

## Articles

# ACCESS TO MEDIA SOURCES IN DEFAMATION LITIGATION IN THE UNITED STATES AND GERMANY

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### I. INTRODUCTION

The apparent fundamental differences between the laws of defamation in the United States and Germany suggest that a comparison might well be considered fruitless or even impossible. Indeed, scholars in the United States, in response to the disparities, have generally not addressed foreign—and especially German—solutions in the field of defamation law. Similarly, the question of access to internal media information has not been the subject of academic review.<sup>1</sup> The characteristic features of common and state law systems—a bifurcated jurisdictional system, pretrial discovery, and jury-awarded general or punitive damages—do not invite a comparative approach when juxtaposed with the features of civil law systems—a monolithic civil judiciary, a system of separate actions for

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1. See, e.g., Gregory J. Thwaite & Wolfgang Brehm, *German Privacy and Defamation Law: The Right to Publish in the Shadows of the Right to Human Dignity*, 8 EUR. INTEL. PROP. R. 336, 343 (1994); Douglas W. Vick & Linda MacPherson, *Anglicizing Defamation Law in the European Union*, 36 VA. J. INT. L. 933, 955-59 (1996); Douglas W. Vick & Linda Macpherson, *An Opportunity Lost: The United Kingdom's Failed Reform of Defamation Law*, 49 FED. COMM. L.J. 621 (1997). See generally INTERNATIONAL MEDIA LIABILITY, CIVIL LIABILITY IN THE INFORMATION AGE (Christian Campbell ed., 1997) (providing a remarkable overview of the defamation laws of several European states, anglophone states, and Japan); Peter Krug, *Civil Defamation and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution*, 13 CARDOZO ARTS & ENT. L.J. 847 (1995) (providing an overview of the defamation laws in Russia).

information without any discovery, and a variety of potential remedies, none of which encompasses jury trial or punitive damages. Nevertheless, the American experience in this area, as in a multitude of other instances, has drawn the attention of legal academics and practitioners from around the world. In Germany, the discourse on innovation in the field of defamation law has been obliged to take account of the legal solutions of various foreign countries, and the United States enjoys a particularly prominent position.<sup>2</sup>

This Article proceeds from the premise that a fruitful comparison of the defamation laws of the United States and Germany need not be a one-way transaction. Rather, it presumes that a reciprocal consideration of the different schemes will convey mutual understanding and provide deeper insights into the inherent justification of traditional legal concepts in the respective legal systems. A more thorough evaluation is likely to disclose significant similarities in the legal structure and protection of essential cultural values of modern democratic societies. Since the United States is examining possible reforms to its own defamation laws,<sup>3</sup> the immanent structures of defamation law and dialogue on reform in a civil law country such as Germany are of particular interest to the American jurist.

The question of access to a journalist's work product in defamation cases involves a considerable number of problems, and most can be reduced to the dichotomy of personality rights: the right to privacy and the freedom of speech. The free flow of information to and from the media is an essential element of a modern democracy and the confidentiality of sources tends to protect this basic democratic warranty, since potential media informers are more willing to submit sensitive information if they are afforded at least some anonymity.<sup>4</sup> This might be one reason why, until very recently,

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2. See, e.g., ASTRID STADLER, *Persönlichkeitsrecht contra Medienfreiheit*, 1989 JURISTENZEITUNG 1084; ROLF STÜRNER, *Die verlorene Ehre des Bundesbürgers—Bessere Spielregeln für die öffentliche Meinungsbildung*, 1994 JURISTENZEITUNG 865; NOLTE, *DER BELEIDIGUNGSSCHUTZ IN DER FREIHEITLICHEN DEMOKRATIE* (1992); STARK, *EHRENSCHUTZ IN DEUTSCHLAND* (1996); AXEL BEATER, *ZIVILRECHTLICHER SCHUTZ VOR DER PRESSE ALS KONKRETISIERTES VERFASSUNGSRECHT* (1996).

3. See generally UNIF. CORRECTION OR CLARIFICATION OF DEFAMATION ACT (Proposed Official Draft) 12 U.L.A. 291 (1993); Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291 (1994) (providing a thorough discussion of the genesis and text of this proposal).

4. See *Goodwin v. United Kingdom*, App. No. 17488/90, 22 Eur. H.R. Rep. 123, 143 (1996) (Commission report) ("Protection of journalistic sources is one of the basic conditions for press freedom. . . . Without such protection, sources may be deterred from assisting the

German courts and commentators alike had not even entertained the idea of a plaintiff's right of access to internal media information in order to improve the evidentiary basis for defamation litigation.<sup>5</sup> Notably, it has been the American paradigm of pretrial discovery against media defendants, *inter alia*, that has induced German scholars to review and challenge the traditional doctrine that generally denied any substantial access to internal media information.

The first part of this comparative analysis addresses the arsenal of civil remedies in the law of defamation, followed by the prerequisites for access to internal media information. The focus then shifts to the different types of obtainable information before turning to an exploration of the journalist's privilege not to reveal sources. In consideration of cultural differences between Germany and the United States, the final section undertakes an evaluation of the idiosyncrasies and the convergence of the respective paradigms.

## II. THE ARSENAL OF REMEDIES IN THE LAWS OF DEFAMATION

### A. Pecuniary Redress

As in the United States, German law provides pecuniary redress for the defamed individual. However, the fundamental difference in the defamation laws of the respective countries is that the American concept relies far more on damage awards to protect the personality of the defamed. By contrast, the German system favors a variety of different remedies that place less emphasis upon money awards.

1. *Special Compensatory Damages.* In Germany, a defamation action for compensatory damages lies under Section 823 of the Civil Code (the *Bürgerliches Gesetzbuch*, or "BGB"): that is, when the defendant intentionally or negligently violates the plaintiff's

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press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the [European] Convention [of Human Rights] unless it is justified by an overriding requirement in the public interest." *But see* *Branzburg v. Hayes*, 408 U.S. 665, 691, 693-701 (1972).

5. *But see generally* ALEXANDER BRUNS, *INFORMATIONSPRÜCHE GEGEN MEDIEN* (1997) (arguing in favor of actions for information against media).

constitutionally granted personality right.<sup>6</sup> The question of whether the plaintiff is entitled to compensatory damages primarily turns upon the distinction between statements of fact and statements of opinion.<sup>7</sup> This differentiation is mainly rooted in the Free Speech Clause of Article 5(1) of the German Constitution (*Grundgesetz*, or “GG”), which affords special protection to mere expressions of opinion.<sup>8</sup> As a general rule, defamatory factual statements trigger media liability when the plaintiff can prove the falsity of the statement. On the other hand, statements of opinion entail actionable damages only in cases of malicious insult (*Schmähkritik*),<sup>9</sup> which under the Constitutional Court’s restrictive interpretation hardly ever occurs. This core distinction between statements of fact and opinion has been sanctioned by the German Constitutional Court (Bundesverfassungsgericht),<sup>10</sup> although it imposes a considerable burden on defamation plaintiffs by requiring courts to presume an opinion rather than a statement of fact in close cases. German courts therefore need to thoroughly evaluate whether or not the case at bar involves a factual statement, and the scrutiny regarding whether the statement in controversy is defamatory or not plays a more subordinate role in German practice than in American defamation law.

Even untrue factual statements are privileged as non-negligent if the media defendant complied with the requirement to duly investigate the reported matter. The burden of proving the media defendant’s negligent deviation—which under German civil procedure is beyond a reasonable doubt—rests with the defamed plaintiff. Standards of investigative care appear to be verifiable only if the plaintiff is provided access to the relevant information gathered by the media. Since German civil procedure does not provide pretrial discovery, defamation plaintiffs in many cases likely encounter almost insurmountable evidentiary difficulties.<sup>11</sup>

Furthermore, a German defamation plaintiff’s actionable damages generally are limited to actual, specifically proven economic loss, and presumed damages cannot be obtained. Hence, unlike its

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6. See § 823 BGB. See generally Thwaite & Brehm, *supra* note 1, at 337-39 (sketching the constitutional background of the German personality right).

