LEGAL FRAMEWORK CONDITIONS OF ONLINE COMMUNICATION IN GERMANY

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Personal information

- Jan Mönikes, b. 1970, married with one son (12), living in Berlin and Ludwigsburg
- Studies of Law, Politics, and Psychology (1990-2000)
- Previous Positions
  - Parliamentary Advisor/ Head of Office for Members of the German Bundestag (Federal Parliament), 1990-1999
  - Government Relations Manager/ Advisor
    IBM Germany, AOL Germany (2000-2002)
  - General Counsel Versatel Group Germany (2004-2005)
  - Since 2003: Attorney-at-law in Berlin with a focus on press, media, and telecommunications law.
  - Legal Advisor to several NGOs, e.g. the German Federation of Press Officers (BdP) and the European Association of Communication Directors (EACD).
- Candidate for German Parliament for the (presently oppositional) Social Democratic Party (SPD) for the last three federal elections; member of the internet advisory board to the SPD's executive committee.
- Blogging at www.moenikes.de about media/internet law and politics

The “Grundgesetz”

- The **constitutional law** of the Federal Republic of Germany (German: “Grundgesetz für die Bundesrepublik Deutschland”) has been in force since 1949 as the constitution of West Germany.
- The German term “**Grundgesetz**” can be translated as either “Basic Law” or “Fundamental Law”. The term “Verfassung” (i.e. “**constitution**”) was not used, as the drafters regarded the “Grundgesetz” merely as a provisional constitution for the equally provisional West German state which would await future decisions of a reunified Germany regarding a final constitution.
- Germany reunified 1990 when the Communist regime in Eastern Germany was toppled peacefully and the GDR joined the Federal Republic of Germany. After the reunification, the **Basic Law remained in force nearly unaltered,** having proved itself as a stable foundation for the thriving democracy in West Germany that had emerged from the ruins of World War II.

Role of the Press in Germany

- The Basic Law established Germany as a **parliamentary democracy** with **separation of powers** into executive, legislative, and judicial branches.
- The **press** (synonymously for all kinds of mass-media) is called upon to contribute to the creation of a public opinion which in return is enabled to execute its democratic rights in an informed and responsible manner;
- **press rights are protected and censorship is prohibited** by virtue of Art. 5, para 1 of the Grundgesetz – the "Freedom of the Press".
- This freedom preserves relevant press institutions (e.g. publishing houses) as well as the **right of individuals** to communicate and perform press-related activities free from governmental intrusion.

Freedom of expression

- ***Article 5 [Freedom of expression]***
- *(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.*

Communication Rights

- Freedom of expression is **backed** by **several other basic (economical) rights**, such as the guarantee of private property or the right to freely chose and exercise any profession
- All citizens are generally **free** to run a publishing company or offer (critical) opinions and information in any form to the public – e.g. by starting an internet blog – **without** any kind of governmental approval
- **However:** like any individual freedom, the freedom of expression is limited by colliding constitutional rights of others

Constitutional Limits

- ***Article 5 [Freedom of expression]***
- *(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor.*
- Accordingly, limits to the freedom of expression are set by
  - general laws (incl. opposing constitutional rights of third parties)
  - youth protection
  - right to personal honor

