Regulation of Blog Campaign Advocacy On the Internet: Comparing U.S., German and EU Approaches

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COMPARING U.S., GERMAN AND EU APPROACHES

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ABSTRACT

This essay examines how U.S., Germany, and EU cases have treated the regulation of political commentary on the Internet. As political blogging grows in popularity, the reach of these sites, and their influence in political campaigns, may make them a target for regulation by rivals and incumbents, both at home and abroad. Since ordinarily any URL can be reached from anywhere with Internet access, conflicting domestic rules about what can be said (and who can say it) present potential for conflicting rules on blogging.

In brief, U.S. law protects blogging content, but may impose restrictions on the source of political commentary by barring certain funding sources. German law imposes stricter limits on the content of blogging, but does not regulate financial sources to the same degree. European court rulings may offer greater protection than domestic German law, but seem inconsistent and thus add uncertainty and ambiguity to the situation. In the end, bloggers may avoid legal entanglement because they enjoy public sympathy and support, but better still would be an international agreement to spare blogging from prosecution.

I. Introduction

Internet communications continue to provide challenges for national and international regulators. In particular, the political debates carried out by bloggers – independent individuals with pointed things to say about government, cut across conventional communications regulation. Governments desiring to protect citizens from sexually explicit material, false information, fraud, incitement to violence, harassment, threats, or defamation desire to extend domestic definitions of these terms to all Internet communications, but in this context that goal is a difficult one.

How governments should strike a balance here, both in the substance of regulations and in their extraterritorial reach, is very much an open question in both the United States and Germany. Each country has its own perspective on the value of speech compared with other interests, and each is dedicated to protecting its chosen priorities. An overlay of treaty-insured political rights, most prominently those guaranteed to Europeans by the Convention for the Protection of Human Rights and Fundamental Freedoms, may prevent the full enforcement of domestic German speech regulations, but that issue is also

1 Assistant Professor of Law, George Mason University School of Law. I thank the faculty and students at the Law and Economics program at the University of Hamburg for inviting me to present an earlier version of this paper, and Professor Neomi Rao for thoughtful comments.
unsettled. Add to this the global reach of Internet communications, their low cost, and their anonymity, and the clash of laws among nations becomes a jurisdiction and international law conundrum.

At present, countries have at least three strategies for applying domestic law to foreign Internet communications. One, governments may pursue the foreign speaker, “going after” offenders outside the country who have assets or a business or some personal presence within the country. Two, they may thwart communications midstream by targeting the service providers, browsers, networks, and financial supporters who make up the domestic end of the network. Three, they may use filtering technology to censor material, or block access to servers and sites with unlawful content.

None of these alternatives works well. The first alternative may be seen as an imposition on the sovereignty of another country. Targeted individuals and groups, and their friends and allies, will resist attempts to impose the national laws of a country far from home. The second and third options are not well tailored to target just the offending conduct, because they cut off all exchange with a particular server, ISP, browser, search engine, etc. These approaches will over-suppress lawful speech. They are also difficult to implement, and can be circumvented by more sophisticated operators.

With bloggers, at least, the intensive means required to pursue a casual (if illegal) posting seems disproportionate, at least for now. Bloggers may experience some leniency in enforcement -- until an official or powerful rival is sufficiently disturbed to insist upon action. This is not a secure situation for the exercise of political commentary.

II. International Blogging

For many years, the United States, as developer of the Internet, has been the one online superpower, and U.S. attitudes, culture and language dominated the forum. That position is eroding. In the late 1990s, 80 percent of online information was in English – but in 2002 less than 50 percent of web pages were in English, and by 2005, two-thirds of Internet users were nonnative English speakers. Similarly, U.S. laissez faire policies regarding access and content have been pre- eminent, but need not persist indefinitely.

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2 Well-publicized examples of this include litigation against U.S.-based Yahoo in France and against the U.S. publisher Dow Jones & Co. See Yahoo! v. LICRA documents (French and U.S. court rulings), archived at http://www.eff.org/legal/Jurisdiction_and_sovereignty/LICRA_v_Yahoo; Dow Jones & Co. v. Gutnick, [2002] HCA 56 (Dec. 10, 2002) (dismissing Dow Jones appeal with costs, concluding defamation occurred where Internet-published article was downloaded.)

3 JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET 66-70 (2006) (noting offshore platform called “Sealand” did not successfully circumvent regulation, because governments could control other Internet entities within their borders.).

4 Goldsmith & Wu, supra note 3 at 5. English remains the top language of Internet users, at 29.5%, followed by Chinese at 14.3%, Spanish at 8%, Japanese at 7.7% and German at 5.3%. Internet World Stats, Internet World Users By Language, www.Internetworldstats.com/stats7.htm (updated Mar. 10, 2007). The U.S. also remains the home to 50 routers, where Europe has 25, and Asia has 7. Internet traffic report, Internettrafficreport.com (visited May 23, 2007). Proximity to routers affect the quality and availability of Internet services, see Goldsmith & Wu, supra at 54-55.
Similarly, blogging is not solely -- or even primarily -- an American activity. Japanese is the language of 37% of the posts monitored by Technorati, followed by English at 36%, and Chinese at 8%. German and Farsi (a fast-growing online language) were each 1% of posts.  

Political blogging enjoyed a boost in Europe in 2005. French media, embracing the European Constitution, missed the popular French opposition to that (failed) referendum, a sentiment better reflected by bloggers. German political blogs also emerged during the 2005 campaign. Presently there are a number of independent German political blogs, officeholder blogs, and sites for German political parties.

Blogs in both nations have achieved some fame (or notoriety) as fact-checkers. During the 2004 U.S. presidential campaign, bloggers exposed as fraudulent a National Guard memorandum “documenting” then-enlisted President George Bush’s failure to comply with Guard requirements. One of Germany’s most popular blogs is BildBlog, dedicated to fact-checking the Bild newspaper.

Despite these practical similarities, German and American approaches to the regulation of Internet speech are quite different. Each country’s attitude toward regulating political and campaign expenditures is also quite different. As diversification occurs, Americans online become more vulnerable to the policies of other nations. Likewise, bloggers elsewhere may not always enjoy U.S.-facilitated open and decentralized communications

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5 Farsi has quickly expanded in use, despite the fact Iran controls all domestic ISPs and filters all sites from within Iran as well as foreign sites in Farsi. Omid Memarian, Rights-Iran: Bloggers Rebel at New Censorship, IPS, Jan. 10, 2007.


10 See http://www.bundeskanzlerin.de/Webs/BK/DE/Homepage/home.html (Merkel Web page, complete with video podcasts).

11 Parteien im Netz oder Digitaler Wahlkampf, Aug. 26, 2005, at http://www.richshoppingblog.de/archives/000086.cfm (German-language critique of party campaign sites); see e.g. CDU site at http://www.regierungsprogramm.cdu.de.

12 See one of the key posts archived at http://www.powerlineblog.com/archives/007760.php.

on the Internet. Those who desire to keep apprised of Internet regulation need to watch not only domestic lawmakers, but development in other countries.