7. Cf. *id.* at 343-44 (providing specific examples).

8. GRUNDGESETZ [Constitution] [GG] art. 5(1) (F.R.G.).

9. See *id.*

10. See BVerfGE 61, 1 (7-9).

11. See generally, BRUNS, *supra* note 5.

counterpart in the United States, German law does not distinguish between libel and slander.

2. *General Damages for Reputational Harm and Punitive Damages.* German civil law, in satisfaction of the requirements for compensatory damages, awards actionable damages for reputational harm. Remarkably, it was case law relying on constitutional grounds that first acknowledged immaterial damages, such as monetary compensation for non-economic harm, as a remedy in favor of the defamed; this was in disregard of both the restrictive language of the governing sections of the German Civil Code (Sections 847 and 253) and the legislature's explicit intention to exempt defamation cases from damage awards for pain and suffering.<sup>12</sup> In its infancy, the era of general damages for reputational harm was characterized by caution with regard to a more frequent and more generous application of the newly-created remedy. However, in recent years, courts have been more frequently disposed to award higher amounts.<sup>13</sup> Nevertheless, German courts normally do not render judgments comparable in size to those in American practice, presumably as a consequence of the ample variety of remedies available.<sup>14</sup>

This recent German trend toward higher general damage awards should not be interpreted as suggesting that German defamation law

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12. See BVerfGE 34, 269 (282, 292).

13. See BGHZ 128, 1 (14) (recent decisions of Germany's highest Appellate Court for civil proceedings, Bundesgerichtshof in Zivilsachen); see also 1996 NEUE JURISTISCHE WOCHENSCHRIFT 984, 985 (referring to cases brought by Princess Caroline of Monaco); MATTHIAS PRINZ, *Geldentschädigung bei Persönlichkeitsverletzungen durch Medien*, 1996 NEUE JURISTISCHE WOCHENSCHRIFT 953, 954; MÜLLER, *Ehrenschutz und Meinungsfreiheit*, 1997 ARCHIV FÜR PRESSERECHT 499, 502; WALTER SEITZ, *Prinz und Prinzessin—Wandlungen des Deliktsrechts durch Zwangskommerzialisierung der Persönlichkeit*, 1996 NEUE JURISTISCHE WOCHENSCHRIFT 2848; AXEL BEATER, *ZIVILRECHTLICHER SCHUTZ VOR DER PRESSE ALS KONKRETISIERTES VERFASSUNGSRECHT* 68 (1996). See generally MINELLI, *Zur Ausglei chung widerrechtlicher Medieneingriffe in die Privatsphäre*, 1996 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT 73 (providing a Swiss perspective).

14. In America, damage awards for defamation suits are relatively infrequent, but they tend to be much higher than their German counterparts. See, e.g., *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987) (reducing a \$3,000,000 compensatory damages award to \$1,000,000, but upholding \$2,050,000 in punitive damages); *Bressler v. Fortune Magazine*, 971 F.2d 1226 (6th Cir. 1992) (reversing trial court's judgment entered upon jury verdict award of \$550,000). In Germany, the highest awards have not exceeded DM 100,000. Cf. 1996 NEUE JURISTISCHE WOCHENSCHRIFT 984 (awards of DM 30,000 and DM 50,000 were held insufficient).

is on the verge of embracing the idea of punitive damages.<sup>15</sup> Any form of punishment by means of civil remedies is still rather clearly outside the province of German civil law, and its constitutionality is questionable at best.<sup>16</sup>

## B. Injunctive Relief

There is significant dissimilarity in the availability of injunctive relief in the respective defamation laws. While plaintiffs in America have rarely been granted injunctions to prevent defamatory statements,<sup>17</sup> German courts commonly use this device to restrain the media from repeating allegedly false and defamatory reports.<sup>18</sup> An injunction can be issued through final judgment as a permanent prohibition of the defamatory statement and also as a temporary inhibitory order pending litigation of that final judgment.<sup>19</sup> Injunctive relief is available when (1) a plaintiff can prove that the defamatory statement in controversy is untrue, and (2) the defendant fails to meet the burden of showing that he or she has conformed to the duty to investigate the facts.<sup>20</sup> Injunctions purporting to prevent the first publication of a possibly defamatory statement are rarely ever issued because of the difficulty plaintiffs face in substantiating the contents of the prospective statement. Moreover, injunctions against defamation have been disfavored on constitutional grounds, and

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15. In implying that very conclusion, some American authors seem to overlook the fundamental difference between *general* damages and *punitive* damages. See, e.g., MAURICE ROSENBERG, PETER HAY & RUSSELL J. WEINTRAUB, *CONFLICT OF LAWS* 224 (10th ed. 1996).

16. See BVerfGE 91, 335 (345); see also BVerfGE 91, 140 (145-146) (ruling that service of process regarding punitive damages litigation must be effectuated in compliance with the Hague Service Convention); BGHZ 118, 312 (334-345) (Germany's highest Appellate Court for civil proceedings, Bundesgerichtshof in Zivilsachen, holding that an "unspecified" punitive damage award is unenforceable in Germany because of a strong countervailing public policy).

17. See Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916); see also Robert A. Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423, 431-36 (1952); Robert Allen Sedler, *Injunctive Relief and Personal Integrity*, 9 ST. LOUIS U. L.J. 147 (1964). See, e.g., *Kramer v. Thompson*, 947 F.2d 666 (3d Cir. 1991), cert. denied, 112 S. Ct. 2274 (1992). See generally REX S. HEINKE, *MEDIA LAW* § 10.9 (1994) (providing an informative overview of recent case law). But see *Advanced Training Sys. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984) (enjoining media defendants from the repetition of statements that had previously been declared defamatory by a judgment and therefore somewhat approximating German notions); *Lemons v. Mycro Group*, 667 F. Supp. 665, 667 (S.D. Iowa 1987); *Retail Credit Co. v. Russel*, 218 S.E.2d 54, 63 (Ga. 1975); *O'Brien v. University Comm. Tenant Union*, 327 N.E.2d 753 (Ohio 1975).

18. See Thwaite & Brehm, *supra* note 1, at 349. See also Matthias Prinz, *Germany, in INTERNATIONAL MEDIA LIABILITY*, *supra* note 1, at 199, 205.

19. See Thwaite & Brehm, *supra* note 1, at 349.

20. See *id.*

numerous commentators have labeled this type of remedy as censorship.<sup>21</sup> In any event, there is a strong need for the plaintiff to obtain information the media defendant has collected. If the plaintiff seeks to inhibit a future publication of a defamatory statement, there is a manifest need for information even about the contents of a forthcoming report.

### C. Retraction and Clarification

In the course of the American defamation law reform discussion, proposals have emerged from the National Conference of Commissioners on Uniform State Laws that resemble state retraction statutes.<sup>22</sup> The proposed Uniform Correction or Clarification of Defamation Act of 1993 required the plaintiff to request correction or clarification of a defamatory statement so as to maintain the right to sue for defamation.<sup>23</sup> Timely and sufficient correction or clarification by the defendant would have been a bar to any presumed or punitive damages;<sup>24</sup> the plaintiff's action was subject to comparable restrictions if the defendant offered to correct or clarify under Section 8 of the proposed Act.<sup>25</sup>

German law has long embraced the idea of retraction and clarification, not as defenses against damage litigation, but rather as separate causes of action. Plaintiffs may pray for judgment ordering the newspaper or broadcaster to retract—or at least to clarify—the statement in controversy.<sup>26</sup> Complete retraction (*Widerruf*) requires that the plaintiff prove the falsity of the statement beyond a reasonable doubt. If the plaintiff does not succeed in doing so, he or she may still be entitled to a so-called restricted retraction (*eingeschränkter Widerruf*), where the defendant states that he or she

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21. *See id.*

22. *See, e.g.,* CAL. CIV. CODE § 48(a). *See also* Holden v. Pioneer Broad. Co., 365 P.2d 845 (Or. 1961), *cert. denied* 370 U.S. 157 (1962); Arizona statute was being held unconstitutional: Boswell v. Phoenix Newspapers, 730 P.2d 186 (Ariz. 1986), *cert. denied* 481 U.S. 1029 (1987); Montana statute was also declared unconstitutional: Madison v. Yanker, 589 P.2d 126 (Mont. 1978).