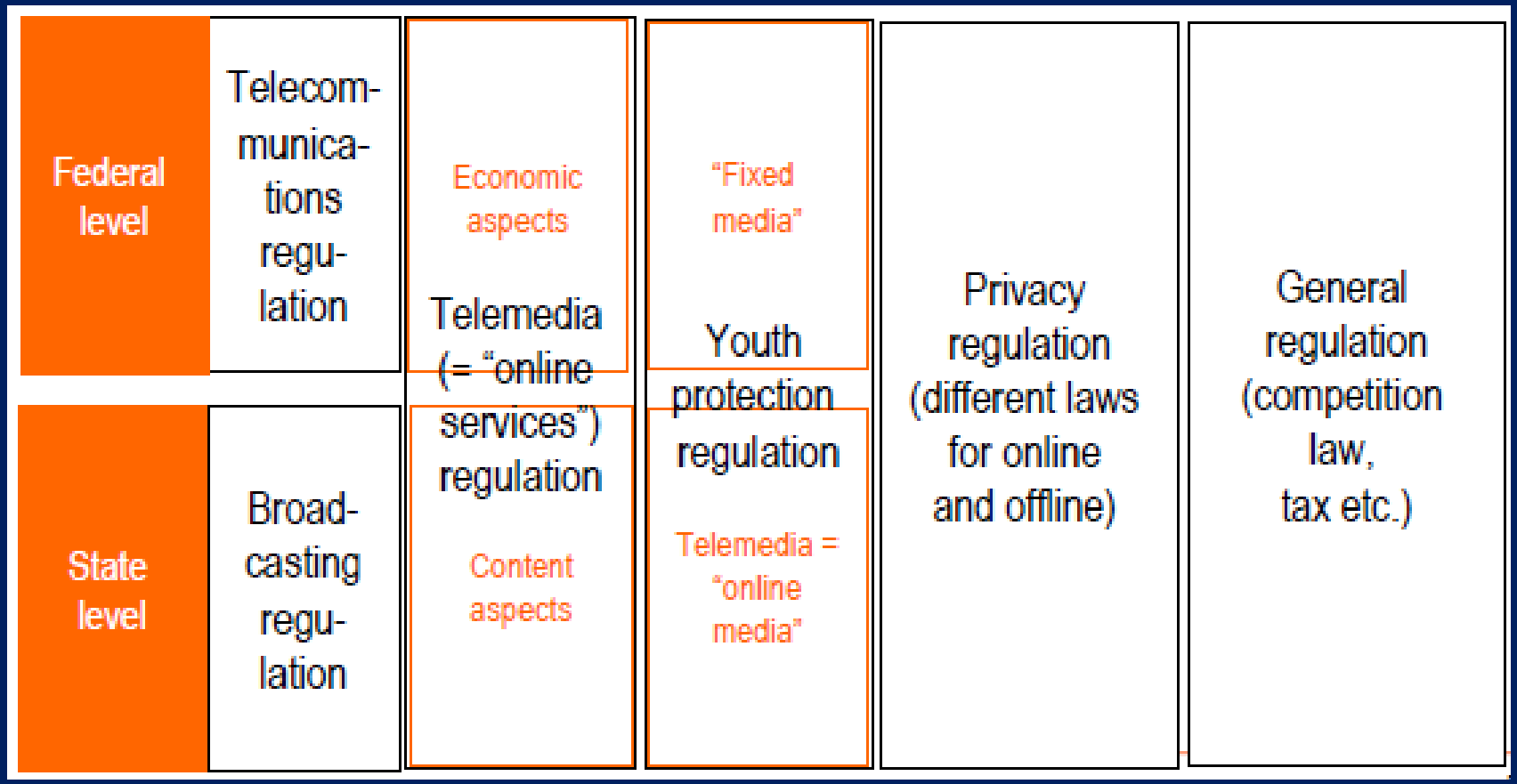
Lawmaking in a Federal Republic

- Germany is composed of **sixteen Länder** (=States). The Basic Law stipulates that the structure of each Federal State's government must *"conform to the principles of republican, democratic, and social government, based on the rule of law"* (Article 28 [1]).
- The powers of the state governments and legislatures in their own territories have been significantly diminished in recent decades due to an increasing federal jurisdiction. A commission has been formed to examine a **clearer separation of federal and state powers.**
- As one result of this commission, the **states' jurisdiction** comprehends **law enforcement** (also with regard to federal laws), **broadcasting regulation, press and media law**. **Federal jurisdiction** contains matters of **commercial law** and **telecommunications regulation**.
- Hence: all **content** of (online-) mass-media is regulated on the state level, whereas all **internet infrastructure** and **offline-media** by the federal government.