III. Regulation of Political Blogs in the U.S.

What Americans can say about politics and political leaders – in fact, about pretty much anything, remains relatively free from governmental control. While “hate crimes” are specially punished in some jurisdictions, and much is made of campus “speech codes” that attempt to restrict prejudiced, unpleasant, or socially disturbing speech -- in the realm of political opinion (that does not contain obscenity or classified information) few restrictions are placed on the content of speech.

In particular, the U.S. Supreme Court has closely scrutinized attempts to legislate Internet speech. In the Court’s review of the Communications Decency Act (CDA), Reno v. American Civil Liberties Union, Justice Stevens’s majority opinion noted that Internet activity was different from previous forms of communication:

> Unlike communications received by radio or television, “the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial.”

The government’s justification for regulating content on the Internet would need to be different than its justification for regulating content on television or radio. The Court concluded that the statute could be enforced only if enforcement was limited to obscene communications, which under prevailing precedent are entitled to much less legal protection. Congress’s successor statute to the CDA, the Child Online Protection Act, was recently also found unconstitutional at the trial court level.

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14 For some insight into the “good old days” of decentralized engineer-run Internet, see Goldsmith & Wu, supra note 3, at 13-46 (relating how Jon Postel moved the root server, prompting U.S. to assume authority over root).
15 For a chart detailed which American states have hate crime or bias crime laws, see http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf.
17 Possible structural and historic reasons for the differences in U.S. and European democracies are discussed in Samuel Issacharoff, Fragile Democracies, 120 Harv. L. Rev. 1405 (2007).
19 521 U.S. 844.
21 Merely vulgar or offensive content can be regulated on the radio, see FCC v. Pacifica Found., 438 U.S. 726, 744-48 (1978), in this instance because in context children might be exposed to the material. Other justifications for speech regulation of broadcast media include the legacy of governmental regulation, Red Lion Broadcasting v. FCC, 395 U.S. 367, 399-400 (1969), the scarcity of spectrum, Turner Broadcasting v. FCC, 512 U.S. 622, 637-38 (1994), and broadcasting’s invasive character, Sable Comm. v. FCC, 492 U.S. 115, 128 (1989). None of these rationales apply to Internet communications.
22 ACLU v. Gonzales, 478 F. Supp 2d 775 (E.D. Pa. 2007); see also discussion of these cases in Lawrence Lessig, Code 2.0 249-50 (2006).
The CDA also contained a provision that protected Internet Service Providers (ISPs) from liability for material posted in the Internet by others. The relevant portion states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

Accordingly, when plaintiffs have sued ISPs, like America Online, to recover damages for material posted about them by other individuals (choosing the ISP possibly because the ISP is a wealthier or more accessible defendant), courts have held that the ISP is immune. This statute has also protected other forms of intermediaries, such as search engines, online matchmaking services, online stores, and sites hosting message boards. In the blog context, original blogged material would be deemed “published” by the blogger, but comments (even anonymous ones) posted by visitors would not be attributed to the blogger.

Moreover, ISPs cannot be required to identify anonymous Internet posters without a court order. When a local government officeholder sought to learn the identity of the person who defamed him as “paranoid” and suffering “mental deterioration” the court concluded that such an order would only be proper if the plaintiff could show that otherwise he had stated a *prima facie* defamation claim. (This standard is higher than the standard for going forward ordinarily, where the plaintiff need only show that he has stated a cognizable claim.) The court reasoned that anonymous Internet speech was the modern day equivalent of “political pamphleteering” in line with “an honorable tradition of advocacy and dissent.”

Under the Patriot Act, ISPs may be required to provide records or subscriber information if subpoenaed by the Federal Bureau of Investigation. The original version of this law provided no pre-enforcement judicial review of the subpoena, and a federal district court had found it unconstitutional. During that litigation, Congress revised the statute, and allowed recipients to challenge the administrative orders in court, rendering moot the legal issue in the case.

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23 47 U.S.C. §230(c)(1). This statute was enacted to reverse the rule articulated in *Stratton Oakmont v. Prodigy*, in which an ISP was held strictly liable for the publication of defamatory statements. See 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
24 See Ben Ezra, Weinstein & Co. v. America Online, 206 F.3d 980 (10th Cir. 2000); Xeran v. America Online, 129 F.3d 327 (4th Cir. 1997).
28 Compare FRCP 12(B)(6) (Motion to dismiss) with FRCP 56 (summary judgment).
33 Doe v. Gonzales, 449 F.3d 415 (2d Cir. 2006).
Private actions against bloggers are more frequent. Typically they take the form of a “cease-and-desist” letter to the author or his ISP requesting that content be removed. The letter may threaten legal action, but does not itself carry the force of a court order. Even so, some bloggers complain that ISPs are too willing to grant these requests, rather than taking the time and expense to resist.

American law encourages this ISP reaction, in part by providing immunity from copyright liability if ISPs promptly take down allegedly infringing content. Knowing this, many allegations will recite intellectual property injuries, such as copyright or trademark infringement. For example, attorneys for Diebold, a company that among other items manufactures voting machines, sent takedown notices to Internet sites that published leaked internal memos regarding the security of its voting machines, asserting a copyright in the memos. This specific argument was unsuccessful; a court ruled that Diebold misrepresented the copyright and Diebold agreed to damages and fees of $125,000. Even so, other cease and desist type actions continue to pursue this tactic by stating some kind of infringement claim.

Some cease-and-desist attempts are clearly political or ideological – sent by politicians to bloggers asking them to remove undesirable material. Attorneys represented Democratic National Committee Chair Howard Dean recently sent a cease and desist letter to the blog FreeRepublic, demanding they remove a post asserting (falsely, they insist) that Dean asked the Governor of Kansas to “politicize” a fatal Kansas tornado. Political parodists are especially vulnerable to “takedown” requests, since they may use elements of the party’s own materials in the parody. Yet when U.S. bloggers (who have a more direct interest in their work than the ISP) fight these demands, they often prevail.

In general, bloggers can post broadly under U.S. law, with few restrictions on what they can say, and insulated from liability for the unlawful statements made by visitors who comment. Moreover, U.S. law does not require that a blogger disclose his identity on his

34 A website devoted to such letters is maintained by several prominent U.S. law schools and is at http://www.chillingeffects.org/index.cgi.
35 See http://www.blogiam.com/2004/10/17/cease-and-desist (relating to parody site “Don’t Ask Jeeves); http://mediamatters.org/items/200701090004 (relating to ISP termination of blogger critical of ABC Radio). Even if a blogger’s own ISP refuses to comply, the upstream provider of the ISP may be easier to influence, and if that service is denied, not only the offending site but all others handled by that provider are taken offline. See Laura Quilter & Marjorie Heins, Intellectual Property and Free Speech In the Online World (Brennan Center for Justice, 2007) at 35.
36 17 U.S.C. § 512. It isn’t clear that absent section 512, ISPs would be liable in any case. See Quilter & Heins, supra note 35 at 10 & n.22
site, and it can be difficult to identify a blogger who chooses to remain anonymous, even with the help of the courts and law enforcement. Because the Internet author and the Internet reader can both be difficult to identify and reach, regulation depends upon ISPs and intermediaries for assistance.

