

A Right to Be Forgotten? - How Recent Developments in Germany May Affect the Internet Publishers in the US

Lawrence Siry [1], Sandra Schmitz [2]

Cite as: Siry, L., Schmitz, S., 'A Right to Be Forgotten? - How Recent Developments in Germany May Affect the Internet Publishers in the US', European Journal for Law and Technology, Vol. 3, No. 1, 2012

Nowhere is the world smaller than on the Internet. Today, with a click of a mouse, people from across the globe can re-acquaint themselves with the old friends, research the unknown, and read newspapers from faraway places and far away times. As the world cyber-shrinks, the ways in which governments and courts attempt to control the information on the web has become diverse and contradictory. Issues of national interest and international jurisdiction have stretched across all aspects of the web. As we move forward, we must search for a more cooperative, coherent and consistent international policy, one which fosters the free flow of information, while at the same time, protects the individual and her personality.

This controversy is not limited to the present, but has the potential to affect the way the Internet records and preserves society's recent history. As newspapers and other media begin to bring their massive archives online, they are faced with a myriad of laws affecting the liability of the media outlets. In particular, the different policies concerning defamation and the Internet as it relates to online archives has led to conflict between nations and has resulted in policies that inadequately ensure the free flow of information, as well as protection of personality. This problem effects what authors may write, what films can be made and what newspapers can report. What is protected speech in one country may be defamation judged from another country in a future time. Take for instance, *the right to be forgotten*. In Germany, as well as other European countries, individuals who have been convicted of crimes, yet who have served their sentence and paid their debt to society, are entitled to protection of their privacy. While media coverage of their crimes, including their identities, might be warranted at the time of the offense, as time passes the weight given to their right to privacy increases and the weight given to the media's freedom of expression and the public's right to know wane. Essentially, these individuals obtain a right to be forgotten. Controversy emanates when an online publisher, headquartered in a country such as the United States (which does not recognize such a strong protection for personality rights) publishes a truthful article about an event and places the article in the online archives.

The paper explores in specific how German courts are attempting to meld traditional theories of liability to fit the new Internet-based reality of publishing and archive maintenance. The paper examines a recent case in Germany, which extends national jurisdiction into the New York Times archives in New York City, as well as claims filed by two convicted murderers who have tried to have their names deleted from the worldwide memory that is the Internet. This paper will analyse under which circumstances German courts may accept online archives as 'digital pillories' when they contain stories on crimes committed in the past which identify the offender. Interconnecting the New York Times case and the *murderer* cases, we also review the enforcement of defamation judgments from foreign jurisdictions in the US, where many media outlets involved are headquartered. The paper then outlines recent developments to 'combat' what is often referred to as *libel tourism* in the US. These statutes extend jurisdiction to foreign nationals who have not availed themselves of American jurisdictions, extending the First Amendment far beyond American borders. These developments are in many ways, escalating away from a common path for resolution of the competing interests of society and personality. The controversy has led to legal uncertainty with repercussions that are both financial and rights-based. While a common solution might be warranted, such will be difficult given the competing priorities in the varied jurisdictions. The paper will also attempt to review potential solutions for standards that will satisfy these diverse priorities.

I. Online Archives in the US

Although in the US, individuals are affected by what has been published about them on the Internet, their chances to have true information removed from websites are almost non-existent. Accurate, and under specific circumstances, even inaccurate information is specifically protected by the First Amendment.

1. Defamation v. Personality in the US

In the area of US defamation law, one case stands out as seminal, the 1964 Supreme Court Decision of *New York Times v. Sullivan*, in which the Court attempted to clarify the rights of individuals about whom material had been published. [3] The case reflects greater social movements within the American society at the time. The plaintiff, L.B. Sullivan, the Police Commissioner of Montgomery, Alabama, sued the New York Times for a 1960 advertisement entitled, 'Heed Their Voices!' The advertisement sought to raise money and awareness for the civil rights movement. It contained several inaccurate statements regarding the troubles encountered by students and civil rights leaders fighting for equality at the University of Alabama. [4]

The Court used the case to reinvent the law of defamation in the United States. In extending First Amendment protection to the advertisement that was the subject of the litigation, the Court noted that even though the piece was technically an advertisement (worthy of less protection), the piece also sought to add to the political debate, elevating its importance in the First Amendment analysis. The Court highlighted what had become a rediscovery of the First Amendment when it posited that the protection '...was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' [5] Furthermore that 'it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions,' and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.' [6] [7]

Ultimately, the Court established a new test for what constituted the defamation actionable by a public figure. Under this regime, a public official was precluded

'... from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' [8]

It is important to note that the decision carries a tone of importance - this was not any ordinary defamation case and the Court seemed cognizant of the departure that it was taking from the established history of common law jurisprudence. In fact, the Supreme Court at the time, led by Chief Justice Earl Warren was expansive of rights generally, and the *Sullivan* decision can be seen in light of several decisions that expanded the freedom of speech and press rights by extending First Amendment protection into areas unprotected up to that point. [9] In essence, *Sullivan* elevated the discussion of defamation law to a constitutional level. [10] American courts placed the burden of proof with the *victim* of the speech. *Sullivan* set up new parameters and cast these protections through the lens of the First Amendment. Recognizing that there was a need for public discourse that need not fear the potential chill of litigation, the Supreme Court established that there would be a two-tiered analysis of defamation. If the *victim* were a public person, the Court would grant less protection than that granted to a private person. A public person would have to show that the speaker acted with actual malice, or with reckless disregard for the truth. A private person would have to show that the speaker acted with a reckless disregard for the truth. [11] Additionally, the Court retained the defence of truth.