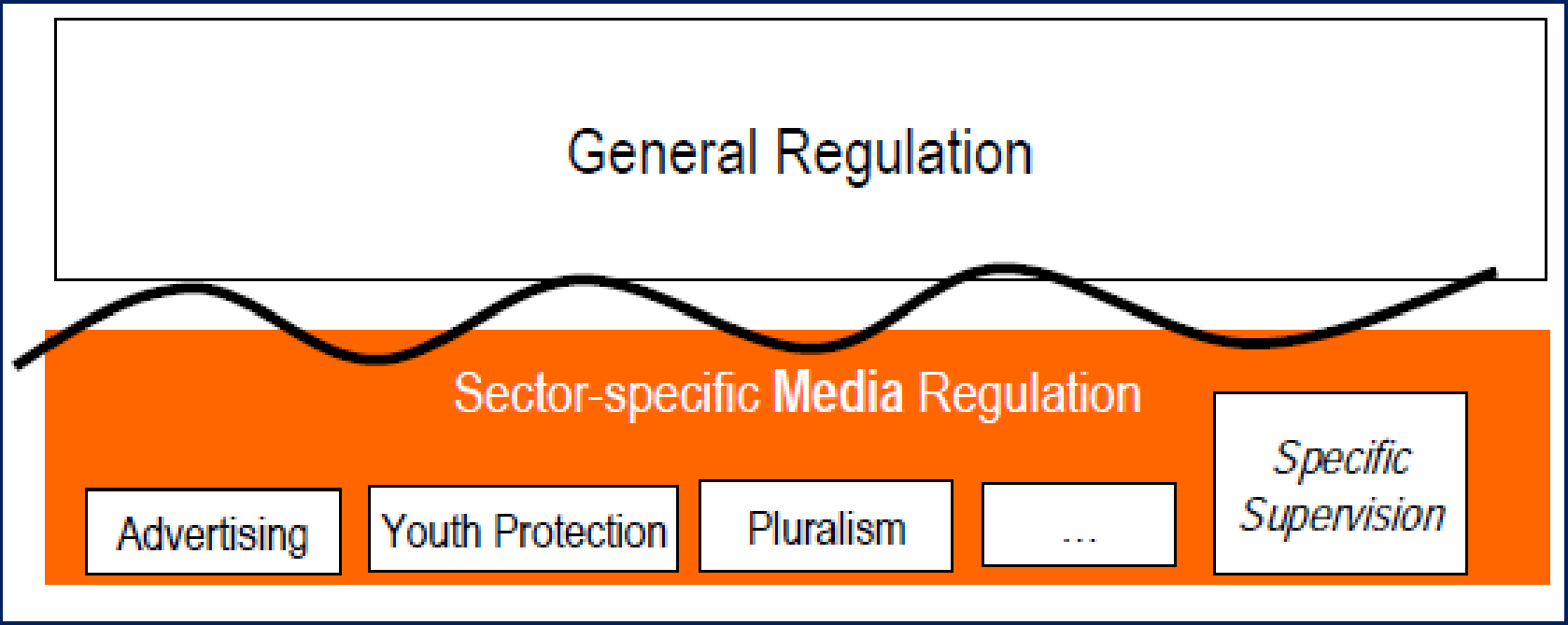
German Law No "One-Stop-Shop"

- Due to its **different responsibilities,** the legal framework in Germany can be complex. For example, youth protection has to be regulated by **two** laws on the two **different institutional levels,** state and federal, to cover all online and offline issues consistently
- Therefore, in many cases, **regulation of the internet** in Germany is only possible through **parallel** laws. E.g.:
  - On 21 June 2002, the Bundesrat (upper house of parliament) followed the Bundestag (lower house) and approved a new Jugendschutzgesetz (Youth Protection Act).
  - This act entered into force together with the "Staatsvertrag über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien – Jugendmedienschutz-Staatsvertrag" (Public Treaty on the Protection of Human Dignity and Minors in Broadcasting and Telemedia – JMStV), which is executed through the states.
- As the internet represents cross-over-media including various services, communication, and mass-media, this leads to sometimes very difficult political debates – not only within the same political level but also between the different levels.