U.S. campaign finance laws also may regulate political blogging. The purpose of these laws is to prevent or expose corruption, reduce the “appearance of corruption,” and prevent certain prohibited sources from participating financially in campaigns. The chief prohibited sources are corporations, labor unions, and foreign nationals. For others, the law imposes limits on the sums that can be spent in coordination with a candidate or party, limits on direct contributions of money, reporting requirements for independent expenditures over a certain threshold, and disclaimer requirements identifying the source of campaign spending. When the contribution involves money spent on advertising in coordination with a campaign, or the FEC seeks to enforce reporting requirements on expenditures, the test is whether the message contains express advocacy of the election or defeat of the relevant candidate(s).

These limits, prohibitions and reporting requirements were written in an age of high communications costs and centralized political activity. How they apply to political activity over the Internet has been a source of great controversy, in large measure due to the general perception that political blogging is beneficial, and could easily fall silent if regulation is threatened.

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40 Purchasers of Internet domain names are required to provide identification information accessible through the WHOIS database. Domain owners, can pay additional fees for “private registration” and list an intermediary hosting company as the contact. Individuals seeking to avoid all contact typically have chosen public registration and submit false contact information. Under U.S. law, registering a domain using false information is not itself illegal, but may be considered against the registrant if the domain is later used for cybersquatting, or for trademark or copyright infringement. See 15 U.S.C. §§ 1125(d)(1)(B)(i); 15 U.S.C. § 1117(e) (trademark); 17 U.S.C. § 504(c)(3) (copyright).


43 2 U.S.C. §§ 441b (prohibiting contributions or expenditures by national banks, corporations, or labor organizations); 441e (prohibiting contributions and expenditures by foreign nationals)

44 2 U.S.C. §§ 431(8)(A) (definition of contribution includes “gift, subscription, loan, advance, or deposit of money or anything of value”); 441a (limits).

45 See supra note 44.

46 2 U.S.C. §§ 431(17) (definition of independent expenditure); 434(c) (requiring reports when independent expenditure exceed aggregate of $250 in a calendar year); 434(g) (special repoerts for last-minute independent expenditures).

47 2 U.S.C. § 441d.


49 See Larry Ribstein, From Bricks to Pajamas: The Law and Economics of Amateur Journalism, 48 WM & MARY L. REV. 185, 207 (2006) (arguing that blogs are subject to strong self-correction mechanisms, but can easily be over-deterred “because bloggers do not internalize the social benefits of their work.”)
In the Bipartisan Campaign Reform Act enacted in 2002 ("BCRA" or "McCain Feingold") Congress imposed additional limits on parties, state and local candidates, coordinated expenditures (by anyone), and required disclaimers on advocacy materials if the spending was for "public communications."\(^{50}\) The Federal Election Commission, the agency charged with interpreting and enforcing BCRA, excluded Internet communications from those deemed "public communications." The FEC interpreted Congress’s silence as indicative of an interest in leaving Internet activity out of the new law. However, challengers successfully argued in court that the Internet should be included.\(^{51}\) The court remanded the rules back to the Commission to rewrite them consistent with the court’s stricter interpretation of BCRA.\(^{52}\)

At the same time, the growth in political activity online had provoked questions about how the prohibited source rules would apply to the Internet. As noted above, corporations are prohibited from making expenditures advocating the election or defeat of a candidate for federal office. Did this mean that an incorporated web site would also be prohibited from posting this kind of content? Would bloggers who use workplace computers (or University computers) be implicating their employers in campaign finance violations? Would personal email about campaigns require a disclaimer stating who paid for the message? Or would Internet "publication" be exempt from campaign limits, as are the "press" when engaged in a "press function."?\(^{53}\)

The FEC considered both sets of issues in a controversial 2005 rulemaking.\(^{54}\) The resulting rules, colloquially known as the "paid ads and spam" approach,\(^ {55}\) included Internet communications placed for a fee on another person’s Web site as "public communications".\(^{56}\) It also extended the "press exemption" to stories, commentary or editorials carried over the Internet, but avoided providing addition specificity regarding what kind of prose would fit the definition of "news story, commentary, or editorial."\(^{57}\) The Final Rules also exempted from campaign finance regulation individual uncompensated Internet activity, which would protect among others those individuals who blog about politics from a workplace computer (as well as the owner of the computer).\(^{58}\) The final rule required disclaimers only for political committees’ Internet sites and email.\(^{59}\)

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\(^{50}\) Pub. Law 107-155, 116 Stat. 81 (2002); in particular codified at 2 U.S.C. § 431 (20), (21) & (22); 441d; 441i(b) & (f).


\(^{52}\) Id. at 131.

\(^{53}\) The statutory press exemption is at 2 U.S.C. § 431(9)(B)(i). In Reader’s Digest v. FEC, a federal court concluded the FEC should inquire whether a press entity was acting in its press function, to determine whether exemption applied. 509 F. Supp. 1210 (S.D.N.Y. 1981).


\(^{56}\) See 71 Fed. Reg. 18613 (final rule revising definition of “public communication” at 11 C.F.R. § 100.26).

\(^{57}\) Ibid. (final rule revising press exemption at §§ 100.73 and 100.132).

\(^{58}\) Ibid (final rule adding § 100.94 and 100.155). This exemption will not protect workplace activity if that activity prevents the employee from completing the normal amount of work, increases the overhead of the workplace, or is performed under coercion. See 71 Fed. Reg. 18614 (revision § 114.9).

\(^{59}\) Ibid (final rule revising § 110.11).
In general bloggers and Internet activists were pleased with the final rule.\(^{60}\) What remains unclear is how new bloggers establish themselves as “press entities” engaged in a “press function,” so as to fall within the contours of the “press exemption.” This question rarely arises in the print or broadcasting world, because of the start-up costs involved in hiring, leasing, training, advertising, and so forth. However, a blog or other Internet site (even an elaborate one) can be brought on-line in a matter of minutes, anonymously. This “press” outlet would provide tempting to campaign activists, legitimate outside commentators who fear reprisal, and, more troublesome, dirty-tricksters. On the other hand, since online communications are less invasive that broadcast, print or even direct mail, last-minute tricks may prove ineffective. The problem, to the extent one believes it is a real problem, may prove to be minor or self-correcting.

Another issue left unresolved in the Commission’s regulations is the status of foreign nationals. Individuals (and entities) who are neither American citizens nor permanent resident aliens – may not make any contributions or expenditures in any American elections.\(^{61}\) Although the Commission’s Internet rulemaking excluded uncompensated Internet activities by individuals from being considered a “contribution” or “expenditure” those rules were debated entirely with corporations and labor organizations in mind. These exceptions would also not apply to activity by an entity other than an individual – communications by a foreign political party, for instance. Meanwhile, the Commission continues to interpret the foreign national prohibition broadly, to bar volunteer participation in any campaign decisions such as fundraising, spending, or strategy.\(^{62}\) Certainly, the law would prohibit U.S. political activity by a foreign national for compensation.