2. The Single Publication Rule

The US courts have also adopted what is called the single publication rule, wherein a publisher is only liable once for each publication. Each access to the potentially defamatory material does not trigger a new cause of action, rather the original publication date triggers the time restrictions (generally one year in the US) for defamation claims. Additionally, alleged victims are entitled to only one cause of action against a publisher of the defamatory statement.

3. Online Archives on Trial in the US

As the Internet Age dawned, and massive amounts of archival material has become available on the web, courts in the US have been confronted with the question of how to analyse defamation cases relating to materials available through online archives. The leading case, which has set the tone of the debate in the US, is *Firth v New York*, 4 N.Y.3d 709 830. [12] George Firth, a former New York State employee sued New York State for defamation because of an Internet post critical of Firth's management style which had been posted on a state run website. Firth, however initiated his claim after the one year statute of limitations that applied in New York, had expired. The plaintiff argued that the site's archived defamatory statements gave rise to a continued cause of action. Firth argued that the statute of limitation for defamation claims '...should not be applied verbatim to defamatory publications posted on the Internet in light of significant differences between Internet publications and traditional mass media,' namely, the fact that a web site may be altered at any time by its publisher or owner. He further argued that the statute of limitations would be 'retriggered' upon each new search that results in a reviewing or republication of the offending passage. [13] The trial court and the New York Court of Appeals rejected this analysis. [14] The court found that archived information must be governed by the same time limitations as print publication, and that print date would serve as the publication for archived material for the purpose of calculating liability time limitations. [15]

This decision represented a further expansion of protection for publishers and must be contrasted against a dearth of protection in the US for convicted criminals who have served their sentences. Extremely limited protection exists for those convicted of crimes who have served their sentences. Being judged under *New York Times v Sullivan* and its progeny, an aggrieved plaintiff, even if rehabilitated, must show that the statement is false and that the publisher acted with reckless disregard for the truth and potentially that the publisher acted with actual malice. Given the Firth Rule, this reintegrated member of society would never be able to force a publisher to remove stories written at the time of the trial or thereabouts, from the archives as the time for a case to be file would have run one year from the date of publication in print.

II. Defamation and Online Archives in Germany

Against this background, two developments have arisen in Germany that are worthy of attention: The first is the development of cases pertaining to an individual's right under the broad concept of a general right to personality to protect his identity after he has served a criminal sentence for a crime for which he was convicted. The second is the Decision of the German Federal Court of Justice in the case of *Fuchsmann v. New York Times*. [16] In this case the Court raised some interesting issues which have the potential to affect the liability of online archive providers. While German criminal and civil law protects against defamatory or libellous publications, German law in general also acknowledges the so called 'Allgemeine Persönlichkeitsrecht' - the 'general right to personality' - which protects an individual's personality and privacy even against statements that are true and non-defamatory but in some other way affect the privacy of the individual. [17]

1. The German Online Archives Cases

German courts in the recent past have dealt with several cases in which criminal offenders sued media outlets to take down news stories from their online archives or delete their full names mentioned in these. The most famous cases concerned two half-brothers, Wolfgang Werlé and Manfred Lauber, who were convicted in 1993 of having robbed and murdered Walter Sedlmayr, a famous Bavarian actor, in 1990. [18] The two accused, who both knew Sedlmayr personally, denied the accusations. The pair appealed unsuccessfully against their convictions and in 1999, even filed a constitutional complaint in an attempt to have them overturned. [19] The Constitutional Court held their complaint to be not admissible. [20] Further applications for a re-litigation of the case in 1997 and 2004 were unsuccessful.

The murder, and the subsequent trial and conviction of Werlé and Lauber, received extensive media coverage in Germany, especially due to controversies surrounding the investigations. The case became notable for its lurid tabloid newspaper coverage of Sedlmayr's homosexuality, which had previously been private. News stories referring to the defendants often mentioned the two half-brothers by their full names. With the rise of the Internet, those reports made their way into the online archives of newspapers or other websites containing news stories. In 2007 the alleged Sedlmayr murderers started filing lawsuits against website providers demanding to permanently have their full names removed on the internet in connection

with the crime they were convicted for. As Werlé was released on parole in August 2007 and Lauber was released in 2008, they were worried that the news reports may have an impact on their life in freedom as future landlords, employers or acquaintances might google their names and find out about the crime they were convicted of. In order to prevent to be stigmatised as the Sedlmayr murderers forever, they tried to have their names taken from all the articles which connected them in some way to the crime. They did not institute proceedings against publications in traditional newspaper archives, only online publications were concerned due to their easier accessibility.

The brothers sued a number of media outlets and were also successful in a number of cases. However, some of the decisions were overturned by Higher Regional courts which let them to take the matter to the German Federal Court of Justice. [21] They argued that German law allows the suppression of criminals' names in news accounts once they have paid their debt to society and that they should be allowed to 'lead a life without being publicly stigmatised' for their crime. [22] This is in so far true, as the law recognises the right of a criminal to reintegrate into society after his release from prison and also grants criminal offenders a right to privacy, and a right to be left alone. A news story, that identifies an offender by stating his full name and/or showing a depiction of him, affects the general right to personality of the offender. The general right to personality constitutes an umbrella right that protects different aspects of an individual's personality from unauthorised public exposure. It protects an individual's private sphere and reputation and includes in particular a right to privacy. [23] With regard to criminal offender it specifically provides for a right to reintegrate into society. [24] Due to the open nature of statutory provisions that protect specific personality rights and/or the 'general right to personality', the scope of protection often needs to be determined by a balancing of weights of colliding interests. In the case of news stories affecting the general right to personality of criminal offenders, a balancing of interests with the freedom to express and disseminate one's opinion, the right to inform oneself from generally accessible sources and the freedom of the press, i.e. Art. 5 I of the Basic Law, is required.