23. *See* UNIF. CORRECTION OR CLARIFICATION OF DEFAMATION ACT § 3, 12 U.L.A. 291 (1993). In 1995, North Dakota became the first state to enact the Uniform Act. *See North Dakota Adopts Uniform Correction Act*, MEDIA L. RPTR. NEWS NOTES, May 2, 1995, at 2.

24. *See* UNIF. CORRECTION OR CLARIFICATION OF DEFAMATION ACT § 5, 12 U.L.A. 291 (1993).

25. *See id.* § 8.

26. *See* §§ 823, 1004 BGB; *see also* BGHZ 69, 181 (182). *See generally* EGBERT WENZEL, DAS RECHT DER WORT- UND BILDBERICHTERSTATTUNG, no. 13.57, 13.68 (4th ed. 1994) (providing a more detailed presentation); Prinz, *supra* note 18, at 205-06.

does not uphold the defamatory statement. The plaintiff may secure this restricted retraction if he or she can establish falsehood by a preponderance of the evidence, and there is no serious indication that the statement might be true. In these cases, knowledge of the media defendant's sources again could be extremely helpful to the plaintiff.

#### D. Declaratory Judgment

American reformers have called for the use of declaratory judgment actions, which call for the court to determine not the question of fault, but rather the veracity of the statement in question—at first glance a somewhat astonishing proposal.<sup>27</sup> Supporters of this concept disagree on whether the decision to invoke this remedy should rest exclusively within the plaintiff's discretion<sup>28</sup> or if the defendant should also have the right to choose between declaratory judgment and damage litigation.<sup>29</sup> Such proposals rely mostly on statutory intervention by the legislature, although contemporary civil procedural law also provides for declaratory judgments.<sup>30</sup>

German doctrine envisages a more or less comparable problem: practice and prevailing doctrine have not yet endorsed the concept of a declaratory judgment action, even though a judgment stating the infringement of personality rights can be subsumed under the language of the governing provision of the German Civil Procedure Code (*Zivilprozessordnung*, or “ZPO”).<sup>31</sup> Opponents of declaratory judgments argue that adjudicating the veracity of a statement is not an appropriate issue for civil litigation because the judiciary was not meant to resolve factual controversies independent of any substantive legal issue.

However, the declaration of an infringement of the personality right does require the court to dispose of a legal issue, especially if one takes into account that the media may be justified in publishing

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27. See ANNENBERG WASHINGTON PROGRAM IN COMMUNICATIONS POLICY STUDY OF NORTHWESTERN UNIVERSITY, PROPOSAL FOR THE REFORM OF LIBEL LAW: THE REPORT OF THE LIBEL REFORM PROJECT OF THE ANNENBERG WASHINGTON PROGRAM 11-12, 16, 22 (1988).

28. See Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809, 836-42 (1986).

29. See David A. Barrett, *Declaratory Judgment for Libel: A Better Alternative*, 74 CAL. L. REV. 847, 864-80 (1986).

30. See 28 U.S.C. § 2201(a); see also FED. R. CIV. P. 57 and the corresponding state law provisions.

31. See § 256 ZPO.



falsities if they have followed the journalistic standard of care. Thus, the Juristentag, Germany's most influential private association of lawyers, proposed a resolution in 1990 to modify the text of Section 256 of the ZPO to clarify that an action for declaratory judgment lies in defamation cases.<sup>32</sup> The legislature, however, has yet to take any action in furtherance of this proposal, presumably because German politicians are anxious to preserve their good relations with the media—a desire probably shared by their American colleagues.

#### E. Right to Reply

Another remedy in German defamation law that is unfamiliar to many American jurists is the right to reply (*Gegendarstellung*). The question of veracity notwithstanding, the press and media codes of the sixteen German states (*Bundesländer*) afford a right to reply.<sup>33</sup> An individual personally affected by a published statement may seek to order the newspaper or broadcaster to publish a factual response of comparable publicity. Since this remedy is to be pursued in accelerated proceedings similar to those for temporary injunctions, it establishes a highly effective device to vindicate personality rights, and its core is even constitutionally warranted.<sup>34</sup>

#### F. German Reform Discussion

In Germany, recent reform considerations have been stimulated through the 58th Congress of the German Juristentag of 1990 in Munich, of which one section dealt with the conflict of media freedom and personality rights.<sup>35</sup> The Congress first addressed the overarching question of whether a new and more sophisticated federal codification in the field of mass media and personality law would be advisable; it answered in the affirmative.<sup>36</sup> However, the Congress

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32. See SITZUNGSBERICHT K ZUM 58. DEUTSCHEN JURISTENTAG, p. 218 No. 3 lit. g (Ständige Deputation des Deutschen Juristentages ed., 1990) [hereinafter SITZUNGSBERICHT].

33. See Prinz, *supra* note 18, at 202-05; see also Karina Hesse, *The Right of Reply under German Press Law*, in MEDIA LAW IN EUROPE 97-102 (Löw & Vorderwülbecke eds., 1994). See generally SEITZ, SCHMIDT & SCHOENER, DER GEGENDARSTELLUNGSANSPRUCH IN PRESSE, FILM, FUNK UND FERNSEHEN (2d ed. 1990) (providing a detailed exploration in German); BIRGIT KOCH, RECHTSSCHUTZ DURCH GEGENDARSTELLUNG IN FRANKREICH UND DEUTSCHLAND (1995) (providing a comparative approach).

34. See BVerfGE 63, 131 (142); see also BVerfGE 73, 118 (201); 1994 DEUTSCHE RECHTSZEITSCHRIFT 67; STÜRNER, *supra* note 2, at 875.

35. See generally ROLF STÜRNER, GUTACHTEN FÜR DEN 58. DEUTSCHEN JURISTENTAG (1990) (providing an instructive overview of the agenda and issues).

36. See SITZUNGSBERICHT, *supra* note 32, at 218.

failed to achieve a consensus on how such a comprehensive codification should be conditioned. The majority's proposal to clarify the statutory basis for declaratory judgment actions has already been discussed.<sup>37</sup> However, the option of increased damage awards was rejected,<sup>38</sup> and in this respect, an approximation to American standards is not likely to evolve, at least for the time being. The majority also favored a uniform federal codification of the right to reply in order to abolish the labyrinthine network of provisions among the sixteen Bundesländer.<sup>39</sup> Finally, although several parliamentary initiatives and a proposed 1974 Federal Press Code Bill<sup>40</sup> raised the possibility of actions for information, this issue was only marginally addressed at the Congress, and the legislature has unfortunately not yet promoted any of these generally desirable propositions.

### III. THE REQUIREMENTS FOR ACCESS TO INTERNAL MEDIA INFORMATION

#### A. Procedural Posture

Before addressing the requirements a defamation plaintiff must satisfy in order to gain access to internal media information, one should visualize the typical procedural posture of defamation litigation. In the American setting, the procedural outset is plain: the plaintiff may obtain pretrial discovery pursuant to Rule 26 of the Federal Rules of Civil Procedure<sup>41</sup> and the corresponding state law provisions. Discovery of internal media information, however, is likely to collide with First Amendment guaranties and state shield statutes.<sup>42</sup> This conflict culminates in cases where a confidential informer's anonymity is at stake and a plaintiff seeking punitive damages wants to establish the standard of actual malice used in *New York Times v. Sullivan*.<sup>43</sup>

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37. See *supra* note 32 and accompanying text.

38. See SITZUNGSBERICHT, *supra* note 32, at 218.

39. See *id.* at 219.

40. See HOFFMANN-RIEM/PLANDER, RECHTSFRAGEN DER PRESSEREFORM 213, 216 (1977).

41. Fed. R. Civ. P. 26.

42. See discussion *infra* Part V for problems arising under constitutional and statutory provisions.

43. 376 U.S. 254 (1964). See MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW 519-21 (5th ed. 1995).