Although most lawsuits regarding foreign nationals and American elections have involved individuals within the United States, on the Internet such activity can take place anywhere. Recent precedent provides U.S. courts with jurisdiction over defendants in cases that “arise under federal law,” and where the putative defendant’s contacts with the nation as a whole (rather than with the state in which the court sits) are sufficient to hail him or her into U.S. court.\(^{63}\) Once the plaintiff makes this showing, it is up to the defendant to show that contacts with the United States are insufficient (as determined under a long and rather unclear line of U.S. personal jurisdiction decisions).\(^{64}\) When a


\(^{61}\) 2 U.S.C. § 441e.

\(^{62}\) FEC Advisory Opinion 2004-24 (stating that foreign national may volunteer, but may not make campaign decisions)


claim involves Internet activity, courts occasionally have found jurisdiction based on little more than the reach of a website into the United States. Courts may also find that plaintiff’s assertions about such activity are sufficient to subject the defendant to limited discovery, requiring the foreign party to produce evidence to demonstrate its contacts (virtual and terrestrial) with the United States.

A foreign national involved in expressly political commentary about American campaigns would seem vulnerable to U.S. jurisdiction, and in violation of U.S. law. An American plaintiff could state some type of legal claim upon which to recover, perhaps a personal tort, or via an FEC complaint or the private right to prosecute violations of campaign finance rules not pursued by the Federal Election Commission. The expense and inconvenience involved in challenging jurisdiction might prompt some foreign defendants to settle, and that precedent will discourage other Internet writers from engaging in similar commentary.

III. Regulation of Political Blogs in Germany

In contrast with U.S. law, German law regulates content rather than finance. While Germany is committed to freedom of expression, particularly as a component of deliberative democracy, German law strikes the balance between speech and other interests differently. German law protects personal reputation and dignity more vigorously, and is more ready to bar certain political communications altogether.

Article 5 of the German Basic Law protects free expression, but those rights “find their limits in the provisions of the general statutes, in statutory provisions for the protection of youth, and in the right to respect for personal honor.” The Federal Constitutional Court in Germany has held that Article 5 rights are subordinate to the rights to human dignity and the development of personality protected in Articles 1 and 2 of the Basic Law.

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65 Quokka Sports v. Cup Int’l Ltd, 99 F. Supp. 2d 1105, 1110 (N.D. Cal. 1999) (finding jurisdiction over a New Zealand defendant in a trademark infringement claim arising from domain name dispute, citing evidence that defendant targeted U.S. with “Americascup.com”). But see MGM Studios v. Grokster, 243 F. Supp. 2d 1073, 1087 (C.D. Cal 2003) (finding jurisdiction because foreign plaintiff, through providing offending software to 2 million Californians, had purposefully availed itself of California’s market and could be sued there); Graduate Management Admission Council v. Raju, 241 F. Supp. 2d 589 (E.D. Va 2003) (finding jurisdiction under Rule 4(k)(2) over Indian defendant whose infringing website contained a testimonial from a putative Virginia customer, infringing materials were delivered in Virginia, and website targeted ordering information to U.S. customers.)

66 See Mark Manby Ministries v. Lubet, Slip Op. 2007 WL 1004169 (E.D. Tenn. Mar. 30, 2007) (citing authority that merely posting information or advertisements on a Web site is not sufficient for personal jurisdiction, but email directed toward plaintiff was aimed at forum state, allowing evidentiary hearing.)


69 Tucholsky Case, BverfGE 93, 266 (1995) (“soldiers are murderers” case).
Compared with the U.S. regime, German constitutionalism permits personal dignity, honor and reputation to trump rights of free expression.\(^\text{71}\) German law also permits private individuals to enforce this right against other private parties.\(^\text{72}\)

The emphasis on personal honor and dignity has obvious implications for defamation, libel, parody and “tough” political commentary. Speech tolerated in the United States faces tougher standards in Germany.\(^\text{73}\) Under the German Criminal Code, defamation can be pursued as “Beleidigung” (an insult) made in a person’s presence, slander or “Ulbe Nachrede,” factual claims that harm a person’s reputation – the maker of the statement must prove the truth of it to avoid prosecution – or Verleumdung, (or malicious defamation).\(^\text{74}\)

Civil liability reaches further, protecting a person’s “personality right” by recognizing three zones. These zones are an “intimate zone” containing a person’s personal beliefs, health and intimate details; a “private zone” protecting private and family life, and an “individual zone” protecting image and self-determination, for example publishing a photo of another. If these zones are breached, claimants can demand compensation. Claimants may also obtain civil damages for violations of criminal defamation laws. Truth is a defense to slander, but not against “insult” or “intimate zone” claims, and in any event the burden rests on the defendant to prove the truth of his statement.\(^\text{75}\)

Accordingly, in an “intimate zone”-type claim, a German court found the German-language version of Wikipedia liable for publishing the real name of a deceased famous German hacker, against his family’s wishes.\(^\text{76}\) By contrast, if a U.S. individual’s personal information or photo becomes popular in the Web, as was the case recently with 18-year-old student athlete Allison Stokke, subjecting her to unwanted international attention, U.S. law provides little relief.\(^\text{77}\) When a public official is the target, German law is far readier than U.S. law to permit recovery for speech infringing on dignity or personality, such as critical editorial cartoons or parody.\(^\text{78}\)


\(^{72}\) Lutomski, *supra* note 69 at 576.

\(^{73}\) Krotoszynski *supra* note 71 at 1563-64 (U.S. protection of some sexually explicit material (citing *Hustler*) and fictional material critical of individuals (citing *Citizen Kane*) not shared in German law (citing *Mefisto*, 30 BVerfGE 173 (1971))).


\(^{75}\) *Id.* See also In re Dr. S, BverfG, 1 BvR 1696/98 NJW 2006, 207 (Oct. 25, 2005)(statements that claimant belonged to Ministry of State Security violated right of personality, defendant unable to prove truth since records had been destroyed).


\(^{78}\) Strauß Karikatur, BverfGE 75, 369 (1987); Lutomski, *supra* note 69 at 585-86 (discussing *Soraya* and *Strauss* recoveries). The ad hoc balancing used by German courts can lead to unpredictable results, such as
German laws also abolished certain political parties, and prohibited the use of propaganda and symbols associated with those parties. The law bars racist material, “hate” speech and Holocaust denial. The law applies to “domestic distribution” or “public use” of such material, and these terms have been broadly interpreted. Even password-protected material accessible to only particular individuals by computer are illegal. Banned images, symbols and propaganda on a foreign-based Internet site “would be prosecuted if the web site was retrieved in Germany” noted one author.

Such was the case in the German prosecution of Frederick Töben, who was sentenced to 10 months imprisonment for spreading Holocaust denial arguments from an Australian-based website.

If the author of this illegal speech stays out of German reach, German authorities are quite willing to enforce these laws on Internet service providers and hosts. In 2002, Düsseldorf’s District Government President has ordered ISPs in North Rhine-Westphalia to block user access to certain U.S. based neo-Nazi sites. In general, liability of hosts for content placed on the Internet by others is regulated by the EU E-Commerce directive, which has been incorporated into German law. Even so, German Länder have regulatory authority over media content, and some Länder are less permissive than others.