The Federal Constitutional Court of Germany developed criteria for the balancing of legal interests: Individuals have to accept true statements even where they are disadvantageous for them, whereas false statements are not acceptable. However, even true statements may violate personality rights, when they are likely to have a negative effect on the person or his reputation, which is disproportionate to the interest of disseminating the truth. [25] This is in particular the case where statements reach a wide audience and lead to a stigmatisation of the person concerned in such a way that he is likely to suffer from social exclusion or isolation. [26]

If a news story informs the public about the misconduct or criminal offence of someone, this leads to negative qualification of this person in the perception of others and thereby intervenes with the personality right. [27] However, balancing the legal interests involved, news coverage which identifies an offender is legitimate, where a current case is concerned that is of some severity or of specific interest to the public either because the crime is of interest or a person in a specific position has committed it. [28] Crimes may be part of contemporary history, and it is the task of the media to satisfy the legitimate interest of society and individual citizens on news coverage. [29] German courts have considered the degree of interest of the public on news reporting as proportionate to the way a crime was committed and the severity of the offence. [30] Thus, severe crimes that particularly affect society, allow for detailed news reports about the offence, the way it was committed, the person of the offender and his motives as well as the prosecution of the case. [31] Hence, although the general personality right protects an individual against negative depictions of his person, it does not protect him from being named in public. [32] It only protects him from a time-wise unlimited coverage of his person in connection with the crime. [33] If time has passed since the offence and trial, the interests of the offender, particularly his right to be spared from a 're-update' ['Reaktualisierung'] of his wrongdoing and be left alone, gains weight in the balancing of interests. [34] Time, in general, does not outweigh an interest of the media to publish a story or the interest of the public to be informed about a specific case. [35] A court will have to consider the degree of interference with the interests of the offender. [36] For example, due to the highly suggestive manner, a TV documentary will constitute a more severe intrusion of the right to personality than a printed story. [37] In summary, the interests of the offender regularly outweigh where a sufficient amount of time has passed, the offender is due to be released from prison and he did not trigger new news coverage himself.

When Lauber and Werlé began to sue publishers in an effort to have their names deleted from archived stories, the question arose whether the easy accessibility of these stories, amounts to another quality of the stories. While new reports would certainly fail the test of proportionality (time has passed, offenders due to be released, interest of public to be informed about trial and proceedings satisfied), the archived stories are

not new publications. Some lower courts have found that the storage of old news stories in online archives equals a current dissemination of the story, thus having the quality of completely new reports, [38] and hence applied a similar standard as the UK courts with the multiple publication rule. Other lower courts have found that online archives are comparable to traditional archives for printed works and accordingly, came to the conclusion that there is 'no renewal of former statements'. [39]

2. The Findings of the Federal Court of Justice

In 2009, the first lawsuits initiated by Lauber and Werlé reached the Federal Court of Justice, which finally ruled that as long as a news story on the internet can be identified at a first glance as being an out-dated news report, the provision of such a report is legitimate. [40] The Court relied on the different quality of out-dated, old news reports and current news reports. [41] The degree of intrusion of personality rights shall be determined primarily by a two-step test, namely how the report is disseminated and how readers will perceive it. Thus, a protocol of a radio report on the radio station's website under the heading 'calendar sheet' was held to be legitimate as having only a minor degree of dissemination. [42] Unlike a TV documentary at prime time with a high viewing rate, a perception of the report required an active search by the potential reader. [43] The context of the text also did not suggest a current story. A similar reasoning was given, where the report was part of a dossier, which could only be accessed for money. [44] Also teasers in online archives, that identified Werlé and Lauber and linked to pay-to-view archived content, are held to reach only a small audience and having only a small widespread effect. [45] In the latest Sedlmayr murderer cases the Federal Court of Justice held, that there was no violation of personality rights where only users with specific access rights could access the news story in the online archive. [46] The provision of an out-dated story in this form does not constitute a 'digital pillory' as was feared by Lauber and Werlé. [47] The constitutional complaints filed by one of the murderer pair in order to have the decisions of the Federal Court of Justice overruled were held to be not admissible. [48]

The Federal Court of Justice made it clear in all its decisions in the Sedlmayr cases, that as long as the archived story does not give the impression that it is up to date or presents an afresh publication on the offender or has the characteristics of an afresh publication, the provision of the story in an online archive is legal. The easy accessibility of old and often out-dated news stories by search engines as such does not constitute sufficient reason to eliminate our 'historical memory'. [49] Accordingly, where the articles are clearly marked as archived reports, the potential for infringement of the right to personality is little. As long as it is left to the reader to actively search for a story, publishers will be fine. However, where the story is literally pushed to the reader, in a sense that an old story is linked in a current news story, or otherwise dragged to the attention of the reader, the case may be decided with a different outcome. [50]

