

# REGULATION OF BLOG CAMPAIGN ADVOCACY ON THE INTERNET: COMPARING U.S., GERMAN, AND EU APPROACHES

*Allison R. Hayward\**

## ABSTRACT

This essay examines how U.S., German, and EU laws have treated the regulation of political commentary on the Internet. As political blogging grows in popularity, the reach of these web 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

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\* Assistant Professor of Law, George Mason University School of Law. I thank Prof. Hans-Bernd Schaefer and 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 her thoughtful comments.

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, 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-ensured 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 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 jurisdictional and international law conundrum.

At present, countries have at least three strategies for applying domestic law to foreign Internet communications. First, governments may pursue the foreign speaker, “going after” offenders outside the country who have assets, a business, or some personal presence within the country.<sup>1</sup> They may also thwart communications midstream by targeting the service providers, browsers, networks, and financial supporters who make up the domestic end of the network. Finally, they may use filtering technology to censor material or block access to servers and sites with unlawful content.<sup>2</sup>

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 also suppress lawful speech. Moreover, they are

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<sup>1</sup> 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*, 169 F. Supp. 2d 1181 (D. Cal. 2001); *Dow Jones & Co. v. Gutnick* (2002) 210 C.L.R. 575 (dismissing Dow Jones appeal with costs, concluding defamation occurred where Internet-published article was downloaded).

<sup>2</sup> 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).

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 have 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 non-native English speakers.<sup>3</sup> Similarly, U.S. laissez faire policies regarding access and content have been pre-eminent, but may not persist indefinitely.

Similarly, blogging is not solely—or even primarily—an American activity. Japanese is the language of 37 percent of the posts monitored by Technorati, followed by English at 36 percent, and Chinese at 8 percent. German and Farsi (a fast-growing online language) were each 1% of posts.<sup>4</sup>

Political blogging enjoyed a boost in Europe in 2005. French media, which favored the proposed the European Constitution, largely ignored popular French opposition to that (failed) referendum, a sentiment better reflected by bloggers.<sup>5</sup> German political

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<sup>3</sup> *Id.* at 51. 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, <http://www.Internetworldstats.com/stats7.htm> (last visited Mar. 10, 2008). The U.S. also remains the home to 50 routers, while Europe has 25, and Asia has 7. Internet Traffic Report, <http://www.internettrafficreport.com> (last visited March 11, 2008). Proximity to routers affects the quality and availability of Internet services. See GOLDSMITH & WU, *supra* note 2, at 54-55.

<sup>4</sup> In its most recent report, Technorati tracked over 70 million blogs with a volume of 1.4 million posts per day. See David Sifry, *The State of the Live Web*, April 2007, <http://technorati.com/weblog/2007/04/328.html> (last visited Mar. 11, 2008).

<sup>5</sup> Jonathan Eyal, *Election a Test of Internet's Influence*, STRAITS TIMES (Singapore), Apr. 21, 2007 (“... an army of opponents dominated the Internet debate and, to everyone's astonishment, they won the argument.”). Bloggers remained active in the April 2007 French election. Martin Walker, *France's Cyber-Election*, UNITED PRESS INTERNATIONAL,

blogs also emerged during the 2005 election campaign.<sup>6</sup> Presently there are a number of independent German political blogs,<sup>7</sup> office-holder blogs,<sup>8</sup> and sites for German political parties.<sup>9</sup> Blogs in both the United States and Germany 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” President George Bush’s failure to comply with requirements when he was enlisted in the National Guard.<sup>10</sup> One of Germany’s most popular blogs is *BildBlog*, dedicated to fact-checking the *Bild* newspaper.<sup>11</sup>

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. Bloggers elsewhere may not always enjoy U.S.-managed Internet communications under liberal U.S. content regulations forever.<sup>12</sup> Those who desire to keep apprised of Internet regulation need to watch not only domestic lawmakers but developments in other countries as well.

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Apr. 11, 2007, available at [http://www.upi.com/International\\_Intelligence/Analysis/2007/04/10/walkers\\_world\\_frances\\_cyberelection](http://www.upi.com/International_Intelligence/Analysis/2007/04/10/walkers_world_frances_cyberelection).

<sup>6</sup> Sean Sinico, *Blogs Making Baby Steps in German Politics*, Feb. 9, 2005, <http://www.dw-world.de/dw/article/0,1564,1698221,00.html> (last visited Mar. 11, 2008); Weblogs in the German Election Campaign 2005, [http://www.tuhh.de/tbg/Deutsch/Projekte/Weblogs/index\\_en.html](http://www.tuhh.de/tbg/Deutsch/Projekte/Weblogs/index_en.html) (last visited Mar. 11, 2008).

<sup>7</sup> See KDAS’s Political Blog, <http://political-blog.kdas.de> (last visited March 11, 2008); Law Blog, <http://www.lawblog.de> (last visited Mar. 11, 2008); RA-Blog, <http://www.ra-blog.de> (last visited Mar. 11, 2008); Mein Parteibuch, <http://www.mein-parteibuch.com> (last visited Mar. 11, 2008); Politblog, <http://politblog.net> (last visited Mar. 11, 2008); Karl Weiss, <http://karlweiss.twoday.net> (last visited Mar. 11, 2008).

<sup>8</sup> See <http://www.bundeskanzlerin.de/Webs/BK/DE/Homepage/home.html> (Merkel Web page, complete with video podcasts) (last visited Mar. 11, 2008).

<sup>9</sup> See [www.cdu.de](http://www.cdu.de); [www.csu.de](http://www.csu.de); [www.gruene.de](http://www.gruene.de) (German political party sites).

<sup>10</sup> For one of the key posts, see Power Line: The Sixty-first Minute, <http://www.powerlineblog.com/archives/007760.php> (last visited on Mar. 11, 2008). More recently, work by U.S. bloggers led a prominent newsmagazine to retract a series of article about the activities of military in Iraq. See <http://www.captainsquartersblog.com/mt/archives/016178.php>.

<sup>11</sup> BILDblog, <http://www.bildblog.de/>; see also *Germany’s Press: Checkpoint Rudi*, THE ECONOMIST, Jan. 27, 2007, at 37.

<sup>12</sup> For some insight into the “good old days” of decentralized engineer-run Internet, see GOLDSMITH & WU, *supra* note 2, at 13-46 (relating how Jon Postel moved the root server, prompting the United States to assume authority over root).

## 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,<sup>13</sup> and much is made of campus “speech codes” that attempt to restrict prejudiced, unpleasant, or socially disturbing speech,<sup>14</sup> in the realm of political opinion (which does not contain obscenity or classified information) few restrictions are placed on the content of speech.<sup>15</sup>

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),<sup>16</sup> in *Reno v. American Civil Liberties Union*,<sup>17</sup> 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.’”<sup>18</sup>

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.<sup>19</sup> 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

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<sup>13</sup> For a chart detailing which American states have hate crime or bias crime laws, see ADL: Anti-Defamation League, [http://www.adl.org/99hatecrime/state\\_hate\\_crime\\_laws.pdf](http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf) (last visited Mar. 11, 2008).