German defamation litigants encounter similar—if not more complicated—intricacies in the absence of pretrial discovery. Since prospective media defendants are not prone to expose the information on which an allegedly defamatory publication is based, a German plaintiff usually will need to commence an action for information in order to prepare the evidentiary basis for a subsequent suit in pursuit of various remedies. Proceedings for information may either be brought as separate actions or joined with the plea for the subsequent remedy pursuant to Section 254 of the German Civil Procedure Code<sup>44</sup> (*Stufenklage*, literally “step-action”).<sup>45</sup> In the latter case, once the information issue has been adjudicated in the affirmative and the information has been provided, the plaintiff may proceed on the merits of the remedy sought. This procedural scheme resembles American pretrial discovery only in some regards, namely insofar as it presents a bifurcated proceeding designed both to clarify the evidentiary basis in a first stage and eventually to try the facts underlying the ultimate remedy. Although actions for information are the typical means for plaintiffs to mitigate their burden of proof, until very recently, prevailing German doctrine has not even pondered making information actions available to defamation plaintiffs on a broader scale. The latest proposals to provide more generously for information actions in defamation cases can be expected to meet determined opposition on the grounds of the Freedom of Media Clause of Article 5(1) of the German Constitution.<sup>46</sup>

## B. Material Requirements

American civil procedure allows pretrial discovery regarding internal media information under the very broadly construed relevancy test of Federal Rule of Civil Procedure 26(b)(1)<sup>47</sup> and its state analogues. The German counterpart, the information action, is based on an analogy both to existing federal statutory preparatory information claims<sup>48</sup> and to rights to obtain information on personal

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44. § 254 ZPO.

45. See generally BRUNS, *supra* note 5, at 263-77 (providing further details).

46. GRUNDGESETZ [Constitution] [GG] art. 5(1) (F.R.G.). The idea of actions for information in defamation and invasion of privacy cases is developed and favored by BRUNS, *supra* note 5, at 152-233.

47. Fed. R. Civ. P. 26(b)(1).

48. See, e.g., § 666 (alt. 3) BGB and its systemic progeny: §§ 1698 subs. 1 and 2, 1890, 1978 subs. 1, 2130 subs. 2 BGB; § 740 subs. 2 alt. 1 BGB; § 235 subs. 3 alt. 1 HGB; § 1214 subs. 1 BGB; see also, §§ 97 subs. 1 clause 2, 101 a Copyright Code, § 19 Trademark Code, § 140 b

data gathered by media, the latter being laid down in data protection and media codes of the sixteen Bundesländer.<sup>49</sup> Moreover, the German Constitutional Court—in sharp contrast to present American notions of data protection—acknowledged a constitutionally anchored “right to informational self-determination” (*Recht auf informationelle Selbstbestimmung*), which essentially grants a minimum standard of data protection.<sup>50</sup> The core of this right to data protection is an individual’s right to know who has information concerning him or her and exactly what they have.<sup>51</sup> Hence, a rather strong argument can be made that the German Constitution demands a certain amount of access to internal media information with regards to defamation, as such information is collected for a purpose.

Although the prerequisites for an information action are highly controversial, one could argue that the plaintiff is required to produce factual leads showing reasonably meritorious prospects for the remedy ultimately pursued.<sup>52</sup> It is not necessary for the information plaintiff to substantiate the merits of the remedy by a preponderance of the evidence or to establish a *prima facie* case. Normally, the plaintiff will satisfy the burden by making it appear reasonably plausible that the defamatory statement is false. Still this threshold requirement is far more difficult to meet than obtaining pretrial discovery. On the other hand, American pretrial practice, taking into

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Patent Code, § 24 b Design Protection Code, § 9 Semi-Conductor Protection Code. For more details, see BRUNS, *supra* note 5, at 163-64.

49. § 41 subs. 3 Federal Data Protection Act; § 31 subs. 3 Data Protection Act (DPA) Baden-Württemberg; Art. 21 subs. 3 Broadcasting Act Bayern; § 45 subs. 3 Ostdeutscher Rundfunk Brandenburg Act; § 50 subs. 3 Westdeutscher Rundfunk Act; § 74 subs. 7 Broadcasting Act Saarland; Art. 20 subs. 3 Media Act Bayern; § 46 subs. 3 Broadcasting Act Nordrhein-Westfalen; § 31 subs. 3 Broadcasting Act Rheinland-Pfalz; § 57 subs. 3 Private Broadcasting Act Thüringen; § 50 subs. 2 Media Act Bremen; § 50 subs. 2 Media Act Hamburg; § 63 subs. 6 Broadcasting Act Saarland. Rather complicated technical details of this newly generated analogy are not essential to the understanding of the outlines of the German concept and, therefore, are not supposed to be of special interest to American scholars. For more details, see BRUNS, *supra* note 5, at 163-67.

50. See BVerfGE 65, 1 (41-52).

51. Many European data protection codes afford such a right to know. See, e.g., France (Law No. 78-17 of Jan. 1978, J.O. 1978, 227); England (Data Protection Act, 1984, § 21, sced. 1); Austria (§§ 11, 25 Bundesgesetz über den Schutz personenbezogener Daten BGBl 350, 565/1978, as amended by Bundesgesetz vom 27.06.1986, BGBl 237, 370/1986); Belgium (Data Protection Act, 1992, Art. 1 § 1); Sweden (Datalag, 1973, § 10(1)); Denmark (lov nr. 293 om private registre m. v. af 8 juni 1978, Lovtidende A 1978, 833, amended by lov nr. 383 af 10 juni 1987, Lovtidende A 1987, 1300; lov nr. 294 om offentlige myndigheders registre af 8 juni 1978, Lovtidende A 1978, 839); Norway (§ 7 lov om personregistre m. m. af 9 juni 1978, Norsk Lovtidend 1978, Avd. 1, Nr. 48, 402).

52. See BRUNS, *supra* note 5, at 179-86.

consideration First Amendment concerns, often restricts its generally wide range discovery approach in the context of defamation litigation against media.<sup>53</sup> Thus, the apparently wide gulf between the American and the German procedural frameworks narrows somewhat upon examination of the constitutional and statutory limits on pretrial discovery against media defendants in defamation lawsuits.

#### IV. THE TYPE OF ACCESSIBLE INFORMATION

At first glance from an American perspective, the scope of discoverable information in defamation cases bears no specific problem. First Amendment and statutory restrictions notwithstanding, the media defendant is generally required to produce every imaginable kind of evidentiary material, including documents, photographs, tapes, or material gathered, obtained, processed, or edited in the course of preparing the allegedly defamatory publication. The same applies to pre-publication drafts.

In Germany, media defendants are obliged to provide written information on the factual results of preparatory investigation insofar as these facts concern the plaintiff.<sup>54</sup> They may deny access to editorial opinions on the ground that Article 5(1) of the German Constitution<sup>55</sup> privileges editorial secrecy.<sup>56</sup> Special problems arise as to whether a plaintiff is entitled to learn about the contents of a forthcoming manuscript, as German defamation law affords an injunction against defamation.<sup>57</sup> Knowledge about a future publication may therefore be of exceptional importance. On the other hand, the editorial privilege urges some caution before courts intrude into editors' constitutionally protected sphere. If, however, a plaintiff can present evidence that a newspaper or broadcaster is about to publish a defamatory statement, the editorial privilege should yield.<sup>58</sup>

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53. *See infra* Part V.A.

54. *See* BRUNS, *supra* note 5, at 204-06.

55. GRUNDGESETZ [Constitution] [GG] art. 5(1) (F.R.G.).

56. The German Constitutional Court (Bundesverfassungsgericht) has assumed a qualified rather than an absolute privilege. *See* BVerfGE 66, 116 (133-135); BVerfGE 77, 65 (74-75); 1997 NEUE JURISTISCHE WOCHENSCHRIFT 386-87.

57. *See supra* Part II.B.

58. *See* BRUNS, *supra* note 5, at 77-78, 171-72.

## V. THE JOURNALIST'S PRIVILEGE NOT TO REVEAL SOURCES

American journalists and media operations may invoke the First Amendment and exercise their privilege not to reveal sources. Similarly, Article 5(1) of the German Constitution<sup>59</sup> imposes limits on the scope of available information in defamation cases. Perhaps the sharpest contrast between the two legal systems in this regard is that, unlike German law, American state law provides a remarkable body of shield statutes setting forth a reporter's privilege. Since court decisions and literature on the journalist's privilege in America are already abundant,<sup>60</sup> a rather concise outline of American law may suffice for the purpose of this comparative exploration. Following this summary, the German journalist's privilege not to reveal sources will be addressed.