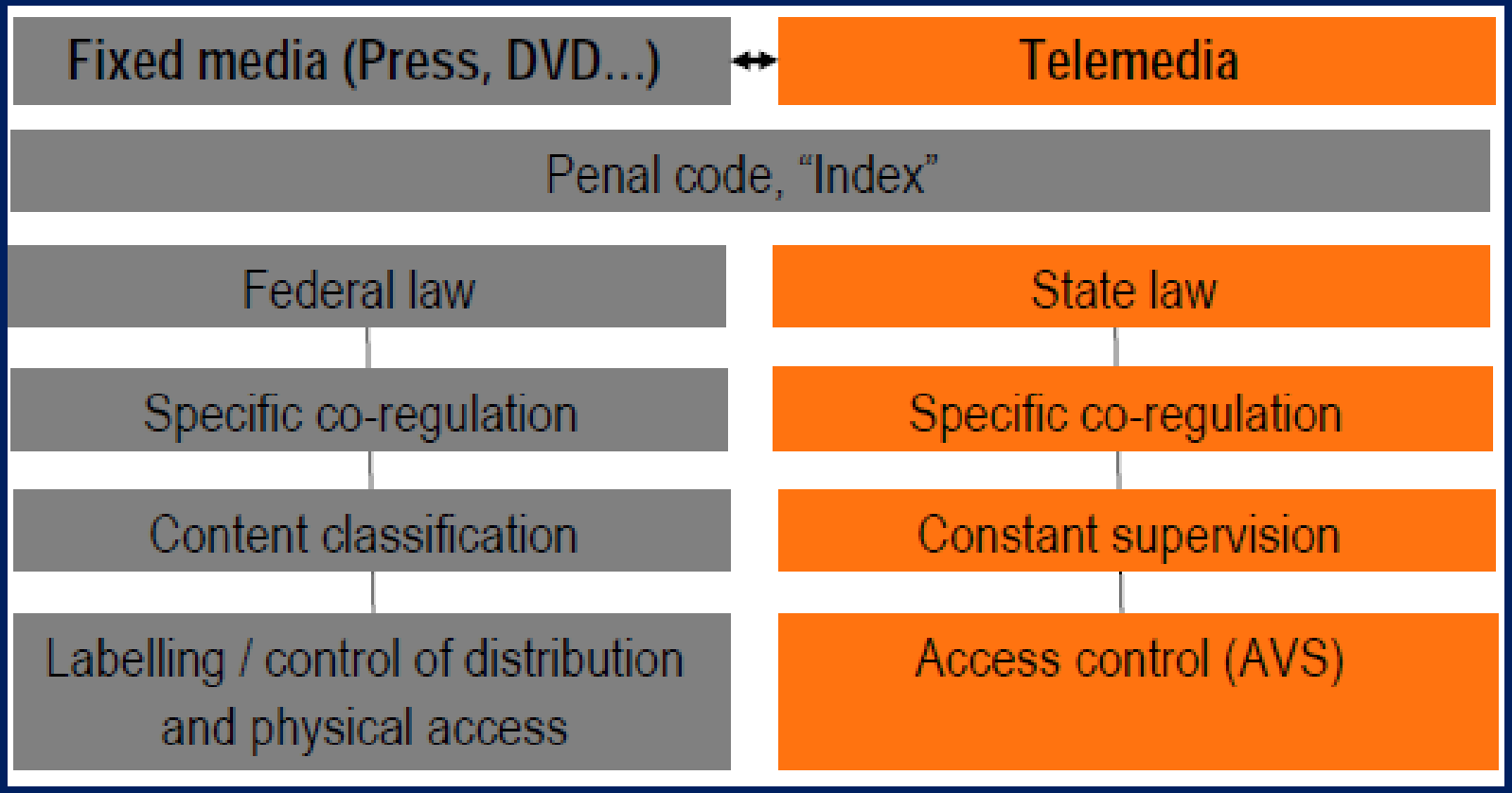
Todays Legal Framework



Media Regulation



Off- and Online Media



General Laws – Penal Code

- Under German law, authors can be penalized under the **German Penal Code** for **slander, libel** and **defamatory statements** in violation of personal rights by spreading gossip/news which are neither evidentially true or false. In German law, there is no distinction between libel and slander.
- Incitement of hatred against a segment of the population ("Volksverhetzung") and Holocaust denial are illegal under penalty of law (also: prison). Any **racial hate propaganda**, publications, broadcasting, public correspondence (including lectures), and music are censored accordingly.
- The most relevant offences of Germany's Penal Code are Sec. 90 (Denigration of the Head of State); Sec. 90a (Denigration of the State and its Symbols); Sec. 90b (Unconstitutional Denigration of the Organs of the Constitution); Sec. 185 (Defamation); Sec. 186 (Defamation of Character); Sec. 187 (Libel/Slander); Sec. 188 (Political Defamation; increased penalties compared to Sec. 186 and 187); Sec. 189 (Denigration of a Deceased); Sec. 192 (Defamation Despite Factual Truth).

Holocaust Denial

- Holocaust denial is a **crime** in Germany; Sec. 130 para. 3 of the StGB (German Penal Code) reads:

  He who, publicly or in assembly, approves, denies, or trivializes [genocide] committed under the regime of National Socialism in a way that is suitable to disturb the public peace, is subject to imprisonment up to 5 years or a monetary fine.

  - Perpetrators of Holocaust denial can be tried in absentia and declared *persona non grata*, thus being barred from entering the country. A *persona non grata* who enters Germany can be arrested immediately
  - Furthermore, a German **arrest warrant** based on the offense of Holocaust denial is deemed executable in many EU states; therefore, a Holocaust denier's entry into any EU state could lead to arrest and **extradition to Germany** (or any other state where such denial is an offense, such as Austria, and which has issued an arrest warrant).

Youth Protection

Illegal Content

- Art. 4 JMStV describes illegal content broadcasting or distributing of which via media (incl. internet) is prohibited, e.g. child pornography, cruel violence, race hate propaganda etc. distribution, sometimes even possession, of such material is unlawful and/or a crime.

Material Harmful to the Youth