<sup>14</sup> See *Doe v. Univ. of Michigan*, 721 F. Supp 852 (E.D. Mich. 1989).

<sup>15</sup> 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).

<sup>16</sup> Communications Decency Act, 47 U.S.C. § 223(a) (2007).

<sup>17</sup> *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>18</sup> *Id.* at 854.

<sup>19</sup> Content that is merely vulgar or offensive can be regulated on the radio because in that context children more easily might be exposed to the material. See *FCC v. Pacifica Found.*, 438 U.S. 726, 744-48 (1978). Other justifications for speech regulation of broadcast media include the legacy of governmental regulation, *Red Lion Broad. v. FCC*, 395 U.S. 367, 399-400 (1969); the scarcity of spectrum, *Turner Broad. v. FCC*, 512 U.S. 622, 637-38 (1994); and broadcasting’s invasive character, *Sable Commc’n. v. FCC*, 492 U.S. 115, 128 (1989). None of these rationales apply to Internet communications.

the CDA, the Child Online Protection Act (COPA), was also recently found unconstitutional at the trial court level.<sup>20</sup>

The CDA also contained a provision that protected Internet Service Providers (ISPs) from liability for material posted on 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."<sup>21</sup> Accordingly, when plaintiffs have sued ISPs, such as 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.<sup>22</sup> This statute has also protected other types of intermediaries, such as search engines, online matchmaking services, online stores, and sites hosting message boards.<sup>23</sup> 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 or the subscriber's consent.<sup>24</sup> 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 he had otherwise stated a *prima facie* defamation claim.<sup>25</sup> This standard is higher than the standard for going forward ordinarily, where the

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<sup>20</sup> *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007).

<sup>21</sup> 47 U.S.C. § 230(c)(1) (2007). 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 *Stratton Oakmont v. Prodigy*, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

<sup>22</sup> See *Ben Ezra, Weinstein & Co. v. AOL*, 206 F.3d 980 (10th Cir. 2000); *Zeran v. AOL*, 129 F.3d 327 (4th Cir. 1997).

<sup>23</sup> *Parker v. Google*, 422 F. Supp. 2d 492, 500-01 (E.D. Pa. 2006) (search engine); *Carafano v. Metrosplash.com*, 207 F. Supp. 2d 1055, 1065-66 (C.D. Cal. 2002) (online dating service); *Schneider v. Amazon.com*, 108 Wash. App. 454 (2001) (retailer); *DiMeo v. Max*, 433 F. Supp. 2d 523 (E.D. Pa. 2006) (message boards).

<sup>24</sup> *Polito v. AOL Time Warner*, 78 Pa. D. & C.4th 328 (2004); *Doe v. 2themart.com*, 140 F. Supp. 2d 1088 (2001). For an extended treatment of anonymity and speech issues, see Lyrissa Lidsky & Thomas Cotter, *Authorship, Audience and Anonymous Speech*, 82 *NOTRE DAME L. REV.* 1537 (2007).

<sup>25</sup> *Doe v. Cahill*, 884 A.2d 451 (2005).

plaintiff need only show that he has stated a cognizable claim.<sup>26</sup> 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.”<sup>27</sup>

ISPs may be required to provide records or subscriber information if subpoenaed by the Federal Bureau of Investigation.<sup>28</sup> The original version of this law provided no pre-enforcement judicial review of the subpoena, and a federal district court found it unconstitutional.<sup>29</sup> During that litigation, Congress revised the statute and allowed recipients of a subpoena to challenge the administrative orders in court,<sup>30</sup> rendering moot the legal issue in the case.<sup>31</sup>

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.<sup>32</sup> 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.<sup>33</sup>

American law encourages this ISP reaction, in part by providing immunity from copyright liability if ISPs promptly take down

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<sup>26</sup> Compare FED. R. CIV. P. 12(b)(6) (motion to dismiss) with FED. R. CIV. P. 56 (summary judgment).

<sup>27</sup> *Cahill*, 884 A.2d at 456 (quoting *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995)). But see *Fitch v. Doe*, 869 A.2d 722 (Me. 2005) (approving identification of anonymous e-mailer in civil discovery, noting defendant never raised First Amendment claim).

<sup>28</sup> See 18 U.S.C. § 2709 (2007). The administrative subpoenas are called National Security Letters.

<sup>29</sup> *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004).

<sup>30</sup> See USA Patriot Improvement and Reauthorization Act of 2005, 18 U.S.C. § 3511(a) (2007).

<sup>31</sup> *Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006).

<sup>32</sup> A website devoted to such letters is maintained by several prominent U.S. law schools and can be found at <http://www.chillingeffects.org/index.cgi>.

<sup>33</sup> See *blogjam dot com, Cease and Desist*, Oct. 17, 2004, <http://www.blogjam.com/2004/10/17/cease-and-desist> (last visited Mar. 11, 2008) (relating to parody site “Don’t Ask Jeeves”); *Media Matters For America, ABC Shut Down Blogger Who Criticized Violent Rhetoric on one of its Radio Stations*, Jan. 9, 2007, <http://mediamatters.org/items/200701090004> (last visited Mar. 11, 2008) (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. 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* 35 (Brennan Center for Justice, NYU School of Law 2007).

allegedly infringing content.<sup>34</sup> 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.<sup>35</sup> This specific argument was unsuccessful. A court ruled that Diebold misrepresented its claimed 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 intellectual property infringement claim.

Some cease-and-desist attempts are clearly political or ideological in nature—sent by politicians to bloggers asking them to remove undesirable material. For example, attorneys representing Democratic National Committee Chair Howard Dean sent a cease-and-desist letter to the blog *FreeRepublic*, demanding they remove a post asserting (falsely, they insisted) that Dean asked the Governor of Kansas to “politicize” a fatal Kansas tornado.<sup>36</sup> Political parodists are especially vulnerable to “takedown” requests since they may use elements of the party’s own materials in the parody.<sup>37</sup> Yet when U.S. bloggers (who have a more direct interest in their work than the ISP) fight these demands, they often prevail.<sup>38</sup>

In general, bloggers can post broadly under U.S. law, with few restrictions on what they can say, and remain insulated from liabil-

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<sup>34</sup> 17 U.S.C. § 512 (2007). It is not clear that absent section 512, ISPs would be liable in any case. See *QUILTER & HEINS, supra* note 33, at 10, n.22

<sup>35</sup> See *Online Policy Group v. Diebold*, 337 F. Supp. 2d 1195, 1198 (N.D. Cal. 2004).