3. The New York Times Case: The Extension of Jurisdiction by the German Federal Court of Justice

In defamation cases, jurisdiction is generally determined by § 32 of the German Civil Procedure Code as being the 'place of infringement' - i.e. the place of commission of the wrongful act as well as the place where the result occurred. [51] Following the principle of actor sequitur forum rei, primarily the place where the provider of the information is located or domiciled will be deemed to be the place of commitment. [52] The location of a server as such is not sufficient to constitute a connecting factor if there are no further indicators like for example control over the server. [53] The second connecting factor is the place where the damage itself occurred. [54] The damage regularly occurs where the information that gives rise for action can be accessed. In the 'offline' world, namely with regard to print publications, this will be the place of distribution of a work. However, information on a website is not distributed but stored and can in general be accessed worldwide. Criteria that have been developed in the 'offline' world, such as for example the place of the publisher's establishment or the place of distribution [55] are not feasible where content is basically not distributed but stored in order to be accessed by users. Hence, the question is whether mere accessibility is sufficient to establish jurisdiction or whether an additional connecting factor is necessary.

In a recent case, the German Federal Court of Justice developed some criteria under which a German court could claim jurisdiction as the court of the place where the harmful event occurred. The claimant in this case addressed a German court in order to obtain injunctive relief, so that the New York Times has to refrain from publishing or distributing certain statements, which were contained in a news article in the New York Times online archive. The article, which was published in the print edition of the New York Times on June 12, 2001

and moved to the online archive on the same day, cited a 1994 FBI report describing the claimant *inter alia* 'as a gold smuggler and embezzler'. [56] The Regional Court of Düsseldorf, as well as the Higher Regional Court of Düsseldorf, on appeal from first instance, denied jurisdiction on the grounds that the article originally appeared in the metro section of the paper and was directed at a New York audience. [57] [58] The Federal Court of Justice held, applying the criterion of 'directed to', that jurisdiction will be established where the content in question contains a clear reference to a location. [59] This reference must be in the sense that a collision of conflicting interests (the interest of the claimant to protect his personality rights on the one hand, and the interest of the defendant to provide the content in question on the other hand) may have occurred or may occur in the location due to the specific circumstances of the case. [60] Such a specific connection will be assumed if taking notice of the content at the location of the court is considerably more likely as compared to a mere availability on the internet, and if the infringement of the personal rights asserted by the claimant occurs because the information was taken notice of. It is not necessary that the content in question addresses or is directed at users in the country of the court. A German court could therefore claim jurisdiction over a news article in the local section of the online archive of the New York Times newspaper. The German Court established the necessary specific connection by the fact that the news article was likely to be accessed from Germany as it concerned a German national. Additional proof of a substantial connection - though not necessary proof - was that the New York Times clearly addresses a worldwide readership; the online registration process allows users to choose Germany as country of residence and has approx. 15,000 users in Germany. How often the news story was actually accessed from Germany was irrelevant (because it was also not technically possible to determine a correct number and data protection issues made it difficult to determine).

The criteria developed by the Court are still very vague; the Court only gave examples of what could determine jurisdiction, with the international readership only being a proof of a substantial connection and not a determining factor of what could establish jurisdiction. [61] One may criticise that the Court did not discuss concepts that also take into account the intentions of the service provider from the perspective of an objective bystander. [62] Further, there was no reference as to the influence of the language in which the website is provided. The Court did not differentiate between the local news section and national or international news section. Accordingly, a website that restricts its information to a specific region and thus, only addresses a regional readership might still face an unforeseeable number of competent courts. The direction of the website towards a specific geographical area does not constitute a means to limit jurisdiction to that specific area. Thus, in the end the criteria of the German Federal Court of Justice - especially the complex formulation that the collision of the conflicting interests may have occurred or may occur in the location due to the specific circumstances of the case - are more likely to open the floodgates for a number of lawsuits than restricting jurisdiction.

III. The Impact of the German Cases on International Publishers

The claims of the Sedlmayr murderers were not only directed against domestic publishing houses or website providers, but also against non-domestic websites. [63] The two half-brothers gained world fame by also trying to have their names removed from the English-language version of Wikipedia. [64] So far, they have not filed a lawsuit, but have sent out a warning letter to the Wikimedia foundation asking the foundation to delete their names on Wikipedia and refrain from any future naming of them. While filing a lawsuit in the US is deemed to be unsuccessful due to the broad protection granted by the First Amendment, another way might have opened up for them with the recent ruling of the German Federal Court of Justice in the New York Times case. A German court may now find that it may well have jurisdiction where a claimant tries to have his name deleted from a news story published on a foreign website. And this may even be the case, where the story, that had been published, is true.

IV. Recognition and Enforcement of Foreign Judgements

While within Europe the Brussels I Regulation sets forth that a judgement given in one EU Member State has to be recognised without special proceedings in any other Member State, the situation becomes more

complex and unsatisfying when recognition is not covered by the European regime or an international agreement. For example, a French order, condemning Yahoo to take steps to prevent French Internet users from accessing sections of the Yahoo auction site containing Nazi memorabilia, was not enforceable in the US, domicile of Yahoo Inc. [65] An US court granted a summary judgement in favour of Yahoo Inc. declaring that the 'First Amendment precludes enforcement within the United States of a French order intended to regulate the content of its speech over the internet'. [66]