### A. The American Journalist's Privilege

1. *First Amendment Protection.* The common law does not confer any privilege on media defendants.<sup>61</sup> In the leading Supreme Court decision of *Branzburg v. Hayes*,<sup>62</sup> a five-justice majority held that reporters are not entitled to any First Amendment privilege when called upon to testify in grand jury proceedings.<sup>63</sup> Although the Court rejected the notion of a First Amendment privilege not to reveal sources even when the information was procured in confidentiality, this decision can be considered anything but the last word on a journalist's First Amendment privilege. First, the Supreme Court's holding referred to grand jury proceedings and not to civil litigation; it specifically did not address the issue of media defendants in defamation suits. Second, and more importantly, Justice Powell's concurrence acknowledged First Amendment protection for

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59. GRUNDGESETZ [Constitution] [GG] art. 5(1) (F.R.G.).

60. See, e.g., 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE §§ 5426, 712-14 (1980); REX S. HEINKE, MEDIA LAW §§ 14.1-14.8 (1994); C. THOMAS DIENES, LEE LEVINE & ROBERT C. LIND, NEWSGATHERING AND THE LAW §§ 14.1-16.3, (1997); JOHN D. ZELESNY, COMMUNICATIONS LAW 255-73 (2d ed. 1997); RALPH HOLSINGER & JOHN PAUL DILTS, MEDIA LAW 314-61 (4th ed. 1997).

61. For a historical analysis, see WRIGHT & GRAHAM, *supra* note 60, at 714-26; Sam J. Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 235-36 (1974); Talbot D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. ON LEGIS. 307, 309-14 (1969).

62. 408 U.S. 665 (1972).

63. See *id.* at 690-91.

confidential sources, provided that the link between the information sought and the subject matter of the grand jury investigation is attenuated.<sup>64</sup> Given the bare majority of the *Branzburg* Court, the decision was widely conceived as acknowledging a qualified First Amendment privilege. This viewpoint was bolstered by vigorous academic criticism.<sup>65</sup>

In *Herbert v. Lando*,<sup>66</sup> the Supreme Court, inter alia, addressed the discoverability of editorial opinions in a defamation lawsuit against journalists and a broadcaster. The Court denied a “privilege for the editorial process” insofar as it was crucial for a plaintiff asserting actual malice to obtain discovery regarding the journalist’s state of mind.<sup>67</sup> Defamation plaintiffs were not obliged to make a prima facie showing of the falsity of the defamatory statement.<sup>68</sup> On the other hand, the Supreme Court held that mere curiosity or a common public interest would not suffice to justify disclosure of the internal editorial process. Despite distinct criticism from media advocates,<sup>69</sup> most scholarly opinion sided with the Court.<sup>70</sup>

In the aftermath of *Branzburg* and *Herbert*, lower courts have generally followed the Supreme Court’s rejection of the notion of an *absolute* journalist’s privilege. However, the overwhelming majority of courts have adhered to a *qualified* First Amendment privilege. For example, the Ninth Circuit Courts of Appeals has embraced a qualified First Amendment privilege not to reveal sources.<sup>71</sup> Only the

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64. *See id.* at 710 (Powell, J., concurring).

65. *See* WRIGHT & GRAHAM, *supra* note 60, at 743.

66. 441 U.S. 153 (1979).

67. *Id.* at 170.

68. *See id.* at 174 n.23. *But see id.* at 180 (Brennan, J., dissenting).

69. *See, e.g.*, William J. Brennan, *Address at the Dedication of the Samuel I. Newhouse Center for Law and Justice in Newark, N.J.*, 32 RUTGERS L. REV. 173, 179-80 (1979).

70. *See* Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to “The Central Meaning of the First Amendment,”* 83 COLUM. L. REV. 603, 610-11 (1983).

71. *See, e.g.*, *Bruno & Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 586, 595-96 (1st Cir. 1980) (newspaper sued for defamation); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (media witness in criminal proceedings), *cert. denied*, 464 U.S. 816 (1983); *Krase v. Graco Children Products, Inc.*, 79 F.3d 346, 351-353 (2d Cir. 1996) (media witness in product liability case). *But see* *United States v. Cutler*, 6 F.3d 67, 73 (2d Cir. 1993) (privilege claim of media witness in criminal proceedings rejected); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3rd Cir. 1980) (criminal proceedings), *cert. denied*, 449 U.S. 1126 (1981); *LaRouche v. National Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986) (libel action against broadcaster), *cert. denied*, 479 U.S. 818 (1986); *Church of Scientology Int’l v. Daniels*, 992 F.2d 1329, 1335 (4th Cir. 1993) (media witness in defamation suit), *cert. denied*, 510 U.S. 869 (1993); *Miller v. Transamerican Press*, 621 F.2d 721, 725 (5th Cir. 1980) (defamation suit against print medium), *cert. denied*, 450 U.S. 1041 (1981); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93 (8th Cir. 1972) (libel media defendant); *Mark v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (media witness in defamation

Sixth Circuit has explicitly rejected a privilege in grand jury proceedings.<sup>72</sup>

Most courts, in evaluating whether a First Amendment privilege applies, employ a three-part test partly derived from the dissent in *Branzburg* by Justices Stewart, Brennan, and Marshall,<sup>73</sup> and with an element of an earlier Second Circuit holding in *Garland v. Torre*.<sup>74</sup> This three-part scrutiny affords First Amendment protection for confidential media information only if (1) the defendant is likely to have definite, clearly relevant information, (2) that information is not otherwise obtainable, and (3) the information sought goes “to the heart of the plaintiff’s claim.”<sup>75</sup> The third part of this narrow threshold test stems from the 1958 *Garland* decision, which disposed of a mere testimonial privilege in civil proceedings. Since plaintiffs in defamation cases frequently need to call confidential informants to the witness stand to prove actual malice, media defendants are seldom completely successful in invoking First Amendment protection.<sup>76</sup> Sometimes delay tactics may prove effective, as the defendants can often show that the information sought is otherwise obtainable.<sup>77</sup> Efforts to deny discovery of editorial remarks or opinions, however, are hardly ever successful.<sup>78</sup>

2. *Statutory Shield Law.* It would take a small treatise to fully analyze the thirty state shield laws governing journalistic privileges.<sup>79</sup>

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litigation against a third person); *Shoen v. Shoen*, 48 F.3d 421, 415-16 (9th Cir. 1995) (media witness in defamation against a third person); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977) (media witness in civil litigation); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981) (non-party journalist in civil litigation).

72. See *In re Grand Jury Proceedings*, 810 F.2d 580, 584-85 (6th Cir. 1987).

73. See *Branzburg*, 408 U.S. at 725.

74. 259 F.2d 545 (2d Cir. 1958).

75. *Garland*, 259 F.2d at 549.

76. See, e.g., *Carey v. Hume*, 492 F.2d 631, 638-39 (D.C. Cir. 1974); *Miller*, 621 F.2d at 726-727; *DeRoburt v. Gannett Co., Inc.*, 507 F.Supp. 880, 886 (D. Haw. 1981); *Dangerfield v. Star Editorial, Inc.*, 817 F.Supp. 833, 838-39 (C.D. Cal. 1993); *Aequitron Medical, Inc. v. Columbia Broad. Sys., Inc.*, 1995 U.S. Dist. LEXIS 9485 at 1, 9 (S.D.N.Y. July 6, 1995).

77. See, e.g., *Dangerfield*, 817 F. Supp at 838; *LaRouche*, 780 F.2d at 1139.

78. See *Aequitron Medical, Inc. v. CBS, Inc.*, 1995 U.S. Dist. LEXIS 9485 at 1, 9 (S.D.N.Y. July 6, 1995).

79. The following jurisdictions provide for some statutory protection of journalistic sources: Alabama, ALA. CODE § 12-21-142 (1995); Alaska, ALASKA STAT. §§ 09.25.300-390 (Michie 1998); Arizona, ARIZ. REV. STAT. ANN. §§ 12-2214, 12-2237 (West 1994); Arkansas, ARK. CODE ANN. § 16-85-510 (Michie 1987); California, CAL. EVID. CODE § 1070 (West 1995); CAL. CONST. art. I, § 2(b); Colorado, COLO. REV. STAT. §§ 13-90-119, 24-72.5-101-106 (1999); Delaware, DEL. CODE. ANN. tit. 10, §§ 4320-4326 (1999); District of Columbia, D.C. CODE ANN. §§ 16-4702-4704 (1997); Georgia, GA. CODE ANN. § 24-9-30 (1995); Illinois, 735 ILL.