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the protection under Article 5(1) of Greenpeace’s billboard assailing specific chemical executives for their role in global warming. Id. at 587 (citing 1993 decision).

79 Grundgesetz art. 21(2); Section 86a Strafgesetzbuch (Criminal Code [StGB]); see Andreas Stegbauer, The Ban of Right-Wing Extremist Symbols according to Section 86a of the German Criminal Code, 8 Germ. L. J. 173 (2007).

80 Stegbauer, supra note 79 at 177. Holocaust denial is a violation of German Penal Code § 130 and 131. These restrictions are popular among Germans, see Giacomello, supra note 76 at 119, 131-32. Unpopularity with mainstream society makes the Internet an important tool for these groups, since people can participate anonymously, and circumvent social strictures, for low cost. See Andrew Chadwick, Internet Politics: States, Citizens and New Communication Technologies 138 (2006). So thwarting their Internet communications is seen as crucial for enforcing this law.

81 The ban on symbols extends to their use in material critical of, e.g., the Nazi party. See Von Antonia Gotsch, Vor Gericht Wegen Eines Anti-Nazi-Symbols, SPIEGEL ONLINE, March 23, 2006, at http://www.spiegel.de/unispiegel/wunderbar/0,1518,407112,00.html.

82 Stegbauer, supra note 79 at 181 (citing OLG Frankfurt am Main, NstZ 356 (1999)).

83 Id at 182.


85 Sperrungsverfügung, v. 06.02.2002 (“Blocking Order”). German Länder (states) have regulatory jurisdiction over media content through a series of inter-state treaties. The German Bund (federal government) regulates the means of distribution. See Eric T. Eberwine, Sound and Fury Signifying Nothing?: Jürgen Büßow’s Battle Against Hate Speech on the Internet, 1 N.Y.L. SCH. L. REV. 353 (2004). Consequently, bloggers face inconsistent regulatory postures depending upon the Länder is pursuing a matter.

For instance, the Regional Court of Hamburg held a moderator of an Internet forum responsible for content posted by others even though the moderator was not aware of the particular content. Düsseldorf’s Regional High Court, by contrast, has held that content provider liability will not apply to an online service that provides a “platform” for opinion, much as German television stations are insulated from liability for illegal speech occurring during a live debate. However, the identity of the source must be disclosed. If the participant is anonymous, then the provider should remove the content when it becomes aware of it, and take reasonable measures to prevent future violations.

These conflicting decisions leave content providers wary, since German prosecutors have in recent years shown willingness to pursue Internet speech prosecutions. That record is similarly uneven. When Yahoo! was prosecuted for offering copies of Mein Kampf on its auction sites, a German court concluded that it would not be liable for the content of auction items offered by individuals through Yahoo!. The conviction of the head of Compuserve’s German operations for distributing pornography was overturned on appeal, with the court concluding that Compuserve lacked technology that would block all offending material.

German disclosure laws facilitate suits against bona fide Internet authors. German Impressum laws require content providers to identify themselves. Web sites are included within this requirement, so even amateur sites and blogs exhibit an Impressum page listing the author’s name, address, and other identification information including a

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89 Oberlandesgericht (Düsseldorf) (1-15 U 21/05) (Unreported, June 7, 2006).
90 Jan Lyman, German Court Rules Yahoo! Not Liable, March 28, 2001, at http://www.newsfactor.com/perl/story/8500.html. Yet another cite was held liable for listings of “knock off” Rolex watches. See BGH (Urtv. 11 2004 – 1 ZR 304/01).
91 Felix Somm decision, Urteil des LG München vom 17. November 1999, see also JAE-YOUNG KIM, SORTING OUT Deregulation: Protecting Free Speech and Internet Access in the United States, Germany and Japan 117-18(2002) (describing effect on Compuserve decision on new German Telecommunications law); Giacommello, supra note 76 at 123-24 (describing controversy over sentence in Germany). If the Internet author is persistent and has access to the right resources, efforts to block German access to his Internet pages will be ineffective. After German ISPs closed off access to one offending site at authorities’ request, within hours over 50 mirror sites had reappeared. Kim, supra at 119.

92 Impressum Law, § 5 TMG & § 55 RstV, see also www.impressum-recht.de. Individuals registering at sites must be allowed anonymity, however. ¶ 4 TDDSG, (§ 13 Abs. 1 MstV sub.6). The Impressum law was revised as of March 1, 2007, but these revisions have been criticized as confusing and unclear. See Stephan Ott, Impressumspflicht für Webseiten neu geregelt!, TELEPOLIS, Feb. 26, 2007, at http://www.heise.de/r4/artikel/24/24689/1.html.
tax identification number. Anonymity, prized by American bloggers, is elusive for Germans.

Since German bloggers are easy to identify and serve with court papers, lawsuits against bloggers are an increasing problem. Bloggers who publish an individual’s full name or use photographs are vulnerable to infringement lawsuits. They have been targeted as well for content added by visitors. Bloggers have also been presented with cease-and-desist demands for posting inadequate information in an Impressum. One prominent German blogger, after being ordered to pay the attorney’s fees for a cease-and-desist order compelling him to remove from his site a scanned picture of another cease and desist letter, closed his Germany—based political blog and moved his site elsewhere.

Some examples involve politicians successfully cleansing the Web of critical content—political criticism that an American blog reader would find mild in comparison to that found on U.S. blogs. The press chamber of Landgericht Hamburg is reputed to be particularly restrictive, and is a choice forum for lawyers seeking to recover from bloggers and press.

To be sure, cease and desist letters are used in the United States to thwart undesirable Internet activity, but U.S. bloggers, encouraged by more lenient laws and a culture that celebrates resisting authority, can prevail. Outside of the DMCA “take down” context

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93 Noncommercial sites need not provide Impressum information unless the site is in the pursuit of trade. But this is a broadly construed standard, and if the site can be seen to serve any business purpose (by including banner ads, or by promoting the author’s career) it must contain an Impressum. Az. 2-06 0212/01 (Frankfurt/Main) (including banner ad required Impressum); LG Hamburg, Beschl. 01.03.2000, Az 315 0219/99 (holding that use of mark in domain name made site in “trade”); GERMAN AMERICAN LAW JOURNAL (American Ed. Dec. 18, 2004) at http://galj.info/2004/12/18#z1218taxnumbers.txt. Examples of Impressum pages are at http://www.mein-partieibuch.com/impressum (contact information for blogger Marcel Bartels); and at http://www.gomopa.net/o30/Impressum.html (Impressum for U.S.-based German investment site)

94 Abmahnung, a German blog that covers litigation against bloggers is at http://abmahnung.blogger.de/


99 One author has dedicated his own Web page to the rulings of this court and its judge, Andreas Buske. See www.buskeismus.de
aimed toward ISPs, U.S. law does not favor enjoining content, especially when the author would have willingly removed the content through informal contact.\textsuperscript{100}

Just as German regulation of speech differs from the U.S., so does the German regulation of campaign finance. In response to the suppression of political organizations during the Nazi regime, Germany’s Basic Law sets aside a special place in politics for German political parties.\textsuperscript{101} In contrast with American candidate-centered campaigns, German parties essentially run and finance political activity.\textsuperscript{102}

German law permits corporations and labor unions to donate and spend money in elections. With the passage of the Party Law in 1967, parties were required to report the identity of large donors (20,000 DM from 1967 to 1988; 40,000 DM to 1992, the 20,000 DM).\textsuperscript{103} With the conversion to the Euro, the reporting threshold is now €10,000.\textsuperscript{104} Mandatory disclosure was a controversial element in the 1967 Political Parties Act, with one prominent party leader commenting that no donor would be “so crazy” as to allow publication of his name, as that could lead to a loss of business from clientele of the other party.\textsuperscript{105} (By contrast, donor identification has been a relatively noncontroversial item in American campaign finance reform.)

