vanessa Allen, *Three Google Executives Convicted in Italy of Violating Privacy Laws over Bullying*

right to privacy, the court does not allow Article 8 to override the protections provided by Article 10 for freedom of expression.<sup>61</sup> Indeed, in *Axel Springer AG*, the court called a free press “one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfillment.”<sup>62</sup> The ECtHR tempers freedom of expression, however, by closely considering the underlying purpose for releasing certain information—leading to a narrower interpretation of freedom of the press than in the United States.<sup>63</sup>

The decisive factor for determining the correct balance between freedom of the press and the right to privacy lies in the value of the information provided by the press and the extent to which the information contributes to a debate of public interest.<sup>64</sup> Although the ECtHR has affirmed the crucial role of “the media . . . to impart information and ideas on all matters of public interest,” the court has not provided a clear standard for what the term “public interest” includes.<sup>65</sup> It has, however, made a distinction between reporting information “capable of contributing to a debate in a democratic society” and “reporting details of the private life of an individual who . . . does not exercise official functions.”<sup>66</sup> Article 10’s protection, therefore, only stretches as far as information that meaningfully contributes to important public dis-

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*Video*, DAILY MAIL ONLINE (Feb. 24, 2010, 4:17 PM), <http://www.dailymail.co.uk/news/article-1253383/Italy-convicts-Google-executives-autism-bullying-video.html>.

<sup>61</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 87 (“In cases such as the present one the Court considers that the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher who has published the offending article or under Article 8 of the Convention by the person who was the subject of that article. Indeed, as a matter of principle these rights deserve equal respect.”) (citations omitted); Nohlen, *supra* note 11, at 199.

<sup>62</sup> *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 78.

<sup>63</sup> See *id.* ¶ 91; *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. ¶¶ 65–66; Shackelford, *supra* note 11, at 196–97.

<sup>64</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶¶ 60, 90; *Von Hannover (No. 2)*, App. Nos. 4066/08 and 60641/08, 228 Eur. H.R. Rep. ¶ 109; *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. ¶ 76.

<sup>65</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 90; *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. ¶ 109; *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. ¶ 76; Shackelford, *supra* note 11, at 195–96; Jack Gilbert, *No Second Victory for ‘Paparazzi Princess’ as European Court of Human Rights Favours Freedom of Expression*, OLSWANG LLP (Feb. 13, 2012), <http://www.olswang.com/articles/2012/02/no-second-victory-for-paparazzi-princess-as-european-court-of-human-rights-favours-freedom-of-expression>.

<sup>66</sup> See *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. ¶ 63.

course, while “infotainment” that merely satisfies the reader’s curiosity faces the buttress of Article 8.<sup>67</sup>

This lack of a definition for public interest has made it difficult to predict how the court may decide a particular case.<sup>68</sup> In *Von Hannover v. Germany (No. 1)*, for example, the ECtHR held that the German court violated Princess Caroline of Hannover’s privacy rights by failing to prevent the publication of photographs revealing intimate parts of her family life—from picking up her children from school, to practicing sports, to shopping at the supermarket, to walking in a towel at a beach club.<sup>69</sup> The court stated that “the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest.”<sup>70</sup> Since Princess Caroline exercised no official function, the court determined that the sole purpose of publishing the photos was to “satisfy the curiosity” of the newspaper’s readership about her private life and did not contribute to any debate about the public interest.<sup>71</sup>

Eight years later, Princess Caroline again lodged a complaint with the ECtHR, claiming that another set of published photographs violated her rights under Article 8.<sup>72</sup> In *Von Hannover v. Germany (No. 2)*, the princess sought an injunction against the publication of photographs depicting her skiing holiday in St. Moritz with her husband, Prince Ernst August von Hannover.<sup>73</sup> The pictures accompanied an article about the failing health of her father, Prince Rainier III, and criticized the couple’s decision to take a vacation while her father suffered.<sup>74</sup> Like in *Von Hannover (No. 1)*, the princess argued that the photos did not contribute to a debate of public interest, but rather served to satisfy the curiosity of the periodical’s readership.<sup>75</sup>

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<sup>67</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶¶ 53, 91; *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. ¶¶ 43, 63, 76.