<sup>36</sup> See *Bloggers v. Beltway II: So Sue Us*, The Hotline, May 14, 2007, <http://hotlineblog.nationaljournal.com/archives/2007/05/> (last visited Mar. 11, 2008); John Byrne, *Democrats Send Cease and Desist Demand to Conservative Website and XM Radio over Alleged Dean Remarks*, RAW STORY, May 11, 2007, available at <http://www.rawstory.com/archives.php> (last visited Mar. 11, 2008). As of this writing, FreeRepublic had not removed the information.

<sup>37</sup> See Justinisomnia, *My First Cease-and-Desist Letter*, Mar. 2, 2006, <http://justinisomnia.org/2006/03/my-first-cess-and-desist-letter> (last visited Mar. 11, 2008). This matter involved a blogger’s parody of a billboard sponsored by a gay-intervention group. The blogger resisted the demands, and eventually the matter was dropped. See Justinisomnia, *Justin on TV, In the Papers*, Mar. 24, 2006, <http://justinisomnia.org/2006/03/justin-on-tv-in-the-papers> (last visited Mar. 11, 2008).

<sup>38</sup> Rather than litigating, bloggers may discourage litigation by publicizing the cease and desist letter, creating adverse publicity for the issuer. One attorney, in response, argued that the letter itself was subject to copyright. A blog post detailing this exchange is available at <http://randazza.wordpress.com/2008/01/27/copyright-vs-free-speech-in-cess-and-desist-letters/>; see also <http://www.dvorak.org/blog/?p=16148>.

ity for the unlawful statements made by visitors who comment. Moreover, U.S. law does not require a blogger to disclose his identity on his 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.<sup>39</sup> Because the Internet author and the Internet reader can both be difficult to identify and reach, regulation depends upon ISPs and other intermediaries for assistance.<sup>40</sup>

U.S. campaign finance laws may also 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 financially participating in campaigns.<sup>41</sup> The chief *prohibited* sources are corporations, labor unions, and foreign nationals.<sup>42</sup> For others, the law imposes limits on the sums that can be spent in coordination with a candidate or party,<sup>43</sup> limits on direct contributions of money,<sup>44</sup> reporting requirements for independent expenditures over a certain threshold,<sup>45</sup> and disclaimer

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<sup>39</sup> Purchasers of Internet domain names are required to make their identification information accessible through the WHOIS database. However, 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) (2007) (cybersquatting); 15 U.S.C. § 1117(e) (2007) (trademark); 17 U.S.C. § 504(c)(3) (2007) (copyright).

<sup>40</sup> See Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006) (describing and criticizing “proxy censorship” arising from government using ISPs to detect/limit Internet abuse).

<sup>41</sup> See brief summary of U.S. campaign finance regulation in LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS 6-7 (Michael J. Malbin ed., 2003). The best history of U.S. campaign finance regulation is ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW (1988). A summary of more recent developments is found in Anthony Corrado, *The Regulatory Environment: Uncertainty in the Wake of Change*, in FINANCING THE 2004 ELECTION 30-67 (David B. Magleby et al. eds., 2006).

<sup>42</sup> 2 U.S.C. § 441b (2007) (prohibiting contributions or expenditures by national banks, corporations, or labor organizations); 2 U.S.C. § 441e (2007) (prohibiting contributions and expenditures by foreign nationals).

<sup>43</sup> 2 U.S.C. § 431(8)(A) (2007) (definition of contribution includes “gift, subscription, loan, advance, or deposit of money or anything of value”); 2 U.S.C. § 441a (2007) (limitations).

<sup>44</sup> See *supra* note 43.

<sup>45</sup> 2 U.S.C. § 431(17) (2007) (definition of independent expenditure); 2 U.S.C. § 434(c)(1) (2007) (requiring reports when independent expenditure exceed aggregate of \$250 in a calendar year); 2 U.S.C. § 434(g) (2007) (special reports for last-minute independent expenditures).

requirements identifying the source of campaign spending.<sup>46</sup> When the contribution involves money spent on advertising in coordination with a campaign, or when the Federal Election Commission (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).<sup>47</sup>

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.<sup>48</sup>

In the Bipartisan Campaign Reform Act (BCRA or “McCain Feingold”) enacted in 2002, 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.”<sup>49</sup> The FEC, 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, litigants unhappy with the FEC’s construction successfully argued that the Internet should be included.<sup>50</sup> The federal district court remanded the rules back to the FEC to rewrite them consistent with the court’s stricter interpretation of BCRA.<sup>51</sup>

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

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<sup>46</sup> 2 U.S.C. § 441d (2007).

<sup>47</sup> See *Buckley v. Valeo*, 424 U.S. 1, 41-44 (1976); *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007).

<sup>48</sup> See Larry E. 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 . . .”).

<sup>49</sup> 2 U.S.C. §§ 431(20)-(22), 441d, 441i(b), (f) (2007).

<sup>50</sup> *Shays v. FEC*, 337 F. Supp. 2d 28, 64-70 (D.D.C. 2004).

<sup>51</sup> *Id.* at 131.

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?”<sup>52</sup>

The FEC considered both sets of issues in a controversial 2005 rulemaking.<sup>53</sup> The resulting rules, colloquially known as the “paid ads and spam” approach,<sup>54</sup> regulated Internet communications placed for a fee on another person’s Web site as “public communications.”<sup>55</sup> These revised rules also extended the “press exemption” to stories, commentary, or editorials carried over the Internet, but avoided providing additional specificity regarding what kind of prose would fit the definition of “news story, commentary, or editorial.”<sup>56</sup> 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).<sup>57</sup> The final rule required disclaimers only for political committees’ Internet sites and email.<sup>58</sup>

In general, bloggers and Internet activists were pleased with the final rule.<sup>59</sup> What remains unclear is how new bloggers establish themselves as “press entities” engaged in a “press function,” so as to fall within the protection of the “press exemption.”<sup>60</sup> This

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<sup>52</sup> The statutory press exemption is codified in 2 U.S.C. § 431(9)(B)(i) (2007). 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 the exemption applied. 509 F. Supp. 1210 (S.D.N.Y. 1981).

<sup>53</sup> Notice of Proposed Rulemaking on Internet Communications, 70 Fed. Reg. 16967 (Apr. 4, 2005).

<sup>54</sup> See *Hotline Blog, BCRA, Bloggers, And Poetry*, Nov. 1, 2005, [http://hotlineblog.nationaljournal.com/archives/2005/11/bcra\\_bloggers\\_a.html](http://hotlineblog.nationaljournal.com/archives/2005/11/bcra_bloggers_a.html) (last visited Mar. 11, 2008).