In 1983, parties were also required to report expenditures. In 1994 contributions from foreigners in Germany, straw donors, and anonymous donors were capped, and today parties can take €1000 from aliens outside the EU (EU-source contributions are treated as domestic), and €500 from anonymous donors and donors making contributions from other people’s funds (called in US law a contribution “in the name of another”).\textsuperscript{106}

\textsuperscript{100} See cease and desist letter posted at wasweissich.twoday.net/stories/174827 (Transparency International ordering blogger to remove post about friend’s employment experience at this NGO). The irony of a “transparency” group proceeding this way was not lost on many Germans, and the reaction from bloggers was, predictably, very critical. See id (comments); larko.wordpress.com/2006/03/26/transparency-the-german-way.

\textsuperscript{101} “The parties shall participate in the forming of the political will of the people.” Art. 21 para. 1. By contrast parties are mentioned nowhere in the U.S. Constitution, and many of the Founders were skeptical (or hostile) to party activity. See Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 HARV. L. REV. 2311, 2320-21 (2006); Gerald Leonard, The Invention of Party Politics 26-28 (2002).

\textsuperscript{102} Peter Lösche, Problems of Party and Campaign Financing in Germany and the United States – Some Comparative Reflections, in ARTHUR B. GUNDLICKS, ED., CAMPAIGN AND PARTY FINANCE IN NORTH AMERICA AND WESTERN EUROPE 221 (2000).

\textsuperscript{103} 40,000 DM is roughly $27,700. In April 1992, the Federal Constitutional Court held that the itemization threshold of 40,000 DM was too high, and reverted to 20,000 DM. Aktenzeichen BvE 2/89.

\textsuperscript{104} § 25(3) Law of Political Parties. €10,000 is roughly $13,540. Also, contributions of € 50,000 or more must be reported immediately to the Bundestag. Id. These reporting requirements do not apply to contributions to party foundations, which work closely on party agendas but are prohibited from transferring funds to parties. See Michael Pinto-Duschinsky, The Party Foundations and Political Finance in Germany, in F. LESLIE SEIDLE, ED., COMPARATIVE ISSUES IN PARTY AND ELECTION FINANCE (1991).


\textsuperscript{106} Art. 25: §§ 2(3)(c) and 2(6); see also Arthur B. Gunlicks, Campaign and Party Finance in the West German “Party State”, 50 REVIEW OF POLITICS 30, 43 (1988).
German parties also collect sizable public subsidies.\textsuperscript{107} Individual contributors can deduct up to € 3,000 in political contributions annually from their taxes.\textsuperscript{108} The Basic Law dictates that parties must remain “private” and thus a party’s public subsidy cannot exceed the total private funds raised by the party.

For our purposes, the important element of German law is the absence of limits on amount or source of contributions for most donors. Even if blogging or other Internet communications are viewed as contributions on behalf of a party, it is difficult to imagine those expenditures exceed the € 10,000 itemization threshold, or even the relatively generous limits (€1,000 and €500) applicable to foreign and anonymous donors.

Likely because of the absence of limits and the high reporting thresholds, there has been less interest in Germany in regulating independent expenditures. Germany has no rule limiting such expenditures or requiring reporting. Given this, individuals (including groups) and foreign bloggers may equally distribute their views about politics – subject to German strictures on content.

As noted previously, German courts will exercise jurisdiction over Internet speech, even when the speaker is outside Germany. The Federal Court of Justice concluded that a Holocaust-denier’s statements on an Australian webpage were subject to German criminal laws.\textsuperscript{109} The Court stated that the “place of offense” in this case was within Germany, because Germany was the place where the acts “showed effects” or were intended to effect.\textsuperscript{110} The German Railroad also successfully prevailed on Dutch courts to disable a Dutch website that published German rail schedules, assisting protesters to sabotage the trains.\textsuperscript{111} The Dutch court concluded that the material was illegal in relation to the railroad, so the Dutch ISP was obligated to make it inaccessible. Nevertheless, several prominent bloggers on German issues have avoided litigation by moving their blogs to non-German hosts.\textsuperscript{112} Still other German bloggers appear to be willing to withstand the legal landscape, and remain active in Germany.\textsuperscript{113}

\section*{IV. Regulation of Political Blogs under ECHR Rulings and Article 10}

The Convention for the Protection of Human Rights and Fundamental Freedoms, to which Germany (as a member of the Council of Europe) is a signatory, protects the “freedom of expression” Under Article 10, “everyone has the right to freedom of

\begin{itemize}
\item \textsuperscript{108} § 10b(2) § 34g s. 2 (German Income Tax Act).
\item \textsuperscript{110} \textit{Id.} (citing § 9 StGB “Place of Offense”).
\item \textsuperscript{111} Deutsche Bahn AG v. XS4ALL Holding B.V. No. KG 02/790 OdC, Amsterdam Dist. Ct., Ap. 25, 2002
\item \textsuperscript{112} Email from Marcel Bartels to author, May 22, 2007 (“after getting too many cease and desist letters, I decided to close my blog in Germany, leave the country virtually and escape in anonymity . . .”); email from Larko to author, May 21, 2007 (blogs in several languages in several countries, none of them German).
\item \textsuperscript{113} See RA-Blog,, \url{www.ra-blog.de} (German politics and law blog authored by German attorney).
\end{itemize}
expression” but this freedom is subject to laws “necessary in a democratic society” such as those protecting national security, territorial integrity, public safety, those necessary for crime prevention, protection of health or morals, reputation, confidentiality, and for maintaining the impartiality of the judiciary.114

The European Court of Human Rights (“ECHR”) hears challenges to state action that infringe on the rights protected in the Convention. The Court will defer to domestic judgment about the necessity or appropriateness of infringement of an individual right under the “margin of appreciation” doctrine. Briefly, the Convention vests Contracting States with the primary responsibility to ensure rights, subject to subsidiary review by the ECHR to ensure that states properly exercise power within the limits of the Convention.115 Rhetorically, the Court claims a narrower margin of appreciation in freedom of expression cases, especially involving political criticism.116