<sup>68</sup> Compare *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. (2004) ¶¶ 77–80 (holding that photographs depicting Princess Caroline’s private family life could not be published due to its inadequate contribution to the general interest), with *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. (2012) ¶¶ 124–26 (holding that photographs depicting Princess Caroline’s private family life could be published because they supplemented an article that contributed to the general public interest).

<sup>69</sup> *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. ¶¶ 11–7, 77–80.

<sup>70</sup> *Id.* ¶ 76.

<sup>71</sup> See *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. ¶¶ 62, 65; Nohlen, *supra* note 11, at 199.

<sup>72</sup> *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. ¶¶ 1–2.

<sup>73</sup> See *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. ¶¶ 2, 17–20.

<sup>74</sup> See *id.* ¶¶ 17–20.

<sup>75</sup> *Id.* ¶¶ 13, 15, 85.

This time, however, the ECtHR found that the German national courts did not violate Article 8.<sup>76</sup> Although the photos themselves did not contribute to a debate of public interest, the ECtHR found that the Federal Court of Justice correctly concluded that the article regarding Prince Rainier III—the reigning monarch of Monaco at the time—his illness, and the conduct of his family during that illness did qualify as subject matter relevant to the public interest.<sup>77</sup> The photos taken at the ski resort supplemented the information conveyed in the article, and thus could be published for the benefit of the public interest.<sup>78</sup>

The same day that the ECtHR revisited the public interest in *Von Hannover (No. 2)*, the court also determined in *Axel Springer AG* that “public judicial facts,” such as the actor’s arrest at Oktoberfest, “may be considered to present a degree of general interest.”<sup>79</sup> The court decided that the public does have an interest in being informed about criminal proceedings as long as the presumption of innocence can be preserved.<sup>80</sup> Yet not all of the judges agreed with this determination.<sup>81</sup> Judge Guerra joined with four other judges in dissent, acknowledging that the article did indeed disclose public judicial facts but the Hamburg Court of Appeal still properly balanced the freedom of the press and right to privacy.<sup>82</sup>

### III. ANALYSIS

The ECtHR in *Von Hannover v. Germany (No. 1)*, *Von Hannover v. Germany (No. 2)*, and *Axel Springer AG v. Germany* consistently considered the published content’s contribution to the public interest as the decisive factor in determining how to balance the protection of private life against freedom of expression.<sup>83</sup> Building on *Von Hannover (No. 1)*, the

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<sup>76</sup> *Id.* ¶¶ 124, 126.

<sup>77</sup> *See id.* ¶¶ 117, 124, 127.

<sup>78</sup> *See id.*

<sup>79</sup> *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 96.

<sup>80</sup> *See id.*

<sup>81</sup> *See id.* at 38 (Guerra J., dissenting).

<sup>82</sup> *See id.*

<sup>83</sup> *Axel Springer AG v. Ger.*, App. No. 39954/08, 55 Eur. H.R. Rep. 183 ¶¶ 60, 90 (“An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest . . .”) (citations omitted); *Von Hannover v. Ger. (No. 2)*, Apps. No. 40660/08 and 60641/08, 228 Eur. H.R. Rep. ¶ 109 (2012) (“An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest . . .”) (citations omitted); *Von Hannover v. Ger. (No. 1)*, App. No. 59320/00, 40 Eur. H.R. Rep. ¶ 76 (2004) (“As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie

court clarified in the later cases that the public interest does not just pertain to criminal and political issues, but could also include events like sports and the performing arts.<sup>84</sup>

Even while broadening the scope of the general interest, however, the ECtHR failed to use *Axel Springer AG* as an opportunity to better define the “public interest.”<sup>85</sup> The ECtHR attempted to define the public interest by stating that *Bild*’s articles were in the public interest because they focused on public judicial facts.<sup>86</sup> The court, however, almost immediately began to backtrack on this assessment.<sup>87</sup> The opinion stated:

That interest will vary in degree, however, as it may evolve during the course of the proceedings—from the time of the arrest—according to a number of different factors, such as the degree to which the person concerned is known, the circumstances of the case and any further developments arising during the proceedings.<sup>88</sup>

Therefore, the court seemed to insinuate that even public judicial facts may not always be in the public interest.<sup>89</sup> Public interest can vary throughout the progression of the trial and is dependent on ambiguous factors largely contingent on the discretion of the judge.<sup>90</sup> To make matters even more confusing, the court also emphasized that the press needed to “strictly” observe the “presumption of innocence” for the individual on trial.<sup>91</sup>

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in the contribution that the published photos and articles make to a debate of general interest.”) (citations omitted).