<sup>55</sup> See 71 Fed. Reg. 18613 (Apr. 12, 2006) (codified at 11 C.F.R. § 100.26) (final rule revising definition of “public communication” at 11 C.F.R. § 100.26).

<sup>56</sup> *Id.* (final rule revising press exemption, codified at 11 C.F.R. §§ 100.73, 100.132).

<sup>57</sup> *Id.* (final rule codified at 11 C.F.R. §§ 100.94, 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 (Apr. 12, 2006) (revised and codified at 11 C.F.R. § 114.9).

<sup>58</sup> *Id.* (final rule revising 11 C.F.R. § 110.11).

<sup>59</sup> See *Beltway Blogroll, Bloggers Beat the FEC, So Now What?*, Apr. 11, 2006, [http://beltwayblogroll.nationaljournal.com/archives/2006/04/bloggers\\_beat\\_t.php](http://beltwayblogroll.nationaljournal.com/archives/2006/04/bloggers_beat_t.php) (last visited Mar. 11, 2008).

<sup>60</sup> *Established* blogs have found the FEC willing to extend protection to them as media entities. The FEC dismissed a complaint against *DailyKos.com* in September 2007, finding that the popular site was a “media entity exempt from campaign finance restrictions. Fed-

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 prove tempting to campaign activists, legitimate outside commentators who fear reprisal, and, more troubling, dirty-tricksters. On the other hand, since online communications are less invasive than broadcast, print, or even direct mail, last-minute tricks may prove ineffective, since people can more easily avoid them.<sup>61</sup> 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.<sup>62</sup> 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 only apply to the individual and do not apply to activity by any entity; 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.<sup>63</sup> 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, such Internet 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

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eral Election Commission, Factual and Legal Analysis, FEC Matter Under Review (MUR) 5928, available at <http://eqs.nictusa.com/eqsdocs/000061C5.pdf>.

<sup>61</sup> See *Reno v. ACLU*, 521 U.S. 844, 854 (1997).

<sup>62</sup> 2 U.S.C. § 441e (2007).

<sup>63</sup> 2007 Op. Fed. Election Comm’n No. 22 (2007) (prohibiting US candidate use of foreign-supplied literature); 2004 Op. Fed. Election Comm’n No. 24 (2004) (stating that foreign national may volunteer, but may not make campaign decisions).

the court sits) are sufficient to hail the defendant into U.S. court.<sup>64</sup> 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).<sup>65</sup> When a claim involves Internet activity, courts occasionally have found jurisdiction based on little more than the reach of a website into the United States.<sup>66</sup> 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.<sup>67</sup>

A foreign national involved in express 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 claim, an FEC complaint, or the private right to prosecute violations of campaign finance rules not pursued by the FEC.<sup>68</sup> The expense and inconvenience involved in challenging jurisdiction might prompt some foreign defendants to settle, and that

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<sup>64</sup> See *Mwani v. bin Laden*, 417 F.3d 1, 13 (D.C. Cir. 2005) (finding 4(k)(2) jurisdiction over Osama bin Laden); *U.S. v. Swiss American Bank*, 116 F. Supp. 2d 217 (D. Mass. 2000), *aff'd*, 274 F.3d 610 (1st Cir. 2001) (applying Fed. R. Civ. P. 4(k)(2)).

<sup>65</sup> See *supra* note 64; see also Jeffrey R. Armstrong, *Guaranteed Jurisdiction: The Emerging Role of Fed. R. Civ. P. 4(k)(2) in the Acquisition of Personal Jurisdiction of Foreign Nationals in Internet Intellectual Property Disputes*, 5 MINN. INTELL. PROP. REV. 63 (2003). For an interesting discussion of the challenge US jurisdiction faces in dealing with VoIP, see Danielle Keats Citron, *Minimum Contacts in a Borderless World: Voice over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 U.C. DAVIS L. REV. 1481 (2005).

<sup>66</sup> *Quokka Sports, Inc. 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 "amerciascup.com"); *Bird v. Parsons*, 289 F.3d 865, 875 (6th Cir. 2002) (finding jurisdiction over defendant domain name sales in forum state). *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 Mgm't Admission Council v. Raju*, 241 F. Supp. 2d 589 (E.D. Va. 2003) (finding jurisdiction under Fed. R. Civ. P. 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).

<sup>67</sup> See *Mark Hanby Ministries Inc. v. Lubet*, Slip Op. 2007 WL 1004169 (E.D. Tenn. Mar. 30, 2007) (citing authority that merely posting information or advertisements on a website is not sufficient for personal jurisdiction, but email directed toward plaintiff was aimed at forum state, allowing evidentiary hearing).

<sup>68</sup> 2 U.S.C. § 437g(a)(8) (2007).

precedent will discourage other Internet writers from engaging in similar commentary.

#### IV. 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.<sup>69</sup> 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.”<sup>70</sup> 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.<sup>71</sup> Compared with the U.S. regime, German constitutionalism permits personal dignity, honor, and reputation to trump rights of free expression.<sup>72</sup> German law also permits private individuals to enforce this right against other private parties.<sup>73</sup>

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

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<sup>69</sup> Ronald J. Krotoszynski, Jr., *Defamation in the Digital Age: Some Comparative Law Observations on the Difficulty of Reconciling Free Speech and Reputation in the Emerging Global Village*, 62 WASH. & LEE L. REV. 339 (2005).

<sup>70</sup> Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 1949, art. 5(2). Under the principle of “reciprocal effect” the Civil Code cannot overrule constitutional provisions in a manner that goes against the “objective values” of the Basic Law. See Pawel Lutomski, *Private Citizens and Public Discourse: Defamation Law as a Limit to the Right of Free Expression in the U.S. and Germany*, 24 GERMAN STUD. REV. 571, 583 (2001).

<sup>71</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct 10, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 266 (F.R.G.) (Tucholsky, the “soldiers are murderers” case). [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=620](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=620)

<sup>72</sup> Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1578 (2004).

<sup>73</sup> Lutomski, *supra* note 70, at 576.

standards in Germany.<sup>74</sup> Under the German Criminal Code, defamation can be pursued as “Beleidigung” (an insult) made in a person’s presence, “Ulbe Nachrede” (slander or factual claims that harm a person’s reputation—the maker of the statement must prove the truth of it to avoid prosecution), or “Verleumdung” (malicious defamation).<sup>75</sup>

Civil liability reaches further, protecting a person’s “personality right” by recognizing three zones. These zones include 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.<sup>76</sup> If these zones are breached, claimants can demand compensation.<sup>77</sup> Claimants may also obtain civil damages for violations of criminal defamation laws.<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup> By contrast, if a U.S. individual’s personal information or photo becomes popular on the Web, as was the case with 18-year-old student athlete Allison Stokke, subjecting her to unwanted international attention, U.S. law provides little re-

<sup>74</sup> Krotoszynski, *supra* note 72, at 1563-64 (discussing how the U.S. protection of some sexually explicit material, citing *Hustler*, and fictional material critical of individuals, citing *Citizen Kane*, are not shared in German law, citing *Mephisto*). See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1971, 30 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 173 (F.R.G.).