For this comparative presentation, a summary should suffice.<sup>80</sup> Except for a few states,<sup>81</sup> most shield laws apply to both state and federal proceedings. As a general rule, statutory protection shields newspapers and broadcasters alike.<sup>82</sup> Apparently as a consequence of the *Branzburg* decision, Delaware exempts grand jury proceedings.<sup>83</sup> Some other statutes set forth special rules for defamation or libel cases.<sup>84</sup> The recently enacted South Carolina shield statute restricts its applicability to parties in interest to the proceedings.<sup>85</sup>

Shield statutes normally afford a privilege to both confidential and non-confidential sources. However, Delaware and New Mexico confine their privilege to confidential sources.<sup>86</sup> New York permits an absolute privilege for confidential sources and a qualified privilege for non-confidential sources.<sup>87</sup> The Indiana journalist has a far-

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COMP. STAT. ANN. 5/8-901-5/8-909 (West 1992); Indiana, IND. CODE ANN. § 34-3-5-1 (Michie 1998); Kentucky, KY. REV. STAT. ANN. § 421.100 (Baldwin-Banks 1999); Louisiana, LA. REV. STAT. ANN. §§ 45:1451-45:1459 (West 1999); Maryland, MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (1998); Michigan, MICH. COMP. LAWS ANN. § 28.945(1) (West 1994); Minnesota, MINN. STAT. ANN. §§ 595.021-025 (West 1988); Montana, MONT. CODE ANN. §§ 26-1-901-26-903 (1998); Nebraska, NEB. REV. STAT. ANN. §§ 20-144-20-146 (Michie 1999); Nevada, NEV. REV. STAT. ANN. § 49.275 (Michie 1996); New Jersey, N.J. STAT. ANN. §§ 2A:84A-21-29 (West 1994); New Mexico, N.M. STAT. ANN. § 11-514 (Michie 1999); New York, N.Y. CIV. RIGHTS LAW § 79-h (West 1992); North Dakota, N.D. CENT. CODE § 31-01-06.2 (1996); Ohio, OHIO REV. CODE ANN. §§ 2739.04, 3729.12 (Baldwin 1994); Oklahoma, OKLA. STAT. ANN. tit. 12, § 2506 (West 1993); Oregon, OR. REV. STAT. §§ 44.510-540 (1988); Pennsylvania, 42 PA. CONS. STAT. ANN. § 5942 (West 1982); Rhode Island, R.I. GEN. LAWS §§ 9-19.1-3 (1997); South Carolina, S.C. CODE ANN. § 19-11-100 (Law. Co-op. 1999); Tennessee, TENN. CODE ANN. § 24-1-208 (1980). For a comprehensive survey on these statutory provisions, see the references cited *supra* note 60.

80. The history of shield law legislation began as early as 1898 when Maryland launched the first reporter's privilege statute. For historical data, see Ervin, *supra* note 61, at 237; D'Alemberte, *supra* note 61, at 327.

81. See COLO. REV. STAT. § 13-90-119(1)(e) (1999); MINN. STAT. ANN. § 595.023 (West 1988); OHIO REV. CODE ANN. § 2739.04 (Baldwin 1994); OKLA. STAT. ANN. tit. 12, § 2506 (West 1993); TENN. CODE ANN. § 24-1-208(a) (1980); 42 PA. CONS. STAT. ANN. § 5942(a) (West 1982) ("No person . . . shall be required to disclose . . . in any legal proceeding, trial or investigation before any *government unit*." (emphasis added)).

82. Exceptional in this regard is the Arkansas shield law which mentions radio, but not television broadcasters. See ARK. CODE ANN. § 16-85-510 (Michie 1987).

83. See DEL. CODE ANN. tit. 10, §§ 4320 (1), 4322 (1999).

84. See, e.g., COLO. REV. STAT. § 13-90-119(5) (1999); 735 ILL. COMP. STAT. ANN. 5/8-903 (West 1992); LA. REV. STAT. ANN. § 45:1454 (West 1999); MINN. STAT. ANN. § 595.025 (West 1988); OR. REV. STAT. § 44.530(3) (1988); TENN. CODE ANN. § 24-1-208(b) (1980).

85. See S.C. CODE ANN. § 19-11-100(A) (Law. Co-op. 1999).

86. See DEL. CODE ANN. tit. 10, § 4322 (1999); N.M. STAT. ANN. § 11-514(b)(1) (Michie 1999).

87. See N.Y. CIV. RIGHTS LAW § 79-h(b), (c) (West 1992).

reaching privilege that includes even published sources.<sup>88</sup> Faced with this type of shield, plaintiffs are left to conduct their own investigations.

An examination of the protection standards for journalists' research material reveals three crucial concepts: (1) roughly one-third of all statutes provide no protection to gathered information,<sup>89</sup> (2) about a third accord a privilege to *unpublished* information,<sup>90</sup> and (3) the remaining states declare a sweeping privilege to all obtained information.<sup>91</sup> Confidentiality is requisite only in Delaware,<sup>92</sup> New Mexico,<sup>93</sup> and, with respect to an absolute privilege, New York.<sup>94</sup> Evidently, a tendency has emerged in recent years towards extending statutory privileges to include all research material. By contrast, state legislation tends to exclude from protection editorial opinions or, even more broadly, the journalist's work product,<sup>95</sup> in accordance with *Herbert*.

88. See IND. CODE ANN. § 34-3-5-1 (Michie 1998). Similarly under the 1993 South Carolina privilege statute, publication of the protected material does not constitute a waiver, S.C. CODE ANN. § 19-11-100(C) (Law. Co-op. 1999).

89. Alabama, Alaska, Arizona, Arkansas, Illinois, Indiana, Kentucky, Ohio, Pennsylvania.

90. See CAL. EVID. CODE § 1070 (a)-(c), CAL. CONST. art. I, § 2 (b); LA. REV. STAT. ANN. § 45:1459(B) (West 1999); MD. CODE ANN., CTS. & JUD. PROC. § 9-112(c)(2) (1998); MICH. COMP. LAWS ANN. § 28.945(1) sec. 5a(1) (West 1994); MINN. STAT. ANN. § 595.023 (West 1988); NEB. REV. STAT. ANN. § 20-146 (2) (Michie 1999); NEV. REV. STAT. ANN. § 49.275 (Michie 1996); OKLA. STAT. ANN. tit. 12, § 2506(b)(2) (West 1993); OR. REV. STAT. § 44.520(1)(b) (1988).

91. See, e.g., COLO. REV. STAT. § 13-90-119(2) (1999); D.C. CODE ANN. § 16-4702(2) (1997); GA. CODE ANN. § 24-9-30 (1995); MONT. CODE ANN. § 26-1-902(1) (1998); N.J. STAT. ANN. § 2A:84A-21 rule 27(b) (West 1994); N.D. CENT. CODE § 31-01-06.2 (1996); S.C. CODE ANN. § 19-11-100(A) (Law. Co-op. 1999); Tennessee, TENN. CODE ANN. § 24-1-208(a) (1980).

92. See DEL. CODE. ANN. tit. 10, § 4322 (1999); N.M. STAT. ANN. § 11-514(b)(2) (Michie 1999); N.Y. CIV. RIGHTS LAW § 79-h(b) (West 1992).