<sup>84</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 90; *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. ¶ 109.

<sup>85</sup> See Gilbert, *supra* note 65 (“[I]t is unfortunate that the recent judgments did not give more guidance on the extent to which any given subject matter can be considered to contribute to a ‘debate of general interest’ worthy of Article 10 protection.”); cf. *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 90 (noting that public interest can include sports and performing arts in addition to crimes and politics).

<sup>86</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 96; Gilbert, *supra* note 65.

<sup>87</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 96 (“That interest will vary in degree, however, as it may evolve during the course of the proceedings—from the time of the arrest—according to a number of different factors, such as the degree to which the person concerned is known, the circumstances of the case and any further developments arising during the proceedings.”).

<sup>88</sup> *Id.*

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

The court provided no instruction on how to comply with this standard.<sup>92</sup> As the dissenting opinion argued, the Hamburg Regional Court and the Court of Appeals did carefully weigh these different factors, and still found that there was not sufficient public interest in the popular actor’s arrest to warrant *Bild*’s publication and breach of privacy.<sup>93</sup> Even using the ECtHR standard for assessing the public interest, two competent courts, not acting in an “arbitrary, careless, or manifestly unreasonable” way, still arrived at opposite outcomes.<sup>94</sup>

In both *Axel Springer AG* and *Von Hannover (No. 2)*, the court asserted, “The definition of what constitutes a subject of general interest will depend on the circumstances of the case.”<sup>95</sup> The ECtHR understandably does not want to create a strict standard that could potentially be applied to the detriment of either Article 8 or Article 10.<sup>96</sup> Although the ECtHR plans to deal with this issue on a case-by-case basis, the resulting lack of clarity—and thus lack of predictability—can have negative effects on both publishers and public figures.<sup>97</sup>

Although many observers considered *Axel Springer AG* a victory for the press, the lack of a standard for “public interest” may have a chilling effect on publishers and other businesses, due to the lack of certainty for how courts may decide a particular case.<sup>98</sup> For example, the ECtHR did specify that the press could report on “performing artists,” but “financial difficulties of a famous singer” did not constitute a matter of general interest.<sup>99</sup> These are arbitrary examples rather than a test for

<sup>92</sup> See *id.*; Gilbert, *supra* note 65.

<sup>93</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶¶ 13–15, 27, 31. *But see id.* at 38 (Guerra, J., dissenting).

<sup>94</sup> See *id.* at 39 (Guerra, J., dissenting).

<sup>95</sup> *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 90; *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. ¶ 109.

<sup>96</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 87; *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. ¶ 106; *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. ¶ 58; Nohlen, *supra* note 11, at 199.

<sup>97</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 90; *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. ¶ 109; Shackelford, *supra* note 11, at 129–30.

<sup>98</sup> See Shackelford, *supra* note 11, at 130; Brenda T. Simensky, *Chilling Effect on First Amendment Rights*, 40 BROOK. L. REV. 1097, 1099 (1974); Dave Gilbert, *After Diana: How Can Intimate Royal Snaps Be Published in France?* CNN.COM (Sept. 14, 2012, 11:00 A.M.), <http://www.cnn.com/2012/09/14/world/europe/france-privacy-law-qa/index.html>; Paul McNally, *EU Privacy Rulings: ‘Huge Consequences’ for UK Press*, JOURNALISM.CO.UK (Feb. 10, 2012), <http://www.journalism.co.uk/news/eu-privacy-rulings-have-huge-consequences-for-uk-press/s2/a547818/>; Shan & Dennis, *supra* note 54.