<sup>75</sup> Maryann McMahon, *Defamation Claims in Europe: A Survey of the Legal Armory*, 19 WTR COMM. LAW. 24, 31 (2002).

<sup>76</sup> *Id.*

<sup>77</sup> See Krotoszynski, *supra* note 72, at 1569-72.

<sup>78</sup> McMahon, *supra* note 75, at 31.

<sup>79</sup> *Id.* See also Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 25, 2005, 1 [BvR] 1696/98 207 (F.R.G.) (In re Dr. S; statements that claimant belonged to Ministry of State Security violated right of personality, defendant unable to prove truth since records had been destroyed); see generally DAVID KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 424 (2d ed. 1997).

<sup>80</sup> Floricic v. Wikimedia Deutschland e.V.; see also Wikipedia, Tron (Hacker), [http://en.wikipedia.org/wiki/Tron\\_%28hacker%29](http://en.wikipedia.org/wiki/Tron_%28hacker%29) (last visited Mar. 11, 2008) (discussing suit). For a broader discussion of the popularity of the hackers known as the Chaos Computer Club, see GIAMPIERO GIACOMELLO, NATIONAL GOVERNMENTS AND CONTROL OF THE INTERNET 122-23 (2005).

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lief.<sup>81</sup> When a public official is the target, German law is far more ready than U.S. law to permit recovery for speech infringing on dignity or personality, such as critical editorial cartoons or parody.<sup>82</sup>

German law also abolished certain political parties and prohibited the use of propaganda and symbols associated with those parties.<sup>83</sup> The law bars racist material, “hate” speech, and Holocaust denial.<sup>84</sup> The law applies to “domestic distribution” or “public use” of such material, and these terms have been broadly interpreted.<sup>85</sup> Even password-protected materials accessible to only particular individuals by computer are illegal.<sup>86</sup> One author noted that banned images, symbols, and propaganda on a foreign-based Internet site “would be prosecuted if the web site was retrieved in Germany.”<sup>87</sup>

Such was the case in the German prosecution of Frederick Töben, who was sentenced to 10 months imprisonment for spread-

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<sup>81</sup> See Eli Saslow, *Teen Tests Internet's Lewd Track Record*, WASH. POST, May 29, 2007, at A1. The *Post*, notably, featured this story about unwanted fan attention on its front page.

<sup>82</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 1, 1987, 75 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 369 (F.R.G.); Lutomski, *supra* note 70, at 585-86 (discussing *Soraya* and *Strauss* recoveries); KOMMERS, *supra* note 79, at 435. The ad hoc balancing used by German courts can lead to unpredictable results, such as the protection under Article 5(1) of Greenpeace's billboard assailing specific chemical executives for their role in global warming. Lutomski, *supra* note 70, at 587 (citing 1993 decision).

<sup>83</sup> Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 1949, art. 21(2); Strafgesetzbuch [StGB] [Penal Code] § 86a. See Andreas Stegbauer, *The Ban of Right-Wing Extremist Symbols According to Section 86a of the German Criminal Code*, 8 German L.J. 173 (2007).

<sup>84</sup> Stegbauer, *supra* note 83, at 177. Holocaust denial is a violation of German Penal Code sections 130 and 131. These restrictions are popular among Germans. See GIACOMELLO, *supra* note 80, 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 at low cost. See ANDREW CHADWICK, *INTERNET POLITICS: STATES, CITIZENS AND NEW COMMUNICATION TECHNOLOGIES* 138 (2006). Thus, thwarting their Internet communications is seen as crucial for enforcing this law.

<sup>85</sup> The ban on symbols extends to their use in material critical of a particular group, for example, the Nazi party. See Von Antonia Gotsch, *Vor Gericht Wegen Eines Anti-Nazi-Symbols*, SPIEGEL ONLINE, Mar. 23, 2006, <http://www.spiegel.de/unispiegel/wunderbar/0,1518,407112,00.html> (last visited Mar. 11, 2008).

<sup>86</sup> Stegbauer, *supra* note 83, at 181 (citing OLG Frankfurt am Main, NSTZ 356 (1999)).

<sup>87</sup> *Id.* at 182.

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ing Holocaust denial arguments from an Australian-based website.<sup>88</sup>

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 ordered ISPs in North Rhine-Westphalia to block user access to certain U.S. based neo-Nazi sites.<sup>89</sup> In general, the 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.<sup>90</sup> Even so, German Länder (states) have regulatory authority over media content, and some Länder are less permissive than others. For instance, the Regional Court of Hamburg held the moderator of an Internet forum responsible for content posted by others even though the moderator was not aware of the particular content.<sup>91</sup> 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.<sup>92</sup> However, the iden-

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<sup>88</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Dec 12, 2000, 1 Str 184/00 (F.R.G.). See also Steve Kettmann, *German Hate Law: No Denying It*, WIRED, Dec. 15, 2000. In 1996, Germany blocked Canadian Ernst Zündel's website under Section 131 for denying the holocaust. After extradition, Zündel was convicted in Germany of incitement in 2007. See *Ernst Zündel Sentenced to 5 Years for Holocaust Denial*, CBC NEWS, Feb. 15, 2007, <http://www.cbc.ca/world/story/2007/02/15/zundel-germany.html> (last visited Mar. 11, 2008). Although Zündel's site is based in the U.S. (in Tennessee), it provides a translated page in German. See *Die Zündel'site*, <http://www.zundel'site.org/german> (last visited Mar. 11, 2008) (suggesting an intent to reach Germans); Stegbauer, *supra* note 83, at 182.

<sup>89</sup> Bezirksregierung Düsseldorf, Sperrungsverfügung, Feb. 6, 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, Note, *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 which Länder is pursuing a matter.

<sup>90</sup> E-Commerce Directive 2000/31, art. 14(1), 2000 O.J. (L178) 1 (EC). This was implemented in Germany by Teledienstegesetz [TDG] [Teleservices Act] § 8 (F.R.G.).

<sup>91</sup> Landgericht [LG] [Trial Court] Sep 20, 2005, 7 U 50/06 [324 O 721/05] (F.R.G.) (Universal Boards GmbH & Co. KG v. Heise). See also *First-Instance District Court of Hamburg Says Forum Operators are Liable for Comments*, HEISE ONLINE, Apr. 18, 2006, <http://www.heise.de/english/newsticker/news/72085> (last visited Mar. 11, 2006); Jan Libbenga, *German Court Rules Moderators Liable for Forum Comments*, THE REGISTER, Apr. 21, 2006; Julia Meuser, *Germany: Electronic Commerce—ISP Liability—Provider Liability for Internet Chat Rooms*, C.T.L.R. 2006, 12(7), N169-170 (discussing conflicting decisions).