93. New Mexico, N.M. STAT. ANN. § 11-514(b)(2) (Michie 1999).

94. N.Y. CIV. RIGHTS LAW § 79-h(b) (West 1992).

95. *But see* COLO. REV. STAT. § 13-90-119(b) (1999) (“...any news information received, observed, processed, prepared, written, or edited by a newsperson . . .”); GA. CODE ANN. § 24-9-30 (1995) (“... any information, document, or item obtained or *prepared* in the gathering or *dissemination* of news . . .” (emphasis added)); MICH. COMP. LAWS ANN. § 28.945(1) sec. 5a(1) (West 1994) (“... any *unpublished matter* or documentation, . . ., *relating* to a communication with an informant . . .” (emphasis added)); NEV. REV. STAT. ANN. § 49.272 (Michie 1996) (“... any . . . information obtained or *prepared* . . . in gathering, receiving or *processing* information . . .” (emphasis added)); OR. REV. STAT. §§ 44.520(1)(b), (2) (1988) (“... Any unpublished information obtained or *prepared* . . . in the course of gathering, receiving or *processing* information . . .” (emphasis added)); S.C. CODE ANN. § 19-11-100(A) (Law. Co-op. 1999) (“... any information, document, or item obtained or prepared in the gathering or dissemination of news . . .” (emphasis added)).

Regarding the legal consequences of statutory privileges, most states bar sanctions against journalists who refuse to disclose privileged information. The vast majority of the shield laws broadly prohibit “compelled disclosure.” This includes contempt sanctions and also, for example, shifting the burden of proof or striking out pleadings or evidentiary material. California and New York are notable exceptions: both states bar contempt measures but permit any other available sanction.<sup>96</sup>

Little more than half of the statutes provide, in various forms, an absolute privilege.<sup>97</sup> However, about one-half of these absolute privileges are confined to mere sources or informants.<sup>98</sup> The other half tend to extend their absolute statutory privilege either to collected research material,<sup>99</sup> or to unpublished<sup>100</sup> or confidential information.<sup>101</sup> The statutory guarantee of absolute journalistic privilege manifests a significant departure from the First Amendment privilege as construed by case law. The criteria for qualified protection vary. Mostly, however, the shield statutes rely on a level scrutiny similar to that employed by the majority of courts in determining the First Amendment privilege.<sup>102</sup> These special provisions notwithstanding, “general” privilege rules are applicable.

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96. See CAL. EVID. CODE § 1070 (a), (b), CAL. CONST. art. I, § 2 (b); N.Y. CIV. RIGHTS LAW § 79-h (b), (c) (West 1992).

97. See ALA. CODE § 12-21-142 (1995); ARIZ. REV. STAT. ANN. §§ 12-2214, 12-2237 (West 1994); CAL. EVID. CODE § 1070 (West 1995), CAL. CONST. art. I, § 2; DEL. CODE ANN. tit. 10, §§ 4322, 4323 (1999); D.C. CODE ANN. §§ 16-4702, 4703(b) (1997); IND. CODE ANN. § 34-3-5-1 (Michie 1998); KY. REV. STAT. ANN. § 421.100 (Baldwin-Banks 1999); MD. CODE ANN., CTS. & JUD. PROC. § 9-112(c), (d)(2) (1998); MICH. COMP. LAWS ANN. § 28.945(1) sec. 5a(1) (West 1994); MONT. CODE ANN. § 26-1-902(1) (1998); NEB. REV. STAT. ANN. § 20-146 (Michie 1999); NEV. REV. STAT. ANN. § 49.275 (Michie 1996); N.J. STAT. ANN. § 2A:84A-21 rule 27, 2A:84A-21.3 (West 1994) (excluding criminal proceedings); N.Y. CIV. RIGHTS LAW § 79-h(b) (West 1992); OHIO REV. CODE ANN. §§ 2739.04, 3729.12 (Baldwin 1994); OR. REV. STAT. § 44.520(1) (1988); 42 P.A. CONS. STAT. ANN. § 5942(A) (West 1982).

98. This is the case in Alabama, Arizona, Delaware (confidential sources), District of Columbia, Indiana, Kentucky (no protection regarding informants who engage in criminal conduct—therefore, statutory privilege did not apply in *Branzburg v. Hayes*), Maryland, Ohio, Pennsylvania.

99. See, e.g., MONT. CODE ANN. §§ 26-1-902(1), 26-903 (1998); NEV. REV. STAT. ANN. § 49.275 (Michie 1996); N.J. STAT. ANN. § 2A:84A-21 rule 27(b) (West 1994) (excluding criminal proceedings).

100. See, e.g., CAL. EVID. CODE § 1070(a), (b), CAL. CONST. art. I § 2(b); MICH. COMP. LAWS ANN. § 28.945(1) sec. 5a(1) (West 1994); NEB. REV. STAT. ANN. § 20-146(2) (Michie 1999); OR. REV. STAT. § 44.520(1)(b) (1988).

101. See N.Y. CIV. RIGHTS LAW § 79-h(b) (West 1992).

102. See *supra* note 71 and accompanying text. For example, COLO. REV. STAT. §§ 13-90-119(3), 13-24-72, 13-5-104 (1999); D.C. CODE ANN. § 16-4703(a) (1997) (not with respect to *informants*), GA. CODE ANN. § 24-9-30 (1995) (third requirement modified: “. . . necessary to

By and large, contemporary American law does not strictly protect internal media information in defamation litigation. Mostly, internal media information, sources, and the identity of informants are obtainable in discovery, provided that the plaintiff can show that the information sought is crucial to his claim. Hence, in defamation cases, the defendant's reliance on statutory, or even on First Amendment protection, with the exception of some limited absolute statutory privileges, is hardly ever successful.

#### B. Substantive Restrictions of Information Actions in Germany

German private media law places its particular parameters on information actions in defamation cases. Since the development of information claims in German defamation law is a rather recent phenomenon, majority and plurality opinions have not yet crystallized, nor has a consensus emerged from academic discussion. However, limitations of information actions in the law of defamation can be inferred by analogizing to generally accepted limits of preparatory information claims, as well as to some landmark decisions of the German Constitutional Court.

First, the peril of self-incrimination does not justify barring a plaintiff access to information obtained from a journalistic investigation. Although a privilege against self-incrimination is constitutionally granted in penal and administrative proceedings,<sup>103</sup> it is generally accepted that defendants in a civil information action may not withhold information on the basis of self-incrimination.<sup>104</sup> The

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the *proper preparation or presentation* of the case . . ."); LA. REV. STAT. ANN. § 45:1459 (B), (D) (West 1999) (regarding *non-confidential* information); MD. CODE ANN., CTS. & JUD. PROC. § 9-112(d) (1998) (prerequisites must be shown "by clear and convincing evidence"); MICH. COMP. LAWS ANN. § 28.945(1) sec. 5a (a) (West 1994) (excluding life-sentencing proceedings); MINN. STAT. ANN. § 595.024(2) (West 1988) (conditions need be proven "by clear and convincing evidence" and disclosure must be necessary to prevent injustice—proviso regarding defamation cases, *see supra* note 84); N.M. STAT. ANN. § 11-514(c) (Michie 1999) (requirements are to be proven by "preponderance of evidence"); N.Y. CIV. RIGHTS LAW § 79-h(c) (West 1992) (for non-confidential information and informants); OKLA. STAT. ANN. tit. 12, § 2506(B)(2) (West 1993) (information sought need only be relevant for a significant issue and not otherwise available); S.C. CODE ANN. § 19-11-100(B) (Law. Co-op. 1999) (requirements must be established by "clear and convincing evidence"); TENN. CODE ANN. § 24-1-208(2) (1980) (requires showing of need "by clear and convincing evidence" as well as preponderant and compelling public interest in disclosure).

103. *See* GRUNDGESETZ [Constitution] [GG] art. 1(1), 20 (F.R.G.).

104. *See* BGHZ 41, 318 (322); 1990 NEUE JURISTISCHE WOCHENSCHRIFT 510, 511. *But see* 1957 NEUE JURISTISCHE WOCHENSCHRIFT 669. Representative of the prevalent view among academics is PALANDT/HEINRICH, BÜRGERLICHES GESETZBUCH, § 261 N. 4 (56th ed. 1997); ROLF STÜRNER, DIE AUFKLÄRUNGSPFLICHT DER PARTEIEN DES ZIVILPROZESSES 365 (1976);

rationale for this restrictive interpretation is that information plaintiffs should not be penalized by the criminal conduct of defendants. In penal proceedings, the inadmissibility of evidence revealed through coercion accounts for a defendant's interest in not being compelled to produce self-incriminating evidence.<sup>105</sup>

Another potential curb on journalists' obligations to disclose background material is their personality right.<sup>106</sup> However, intrusion into a journalist's private sphere does not of itself justify barring the plaintiff's information claim. A journalist may be compelled to answer the defamation plaintiff's questions and comply with document production requests, even if these materials are stored at home or are the result of "private" conversations with an informant.<sup>107</sup> On the other hand, the journalist's personality right prevails with respect to intimate diary notes taken in the course of gathering material.<sup>108</sup> Other limits valid for general preparatory information claims impose no significant or further restrictions on actions for information in defamation cases.