Yet the Court’s rulings in specific cases can defer to state regulation of expression. In support of domestic speech regulation, the ECHR has ruled that extreme racist speech is not protected by Article 10, and has upheld German law to that end.117 This court has also upheld a member state’s efforts to prohibit “defamatory libel” but has cautioned that such laws must be proportional. The ECHR has, meanwhile, noted that comments about public figures should be regulated less than comments about private figures.118 Furthermore, the ECHR has ruled against contracting states in a number of cases where officials brought defamation charges to silence critics.119

The Convention, as interpreted, has also prevented contracting States from imposing limits on campaign activity by third parties. In Bowman v. UK, the ECHR held by a 14-6 vote that Article 10 would not permit Britain to limit to £ 5 independent (“unauthorized”) expenditures during the election period.120 The majority concluded that the distribution of truthful information about candidates were of public interest, and the low limit was

116 Id at 723-24.
117 Kuhnen v. Germany, 56 D.R. 205
118 Lingens v. Austria, 8 EHRR 407; Oborschlick v. Austria, 25 EHRR 357. Under the Convention, states also retain the power to prohibit blasphemy. Written Question E-2204/02 by Marco Cappato, OJ 052E, at 144 (Ap. 17, 2003) (deferring to Italian police blocking U.S. based Internet sites for blasphemy, under Art. 10 and Art. 33 of the Treaty of the European Union).
119 See e.g. Short Survey of Cases Examined by the Court in 2005, at 33, at http://www.echr.coe.int/NR/rdonlyres/C8B96BB2-45AF-49DF-9738-75D517EA5D0/0/2005analysisofcaselaw.pdf (“As in past years, a considerable proportion of the judgments dealing with freedom of expression related to defamation, and in particular defamation of public officials.”) See also Council of Europe, Steering Committee on the Media and New Communication Services, Reply to the Committee of Ministers on the Alignment of Laws on Defamation with the Relevant Case-law of the European Court of Human Rights, CDMC (2006) 028, Feb. 7, 2007.
120 Bowman v. United Kingdom, 26 EHRR 1 (1998). Britain has since amended its law to allow independent expenditures of up to £ 500. This law had not been reviewed by the ECHR. See Wayne Batchis, Reconciling Campaign Finance Reform with the First Amendment: Looking Both Inside and Outside America’s Borders, 25 QLR 27, 70 (2006).
“disproportionate to the legitimate aim pursued and cannot be regarded as ‘necessary in a
democratic society’ for the protection of the rights of others.”

The ECHR has also looked skeptically at member states’ attempts to bar political
advertising from broadcast media. While the Court recognizes a margin of appreciation,
it has required Contracting States to justify such a ban. The Court concluded in one
prominent case that the Swiss government has not stated sufficient reasons for barring a
“political” television ad designed to convince people to eat less meat.122 In other contexts
the ECHR has opposed what it calls “undue” restrictions on political parties.123 If party
issues are raised in the EU context, the Treaty of Rome seems similarly protective of
political parties.124

To the extent the Council of Europe would tolerate additional regulation of Internet
activity, the focus would be on illegal activities like fraud, pornography, and gambling,
and content that in the European view is not entitled to protection, such as racist and
xenophobic content. The European Economic and Social Committee’s Safer Internet
Plan reflects these priorities.125 The EU’s position in the Internet and democracy is
generally liberal, endorsing an international regulatory framework to protect freedom of
expression, especially “with countries whose people live under authoritarian and
repressive regimes.”126 Yet, Europeans have generally tolerated private cease and desist
letters. European ISPs will respond to cease and desist requests by removing the
offending site, often without any independent consideration of the complaint’s merits.127

The ECHR’s jurisdiction, and its reach to speakers outside the Contracting States, derives
from the exercise of jurisdiction by those member states. The ECHR may hear matters
once domestic remedies have been exhausted, and within 6 months of any final

121 Id. at 13.
122 Vgg Verein gegen Tierfabriken v. Switzerland, 34 EHRR 157, 177 (2002). Yet British Courts have
concluded that Article 10 would allow a member state to bar political ads (including issue advertising) from
broadcasting media. Animal Defenders v. Secretary, 2006 EMLR 6, 186 (“a contracting state may normally
be expected to have a better or surer grasp of its democratic needs and their practicalities than the
Strasbourg Court or its own courts.”)
Nov. 2003). Political parties at the European level must itemize donors of €500 ion annual reports, and
may not accept anonymous contributions, funds from the budget of political groups in the European
Parliament, funds from undertakings controlled by public authorities, and are limited to contributions from
natural or legal persons of €12,000 a year. European political parties may accept funds from member
political parties, but these cannot exceed 40% of the recipient’s annual budget. Id. Art. 6.
125 See Providers are Called on to do More Against “Hate Pages” On the Web, at
www.heise.de/english/newsticker.news/88577; Opinion of the European Economic and Social Committee
on the Proposal for a Decision of the European Parliament and of the Council on Establishing a
Multiannual Community Programme on Promoting Safer use of the Internet and New Online Technologies,
OJ 2005 C157/136 (June 28, 2005); see also Resolution on the Commission communication on illegal and
harmful content on the Internet, O.J. 1997 C150/38.
126 Resolution on the Information Society, the Management of the Internet, and Democracy, OJ 1998
C210/327.
127 See John Naughton, Can’t Censor the Internet? Tell that to Your Compliant ISP, THE
Any person, entity or group suffering injury by a contracting state by its violation of the Convention may bring an application for review to the ECHR. If for instance, an American has been fined for violations of German law, which he believes are contrary to the Convention, he could bring a complaint notwithstanding the fact that the United States is not a party to the Convention. But that American’s status as an alien may decrease his odds for success. Under Article 16 of the Convention, nothing in Article 10 “shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.”

The ECHR has not, as of this writing, ruled on such a challenge. No cases demonstrate how the ECHR would proceed in a case where an American blogger faced German charges for violating a German public figure’s “intimate zone,” for engaging in defamation or for using prohibited political images – the scenarios that (given the tone of some U.S. blogging) would seem most likely to provoke litigation. Nor has any German blogger challenged a German holding in an application before the ECHR. Theoretically, Article 10 provides some means for aggrieved bloggers to resist domestic regulation, but whether that theory translates into a workable defense remains to be seen.

One decision suggests that the trans-European courts would extend a margin of appreciation to national determinations on these questions. In 2003, the European Court of Justice considered criminal proceedings against Bodil Lindqvist, a Swedish church volunteer. In 1998, Lindqvist published a Web page from her home computer to assist parishioners with confirmation, and included on that page personal information about fellow parishioners, including some full names, jobs, hobbies, family anecdotes, and, in one case, the fact a colleague had injured her foot and been placed on half-time leave. When the individuals objected, she removed the references from the page. Nevertheless, the public prosecutor charged her with violating the Swedish law (which implements EU law) protecting personal data, by failing to report the “processing” of personal data to the Swedish government (including “health data” -- the foot injury), and by transferring the data to third countries without authority. Lindqvist was fined SEK 4,000.