<sup>92</sup> Oberlandesgericht [OLG] [Trial Court for Selected Criminal Matters and Court of Appeals] Apr. 26, 2006, 1-15 U 180/05 (F.R.G.) (unreported).

tivity 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.<sup>93</sup>

These conflicting decisions leave content providers wary, since German prosecutors have in recent years shown a 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!.<sup>94</sup> 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.<sup>95</sup>

German disclosure laws facilitate suits against bona fide Internet authors by requiring content providers to identify themselves.<sup>96</sup> Websites 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 includ-

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<sup>93</sup> Oberlandesgericht [OLG] [Trial Court for Selected Criminal Matters and Court of Appeals] Jun. 7, 2006, 1-15 U 21/05 (F.R.G.) (unreported). The Düsseldorf court also recently ruled that the provider of a wifi network could be held liable for user's infringing activities, if the provider had not password protected the network. See German Fear of Anonymity, German American Law Journal, at <http://galj.info/2008/02/18/#0218-wlan-anonymity.txt>.

<sup>94</sup> Jay Lyman, *German Court Rules Yahoo! Not Liable for Nazi Auctions*, Mar. 28, 2001, <http://www.newsfactor.com/perl/story/8500.html> (last visited Mar. 11, 2008). Yet another site was held liable for listings of "knock off" Rolex watches. See Bundesgerichtshof [BGH] [Federal Court of Justice] Mar 11, 2003, Urt. v. 11 2004-1 ZR 304/01 (F.R.G.).

<sup>95</sup> Landgericht [LG] [Trial Court] Nov. 17, 1999 (F.R.G) (Felix Somm decision). 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 of *Compuserve* decision on new German Telecommunications law); GIACOMELLO, *supra* note 80, 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* note 95, at 119.

<sup>96</sup> Impressum Law, § 5 TMG & § 55 RstV, see also <http://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, <http://www.heise.de/tp/r4/artikel/24/24689/1.html> (last visited Mar. 11, 2008).

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ing a tax identification number.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> Moreover, bloggers have been presented with cease-and-desist demands for posting inadequate information in an Impressum.<sup>100</sup> 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.<sup>101</sup>

Other actions against bloggers 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.<sup>102</sup> The press chamber of Landgericht Hamburg is

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<sup>97</sup> Noncommercial sites need not provide Impressum information unless the site is in the pursuit of trade. But this is a broadly construed standard. If the site can be seen to serve any business purpose, it must contain an Impressum. Landgericht [LG] [trial court] Hamburg, Mar. 1, 2000, Az 315 O219/99 (holding that use of mark in domain name made site in "trade"); German American Law Journal, Feb. 15, 2007, *available at* <http://galj.info/2007/02/15#0215onlinestatute.txt>. Examples of Impressum pages are at Mein Parteibuch, (May 27, 2005), <http://www.mein-partreibuch.com/impressum> (contact information for blogger Marcel Bartels); and at Goldman Morenster & Partners Consulting LLC, <http://www.gomopa.net/o30/Impressum.html> (Impressum for U.S.-based German investment site).

<sup>98</sup> *Abmahnung*, (Aug. 24, 2007), <http://abmahnung.blogger.de/> (a German blog that covers litigation against bloggers).

<sup>99</sup> *See id.* (describing cases); *see also* Larko, Maul halten und weiter dienen, Nov. 9, 2006, <http://larko.wordpress.com/2006/11/09/> (last visited Mar. 11, 2008) (discussing legal exposure for bloggers).

<sup>100</sup> *See* Larko, Cease and Desist Hunters Ready for Kick-Off, Feb. 27, 2007, <http://larko.wordpress.com/2007/02/27/cease-and-desist-hunters-ready-for-kick-off> (last visited Mar. 11, 2008); Margaret Marks, Dog Law, Nov. 10, 2006, <http://www.margaret-marks.com/Transblaw/archives/002153.html> (last visited Mar. 11, 2008) (discussing *Abmahnen* practice and debating whether German practice is followed elsewhere in EU).

<sup>101</sup> Marcel Bartels, Open Letter from Marcel Bartels, Jan. 30, 2007, <http://www.mein-partreibuch.org/blog/open-letter-from-marcel-bartels> (last visited Mar. 11, 2008) (English version).

<sup>102</sup> *See* action against Marcel Bartels by German Environmental Minister Sigmar Gabriel for image posted by visitor on Marcel Bartels's Wiki, Aug. 25, 2006, <http://www.mein-partreibuch.de/2006/08/25/abmahnung-von-sigmar-gabriel-dem-bundesumweltminister> (last visited Mar. 11, 2008). Compare the relatively mild tone of these with Mission Accomplished-All Hat No Cattle, May 1, 2007, [http://www.allhatnocattle.net/5-1-07\\_mission\\_accomplished.htm](http://www.allhatnocattle.net/5-1-07_mission_accomplished.htm) (last visited Mar. 11, 2008) (series of anti-Bush administration illustrations, quotes and cartoons).

reputed to be particularly restrictive and as a result is a choice forum for lawyers seeking to recover from bloggers and press.<sup>103</sup>

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.<sup>104</sup> In contrast with American candidate-centered campaigns, German parties essentially run and finance political activity.<sup>105</sup>

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, then 20,000 DM thereafter).<sup>106</sup> With the conversion to the Euro, the reporting threshold is now €10,000.<sup>107</sup> 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, since that could lead to a loss of business from clientele of the other party.<sup>108</sup> By contrast, donor identification has been a relatively noncontroversial item in American campaign finance reform.

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<sup>103</sup> One author has dedicated his own Web page to the rulings of this court and its judge, Andreas Buske. See Buskeismus, <http://www.buskeismus.de>.

<sup>104</sup> "The parties shall participate in the forming of the political will of the people." Grundgesetz für die Bundesrepublik Deutschland [GG] [federal constitution] art. 21, para. 1. In contrast, parties are mentioned nowhere in the U.S. Constitution, and many of the Founders were skeptical of (or hostile to) party activity. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2320 (2006); GERALD LEONARD, *THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS* 26-28 (2002).

<sup>105</sup> Peter Lösche, *Problems of Party and Campaign Financing in Germany and the United States—Some Comparative Reflections*, in *CAMPAIGN AND PARTY FINANCE IN NORTH AMERICA AND WESTERN EUROPE* 221 (Arthur B. Gundlicks ed., 1993).