In the US, defamation law is much less claimant-friendly than in Europe, where much protection is given to personality rights including reputation of individuals. European and other courts rendering judgements against US media outlets and service providers triggered debate in Congress and in the individual states concerning what effect US courts should give foreign judgements. [67] The debate arose because foreign judgements especially in defamation proceedings tend to be not compliant with the broad protection regime under the First Amendment. Where a defamation claim was unlikely to succeed if pled in a US court, claimants have sought out foreign jurisdictions to achieve a judgement and then tried to enforce it in the US. This practice has been condemned by the US congress as obstructing the free expression rights of US authors and publishers and in turn chilling the interest of citizens in receiving information on matters of importance, which is protected under the First Amendment. [68] The US congress considers foreign defamation lawsuits as suppressing the free speech rights and inhibiting written speech that might otherwise have been written or published. [69]

In order to avoid the negative effects foreign more restrictive libel laws have on US authors and journalists and put an end to libel tourism, a new statute has recently been passed which amends Title 28 of the United States Code: The Securing the Protection of our Enduring and Established Constitutional Heritage (Speech) Act, signed by the US President on 10 August 2010. [70] Following this law reform, Title 28 of the United States Code § 4102 (a) (1) now prohibits a US court from recognising or enforcing a foreign judgment for defamation unless the court determines that:

'(A) the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the First Amendment to the Constitution and by the constitution and law of the state in which the court is located; or

(B) even if the defamation law applied in the foreign court's adjudication did not provide as much protection for freedom of speech and press as the First Amendment to the Constitution and law of the state, the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a US court applying the First Amendment to the Constitution and the constitution and law of the state in which the court is located. The Speech Act also provides for actions for a declaration that a foreign judgement is repugnant to the US Constitution.' [71]

While lawsuits against domestic website provider and publishers in Germany - even where true statements are concerned - are not unlikely to succeed, such cases are deemed no chances in the United States. For cross-border cases in the EU the German Federal Court of Justice awaits a preliminary ruling by the ECJ on the question of jurisdiction. [72] Again it was the Sedlmayr murderers who initiated proceedings in an attempt to have their names removed from the online archive of an Austrian website. It remains to be seen whether they will also file a lawsuit against the New York Times which has reported on their attempt to have their names removed from the English-language version of Wikipedia and identified both of them by their full names. In the meantime, the story has been moved to the online archive of the New York Times.

V. Finding a Way Forward

The case-law in relation to the Sedlmayr murderers highlights how courts struggle to apply their traditional laws to the medium Internet. Although in all cases so far the Federal Court of Justice denied their claims to be universally forgotten, there is no legal certainty for cases of a slightly different nature, for example a constellation where a current news story directly links to older news reports. When the material is published in the domestic media, it is a matter of domestic law, yet the issue becomes more complex when foreign publications are concerned. With the German Federal Court of Justice claiming jurisdiction over content on the English language website of the New York Times based in New York City, questions of recognition and enforcement of German judgements in the US arise. A scenario more likely to occur than German residents suing the providers of English language websites, is that of British residents suing foreign English language publications. Here, one aspect comes into play, including that of the multiple publication rule, which leads to

a new claim each time the potentially defamatory article is retrieved and thus, eliminating the statute of limitations.

It is difficult to see a path that would pacify the needs and priorities of the United States and the European states. At the root may be the contrasting fundamental principals. In the US, the priority is given to the freedom of speech, even if the speech is wrong, unless there is malice or at least a reckless disregard for the truth, the interest of the speaker will prevail over the subject of the speech. In Germany, as in the rest of Europe, the emphasis is to balance the rights, often towards the subject of the speech, at the expense of the rights of the speaker. As the world becomes more interconnected, this struggle becomes more prevalent, more costly for both plaintiffs and defendants alike and potentially more divisive.

It remains to be seen how the struggle will play out. But one thing is certain- It will *have* to resolve itself as information becomes more and more accessible and the world *cyber-shrinks*.

References:

Damm O, Sind deutsche Gerichte zur weltweiten Internetregulierung befugt ? Anmerkung zur BGH-Entscheidung 'New York Times', GRUR 2010, 891 - 893

Hoeren T/Sieber U, Handbuch Multimedia-Recht (26. Looseleaf Supplement Ed. 2010)

N.N., Editorial in the New York Times of 25 May 2009 'Libel tourism', http://www.nytimes.com/2009/05/26/opinion/26tue2.html?_r=1

Post, Robert C., The Social Foundations of Defamation, Reputation and the Constitution, 74 Cal. L. Rev 691 (1986)

Rauscher T, Wax P, Wenzel J (eds), Münchener Kommentar zur Zivilprozessordnung, §§ 1 - 510c (3. Ed. 2008)

Schmitz S./Siry L., Online-Archive - 'Der ewige Pranger im Internet'? in: Taeger (ed.), Digitale Evolution (2010), 217 - 232

Schwartz J, Two German Killers Demanding Anonymity sue Wikipedia's parent, NY Times 12 November 2009, <http://www.nytimes.com/2009/11/13/us/13wiki.html> (last accessed 24 June 2011)

[1] Lawrence Siry is a PhD candidate in the Faculty of Law, Economics and Finance at the University of Luxembourg. Siry is an attorney licensed to practice in the State of New York. Both authors would like to thank Assoc. Prof. Mark D. Cole of the University of Luxembourg for his guidance and support.

[2] Sandra Schmitz is a PhD candidates at the Interdisciplinary Centre for Security, Reliability and Trust (SnT) at the University of Luxembourg. Her work is funded by the Fonds National de la Recherche Luxembourg.

[3] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

[4] The advertisement read: "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission." Sixth paragraph: "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times - for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury' - a felony under which they could imprison him for ten years. . . ." 376 US 254, 258. It may have been significant that the inaccuracies did not go to the core of the claims of the advertisement, but rather the details of the events in Montgomery, and the court outlines these actual discrepancies in its decision.