- the “Bundesprüfstelle für jugendgefährdende Medien” (the Federal Examination Department for Media Harmful to Young Persons) is responsible for maintaining the “Index of Harmful Materials”. All materials on the Index are severely **restricted in their sale and distribution**: they cannot be distributed by internet or sold by mail, and many materials can only be sold "underneath the counter". While their **advertisement and marketing is censored** in general, these publications themselves are not, because they stay legal for adult users (18+).
- Items on this index include pornography, graphic media glorifying war and violence, materials considered to be anti-constitutional (such as the writings of the Red Army Faction), and material likely or intended to induce hate.
- Distribution of harmful (adult) content via the internet is only allowed if proper adult-access-control-systems are in use.

“False Light” Law

- In German law, there is **no distinction between libel and slander**. But: criminally relevant are **only** serious cases. Usually, the victim has (also) to **stop further distribution of a defamatory statement** via mass-media incl. the internet through civil courts.
- Like most jurisdictions, German law **allows civil legal actions** to deter various kinds of **defamation** and retaliate against groundless criticism. That includes public disclosure of private facts, i.e. revelation of information that is not of public concern and potentially offending reasonable to third persons (“false light”).
- Germany has strict **data protection laws** to protect **privacy** but no distinct “false light” laws. Instead, the German Supreme Court (Bundesverfassungsgericht) considers the “**personal rights and the right of informational self-determination**” equal to the “freedom of expression”. Accordingly, the court has to balance the right of the individual against those of the public
- If the publication of a piece of information is **false and harmful**, the a tort of defamation may result. If that communication is not technically false, but still misleading, then a tort of false light might have occurred.

Privacy Laws

- The distribution of **secretly recorded** videos and pictures is only permitted if the affected individual is of relative or absolute contemporary relevance. These persons are entitled to complete privacy once the withdrew to a 'secluded place' with the 'objectively perceptible aim of being left alone' – e.g. not at offices or public places.
- In Germany, it is prohibited under penalty of law to secretly audio-record non-public verbalizations (incl. wire tapping phone conversations) as well as secretly photographing inside a place of residence or any distinctly protected space (Sec. 201 and Sec. 201a StGB)
- **Legitimate exceptions** are made only in cases of outstanding public interest – e.g. covering preparations for a coup d'état etc.