<sup>106</sup> 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; see also KOMMERS, *supra* note 79, at 215

<sup>107</sup> Law of Political Parties, § 25(3). €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 4 *COMPARATIVE ISSUES IN PARTY AND ELECTION FINANCE* (F. Leslie Seidle ed., 1991).

<sup>108</sup> See Thomas F. Gede, *Comparative Study of U.S. and West German Political Finance Regulation: The Question of Contribution Controls*, 4 HASTINGS INT'L & COMP. L. REV. 543, 574-75 (1980) (citing *Der Spiegel*, Feb. 3, 1965, at 24).

In 1983, parties were also required to report expenditures. In 1994, contributions from foreigners in Germany, straw donors, and anonymous donors were capped. 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 U.S. law a contribution "in the name of another").<sup>109</sup> German parties also collect sizable public subsidies.<sup>110</sup> Individual contributors can deduct up to €3,300 in political contributions annually from their taxes.<sup>111</sup> 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 the 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 that those expenditures would 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. Consequently, 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.<sup>112</sup> The Court stated that the "place of offense" in this case was within Germany because Germany was the place

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<sup>109</sup> Law of Political Parties Art. 25, §§ 2(3)(c), 2(6); see also Arthur B. Gundlicks, *Campaign and Party Finance in the West German "Party State,"* 50 REV. POL. 30, 43 (1988).

<sup>110</sup> Hans Herbert von Arnim, *Campaign and Party Finance in Germany,* in CAMPAIGN AND PARTY FINANCE IN NORTH AMERICA AND WESTERN EUROPE 203-204 (Arthur B. Gundlicks ed., 1993).

<sup>111</sup> Einkommensteuergesetz [EStG] [German Income Tax Act] § 10b(2), § 34g, s. 2 (F.R.G.).

<sup>112</sup> *Federal Court of Justice (BGH) Convicts Foreigner for Internet Posted Incitement to Racial Hatred,* 2(8) GERMAN L. J. (2001), available at <http://www.germanlawjournal.com/print.php?id=67>; see also Steve Kettmann, *German Hate Law: No Denying It,* WIRED NEWS, Dec. 15, 2000, available at <http://www.wired.com/news/politics/0,1283,40669,00.html>.

where the acts “showed effects” or were intended to effect.<sup>113</sup> 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.<sup>114</sup> The Dutch court concluded that the material was illegal in relation to the railroad, and that 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.<sup>115</sup> Still other German bloggers appear to be willing to withstand the legal landscape and remain active in Germany.<sup>116</sup>

#### V. 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 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.<sup>117</sup>

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 Conven-

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<sup>113</sup> *Federal Court of Justice (BGH) Convicts Foreigner for Internet Posted Incitement to Racial Hatred*, *supra* note 112 (citing “Place of Offense” in Strafgesetzbuch [StGB] [Penal Code] § 9).

<sup>114</sup> *Deutsche Bahn AG/XS4ALL Holding B.V., Gerechtshof [Hof]* [ordinary court of appeal], Amsterdam, 25 Apr. 2002, KG 02/790 (Neth.).

<sup>115</sup> E-mail from Marcel Bartels to Allison R. Hayward, Assistant Professor of Law, George Mason University School of Law (May 22, 2007) (on file with author) (“[A]fter getting too many cease and desist letters, I decided to close my blog in Germany, leave the country virtually and escape in anonymity . . .”); E-mail from Larko to Allison R. Hayward, Assistant Professor of Law, George Mason University School of Law (May 21, 2007) (on file with author) (blogs in several languages in several countries, none of them German).

<sup>116</sup> See RA-Blog, <http://www.ra-blog.de> (German politics and law blog authored by German attorney).

<sup>117</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, May 18, 1954, 213 U.N.T.S. 262.

tion 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.<sup>118</sup> Rhetorically, the Court claims a narrower margin of appreciation in freedom of expression cases, especially those involving political criticism.<sup>119</sup>

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.<sup>120</sup> 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.<sup>121</sup> Furthermore, the ECHR has ruled against contracting states in a number of cases where officials brought defamation charges to silence critics.<sup>122</sup>

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.<sup>123</sup> The

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<sup>118</sup> *Onder Bakircioglu, The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*, 8 GERMAN L. J. 711, 717 (2007).

<sup>119</sup> *Id.* at 723-24.

<sup>120</sup> *Kuhnen v. Germany*, 56 Eur. Ct. H.R. 205 (1988)

<sup>121</sup> *Lindon v. France* (2008) 46 EHRR 35 at ¶ 46, 2007 WL 4947496; *Unabhängige Initiative v. Austria*, (2003) 37 EHRR 33 at ¶ H7, 2003 WL 32092955; *Lingens v. Austria*, 8 Eur. Ct. H.R. 407; *Oberschlick v. Austria*, 25 Eur. Ct. H.R. 357. Under the Convention, states also retain the power to prohibit blasphemy. Written Question E-2204/02 by Marco Capato, 2003 O.J. (052E) 144 (deferring to Italian police blocking U.S. based Internet sites for blasphemy, under Article 10 and Article 33 of the Treaty of the European Union).

<sup>122</sup> *See, e.g., Short Survey of Cases Examined by the Court in 2005*, at 33, available at <http://www.echr.coe.int/NR/rdonlyres/C8B96BB2-45AF-49DF-9738-75D5117EA5D0/0/2005analysisofcaselaw.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.

<sup>123</sup> *Bowman v. United Kingdom*, 26 Eur. Ct. H.R. 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 QUINNIPIAC L. REV. 27, 70 (2006).

majority concluded that the distribution of truthful information about candidates was of public interest, and the low limit was “disproportionate to the legitimate aim pursued and cannot be regarded as ‘necessary in a democratic society’ for the protection of the rights of others.”<sup>124</sup>

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.<sup>125</sup> In other contexts the ECHR has opposed restrictions on political parties unless strictly “necessary in a democratic society.”<sup>126</sup> If party issues are raised in the EU context, the Treaty of Rome seems similarly protective of political parties.<sup>127</sup>

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.<sup>128</sup> The EU’s posi-

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<sup>124</sup> *Bowman*, 26 Eur. Ct. H.R. at 13.

<sup>125</sup> *Vgt Verein gegen Tierfabriken v. Switzerland*, 34 Eur. Ct. H.R. 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.”).

<sup>126</sup> European Commission for Democracy Through Law, Opinion: On the Prohibition of Financial Contributions to Political Parties from Foreign Sources, CDL-AD (2006) 014, March 31, 2006, para. 32.

<sup>127</sup> The Treaty on European Union and of the Treaty Establishing the European Community, O.J. (C321) art. 119, *available at* <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>. The Rule for EU-Level political parties is at Eur Reg. (EC) 2004/2003 (4 Nov. 2003). Political parties at the European level must itemize donors of  $\_500$  in 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.* at art. 6.