[5] *New York Times v. Sullivan*, 376 U.S. 254 (1964) quoting *Roth v. United States*, 354 U.S. 476 (1957), 484.

[6] *New York Times v. Sullivan*, 376 U.S. 254 (1964) quoting *Bridges v. California*, 314 U.S. 252, (1941) 270.

- [7] *New York Times v. Sullivan*, 376 U.S. 254 (1964) quoting *N. A. A.C.P. v. Button*, 371 U.S. 415, (1963) 429.
- [8] *New York Times v. Sullivan*, 376 U.S. 254 (1964) at 280.
- [9] See, *Cohen v. California*, 403 U.S. 15(1971) (indecent speech), *Roth v. US*, 354 US 476 (obscenity).
- [10] Post, *The Social Foundations of Defamation, Reputation and the Constitution*, 74 Cal. L. Rev 691 (1986) at 691.
- [11] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
- [12] *Firth v New York*, 4 N.Y.3d 709 830 N.E.2d 1145 797 N.Y.S.2d 816 ((2005) N.Y. Co.).
- [13] *Firth v New York*.
- [14] The New York State Court of Appeals is the highest Appeals court in the New York State Judicial System. (In the New York State system, the Supreme Court is the trial court (court of original jurisdiction from where cases may be appealed to the Appellate Division and then The Court of Appeals).
- [15] *Firth* at 4 N.Y.3d 709, reiterating a long-standing NY rule, citing *Gregoire v G.P. Putnam's Sons*, (298 NY 119, 123 (1948) at 125; see also *Wolfson v Syracuse Newspapers, Inc.*, 254 App Div 211 [1938] *affd. no op* 279 NY 716 (1939).
- [16] BGH, Decision of 2 March 2010 - VI ZR 23/09 (*The New York Times*), GRUR 2010, 461.
- [17] The General Personality Right is encompassed in Art.2 I in connection with Art.1 I of the Basic Law ("Grundgesetz") of Germany. It has been recognised in the case law of the Federal Court of Justice since 1954 as a basic right (BGH, Decision of 25 May 1954 - Case No. 1 ZR 211/53 (*Schacht-Briefe*), 13 BGHZ 334) and applies when specific statutory provisions are not applicable (Some of the rights protected under this principle are also protected by specific provisions in the law such as § 22 of the Art Copyright Act (*Kunsturhebergesetz--KUG*), granting a right to one's image or § 12 of the Civil Code (*Bürgerliches Gesetzbuch - BGB*). Fundamental rights only bind state authorities (Art. 1 III of the Basic Law); there is no direct horizontal effect. As state authorities, however, the courts are under an obligation to interpret and develop private law in accordance with the principles set forth by the Basic Law ("indirect horizontal effect", see BVerfGE 34, 269; BVerfGE 84, 192, 194).
- [18] Sedlmayr was found dead in his apartment in July 1990. He had been tied up, tortured, stabbed with a knife and his head beaten with a hammer; some valuables had been stolen. BGH, Decision of 21 July 1994 - case no.1 StR 83/94, NJW 1994, 2904.
- [19] Anyone who feels that his or her fundamental rights have been infringed by the action of the public authorities may lodge a constitutional complaint, see Art. 93 I No 4a of the Basic Law. It may be directed against any measure taken by the executive, judiciary, and legislature, thus covers administrative acts, court decisions, and legislative acts. The Federal Constitutional Court only reviews compliance with the fundamental rights. Judgment of other points of law and the finding of facts are for the other courts only. As long as no fundamental right has been infringed, the Federal Constitutional Court is bound by their decisions.
- [20] BVerfG, Decision of 1 March 2000 - case nos. 2 BvR 2017 and 2039/94, NSTZ 2000, 489.
- [21] BGH, Decision of 10 November 2009 - VI ZR 217/08 (*rainbow.at*); Decisions of 15 December 2009 - VI ZR 227/08 and 228/08 (*Deutschlandradio*); Decisions of 09 February 2010 - VI ZR 243/08 and 244/08 (*Spiegel online*); Decisions of 20 April 2010 - VI ZR 245/08 and 246/08 (*morgenweb.de*); Decision of 01. February 2011 - case no. VI ZR 345/09 (*Kölner Stadtanzeiger, ksta.de*), BeckRS 2011, 05428; Decision of 01. February 2011 - case no. VI ZR 114/09 (*Süddeutsche Zeitung, sz-online.de*), BeckRS 2011, 06485; Decision of 01. February 2011 - case no. VI ZR 346/09 (*Frankfurter Allgemeine Zeitung, faz.net*), BeckRS 2011, 06487.
- [22] See Schwartz, *Two German Killers Demanding Anonymity sue Wikipedia's parent*, NY Times 12 November 2009, <http://www.nytimes.com/2009/11/13/us/13wiki.html> (last accessed 24 June 2011).
- [23] The general right to personality has been developed primarily by case-law from the right to free development of the personality, Art. 2 I of the German Basic Law, by taking into account the protection of human dignity enshrined in Art.1 I of the Basic Law. The fundamental rights catalogue of the German Constitution, the "Basic Law" (*Grundgesetz*) of 1949, does not encompass an explicit right to privacy as for example the European Convention of Human Rights. However, when examining whether an infringement of personal rights has taken place, the court will also take into account Art.8 of the Convention.