Legal Status of Bloggers

- German law does not have special laws for blogging. A blogger‘s legal status is unclear.
- Some publicists such as Prof. Stephan Weichert argue: the »new blogging culture« does not yet comprise objectivity, which still has to emerge: »Professionell ideals only developed when journalists realized that, in return, their work grew more trustworthy. **Blogger are, in principle, journalists of the 16th and 17th century.** They are still in an early stage of development«
- But, because mass-media in Germany has remain free from governmentas intrusion, there is no registration-office to become a “professional journalist”. Also, the Grundgesetz does not require minimum quality for a website to qualify as classical journalism

Are Bloggers Journalists?

- German Telemedia Law (TMG) and the Interstate Broadcasting Treaty (RStV) only differentiate with regard to an online imprint notification between the merely "**private" or "commercial**" online information offer (TMG) and a "**journalistically/editorially designed offer**" (RStV). The bill's rationale deems these offers to "resemble **mass communication character** and are hence described as electronic press". An editorial design usually refers to a "willfully, not necessarily commercial activity, which aims for the processing of an offer with regard to its content, language, graphics or acoustics, and which is meant to serve public information or the formation of a public opinion."
- Further understanding of the term: an offer, which is relevant for the formation of a public opinion, and which **could** create an affected individual's claim for correction.
- Depending on its design/structure, a blog could therefore be covered by Sec. 55 para. 2 RStV rendering the blogger a classical "journalist" and his online medium "press".

Good Bloggers Are Journalists!

- **The good news is:** as "online-media-journalist", bloggers possess all rights conferred upon the press in Germany. E.g. they can apply for a press ID by acquiring membership at a "press union", they can join the social security system for journalists, their articles are protected by copyright law, and government officials have to respond to their questions, they can apply for access to press conferences etc.
- **The bad news is:** journalists shall respect the "press codex" in their work, a collection of non-official rules for professional journalism. This includes regulations regarding accurate research and coverage. If the fail to meet these standards, the owner and the author of a blog can be held liable as publisher similar to any other media. And: Journalists cannot claim to be privileged like mere amateurs, which cannot be held responsible for posting information they obtained through regular press ("Laymen Privilege") and did not research or check by themselves. Press reports may generally be assumed by laymen without prior checking, may be distributed, and also used as foundation for formulating an own opinion.

Liability Privilege for Blogger

- Every Blogger ist fully responsible for his own content. If he publishes content of other authors, he equally responsible for this content like a publisher
- This is why, like any other publisher, blogs require an "Impressum" (imprint), a legally required statement of ownership and authorship of a document, which must be included in books, newspapers, magazines, and websites published in Germany and other German-speaking countries.
- The German law **does not** have a general liability privilege for online service providers and users from actions against them based on the content of third parties (**user generated content**) like in Section 230 of the US Communications Decency Act.
- But there is a **Liability Privilege** of the Telecommunications Media Act (Telemediengesetz – TMG) and the EU Directive on E-Commerce (2000/31/EC): As per Sec. 8 to 10 TMG, service providers are not obliged to monitor third party information transmitted or stored, or to investigate circumstances indicating unlawful activity.

Liability For User Generated Content

- Blogger‘s liability for user generated content: (+/-)
  - **With Knowledge** (+)
    - Liability for external illegal content (e.g. incorrect assertions about individuals/companies by virtue of commentaries or uploaded copyright protected material) beginning with the “knowledge of a clear and definite legal infringement”.
    - Liability occurs through inactivity subsequent to learning about the violation.
    - Blogger is not held liable nor does he face any costs, if he takes down any illegal/ defamatory content shortly after be notified accordincly.
  - **Prior to Knowledge** (-)
    - Unless: Liability of the Disturber (“Störerhaftung”) (in discussion)
    - It is argued that an adequately causal contribution to the legal infringement may violate obligations to check content. A general duty to monitor, as is being argued, may stem from a “provocation” of a blog’s operator for users to contribute illegal content in an online forum (Heise case)