<sup>128</sup> See *Providers Are Called on to Do More Against “Hate Pages” On the Web*, Apr. 20, 2007, <http://www.heise.de/english/newsticker.news/88577> (last visited Mar. 11, 2008); 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 Pro-

tion 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.”<sup>129</sup> 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.<sup>130</sup>

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 decision.<sup>131</sup> 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.<sup>132</sup> 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.”<sup>133</sup>

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

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gramme on Promoting Safer Use of the Internet and New Online Technologies, 2005 O.J. 2005 C157/136; *see also* Resolution on the Commission Communication on Illegal and Harmful Content on the Internet, 1997 O.J. C150/38.

<sup>129</sup> Resolution on the Information Society, the Management of the Internet, and Democracy, 1998 O.J. C210/327.

<sup>130</sup> *See* John Naughton, *Can’t Censor the Internet? Tell that to Your Compliant ISP*, THE OBSERVER/GUARDIAN, Aug. 20, 2006, available at <http://observer.guardian.co.uk/business/story/0,1853971,00.html>.

<sup>131</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 35. A good general description of ECHR procedure is in Elizabeth Heger Boyle & Melissa Thompson, *National Politics and Resort to the European Commission on Human Rights*, 35 LAW & SOC’Y REV. 321, 325-27 (2001).

<sup>132</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 34.

<sup>133</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 16. *See also* Regina (Farrakhan) v. Secretary, [2002] Q.B. 1391 (U.K.).

(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.<sup>134</sup> 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, comprising 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<sup>135</sup> 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.<sup>136</sup> Lindqvist was fined SEK 4,000.<sup>137</sup>

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.”<sup>138</sup> The Court concluded that her activity did fall within the directive regulating the processing of personal data on the Internet, but her mere posting of the information on a web page was not the “transfer” of data “to a third country.”<sup>139</sup> 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

<sup>134</sup> Criminal Proceedings Against Bodil Lindqvist, Eur. Ct. H.R. I-12971 (2003) [hereinafter *Lindqvist*].

<sup>135</sup> Personuppgiftslag (Svensk författningssamling) [SFS] 1998:204 (Swed.), implementing Council Directive 95/46, 1995 O.J. (L 281) 31 (EC).

<sup>136</sup> *Lindqvist*, supra note 134, para. 15.

<sup>137</sup> *Id.* para. 17, worth about \_ 430 or \$576.

<sup>138</sup> *Id.* para. 18.

<sup>139</sup> *Id.* holdings 2, 3 & 4.

nations. Despite the conclusion of one author that the case imposes a “monumental bureaucratic disaster” not intended by the declaration’s drafters,<sup>140</sup> European bloggers may be vulnerable whenever their posts reveal names and personal information about other private individuals.

## VI. 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 ac-

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<sup>140</sup> Flora J. Garcia, *Bodil Lindqvist: A Swedish Churchgoer’s Violation of the European Union’s Data Protection Directive Should Be a Warning to U.S. Legislators*, 15 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1204, 1233 (2005).

tivity, which would require German Länder to agree among themselves on the scope of restrictions.

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

Even if these changes were 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;<sup>141</sup> especially if that content is offered in German or appears intended for Germans.<sup>142</sup> This is not an intuitive consequence most Americans anticipate. U.S. bloggers (and campaigning candidates) are accustomed to writing harsh statements about public officials, harsher than the German content cited here, so an American blogger (to his or her 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.<sup>143</sup> Alternatively, given how unpopular many U.S. policies are with German voters, a Ger-

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<sup>141</sup> Robert VerBruggen, *Bush is No Nazi*, NORTHWESTERN CHRONICLE, Jan. 23, 2004. A notorious example is a 2004 cycle web-based video posted at Moveon.org, showing President Bush morphing into Hitler. See David E. Sanger, *Hitler Reappears in '04 Campaign, This Time in Bush Ad*, N.Y. TIMES, June 26, 2004, at 11.

<sup>142</sup> 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 83, at 182.

<sup>143</sup> In general, Germans are critical of U.S. war policy and policy regarding climate change. See Bjorn Hengst, *A Wild Boar for the President*, SPIEGEL ONLINE, July 6, 2006; Tony Paterson, *Thousands March in Berlin Protest Against Bush Visit*, THE INDEPENDENT, May 23, 2002. Many German web sites are critical of U.S. policy and of President Bush. See, e.g., Anti-Amerika, <http://www.beepworld.de/members48/tarick> (note comparison of Bush with Hitler); Anti-Bush Forum, <http://www.forum-hilfe.de/viewtopic.php?p=88887> (with jokes); Bush and Hitler comparisons, MyVideo, <http://www.myvideo.de/watch/1015884> (a German MyVideo site featuring yet another comparison of Bush with Hitler).

man 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.<sup>144</sup> 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).<sup>145</sup> Again, because Germany does not limit expenditures categorically as U.S. law does, that potential would likely never occur to a German.

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 respects 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 United States to Germans to abandon these principles would be successful.

Domestic prosecutors in Germany or the United States might exercise restraint voluntarily. But such restraint lasts only so long as politics permit it, and the hypotheticals offered here would seem

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<sup>144</sup> See *America's Image in the World*, Testimony of Dr. Steven Kull, March 6, 2007, available at [http://www.worldpublicopinion.org/pipa/articles/views\\_on\\_copuntriesregions\\_bt/326.php](http://www.worldpublicopinion.org/pipa/articles/views_on_copuntriesregions_bt/326.php) (noting German “favorable” view of US dropped from 78% in 1999-2000 to 37% in 2005-06).

<sup>145</sup> 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, and remains a top donor thus far in the 2008 cycle. See *Top Individual Contributors to 527 Committees, 2005 Election Cycle*, [www.opensecrets.org/527s/527indivs.asp?cycle=2004](http://www.opensecrets.org/527s/527indivs.asp?cycle=2004); [www.opensecrets.org/527s/527indivs.asp?cycle=2008](http://www.opensecrets.org/527s/527indivs.asp?cycle=2008). A “527” is a form of political organization that avoids many of the campaign finance restrictions otherwise applied to U.S. political committees. 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) (2007); see generally Danielle Knight, *An Appeal for More Teeth*, U.S. NEWS & WORLD REP., Sept. 16, 2007.

particularly provocative. If American lawmakers 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 nation's law 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 line for political speech protection should be drawn. One standard could exclude noncommercial Web activity from most regulation, yet permit 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.<sup>146</sup>

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 expression 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.

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<sup>146</sup> See John J. Schgulze, Jr., *Caveat E-Emptor: Solutions to the Jurisdictional Problem of Internet Injury*, 29 AM. J. TRIAL ADVOC. 615, 643 (2006) (critiquing WTO Dispute Settlement Body as adjudicator of international internet-based claims).