<sup>99</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 90; *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. ¶ 109.

navigating the gray area between Article 8 and Article 10.<sup>100</sup> Without a clear standard, publishers may shy away from publishing on any issue that could hover around Article 8 to avoid hefty fines, even if a court would later decide that the content is in the public interest.<sup>101</sup>

The lack of a clear standard for “public interest” may be even worse for public figures.<sup>102</sup> In *Von Hannover (No. 1)* and *Von Hannover (No. 2)*, Princess Caroline sued both times for the use of pictures that arguably contained the same general subject matter—photographs depicting the princess in public going about her daily life.<sup>103</sup> In fact, photographs in both cases depicted Princess Caroline on a skiing holiday.<sup>104</sup> The ECtHR, however, found that one set of photographs contributed to the public interest, while the other set did not.<sup>105</sup> Since publishers may not know the purpose for the photos when the pictures are being taken, the ECtHR’s holdings can make it much more difficult for public figures to defend themselves against intrusive photographs and harassment from the paparazzi.<sup>106</sup> The pictures may end up being used to support an article deemed by the courts to be “in the public interest” even if the photographs are marginally related—and a public figure has no way of knowing how the pictures may be used before the story is published.<sup>107</sup>

Additionally, personal information that has enough social or political weight to provide a meaningful contribution to the public interest usually will be more detrimental to the private life of the individual involved than information with only entertainment value.<sup>108</sup> In *Axel Springer AG*, for example, the court predicted that the actor’s arrest dis-

<sup>100</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶¶ 87–8; *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. ¶¶ 106, 109.

<sup>101</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 109; Shackelford, *supra* note 11, at 129–30.

<sup>102</sup> See Shackelford, *supra* note 11, at 129.

<sup>103</sup> Compare *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. ¶¶ 11–17 (photographs depicting the princess on a date, horseback riding, shopping, on a skiing holiday, and playing tennis), with *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. ¶¶ 17–20 (photographs depicting the princess taking a walk in St. Moritz on her skiing holiday).

<sup>104</sup> *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. ¶¶ 17–20; *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. ¶ 14.

<sup>105</sup> See *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. ¶ 124; *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. ¶ 76.

<sup>106</sup> See *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. ¶¶ 103, 119, 124; *Von Hannover (No. 1)*, 40 Eur. H.R. Rep. ¶ 76; Cameron Danly, *Paparazzi and the Search for Federal Legislation*, 38 W. St. U. L. Rev. 161, 161–62 (2011).

<sup>107</sup> See *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. ¶¶ 118–19; Gilbert, *supra* note 65; *supra* note 68 (comparing the holdings of *Von Hannover (No. 1)* and *Von Hannover (No. 2)*).

<sup>108</sup> See *Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 31; *Von Hannover (No. 2)*, 228 Eur. H.R. Rep. ¶ 114; Nohlen, *supra* note 11, at 199.

closed in *Bild* would most likely affect his ability to secure acting jobs in the future—especially roles aimed at a young audience—even though both the Hamburg Regional Court and the Court of Appeals did not find that the information would contribute in any meaningful way to German society.<sup>109</sup> Therefore, creating a clear standard for what does and does not contribute to the “general interest” is vitally important to public figures because the press’s disclosures could have significant repercussions on an individual’s career and personal life.<sup>110</sup>

#### CONCLUSION

Although the ECtHR seems content with regulating the difficult intersections between Article 8 and 10 on a case-by-case basis, the stakes are too high—both for corporation’s finances and for public figures’ quality of life—to continue having such an unclear and unpredictable standard. Since the elusive “public interest” is essential to determine how Article 8 and Article 10 should intersect, all parties would benefit from having a clear standard that promotes predictability in the courts. Parties should have an accurate expectation of both their privacy and what news and photographs are permissible to print. In an era increasingly concerned about the paparazzi and the business implications for Europe’s high privacy standards, the ECtHR should help create a more predictable standard to provide clarity and more realistic expectations in the future.

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<sup>109</sup> *Axel Springer AG*, 55 Eur. H.R. Rep. ¶¶ 19, 31–33.

<sup>110</sup> *See Axel Springer AG*, 55 Eur. H.R. Rep. ¶ 31; Nohlen, *supra* note 11, at 199.