On appeal, the Swedish court referred to the European Court of Justice the question whether her prosecution properly stated a violation of relevant directives, and whether prosecution comported with “free expression.” The Court concluded that her activity did fall within the directive regulating processing personal data on the Internet, but her merely posting the information on a web page was not the “transfer” of data “to a third

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129 Convention. art. 34
130 Convention, art. 16.
133 Lindqvist ¶ 15 (Lundqvist charged with violating SFS 1998:204, the Swedish law on personal data implementing Directive 95/46)
134 Id. ¶ 17, worth about € 430 or $576.
135 Id. ¶ 18.
country". This decision may just reflect ECJ deference to the Swedish reading of the law. Yet, the data directive was meant to provide uniform data transfer guidelines within the EU, so one might expect uniform application of the directive in subsequent cases from other nations. Despite the conclusion of one author that the case imposes a “monumental bureaucratic disaster” not intended by the declaration’s drafters, European bloggers may be vulnerable whenever their posts reveal names and personal information about other private individuals.

V. Conclusion

Political Internet activity is of growing importance worldwide. Blogs in particular have demonstrated skill at fact-checking other media, as well as providing an outlet for opinion and a forum for debate and organization. Since a website is inexpensive and potentially limitless in reach, this mode provides a method for individuals and small groups to participate alongside more sophisticated speakers. But with these benefits come costs in the form of inaccurate information, offensive expression, or infringing content.

U.S. and German law impose disparate burdens on political blogging. As we have seen, U.S. campaign finance restrictions and statutory attempts to limit ISP liability for copyright infringing content impose some limits on certain political blogging. German burdens arise from strict domestic laws regarding prohibited content and defamation, and the Impressum law requiring identification of bloggers. The potential for EU and ECHR judicial intervention adds risk and uncertainty to the situation. While generally these bodies are more permissive regarding content than German domestic authorities, and less regulatory of campaign activity than (potentially) U.S. authorities, their occasional deference to domestic law in these areas makes this influence hard to gauge.

Both regimes could improve their own regulations by offering greater protection for blogging about political and social issues. In Germany, public officials should not be able to silence political critics through use of defamation-type laws. Nor should bloggers who enable comments on their sites be found liable for material posted by visitors. Bloggers who are primarily political (not commercial) should not be required to list Impressum information; instead perhaps their registration information could be kept with the ISP for law enforcement purposes, if such is ever necessary. These observations presuppose a national standard for regulating such activity, which would require German Lander to agree among themselves on the scope of restrictions.

In the U.S., commentary (especially parody) should not be actionable as copyright infringement, which would reduce the apparent fear pliable ISPs now assert when confronted with “take down” requests. Moreover, the present FEC commitment to robust political speech on the Internet should be guaranteed in US statutes. As of now, these rules could become more restrictive if the consensus on the Commission changes.

136 Id. see holdings 2,3 & 4.
Even were these changes made, what distinctions remain between German and U.S. law can still catch bloggers in crossfire. American bloggers engaged in Nazi-related commentary are not within the heartland of political speakers, thankfully, but mainstream speakers could be vulnerable to German enforcement efforts if they use Nazi symbolism to make other points about politics—especially if that content is offered in German or appeared intended for Germans. This is not an intuitive consequence most Americans anticipate. U.S. bloggers (and campaigning candidates) are accustomed to writing harsh statements about public officials—more harsh than the German content cited here, so an American blogger (to his surprise) could violate German law by writing things Americans find typical of the medium.

German activists might feel strongly enough about American war or environmental policy to direct political campaign commentary via the Internet toward Americans. Alternatively, given how unpopular many U.S. policies are with German voters, a German party or politician might engage in this type of activity to enhance his or her domestic popularity, directing commentary to the U.S. to demonstrate credibility and commitment. Neither possibility seems far-fetched. Such efforts could run afoul of U.S. law prohibiting political expenditures by foreign nationals. U.S. prosecutors might take little notice—unless these efforts were broad and their costs underwritten by a political party, or a prominent activist with a record of American campaign activity (akin to international financier George Soros). Again, because Germany does not limit expenditures categorically as U.S. law does, that potential would likely never occur to a German.


139 An estimated 75% of the European Union is fluent in English. Given the broad comprehension of English throughout Europe, prosecutors could argue that translation into German is not necessary to find that a blogger intended to reach a German audience. Cf. Stegbauer, supra note 79 at 182.


141 See Global Views of the U.S.: European Backgrounder (Pipa/Globescan 2007) at http://www.worldpublicopinion.org/pipa/pdf/jan07/BBC_U.S.Role_Jan07_bgeurope.pdf (“German views of U.S. influence have worsened significantly over the last year, with negative attitudes increasing from 65 to 74 percent.”)

142 Soros was the top individual donor to so-called “527s” in the U.S. in 2004, with $23,450,000 in total contributions to these groups. 527s are a form of political organization that avoids many of the campaign finance restrictions otherwise applied to U.S. political committees. (Soros contributed an additional $3,542,500 to 527s in 2006).

Civil liability is a matter of administrative discretion, but that process can commence with little more than a signed and sworn assertion that the law has been broken, in a complaint filed at the FEC by anyone (not just persons aggrieved by the conduct). See 2 U.S.C. § 437g(a)(1).
It seems unlikely that U.S. and German speech laws will ever become uniform. The history, heritage and culture of the two nations are just different. Viewing German law as an American, one might wonder whether its restrictions on Nazi-related speech need to persist almost 70 years after the rise of Hitler. Yet neo-Nazi activity remains a public concern in Germany, and these laws are popular with most Germans, so perhaps justifications remain. Liability for personal criticism of public individuals would seem like another legal burden a healthy, vibrant democracy could abandon. Yet German culture has seen personal dignity and honor as a human right in ways modern American political speech rulings do not. One would be hard pressed to envision a situation where an appeal by the U.S. to Germans to abandon these principles would be successful.

Domestic prosecutors in Germany or U.S. might exercise restraint voluntarily. But such restrain lasts only so long as politics permit it, and the hypotheticals offered here would seem particularly provocative. If Americans do not care whether U.S. sites with prohibited content can be prosecuted under German law, or Germans do not care that domestic activists could be held to U.S. campaign finance rules, then each should state that explicitly.

An alternative in this context may be an international agreement regarding Internet communications. Within that agreement, national government should settle where the political speech protection line should be drawn. One standard could exclude noncommercial Web activity from most regulation, yet permits governments some latitude to filter offensive material as domestic sensibilities require. The scope of that latitude should be explicit in the agreement, so signing parties would not see this as permitting the right to filter as dictated by whim or political expediency. An international body could hear disputes regarding overreaching.143

This solution has its limits—it would only address disputes among signatories, and enforcement of any adverse decisions remains complicated so long as signatories (among them the U.S.) resist international encroachments on sovereignty. Moreover, as discussed, filtering burdens the middleman, censors more speech than is necessary, and can be circumvented by sophisticated parties.

The promise of a solution that accommodates national differences yet protects express in areas where it is permitted, remains elusive. Barring this, bloggers can hope that their sympathetic status as public-spirited citizen journalists discourages prosecutors or bureaucrats from imposing conflicting and inconsistent laws.