- [24] BVerfG, Decision of 05 June 1973 - 1 BvR 536/72 (Lebach I), BVerfGE 35, 202, 230 et seq..
- [25] Instead of many cf. BVerfG, Decision of 10 June 2009 - case no. 1 BvR 1107/09 (reports on sexual offences), MMR 209, 683.
- [26] BVerfG, Decision of 24 March 1998 - 1 BvR 131/96, NJW 1998, 2889; BVerfG, Decision of 10 June 2009 - case no. 1 BvR 1107/09 (reports on sexual offences), MMR 209, 683.
- [27] BVerfG, Decision of 05 June 1973 - 1 BvR 536/72 (Lebach I), BVerfGE 35, 202, 226.
- [28] Instead of many, see only: BVerfG, Decision of 05 June 1973 - 1 BvR 536/72 (Lebach I), BVerfGE 35, 202 (230 et seq.); BGH, Decisions of 20 April 2010 - VI ZR 245/08 and 246/08 (morgenweb.de), 15.
- [29] Instead of many, see only: BVerfG, Decision of 05 June 1973 - 1 BvR 536/72 (Lebach I), BVerfGE 35, 202, 230 et seq.; BGH, Decisions of 20 April 2010 - VI ZR 245/08 and 246/08 (morgenweb.de), 15.
- [30] BVerfG, Decision of 10 June 2009 - 1 BvR 1107/09; with regard to the current cases see only BGH, Decisions of 20 April 2010 - VI ZR 245/08 and 246/08 (morgenweb.de), 15.
- [31] Cf. BVerfG, Decision of 05 June 1973 - 1 BvR 536/72 (Lebach I), BVerfGE 35, 202, 231; BGH, Decision of 17 March 1994 - III ZR 15/93, NJW 1994, 1950, 1952; with regard to the current cases cf. only BGH, Decisions of 20 April 2010 - VI ZR 245/08 and 246/08 (morgenweb.de), 15.
- [32] The situation is somewhat different where minors or minor offences are concerned. In these cases the principle of proportionality would generally not allow for news reports identifying the offender. BGH, Decision of 15 November 2005 - VI ZR 286/04 (Ernst-August von Hannover), ZUM 2006, 323, 325.
- [33] Instead of many, see only: BVerfG, Decision of 05 June 1973 - 1 BvR 536/72 (Lebach I), BVerfGE 35, 202, 220.
- [34] BVerfG, Decision of 10 June 2009 - 1 BvR 1107/09; with regard to the current cases cf. only BGH, Decisions of 20 April 2010 - VI ZR 245/08 and 246/08 (morgenweb.de), 17.
- [35] BVerfG, Decision of 10 June 2009 - 1 BvR 1107/09; with regard to the current cases cf. only BGH, Decisions of 20 April 2010 - VI ZR 245/08 and 246/08 (morgenweb.de), 17.
- [36] The degree of interference depends on the manner of reporting and the dissemination factor of the publication in question. Instead of many see: BGH, Decisions of 20 April 2010 - VI ZR 245/08 and 246/08 (morgenweb.de), 17.
- [37] BGH, Decisions of 20 April 2010 - VI ZR 245/08 and 246/08 (morgenweb.de), 17.; see also BVerfG NJW 2000, 1859, 1860; as well as BVerfG, Decision of 05 June 1973 - 1 BvR 536/72 (Lebach I), BVerfGE 35, 202.
- [38] LG Hamburg, Decision of 1 June 2007 - 324 O 717/06, MMR 2007, 666; LG Hamburg: Decision of 29 February 2008 - 324 O 469/07, BeckRS 2009, 22552; LG Hamburg: Decision of 28 February 2008 - 324 O 459/07, BeckRS 2010, 03447; LG Hamburg, Decision of 18 January 2008 - 324 O 507/07, NJW-RR 2009, 120, 121.
- [39] OLG Frankfurt, Decisions of 20 September 2006 - 16 W 55/06 and 16 W 57/06, also KG Berlin, Decision of 19 October 2001 - 9 W 132/01, BeckRS 2007 02224; LG München I, Decision of 13 June 2007 - 9 O 2295/07, BeckRS 2008 03243.
- [40] BGH, Decision of 10 November 2009 - VI ZR 217/08 (rainbow.at); Decisions of 15 December 2009 - VI ZR 227/08 and 228/08 (Deutschlandradio); Decisions of 09 February 2010 - VI ZR 243/08 and 244/08 (Spiegel online); Decisions of 20 April 2010 - VI ZR 245/08 and 246/08 (morgenweb.de).
- [41] BGH, Decisions of 15 December 2009 - VI ZR 227/08 and 228/08 (Deutschlandradio), 19.
- [42] BGH, Decisions of 15 December 2009 - VI ZR 227/08 and 228/08 (Deutschlandradio), 19.
- [43] BGH, Decisions of 15 December 2009 - VI ZR 227/08 and 228/08 (Deutschlandradio), 19.
- [44] BGH, Decisions of 09 February 2010 - VI ZR 243/08 and 244/08 (Spiegel online), 22. The same result was achieved where the story was not part of a dossier but nevertheless could only be accessed for money, see BGH, Decision of 01 February 2011 - case no. VI ZR 346/09 (Frankfurter Allgemeine Zeitung, faz.net), BeckRS 2011, 06487.