More important than these general limits are potential constitutional limits on German journalists' duties to disclose relevant information. The constitutional requirements can be reduced to three main issues: freedom of collecting information, secrecy of editorial process, and protection of confidential informants. The freedom of collecting information is outweighed by a defamed individual's interest in remaining informed about factual background material so that he or she can prepare for litigation of the substantive remedies.<sup>109</sup> The editorial privilege pertains only to journalistic opinions, comments, and internal assessments of the factual basis.<sup>110</sup> Thus, the gathered material itself may constitutionally be subject to compelled disclosure. However, in order to maintain the free flow of information, informants' identities are absolutely privileged.<sup>111</sup> This characteristic feature of German law reflects that, unlike American

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PETER WINKLER VON MOHRENFELS, ABGELEITETE INFORMATIONSLISTUNGSPFLICHTEN IM DEUTSCHEN ZIVILRECHT 100-01 (1986).

105. See BVerfGE 56, 37 (48-51). See also Rolf Stürner, *Strafrechtliche Selbstbelastung und verfahrensförmige Wahrheitsermittlung*, 1981 NEUE JURISTISCHE WOCHENSCHRIFT 1757.

106. See *supra* Part II.A.1.

107. See BRUNS, *supra* note 5, at 238-40.

108. See WINKLER VON MOHRENFELS, *supra* note 104 at 98; Stürner, *supra* note 105 at 370; see also BGHSt 19, 325 (diary is inadmissible evidence in criminal proceedings).

109. See BRUNS, *supra* note 5, at 246.

110. See *id.* at 247.

111. See *id.* at 248-50.

evidence law, German civil procedure is not governed by the hearsay rule.<sup>112</sup> Therefore, the journalist may testify about the contents of confidential conversations without revealing an informant's identity. It could be argued that the absolute protection of informants' anonymity compensates the media for its exposure to a broader variety of civil remedies. This latter argument is not compelling in light of the American media's susceptibility to significantly higher damage awards.

Editorial and informant privileges raise questions as to how a plaintiff may obtain information and what information may be withheld by the journalist. *In camera* inspection of evidence<sup>113</sup> is generally unknown to German civil procedure.<sup>114</sup> However, where there is an apparently irreconcilable divergence of the plaintiff's information claim and the media defendant's secrecy interest, there is the option to use a neutral third party, such as a notary, who scrutinizes the material in question and sorts out privileged information.<sup>115</sup> In these cases, the plaintiff may ask the court to order the media defendant to turn its files over to the neutral party, which examines the internal information pertinent to the allegedly defamatory publication. The material is edited by the neutral party to protect informants' identities. Any permissible information is given to the plaintiff. In form, as well as in the results, this technique resembles the American *in camera* inspection. Hence, the German reluctance to permit *in camera* inspections is difficult to explain and may lie simply in historical practice.

## VI. IDIOSYNCRASIES AND CONVERGENCE OF THE RESPECTIVE SCHEMES

Defamation litigation in the United States and Germany is similar in many respects. Both systems harbor idiosyncratic notions of how to balance competing interests and rights of modern mass media and individuals. The most discernable substantive difference

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112. For comprehensive commentaries on the hearsay rule, see MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE §§ 6691-7070 (Interim ed. 1997).

113. See, e.g., *Doe v. Kohn Nast & Graf, P.C.*, 853 F. Supp. 147, 147-48 (E.D. Pa. 1994).

114. The only explicit exception in this regard is section 259, clause 2 of the Commercial Code. See § 259 Cl. 2 HGB. German practitioners and scholars, pondering on *in camera* inspections, face considerable difficulties with the traditional German interpretation of the adversary system and even constitutional arguments based on the right to be heard. Yet, the notion of employing *in camera* inspections on a broader scale has been rejected. See BRUNS, *supra* note 5, at 256-60.

115. See *id.* at 251-56.

lies in the variety of remedies available in defamation cases. The American reliance on pecuniary redress reflects the common law tradition of money awards as the legal system's central response to wrongful conduct. The contingency fee practice, having emerged from the American rule that each party pays its own litigation costs, has probably rendered this money award-centered remedial concept an almost irrefutable principle. In defamation actions against media, the menace of comparably high damage awards might tend to disfavor or even endanger smaller newspapers and broadcasters. The more colorful German remedial palette, in contrast, eschews emphasizing monetary relief; German courts and legislators are reluctant to endorse heightened damage awards. However, given the American jury system, Germany's complicated, variegated arsenal of remedies cannot be recommended to the United States without reservation. Apart from the question of whether a jury trial should be available in actions for retraction, injunction, or reply, it seems plain that adoption of these procedural remedies would import alien concepts into the American system of defamation law. Such legal implants would likely face constitutional objection and cultural rejection.

The German system, with its use of professional judges in lieu of lay juries as triers of fact, seems better positioned to handle this intricate array of remedies. Nonetheless, the Achilles heel of German civil procedure is its lack of pretrial discovery. Plaintiffs generally commence a preparatory information lawsuit to clarify and assess the evidentiary basis of the "real" action. With German practice tending to limit information actions so as not to duplicate litigation "unnecessarily," plaintiffs in defamation suits have encountered serious difficulties in preparing for litigation concerning the eventual remedy. Germany's reluctant departure from the traditional provision of information to defamation plaintiffs suggests a modest convergence of the respective legal systems.

In the United States, determining the scope and limits of the journalist's privilege not to reveal sources requires more investigative proficiency and patience than the majority of continental European scholars would imagine. There is no such thing as a uniform American journalist privilege. In Germany, matters are resolved by one federal, civil, and civil procedural law. The absence of a strict hearsay rule in German civil procedure appears to be but a technical reason for the intensified protection of informants. At least arguably, the perseverance of German courts and doctrine in protecting the

identity of confidential informants against compelled disclosure reveals a fundamentally different conception of a democratic polity. The essential free flow of information to the media in the rather paternalistic German perspective calls upon the state, be it legislature, administration, or judiciary, to secure and safeguard the basic conditions of democracy. American law, by contrast, might reflect a society of self-determined individuals who can take care of themselves. Thus, informants who want to remain anonymous are expected to transmit sensitive information anonymously. The media may let informants know that their capability to assist them in protecting against disclosure of identity is limited. Ultimately, free flow of information is warranted either way. Yet, while the American legal system, perhaps driven by an inherent resentment of excessive state power and control, tends to de-emphasize regulatory intervention, German legal culture relies more on state administered and supervised safeguards. The key to this very antagonism may lie in history.

Intriguing is the convergence of the respective schemes of defamation litigation regarding a plaintiff's access to internal media information. Despite seemingly irreconcilable systemic differences, both American and German defamation proceedings are governed by a principle of generous access to media sources in favor of defamation plaintiffs. This remarkable transatlantic congeniality may flow from manifold wells. One reason could be the general perception that mass media—as a “fourth power” alongside the legislative, executive, and judicial branches—has become so powerful that it must have some constraints. This rationale, however, cannot explain why there should be guaranteed access to internal media information. Another explanation might be the present tendency in our modern media societies toward informative transparency: why should individuals who have been exposed to the public spotlight not participate in, and profit from, a “free flow of information?” From this perspective, the media's resistance to affording allegedly defamed individuals unrestricted access to internal information mirrors a very human propensity to monopolize the availability of information. Whether this propensity is justifiable poses a different question. It may well be argued that since free and vigorous media depend upon unfettered access to information, they should not strive, nor be entitled, to erect an insuperable bulwark against disclosure of background material in defamation litigation. Apparently, in democracies on both sides of the Atlantic Ocean, this fundamental idea has taken effect.