Possible Civil Court Orders

- **Before** going to court, a call to delete or a legal notice is ordinarily issued (through the concerned party's attorney). Acceptance thereof my or may not incur costs – and is less expensive than a law suit.
- Non-acceptances may give rise to a law suit
- **Interim injunctive** relief is the principal and most important remedy in this field of law. If disregarded, a fine up to € 250,000 – payable to the applicant – or a maximum of 6 months in prison may follow
- Compensation for **pecuniary** or **non-pecuniary damage** are rare. Under German law, there is a legally enforceable **right of response** and also for corrections / clarifications / sometimes even a revocation
- Interim injunctions are issued by the Landgericht (comparable to a District Court or UK County Courts) relative quickly and most often **without any prior court hearing**.

Interim injunctions

- But: Interim injunctions are only in force **after** official service of process . Actual proceedings only occur if the respondent files an objection.
- Before a Landgericht, the parties have to represented by attorneys.
- It is irrelevant where an infringement occurs. In internet matters, any Landgericht has potential jurisdiction – irrespective of the place of origin of the relevant content.
- In Germany, the parties of any civil proceeding bear the costs of these proceedings in proportion to their prevailing or losing, including the lawyers' fees.
- If lost, the monetary risk is usually between € 800 to € 4,000, depending on the court's decision

Discussions in Germany

- The ability of an individual to turn to a court and obtain an injunction which prevents the media from publishing what it wants to publish – whether for the purpose of protecting privacy or for some other reason – is obviously a particularly **important issue** in the free speech context.
- Because of the global structure of the internet, it **seems odd**, that e.g. the Hamburg District Court issues an injunction against the New York Times or google.com under German law.
- "In increasing numbers, **aggressive lawyers**, who used to use libel law to protect their clients, are now using injunctions to secure privacy and confidentiality. They have found it is a legal technique which shuts down stories very quickly so that now it is not a question of publish and be damned, as it used to be: we are now finding that we can't even publish at all." - Godwin Busutill

Discussions in Germany

- But: In Germany, **pre-publication** interim injunctions are **very unusual** as courts **are** allowed to limit "freedom of expression" to a certain extend, but **not** to limit "the freedom of opinion" - until it is not illegal vituperation (e.g. deliberate insult).
- And: German interim injunctions will be in force **only** if also **accepted** in the country of residence of the blogger. If the local law does **not** accept a foreign court order, nothing will happen.
- So at the end bloggers who act on the same level of quality as classical journalists in there country will not encounter any special problem – also not with the German law. The only problem **German** bloggers have to deal with are the costs for possible legal procedures if they are not willing to avoid own or "notice & take down" defamatory user generated content.

Zugangserschwerungsgesetz

- To **improve the options for law enforcement** in June 2009 the German parliament approved legislation that will allow for the blocking of Web sites showing pornographic content involving minors (child porn).
- The law requires a stop sign to be posted on sites that are to be listed with Germany's federal criminal authorities. The list is secret but a five-member group is to determine which sites are to be listed.
- The law has come under fire by some for failing to do enough to prevent users from accessing child porn over the Internet. Others charge the measure infringes on guarantees on freedom of information. Massive public protest occurred against the so called #zensursula law.
- After government was voted out of office., the new government decided not to set the Web Blocking in force.
- EU-Commissioner #Censilia Malmström started the same political discussion on EU-Level – see www.cleanternet.org

Conclusion

- Based on the experience with the atrocities of the Nazi regime, human rights in Germany are protected extensively by the constitution and the courts. Germany has ratified most international human rights treaties. Reports from independent organizations such as Amnesty International certify a high level of compliance with human rights.
- Monitoring communication and "censorship" by government or courts are allowed only in a **very restricted** manner. Privacy and Data Protection is strongly protected by law.
- According to the "Reporters Without Borders Press Freedom Index", Germany is currently ranked 18th (USA: 20th) out of 175 countries in the world in terms of press freedom.
- But: the internet challenges the German laws regarding privacy and the possibility of national law enforcement. Due to political symbolism and helplessness, a tendency can be noted to limit the freedom of internet more than would be considered with regard to classic media.

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