- [45] BGH, Decisions of 20 April 2010 - VI ZR 245/08 and 246/08 (morgenweb.de), 20.
- [46] BGH, Decision of 01. February 2011 - case no. VI ZR 345/09 (Kölner Stadtanzeiger, ksta.de), BeckRS 2011, 05428; BGH, Decision of 01. February 2011 - case no. VI ZR 114/09 (Süddeutsche Zeitung, sz-online.de), BeckRS 2011, 06485.
- [47] BGH, Decision of 01. February 2011 - case no. VI ZR 345/09 (Kölner Stadtanzeiger, ksta.de), BeckRS 2011, 05428; BGH, Decision of 01. February 2011 - case no. VI ZR 114/09 (Süddeutsche Zeitung, sz-online.de), BeckRS 2011, 06485.
- [48] See BVerfG, Non-Admissibility Order of 6 July 2010 - 1 BvR 535/10 with regard to BGH, Decision of 15 December 2009 - case no. VI ZR 227/08 (deutschlandradio.de); Non-Admissibility Order of 6 July 2010 - 1 BvR 923/10 with regard to BGH, Decision of 9 February 2010 - case no. VI ZR 243/08 (Spiegel online); Non-Admissibility Order of 23 June 2010 - 1 BvR 1316/10 with regard to BGH, Decision of 20 April 2010 - case no. VI ZR 245/08 (morgenweb.de).
- [49] See also Seitz in: Hoeren/Sieber, Handbuch Multimedia-Recht (2010), Part 8 C, para. 62a.
- [50] See Schmitz/Siry, Online-Archive - "Der ewige Pranger im Internet"? in: Taeger (ed.), Digitale Evolution (2010), p. 217 et seq..
- [51] Cf. Patzina in Münchener Kommentar zur Zivilprozessordnung, §§ 1 - 510c (2008), § 32 ZPO para.20 with further references; in lawsuits between a German domiciliary and a EU/EEA-domiciliary, jurisdiction is determined by Art. 5 (3) of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, [2001] OJ L12/1.
- [52] Pichler in : Hoeren/Sieber, Handbuch Multimedia-Recht (2008), Part 25 para.186 et seq..
- [53] Pichler in : Hoeren/Sieber, Handbuch Multimedia-Recht (2008), Part 25 para.189 et seq. with further references.
- [54] C-68/93 Shevill v Press Alliance SA [1995] ECR I-415, paras. 24 -25.
- [55] BGH, Decision of 03 May 1977 - VI ZR 24/75 ("profil"), GRUR 1978, 194.
- [56] For the facts of the case see LG Düsseldorf, Decision of 9 January 2008 - case no. 12 O 393/02, ZUM-RD 2008, 482.
- [57] LG Düsseldorf, Decision of 9 January 2008 - case no. 12 O 393/02, ZUM-RD 2008, 482.
- [58] OLG Düsseldorf, Decision of 30 December 2008 - case no. 15 U 17/08, NJW-RR 2009, 701.
- [59] BGH, Decision of 2 March 2010 - VI ZR 23/09 (New York Times), ZUM 2010, 524.
- [60] BGH, Decision of 2 March 2010 - VI ZR 23/09 (New York Times), ZUM 2010, 524, 526.
- [61] For a critical evaluation of the decision see Damm, Sind deutsche Gerichte zur weltweiten Internetregulierung befugt ? Anmerkung zur BGH-Entscheidung "New York Times", GRUR 2010, 891. Damm also mentions the drawbacks the decision of the German court may have, namely that foreign publications such as the New York Times may resort to block access of German IP-addresses to their online service. Partial geoblocking is already operated by YouTube. Also for example the BBC blocks access to any videos on its website from outside the UK.
- [62] Damm, Sind deutsche Gerichte zur weltweiten Internetregulierung befugt ? Anmerkung zur BGH-Entscheidung "New York Times", GRUR 2010, 891, 893.
- [63] With regard to the Sedlmayr murderer case see: BGH, Decision of 10 November 2009 - VI ZR 217/08 (rainbow.at)
- [64] See http://www.wired.com/images_blogs/threatlevel/2009/11/stopp.pdf.
- [65] La Ligue contre le racisme et l'antisemitisme et al. v. Yahoo Inc, County Court Paris, 20 November 2000.
- [66] Yahoo Inc. v. La Ligue contre le racisme et l'antisemitisme et al., 169 F.Supp. 2d 1181 (N.D. Cal. 2001), p.22.
- [67] Cf. Editorial in the New York Times of 25 May 2009 "Libel tourism", http://www.nytimes.com/2009/05/26/opinion/26tue2.html?_r=1.

[68] § 2 (2) of the Securing the Protection of our Enduring and Established Constitutional Heritage (Speech) Act.

[69] § 2 (3) of the Securing the Protection of our Enduring and Established Constitutional Heritage (Speech) Act.

[70] For the full text of the Act and the legislative process of H.R. 2765, the “Securing the Protection of our Enduring and Established Constitutional Heritage Act,” which amends title 28, United States Code, see <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR02765:@@L&summ2=m&>.

[71] Title 28 of the United States Code § 4104.

[72] Case C-509/09, Reference for a preliminary ruling from the Bundesgerichtshof, Germany (eDate Advertising GmbH v X), OJ C 134/04 of 22 May 2010. C-509/09, (eDate Advertising GmbH v X) has been joined with C-161/10, (Olivier Martinez, Robert Martinez v MGN Ltd), see C-509/09 and C-161/10, Order of 29 October 2010. The Opinion of the Advocate General Pedro Cruz Villalón in the joined cases has been published on 29 March 2011.